IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO. 15/07

In the matter between:

THATO LEKULA MOTEBEJANE **APPELLANT**

AND

BOLIBA MULTI-PURPOSE COOPERATIVE SOCIETY **RESPONDENT**

CORAM: RAMODIBEDI JA
SMALBERGER JA
GAUNTLETT JA

HEARD: 4 APRIL 2008
DELIVERED: 11 APRIL 2008

SUMMARY

Practice and procedure - Default judgment - Rescission thereof - Principles involved - Appeal against a High Court's refusal of an application to rescind default judgment.

JUDGMENT

RAMODIBEDI JA

[1] This is an appeal against a decision of the High Court refusing the appellant's application for rescission of default judgment. The respondent, a cooperative society duly registered under the laws of Lesotho, brought an action against the appellant by way of summons claiming:-

b) Payment of a sum of M41,265.38 being money due under account No. 1800727412.

c) Payment of M48,530.36 being money due under account No. 18002672612.

d) Interest at the rate of 18.5% a *tempore morae.*

e) Costs of suit.

f) Further and/or alternative relief.

These sums of money were allegedly advanced by the respondent to the appellant at his special request during February to September 2005.

[2] The parties are on common ground that not only did the appellant file a

notice of appearance to defend the action but he also filed a plea which included a special plea as well in the following terms:-

> *SPECIAL PLEA*
>
> *In advance of pleading in the merits of the action defendant hereby specially pleads as follows:*
>
> *(a) There is no resolution by the appropriate reposition(sic) of the plaintiff authorising the institution of the present proceedings against the defendant. Thus, the present proceedings have not been authorised by plaintiff.*
>
> *(b) There is no special power of attorney attached to the summons, thereby rendering the institution of the present summons excipiable for want of compliance with Rules of this Honourable Court. Wherefore defendant prays that the action be dismissed with costs. "*

[3] Paragraphs 4 and 5 of the appellant's plea are, in my view, crucial for a determination of this appeal. Therein the appellant made the following important averments :-

AD PARA 5 THEREOF

(a) Defendant denies that he owes plaintiff the sum of M41,265.38 in the account NO. 1800727412 and/or at all and put (sic) plaintiff to the proof thereof.

(b). Liability in respect of the sum of forty-eight thousand five hundred and thirty [Maloti] and thirty six lisente (M48,530.36) in account No. 1802672612 is accepted.

5.

WHEREFORE defendant denies liability for the sum of M41,265.38, as well as interest thereon as claimed, and costs ensuring (sic) therefrom. "

[4] On 22 May 2006, the learned Judge a quo granted default judgment in favour of the respondent in terms of claim (b). As can readily be seen from paragraph 4(b) of the appellant's plea as fully set out in the preceding paragraph, the appellant had specifically "accepted" liability in claim (b).

[5] Thereafter, the appellant launched an application for rescission of default judgment. He duly filed a founding affidavit in support thereof. In paragraph 8 of his founding affidavit, the appellant confirmed once again that he admitted liability for the amount of M48,530.36 in claim (b). Strangely, he did not deal with the question of a bona fide defence at all in respect of claim (b). Nowhere did he deal with set-off as his counsel purported to do at the hearing of the matter before us. In any event, the alleged set-off is in respect of claim (a) and not claim (b). Set-off is, therefore, irrelevant to the determination of this appeal.

In its opposition to the appellant's application, the respondent did not file an answering affidavit. Instead, it filed a notice purportedly in terms of Rule 8(10)(c) of the High Court Rules 1980. That Rule provides as follows:-

> *"(10) Any person opposing the grant of any order sought in the applicant's notice of motion shall:*
>
> *(a) within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept notice*

and service of all documents.

g) *Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and*

h) *if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."*

[7] The point raised by the respondent was couched in these terms :-

"(a) The application for rescission does not disclose a bona fide defence as Applicant/Defendant has consented to judgment on the said amount in terms of Rule 38(10) of the High Court Rules."

Rule 38 empowers the defendant in any action for payment of a sum of money to make an unconditional tender and payment into court of the sum claimed or any part thereof.

Sub-rule 38(10) which the respondent relies upon simply provides as follows:-

> *"(10) Nothing in this rule shall prevent a defendant from stating in his plea that he consents to judgment for a portion only of the plaintiff's claim. "*

On 3 October 2006, the High Court dismissed the appellant's application for rescission of default judgment. In his ruling the learned Judge a quo expressed himself in three short paragraphs which require quotation in full. He said the following:-

> *"Two twin factors are firstly the fact that the Defendant Counsel had been absent on the date of hearing when judgment was grounded (sic) by default. Secondly, it was this aspect that the date of hearing had been on the uncontested motion. Against this (sic) two factors the whole background are (sic) not very arguable.*
>
> *Indeed it is important as to what Plaintiff Counsel explained before the Judge as to why he was proceeding in the absence of the other party. The explanation is to be found as to why he proceeded when the matter of liability seemed to be uncontested. Indeed it was uncontested and was admitted in his pleas except for the question of the power of Attorney, Resolution and Locus Standi.*
>
> *This (sic) issues become unimportant and merely technical when the question of liability is considered in the manner it was uncontested. It is this aspect which has persuaded me that the Defendant's application ought to fail. I would have considered awarding cost (sic) to the Plaintiff.*
>
> *I am prepared half of the cost (sic) to the plaintiff. "*

