IN THE COURT OF APPEAL OF LESOTHO

JUDGMENT

HELD AT MASERU

C of A (CIV) NO. 3/2014
CIV/A/23/2011

In the matter between:

MATELA TJABANE **APPLICANT**

And

TSELISO LESOLE **RESPONDENT**

CORAM: MAJARA CJ, PEETE JA, CHINHENGO AJA

HEARD: 14 OCTOBER 2015
DELIVERED: 6 NOVEMBER 2015

SUMMARY

Application to reinstate appeal – Applicant with history of defaulting and making several rescission applications - Legal representative largely to blame – Lack of diligence on part of legal practitioner by leaving responsibility to ensure filing dates are met to clerk in own office - Considerations weighed by court in granting or refusing to

grant order of reinstatement - unnecessary and avoidable delay occasioned to administration of justice; interest of respondent in finality of litigation compromised – Application dismissed.

CHINHENGO AJA

Introduction

[1] This is an opposed application for the reinstatement of an appeal struck off the roll with costs for breach of Rule 5(1), as read with Rule 5(3), of the Court of Appeal Rules, 2006. The appeal was struck off during the session of the Court in August 2015.

[2] The applicant's counsel deposed to the founding affidavit wherein he cryptically stated -

> "3.1 I am informed by my clerk that on the 1st of July 2014, our office instructed him to assist in the preparation of the record of appeal as the office was fully engaged with attending court cases in the magistrate court. I refer…to the supporting affidavit of the clerk hereto annexed.
>
> 3.2 I am informed again that the office was not aware that the deadline for filing of records had already been stipulated, hence it could not be foreseen that the filing would be late, such that the record could have been filed earlier.
>
> 4. It was only upon filing the record that the office learned the deadline had already passed.
> …

> 7. I respectfully submit further that the Respondents are not likely to suffer any prejudice by the Reinstatement."

[3] The respondent's opposition is equally brief. He stated that the applicant's counsel could not legitimately rely on being informed by a clerk in his office about the deadline for filing the record without himself taking the initiative to ensure that the rules of court were complied with. The excuse for the breach of the rules was not satisfactory at all. He pointed out that the applicant did not obtain a judge's certificate in terms of s 17 of the Court of Appeal Act nor did he apply for leave to appeal in terms of Rule 3 upon lodging the appeal that he prays should be reinstated on the roll.

[4] It seems to me that there is merit in the criticism leveled against the applicant's conduct of the appeal. There is a thread which runs through the applicant's conduct of the case from the time that the dispute between the parties was brought to the courts, as the history of this litigation set out below, will show.

History of Litigation

[5] This matter commenced a long time ago, in 2005. The respondent was, and still is, the owner of a fairly big piece of land ("the site") at Motimposo, Maseru. Thereon he had a two-roomed dwelling house, which he estimated to be worth

M10,500.00. On 12 December of that year he entered into a verbal agreement with the applicant in terms of which he sold to the applicant a portion of the site on which the dwelling house was situated. The applicant was to pay the purchase price in kind. He had to build on the remaining portion of the site a house similar to the one already on the site. The applicant built the house but, according to the respondent, it was not up to standard. In no time the walls cracked and the roof leaked. He complained about these faults to the applicant and even made a formal demand through his attorneys but the applicant did not rectify the faults.

Default Judgment entered against Applicant

[6] The respondent considered that the applicant's failure or refusal to rectify the faults in the building was in material breach of the verbal agreement. In October 2010 he commenced action against the applicant in the magistrate court by way of summons for cancellation of the agreement, the eviction of the applicant from the site and costs of suit. The action was not defended and a default judgment was entered on 16 December 2010. A writ of execution was served on the applicant on 27 January 2011, together with the default judgment.

Application for Rescission of Default Judgment and dismissal thereof

[7] On receipt of the judgment and writ the applicant lodged, in early March 2011, an application for the rescission of the judgment. He alleged that the summons had not been served on

him and that he was surprised when he was served with the default judgment and the writ of execution. He said that on perusing the record at the court he learnt for the first time that a summons had been served upon Mrs. 'Matjabane who was described in the return of service as his wife. He alleged that the return was "a fabrication". His wife is commonly known as 'Mabaruti or 'Matlalane Tjabane and not 'Matjabane. At the material time she was in any event away from home attending to "some family matter" at Likhoele, Mafeteng whose nature he did not specify. He set out other grounds upon which he relied for the order he was seeking. It is not necessary for me to set them out here. He indicated his defence on the merits, being that he had built a "beautiful two-roomed house" as agreed. He averred that the respondent had no valid claim against him.

[8] The respondent opposed the application and reiterated that the summons was served upon the applicant's wife, whatever her other names may be, and that the return of service clearly showed that service was properly effected. The messenger of court filed a supporting affidavit stating that he had served the summons as indicated in his return.

