IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO 57/2016

In the matter between:

WHITELIFE CONSULTANCY (PTY) LTD **APPELLANT**

and

MOOKOLI HOLDINGS
T/A MOOKOLI INFRA-CONS (PTY) LTD **RESPONDENT**

CORAM : MUSONDA AJA
CHINHENGO AJA
MTSHIYA AJA

HEARD : 17 May 2019

DELIVERED: 31 MAY 2019

SUMMARY

Civil Procedure – Condonation of breach of Court of Appeal Rules – application for condonation made from the bar contrary to mandatory Rule 15 (3) – application invalid – Appellant's failure to comply with the High Court Security of costs order pursuant to Rule 8 (1) of the Court of Appeal Rules – effect of summary judgement – requirements discussed – Appellant failing to show ***bona fide*** *defence where amount claimed clearly set out in schedule of invoices, payments and balances – appeal frivolous and vexatious – appeal dismissed with costs on attorney and client scale.*

JUDGMENT

Dr P MUSONDA AJA

[1] This is an appeal against a summary judgement of the High Court (Chaka-Makhooane J) handed down on 9th November 2018.

[2] The respondent instituted proceedings against the appellant on 4th March 2018 claiming payment of two hundred and eighty two thousand two hundred and five maloti and ninety two lisente (M282,205.92) plus interest at the rate of 18.5% per annum, for services rendered at the appellant's, request.

[3] Before the appellant could file its plea, the respondent applied for summary judgement in terms of Rule 28 (1) (b) of the High Court Rules, 1980. The appellant in turn filed its opposing affidavit in terms of Rule 28 (3) (b), which it was entitled to do. The learned judge in the court ***a quo*** entered summary judgement for the respondent in terms of Rule 28 (6), as the appellant did not satisfy the court that they had a *bona fide* defence.

[4] The learned judge dismissed the opposition to the summary judgement application as the affidavit was devoid of a ***bona fide*** defence as elucidated by the ***Supreme Court of Appeal*** in ***Mojola V Nitro Securitisation*** **(Pty) Ltd**[1]**,** where the court observed that:

> *"The purpose of summary judgement is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant*

[1](2012) (1) SA 226 at para 25

who has no real defence to that claim. It is at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights"

[5] The judge went on to cite the case of ***Maharai V Barlay, National Bank Ltd[2],*** where it was held that:

"The remedy of summary judgement is not intended to shut out defendants who are able to demonstrate a bona fide intention to defend the action. It does require them, however, to show what their intended defences are. It must appear from what they say in this respect that the defences are legally sustain in good faith. They are expected to do this by setting out in their opposing affidavits the nature and grounds of the defence and the material facts upon which it is founded. If the averments made by a defendant in the opposing affidavit are vague, or markedly lacking in the particularity that might be expected in the circumstances of the case, then the court is likely to hold a bona fide defence has not been disclosed, and summary judgement will follow"

[6] The learned judge was of the view that the defendant now appellant had not disclosed the nature and ground of its defence and the material facts upon which it was founded. Appellant averred that it had paid all the monies and that the respondent had not disclosed the basis of the alleged indebtedness. However, the learned judge dismissed these assertions. She was of the view that the appellant had failed to provide any material in support of its assertions i.e. there was no evidence of the final payment of the debt. Consequently the court remained unconvinced that the appellant had disclosed a defence which was *bona fide* and good in law as stated in the case of ***Maharai V Barclays National Bank Ltd (Supra)***

[2] 1976 (1) SA 418 (A) 425 – 426 (E)

[7] The court ***a quo*** concluded that the appellant's affidavit was vague and lacked sufficient particularity and the defence was not ***bona fide***. It was simply for purposes of delay. The application for summary judgment was granted.

[8] The appellant filed an application for stay of execution pending appeal. The court *a quo* made the following remarks:

> *"The application for stay of execution is granted subject to the appellant giving security for payment of the whole of the amount that the applicant would have to pay if the appeal should fail"*

[9] Aggrieved by the granting of summary judgement the appellant noted an appeal to this Court. The appellant's, counsel applied for condonation for breach of **Rule 7 (2**) from the bar.