It is unfortunate that the court a quo's ruling did not describe the nature of the proceedings as well as the issues before the learned Judge. This has not helped to solve the confusion relating to the issues such as the exact nature of the default judgment granted and the date of the default judgment. Thus for example, the court order filed of record erroneously puts the date of the default judgment as 3 October 2006, whereas the correct date is 22 May 2006. The order in question simply reads: "Default judgment is granted". Nothing is said about the other prayers such as interest and costs. To add to the confusion, the writ of execution filed of record refers to interest at the rate of 18.5% per annum plus costs despite the fact that no mention is made of these items in the court order of default judgment. Needless to say that all these mishaps could easily have been avoided if the attorneys involved had done their work properly. I should record here, however, that, in fairness to both Mr. Thoahlane for the appellant and Mr. Matooane for the respondent, they very fairly and properly apologised to the Court for these shortcomings and many more.

[10] I turn now to the principles involved in an application for rescission of default judgment. A good starting point is no doubt Rule 27(6)(a)(c) of the High Court Rules. It reads as follows:-

> *"(6) (a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgment apply to Court, on notice to the other party, to set aside such judgment.*
>
> *(b)*
>
> *(c) At the hearing of the application the court may refuse to set aside the judgment or may on good cause shown set it aside on such terms including any order as to costs as it thinks fit. "*

[11] This Rule, as it seems to me, is the core of the procedure involved in an application for rescission of default judgment. The use of the word "may" in sub-rule 27(6)(a)(c) indicates that the court hearing an application for rescission of default judgment has a discretion whether or not to rescind the judgment. It is a judicial discretion which must be exercised upon a consideration of all the relevant factors that bear upon the matter. As a matter of general principle, an appellate court will not lightly interfere with the exercise of a lower court's discretion in the absence of a material misdirection resulting in a miscarriage of justice.

[12] Apart from Rule 27(6)(a)(c) of the High Court Rules, it is now well - established that a defendant in an application for rescission of default judgment must satisfy two requirements, namely (1) that he was not in wilful default and (2) that he has a bona fide defence to the plaintiff's claim. See for example **Chetty v Law Society, Transvaal 1985** (2) **SA 756 (A)** at 765.

[13] It is not strictly necessary to consider the question of wilful default in this matter. The appellant's case ultimately turns on whether he has a bona fide defence to respondent's claim (b). This is especially so since he has admitted liability in his plea. It was submitted on the appellant's behalf, however, that the admission was made only in the event of the special plea failing. Put differently, it is the appellant's case that the special plea constitutes his bona fide defence in the matter. I proceed then to determine the correctness or otherwise of this proposition.

In argument before us, the appellant's complaint raised in his special plea

was confined to a power of attorney only. It was accepted on the appellant's behalf, however, that a power of attorney was in fact filed in the matter in terms of Rule 15(1) of the High Court Rules 1980, albeit a few days after the filing of the summons. Reliance was placed on the South African case of **Allan Pohl, Otto & Theron (Pty) Ltd v Schoeman and Another 1954 (3) SA 589 (T)** at 593 for the proposition that failure to file a power of attorney with the summons is fatal. It will be seen, however, that the case dealt with a differently worded Rule 10 of the old Transvaal Rules of the Supreme Court. The Rule in question provided as follows :-

> *"In every action which shall be commenced in the Court the attorney of the plaintiff shall, before any process is sued out to compel any person to appear to answer any claim or demand, file with the Registrar his power of attorney or warrant to sue, signed by the plaintiff.*
>
> > *Should a power to sue be given by the agent of the plaintiff or person authorised to act for him, the attorney shall file with the Registrar, together with such power granted to him, a duly certified copy of the power of attorney granted to the agent, in terms of which the power to sue has been given. "*

[15] By contrast, Rule 15(1) of the High Court Rules 1980 reads as

follows:-

> *"15. (1) Any party bringing or defending any proceedings in person may at any time appoint an attorney to act on his behalf, who shall file a power of attorney and give notice of his name and address to all other parties to the proceedings. "*

It is plain that, whereas the South African Rule prescribes that a power of attorney must be filed before any process is sued out, Rule 15(1) of the High Court Rules 1980 does not have a similar provision. It is, however, strictly unnecessary to express a concluded view as to the time-limit for filing a power of attorney in the High Court. It shall no doubt be sufficient for me to express my view that, in casu, the filing of a power of attorney, albeit a few days after summons had already been filed, amounted to substantial compliance with Rule 15(1) of the High Court Rules. That being the case, the appellant's so called bona fide defence based on this issue fails. It was no more than a tactical and technical ploy designed, as it is, solely for the purposes of delay to the respondent's prejudice. That surely cannot be right.

[16] It follows from the foregoing considerations that the appellant failed to

show that he has a bona fide defence to respondent's claim (b). Accordingly, the learned Judge a quo was correct in dismissing the appellant's application for rescission of default judgment in this claim.

[17] The result is that the appel is dismissed with costs.

M.M RAMODIBEDI

JUSTICE OD APPEAL

I agree:

J.W SMALBERGER

JUSTICE OF APPEAL

I agree:

J. J GAUNTLETT

JUSTICE OF APPEAL

FOR APPELLANT: ADV. R. THOAHLANE

FOR RESPONDENT: MR. T. MATOOANE