IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No. 46/2011

In the matter between:

FAROUK DAMBHA **APPELLANT**

AND

STANDARD LESOTHO BANK LIMITED **FIRST RESPONDENT**

TSEBO MONYAKO **SECOND RESPONDENT**

CORAM: **SMALBERGER, JA**
SCOTT, JA
HOWIE, JA

Heard: **16 APRIL 2012**
Delivered: **27 APRIL 2012**

Summary

Appeal against refusal to rescind default judgment – late noting of appeal – unsatisfactory reason for delay and absence of prospects of success – application for condonation dismissed with costs.

JUDGMENT

SCOTT, JA

[1] This is an appeal against a judgment of Monapathi J who dismissed an application for the setting aside of a default judgment. The default judgment was granted on 23 February 2009. On 7 May 2009 the Deputy Sheriff, who is the second respondent, attached certain property belonging to the appellant and was paid the sum of M11,672-18 by the appellant in reduction of the debt owed to the bank, which is the first respondent. Subsequently on 1 July 2009 a motor car in the possession of the appellant was attached. On 12 October 2009 (more than two months later) the application for rescission of the judgment was launched as a matter of urgency. The application was dismissed by Monapathi J on 2 June 2010 and the learned judge handed down his reasons on 10 June. A notice of appeal was served on the bank on 3 June 2010. However, the notice of appeal was filed with the Registrar only on 27 November 2011, that is more than one year and five months later.

[2] The appellant applies for condonation for the late noting of the appeal. This is opposed by the bank. The appellant in his affidavit in support of his application says that he became ill and because he was unemployed was unable to raise sufficient funds to pay the legal fees necessary for the lodging of the appeal. No details as to the nature of his illness and his employment are given. The explanation is most unsatisfactory. He contends, however, that his prospects of success on appeal are good.

[3] The court a quo decided the matter as if it an application for rescission in terms of Rule 27, but it was not. The application was brought in terms of Rule 45 (1) (a). It reads.

> "45 (i) The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary-
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of the party affected thereby."

[4] The principal ground relied upon by the appellant in his founding affidavit was that the summons and particulars of claim

were defective for want of compliance with Rule 20(6) in that although the cause of action was based on contract, the respondent failed to state whether the contract was verbal or in writing and where, when and by whom it was concluded. The *"summons and particulars of claim"* which the appellant refers in his founding affidavit were not included in the record of the appeal and to this extent the record is incomplete. But even if the particulars of claim were defective in the respect alleged, it would be of no consequence provided that there was compliance with Rule 18 in the sense that there was enough in the summons or particulars of claim that comprised, at the least, a concise statement of the material facts relied upon by the bank to support its claim with sufficient detail to disclose a cause of action. The reason is that this is all that need be before a judge granting default judgment. The provisions of Rule 20 apply to the declaration and subsequent pleadings but not to a summons, and it is on the basis of a summons alone that the rule makes provision for the granting of default judgment. In terms of Rule 21 a declaration need only be served *"within 14 days after the entry of appearance."* Even if the judge

had overlooked the non-compliance with Rule 20 in so far as the declaration or particulars of claim were concerned, the fact of such non-compliance, had he been aware of it, would therefore not have induced him to refuse default judgment. As to the test, see **Nyingwa v Moolman (NO) 1993 (2) 508 (TK GD)** at 510 G. It is apparent from the opposing affidavit that the amount claimed by the bank was in respect of money advanced in pursuance of overdraft facilities afforded to the appellant. That and the amount claimed would be enough.

[5] The grounds relied upon for contending that the order was erroneously granted were that the bank had not authorised the proceedings; that the person who nominated the bank's attorneys was not authorised to do so, and that the person who sought the order, Mpoi Leuta, had no right of audience. All these allegations were denied by the bank and in my view are without substance.

[6] It follows that in my view the appellant has no prospects of success in so far as the appeal against the refusal to rescind the default judgment is concerned.

[7] In addition to seeking to have the default judgment set aside, the appellant sought to have an attachment in pursuance of the judgment uplifted and execution stayed. An order was also sought for the repayment of the amount of M11 672-18 which the appellant had paid to the Deputy Sheriff. To the extent that this relief is premised on the invalidity of the default judgment, there is similarly no prospect of success. It appears from the record that the attachment of a motor car claimed by the appellant not to be his property has since been uplifted and there is accordingly no need to consider the appellant's claim in respect of it.

[8] In the circumstances, the application for the late noting of the appeal is dismissed with costs, such costs to include the costs of the appeal.

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D.G SCOTT
JUSTICE OF APPEAL

I agree:

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J.W SMALBERGER
JUSTICE OF APPEAL

I agree:

_____

C.T. HOWIE
JUSTICE OF APPEAL

For the Appellant : Adv S. Fihlo

For the Respondent : Adv T.R. Mpaka