IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO. 76/2017

CIV/T/122/2016

In the matter between:

LESOTHO PEOPLE'S CONGRESS

NATIONAL EXECUTIVE COMMITEE **1ST APPELLANT**

LESOTHO PEOPLE'S CONGRESS **2ND APPELLANT**

MOLAHLEHI LETLOTLO **3RD APPELLANT**

MABALA MAQELEPO **4TH APPALLENT**

THAPELO NTŠOELE **5TH APPALLENT**

SOPHIE MALIMABE **6TH APPALLENT**

KOATLE TSEKO **7TH APPALLENT**

MOELETSI QEKISI **8TH APPALLENT**

'MAPABALLO MOLIBE **9TH APPALLENT**

MOEKETSI MONYANE **10TH APPALLENT**

'MAKOPANO SEKHOBO **11TH APPALLENT**

KOPANANG MOREBOLI **12TH APPALLENT**

'MALESELI LESELI **13TH APPALLENT**

LEHLOHONOLO MOKAU **14TH APPALLENT**

'MATEFO RABOKO **15TH APPALLENT**

MAMAHLAPE KHETSI **16TH APPALLENT**

'MASEKA MOTHAE **17TH APPALLENT**

TELANG MPOLE **18TH APPALLENT**

AND

MABUSETSA MAKHARILELE **1ST RESPONDENT**

MOIPONE PIET **2ND RESPONDENT**

SEFAKO PHOSISI **3RD RESPONDENT**

TLALI MOHLOMI **4TH RESPONDENT**

BOKANG RAMTŠELLA **5TH RESPONDENT**

MAFEREKA TŠUKULU **6TH RESPONDENT**

MAPHUMA SEJANAMANE **7TH RESPONDENT**

MATLA SEPITLA **8TH RESPONDENT**

KHITSANE LETŠOAELA **9TH RESPONDENT**

MANTJA MAKHAKHE **10TH RESPONDENT**

KUENANE NKUEBE **11TH RESPONDENT**

SECHABA TŠEHLANA **12TH RESPONDENT**

'MAKOPANO MAFUBE **13TH RESPONDENT**

'MASEKHOANE MOKOALELI
14THRESPONDENT

THE REGISTRAR OF COMPANIES **15TH RESPONDENT**

THE ATTORNEY GENERAL **16TH RESPONDENT**

CORAM : DR. K. E. MOSITO P.
DR P. MUSONDA AJA
N. MTSHIYA AJA

HEARD : 18 January 2019

DELIVERED : 01 February 2019

SUMMARY

Civil Practice - Rule 41 (3) – Absolution from the instance granted where plaintiffs failed to appear at the trial – Rule 45(1)(a) - Court a quo wrongly dismissing the rescission - Order set aside and replaced with rescission judgment for the plaintiff with costs– Appeal upheld with costs.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This is an appeal against the judgment of the High Court (**Moahloli AJ.**) on 2 March 2016.

[2] This matter began as a trial action in which the appellants (as plaintiffs) brought an action for judgement in the following terms:

(a) A declaratory order that 3rd to 18th Plaintiffs are the lawfully constituted National Executive Committee members of LPC (2nd Plaintiff).

(b) A declaratory order that the purported Annual General Conference of LPC held at Lesotho Cooperative College on the 27th and 28th February, 2016 was null and void and of no force or effect.

(c) A declaratory order that the Annual General Conference of LPC held at Masite St Barnabas on the 27th and 28th February 2016 was lawfully constituted and its resolutions binding.

(d) An order interdiction and restraining 1st to 14th Defendants from holding themselves out as *bonafide* members of the National Executive Committee of LPC.

(e) An order interdicting and restraining 1st to 14th Defendants from interfering with 3rd to 18th Plaintiff's exercise of rights as *bonafide* members of 2nd Plaintiff other than by due process of law.

(f) 1st to 14th Defendants be ordered to pay costs of suit.

(g) Further and/or alternative relief.

[3] The respondents, as defendants, filed a Notice of Appearance to Defend on 7th March 2016. There was a Request for Further Particulars filed which was followed by the Further Particulars themselves. On 6th March 2017 the matter was set down for hearing on 19th and 20th April 2017, with the legal representatives of both parties present.

[4] Thereafter, the respondent's counsel unilaterally and without resorting to Rule 39 (3) of the **High Court Rules 1980**, approached the Court's Clerk to secure a new date. The Learned Judge a quo re-set the matter on 21st and 25th March 2017. As I said, the new dates were evidently secured without the involvement of the Appellant's legal representatives. On the 21st March 2017 when neither the Appellants nor their legal representatives appeared in

Court when the matter was called on for hearing, the Court a quo issued an order of absolution from the instance.

