IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV)/72/14**
CCT/0034/13

In the matter between:

LESOTHO NISSAN (PTY) LTD **Appellant**

AND

KATISO MAKARA **Respondent**

CORAM: W. J. LOUW AJA
P. MUSONDA AJA
M. H. CHINHENGO AJA

Date of Hearing : 14 April 2016
Date of Judgment : 29 April 2016

CHINHENGO AJA

[1] The Appellant herein did not file the record of proceedings and its heads of argument within the time prescribed by

the rules of court. It accordingly applied for condonation of its failures. At the hearing of the appeal the Respondent opposed the application for condonation of the late filing of heads of argument and did not persist with its opposition to the condonation of the late filing of the record. With the agreement of counsel the Court directed that it would hear the application for condonation together with the appeal on the merits.

[2] The background to this appeal is the following. In an action commenced by way of summons issued out of the High Court on 7 November 2013, the Respondent claimed from the Appellant specific performance in relation to the repair of his motor vehicle and damages in the sum of M 120,000.00 for "loss of business", interest on that sum at the rate of 18% per annum and costs of suit. In the declaration the Respondent alleged that the Appellant failed to properly repair his motor vehicle, a Nissan Navara Registration No. J0045 which he had sent to the Appellant's garage for repair in August 2013. He alleged that the Appellant's employees had advised him that the motor vehicle had two faults that needed to be attended to - replacement of a turbo pipe and repair of the gearbox mounting. The Appellant made two attempts within four weeks to repair the motor vehicle but failed to put it right. He then demanded, through his attorney the delivery to

him of the motor vehicle, fully repaired, by 5 September 2013. The motor vehicle was not delivered and so he instituted legal proceedings to compel the Appellant to carry out the repairs and pay damages for the loss he had suffered.

[3] The Respondent alleged that his motor vehicle was, at all material times and to the knowledge of the Appellant, on hire for M60,000.00 per month to a construction company called Moqoqolo Construction Company. The failure to repair the vehicle had thus occasioned him loss of M 120 000.00 which he now claimed as damages.

[4] The Appellant entered an appearance to defend on 12 November 2013 but defaulted in filing a plea despite a notice to plead having been served upon it on 25 November 2013. Consequently the Appellant was barred on or about 12 December 2014. Thereafter the Respondent applied for judgment in default. On 24 March 2014, her Ladyship Chaka-Makhoane J granted judgment in the the following terms-

> *"(a) Defendant specifically performs repairs as requested by the plaintiff of motor vehicle J 0045.*

(b) Defendant pays damages in the amount of M120,000.00.

(c) Defendant pays interest at the rate of 18% per annum on the damages.

(d) Costs of suit."

[5] This order contained an error. On or about 9 April 2014 the Respondent applied for it to be corrected. His legal practitioner had made an error in the summons in that he had recorded the registration number of the motor vehicle as J 0045 instead of J 0047. The application was served on the Appellant, who did not oppose it. The order was corrected accordingly. On 16 June 2014 the Appellant applied by way of an urgent notice of motion for a rule *nisi* calling upon the Respondent to show cause why execution of the court order of 24 March 2014 should not be stayed pending the finalisation of an application for rescission of the default judgment.

[6] It is to be noted that the order sought to be rescinded was made on 24 March 2014 and the application for rescission was lodged on 16 June 2014. After hearing the application, the learned judge *a quo* delivered an *ex tempore* judgment on 11 December 2014 and, apparently, dismissed the application. I have used the word "apparently" because the

operative part of that judgment is rather unintelligible. The judgment is a short one and I might as well reproduce it here. It reads-

> "1. This is an application for rescission of my judgment in default on the 24th March 2013. The application is opposed by the Respondents.
>
> 2. I must at the outset mention that this is one of the most peculiar applications this court has ever been confronted with. The Applicant in his Heads of argument makes an attempt to argue a point *in limine* unsuccessfully I might add and then while he is incoherently trying to argue on abuse of ex parte procedure, he leaves it in midstream to jump to the merits.
>
> It is clear that the applicant failed firstly to properly establish the urgency he claimed and even failed to state explicitly why the ordinary rules should be dispensed with.
>
> 3. In an application for rescission an important factor is the duty to apply within a reasonable time because acquiescence in a judgment will normally be a bar to rescission. In *casu* the applicant acquiesced to the judgment in that he took a long time before attempting to rescind the judgment.
>
> 4. In this regard and in exercising its discretion judicially the following order is made. The application to address that point

in *limine* because the applicant's counsel Mr Peete did not pursue it.

