

LESOTHO / JUDGMENT

Malefetsane Malebo V Tseliso Senekane & Ano. (CCT/0216/2017)

[2025] LSHC 131 (9 June 2025)

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COURT
High Court

CASE / FILE NUMBER
CCT/0216/2017

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IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)
HELD AT MASERU
CCT/0216/2017

In the matter between: MALEFETSANE MALEBO
 APPLICANT
 AND
 TŠELISO SENEKANE
 DEPUTY SHERIFF (THATO MOHALE)
 1ST RESPONDENT
 2ND RESPONDENT
Neutral Citation: Malefetsane Malebo v Tšeliso Senekane & Another [2025]
LSHC 131 Comm. (09 JUNE 2025)

CORAM: MOKHESI J
 HEARD: 07 MAY 2025
 DELIVERED: 09 JUNE 2025
 SUMMARY
Civil Practice: Application for rescission on account of the defendant not being served with the summons at his residence in terms of Rule 4(1)(b) of the High Court Rules 1980-Held, even though the application was lodged in terms of Rule 27 as it evident that service of summons was not done in terms of rule 4(1)(b) the application should succeed on that score alone.
 ANNOTATIONS
Legislation
High Court Rules 1980
Cases
Lesotho
Doti Store v Herschel Foods (Pty) Ltd 1982-84 LLR

South Africa

Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T. P. D)

Lodhi2 Properties Investment CC v Bonder Development (Pty) 2007 (6) SA 87 (SCA)

O'Donoghue v Human 1969 (4) SA 35 (E)

JUDGMENT

[1]

Introduction

This is an application for rescission of default judgment which was granted by Molete J on 23 August 2018. In terms of this judgment the court cancelled the oral agreement between the parties and ordered the defendant to pay the plaintiff “damages to the tune of Two Hundred and Sixty-Four Thousand Seven Hundred and Thirty Maloti (M264,730.00) as purchase consideration for the animals that the plaintiff has already paid to the defendant in full.” In this judgment the parties will be referred to as they are in the summons.

- [2] Background facts On 12 June 2017 the plaintiff sued out summons against the defendant seeking specific performance order and in the alternative the reliefs in terms of which Molete J's order was made, above. The Deputy Sheriff's return of service records that: (in relevant parts): “I served copies by pushing summons under door of the defendant home where I was informed that there was nobody at home by the neighbours. The copies were served at his home because it is difficult to find the defendant at his residential place. Service was effected on 15-06-2017.”
- [3] Defendant did not respond to the summons and therefore the plaintiff sought and was granted default judgment. On 03 June 2019 the defendant lodged an urgent application in terms of which he sought the stay of execution of the order in CCT/0216/2017 pending the determination of the present application which in the main seeks a relief that the order of this court which was granted by default on 23 August 2018, be rescinded, and other ancillary reliefs.
- [4] Respective Parties' Cases The defendant's case a straightforward one: he did not receive the summons and that he has a bona fide “defence to 1st respondent claim which is exhibited by inconsistencies of the amounts claimed.” The defendant avers that he only learned of the judgment against him when he was served with the writ of execution. He contends that the money which the plaintiff periodically sent to him was for paying salaries of three herders which they hired to look after their livestock which they kept on an unspecified farm at an unspecified place in the Republic of South Africa. He further contends that service of summons was not done in terms of Rule 4(1)(b) as it was not done at his residence.

- [5] On the one hand, plaintiff denies that defendant has a bona fide defence only because of the inconsistencies between the amount claimed. He denies that they had collectively kept their livestock at the farm in South Africa as the defendant does not even show the location of such a farm. Instead, he avers that the money which he paid to the defendant was because the latter had promised to buy him sheep at the auction at different places in South Africa, which he never did. [6] Issues for determination Should application for rescission be granted?
- [7] The law and discussion The application was lodged in terms of the provisions of Rule 27 of the High Court Rules 1980. In terms of this rule, default judgment can only be rescinded on good cause being shown. Good cause will be shown where the defendant has provided a reasonable and acceptable explanation for his default and has shown the existence of a bona fide defence, that is, one which has some prospects of success. A determination of whether a good cause has been shown is dependent on whether the defendant acted in wilful disregard of the rules of court (*Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T. P. D) at 529E – F).
- [8] The basic idea for granting default judgment is that the defendant having been notified of the plaintiff's claim in terms of the rules, did not indicate his intention to defend it, and in consequence, the plaintiff in terms of the rules seeks an order based on the defendant's default (*Lodhi2 Properties Investment CC v Bonder Development (Pty)* 2007 (6) SA 87 (SCA) at para.
27. The question in this matter is whether the defendant was notified of the plaintiff's claim against him. He contends that he was never notified because he never received the summons; that he only became aware that there was a claim against him when he was served with a writ of execution. This assertion directly attacks the return of service of the Deputy Sheriff. [9] It is a trite principle of our law of practice that a return of service of the Deputy Sheriff is prima facie evidence of what is stated therein and that in order to successfully impeach it, "Clearest and most satisfactory evidence" must be adduced (*Doti Store v Herschel Foods (Pty) Ltd* 1982-84 LLR 338 at 339).
- [10] In terms of Rule 4(1)(a) and (b) of the High Court Rules 1980 service of process of the court shall be effected: "(a) By delivering a copy of the process personally to the person to be served....
- (b) By leaving a copy of such process at the place of business or residence of the person to be served...."
- [11] From the Deputy Sheriff's return of service it is clear as daylight that the defendant was not served with the summons at his residence. Rather the summons was left at his parental home "because it is difficult to find the defendant at his resident place." This return is self-explanatory and requires nothing more than a denial in the manner in which the defendant did - that he was never served with the summons. It is evident from the rule that personal service is the preferred method of primary service. It is only when the defendant proves to

be elusive or untraceable that other methods of service of process can be resorted to (O'Donoghue v Human 1969 (4) SA 35 (E) at 39). In the present matter, instead of the Deputy Sheriff leaving the process at the defendant's residence as required by rule 4(1)(b) when he could not effect personal service she elected to leave it at his parental home where he is not resident. In the circumstances of this case, once it is evidence that defendant was not served, the application for rescission should succeed. The minimum evidence adduced in this case suffice to impeach the return of service.

[12] In the result the order is made: (i) The application succeeds with costs.

MOKHESI J For the Applicant: Advocate N. Mafaesa For the 1st Respondent: Advocate T. Ntsane
For the 2nd Respondent: No Appearance 7

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