[10] POINTS *IN LIMINE*

For the respondent, Adv Khesoue raised three points ***in limine***:

(i) The breach of **Rule 7 (3**) which is couched in these terms:

> **"7 (2)** A certificate certifying the correctness of the record, duly signed by the persons referred to in sub-rule (1) shall be filed with the record and served on all other parties to the appeal;

(ii) The breach of **Rule 15 (3)** is couched in these terms:

15 (3) such application shall be by notice of motion delivered to the respondent and to the Registrar not less than seven days before the date of hearing; and

(iii) Non-compliance with the order to pay costs in breach of Rule **8 (1)** is couched in these terms:

8 (1) Where the judgement appealed from in a civil matter has not been carried into execution by the respondent the appellant shall before lodging with the Registrar copies of the record enter into security to the satisfaction of the Registrar for the respondents costs of the appeal.

[11] When hearing the appeal, we were of view that the pragmatic approach would be to permit the points *in limine* to be argued together with the merits.

[12] Adv Khesuoe, submitted that the appellant has not complied with the mandatory provisions of the Rules of this Court especially **Rule 15 (2**) and **(3)** which enjoins appellant to apply for condonation for breach of the Rules of this court so, the appeal must be struck off.

[13] In ***National University of Lesotho and Another V Thabane***,[3] the court stated that:

> *"The court of Appeal Rules are primarily designed to regulate proceedings in the court and to ensure the orderly, inexpensive and expedition's disposal of appeals. The Rules must therefore be*

[3] LAC (2007 – 2008) p 476 at 477 at para E

interpreted and applied in a spirit that facilitates the court's work. It is incumbent upon practitioners to know, understand and follow the Rules, most if not all of which are cast in mandatory terms. Failure to abide by the rules poses serious consequences for litigants and practitioners alike, and practitioners ignore the Rules at their own peril … The Rules are not inflexible; the court retains the discretion in terms of Rule 15 to condone their breaches in order to achieve at just result. The attainment of justice is the court's ultimate aims, for the rules exist for the court, and not the court for the Rules. There is a limit to the court's tolerance. The court's discretionary power must not be seen as encouragement to laxity in observing the rules.

[14] Adv Khesuoe, valiantly argued that there has been a total disregard of the rules which conduct cannot be condoned.

[15] SECURITY FOR COSTS

The appellant has failed to comply with Rule 8 (1), so it was argued. In ***Thabex Limited and others V Mosebo and Another***[4]the first respondent made an application that the appeal be dismissed due to the appellant's failure to provide security for cost of appeal, the parties reached an agreement to settle the matter and that agreement was to the effect that if the appellant fails to provide security for costs the appeal would be dismissed.

[16] Adv Kometsi, submitted from the bar, that though there were breaches of the rules the court should condone and hear the

[4] LAC (2011 – 2012) p 112 at 121 E-F

applicant as the rules of court are not inflexible. The court retains the discretion to condone the breaches in order to achieve a just result.

[17] The failure to pay the court ordered security for costs was due to the notice of the garnishee order sent on 19th December 2018 to the Chief Executive Officer of Storm Mountain Diamonds 15 United Nations Road Sentinal Maseru, which the appellant perceived as securitising the costs. There were also negotiations ***ex curia***. It is apposite to mention that this was a submission from the bar.

[18] Adv Khesoue, in her reply stated, that, the appellant had later applied for stay of execution after the notice to garnishee. The learned judge granted an order for stay on condition the security for costs was provided before noting the appeal.

[19] THE APPELLANT'S CASE

It was Adv Kometsi, submission that the learned judge erred in granting summary judgement against the appellant as they had a ***bona fide*** defence to the respondent's claim. In support he cited David Barnard, Civil Court in Action, Butterworth's 1977 at page 91 where he states that:

> *"Thus summary judgement effectively denies the defendant the chance of testing the plaintiffs case by discovery and oral evidence and therefore will only be granted where the plaintiff is able to show*

an unanswerable case, it is not enough for a plaintiff to show that he has a strong case or that he is likely to succeed, he will obtain judgement if he can show that he is bound to succeed"

[20] The appellant has always maintained that it is not indebted to the respondent anymore because it has paid all the monies.