[9] After three attempts to get a hearing date for this rescission application, once by the applicant for a hearing on 10 March 2011 and twice by the respondent for a hearing on 29

March and 8 June 2011, the matter was heard on the last mentioned date. The application was dismissed with costs.

Appeal to High Court against Refusal to Rescind Default Judgment and Failure to prosecute it

[10] The applicant lodged an appeal to the High Court in July 2011 contesting the refusal by the magistrate's court to rescind the default judgment. The applicant served upon the respondent notices to attend the setting of a date on which the appeal could be heard. Those notices were for attendance on 16 August, 27 October and 13 December 2011. A hearing did not take place apparently because the applicant did not conscientiously attend to obtaining a date of hearing.

Application to High Court that Appeal had lapsed and Grant thereof

[11] The applicant's failure to obtain a date of hearing of the appeal against the refusal to rescind the default judgment prompted the respondent to apply to the High Court in early March 2012 for an order declaring that the appeal had lapsed in terms of Rule 52 of the High Court Rules. In that application the respondent stated that the applicant had lodged the appeal on 8 July 2011 and had failed to prosecute it within 6 months from that date. The applicant had also failed to apply for a date of hearing within 4 weeks of noting the appeal and neither had he (respondent) applied within 2 months of the date on which the appeal was noted. The appeal had accordingly lapsed in terms of Rule 52(1)(d). He said that his attorney had been served

with notices inviting him to attend to setting the date of hearing. The notices were for attendance on 16 August, 27 September, 27 October, 2 and 13 December 2011. On all these dates, whilst the respondent's attorney appeared, there was no appearance for the applicant.

[12] The applicant opposed the application for a declaration that the appeal had lapsed, lamely contending that the duty to set down a matter under rule 52(1) (c) was reciprocal: where the applicant failed to apply for a date of hearing, the respondent was required to do so. He said that a hearing date was not obtained because no judge was assigned to deal with the notices. When the matter was eventually allocated to Chaka-Makhooane J, her clerk advised that it would not proceed because the record of proceedings in the magistrate's court had not been availed to the High Court.

[13] The application for a declaration that the appeal had lapsed was eventually heard by Moiloa J on 18 March 2013 and he granted an order that the appeal had lapsed as prayed.

Application for Rescission of Order Declaring Appeal Lapsed and Dismissal thereof

[14] Still undaunted, on 17 April 2013, the applicant applied for the rescission of Moiloa J's order. He alleged that the order had been improperly obtained in that on 27 September 2012 counsel for both parties had agreed that the application would

be abandoned. His counsel had therefore been taken aback when he discovered that the order had been granted. His counsel had told him that on the day that the order was issued he had been before another judge and when he rushed to Moiloa J's court, he found that the order had already been issued. Regarding the merits of the application, the applicant stated that his appeal had not lapsed because he had applied to the court several times for a date of hearing without success. The record of proceedings in the magistrate's court was not available at all relevant times and in those circumstances it was wrong to declare that the appeal had lapsed.

[15] Needless to say that the respondent again opposed the application for the rescission of Moiloa J's order. In so doing he denied that an agreement to abandon the application for a declaration had been reached between their respective counsels. He also averred that the fact that the applicant did not obtain a supporting affidavit from his counsel on the allegation that he was before another judge when the order was made showed that that allegation was false.

[16] The applicant and his counsel did not attend court on the day that the rescission application was heard. The judge dismissed the application with costs.

Appeal to Court of Appeal and Removal of Appeal from the Roll

[17] In January 2014 the applicant appealed to this Court against the dismissal of the rescission application. He contended that the judge in the lower court had erred in dismissing the rescission application without giving reasons for his decision. He also contended that counsel for the respondent was not properly before the court when he moved for the dismissal of the application because, on the face of the papers filed of record, he had not been instructed by an attorney to appear on his behalf. The other ground of appeal was that the judge *a quo* erred in declaring that the appeal had lapsed without taking into account that both parties had a duty under Rule 52(1) (c) of the High Court Rules to enroll the application. This is the appeal that was struck off the roll during the August session of this Court.

Implications of Success of Reinstatement Application and Incidences of Default by Applicant

[18] As previously stated, before us is an application to reinstate the appeal against the decision of Moiloa J dismissing the applicant's application for the rescission of a default judgment entered against him in the magistrate's court. This litigation has unfortunately become a thoroughly scrambled egg.

