

IN THE COURT OF APPEAL OF LESOTHO**HELD AT MASERU****C OF A (CIV) 39/2015**

In the matter between

CAPRICONS CONSULTANTS (PTY) LTD**1ST APPELLANT****PITSO NTSENE****2ND APPELLANT****And****BUTT MOTORS & PARTS (PTY) LTD****RESPONDENT****CORAM:**

MOKGORO AJA

CLEAVER AJA

CHINHENGO AJA

HEARD:

15 APRIL, 2015

DELIVERED:

29 APRIL, 2015

SUMMARY

Appellant having acknowledged indebtedness to respondent of the outstanding amount owed as balance of purchase price of a motor vehicle in terms of a contract of sale amounting to consent to judgment – Court a quo making an order based on such consent to pay by a determined date - Appellants not competent to appeal against such order except on grounds including fraud or reasonable error of fact or law – Absence of certificate in terms of Section 17 of Appeal Court Act 10 of 1979 – raising question whether appeal is properly before this Court.

JUDGMENT

MOKGORO AJA:

- [1] This matter comes as an appeal against the order of the Court a quo, given without reasons for the order. In view of the need for finality and in the interests of justice, this Court uses its discretion, treating the matter as an appeal. (See in general *Billiton Aluminium t/a Hillside and Others vs Khanyile and Others* 2010 BCLR 422 (CC) for the discretion of Courts to dispense with rules of court where necessary.

- [2] The parties are Capricorns Consultants (Pty) Ltd (Capricorns) who is the first Applicant, where Mr Pitso Ntsene, appointed by Capricorns as signatory to all court papers to be filed, on their behalf, is cited as second appellant.

[3] The Respondent is Butt Motors & Parts (Pty) Ltd (Butt Motors), a company duly incorporated under the relevant laws of Lesotho and represented by Ms Rahima Butt, who, like Mr Pitso Ntsene, was also authorised to sign all court documents on behalf of Butt Motors.

[4] The appeal is against an order of the High Court, sitting as the Commercial Court, handed down on 18 August, 2015. Making specific mention that it was based on the consent of the parties, the order reads:

“(a) Judgment is entered in favor of the Applicant by consent of the parties in the payment of the amount of M16000.00 payable on or before Wednesday the 26th August, 2015.

“(b) Should the parties not agree on costs, the matter will be reset in respect thereof.”

[5] Expressing their discontent with the order, based on the very concessions they had made, Capricorns appealed on the following grounds in relevant part:

“1. The learned judge erred and misdirected himself in not addressing the points of law raised in [limine] despite the fact that the matter was ripe for hearing and heads of argument by both parties are duly filed.

2. The learned judge erred and or misdirected himself in ordering settlement in respect of prayers that applicants never prayed for ...”

[6] The rather unusual turn of events described in paragraph [4] above, calls for a factual context of the issues which I shall outline only briefly for purpose of the order in this judgment. The facts appear from the written submissions of the parties in this Court.

[7] Butt Motors had sold Capricons a motor vehicle for the sum of M48000.00, on 1 September, 2014. The latter paid an upfront sum of M32000.00, thus remaining with a balance of M16000.00, which the parties had agreed would be paid before the end of the month of September, 2014.

Mr Pitso Ntsene, duly signed the contract of sale, as authorised, on its terms and without any alterations.

[8] By the end of September, 2014, Capricons had not paid the remaining balance of M16000.00, as agreed. Almost a year later, by July 2015, to the frustration of Butt Motors, Capricons had still not paid up.

[9] Determining that Capricons was in breach, Butt Motors proceeded to commence the process of repossession of the vehicle, in accordance with clause 8 of the contract of sale.

[10] Urgently applying ex parte for an interdict to the High Court sitting as a Commercial Court, Butt Motors' prayer was,

among others, that Capricons must show cause why the motor vehicle shall not be repossessed and restored to them. They also prayed for the cancellation of the contract of sale and for costs.

- [11] In support of their application, Butt Motors cited the endless frustrations they endured at the hands of Capricons, as they impeded every effort at recovering payment of the remaining balance of M16000.00.
- [12] Almost a year after the due date for payment, when Capricons was served with a letter of demand, in response, they instead re-negotiated a new payment plan in the following terms: M10000.00 on the 19th June, 2015; M5000.00 on 3rd July, 2015 and the final M7000.00 on the 17th July, 2015. The total amount would include the applicable collection fees. Butt Motors, with utmost consideration found itself agreeing to the new arrangements.
- [13] Although the application was ex parte, Butt Motors atypically cited Maseru Charge Office, the Commissioner of Police and the Attorney General with a view to seeking their assistance in the execution of the order they anticipated the Court would make, as Capricons had up to this point, shown particular recalcitrance.