[21] The learned judge erred and misdirected herself by concluding that the annexures provided sufficient proof of the claimed amount. There was no evidence of ascertainable amount nor was the agreement or contract filed, on the basis of which work was done.

[22] There were no exhibits or annexures by the respondent to show how the appellant came to be indebted to the respondent. There was no particular sufficient to disclose a cause of action. Adv Mokhesi cited the decision of ***Standard Lesotho Bank Ltd V Mahomed***[5] which characterised annexures as evidential documents and not pleadings.

[23] Justice Lyons, in ***Standard Lesotho Bank V Mohamed (Supra)*** concluded his analysis in the case above, as follows:

"The practice is straight forward, and if properly followed this problem should seldom be encountered. If the client's instructions lead to a conclusion that summary judgement is a viable option,

[5] (CIV/T/182/2010) (2010) Lsite 105 (07 June 2010)

bearing in mind that the law requires that the defendant's position be demonstrated on the pleading to be hopeless, then the summons is comprehensively pleaded so as to prepare for the forthcoming summary judgment application. Practitioners should keep in mind that the threshold is set very high. This is due to the very nature of summary judgement, which is the removal of the defendant from the judgement seat without there being a full hearing. If there is any doubt, it is best to take the trial process option.

[24] Adv Mokhesi, went on to cite the judgment of Lehohla CJ in ***Lesotho Bank V Johaness Maisa Matsabatla Father and Son Butchery,***[6] where he said:

"I agree with Mr Phafane's submission that in an application for summary judgement there is a need for the defendant to be as detailed and specific as he would otherwise be required to be when filing a plea"

Summary judgement is not there for the taking, it is not a procedure intended to short-circuit proceedings. It is adopted in extreme cases where the defendant would certainly not even have a defence, especially where the annexed document proving indebtedness is ***prima facie*** conclusive evidence of indebtedness. Judgement entails in essence that the defendant be condemned before being heard. To this extent it is a negation of the ***audi alteram partem*** rule. The case of ***Fashion Centre and Another V Jasat,***[7] was cited in support of the proposition.

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[6] 12th February 2001

[7] 1960 (3) SA p221 at 222

[25] Adv Mokhesi, concluded by urging this court to allow the appeal with costs and send the case back the High Court for trial.

[26] THE RESPONDENT'S CASE

Adv Khesoue, argued that the respondent proved its claim by attaching quotations, claims, invoices, a letter of demand as well as respondent's bank statement indicating the amount paid by the appellant after a letter of demand was issued by the respondent. Further an email from the respondent's Managing Director to the Managing Director of the appellant where the latter was invited to discuss issues pertaining to outstanding payments and a threat to hand over the case to the lawyers. The annexures were marked MH1 to MH9 and appeared at paper 24-44 of the record. These annexures were explained in paragraph 3 of the respondent's founding affidavit at page 22 of the record. The appellant's indebtedness was explained in paragraph 9-11 of the Declaration at pages 10-11 of the record. After completion of the work the respondent issued invoices to the appellant company appearing on page 46 of the record. This list indicates invoice paid in full and those that have not been paid in full or at all.

The court *a quo* was therefore correct to rule in favour of the respondent because it met the requirements laid down in **Rule 28 (1) (b).**

[27] The appellant had failed to meet the requirements of **Rule 28 (3)**, as the appellants Managing Director only alleges that she had paid in full and final settlement. She did not disclose the grounds and the material facts relied upon. For example how much was paid, when it was paid and the mode of payment and the receiver of the payment.

[28] The respondents heavily relied on ***ABSA Bank Limited V EFM Investments and ABS Bank Limited V the Lakes.***[8] In that case Binns-Ward J made the following remarks:

> *"The remedy of Summary Judgement is not intended to shut out defendants who are able to demonstrate a bona fide intention to defend the action. It does not require them, however, to show what their intended defences are. It must appear from what they say in this respect that the defences are legally sustainable and that they are maintained in good faith. They are expected to do this by setting out in their opposing affidavit the nature and grounds of the defence, and material facts upon which it is founded. If the averments made by the defendant in the affidavit are vague or markedly lacking in the particularity that might be expected in the circumstances of the case, then the court is likely to hold that a bona fide defence has not been disclosed and summary judgement will follow"*