Application of the Law to the facts

[19] If the applicant were to succeed in this application the matter will be back on the Court of Appeal roll. If he were to succeed after the matter is reinstated and get Moiloa J's decision set aside, then the matter will be back on the High Court roll for a decision whether the default judgment entered by the magistrate should be set aside. If he were to succeed in the High Court the matter will be back on the magistrate court roll for a decision on the merits. The applicant will then enter an appearance to defend and file his plea to the respondent's claim. The process of retracing his steps is fraught with difficulties that the applicant may not be able to overcome. This, on its own, cannot be a good enough reason for this Court not to grant the order that the applicant seeks.

[20] I have highlighted the implications of success of the reinstatement application in order to illustrate one of the points made by counsel for the respondent. It is that at every hearing it was the applicant in default. He was in default of entering an appearance to defend the summons in the magistrate's court and default judgment was entered against him on 16 December 2010. He was represented at the hearing of the application for rescission. It was dismissed on 8 June 2011. He noted an appeal to the High Court and did not prosecute it timeously resulting in an application by the respondent for a declaration that the appeal had lapsed. He was in default at the hearing on 18 June 2013 of the application to declare that the appeal had

lapsed. He applied for the rescission of the declaration and was in default at the hearing of the rescission application on 2 December 2013 when the application was dismissed. He noted an appeal to this Court against the order declaring that the appeal had lapsed. He breached the rules of this Court and his appeal was struck off the roll. This, as I understand it, is the history of the applicant's conduct of the litigation in which he alleges his vital proprietary interest are at stake.

[21] In order to succeed in an application of this kind, applicant must give a satisfactory explanation of the default that resulted in the appeal being struck off the roll and that the principles of justice and fair play demand it in order to avoid hardship. See generally *Suidwes-Afrikaanse Munisipale Personeel Vereeniging v Minister of Labour and another*[1]. The requirements are referred to in a number of South African cases. In *Federated Employers Fire & General Insurance Co. Ltd and another v McKenzie*[2] it was stated that the relevant considerations weighed by the court in an application for condonation are the degree of non-compliance with the rules, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. These considerations are equally relevant to an application for the reinstatement of an

[1] 1978(1) SA 1027 (SWA) at 1038 B-C
[2] 1969 (3) SA 360 (A) at 362F-H

appeal. The court is required to consider these factors, or a number of them, cumulatively and not individually because, as stated in *Melane v Santam Insurance Co.Ltd* [3] a good explanation for the breach, for example, may help to compensate for prospects of success which are not strong.

[22] Applying these factors to the present application it becomes apparent that a decision on the merits has eluded this matter because of the several defaults on the part of the applicant, some if not all are attributable to ineptitude on the part of the his legal practitioners. The Appellate Division in South Africa in *Saloojee & another v Minister of Community Development*[4] has however said that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence: there is a stage in such cases where it becomes obvious even to a layman that there is a protracted delay in prosecuting the case such that he cannot just sit by without directing an enquiry to his attorney and expect to be exonerated of blame. The applicant *in casu* does not appear ever to have been concerned that the case was not coming to finality. The respondent suggests that the respondent may not be keen to see this matter finalized because he is in occupation of one of the house on the site, which he stands to lose if the case goes against him.

[3] 1962 (4) SA 531(A) at 532C-D
[4] 1965 (2) SA 135 (A) at 141B-H

[23] The explanation given by the applicant's counsel for the failure to file the record of proceedings is not satisfactory at all. He does not appear, to have himself, given instructions to the clerk in his office and attributes the giving of those instructions to some unmentioned person in his law firm. There is no explanation by him or the clerk why exactly they did not become aware of the deadline for the appeal record. And for a legal practitioner to leave such a matter to the clerk was a lack of diligence on his part. Counsel for the respondent correctly submitted that the applicant did not comply with s 17 of the Court of Appeal Act as read with Rule 3 of the Rules of this Court. In my view that failure is serious and negatively impacts on his success in this application. See generally *Mohale v Mohau*[5] and *Ramoketsi v Ramoketsi*[6].

[24] This case has dragged on from 2010. There have been many applications by the applicant arising from the lack of diligence and defaults on his part or that of his attorney resulting in an unnecessary and avoidable delay to the administration of justice, much to the inconvenience of the courts. The respondent has an interest in the finalization of the case but that has been frustrated by the applicant's defaults and numerous applications for rescission as well as appeals. It is difficult to assess the merits of the applicant's defence because the stage was never reached when he could plead to

[5] LAC (2005-2006) 101
[6] LAC (2005-2006) 465

the respondent's claim and the respondent would reply thereto. I come to the conclusion that in all the circumstances this is not a case in which the court should exercise its discretion in favour of the applicant.

[25] Accordingly the application for the reinstatement of the appeal is dismissed with costs.

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M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

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N.J.MAJARA
CHIEF JUSTICE

I agree

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S PEETE
JUSTICE OF APPEAL

For Appellant: M Posholi
For Respondent: AM Chobokoane