5. The respondent is opposing the application, has raised his own point of law such as urgency for rescission is dismissed with costs."

[7] There was no attempt to make formal corrections of the *ex tempore* judgment so as to make it easy to understand the relief granted. Be that as it may, the parties understood it to mean that the application for rescission had been dismissed with costs.

[8] A fair reading of the judgment shows that the learned judge dismissed the application for two or three reasons – that the appellant failed to establish the urgency of the application; that the Appellant had taken too long a time to lodge the rescission application and therefore was deemed to have acquiesced in the judgment and perhaps that it did not pursue a point *in limine* that it had raised to the effect that the order should not have been granted because the Respondent had not served notice of the application for default judgment upon it.

[9] Soon after the judgment was handed down the Appellant noted the present appeal. It advanced two grounds: first,

that the judge *a quo* misdirected herself by granting the order without hearing evidence when the claim before her was for unliquidated damages, and second, that the judge erred in dismissing the rescission application on a point of law without hearing argument on the merits. I will now examine each of these grounds of appeal.

[10] This is a case in which it is only proper to recall, as a preface to the consideration of the issues, the wise words of ***Smalberger JA in National University of Lesotho and Another v Thabane LCA (2007- 2008)***. Therein the learned judge was constrained to make the following remarks-

> "Before proceeding I propose to make some comments concerning the rules. They are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals consequently the rules must be interpreted and applied in the spirit, which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the rules, most if not all of which are cast in peremptory terms. A failure to abide by the rules could have serious consequences for parties and practitioners alike, and practitioners ignore them at their peril. At the same time formalism in the application of the rules should not be encouraged. Opposing parties should not seek to rely upon

> non-compliance with the rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights. Thus what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains a discretion to condone a breach of its rules (see ***Rule 15***) in order to achieve a just result. The attainment of justice is the Court's ultimate aim. Thus it has been said that the rules exist for the court, not the court for the rules."

[11] There is hardly a case in this Session and other Sessions in the recent past where legal practitioners have not taken up technical objections in the absence of any prejudice to their clients in order, not only "to impede the hearing of appeals on the merits", but also to obfuscate issues. This approach to litigation in the Court of Appeal or other courts for that matter, must be strongly discouraged. In the present case, for example, the issues are quite straightforward and yet the Respondent has raised technical objections, bordering on the injudicious and frivolous. A default judgment was granted after the Appellant was barred for failure to file its plea. Some explanation was given for that failure and although not entirely satisfactory, the inadequacy thereof is compensated for by the prospects of success and by a clear

indication that the Appellant had always wished to defend the claim.

[12] The Appellant's application for condonation for the late filing of its heads of argument was opposed mainly on the ground that the Appellant has no reasonable prospects of success in the appeal. In an application for condonation the court has a discretion to be exercised judicially upon considering all the facts. The factors that the court considers are well known: the degree of lateness in making the application, the explanation therefor, the prospects of success and the importance of the case. It was stated in ***Melane v Santam Insurance Co Ltd 1962 (4) SA 531(A)***, a case that is followed religiously in this country, that these factors are not individually decisive, except that if there are no prospects of success there would be no point in granting condonation. However 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. A practitioner must therefore take a conspectus of these factors before opposing or defending an application of this kind. In my view counsel for the Respondent did not do so in this case, as I show hereunder.

