C of A (CIV) No. 16/2007

IN **THE APPEAL COURT** OF **LESOTHO**

In the matter between:

THE LIQUIDATORS, LESOTHO BANK (In Liquidation)	**Appellant**
and	
EXPERTYPE SECRETARIAL SERVICES (PTY) LTD	**First Respondent**
THE DEPUTY SHERIFF	**Second Respondent**

CORAM:
GROSSKOPF, JA
SMALBERGER, JA
GAUNTLETT, JA

JUDGMENT
3,11 April 2008

Appeal against refusal to rescind default judgment - unreasonable delay by judge in delivering reserved judgment.

GAUNTLETT. JA:

[1] The appellant is the liquidator of the Lesotho Bank. On 31 January 2001, the Lesotho Bank (Liquidation) Act, 2 of 2001, was promulgated. It made provision for the voluntary liquidation of the Lesotho Bank, for the

appointment by the Minister of Finance of a liquidator, and for the powers of the latter. On 22 February 2001 Legal Notice 20 published the consent of the Commissioner of Financial Institutions (in terms of s56(2) of the Financial Institutions Act, 1999) to the voluntary winding up of the Lesotho Bank and recorded "the KPMG Harley and Morris joint venture" as liquidator. On 6 April 2001 formal letters of administration were issued by the Master certifying the joint venture's appointment as liquidator. It appears that the joint venture has at all times been represented by an attorney, Mr. Seymour Harley, and an accountant, Mr. Anthony McAlpine. (Whether it is in law strictly regular for an entity such as a joint venture or a company to be appointed a liquidator, as opposed to designated individuals, is not a matter raised on the papers or otherwise an issue in the appeal).

[2] Some three years after these events - on 12 May 2004 - the appellant received a letter from legal representatives of the respondent. It asserted an entitlement to payment of M4 500 000,00 (with interest claimed at the rate of 18,5% per annum) for services related to the

archiving and scanning of six million pages six years previously, "during or about July 1998". The appellant replied two weeks later, recording that no trace had been found during the liquidation process of the alleged services or indebtedness, and noting that no claim had been lodged with the liquidator "by the stipulated deadline of 31 July 2001". The belated claim was accordingly rejected.

[3] A legal process ensued which can only be described as chaotic. A summons swiftly followed the letters. The appellant failed to enter appearance to defend within seven days, and default judgment was taken. That gave rise to the present matter. The appellant sought, ex parte, an urgent order for a temporary stay of execution of the default judgment "pending the finalization of this matter", and to rescind the default judgment. The temporary order was granted. On the return day, Guni J heard argument. Two years later she handed down judgment. She held that "this application must fail". That was the full extent of her order. Presumably she intended by this to discharge the rule nisi operating as an

interim interdict, and to refuse rescission. However she omitted to do so, or to address the issue of costs.

[4] There is little point in seeking to summarise the High Court's judgment. This is so for two reasons. The first is that on both sides arguments were presented which were characterized by maximal confusion and technicality and minimal merit. The second is that the court in turn allowed itself to be distracted by these arguments from the true issues, and - despite the two-year delay - the judgment is in a form which in material respects is not coherent. This is one verbatim example:

> "What is the really purpose of the use of these many shades? Is it to cloud and obscure the really identity of the really parties? If the obscurity of the identity of the really parties, is the actual endeavour, in that there is a reasonable success. It is really difficult to follow exactly who is who in these papers. The conduct of the parties greatly assisted me in determining exactly who is who in this matter".

[5] Before us, the inquiry narrowed to three main issues. The respondent contended that the temporary order staying the execution was correctly (in the result) discharged and rescission refused because the appellant had failed to show that it had any bona fide defence to the claim

and hence to seek rescission of the judgment; secondly its failure to enter appearance to defend and to oppose default judgment was wilful; and thirdly that a proper basis to discharge the temporary order was that it had been improperly obtained ex parte.

Further contentions - relating to the authority of McAlpine to depose to affidavits and to bring the applications for the appellant; and to locus standi (arising from the confusion engendered by the founding affidavit's confused distinction between the appellant and its "liquidation department") - were wisely not pressed in oral argument. They are without merit.

