IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.8/2007**
CIV/T/365/2007

In the matter between:-

COMMANDER OF LESOTHO DEFENCE FORCE **1st APPELLANT**
ATTORNEY-GENERAL **2nd APPELLANT**

AND

RANTSO SEKOATI **RESPONDENT**

CORAM: RAMODIBEDI, JA
SMALBERGER, JA
GAUNTLETT, JA

Heard: 1 April 2008
Delivered: 11 April 2008

SUMMARY

Application for condonation for late noting of appeal - principles governing - judgment sought to be appealed against preceded by settlement made an order of court - judgment a nullity - no prospects of success - application deficient in other respects - condonation refused - circumstances justifying award of attorney and client costs.

JUDGMENT

SMALBERGER. JA

[1] The respondent (as plaintiff) instituted action against the appellants (as defendants) in the High Court for damages under various heads arising out of the alleged wrongful termination of his commission as an officer of the Lesotho Defence Force. The matter came before Hlajoane J. On 26 March 2007, the learned judge purported to deliver a judgment wherein she made the following order:

> "1. That plaintiff be re-instated as a member of LDF with effect from the 1st of April, 2007.
>
> 2. That he be paid his salary from the date of his dismissal which is June 2000 when he got his last pay, to date of reinstatement.
>
> 3. That he be paid M50,000.00 damages for emotional pain and suffering.
>
> 4. Costs of suit."

[2] On 29 May 2007, the appellant noted an appeal against the above order. The appeal was noted

in the finality of the judgment is a factor which weighs with the Court in the exercise of its discretion **(Beira v Raphaely-Weiner and Others** 1997 (4) SA 332 (SCA) at 337 C-E). Furthermore, in an application for condonation there should be a frank disclosure of all relevant facts that may have a bearing upon the proper exercise of the Court's discretion. The considerations listed above are those of general and most frequent application; they are not intended to be exhaustive.

[4] It is common cause that upon receipt of the Notice of Appeal dated 29 May 2007, the respondent's attorney addressed a letter to the second appellant for the attention of Mr. Letsie, counsel for the appellants. The letter reads as follows:

> "Please refer to your Notice of Appeal dated 29th May, 2007 that has only recently been brought to the attention of the writer hereof.

> We find your attitude in this matter to be absolutely mind boggling. In the first place, you will recall that after the Commander had given evidence and admitted that client had been unlawfully dismissed from the LDF and also confirmed that a decision had been taken to pay client and fellow soldiers as if they had attained the age of 55 years, the Court adjourned the matter on the note that the parties should attempt an amicable settlement.
>
> Your clients then insisted during the negotiations that client should go back to work even though he said he was apprehensive of doing so because he did not understand the reason for insisting that he, in particular, should return to the army when at least one other unlawfully expelled soldier who wanted to return was not allowed to do so.
>
> You will recall that client ultimately relented and accepted the terms of settlement reflected in the Court Order filed of record on 19th February, 2007 when we appeared before it to record our settlement.
>
> How then do you, under those circumstances note an appeal? Is the Court of Appeal going to be informed that even before the Court delivered its written judgment, we had reached an amicable settlement in the matter that was made an order of Court on 19th February, 2007?
>
> We trust that when you apply for condonation for late filling of your appeal, you will also be candid enough to draw the Court's attention to this fact that does not appear in your grounds of appeal."

It is not disputed that the letter was received; it is further common cause that it was never replied to or

its contents disputed, qualified or otherwise called into question.

[5] It is surprising, to say the least, that in his founding affidavit in support of the appellants' condonation application, Mr. Letsie made no reference to the above-quoted letter, more particularly in view of what is stated in the concluding paragraph. It was left to the respondent to do so in his opposing affidavit. In support of his contention that the matter had been settled the respondent annexed a copy of an extract from the presiding judge's notebook where on 19 February 2007, in the presence of Mr. Mohau for the respondent (plaintiff) and Mr. Letsie for the appellants (defendants) the settlement, which was predicated on the re-instatement of the respondent, is recorded as follows:

"1. That he be paid salary from date of dismissal to date of re-instatement.

2. He be reinstated upon payment of the amount set in para. 1. [Above this appears the words 'payment within 3 months']

3. That he be paid M50,000 damages for *contumelia."*

It was further noted:

"The agreement of both parties is made an order of this Court."

[6] The official Court Order issued by the Deputy Registrar on 29 May 2007 reads as follows:

"1. The Defendants be and are hereby directed to pay Plaintiff his salary from the date of his dismissal to the date of his reinstatement;

2. The Plaintiffs reinstatement be effected upon payment of the money referred to in paragraph 1 above;

3. The Defendants be and are hereby directed to pay to the Plaintiff an amount of M50,000.00 for *contumelia."*

It will be observed that there are some minor differences in wording between the Court Order and

the settlement as recorded by the trial judge, but these are clearly of no moment. It is common cause that the respondent was re-instated with effect from 1 April 2007. The extent of the appellants' liability to the respondent is accordingly clearly ascertainable from the Court Order.

