IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) NO. 5/2008

In the matter between:

CGM INDUSTRIAL (PROPRIETARY) LIMITED **Appellant**

and

ADELFANG COMPUTING (PROPRIETARY) LIMITED **Respondent**

CORAM: SMALBERGER JA
MELUNSKY JA
MOFOLO AJA

Heard : 8 OCTOBER 2008
Delivered: 17 OCTOBER 2008

SUMMARY

Claim for damages for breach of contract – default judgment obtained – application for rescission of judgment dismissed – second application for rescission also dismissed – appeal noted against such dismissal – condonation sought for late noting of appeal against dismissal of first rescission application – underlying issue the same in respect of both rescission applications – condonation granted – first rescission application governed by common law not provisions of High Court Rule 45(1) (a) – appeal against dismissal of first rescission application upheld – that against second rescission application dismissed – default judgment set aside on the basis of plaintiff's claim not for a liquidated amount or liquidated demand – costs.

JUDGMENT

SMALBERGER, JA

[1] For a proper understanding of the issues in this appeal it is necessary to have regard to its history. On 24 January 2002 the appellant and the respondent entered into a written digital leased line agreement ("the agreement") in terms of which the respondent was to provide certain services to the appellant at a monthly rate of R12 000.00 (The amount was stipulated in Rand, not Maloti). Clause 3.1 of the agreement provided that its duration would be for a period of 24 months "whereafter this agreement shall automatically be a renewed agreement unless terminated by either party giving to the other not less than 60 (sixty) days written notice of termination". In terms of clause 5.6 of the agreement the respondent was entitled, on the anniversary date of the agreement, at its sole discretion and on 30 days written notice, to vary or increase the monthly rate.

[2] On 15 September 2004 the respondent (as the plaintiff) issued summons against the appellant (as the defendant) for

payment of an amount of M291 600.00 plus interest and costs. Paragraphs 5 to 10 of the accompanying declaration read as follows:

"5.

Neither party notified the other party of termination of the agreement as is provided for in clause 3 of the agreement and therefore a renewed agreement for a further period of 24 months came into being on **1 February 2004.**

6.

Plaintiff, as it was entitled to do in accordance with clause 5.6 of the agreement, increased the monthly rate to **R13,800.00**, effective as from **1 January 2004.**

7.

Plaintiff duly complied with all its obligations stipulated in annexure **A**.

8.

Defendant breached the agreement by failing to make any further monthly payments since **May 2004.** Such failure constitutes a material breach of the agreement as is apparent from clause 10.1.

9.

As a consequence of defendant's aforesaid breach, plaintiff has cancelled the agreement, **alternatively** cancels it herewith.

10.

As a further consequence of defendant's breach of the agreement, plaintiff suffers damages in the amount of **R291,600.00**, which amount is calculated as follows:

22 Monthly instalments of R**13,800.00**	R303,600.00
Less deposit	R 12,000.00

TOTAL **R291,600.00**"

I shall henceforth refer to the parties as the plaintiff and the defendant respectively.

[3] The plea is a poorly drafted document which does not clearly set out the defendant's defence. In paragraph 4 of the plea, responding to paragraph 5 of the declaration, it is alleged that "the defendant gave notice to the plaintiff but that was not flowing from the provision[s] of clause 3 of [the agreement]". Reference was made to an annexure which was not attached. In the context of the pleadings, however, paragraph 4 of the plea must be taken to amount to an allegation that the defendant had lawfully terminated the agreement. Presumably it was seen in this light by the plaintiff. No particularity was sought and no exception taken to the plea. The defendant denied any breach of the agreement.

[4] The matter was eventually set down for hearing on 8 August 2007. There is no suggestion that the defendant was in any way to blame for the delay between the close of pleadings and the date of hearing. The matter came before Hlajoane J. There was no appearance on behalf of the defendant. The learned trial judge, possibly persuaded thereto by the plaintiff's counsel, accepted that the plaintiff's claim was for "a liquidated amount or a liquidated demand" within the purview of High Court Rule 4 (1) and granted default judgment in favour of the plaintiff in the sum of M277,800.00 plus interest and costs, certain deductions from the original amount claimed having been conceded by the plaintiff.

