C of A (CIV) NO16/2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

NAPO THAMAE	**1st Appellant**
LINEO MALITŠITSO THAMAE	**2nd Appellant**
and	
AGNES KOTELO	**1st Respondent**
MESSENGER OF COURT	**2nd Respondent**

Coram:

Ramodibedi JA
Grosskopf JA
Melunsky JA

SUMMARY

Application for stay of execution and rescission of judgement – writ of execution differing substantially from judgment of court – writ should correspondent exactly with court's order – matter referred to Chief Justice in his capacity as chairman of Judicial Service Commission. Numerous postponements, some without apparent reason, and counsels' unexplained failure to appear resulting in lapse of over three years after matter ripe for hearing – this brings the entire judicial process into disrepute and is to be deplored. Chronology of events leading up to the hearing for default judgment uncertain due to discrepancies between first respondent's averments, the Court record and judge a quo's judgment – court records should accurately record each appearance and the order made under name of presiding judge. In applications for rescission, court should consider all factors and make

assessment on basis of the explanation, bona fides of the applicant and prospects of success – factors cannot be considered piecemeal or in isolation – good defence may compensate for poor explanation and vice versa – court a quo considering explanation only and failing to have regard to other factors, including prospects of success. Appellants' denial of liability prima facie establishes a bona fide and valid defence – moreover award of damages by court a quo grossly excessive and out of all proportion to a reasonable award – appellant's explanation of default reasonable. Litigants not inevitably responsible for attorney's neglect. Appeal upheld with costs.

JUDGMENT

12 and 20 October 2005

MELUNSKY JA :

[1] In this appeal the first respondent will be referred to as the plaintiff and the first and second appellants as the first and second defendants respectively. The second respondent is the messenger of the court. He has not taken any part in these proceedings.

[2] As long ago as 10 September 2001, Hlajoane J in the High Court granted judgment by default against the defendants

> "In an amount of M250 000 plus M4 500 for coffin since both are husband and wife the damages for defamation [M250 000] will be paid jointly and severally with costs."

[3] In purported compliance with the judgment, a writ of execution, under the hand of the Registrar of the High Court was issued on 13 November 2001. Inexplicably it directed the sheriff of the High Court or his deputy to cause an amount of M504500 together with interest thereon at the rate of 18% per annum from

16 January 2001 to be realised from the public auction of the defendants' goods. The aforesaid amount and interest, so it is recited in the writ, was recovered by the plaintiff in a judgment dated 30 August 2001. Apart from the fact that the judgment was granted on 10 September and not 30 August, we have to express our grave concern that the amount reflected in the writ was double the amount of the judgment. Moreover the writ included an interest claim that is not contained in the judgement. It is a matter of the utmost importance for the writ to correspond exactly with the court's order. The significant differences between the judgment and the terms of the writ lead us to request the Chief Justice, in his capacity as chairman of the Judicial Service Commission, to undertake such investigation and action as he may deem appropriate with a view to preventing such regrettable occurrences from happening again.

[4] On 22 November 2001 the defendants applied for and were granted a *rule nisi* by Monapathi J which called on the plaintiff and the messenger of the court to show cause on 3 December 2001 why;

> "(a) The execution of the final order in CIV/T/36/01 shall not be stayed pending finalisation of this matter;
>
> (b) Final order in CIV/T36/01 shall not be rescinded;
>
> (c) Applicant shall not be granted such further or alternative relief;

(d) Costs in the event that the application is opposed."

Opposing and replying affidavits were filed and the matter was ready for hearing by Hlajoane J on 2 May 2005. On 20 May the learned judge dismissed the application for rescission with costs. No mention was made in the affidavits or in the judgment of the extraordinary contents of the writ of execution, nor did the court *a quo* deal with the rule *nisi* issued by Monapathi J. The defendants appeal to this court against the dismissal of the application for rescission.

[5] What is of further concern to us in the fact that a relatively uncomplicated application, consisting of only 30 pages, was argued in court more than three years after the matter became ripe for hearing. The inordinate delay was due in part to the fact that judges of the High Court granted numerous postponements, in some cases, according to the record, without any reasons being advanced therefor. Another reason was the failure of counsel to appear before the Court on 18 February 2003 when the matter was struck off the roll. The next appearance, according to the record, was on 25 October 2004 when the matter was again postponed, apparently without the granting of an order for its re-instatement. This Court has frequently deplored delays in bringing litigation to finality. The proper administration of justice and the smooth and efficient functioning of the judicial process require that disputes should be resolved within a reasonable time. The delays that occurred in this instance bring the whole judicial process into disrepute and may result in a loss of confidence in the legal profession, including the judiciary. Judges should be astute not to grant postponements of

cases unless adequate reasons are advanced therefor and legal practitioners should take their responsibilities to the court and their clients far more seriously. I am appalled that in this case the matter had to be removed from the roll because of the non-appearance of counsel and that this in itself resulted in a delay of more than twenty months.

