IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 48/2011

In the matter between:

MOTONOSI SENONE — FIRST APPELLANT
'MAKARABO MOTJOTJI — SECOND APPELLANT

AND

OELE ANNA SENONE (born MOQULO) — RESPONDENT

CORAM: SMALBERGER, JA
SCOTT, JA
TEELE, AJA

HEARD: 17 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Appeal against refusal of application for rescission - bona fide defence not established – appeal dismissed – minor alteration made to court a quo's order – no order as to costs of appeal.

JUDGMENT

SMALBERGER, JA

[1] On 28 June 2011 the respondent (as applicant) brought an urgent application against the appellants (as respondents) in the High Court in which she sought interdictory and other relief against the respondents (the main application). A rule nisi was granted in her favour. On the same day the respondents, through their attorney, filed a notice of intention to oppose. No answering affidavits were filed by the respondents within the period prescribed in High Court Rule 8 (10), and on 28 July 2011, the extended return day of the rule nisi, Chaka-Makhooane J confirmed the rule nisi and made the following order:

> (a) 1st Respondent is interdicted from despoiling the Applicant of peaceful stay and living in the matrimonial home at Khubelu Ha Abia in the district of Maseru pending divorce case;
>
> (b) 1st Respondent be ordered to restore to the applicant possession of all the rooms of matrimonial

home at Khubelu Ha Abia in the district of Maseru pending divorce case;

(c) 1st Respondent is interdicted forthwith from threatening Applicant with threats of assault and death;

(d) 1st Respondent is interdicted forthwith from taking women to matrimonial home under the pretence of hiring them without Applicant's consent;

(e) 2nd Respondent is ejected from Applicant's and 1st Respondent's matrimonial home;

(f) 1st Respondent is ordered to contribute to costs of Applicant's legal representation in the main divorce case in the amount of M12,000.00;

(g) 1st Respondent is ordered to contribute and or pay costs of this application in the amount of M8,000.00".

I shall continue to refer to the parties as in the court a quo.

[2] On 31 August 2011 the respondents launched an urgent application for the rescission of the court a quo's order and for a stay of execution, the founding affidavit being attested by the first respondent (the rescission application). The matter was opposed by the applicant. No

answering affidavit was filed, the applicant being content (through her legal representative) to confine herself, as she was entitled to, to raising certain points of law in terms of High Court Rule 8 (10) (c). These related, insofar as they are relevant, to the respondents' alleged failure to establish that they were not in wilful default in failing to file answering affidavits in the main application timeously, and that they had failed to disclose a bona fide defence. On 23 September 2011 Chaka-Makhooane J, in an "ex tempore ruling", upheld the points of law raised, dismissed the respondents' application for rescission, and directed the costs to be costs in the cause, presumably in the pending matrimonial proceedings between the first respondent and the applicant. The present appeal is directed against her order in that regard.

[3] The appeal record includes an answering affidavit by the first respondent, and a supporting affidavit by the second respondent, both dated 11 August 2011 i.e. after the order in the main application had already been granted. They do not bear the stamp of the Registrar of the High Court and it is uncertain as to whether they were ever filed. The first respondent's founding affidavit in the rescission application refers only to their preparation and an attempt to file them on 17 August 2011. They are not otherwise alluded to or incorporated by reference in his founding affidavit.

[4] In order for the respondents to succeed in their application for rescission it was incumbent upon them to establish that they were not in wilful default and that they had a bona fide defence in the main application. They claimed in their founding affidavits in the rescission

application that it had always been their intention to oppose the main application, but blamed their attorney's illness for their failure timeously to file their answering affidavits. It appears to be common cause that their attorney, who operated a one man practice, was indisposed due to illness at the relevant time, and that the rule nisi was by consent extended on account of that, presumably to enable the necessary answering affidavits to be filed. Yet nothing happened despite assurances from their attorney that alternative arrangements would be made to assist them. In the circumstances I would be disinclined to hold that the respondents were in wilful default. I would warn, however, against the increasing tendency on the part of parties in default to rely upon the laxity of their legal representatives as providing a sufficient and acceptable explanation for such default. Litigants should be aware of the fact that there is a limit beyond which they cannot

escape the result of their legal representatives' lack of diligence.