[5] On 14 August 2007 the defendant launched an urgent application seeking a stay of execution and a rescission of the default judgment ("the first rescission application"). The deponent to the founding affidavit, the defendant's manager Mr. Chang, alleged that he was present at the High Court premises on the trial date awaiting the arrival of the defendant's attorney, Mr. Klass.

The latter arrived at court late, the reason being that he had recently undergone an eye operation and had been to South Africa to collect medication which he required. Upon his arrival it was discovered that judgment had already been granted. This was confirmed by Mr. Klass.

[6] Majara J issued a rule nisi in respect of the first rescission application returnable on 20 August 2007. In due course an opposing affidavit was filed by the plaintiff's managing director. In paragraph 7 of the affidavit the following was stated:

> "I was personally present at the Court on the day in question, and my counsel waited until 10h15 before he approached the Court for a judgment in terms of the Declaration. I know the deponent personally, and I definitely did not see him in the court building on that day."

No replying affidavit was filed by the defendant.

[7] The first rescission application came before Hlajoane J on 3 March 2008, the extended return day of the rule nisi. Once more there was no appearance on behalf of the defendant, Mr. Klass

again having failed to turn up at court. Consequently the application was dismissed with costs. On 6 March 2008 a further urgent rescission application ("the second rescission application") was brought on notice to the plaintiff, to stay execution, rescind the default judgment and certain ancillary relief. By then the defendant, not surprisingly, had terminated Mr. Klass's mandate and was represented by a new attorney, Mr. Mphalane. This time the founding affidavit was deposed to by the defendant's group senior manager. In his affidavit he said, *inter alia*, the following:

> "The applicant has not been personally in default of appearance in court but his attorney was. The applicant was not informed by its attorney hence the reason why there was no one from the applicant's company on those two dates. It is therefore respectfully submitted that the applicant is not at all in willful default of appearance in court and therefore cannot be made to suffer for the negligence on the part of his previous attorney."

No explanation was forthcoming for Mr. Klass's failure to appear on the second occasion. The deponent went on to annex a bank guarantee to cover the whole amount claimed by the plaintiff, plus interest and costs, in the event of the defendant being unsuccessful in the main action, by way of assurance that the defendant was

"not intending to delay this matter or any way avoid its indebtedness". No opposing affidavits were filed.

[8] The second rescission application came before Nomngcongo J on 14 March 2008. This time the defendant was represented. The learned judge held that the default judgment had been granted under Rule 41(1), that error on the part of Hlajoane J could not be claimed, and dismissed the application with costs. On 8 April 2008 the defendant noted an appeal against the dismissal of the second rescission application on various grounds set out in the notice of appeal. On 2 May 2008 the defendant filed amended grounds of appeal. One such ground was that:

> The Learned Judges Nomngcongo and Hlajoane erred in finding that plaintiff's claim was for a liquidated amount or a liquidated demand in terms of High Court Rule 41 (1)".

[9] Subsequently the defendant's attorney realised that instead of proceeding with the second rescission application, the proper course would have been to appeal against the judgment of

Hlajoane J in the first rescission application. On 18 August 2008 he launched an application seeking condonation for the late noting of an appeal in that matter and the late filing of a notice of appeal, and an order that the appeal be heard during this session of the Court of Appeal. The main thrust of the notice of appeal was that Hlajoane J erred in finding that the plaintiff's claim was for a liquidated amount or a liquidated demand in terms of High Court Rule 41(1). In the last paragraph of the founding affidavit it is stated that "upon the application for condonation being granted" the defendant "will abandon the appeal against the judgment of Mr. Justice Nomngcongo". The plaintiff filed an opposing affidavit in which it raised mainly legal arguments against granting condonation and allowing a fresh appeal.