- [14] When, in the High Court, Capricons was called upon to show why the prayers sought by Butt Motors should not be granted, rather than presenting the necessary evidence as to why they are not in breach, including why clause 8 of the sale agreement which provided for repossession should not be implemented, they instead raised a number of points in *limine*.
- [15] The points included, that the matter was not urgent; Butt Motors should not have approached the Court *ex parte*; there is a dispute of fact regarding the balance payable; Rahima Butt has no *locus standi* to act on behalf of Butt Motors and the proceedings were irregular in that Butt Motors should have sued for breach of contract and specific performance, failing which, for damages and or repossession of the vehicle.
- [16] In the Court *a quo*, Capricons, in their opposing affidavit there, made a critical point for purposes of the order, stating emphatically that they were prepared to pay the outstanding balance of M16000.00 only “and nothing more”. They thus further endorsed acknowledgment of their indebtedness to Butt Motors, to the tune of M16000.00 at the most.
- [17] In the result, the learned Judge proceeded to make the order outlined in paragraph [4] of this judgment. It is that order which is the subject of this appeal.

[18] Having lodged the appeal in this Court, Capricons subsequently also applied for a stay of execution of the High Court order, pending the appeal which had already been enrolled in this Court.

The appeal is on grounds as stated in paragraph [5] of this judgment.

[19] Further, they raise substantially the same issues as in the High Court, in particular the points in *limine* that, there had been no need for Butt Motors to have approached this Court *ex parte* as there is no urgency; that Rahima Butt has no locus standi to act on behalf of Butt Motors; that there are lingering disputes of fact still to be resolved in the High Court; that the non-joinder of the Ministry of Public Works and Transport is an impediment and that the current proceedings are irregular in that Butt Motors should not have opted for repossession of the vehicle as a first option.

[20] In view of the approach taken in this matter, there is no need, as will appear in due course, to delve into the points taken in *limine*.

[21] In response to Capricons' arguments in this Court, Butt Motors first identifies a number of issues of common cause, relating among others, to the purchase of the motor vehicle and the payments in relation thereto. Significant here is the

point made that the outstanding balance to be paid is still M16000.00.

[22] A critical issue for determination raised by Butt Motors however, is whether Capricons, coming here without leave to appeal, is correctly before this Court, in terms of section 17 of the Court of Appeals Act, 10 of 1978. That section provides:

“Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not a question of fact.”

It is common cause here that Capricons did not submit the required section 17 Judge’s certificate, nor have they applied for leave to appeal to this Court considering that they treated it as an appeal. On that score alone, this appeal may be dismissed, as counsel for Capricons himself conceded.

[23] Following *Mohale v Mahao*, LAC (2005-2006) 101 at 104 (para [6]), where the plain meaning of section 17 was made clear and guiding principles of its requirements formulated, condonation applications for non-compliance with the section are now likely to abate, and stricter adherence to the Rule will become more entrenched. The adherence to the rules of Court is however a necessary aspect of the

administration of the authority of Courts to regulate their own processes, they have inherent jurisdiction to condone non-compliance, taking into account particular factors present in the circumstances of the case at hand. (See in *Billiton Aluminium t/a Hillside and Others vs Khanyile and Others*, supra at para [13].

[24] Under any circumstances, the test for condonation for lapses in the timeous application for leave to appeal is to determine whether it is in the interests of justice to grant leave, taking into account factors, which arise in the circumstances of the case. These may include, the importance of determining the matter, in particular, where there is need for finality, whether hearing the case would prejudice either of the parties and whether there are any reasonable prospects of success for the appellant. (See *Sello v Sello and Others*, C of A (CIV) 18/2012 (which can be accessed on the website of the Lesotho Legal Information Institute) for the test for condonation for failing to comply with section 17 of the Act.)

[25] In this matter however, there is no particular need for this Court to exercise its inherent jurisdiction, hearing the appeal without leave or the section 17 certificate. That is because, gleaned from the synoptic factual context outlined above, there are no reasonable prospects that the appeal against the High Court order would succeed. It would thus not be in the

interests of justice to hear the matter. Therefore, without more, this appeal must be dismissed.

[26] As for the question of costs, the facts of this case, demonstrate what seems to be an unwillingness on the part of Capricons to settle their debt, considering their acknowledgment of the amount owed. The audacity of appealing an order they consented to borders on the abuse of legal process and the reckless disregard for litigation costs. In my mind there is no reason why Butt Motors should be mulcted in costs, pursuing to the end Capricons' indebtedness to them and why this Court should not issue a punitive cost order against Capricons. Costs must therefore follow the result.

[27] In the result, the following order is made:

1. The appeal is dismissed.
2. The appellants shall pay the costs in this appeal on the scale of attorney and client.

J.Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

M. CHINHENGO
ACTING JUSTICE OF APPEAL

I have read the judgment of my sister Mokgoro and while I agree with her decision, I consider there to be a perhaps more important reason for dismissing the appeal.

The judgment entered against the appellants may more accurately be described as an order. It was not based on evidence, whether verbal or by affidavit but was by consent of the parties who were represented by counsel at the hearing. Consequently there are no reasons for the judgment which can be challenged on appeal and an appeal is therefore not a competent procedure. In Rule 45 of the High Court rules provision is made for rescission of a judgment erroneously granted but the appellants chose not to follow that route.

R. B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellant: L. Ramaema

For the Respondent: K.A. Mariti