[5] While the respondents are able to overcome the first hurdle in seeking rescission they falter at the second – a failure to establish a bona fide defence, save in one minor respect. As I understand the respondents' defence it rests on essentially three legs: (1) the main application was "novel" and "irregular" having regard to the fact that there were divorce proceedings pending between the parties and that the issues raised were ones that fell to be dealt with at the trial; (2) that there was no legal justification for the award of a contribution towards costs, more particularly in an amount of M12,000.00; and (3) that the order (g) to contribute or pay costs of the application in the amount of M8,000.00 was not justified. I shall deal with each of them in turn.

[6] With regard to the first argument, there was nothing that precluded the applicant from bringing the main application on an urgent basis. Nor was there anything irregular in the prayers sought by her. Based on the allegations in her founding affidavit she was entitled to seek the relief she did against the respondents in prayers (b) to (g) having regard particularly to the alleged unlawful conduct of the first respondent. In the absence of answering affidavits from the respondents the learned judge a quo was fully justified in granting such prayers. The first respondent in his founding affidavit in the rescission application has failed to reveal any defence to the applicant's allegations. He seeks to rely on the fact that he has instituted divorce proceedings against her, but that in itself is no answer to her specific allegations of misconduct. Even if one assumes in the first respondent's favour that his answering affidavit in the main application

was filed, albeit out of time and after the relief sought by the applicant had been granted, and that regard may be had to it in the rescission application, it too does not reveal any sustainable defence to the applicant's claims. Paragraph 9 in fact contains an admission of an assault upon the applicant, and her other allegations are simply met with bald denials or vague and unsatisfactory responses.

[7] As far as the second point raised is concerned, while there is no specific provision in the High Court Rules for an application for a contribution towards costs in matrimonial matters, there is nothing in the High Court Act 1978 which precludes such an order being sought, or denies the High Court jurisdiction to grant it, and such orders have been made in the past – see the unreported judgment in MOKUKU v MOKUKU CIV/APN/298/97 delivered on 14

April 1998. There was therefore nothing irregular in prayer (h) being sought and granted. The amount of M12,000.00 claimed was said to correspond to the amount taken from the joint estate funds by the first respondent to pay for his legal fees. Once again this was not dealt with in the first respondent's founding affidavit in the rescission application. In his answering affidavit the first respondent admitted that he was obliged to contribute towards applicant's legal costs but he disputed the reasonableness of the amount claimed, and denied that he had taken M12,000.00 from the parties community funds to pay for his legal fees. The judge a quo had a discretion to grant the amount claimed, or a lesser amount. She elected to grant the amount claimed. On the face of it the amount is not unrealistic, and it cannot be said that she exercised her discretion improperly.

[8] With regard to the third point raised, the judge a quo ordered the first respondent (see paragraph (g) of the court's order) "to contribute or pay costs of this application in the amount of M8,000.00". The stipulation of an amount of M8,000.00 was clearly made in error. The applicant was entitled to the costs of the main application as later taxed, no more. If the taxed costs are less than M8,000.00 (as I suspect they might be) there is no reason why the applicant should receive more than she is entitled to; in the unlikely event of the taxed costs being more, she would be entitled to recover the full amount. The wording of paragraph (g) of the order accordingly requires correction. That, however, would not have amounted to a sufficient prospect of success to justify the granting of the rescission application, although it might have founded a ground of appeal.

[9] It follows that as the respondents failed to make out a case for rescission their application was correctly refused and their appeal falls to be dismissed. The alteration of paragraph (g) of the court's order represents a minor degree of success on appeal – so minor that it does not justify a costs' order in favour of the respondents. However, it would seem to be fair to make no order as to the costs of appeal.

[10] The following order is made:

1. The appeal is dismissed.

2. Paragraph (g) of the order of the court a quo in the main application dated 28 July 2011 is altered to read:

> "1st Respondent is ordered to pay the costs of this application".

3. There will be no order as to the costs of appeal.

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OF APPEAL

I agree:

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellants : Adv R.A. Ntema
For Respondents : Adv K. Ndebele