[10] Arising out of the above this Court has before it an appeal against the dismissal of the second rescission application ("the appeal") as well as an application for condonation for the late noting of an appeal against the dismissal of the first rescission

application ("the condonation application"). As far as the appeal is concerned, it is entirely devoid of merit. The second rescission application was ill-advised, impermissible and a wasted procedure. It was rightly dismissed. What should have been brought, as is now conceded on behalf of the defendant, was an appeal against the dismissal of the first rescission application (something the defendant is now seeking to achieve by way of the condonation application). The fact that the defendant's attorney pursued the wrong legal remedy should not be allowed to prejudice the defendant's entitlement to a determination of what amounts to the true issue between the parties at this stage. There are no grounds for a finding that the defendant or its present attorney were guilty of delaying tactics in order deliberately to frustrate any legitimate claim the plaintiff might have.

[11] There can be little doubt that the defendant has always sought to challenge the default judgment that was granted against it. It could possibly have done so, given the basis on which it seeks to

attack the judgment, by appealing against it. But it was equally open to the defendant to apply for a rescission of the default judgment this, as Mr. Kades for the defendant pointed out, being the more usual course to adopt. The defendant cannot therefore be faulted for following that route. And the underlying basis on which the defendant seeks to challenge the default judgment has always remained constant, viz, that the plaintiff's claim was not for a liquidated amount or a liquidated demand. To this extent the plaintiff has always been aware of the nature of the defendant's challenge.

[12] There is confusion on the record before us with regard to whether the first application for rescission was brought under the provisions of High Court Rule 45 (1) or under the common law. Either is permissible, although different considerations apply to each. Under the Rule, for example, sufficient cause does not have to be established, whereas it is a requirement under the common law. From the defendant's perspective it seems to have been

brought under the Rule whereas the plaintiff, as appears from paragraph 4 of its opposing affidavit in the first rescission application, was under the impression that it was brought under the common law. If the defendant sought to invoke Rule 45 (1), and the Rule is held not to be applicable, he could still pursue the matter under the common law provided he satisfies its requirements. There can be no prejudice to the plaintiff as both situations have been addressed, directly or indirectly, on the record before us. Whether the first rescission application is a matter which fell to be dealt with under Rule 45 (1) or under the common law is a matter to which I shall return later.

[13] It is further apparent that in its attempt to have the default judgment set aside the defendant has generally acted with reasonable expedition. If the condonation application is granted there will have been no undue delay in the hearing of an appeal against the dismissal of the first rescission application. A notice of appeal against such dismissal could only have been filed after 3

March 2008, and the appeal could not have been heard before this session. Once again the plaintiff will not have suffered any cognisable prejudice.

[14] This brings me to a consideration of the condonation application. The fact that the defendant brought the second rescission application, and subsequently noted an appeal against its dismissal, in apparent ignorance at the time of the proper remedy to pursue, does not amount to a waiver or abandonment of its right to appeal against the dismissal of the first rescission application. If the condonation application is granted it would in effect substitute an appeal against the dismissal of the first rescission application for that against the second. To seek to substitute one appeal for another at the stage of the appeal hearing is, to say the least, unusual. However, the real issue involved in both is essentially the same – whether the plaintiff's claim in respect of which default judgment was granted was a liquidated amount or a liquidated demand. The situation is one where there is no real prejudice to

the plaintiff which cannot be cured by an appropriate order as to costs.

[15] In terms of Rule 17 (4) of the Court of Appeal Rules, 2006 this Court, in relation to an appeal before it,

> "shall have the power to give any judgment or make any order that the circumstances may require".

This is a very wide power which is conferred upon this Court and is subject only to the provisions of the Court of Appeal Act, 1978. Naturally it is a power which should be exercised judicially, but it does enable this Court, in an appropriate matter, and in the absence of prejudice, to deal with the true issues between parties in order to arrive at a just decision. In all the circumstances, I am of the view that provided the requirements for granting condonation are satisfied the condonation application should be allowed, thus enabling the defendant to appeal against the dismissal of the first rescission application.

