IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.24/2013

In the matter between:

THABANG NQAKA	**APPELLANT**
And	
THE REGISTRAR OF THE HIGH COURT	**1ST RESPONDENT**
THE CLERK OF THE COURT, BEREA	**2ND RESPONDENT**
THE MINISTRY OF JUSTICE, HUMAN RIGHTS AND CORRECTIONAL SERVICES	**3RD RESPONDENT**
THE ATTORNEY-GENERAL	**4TH RESPONENT**

CORAM: SCOTT, A.P.

FARLAM, J.A.

THRING, J.A.

HEARD: 3 OCTOBER, 2013

DELIVERED: 18 OCTOBER, 2013

SUMMARY

Rescission of default judgment in terms of High Court Rule 27(6) – Good cause – Explanation of failure to enter appearance – Declaration excipiable - **Bona fide** defence – Delay in bringing application for rescission.

JUDGMENT

THRING J.A.

[1] This appeal is brought with leave of the Court a quo, against an order of that Court granting rescission of an earlier order which it had made. The earlier order was granted to the appellant, as plaintiff, against the four respondents in this appeal (who were the third, fourth, sixth and fifth defendants respectively in the Court a quo) by default of entry of appearance to defend the action between the plaintiff and the defendants. To avoid confusion I shall refer to the parties as they were in the trial in the Court a quo and, where apposite,

to the respondents in this appeal as "the defendants concerned."

[2] The matter has a long and very convoluted procedural history, going back to 1988. For the purposes of this appeal it is fortunately not necessary to recite more than a brief outline of this history, which follows.

[3] In 2001 the plaintiff's father, M. Nqaka, issued summons in the Court a quo against one Letuka, who was a messenger of the Subordinate Court for the District of Berea, Teyateyaneng. The action thus instituted was for damages arising out of the allegedly wrongful and unlawful attachment and sale in execution of four Nqaka's motor vehicles by the said Letuka. Letuka entered appearance to defend the action and pleadings were closed in due course. The action then became dormant. On 26 February, 2007 it was dismissed for lack of prosecution. However, it would appear that the order dismissing the action was rescinded about three years later, in 2010, and the action was resuscitated. In March, 2011 M. Nqaka died. The present plaintiff, his son, T. Nqaka, was then substituted as plaintiff in August, 2011.

[4] In the meantime, on 8 March, 2010 the third, fourth and fifth defendants had been joined as defendants in the action. On

14 February, 2011 the sixth defendant was also joined. None of these defendants entered appearance to defend the action.

[5] On 8 September, 2011 the plaintiff launched an application for judgment by default against, inter alios, the third, fourth, fifth and sixth defendants. On 12 September, 2011 default judgment was granted against them in the Court a quo.

[6] On 16 March, 2012 the third, fourth, fifth and sixth defendants launched an urgent application in the Court a quo for rescission of the default judgment. On 22 March, 2013 this application was granted in an ex tempore ruling. Although the learned Judge a quo indicated that reasons for her ruling would follow at a later stage, these have unfortunately not been forthcoming, and we are consequently confined to the benefit of the brief reasons contained in her ex tempore ruling.

[7] It seems to me that the application for rescission must be regarded as having been brought in terms of High Court Rule 27 (6) rather than under the common law (where, for example, fraud is relied on) or under Rule 45 (where an order or judgment has been erroneously sought or granted, or contains an ambiguity or patent error or omission, or has been granted as the result of a mistake common to the parties). I say this on the strength of what was held in this Court by **Howie, J.A.**, in '**Mamoholobela Letsie V The Commander, Lesotho**

Defence Force and Others, C of A (Civ) N0.4/2011 (unreported) at pp. 5-6 (para's [8] and [9], viz.:

> "[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 on granted in default of entry of appearance. When that is the default involved, Rule 27 (3) permits set down and 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."

[8] Rule 27 (6) provides in its relevant parts as follows:

> "(a) Where judgment has been granted against defendant in terms of this rule [i.e. judgment by default of entry of appearance to defend or after the defendant has been barred]... the defendant ... 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."

The corresponding rule in South Africa is Uniform Rule 31 (2) (b), which is similarly, albeit not identically, worded.

