IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.40 OF 2014

In the matter between

LESOTHO MINERAL EXPLORATION **APPELLANT**

And

STANDARD LESOTHO BANK **RESPONDENT**

CORAM: K. E. MOSITO P

Y. MOKGORO AJA

P.T.DAMASEB AJA

HEARD **:** 23 JULY 2015

DELIVERED **:** 7 AUGUST 2015

SUMMARY

Appeal from judgment of the High Court – record incomplete – no certificate certifying the correctness of the record – court a quo having not considered the crux of the case being whether the sum paid was duly distributed to appellant's accounts

There being no compliance with the court Rules as to certificate and completeness of record – warning that breaches of the Rules to attract punitive orders in future - appeal struck off the roll with costs.

JUDGMENT

MOSITO P

[1] The appellant and the respondent entered into a hire purchase agreement in terms of which the respondent was to purchase a Powerstar 2628 tipper for the appellant. The agreement was entered into in August 2008. Apparently, the appellant did not pay some of the instalments that it was to pay under the agreement for a number of reasons.

[2] In terms of the agreement between the parties, the respondent was entitled to repossess the goods subject of the agreement should the appellant default in its payment. The respondent accordingly filed an application for repossession in the Commercial Division of the High Court of Lesotho; the application was opposed by the appellant. It seems that this was not the only application for repossession in which the parties became embroiled in litigation. There were also four others

involving the parties. All the repossession applications were heard by **Molete J**. It appears that on 21 June, 2012, the learned judge granted a rule *nisi* in respect of the applications returnable on 9 July 2012. On that date, the applications were postponed to 23 August 2012 and in the interim, the parties were negotiating a settlement. The filing of opposing and replying affidavits ensued in meantime. In the application subject of appeal before us, the respondent sought an order in the following terms:

> *"1. condoning the non-compliance by the applicant with the rues of Court regulating service of process and time limits relating thereto and dispense with the rules on the grounds of urgency.*
>
> *2. That the Deputy Sheriff be authorised and directed to forthwith attach and take into his possession a 2008 Powerstar 2628 Tipper with Chassis Number LBZF56GA07A017023 and Engine Number 50704059916 where ever or in whose possession it may be found and to hand same over to the applicant, under the attachment of the Deputy Sheriff pending the outcome hereof.*
>
> *3. Directing the issue of a rule nisi calling upon the respondent to show cause on a date to be determined by this Honourable Court why a final order in respect of prayers 2, 3, 4 &5 should not be made an Order of Court and why the vehicle shall not be released to the applicant by the Deputy Sheriff.*
>
> *4. Directing that prayers 2, 3, & 4 shall operate with immediate effect, particularly that the vehicle be held by the Deputy Sheriff pending the confirmation hereof on a final order.*
>
> *5. Confirmation of the cancellation of the Hire Purchase Agreement dated the 24th of March 2009.*
>
> *6. Leave be granted to the applicant to approach this Honourable Court on the same papers, duly supplemented where necessary, for judgment against the respondent for payment of the difference between the balance*

outstanding on the Hire Purchase Agreement and the assessed marked value or sale price of the aforesaid vehicle, in the event of there being an outstanding balance due by the respondent to the applicant.

7. Directing that the respondent pay the costs of this application as between attorney and client.

8. Postponing this application sine die in respect of the relief sought in paragraphs 5 and 6 above.

9. Granting such further and/or alternative relief as may be necessary in the circumstances."

[3] The parties apparently continued to seek a negotiated settlement of the disputes between them in the meantime. They managed to settle three of the five cases through a Deed of Settlement which they signed (though not filed in court). In terms of that agreement, the appellant paid an amount of five million with a view to end the litigation and curtail the duration of the cases. However, it seems that disagreements survived this payment because after the payment, the appellant's position was that, that amount of five million Maloti settled all its accounts with the respondent while the respondent contended that the amount settled only the business term loan and only three repossession applications.

[4] Furthermore, the appellant contended further that any amount outstanding could only be attributed to litigation costs and not the actual debt outstanding. It therefore demanded to see how the amount of five million Maloti was distributed to pay its various accounts. The respondent's position was that this

was not the case and it furnished some of the statements sought by the appellant to both the appellant and the court *a quo*.

[5] The respondent's counsel informed this court that during one of the scheduled postponement dates on 2nd May 2013, the judge a quo ruled that since payment had already been made, any outstanding issues about any amounts still outstanding should be shifted to one of the applications. The respondent's counsel informed the court that the three repossession applications were to be granted and the issue of costs was to stand over until finalization of the application which is the subject matter of the present appeal. I pause to point out that there was no record of this information before us.

[6] It appears that the appellant nevertheless urged the court *a quo* to grant it time to prove through its accountant that the sum of five million Maloti settled all its accounts with the respondent. It does not however appear that a day ever dawned whereon the accountant appeared before the court a quo to prove the contention by the appellant. We were told that the learned judge a quo granted a last postponement to enable appellant to file its accountant's report failing which, the matter was to proceed on 26 May 2014 for the grant of the repossession order. For the respondent, this was ordered by consent of the parties, while for the appellant, that was not to be a date of hearing.