[7] In his replying affidavit Mr. Letsie claims that the judge *a quo* was approached by counsel for the parties to change her order of 19 February 2007. The respondent did not have an opportunity to respond; but in any event it would seem that any changes sought could only have related to minor matters of detail rather than matters of substance. A court's power to effect correctional alterations is limited to changes which do not affect the sense or substance of its judgment or order. Consequently, the Court Order

embodying the settlement agreement between the parties stands as a final order. No case has been made out that the respondent abandoned the Court Order or waived any of his rights in respect thereof. Furthermore, the Court Order possesses all the attributes of a valid order.

[8] It is not apparent why the judge *a quo* considered it necessary to subsequently deliver a judgment, let alone one which in some material respects is at variance with her earlier order. There was no need for her to do so; in law she was precluded from supplanting her previous order. As stated in **Firestone South Africa (Pty) Ltd v Gentiruco A.G** 1977 (4) SA 298 (A) at 306 F-G:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio:* its jurisdiction in the case having been

> fully and finally exercised, its authority over the subject-matter has ceased. See **West Rand Estates Ltd v New Zealand Insurance Co. Ltd,** 1926 A.D. 173 at pp. 176, 178, 186-7 and 192; **Estate Garlick v Commissioner of Inland Revenue,** 1934 A.D. 499 at p. 502."

It follows that the court *a quo's* judgment is a nullity, must be treated as *pro non scripto* and consequently cannot be the subject of an appeal. On that ground alone the application for condonation could not succeed.

[9] Mr. Putsoane, for the appellants, was concerned that the judgment did not correctly reflect the law in certain respects, and was anxious that we should clarify the legal principles that had arisen in the action. We do not know what considerations influenced the parties in reaching a settlement. The parties are bound by their agreement. It was not open to the judge *a quo* to question, nor was she required to

approve, the basis of the settlement. The judgment, as a nullity, cannot create any form of legal precedent. To do as Mr. Putsoane asked would require us to engage upon a purely academic exercise. The Appeal Court is not there for such purpose.

[10] There are other important respects in which the application for condonation is defective. It is lacking in candour. The fact of the earlier settlement should have been mentioned and, to the extent the appellants considered necessary, put in perspective, particularly in view of the letter written to Mr. Letsie calling upon him to do so. He could not reasonably have believed that the previous history of the matter was of no relevance. Furthermore, Mr. Letsie claims that the court *a quo's* judgment only came to his notice on 17 April 2007. Yet in a letter addressed to

the respondent by the first appellant on 2 April 2007 advising him of his re-instatement the opening sentence states that "receipt of judgment delivered by the Honourable Justice A.M. Hlajoane on the 26th March 2007 is acknowledged". On the face of it there is an unexplained discrepancy between these statements. Finally, although the appeal was noted on 29 May 2007 the application for condonation was only filed on 4 February 2008, some eight months later. No explanation is forthcoming for this delay. As previously mentioned, condonation should be sought as soon as non-compliance with a rule becomes apparent; a failure to do so could result in prejudice to a respondent. In the present instance, had condonation been timeously sought it seems likely that the matter could have been disposed of in the previous session.

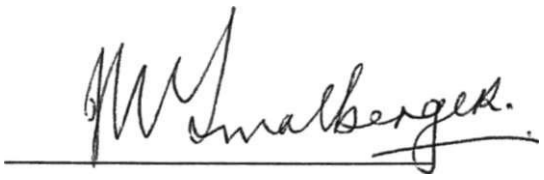
[11] The respondent's commission was terminated and he was dismissed from the Lesotho Defence Force in June 2000. That his dismissal was wrongful, and that he had a legitimate claim against the first appellant, is no longer disputed. He had to wait until 19 February 2007 for his claim to be settled, and until 1 April 2007 for his reinstatement. A year later he is still waiting to be paid the arrear salary and the damages that are his due. While the appellants accept liability for costs should their application not succeed, the history of the matter taken in conjunction with the woeful inadequacies and complete lack of merit in their condonation application call for a punitive order as to costs. It is only fair that the respondent should be put in a position where, as far as possible, he can recover all his costs from the appellants. We are

accordingly of the view that the circumstances justify the award of attorney and client costs.

following order is made:-

1. It is re-iterated that the application for condonation was dismissed on 1 April 2008.

2. The appellants are ordered to pay the costs of the application on an attorney and client scale, such costs to include those of and relating to the appeal.



J W SMALBERGER
JUSTICE OF APPEAL

I agree:

M M RAMODIBEDI
JUSTICE OF APPEAL

I agree:

J J GAUNTLETT
JUSTICE OF APPEAL

For Appellants	Mr T.S. Putsoane
For Respondent	Mr K.K. Mohau