[6] I turn now to deal with the merits of the appeal. Regrettably the facts cannot be stated briefly. The plaintiff claimed damages for two separate alleged acts of defamation – M500 000 against the first defendant and M250 000 against the second defendant. There was also a claim of M4 500 against the first defendant, being the cost to the plaintiff of a coffin which she had purchased for the burial of her granddaughter Lemohang Thamae ("Lemohang") and which, according to the plaintiff, had been removed by the first defendant.

[7] To the plaintiff's summons and declaration, the defendant's attorneys entered an appearance to defend timeously on 14 February 2001. No plea was filed and on 26 March 2001 the plaintiff's attorneys gave the defendant's attorneys a notice to file a plea within 72 hours. There was no response to the notice and on 12 July 2001 the plaintiff's attorneys served a notice of bar on the defendants' attorneys. Two matters require to be noted at this stage. The first is that the notice to file a plea does not appear to comply with High Court Rule 26(2) and it may therefore be open to argument whether the defendants were properly barred from pleading. Secondly, in terms of Rule 26(3) a defendant is barred automatically if he fails to comply with a Rule 26(2) notice and no notice of bar may be necessary. Incidentally, the notice of bar erroneously states that the defendants were barred because of their failure to plead in terms of Rule 27(3). The validity of the notice to plead and the subsequent barring of the defendants were not argued in this Court and I refrain from expressing any opinion thereon, for parties appear to have assumed, both in the court *a quo* and on appeal that the defendants had been duly barred and it is on this assumption that I propose to consider the matter.

[8] There is some uncertainly as to what occurred thereafter. In her affidavit opposing rescission the plaintiff sketches the following chronology:

(1) A notice of set down was served on the defendants' attorneys on 9 August 2001;

(2) On that very day the matter was postponed for two weeks at the request of the defendants' attorney;

(3) The next hearing was on 20th August (11 days later) when, the attorneys for the defendants requested "a final postponement" to 10 September;

(4) Counsel for the defendant was served with a notice of set down for 10 September;

(5) On 10 September evidence was led in respect of the plaintiff's claim for damages.

[9] The Court record, however, reflects that there was a postponement from 13 August to 20 August and a further postponement from 20 August to 27 August. We do not know what happened on 27 August as the next entry on the record is

the appearance on 10 September. It is also not clear how the matter came before the Court on that day. The notice of set down for 10 September was not annexed to the affidavit and does not appear in the record. There is nothing before us to show that the notice of set down complied with Rule 27(3) or that the defendants were given proper notice of the hearing. I conclude this part of the background by referring to certain remarks of the learned judge *a quo* in her judgment refusing rescission. She said the following:

> "The matter was set down for hearing on 9 August 2001 and the notice was served on the applicants (my underlining). It was postponed to 13 August, 2001 and further to 20 August and 27 August. On 10 September it was finally heard. Of the first two postponements counsel for the applicants had been in court and requested the postponements."

[10] The discrepancies between the plaintiff's averments, the court record and the judgment are disturbing. In the circumstances it is not possible to give an accurate chronology of events from 9 August to 10 September 2001. Court records, I emphasise, should clearly record each appearance and the order made under the name of the presiding judge. All that can be said in this instance is that there is a possibility – and I go no further than

this – that the matter was not properly before the Court for the hearing of a default judgment on 10 September.

[11] Next for consideration is a more detailed resume of the plaintiff's claim and the defences raised by the defendants. According to the declaration the second defendant is alleged to have said on 27 December 2000 that the plaintiff was a witch and had killed Lemohang. The first defendant, so it is alleged, told a crowd of people at the funeral on 6 January 2001 that the plaintiff was responsible for Lemohang's death. Both defendants denied the plaintiff's allegations, briefly put forward their versions of what had occurred and, in my view, said enough to raise a *prima facie* defence. The first defendant also denied removing the coffin. Had the defendants admitted to using the words complained of, I would nonetheless have had no difficulty in holding that the defendants had extremely good prospects of success on the quantum, having regard to the extraordinary award of damages. There is no doubt at all in our view that the damage award to the plaintiff was not only grossly excessive but is out of all proportion to the circumstances surrounding the alleged defamations. I have carefully considered the evidence given by the plaintiff at the hearing and there were no grounds at all for the court to have granted the plaintiff damages in an amount even approaching M250 000. In our view the award was so unreasonable that we are able to conclude that the learned judge did not exercise a proper discretion. It may also be noted that the court should have dealt separately with each claim for damages and should have made an appropriate and separate award against each defendant.