[16] The general principles applicable when considering an application for condonation as enunciated in **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 531 (A) at 532 C-F were approved by this Court in **Motlatsi Adolph Mosaase v Rex** C of A (CRI) No. 12 of 2005 (unreported). In order to succeed in its application the defendant needs to show sufficient cause. In deciding whether that has been established this Court has a discretion to be exercised judicially upon a consideration of all the relevant facts. Amongst the most important interrelated facts to be considered are the degree of lateness, the explanation therefore, the prospects of success and the importance of the matter. In the peculiar circumstances of the present matter I am satisfied that an adequate explanation has been provided for the lateness of the application which, as I have pointed out, has not occasioned the plaintiff cognisable prejudice. A large sum of money is at stake and I am satisfied, for reasons that will appear later, that the defendant ought to succeed if the appeal is heard, hence the

requisite prospects of success are present. In the circumstances the condonation application should, in my view, be granted and the appeal against the dismissal of the first rescission application decided, the parties having been afforded a proper opportunity to deal with the matter.

[17] As previously mentioned, an application for the rescission of a default judgment can be brought under either High Court Rule 45(1) (if appropriate) or the common law, the scope of the latter being wider than the former. Rule 45(1) (b) and (c) are clearly not of application in the present matter. That leaves Rule 45(1) (a) which provides for the rescission of:

> "an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

[18] Mr. Steyn, for the plaintiff, contended that the default judgment had not been erroneously granted within the meaning of

Rule 45(1) (a). He relied in this regard upon the decision in **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA). I am doubtful as to whether that decision is of application to the facts of the present matter. It may well be that a judgment can be said to have been erroneously granted where it appears from the record of proceedings before the court granting the default judgment that the judgment was not sustainable in law and thus obviously wrong (*cf* **Bakoven Ltd** v **G.J. Howes (Pty) Ltd** 1992 (2) SA 466 (E) at 471 E-F). It is, however, not necessary to decide the point as I am prepared to consider the appeal on the basis that the first rescission application was brought under the common law.

[19] The principles that apply to an application for rescission under the common law were set out as follows in **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 764 I to 765D:

> "The appellant's claim for rescission of the judgment confirming the rule *nisi* cannot be brought under Rule 31(2) (b) or Rule 42(1), but must be considered in terms of the common law, which empowers the Court to

> rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042* and *Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163*.) The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn 1912 AD 181 at 186 per INNES JA*.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra at 1042*; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357-8.)*"

[20] The defendant was in default of appearance when the default judgment was granted due to the non-appearance of his attorney. That cannot seriously be disputed. The defendant was entitled to rely upon his attorney to appear, and the latter's failure to do so is not attributable to the defendant. Whether or not Mr. Chang was present at the High Court premises (about which there is a dispute) on the day in question is of no real moment. It was not essential for him to be there, and if he was there, he was in any event not afforded an opportunity of being heard. I am satisfied that the

defendant has provided a reasonable and acceptable explanation for his default.

[21] In the circumstances of the present matter the question of whether the defendant has a *bona fide* defence (the second requirement referred to in **Chetty's** case) boils down to whether the granting of the default judgment is sustainable in law. This in turn raises the question whether the plaintiff's claim was for a liquidated amount or a liquidated demand within the meaning of Rule 41(1). If it was not, default judgment could not have been granted without evidence being led.

[22] In **SA Fire and Accident Insurance Co. Ltd v Hickman 1955 (2) SA 131 (C) at 132H** it was held that in order to be a liquidated demand a claim must be so expressed that the ascertainment of the amount is a mere matter of calculation. The words "liquidated demand" are derived from the English Rules, where they are afforded the following meaning:

> "A liquidated demand is in the nature of a debt, ie a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes damages."

South African courts have tended to follow the above meaning ascribed to the words. (see in the above regard **Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia) and Others 1992 (2) SA 66 (Nm HC) at 72.)**

[23] As appears from the declaration, the plaintiff elected to cancel the agreement and claim damages. Clause 10.1.1 of the agreement entitled the plaintiff upon breach to:

> "cancel without notice this agreement forthwith, and to claim all amounts due and such damages as it may be entitled to in law."