[13] Now, in supporting the submission that this appeal should be dismissed, counsel for the Respondent raised a number of issues which individually and cumulatively do not assist the Respondent in view of the very strong prospects of success in this case. The Respondent submitted that in launching the rescission application by way of an urgent application, the Appellant did not file a certificate of an advocate or an attorney setting out that he has considered the matter and that he *bona fide* believes it to be a matter for urgent relief as required by ***Rule 8(22) of the High Court Rules, 1980 (Legal Notice No 9 of 1980)*** and that the appellant also did not comply with ***Rule 22(b)*** that requires the Applicant to set out in detail the circumstances that render the application urgent and why it is claimed that substantial relief could not be granted in a hearing in due course. In respect of the appeal the Respondent has raised the following objections: the Appellant has not complied with ***Rule 8(10)*** in that it did not furnish security for costs; ***Rule 4(4)(a)*** in that it did not state whether the appeal is against the whole or only portion of the judgment, and ***Rule 7(2)*** in that it did not file a certificate that the record is correct. These objections and others raised by the Respondent though properly taken and correct in some respects were persisted in in total disregard of the fundamental point of law raised by

the Appellant. It is that the court *a quo* did not receive evidence in proof of the amount of the damages claimed by the Respondent in that court. It seems to me that had the Respondent's counsel considered all his technical objections in the light of the many decisions of the courts here and in other jurisdictions on the subject of rescission, he may very well have taken a different stance in this matter.

[14] The Respondent's claim is clearly for unliquidated damages. For this proposition one needs go no further than the case of ***CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd C of A (CIV) No. 5/2008*** in which the following seminal statement is made at paragraph [22]:

> "In ***SA Fire and Accident Insurance Co. Ltd v Hickman*** **1955 (2) SA 131(C)** at **232H** it was held that in order to be a liquidated demand a claim must be so expressed that the ascertainment of the amount is a mere matter of calculation. The words 'liquidated demand' are derived from the English Rules, where they are afforded the following meaning:
>
> > 'A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of

> money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes damages.'
>
> South African courts have tended to follow the above meaning ascribed to the words. (See in the above regard ***Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia) and Others*** **1992 (2) SA 66 (Nm HC at 72.**)".

[15] ***CGM Industrial***, *supra,* dealt with a claim similar to the present. Relying on ***Total Lesotho (Pty) Ltd v Hanyane LAC (2000-2004)*** the court therein stated that the fundamental rule in regard to the award of contractual damages is that the Plaintiff should be placed in the position he would have been had the contract been properly performed so far as this can be done by the payment of money and without undue hardship to the Defendant and that, where damages are to be based on loss of business, the true measure of the damages is based on the profits that the Plaintiff lost. In the present case the Respondent's claim was for damages allegedly flowing from a failure of the Appellant to repair the Respondent's motor vehicle, which was on hire to a third party at the rate of M60,000.00 per month. There were obviously some costs that the Respondent incurred in the generation of that gross monthly income. His claim could not equate to the

gross rental income and as such the quantum thereof cannot be a mere matter of arithmetical calculation. It requires investigation and proof of his expenses and other deductions to be made from the gross income per month. The Respondent's claim is therefore not liquidated and should have been proved by evidence. I accordingly reject the Respondent's contention the claim "was purely a liquidated claim" and his reliance on ***Rule 27(5)*** of the High Court Rules.

[16] ***Rule 27(5)*** of the ***High Court Rules*** is clear:

> " Whenever the Plaintiff applies for judgment against the Defendant in terms of sub-rule (3) herein, the court may grant judgment without hearing evidence where the claim is for a liquidated debt or a liquidated demand. In the case of any other claim the court shall hear evidence before granting judgment, or make such order as it seems fit."

[17] The learned Judge *a quo* dismissed the Appellant's application in total disregard of the fundamental requirement that unliquidated damages must be assessed in light of the evidence adduced in proof thereof. In doing so the judge not only disregarded a well established principle of law but the provisions of ***Rule 27(5)*** and thus failed to recognise the nature of the claim as providing a

strong basis for arguing the existence of reasonable prospects of success on appeal. In my view she erred.