[12] The learned Judge *a quo,* in refusing rescission, did not deal with the defendants' prospects of success. She decided that as the defendants, in her view, had not put forward a reasonable explanation for their default, there was no need to consider the prospects of success. In my judgment, the learned Judge was

wrong in holding both that the defendants' explanation was not reasonable and in dealing with each requirement for rescission in isolation. Reliance was placed by the court *a quo* on the remarks of Miller JA in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 B-E, where it was pointed out that a party showing no prospects of success will fail in an application for rescission, no matter how reasonable and convincing the reason for his default; and that a party who could

> "offer no explanation of his default other than his disdain of the Rules was nevertheless [not] permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success in the merits."

Miller JA went on to hold, however, that the appellant's explanation in the case before him was both "unsatisfactory and unacceptable" and that therefore there was no reason to make findings in relation to the prospects of success (at 768 A-D).

[12] Now in an application for rescission what the applicant has to show is good cause in order to succeed. In *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) Smalberger J stated the position as follows at 300F – 301C :

> "In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause an applicant should comply with the following requirements:
>
> a (a) He must give a reasonable explanation of his default;
> b (b) his application must be made *bona fide*;
> (d) he must show that he has a *bona fide* defence to the plaintiff's claim.

It is not disputed that the defendant's application is bona fide and that he has shown that he has a bona fide defence to the plaintiff's claim. What is in issue is whether he has given a reasonable explanation for his default.

> In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for his default, the Court is given a wide discretion in terms of Rule 31(2)(b). When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances. While it was said in Grant's case that a Court should not come to the assistance of a defendant whose default was wilful or due to gross negligence, I agree with the view of Howard J in the case of *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) at 615, that while a Court may well decline to grant relief where the default has been wilful or due to gross negligence it cannot be accepted

'that the absence of gross negligence in relation to the default is an essential criterion, or an absolute prerequisite, for the granting of relief under Rule 31(2)(b)'.

> It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief. The above does not in my view detract in any way from the decision in this Court in *Vincolette v Calvert* 1974 (4) SA 275 (E),"

[13] There is not, and never has been, a concise definition of

what constitutes good cause. It is a question that has to be decided by the trial judge upon a consideration of all the facts. In a recent judgement of this Court – *Mosaase v Rex* C of A (CRI) NO 12/05 – the President approved of the following passage in *Melane v Santam Insurance Ltd* 1962 (4) SA 531 at 532 C-F:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases. "

All of this shows that a court is obliged to look at the total picture presented by all the facts and that, generally speaking, no one factor should be considered in isolation

from all the others (see, further, *De Witts Auto Body Repairs* v *Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 709 E-H).

[14] I now have to consider the explanation given by the defendants for their default. Their explanation is contained in the following paragraph of the first defendant's founding affidavit:

"On the 5th February 2001 summons commencing action against my wife and I were served at my house. After I became aware of the process, I gave it to my then attorneys K.E.M. Chambers with instructions to defend the action on our behalf. Our attorneys there and then instructed their staff to file Notice of Appearance to Defend after they had been given instructions as to our defence. During the interim we had misunderstandings with our attorneys on the question of fees. In the meantime we expected our attorneys to be continuing with the necessary formalities and procedures relating to the case, as they had never indicated to us that they would be unable to continue, nor did they formally withdraw as attorneys of record in the matter. Up until to-day they have not withdrawn as such. Had they withdrawn and if we had been duly advised, we would have instructed another attorney or defended ourselves. We say that we never at any time instructed our attorneys to abandon our defence. We want the matter to go through all the stages of the trial wherein we would present our defence."

The respondents emphasise further that they believed that the attorneys were continuing to look after their interests in the litigation, despite the disagreement about fees. What emerges from the affidavits, in essence, is a lack of contact and no communication between the attorneys and their

clients. The defendants may have been partly to blame for this, for they failed to make inquiries about the progress of their case. But the substantive fault, according to the affidavits, was due to the attorneys' failure to keep in touch with their clients. What is crucial, moreover, is that the attorneys did not give notice to the defendants or the plaintiff in terms of Rule 15 (4) that they had ceased to act in the litigation. This is not disputed. Mrs Mpopo, who, we were informed, is a member of the firm of attorneys representing the defendants, appeared in court on the defendants' behalf on two occasions in August 2001 when the matter was postponed. The plaintiff avers that Mrs Mpopo was also in court when judgment was given on 10 September. If she was, there is nothing on the record to show that she took part in the proceedings. Indeed the record does not reflect that she was present. The defendants point out, moreover, that she had no instructions to consent to judgment by default being granted against them.

