IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 11/09

In the matter between:

LETHUSANG MOTAKE **APPELLANT**

and

LEKOKOANENG LANDSTONE CO. (PTY) LTD. **1ST RESPONDENT**

R. 'MUSI (Messenger of Court) **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

CORAM: GROSSKOPF JA
SMALBERGER JA
MAJARA JA

Heard : 14 October 2009
Delivered: 23 October 2009

SUMMARY

Court a quo rescinded a judgment by default on the return day of an interim court order which only made provision for the stay of a writ of execution. The application for rescission in any event failed to show sufficient cause for rescission.

JUDGMENT

GROSSKOPF, JA

[1] The appellant issued summons against the first respondent (hereinafter referred to as “the respondent”) in August 2008 under case number CIV/T/240/08 and the respondent entered appearance to defend. The parties thereafter endeavoured to settle the dispute out of court and the appellant gave notice of withdrawal of the case to the respondent. The settlement negotiations broke down and the appellant once again on 16 October 2008 issued summons against the respondent on the same cause of action under case number CIV/T/445/08. The summons was served on the respondent on 12 November 2008 but the respondent failed to enter appearance to defend. The appellant thereupon brought an application for judgment by default which was granted by the High Court on 7 January 2009. A writ of execution was issued and served on the respondent on 27 January 2009. The deputy sheriff attached a sandstone cutter. He mentioned in his return of service that the respondent promised to pay M2,000-00 per month.

[2] Despite its promise to pay the respondent brought an urgent application on notice of motion on 3 February 2009 in which it asked that a rule *nisi* issue calling upon the appellant to show cause why the default judgment should not be rescinded on the return day and the writ of execution stayed. (The founding affidavit in this urgent application was for some unknown reason dated 16 April 2008, some nine months prior to the notice of motion.)

[3] The High Court granted the following interim order on 18 February 2009:

> "1. That the ordinary modes and rules relating to notice and service of process of this Honourable Court be dispensed with on account of urgency hereof.
>
> 2. That a rule *nisi* issue and is hereby issued returnable on the 20 February 2009 calling upon the respondents to show cause if any why the following orders shall not be made absolute.
>
> (a) That writ of execution made by this court be stayed pending finalization of this matter."

It should be observed that the interim order did not provide for the rescission of the judgment by default.

[4] The interim order was served on the appellant on 19 February 2009 and he gave notice to the respondent on 20 February 2009 of his intention to oppose confirmation of the rule on the return day, which was 20 February 2009. The High Court however granted a "final order" on 20 February 2009 in the absence of the appellant. This order reads as follows:

> "The default judgment is rescinded with costs."

[5] The appellant lodged an appeal against the final order granted by the court a quo on 20 February 2009. (Condonation is granted to the appellant for his late noting of appeal.) The appellant's notice of appeal was served on the respondent's attorneys but the respondent gave no indication that it intended to oppose the appeal.

[6] There was no appearance for the respondent at the roll call on 5 October 2009 or when the appeal was heard in this Court on 14 October 2009. The court then raised the question whether the respondent was aware of the appeal. Counsel for the appellant

submitted that the respondent, after receiving the notice of appeal, never gave any indication that it intended opposing the appeal. Counsel for the appellant also pointed out that the appellant's application dated 23 April 2009 for condoning his late noting of appeal was also served on the respondent's attorneys. They were therefore reminded that the appellant had lodged an appeal and that he intended to proceed with his appeal. Once again there was no reaction from the respondent. In these circumstances it can be concluded in my view that the respondent does not wish to oppose the appeal, in particular where it should have been clear to the respondent that the appeal had to succeed.

[7] Counsel for the appellant raised a number of valid grounds of appeal, but it is not necessary to deal with all of them in turn. I shall consider only two of those grounds on which the appeal ought to succeed in my view.

[8] In the first place it should be borne in mind that the matter came before the court a quo on the return day of a rule *nisi.* The court a quo did not, however, confirm the rule, which was for the stay of execution only, but instead rescinded the judgment by default. The rescission of the judgment by default never formed part of the interim order and it was therefore not a competent order on the return day of the rule *nisi.*

[9] What is more, in the second place, is that the court a quo, in the absence of the appellant, rescinded the judgment by default despite the fact that the respondent had failed to show sufficient cause for the rescission. It is trite law that a defendant who seeks rescission of a judgment by default must show sufficient cause for rescission. He would be required to give a reasonable and acceptable explanation for his default, and he must show that on the merits he has a bona fide defence with some prospect of success. (See Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J-765D.)

[10] The respondent failed in my view to give an acceptable explanation for his default. In its founding affidavit the respondent merely referred to the appellant's withdrawal of case number CIV/T/240/08, but made no reference to the summons in case number CIV/T/445/08 which was subsequently duly served on it. There is no acceptable explanation why the respondent did not enter appearance to defend this second case.

[11] The respondent in my view also failed to show that it has a bona fide defence. In the founding affidavit the respondent alleges that they have

"very serious prospects of success".

The respondent does not, however, disclose what its defence is. The fact that the respondent intimated to the deputy sheriff that it will pay M2,000-00 per month in any event refutes any allegation of a bona fide defence.

[12] It follows in my judgment that there were no grounds to rescind the judgment by default, more so where it was done in the

absence of the appellant. The order of the court a quo should accordingly be set aside.

[13] Counsel for the appellant submitted that respondent's counsel should be ordered to pay the costs de bonis propriis on an attorney and client scale. I am however not willing to make such a drastic order where counsel for the respondent has not been afforded an opportunity to oppose it.

[14] In the result the following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo rescinding the judgment by default with costs is set aside.

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F.H. GROSSKOPF
JUSTICE OF APPEAL

I agree:

_____

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

_____

N. MAJARA
JUSTICE OF APPEAL

For the Appellant : Adv L.P. Nthabi
For the Respondent: No appearance