[18] There is a further reason allied to the one above why the appeal should also succeed. ***Rule 27(3)*** of the ***High Court Rules*** provides that a default judgment may be entered on application by a Plaintiff if the Defendant has been barred from delivering a plea, as was the case here. The Rule however also provides that –

> " When the defendant is in default of entry of appearance no notice to him of the application for judgment shall be necessary but when he is barred from delivery of a plea not less than three days notice shall be given to him of the date of hearing of the application for judgment."

[19] The Appellant in this case was not given notice after it was barred for failure to file its plea. The default judgment should not have been granted in those circumstances and the judge *a quo* should have taken this into account in her consideration of the application. ***Rule 27(3)*** is a procedural bar to obtaining a default judgment in the circumstances unless it is complied with. In failing to consider this rule, the Judge again erred.

[20] The Respondent in the main considered the prospects of success from one angle. He submitted that the Appellant's denial of liability arising from the alleged failure to repair the motor vehicle was not supported by cogent evidence. Its averment that its employees advised him not to drive the motor vehicle at a speed greater than 80 km/hr was no more than a bald statement because no confirmatory affidavit by any of the Appellant's employees was produced. This was but one plank of the Appellant's defence to the claim for specific performance and not one on which he relied for the rescission application. For the rescission application he attacked the claim for damages predominantly.

[21] In determining this appeal the essential question that has to be answered is whether the factors that the judge *a quo* took into account were sufficient justification for refusing to rescind the judgment.

[22] In terms of ***Rule 27(6) of the High Court Rules*** an application for rescission of a judgment entered in default of a plea must be made within 21 days after the Applicant has knowledge of the default judgment and on notice to the other party. The rule also provides that the Applicant must furnish security to the satisfaction of the Registrar

for the payment to the other party of the costs of the default judgment and the application for the rescission of such judgment. The Respondent herein averred that the application was not made within the prescribed number of days and no security was furnished. There is nothing in the record of proceedings or in the judgment to show that these issues were actively canvassed at the hearing of the rescission application. The Judge did not address them in detail in her *ex tempore* judgment.

[23] In refusing to rescind the judgment, the learned judge considered that the Appellant had failed to establish the urgency of the application and that he had acquiesced in the judgment in that he had taken "too long a time" to make the rescission application. The default judgment was granted on 24 March 2014. An application to correct the order in the respects already mentioned above was made and granted on or about 7 April 2014. There is no evidence establishing when exactly the Appellant was served with the corrected judgment. On 16 June 2014 the Appellant applied on urgency for the rescission of the judgment. In order for the court to reach the conclusion that the Appellant had taken too long to apply for rescission, it should have clearly set out the length of the delay. The Respondent had taken out a writ of execution by the time that the rescission application was made and was

enforcing the judgment. To forestall the execution the Appellant had to apply to the court as a matter of urgency. On these facts and in the absence of other evidence I find it difficult to agree with the judge *a quo* that the Appellant had taken too long a time to make the application or that it should not have approached the court on urgency. The application was in any event heard about three months later on 22 September 2014.

[24] The requirements for rescission are trite. They are set out in ***Thamae and Another v Kotelo LAC (2000- 2004)*** and several cases in this jurisdiction and elsewhere, see ***Du Preez v Hughes NO 1957 R & N 706 (SR), (1958 1 PH F 17) and Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 A-G***. There can be no doubt that the application for rescission in this case was *bona fide* and that the Appellant had a *bona fide* defence to the Respondent's claim which *prima facie* carried some prospects of success on the merits. In addition the case was important to the parties if regard is had to the magnitude of the claim. It is the degree of lateness in making the application and the explanation therefor that tipped the scales against the Appellant, as is apparent from the *ex tempore* judgment. The learned judge *a quo* did not specify or otherwise explain what she meant by "a long time before attempting to rescind the judgment" so that

she could conclude that the Appellant had acquiesced in the judgment. The default judgment was entered on 24 March 2014. It was corrected on 9 April 2014. The papers do not show when the corrected order was served on the Appellant. That to me was the crucial date because the order referring to the wrong motor vehicle could not have galvanised the Appellant into action.