[5] The above mentioned order prompted the Appellants to file a rescission application on the 28th March 2017. The founding affidavit of Mr. Molahlehi Letlotlo clearly shows that the rescission application was brought in term of rule 45 of the High Court Rules dealing primarily with orders erroneously sought and granted. They complained that the order, an order of absolution, was erroneously sought and granted in their absence. The basis for this complaint was that, the matter had been set down on the 21st March 2017 without their involvement.

[6] The rescission application was opposed by the 1st to 14th Respondents. The Learned Judge delivered his judgement in which he dismissed the rescission application on the 30th November 2017.

[7] The parties informed us at the hearing of this appeal that, before the judgement on rescission application was handed down, the judge a quo ordered *mero motu* that additional evidence be provided on affidavits by the Clerk of Court Mrs. Kale, Assistant Registrar Mr. Sharite and Respondents' attorney Mr. Letsika explaining the circumstances surrounding the setting down of the matter and the subsequent rescission application. Both persons referred to above complied and duly filed their affidavits. Thereafter, the Court heard the rescission application and dismissed it.

[8] Dissatisfied with the decision dismissing the rescission application, the appellants approached this Court on appeal complaining in essence that, dismissal of the rescission application was erroneous. It is clear therefore that the issues regarding the setting down of the matter are matters predominantly known by the legal representatives of the parties not the litigants themselves; so much so that whatever the parties say in their affidavits about when the matter was set and how it was set is what they were told by their legal representatives not what they have personal knowledge of. Advocate Kautu Moeletsi. Advocate Kautu deposed to a supporting affidavit to that of Mr. Molahlehi Letlotlo.

[9] The Court a quo, then proceeded to dismiss the rescission application on the basis that the explanation for default of appearance in Court on the 21st day of March 2017 was unreasonable and the application lacked *bona fides*. It was common cause that, in dismissing the said application, the learned judge did not consider the appellant's prospects of success and did not even say why the prospects of success were not considered. I shall revert to this issue later on.

THE FACTS

[10] As far as relevant to the determination of the present appeal, the facts are not in dispute. They are that the 3rd to 18th Appellants were office bearers in the 1st Appellant. These Appellants were elected at an Annual General Conference of the second Appellant

on 1 November 2014. The 17th and 18th Appellants were *ex-officio* members of the 1st Appellant representing the Women's League and the Youth League respectively.

[11] As pleaded in the declaration, before the 28th day of February, 2015 General Elections, 5th Defendant switched allegiance from LPC to the Lesotho Congress For Democracy by campaigning for the latter and becoming its candidate in its proportional representation list. Consequently, the National Executive Committee of LPC suspended 5th Defendant from his position of Publicity Secretary in the NEC and referred his matter to the Annual General Conference. On 27th to 28th February the 2nd Appellant held and Annual General Conference at which 5th Respondent was expelled from the party. However, on the same date, the 1st to 8th Respondents held their own separate meeting at the Lesotho Cooperatives College which they passed as the Annual General Conference of the LPC. This conference was held without the authority of the Appellants. It is for this reason, that the Appellants approached the Court a quo for the prayers outlined in paragraph [2] above.

[12] For their part, the respondents' case as pleaded in their plea is that their conference was the lawful one and not that of the appellants. They contend that the 3rd to the 18th Appellants were not elected into the National Executive Committee on 27th to 28th February 2016 because, they did not attend the Annual General Conference held at the Lesotho Cooperatives College campus in the district of Maseru. They contend that they were the lawful office

bearers of the 2nd Appellant having been elected at the Lesotho Cooperatives College mentioned above. They therefore dispute the allegations made by the Appellants in their declaration.

ISSUES

[13] Before us, there were two procedural issues raised. They were whether the Court a quo was correct in dismissing the recession application as it did in the light of the background and facts outlined above. Connected to that question was whether Rule 45(1) of the Rules of the High Court Rules was not properly invoked.