[8] CC 1461/2012 and CC 11463/2012

[29] It was submitted by Adv Khesoue, that respondent had established in the court ***a quo*** and in this court that the appellant does not have any, real defence. The appellant only says it paid in full and final settlement without disclosing fully material facts relied on. She further cited ***Leen V First National Bank (Pty) Ltd***,[9] where the court stated that:

> *"The procedure for summary judgement is designed to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to the claim. The remedy closes the door to the defendant and should be accorded to the plaintiff if his case is unanswerable"*

[30] In conclusion Adv Khesoue, prayed for costs on attorney and client's scale on grounds that the appeal was frivolous and vexations. It was intended to delay execution to the detriment of the respondent. There was total disregard of the rules.

[31] ISSUES:

(i) Can the court of Appeal exercise discretion under **Rule 15 (2)** to condone any breaches by the appellant, when such appellant has not complied with **Rule 15 (3)**;

(ii) What is the fate of an appeal in circumstances where the appellant fails to provide security for costs as ordered by the lower court; and

[9] (C of A) 16 A of 2016 LSCA 27 28th October 2016

(iii) Where there are no prospects of success on the merits.

[32] THE LAW:

In this appeal condonation of the breach of **Rule 7 (2)** of the Court of Appeal Rules 2006, was sought by the appellant. The Rule is couched in these terms:

> ***7 (2)*** *… A certificate certified the correctness of the record, duly signed by the persons referred to in sub-rule (1), shall be filed with the record and served on all the parties to the appeal.*

The Rule is cast in mandatory terms that the appellant or his attorney shall comply with the Rule, but **Rule 15 (2**) confers a discretion on this Court to condone the breach of the Rule. However, the mode of application under **Rule 15 (3)** is couched in mandatory terms:

> *"**15 (3)** … such application shall be by notice of motion delivered to the respondent and to the Registrar not less than seven days before he date of hearing"*

The rationale is that the respondent should not be ambushed as the respondent is entitled to oppose the application. A condonation application contrary to **Rule 15 (3)** is no application at all.

[33] When dealing with security costs the Supreme Court of New Zealand in a seminal judgement interrogated various aspects including the prospects of success of the appeal

Nichola Paul Alfred Reekie V Attorney General and 3 others,[10] before dismissing the appeal. It is crucial to extensively quote from the judgement.

> *"The security for costs if unsuccessful is a disincentive to the commencement of frivolous proceedings. As well, most litigants will not commence proceedings if the costs of the exercise, including those they must pay if unsuccessful, exceed the likely benefits.*
>
> *Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle the claim,* ***A S Mclachlan Ltd V Mel Network Ltd (2002) 16 PRNZ 747 LA*** *cited with approval.*
>
> *A somewhat different approach has however, been taken in respect of appeals. It was explained rather bluntly in* ***Cowell V Taylor (1885) 31 CHD 34 AT 38 where Bowen LJ observed:***
>
> *The general rule is that poverty is no bar to a litigant, that from time immemorial, has been the rule at Common Law, and also, I believe in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts and so an insolvent party is not excluded from the courts, but only prevented, if he cannot find security, from dragging his opponent from one court to another. The appeal was dismissed".*

The tenor of the judgement is that the courts are more ready and willing to order security for costs on appeal. In ***Tact V Bundle Peysle,***[11] the court held that the underlying approach still has considerable currency.

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[10] SC 47/2013 (2014) NZSC 65

[11] (2002)FCA 322

[34] The European Court of Human Rights had to deal with a challenge, as to the fairness of the trial when the appellant is denied access to the appellate court, because he could not provide security for costs ordered by the Court of first instance. The challenge was based on Art 6 (1) of the European Convention of Human Rights, which is similarly worded as section 12 of the Constitution of Lesotho 1993.