[6] It is logical to begin with the last contention first: if sound, the appeal must fail for that reason alone. But in my view it is not sound. It is correct that orders are only to be obtained ex parte in the most exceptional circumstances, as this court has time and again made clear. Here the circumstances were these: the appellant, as a liquidator, holds a statutory office; its assets are distinct from those of the Bank in liquidation; the writ

procured by the respondent did not respect that basic distinction, but authorized the deputy sheriff "to attach and take into execution the movable goods of KPMG/Harley & Morris Joint Venture" for the debt allegedly due not by it but by the Bank to the respondent; these "movable goods" included computer equipment containing confidential information; the deputy sheriff had already attached the goods and at any time could remove them. In my view these were truly exceptional circumstances such as to justify an ex parte application. It is unsurprising that the court a quo did not discharge the temporary stay on this basis.

[7] I turn to the remaining two issues. In my view, the appellant clearly has a bona fide defence to the claim. The respondent's summons disregards the requirements of s.226 of Lesotho's Companies Act, 25 of 1967. No claim was ever proved by the respondent within the stipulated six month time period (thus by 31 July 2001). The declaration is devoid of any allegation that such a claim had been lodged; that it had been rejected; and that (via s 226) the court was asked to set aside the rejection. There was no dispute before us that Lesotho insolvency law

does not permit a creditor simply to pursue a debt by way of action. Counsel for the respondent indeed conceded before us that the appellant, in the circumstances, has a bona fide defence.

[8] Lastly in my view there is no merit in the contention that the appellant's failure to oppose default judgment was "wilful". What happened is explained in the replying affidavit: there was an oversight by a clerk in ensuring that notice of intention to defend was filed within seven days, it at all times being the intention of the appellant to resist the claim. The respondent full well knew this to be the case: the prompt and categorical denial of the claim in response to the letter of demand made that clear.

[9] For these reasons, in my view the appeal must succeed. As regards costs, counsel for the appellant candidly acknowledged the parlous nature of the founding affidavit and the pursuit by counsel then in the case of wholly misconceived legal contentions. He also recorded his instructing attorney's apology for these matters. Fairly he proposed that

the costs of the application - as regards which, as I have noted - the court a quo simply failed to make an order - together with the costs of the appeal should be costs in the principal action instituted by the respondent.

[10] I would accordingly make this order:

> **"1. The appeal is upheld.**
> **2. The judgment of the court a quo is set aside.**
> 3. **The following order is substituted:**
>
> (a) The judgment granted by default is rescinded and the applicant is granted leave to note its intention to defend the action instituted on 24 May 2004 under case No. CIV/T/288/04.
>
> (b) The costs of the application shall be costs in the action."
>
> **4. The costs of the appeal shall be costs in the action.**

[11] A last matter remains. This is the two-year delay in delivering judgment in a matter essentially procedural in nature and not (to judge in particular from the judgment) requiring particular legal research. The winding up of a bank placed in liquidation by statutory instrument has been delayed. The rights of others have been affected. No explanation at all for the delay is advanced in the judgment. "[D]elays destroy public confidence in the judiciary. There rests an ethical duty on judges to give

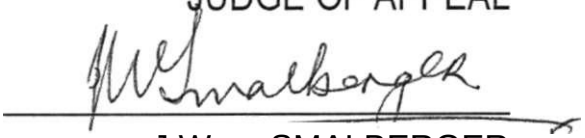
judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible" (New Clicks SA (Pty) Ltd v Minister of Health 2005 (3) SA 238 (SCA) at 261 C - 262 B). In Goose v Wilson Sandford & Co the Court of Appeal of England and Wales, censuring a judge for an eight-month delay in delivering a reserved judgment (leading to his resignation), noted that such delay, if "(l)eft unchecked .. would be ultimately subversive of the rule of law "(The Times Law Reports (Feb. 19, 1998) 85 at 86). The delay in the present matter by Guni J is nearly three times that in either of these instances, and is to be deplored.

J.J. GAUNTLETT
JUDGE OF APPEAL

I agree

F.H. GROSSKOPF
JUDGE OF APPEAL

I agree



J.W. SMALBERGER
JUDGE OF APPEAL

Counsel for the appellant — G. Hoffman, SC
(with him, P.U. Fischer)

Counsel for the respondent — S. Shale