[9] The Court a quo was thus called upon to decide whether or not the defendants concerned had shown good cause for the default judgment to be set aside under the Rule. In **Chetty v Law Society, Transvaal, 1985 (2) SA 756 (AD) Miller, J.A.,** in discussing the term "sufficient cause" or "good cause" said at 765 B-C:

"... it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success."

And in **Melane v Santam Insurance Co. Ltd., 1962 (4) SA 531 (AD) Holmes, J.A.** said at **532 C-F:**

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible

> discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

These remarks were made in the context of an application for condonation of a failure to comply with the rules of the then Appellate Division of the Supreme Court of South Africa: but in my view they are equally applicable, mutatis mutandis, to the concept of "good cause" in the context in which that phrase is used in Rule 27 (6) (c).

[10] I turn to consider the first of these elements, the explanation for the failure of the defendants concerned to enter appearance to defend the action. As I have said, the third, fourth and fifth defendants were joined on 8 March, 2010, and the sixth defendant nearly a year later, on 14 February, 2011. In support of the application for rescission the defendants concerned delivered affidavits deposed to by R.C. Masenyetse (a principal secretary in the Ministry of Justice, Human Rights and Correctional Services, the sixth defendant), Ms M. Mabea, senior Crown Counsel in the Ministry of Law and

Constitutional Affairs, and P. Kali (an employee of the latter ministry).

[11] Masenyetse says that an amended summons and amended declaration were served on the sixth defendant on 17 February, 2011. The order granted three days earlier, on 14 February, 2011, joining the sixth defendant specifies in paragraph 2 "that in the event first respondent [the sixth defendant] intends to defend the main action herein it enters appearance to defend within thirty days after service hereof. Masenyetse goes on to say:

> "We did not file any appearance to defend and the plea as we had reasonably believed that second respondent [Letuka] would defend the matter as he was the one who attached the property and even sold it. Furthermore, there was no allegation in the papers connecting second respondent [Letuka] with the third applicant [the sixth defendant, i.e. the Ministry] in execution of his duties."

[12] Ms Mabea says in her affidavit that "all documents" in the case were served on the fifth defendant (the Attorney-General) but that they were filed by his staff in an "unopposed matter" filed because they reasonably believed-

> > "that the matter was not opposed but that the second respondent [Letuka] would defend that matter."

[13 In essence, then, the explanation of the fifth and sixth defendants for their failure to enter appearance is that:

(a) they assumed that Letuka would defend the action;

(b) there was no allegation in the amended summons and declaration that Letuka was connected in any way with the sixth defendant, i.e. the Ministry (presumably so as to render the later vicariously liable for Letuka's actions); and

(c) the relevant documents were consequently misfiled with documents relating to unopposed matters.

[14] The explanation for the failure of the defendants concerned to enter appearance to defend the action is hardly impressive and, indeed, it leaves a great deal to be desired, in my view. However, that having been said, it would nevertheless seem that, had minds on the defendants' side been properly applied to the matter at the time when they ought to have been, the defendants concerned would, in all probability have timeously entered appearance to defend. There is no basis on the evidence, in my view, for a finding that any of the defendants concerned are or were mala fide in the sense of not being sincere in their wish to defend the action.

[15] Secondly, there is the question whether the defendants concerned have shown that they have a bona fide defence to the action. Here they are on much firmer ground. In the first

place, as at 12 September, 2011, when default judgment was granted against them in the Court a quo, the plaintiff's summons and declaration, as amended, on the basis of which the default judgment was granted:

(a) contained no mention whatever of the sixth defendant (the Ministry of Justice, Human Rights and Correctional Services);

(b) contained to allegations which could form a factual basis for any direct liability on the part of the third defendant (the Registrar of the High Court) or of the fifth defendant (the Attorney-General), or of any vicarious liability on the part of either of them or of the Government of Lesotho, for the alleged wrongdoing of any other person or persons;

(c) were consequently excipiable as lacking averments to sustain a cause of action against either the third, fifth or sixth defendants.

As regards the fourth defendant (the clerk of the Subordinate Court), there is an allegation in the plaintiff's declaration that "first and fourth defendants" sold the property concerned. However, this allegation, insofar as it concerns the fourth defendant, is denied by Masenyetse. There is no evidence

that this denial is not bona fide.