[25] A person may of course acquiesce in a judgment, but where such acquiescence is to be inferred from conduct, the conduct must be of such a nature that it is consistent with acquiescence. This is always difficult to prove. In this case the learned judge did not lay any foundation for the conclusion that the Appellant had acquiesced in the judgment.

[26] In my opinion the court *a quo* should not have been concerned only with the delay in lodging the rescission application, but also with the delay and resultant failure in delivering a plea. The latter would have given it some ammunition to deal with the rescission application. The Appellant however explained the delay that resulted in the default judgment. Its managing director, Michael Wu who, it appears, deals with litigation to the exclusion of anyone else within the Appellant's establishment, was in South

Africa on business and could not attend to the filing of a plea on time. A letter was written to the respondent on 28 November 2013 asking for an indulgence, which was given, allegedly after the parties' attorneys agreed that the plea could be filed on his return. A bar was imposed before the plea was delivered. Then an application was made for default judgment without notice to the Appellant. After the judgment was granted the Appellant applied on urgency for a stay of execution as well as for rescission of the judgment.

[27] The Appellant's explanation for its failure to deliver a plea in time is not altogether acceptable because, as argued by the Respondent, the Appellant is a company, and ordinarily, it should have been able to act in the absence of Mr Wu. Whilst it is not the place of any outsider to say that Mr Wu should have delegated his authority to other functionaries in the company, the position that only him had the authority to deal with such matters left a lot to be desired.

[28] Counsel for the Respondent submitted that the Appellant's failure to deliver a plea is not substantiated in that Mr Wu did not provide proof of his absence from the jurisdiction. He submitted further that while the Appellant may have

had a *bona fide* defence and its application may have been *bona fide* as well, it failed to give a reasonable explanation for the delay in delivering a plea. In this regard he relied on ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470*** in which the court found that the explanation for delay was unacceptable even though the application was *bona fide* and the Applicant had shown that it had a *bona fide* defence, and refused to rescind the judgment. In the instant case the court did not deal with the delay in delivering a plea. Had it done so, it may have arrived at a different result. In my view, the fact that Mr Wu was away is confirmed by the letter written to the Respondent's attorneys following which the Appellant was given more time within which to file a plea. The Respondent cannot now be heard to say that Mr Wu's explanation is a bare assertion and that it should at least have been proved by the production of his passport to show that he was indeed away in South Africa.

[29] The last issue for consideration is the Respondent's submission that the appellant did not raise the fact that no evidence was led before the default judgment was granted. The Appellant did not dispute that this was so. The point however is that the issue raises a question of law which can be raised at any time, even on appeal. I have dealt with this issue at paragraphs 14 –17 above.

[30] The Appellant's counsel explained at some length his inability to file the heads of argument on time. The response from the Respondent did not dispute the averment that he had fallen ill during the relevant period but only postulated that another attorney or advocate in his firm should have attended to the heads of argument. Having regard to the strong prospect of success of the Appellant in the matter I come to the conclusion that it is only proper to condone the Appellant's failure to file its heads of argument. On the merits I also find that the Appellant has made an unassailable case for rescission. Accordingly the order of this Court is that-

1. The application for condonation for late filing of the heads of argument is granted.

2. The appeal is upheld with costs.

3. The decision of the High Court handed down on 27 September 2014 dismissing the appellant's application for rescission of judgment is set aside and substituted with the following-

   "The application is granted with costs."

M. H. CHINHENGO
ACTING JUDGE – APPEAL COURT

W. J. LOUW
ACTING JUDGE – APPEAL COURT

I agree.

P. MUSONDA
ACTING JUDGE – APPEAL COURT

I agree.

For Appellant	:	Adv. P. L. Mohapi with TP Peete
For Respondent	:	Adv. R. G. Makara