[7] On 26 May 2014 there still was no report and no sign of the accountant and the court granted the final order. The appellant continued before us to argue that the date of 26 May 2014 was not to be a hearing date because even a number of procedural steps had not been taken complied with. For the appellant, the case was not yet ripe for hearing and the court a quo ought not to have granted judgment in favour of the respondent on that date. The appellant's concern was that no Heads of Argument had been filed as required by the Commercial Court Rules **(see Rule 34 (c) (1), (2),(3) and (4) of the High Court (Commercial Court)Rules 2011)**. It also complained that the court a quo had proceeded to make a decision without considering the report and/or statements by the appellant's accountants, which consideration would in terms of Rule 18 (1) stand as evidence for the appellant.

[8] It is clear that the issue before this court had to revolve around whether the sum of five million paid covered all the debts. The respondent's contention was that firstly, all the business term loan amount was M4, 182,786.12. Secondly, a combined sum of all balances of the vehicles was M1, 351,523.88. Thirdly, all these added to M5, 534,310.00 and lastly, a M5, 000,000.00 payment leaves a balance of M534, 310.00 as outstanding. It was agued therefore that it defies both logic and common sense that the M5, 000,000.00 settled all accounts and any outstanding amount could be attributable to litigation costs.

[9] The problem before this court was that there was apparently no evidence on how the sum of five million Maloti paid by the appellant had been distributed. There was no record of how the figures mentioned by the learned counsel for the respondent were also arrived at. There was no record of whether or not the court *a quo* had considered the amounts in question and how they were distributed. There was no record of the occurrences that the parties were alleging had been undertaken before the court *a quo* such as the order subject of appeal in this case having been given by agreement. There was no evidence before us of such agreement between the parties.

[10] In other words the record of proceedings before us has been prepared in a slovenly manner with the above glaring omissions. As this court remarked in ***R v Lebina and Another LAC (2000-2004) 464 at 467***:

> *"[10] At this point it is no doubt opportune for me to say something about the record of proceedings in this matter. Notwithstanding several warnings of this court in such cases as* ***Motlatsi v Director of Public Prosecutions LAC(1995-99) 652; 1999-2000 LLR-LB 23 (CA); R V Ts'osane LAC (1995-99) 635; 1999-2000 LLR-LB 78 (CA)and Seate v R LAC (2000-2004) 215; 1999-2000 LLR-LB 426 (CA)*** *about unsatisfactory records of proceedings, I regret to say that the record in this case is a step backwards. It is somewhat cryptic and contains several flaws which have made out task difficult."*

[11] By way of random examples, in the present case, there was no certificate certifying the correctness of the record. This is so

despite the fact that ***Rule 7 (22) of the Court of Appeal Rules 2006*** provides that '[A] certificate certifying he correctness of the record, duly signed by the person referred to in sub-rule (1), shall be filed with the record and served on all other parties to the appeal'. In terms of Rule 7 (1) of the Rules of this court, the appellant or his attorney in civil matters is responsible for the preparation of court records and is liable to adverse order of costs including an order *de boniis propriis* in the event of dereliction of his duty.

[12] The situation has been compounded by the fact that the court a quo has not received evidence to determine the distribution of the five million that was paid by the appellant amongst the various accounts of the appellant. **Advocate Mpaka** for the respondent correctly pointed out that it was incumbent upon **Advocate Mots'oari** and his instructing attorneys, to ensure that the record was in a proper state. There was no application for condonation for the breach of the Rule relating to the preparation of this record.

[13] I must point out that the present session was inundated with lots and lots of applications for condonation for breaches of the Rules of this court. In some instances either the appeals were filed out of time, records filed out of time or incomplete records filed and no certificates certifying the correctness of those records if filed or no appropriate arrangements made as to issues of filling of security. This flagrant disregard of the Rules of this

court cannot be tolerated. Not only do they lower the standards of performance in this court but also, they make the work of this court very difficult.

[14] This court, as the apex court must ensure that appropriate standards of professionalism are maintained by all legal practitioners. Any relaxation of the Rules as has been observed lately, will no longer be tolerated. Legal practitioners are hereby warned that in future, a failure to comply with the Rules of court, with no appropriate applications for condonation duly filed on time will attract an appropriate punitive order of costs as a mark of this court's displeasure of these deteriorating standards. Whenever it comes to the attention of a legal practitioner that there has been a breach of the Rules of this court, that should ring the bell to the legal practitioner that an application for condonation is necessary. Such applications shall not be there for the taking. They must give a satisfactory explanation for the breach in question and show that the concerned practitioner is truly remorseful for such breaches. We have to maintain high standards of professional practise in this court. Failure to observe the Rules will attract costs *de boniis propriis.*

[15] In the present case the flagrant disregard of the Rules as pointed out above, coupled with the fact that the record is incomplete in the respects pointed out above, warrants this matter to be struck off the roll.

[16] In the result the order of this court is that the appeal is struck off the roll with costs for want of compliance with the Rules of court and the filing of the incomplete record.

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DR K.E.MOSITO

President of the Court of Appeal

I agree _____

Y. MOKGORO AJA

Acting Justice of Appeal

I agree _____

P.T. DAMASEB AJA

Acting Justice of Appeal

For Appellant : Advocate M. Mots'oari

For Respondent : Advocate T. Mpaka