In this court, in **Total Lesotho (Pty) Ltd v Hanyane** LAC (2000-2004) 796 at 798 G-I, Melunsky JA stated the following:

> "The fundamental rule in regard to the award of contractual damages is that the plaintiff should be placed in the position he would have occupied had the contract been properly performed so far as this can be done by the

> payment of money and without undue hardship to the defendant (see *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd. 1977 (3) SA 670 (A) at 687C.* In this case it is common cause that the measure of damages is to be based on the profits that the respondent lost as a result of the appellant effectively closing down his business".

[24] The plaintiff's claim was one for damages flowing from an alleged breach of contract which had led to the cancellation of the agreement by the plaintiff. The damages the plaintiff could claim would be its proven loss of profits. In terms of clause 2 of the agreement the plaintiff was to provide a digital internet connection to the defendant. Clause 4 provides for the provision of various services by the plaintiff. *Prima facie* it seems likely that there would be costs involved in the provision of such services. The monthly rate on which the plaintiff's claim is based may therefore not necessarily equate to the plaintiff's monthly loss of profits flowing from the alleged breach – in fact it is unlikely to. Consequently this is a matter where the plaintiff's alleged loss of profits cannot be a matter of mere calculation but requires investigation and, ultimately, proof. The onus would therefore be on the plaintiff to establish such loss. It is a fundamental principle

that a plaintiff must prove his loss. In the circumstances it cannot be said that the plaintiff's claim was for a liquidated amount or a liquidated demand, and default judgment should therefore not have been granted. The cases relied upon by Mr. Steyn for contending to the contrary are clearly distinguishable.

[25] There remains to be considered what orders, including costs' orders, need to be made. In its condonation application the defendant intimated that if the condonation application was granted it would abandon its appeal in respect of the second rescission applicaton. No wasted costs were tendered. In my view it would be more appropriate to dismiss that purported appeal, with costs. As far as the condonation application is concerned, the defendant sought a late indulgence from this Court in rather unusual circumstances. The plaintiff's opposition to that application was understandable and certainly not unreasonable. In the circumstances the defendant should, in my view, be ordered to pay

the costs thereof (see **Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and Others** 1996 (4) SA 411 (C) at 421 I.)

[26] As far as the appeal against the first rescission application is concerned, pursuant to condonation of the late noting of the appeal, the appeal is to be allowed with costs and the order of the court *a quo* altered accordingly. The default judgment granted on 8 August 2007 was largely the consequence of the failure of the defendant's attorney to attend court but was also due to the fact that the plaintiff sought and was granted an order (default judgment) to which the plaintiff was not entitled. In the result I propose to make no order as to costs regarding the proceedings on 8 August 2007.

[27] The following order is made:

1) The appellant's appeal against the order of the High Court on 14 March 2008 in case CIV/T/442/2004 is dismissed with costs.

2) The appellant's application for condonation for the late noting of an appeal against the order of the High Court on 3 March 2008 in case CIV/T/442/2004 is granted. The appellant is to pay the costs of the application.

3) The appellant's appeal against the order of the High Court on 3 March 2008 in case CIV/T/442/2004, consequent upon the granting of the application for condonation referred to in (2) above, is allowed with costs.

4) The order of the High Court on 3 March 2008 in case CIV/T/442/2004 is set aside and there is substituted in its stead an order in the following terms:

"(a) The default judgment granted by the High Court on 8 August 2007 in case CIV/T/442/2004 is hereby rescinded.

(b) The action in respect of case CIV/T/442/2004 is to proceed on a date to be arranged with the Registrar of the High Court, who is requested to accord the matter priority.

(c) The respondent (plaintiff) is to pay the costs of the applicant (defendant).

(d) There will be no order as to costs in respect of the proceedings on 8 August 2007.

J.W. SMALBERGER
JUSTICE OF APPEAL

I AGREE: _____

L.S. MELUNSKY
JUSTICE OF APPEAL

I AGREE: _____

G.N. MOFOLO
ACTING JUSTICE OF APPEAL

For Appellant : Adv N. Kades SC
For Respondent: Adv J.W. Steyn