[16] The default judgment was for M4,104,370.00 for so called "loss of business," with interest thereon. The amount initially claimed by M. Nqaka in his declaration was M84,000.00, but this amount has subsequently been increased some 48-fold by amendment. On 25 August, 2011 the learned Judge a quo (Chaka-Makhooane, J) granted the plaintiff leave to file an affidavit to substantiate his damages in his application for default judgment. On the competence of such an order, in the light of the provisions of Rule 27(5), (as to which, see **Letsie's case, supra, at P.3 (para. [4])**, I shall express no opinion, but assume, without deciding, that it was competent. However, the affidavit which the plaintiff delivered to substantiate his alleged damages, did not do so. The vehicles concerned consisted of two vans and two tractors. He makes a number of completely unsubstantiated statements in his affidavit such as:

> "To the best of my recollection, they [that is, the two vans] created an income to the average value of M300,000.00 per annum."
>
> "As far as the records in my possession can reveal, during the agricultural season of 2001 the two tractors would make an income of M355,730.00."

The records to which he refers are not produced. He proceeds to recite income figures for following years and periods without making any effort to explain how he arrives at such figures. The affidavit, in my view, falls far short of establishing the quantum of the plantiff's losses, if any.

[17] It follows from the above, in my opinion, that:

(a) default judgment was wrongly granted against the third, fifth and sixth defendants, inasmuch as the allegations in the plaintiff's declaration did not disclose a cause of action against any of them;

(b) default judgment was also wrongly granted against all the defendants because the plaintiff had failed to prove the quantum of his damages; and

(c) the fourth defendant has a bona fide defence against the action.

[18] The strength of the concerned defendants' defence in the respects which I have set out above establishes, to my mind, that it is bona fide and that it has, at least prima facie, some prospect of success. Moreover, I find that its prima facie strength is such as to outweigh the shortcomings of the explanation advance by the concerned defendants for their failure to enter appearance. This being so, they have, in my view, satisfied the requirement of showing good cause for the purposes of Rule 27 (6) (c).

[19] A further consideration which must, I think, weigh in favour of granting rescission is the importance of the action: the amount of the judgment is considerable at over M4,000,000 and, if it were to stand, it would presumably have to be satisfied with taxpayers' money. It is not a trifling matter.

[20] The Court a quo exercised its discretion in granting the order of rescission. As a matter of general principle, an appellate court will not lightly interfere with the exercise of a lower courts' discretion in the absence of a material misdirection resulting in a miscarriage of Justice : **Motebejane v Boliba Multi-Purpose Co-operative Society, C of A (Civ). N0.15/2007** (**unreported) at p.12 (para.[II].** I am unable to find that the Court of quo in the present matter misdirected itself in setting aside its earlier order.

[21] It is true that the defendants concerned brought their application for rescission out of time: instead of bringing it within 21 days as required by Rule 27 (6) (a), they waited some six months until 16 March, 2012 to launch the application. However, the Court a quo in its discretion was prepared to condone the delay, finding that it was not wilful or unreasonably long. I can find no basis for interfering with the exercise of that discretion, especially in the light of the shortcomings of the default judgment.

[22] There is one further aspect with which I must deal briefly. The appellant complains that the defendants concerned failed to

furnish security in the Court a quo for the costs of the default judgment and of their application for rescission, as required by Rule 27 (6) (b). This point was not raised in the affidavits before the Court a quo. Mr. Thulo, who appears for the plaintiff, has indicated to us that it was argued in the Court a quo. However, if the failure of the defendants concerned to furnish security had been an issue it ought, in my view, to have been raised by the plaintiff in his opposing affidavit. It could then have been dealt with by the defendants in their replying affidavits. It would not be fair to them, in my view, to allow the point to be raised for the first time in argument. We are not disposed to entertain it now.

[23] For the above reasons the appeal is dismissed, with costs.

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W.G. THRING

JUSTICE OF APPEAL

I agree _____

D.G. SCOTT

ACTING PRESIDENT

I agree _____

I.G. FARLAM

JUSTICE OF APPEAL

For appellant: P.R. THULO

For respondents: M.MABEA