THE LEGAL PRINCIPLES APPLICABLE TO THE RESOLUTION OF THE APPEAL

[14] Rule 41(3) of the **High Court Rules 1980** provides that, if, when a trial is called, the defendant appears and appellant does not appear, the defendant shall be entitled to order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that the judgment should be granted in his favour and the court, if satisfied, may grant such judgment. The Rule 45(1) of the Rules of the High Court which provides as follows: "*The Court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*". In ***Leen v First National Bank (Pty) Ltd***,[1] this Court

[1] Leen v First National Bank (Pty) Ltd (C of A (CIV) 16A of 2016.

observed that, under Rule 45(1)(a) of the **High Court Rules** a judgment is granted in error if, as stated in ***Nyingwa v Moolman*** **1993(2) SA 508** at 510 at the time of its issue there existed a fact of which had the judge been aware, he would not have granted the judgment.It is now well-established that, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond, and was not limited to, the grounds provided in Rules of Court 27 and 45 (1) and those specifically mentioned in **Childerley Estate Stores v Standard Bank of SA Ltd.**[2]

EVALUATION OF APPELLANTS' APPEAL

[15] There are a number of grounds upon which the present appeal is predicated. First, the appellants contend that, in dismissing the rescission application, the Court a quo erred by not considering the appellants' prospects of success in the main case. The court should have considered the requirements of rescission application cumulatively and not in the piece mill fashion as it has done. In ***Thamae and Another v Kotelo and Another,***[3] this Court held that:

> [12] The learned Judge a quo, in refusing rescission, did not deal with the defendants' prospects of success. She decided that as the defendants, in her view, had not put forward a reasonable explanation for their default, there was no need to consider the prospects of success. In my judgment, the learned Judge was wrong in holding both that the defendants'

[2] Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163.
[3] Thamae and Another v Kotelo and Another (C of A (CIV) NO16/2005) .

> explanation was not reasonable and in dealing with each requirement for rescission in isolation. Reliance was placed by the court a quo on the remarks of Miller JA in Chetty v Law Society. Transvaal 1985 (2) SA 756 (A) at 765 B-E, where it was pointed out that a party showing no prospects of success will fail in an application for rescission, no matter how reasonable and convincing the reason for his default; and that a party who could "offer no explanation of his default other than his disdain of the Rules was nevertheless [not] permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success in the merits."

[16] It was common cause before us that, on dismissing the rescission application, the learned judge did not consider the appellants' prospects of success in the main case. In my opinion, the learned judge ought to have done so. Failure to do so was a fatal misdirection.

[17] In terms of Rule 39(2) of the **High Court Rules** provides that, in cases where the pleadings have been closed save where a pre-trial conference has been held the plaintiff may apply to the Registrar to set the case down for trial. If the plaintiff does not apply within 30 days after the latter of the dates in which the pleadings are closed or on which the pre-trial conference has been held, either the plaintiff or defendant may set the case down for trial. In terms of Rule 39(3) of the **High Court Rules**, provides that, at least two court days' notice of the date on which an application will be made in terms of sub-rule (2) must be given to all other parties who shall be entitled to appear before the Registrar and to state any objections they may have to the proposed date of set-down. It was common cause that this was not done *in casu*. This was completely unacceptable.

[18] Mr Letsika argued before us that the appellant's counsel was, after case had been set down, served with a notice of set down. He sought reliance on Rule 39(4) which provides that, whenever a case has been set down the party who set it down shall forthwith give written notice of such set-down to the other parties; thereafter the party who sets the case down shall withdraw such set-down only with the written consent of the other party or by order of a Judge given after application, which must have been made on notice to all other parties. In my opinion, the service of the notice of set down without the notice in terms of Rule 39(3) amounts to a compounded irregularity.

[19] The Court a quo ought to have found the Appellants' explanation for default of appearance in court reasonable and acceptable and further that the appellants did not know that their case was set to proceed on the said date and as such their default of appearance in the court was not wilful. In ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd***[4], Streicher JA remarked that:

> [24] I agree that Erasmus J in Bakoven adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there

[4] Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA).

> has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard Fraind v Nothmann 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.

[20] In light of the above considerations, the Court a quo misdirected itself in unjustifiably dismissing the rescission application when regard is had to the fact that the order which was sought to be rescinded was absolution from the instance and which was not even definitive of the rights of the involved parties.

DISPOSITION OF THE APPEAL

[21] It is clear from the discussions above that the absolution order was not properly obtained, it having been obtained in circumstances in which there had been no notice to the other party inviting them to approach the Registrar of the Court for a date. The result was that, the appellant could not attend to go and raise their opposition to the dates proposed. Absent the notice in terms of Rule 39(2) of the High Court Rules, the matter was irregularly set down for the absolution order, thereby tainting the order secured consequent thereto. In these circumstances, judgment for absolution granted in the absence of the party concerned was granted erroneously. The application for rescission was erroneously dismissed.

COURT ORDER

[22] The appeal succeeds with costs. The judgment of the Court a quo dismissing the rescission application is set aside and substituted with the order that, "the application for rescission of the order of absolution is granted with costs."

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

DR.P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

_____

N. MTSHIYA
ACTING JUSTICE OF APPEAL

For the Appellants : Mr P. Lebakeng

For Respondents : Mr Q. Letsika