[15] According to the facts set out above, the defendants believed that their attorneys continued to represent them in their dispute with the plaintiff and they did not know that default judgment was being applied for. The learned judge *a quo* said, quite correctly, that the defendants themselves made no effort to follow the progress of the litigation, despite the disagreement relating to fees. This does not mean that the defendants were substantially blameworthy. They were lay clients who had entrusted the defence of the case to attorneys who clearly represented them for some considerable time and had never withdrawn from acting in the litigation. There is nothing to indicate that the defendants knew, or even suspected, that the attorneys had received a demand for a plea, or that they were barred or that the plaintiff intended to apply for default judgment against them. I add that the issues in the action are not complicated and that it would have been a relatively simple and inexpensive procedure for the attorneys to have filed a plea on behalf of the defendants. Why they did not do so remains a mystery.

[16] The court *a quo* was seemingly of the view that the defendants inevitably had to accept responsibility for the neglect or fault of their attorneys. The learned judge, in this regard, said the following:

"The courts never hesitate to penalise a litigant for the short – comings, if any, of his counsel."

That is not a correct reflection of the law. Depending upon the circumstances a litigant may have to accept the consequences of his attorney's flagrant and gross non – observance of the rules (See *Darries* v *Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 44 B-G). But it is certainly not the general rule that the neglect of an attorney, even if serious, should always be visited upon the client.

[17] The learned judge's decision not to rescind the judgment was a matter for her discretion. In exercising her discretion she was obliged to evaluate the conduct of the defendants and, indeed, that of their attorneys, against the prospects of success in the action and the possible injustice to the defendants if the judgment was allowed to stand. It was not the proper exercise of her discretion to say, as the

> learned judge did, that the defendants nevertheless had a remedy open to them, namely, to claim damages from the attorneys if they were negligent. The question before the Court was not whether the defendants had an alternative remedy but whether they had shown good cause for having the judgment rescinded.

[18] On a *conspectus* of all the facts in this matter, the question of the defendants' *bona fides* is not in issue. From the outset they were steadfast in their resolve to defend the plaintiff's action. Their explanation for not pleading to the plaintiff's declaration is not unacceptable. On their understanding of the position they were entitled to adopt a passive attitude to the litigation. Moreover they have disclosed a *bona fide* defence and their prospects of success in the litigation, at least on the quantum of damages, are excellent.

[19] It is therefore not difficult to conclude that the defendants have shown good cause to have the judgment rescinded. It is also clear that the learned judge *a quo* did not exercise a proper discretion in a number of respects. First, she adopted a piecemeal approach in concluding that good cause had not been established. In particular, she did not even consider the defendants' prospects of success on the merits or the *bona fides* of their defence disclosed in their affidavits. Second, she penalised the defendants for the apparent neglect of their attorneys because of her view that the client inevitably has to accept responsibility for the attorney's short-comings. Third, she suggested that the defendants could claim damages from their attorneys if they established negligence, as if this was some form of compensation for refusing rescission. Finally, it is only necessary to emphasise that in applications for rescission, a court should not treat each requirement in a vacuum. There is an obvious inter-relationship between all the requirements and a weakness in one respect can be compensated for by strength in others. This will result in justice to both parties.

[20] From the aforegoing it is clear that the appeal should succeed.

The following order is made:

1. The appeal succeeds with costs:

2. The order of the court *a quo* is set aside and is replaced with the following:

"(a) The writ of execution signed by the Registrar on 12 November 2001 is set aside;

(b) For the rest, paragraphs 2 (b) and (d) of the rule nisi issued by Monapathi J on 22 November 2001 are confirmed;

(c) The default judgment granted on 10 September 2001 is rescinded and set aside;

(d) The applicants are given leave to apply to uplift the bar, such application to be lodged on or before 21 November 2005;

(e) The first respondent is to pay the costs occasioned by her opposition to the application for rescission."

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LS MELUNSKY
JUDGE OF APPEAL

I agree

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MM RAMODIBEDI
JUDGE OF APPEAL

I agree

_____
FH GROSSKOPF
JUDGE OF APPEAL

E.H. Phoofolo for Appellants
Ms LV Mochaba for Respondents