

IN THE HIGH COURT OF LESOTHO

In the Matter of :

TAIWAN CONSTRUCTION (PTY) LTD - Applicant

v

LESOTHO NATIONAL INSURANCE CO. (PTY) LTD - Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Judge, Mr. Justice
J.L. KHEOLA on the 5th day of September 1983

The applicant is asking this Court to make an order in the following terms.

- (a) Condoning the applicant's failure to apply within 21 days for the rescission of the judgment granted by the above Honourable Court against it on the 13th December, 1982;
- (b) Setting aside the default judgment granted against the applicant in Case Number Civ/T/416/82 on the 13th December, 1982;
- (c) Suspending the warrant of execution issued in Case No. CIV/T/416/82, pending finalisation of this application,
- (d) Granting leave to applicant to defend the above action and to file a Notice of Intention to Defend within seven days from date of judgement herein;
- (e) Costs.

This application is governed by Rule 27(6) of High Court Rules of 1980 which provides, inter alia, that the applicant must show good cause in order to persuade the Court to set aside a default judgment. There is absolutely no doubt that the onus is on the applicant to show good
/cause..

cause by giving reasons which will satisfy the Court that the default was not wilful. In Rabby Ramdaries v. Khadebe Mafaesa CIV/T/56/83 (unreported) Cotran, C.J. summarised the law when he said:

"The Court does have a wide discretion, but the requirements are:

- (1) the applicant must explain to the Court's satisfaction the reasons for the default,
- (2) the applicant must persuade the Court that the application is not made simply to delay plaintiff's claim,
- (3) the applicant must show a bona fide defence.

In the present application the applicant is in default in two respects -

- (a) it failed to file a Notice of Appearance to defend having been duly served with a summons,
- (b) it is now out of time to apply for rescission of the judgment granted on 13th December, 1982.

The founding affidavit was made by one James Lou who alleges that he is the sole director of the applicant company. He says that he left Lesotho at the beginning of November, 1982 and returned during the beginning of January, 1983. On his arrival he was informed that during his absence the respondent company had instituted an action against the applicant company and that a default judgment was obtained in December, 1982. He says that because of his absence there was no one to convene a meeting of the Board of Directors to pass a resolution nominating and giving power of attorney to a firm of lawyers to defend this action.

/It is ...

It is common cause that the amount of R26,555.75 in respect of which respondent company obtained a default judgment was in terms of an agreement concluded in December, 1979 whereby the respondent company was to provide the applicant company with various types of insurance cover over a period of time.

It appears that in February 1981 certain storms caused damage to a pool that was under construction and the respondent company, as the insurers, had to make good the damage and put the applicant company in the position in which it was before the damage was caused. Applicant company claims that it entered into a contract with a company known as Olsens Olympic Pools to repair the damage caused to the pool. After Olsens Olympic Pools had completed their repairs, the applicant company discovered that the repairs had not been properly done and materials used had been of inferior nature; the work had to be re-done. As soon as this was discovered Mr. Lou informed the respondent company and asked them not to pay Olsens Olympic Pools, in view of the fact that litigation was pending between applicant company and Olsens Olympic Pools (see annexure "B" to the founding affidavit).

Despite this request not to pay Olsens Olympic Pools, respondent company did pay after the work had been inspected by the respondent company's assessor together with a certain Mr. A. Massot who was a duly authorised official of the applicant company. It was agreed that the pool had been properly repaired.

It is quite clear that there are a number of disputes of fact which cannot be resolved by affidavits,
/e.g. did ...

e.g. did Mr. Massot, acting on behalf of the applicant company, approve that the repairs were properly done; but before I come to contentious issues or whether the applicant has a bona fide defence I shall first deal with applicant's failure to enter appearance to defend.

The summons was served upon the applicant company through its secretary on the 11th December, 1982. The secretary is a duly authorised official of the company to receive the summons and pass them on to her superiors. No action was taken to inform Mr. Lou of the action that had been instituted against his company. A telephone call or a telex message would have been enough to make him come back or give instructions to other directors. Mr. Lou has alleged that he is the sole director of the company, but this allegation must be rejected by the Court because the 'letterheads' of the applicant company shows that there are seven directors. (see annexure "A" to the opposing affidavit). The applicant company has filed no replying affidavit to show that the position **changed** at a specified time. Even if Mr. Lou were the sole director of the company he must be held to have been grossly negligent to have gone overseas having made no arrangements for contingencies facing the company. The work of the company did not ^{come to} standstill simply because its director had gone overseas, the company remained a legal person distinct from its officials and it was liable to be sued at anytime. I, therefore, come to the conclusion that the absence of Mr. Lou in Lesotho when the company was served with a summons is not a sufficient ground upon which

/the applicant ...

applicant company can rely for failing to enter Notice of Appearance to defend.

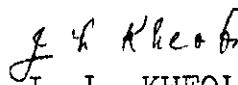
In his affidavit Mr. Lou admits that during the beginning of January, 1983 he was informed by his secretary and his attorneys that the respondent company had obtained a default judgment against his company. This application was lodged with the Registrar of this Court on 20th May, 1983, that is to say, about five months after the default judgment had come to his knowledge. Surely, applicant must show very strong reasons why it failed to take action within a reasonable time. Mr. Lou says that during this long period the parties were negotiating a possible settlement. I do not know what kind of negotiations were going on but it must have become clear to the applicant company that such negotiations were fruitless because on the 22nd February, 1983 the deputy sheriff was instructed to attach property of the applicant company. But applicant did not apply to this Court immediately after its property was attached.

I have come to the conclusion that the applicant company has failed to show good reasons for the default.

The applicant company has also failed to prove a bona fide defence. The default judgment which was obtained by the respondent company was in respect of insurance premium cover due to the respondent for a specified period. Applicant company admits that the total amount was due but asks this Court to rescind the judgment for the simple reason that, it wants to counterclaim an amount of
/money ...

money which was paid to Olsens Olympic Pools for the repairs they carried out on the pool. In his opposing affidavit Mr. Maling showed that the pool was inspected by respondent's assessor together with one Mr. Massot a duly authorised official of the applicant. It was Mr. Massot again who told Mr. Maling that the action the applicant company intended to institute against Olsens Olympic Pools was in respect of a different matter and not damage to the pool by the storms. These allegations of what Mr. Massot said and did, have not been denied by the applicant company. I also had the occasion to see CC 146/81 Leston Construction (Pty) Ltd v T.C.C. (Pty) Ltd and found out that it relates to a different matter. I saw no counterclaim made by the applicant company.

The application is dismissed with costs to the respondent.


J. L. KHEOLA
ACTING JUDGE

5th September, 1983

For the Applicant . Mr. Buys

For the Respondent : Mr. Molyneaux