

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No.4/2011

CIV/T/285/2010

In the matter between:

‘MAMOHLOBELA LETSIE

APPELLANT

AND

THE COMMANDER LESOTHO DEFENCE FORCE 1ST RESPONDENT

THE COMMISSIONER OF POLICE

2ND RESPONDENT

TROOPER KHAMA

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM:

Smalberger JA

Scott JA

Howie JA

Heard : 13th April 2011
Delivered : 20th April 2011

Summary

Default judgment in action for damages granted in default of entry of appearance – rescission sought – granted without consideration of whether good cause shown – order for rescission set aside. Costs of appeal award influenced by default judgment having been given without hearing evidence as required by Rule 27 (5).

JUDGMENT

HOWIE JA

[1] ‘Mamoholobela Letsie was a pedestrian in Kingsway, Maseru on 2 November 2009 when she alleges that she sustained personal injury as a result of a shooting incident involving members of the Lesotho Defence Force and a trooper in the Lesotho Mounted Police Service.

[2] She subsequently sued in the High Court for damages citing as defendants in the action the Commander of the Defence Force, the Commissioner of Police, the trooper allegedly involved and the

Attorney-General. The alleged damages were set out under various heads and totalled M190,000.00. For convenience the parties will be referred to as they were in the court below.

[3] The time for entry of appearance having passed without any defendant having entered appearance, the plaintiff set the matter down in terms of Rule 27 (3) for default judgment. It came before Mofolo AJ on 16th August 2010 who granted default judgment against all the defendants jointly and severally for the full sum claimed without hearing any evidence.

[4] The provisions of Rule 27 (5) of the High Court Rules require evidence to be led before granting default judgment where the claim is not for a liquidated debt or liquidated demand. The claim in this case was in respect of a debt that was unliquidated. It had to be liquidated by the judgment of the court, after determining on the evidence what sum it was reasonable to fix as damages. It follows that the judgment was wrongly given.

[5] By application launched in November 2010 the defendants applied for rescission of the judgment. The application, which was opposed, was duly heard by Mofolo AJ who granted it. In a short judgment the learned Judge said that the defendants were not barred and that it was of paramount importance that a contested matter go to trial. He accordingly ordered rescission. The appeal is against that order.

[6] No reference was made by the Judge to the requirement of Rule 27 (6) (c) that an applicant for rescission of a default judgment must show good cause. It is trite that establishing good cause involves giving a reasonable explanation for failure to enter appearance in time and showing that there is a *bona fide* defence.

[7] The founding affidavit in support of the defendants' rescission application was deposed to by Mr Molokoane, Senior Crown Counsel in the Attorney-General's chambers, who also appeared before us to oppose the appeal. The case put forward in the

affidavit was that the summons was received on 17th May 2010, that it was thereafter proposed to investigate the plaintiff's allegations and that it was thought that the matter could be settled. During August 2010 Mr Molokoane received instructions that the action should be defended as investigation had revealed "possible defences". He therefore served a notice of appearance to defend on 18th August in ignorance of the default judgment granted two days before. He went on to say that the prospects of success in the action lay with the defendants because investigations revealed that the plaintiff had been injured by a pellet, that the service members involved did not use pellet guns and that the police trooper in question had not been on duty at the relevant time.

[8] A pointer to the possibility that the Judge's attention was not drawn to the requirements of Rule 27 (6) (c) when he granted rescission is the assertion in Mr Molokoane's affidavit that the default judgment order was "erroneously granted in my absence".

[9] That, of course, is the language of Rule 45 (1), the general rescission provision, in respect of which it is not necessary to show good cause. This cannot assist the defendants, however, where the order sought to be set aside was one granted in default of entry of appearance. When that is the default involved, Rule 27 (3) permits set down and the grant of judgment without notice to the defendants and also without barring the defendant. In addition, as already mentioned, Rule 27 (6) (c) requires an applicant for rescission to show good cause. The procedural law in South Africa in these respects is set out in ***Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th edition, at 696-7.*** The position, in my view, is the same in Lesotho, particularly having regard to the language of the relevant Lesotho High Court Rules to which I have referred.