[35] In ***Tolstoy Milos Lavsky V United Kingdom:***[12]

> *"In that case, the appellant appealed against a defamation judgement for $1,500,000, but was ordered by the English Court of Appeal to provide $124,900 as security for costs within 14 days of the order being made. The European Court of Human Rights rejected the appellant's contention that this was breach of Art 6 (1) of the European Convention of Human Rights, the right to fair and public hearing. In doing so the court placed considerable weight on the fact that the applicant had had "full access" to the first instance court".*

[36] In the case of ***Nidula Paule Alfred Reekie V Attorney General and 3 others and Tolstoy Milos Lansky V United Kingdom Supra,*** the appeal was dismissed. The courts interrogated the prospects of success. In the court ***Barolong Molise and Exr Company V Zion Christian Church,*** this court struck the appeal off the roll, as only the Rules were breached not the court Order nor were the merits enquired into to determine whether there were prospects of success.

[12] (1995) ECHR 25 at 63

[37] It is inescapable in this case to uphold the points ***in limine,*** which are actually dispositive of this appeal.

[38] CONSIDERATION OF THE APPEAL

In their commercial relationship as from 11th October 2017, as shown in the schedule at p. 46 of the record, the respondents gave the date of the invoice, the invoice number, the account, the amount paid and the balance. The appellants honoured four invoices MH17-37, MH 17-39, MH 17-51, MH 17-55 for the following amounts M429,380.00, M245,667.08, M30,768.60 and M13,680.00 dated 11/10/2017, 18/10/2017, 05/12/2017 and 13/12/2017 respectively, the later two invoices were not honoured in full. Respondents declaration at paragraph 9,10 and 11 clearly explained the indebtedness. When the demand letter was written on 5th April 2018 demanding M747,157-63, with details, the appellant decided by pay M464,950.70 and there was no objection to the amount demanded. It is the balance after that payment, which was litigated.

[39] While the respondent provided details of the outstanding invoices and amounts received. The appellant in the opposing affidavit merely denied the indebtedness. Despite there being no credible defence, the appellant had a determined drive to "slow walk" the judicial process in order to delay respondent's

recovery of what was owed to them. The conclusion reached by the court ***a quo*** was unassailable. We ***echo*** the judgement of the Eswatini Supreme Court in ***Shell Oil Swaziland (Pty) limited V Motor World Trade limited Ha Sir Motors,***[13] where the Court said:

> *"What Summary judgement seeks is to avoid delay of justice in circumstances where the defendant has no* ***bona fide*** *defence on the merits. The judge in the court* ***a quo*** *was accordingly completely justified in finding that on the peculiar facts of the matter, especially the* unequivocal *admission of the debt, that it would be pedantic and costly not to grant summary judgement"*

[40] On the other hand, there is little of practical moment in the appeal contrary to the appellant's submission there was no prospect of success. There is no basis of the Court of Appeal interfering in a substantial way the findings of fact and conclusions of law made by the learned judge in the court ***a quo***.

[41] CONCLUSION

On the judicial decisions cited on appeal from our jurisdiction and foreign jurisdiction, the appellant having breached the mandatory **Rule 15 (3**), by failure to apply for condonation of breaching **Rule 7 (2)** by notice of motion, this court has no

[13] Appeal case No23/2006

reason to condone the breach by exercising the discretion in **Rule 15 (2)**. The court cannot "walk back" on its rules. **Rule 8 (1)** makes it mandatory for the appellant to pay costs where the judgement appealed from in a civil matter has not been carried into execution. Additionally, there was a Court Order to that effect. This court should not deny a successful litigant from enjoying the fruits of the judgement. For these reasons the appeal is dismissed.

[41] COSTS:

It was valiantly canvassed that the appeal was frivolous and vexatious and there was a breach of rules. This court agrees with that assertion that entire appeal was a comedy of breaches. There were breaches of **Rule 7 (2), 8 (1), 15 (3)** and non-compliant with the order of the court ***a quo*** to pay security for costs. We agree that this is a proper case to condemn the appellant to costs prayed by Adv Khesoue on the attorney and client scale.

[42] ORDER:

(I) The appeal is dismissed

(II) Appellants to pay the costs of appeal at attorney and client scale

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Dr P MUSONDA AJA

I agree:

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M. GHINHENGO AJA

I agree:

.....

N. T. MTSHIYA AJA

For Appellants	**:**	Adv Mokhesi
For Respondents	**:**	Adv Khesoue