[10] Mr Molokoane's affidavit contains no grounds which provide a reasonable explanation for the defendants' default. If their intention was to investigate the alleged incident with a view to possible settlement it must have been obvious from the start, at

least to their legal advisers, that if they omitted, in the meanwhile, to enter appearance in time, and their investigations eventually dissuaded them from proposing settlement, that default judgment could be taken without reference to them. Entry of appearance involved minimal time, effort and cost and could have been effected without hindering investigations or the proposal and pursuit of a settlement.

[11] The affidavit also fails to show a bona fide defence. The bare allegation that the plaintiff suffered a pellet wound and that the services do not use pellet guns is far too terse a statement to suffice. One would expect fuller information as to the injuries sustained and the weapons in the possession of the service members involved. One would also expect some indication as to whether any shooting occurred and, if so, why.

[12] The defendants failed, in the circumstances, to show good cause and the Judge erred in ordering rescission of the default

judgment. It follows that the appeal must succeed. There remains the issue of costs.

[13] Ordinarily, there would be no difficulty. However, as I have already said, the default judgment was wrongly given in the absence of evidence. Therefore it cannot be allowed to stand. However, it is clear that the plaintiff was entitled to a judgment if only evidence to prove damages had been given. The question, then, is what effect the setting aside of the default judgment and referral now to the court below should have on the question of costs.

[14] The first thing to bear in mind is that that was not sought in this matter. However, Mr Molokoane conceded, rightly I think, that even if default judgment had been preceded by the leading of evidence rescission proceedings would in any case have resulted. That is no doubt a ground for saying that the wrong grant of default judgment should not affect the issue as to the costs of the present appeal, which should follow the result.

[15] But another way of looking at the matter is this. If the default judgment were allowed to stand, leaving it to defendants to appeal the damages award, as they would undoubtedly be able successfully to do, the costs of that appeal (which would inevitably lead to the setting aside of the award followed by remittal) would be dealt with quite separately from the costs of this appeal. And the costs of that appeal could be ordered, at least in part, to be paid by the plaintiff.

[16] As against that last course there is the following alternative. The parties are now before this court; the issue of the wrong default judgment can be dealt with, even if not the subject of this appeal; and there can be a saving of costs and time in regard to an issue about which there can be no debate.

[17] It seems to me that if the last-mentioned alternative course were followed the plaintiff would on balance have succeeded to a greater extent than the defendants. She would have recovered her

immunity to exposure on the liability issue and she would be entitled to the opportunity to present her case for an award of damages by following the proper procedure. The defendants, by the same token, would have lost the opportunity to defend on the merits and would still be liable to an award of damages.

[18] In these circumstances it seems to me that it would be unduly favourable to the defendants to make no order as to the costs of this appeal. I consider that a fair and proper award to make is that the defendants pay half the plaintiff's costs of appeal.

[19] It is appropriate to order that on remittal the matter should be dealt with by another Judge.

[20] The court's order is as follows:-

1. The appeal succeeds.
2. The order for rescission made by the court below on

3rd January 2011, and its order in respect of costs is set aside.

3. The order of the court below dated 16th August 2010 for default judgment in the sum of M190,000.00 with costs, is set aside.

4. The matter is remitted to the court below, to be dealt with by another Judge, as an application for default judgment subject, in terms of Rule 27 (5), to the hearing of evidence in regard to damages, and subject to such costs order as in the light of the history of the matter, seems appropriate.

5. The respondents are ordered to pay half of the appellant's costs of appeal jointly and severally.

C. T. HOWIE
Justice of Appeal

I agree

J. W. SMALBERGER
Justice of Appeal

I agree

D. G. SCOTT
Justice of Appeal

For the Appellant : Adv. M. M. Kao

For the Respondent : Adv. M. Molokoane