IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 51/2019**
CCA/0040/2017

In the matter between:

FIRST NATIONAL BANK OF LESOTHO LIMITED **APPLICANT**

AND

LUGY'S MANUFACTURING (PTY) LTD **RESPONDENT**

CORAM: DAMASEB AJA
CHINHENGO AJA
MTSHIYA AJA

HEARD: 22 OCTOBER 2019

DELIVERED: 11 NOVEMBER 2019

SUMMARY

Applicant had failed to comply with a court order and sought rescission belatedly. Respondent brought counter-application for contempt. Court a quo holding that although it will hear contempt application first,

applicant not precluded from relying thereon to resist contempt application.

Applicant seeking leave from Court of Appeal to appeal against ruling by High Court to hear counter-application before main application. Applicant contending that such ruling offends rule 8(17) of High Court Rules 1980 which requires main application to be heard first or together with counter-application.

On appeal held that applicant's rights not finally determined as it will have opportunity to resist contempt by relying on case made in rescission. In addition, applicant's attempt to appeal encouraging piecemeal appeals.

Application for leave to appeal dismissed, with costs.

JUDGMENT

PT Damaseb AJA

Introduction

[1] This is an application for leave to appeal in terms of s 16(1)(b) of the Court of Appeal Act 10 of 1978 (the Act), against an interlocutory order of the High Court granted on 23 May 2019. The application was initially erroneously filed in the court a *quo* on 17 June 2019, followed by the subsequent filing of the application in this Court on 25 July 2019. It was then moved from the pre - October Session interlocutory roll of the Court of Appeal to the roll - call on 14 October and assigned by the President to us for allocation of a date for hearing. By consent of the parties we gave directions for the

parties to file heads of argument and for the matter to be heard on 22 October 2019. We accordingly heard the application for leave to appeal on that date. The application for leave to appeal is opposed.

[2] The parties were *ad idem* that only if leave is granted will the actual appeal be set down for hearing, and probably only during the April 2020 session of the Court of Appeal; all things being equal.

[3] The applicant (FNB Lesotho) seeks to set aside a ruling made in pending proceedings a *quo* by Molete J, directing that two competing applications by the parties be heard as follows:

(a) First the respondent's contempt application; and thereafter only;
(b) The applicant's rescission application.

[4] The application for rescission by FNB preceded the contempt application by the respondent (Lugy's).

[5] The appeal arises because FNB maintains that if the judge a *quo* properly applied rule 18(17) of the Rules of the High Court of Lesotho, the two rival applications should have been heard together, alternatively, in the order they were launched - in which case the application for rescission should have been heard first.

[6] Lugy's maintains that the order in question is a non-appealable ruling which, on the test of *Zweni*, (a) has no final effect, (b) does not dispose of a substantial part of the dispute and (c) is not dispositive of the rights of any of the parties. In addition, Lugy's states that the ruling has not made the court a *quo functus* in the sense that it cannot again revisit the issue. Above all, Lugy's position is that the ruling is purely procedural and therefore non-appealable.

[7] FNB's departure point is that because of the sequence in which the court directed the rival applications to be heard (the rescission coming last), it has become impossible for it to pursue its application for rescission which is aimed at reversing the order founding the contempt application; and that in effect it is being compelled to first comply with the very order it wants to have rescinded: A catch 22 situation, if you will!

[8] FNB insists that it is the judge a *quo*'s incorrect interpretation of rule 18(17) that resulted in the ruling it made; and that on a proper construction of that rule only two options were open to the court: to hear the two applications together or to hear the rescission first since it preceded Lugy's application for contempt.

Factual matrix

Common cause facts

[9] Lugy's held an account with FNB. Lugy's caused FNB to issue an irrevocable letter of credit to a third party abroad, Yo Young. On 15 May 2017, Lugy's approached the High Court *ex parte* on urgent basis to obtain a *rule nisi* against FNB, returnable on 23 May 2017. In so far as it is relevant to this appeal, the order reads:

> *"2. [FNB] is prohibited and interdicted to honour and make payment in terms of the letter of credit issued by [FNB] dated 29th November 2016 pending the finalization hereof.*
>
> *3. That the rule nisi is returnable on the 23rd of May 2017. Court calling upon [FNB] to show cause if any why the following orders shall not be granted:*
>
> *(a) That [FNB] shall not be permanently interdicted to honour and make payments in terms of the letter of credit issued by [FNB] dated 29th November 2016 unless it is by consent or approval of [Lugy's].*
>
> *Alternatively*
>
> *(b)That [FNB] shall not be ordered to cancel the letter of credit issued by [it] on the 29th November 2016.*
>
> *(c) That no order as to costs be made against [FNB] except in the event that they oppose this application".*

[10] The interim interdict was served on FNB on 15 May 2017. It is now common ground that FNB was fully aware of the order. It did neither anticipate it nor oppose it on the return date. A final order was consequently granted on 23 May 2017 as follows:

> "*2. [FNB] is prohibited and interdicted to honour and make payment in terms of the letter of credit issued by [FNB] dated 29th November 2016 pending finalization hereof.*
> *3. FNB is ordered to cancel the letter of credit issued by [it] on the 29th November 2016.''*

[11] Again, the final order was duly served on FNB as soon as it was granted. But FNB would not be bothered by it. Why they would not be bothered has since become apparent: it adopted the attitude that the order was bad in law. In the words of FNB's Mr Roper who deposed to the founding affidavit in support of the present application for leave to appeal:

> *[T]he application [for an interim interdict] was so flawed and bad that no court acting reasonably could act upon it. Applicant herein failed to oppose the application on a conscious understanding that in any event the resultant order will not interfere with its rights in terms of the irrevocable letter of credit.''* (Underlined for emphasis).

In other words, it could ignore the court order.

[12] In Lugy's affidavit in opposition to the application for leave to appeal, the following facts have emerged, based on the application for rescission and that for contempt of court, both of which do not form part of the record on appeal. Lugy's incorporates aspects from those applications in the affidavit filed in opposition to the

application for leave to appeal. It emerges therefrom that, contrary to the final court order, FNB proceeded to honour the letter of credit which the High Court ordered it not to.

[13] In the answering affidavit to the contempt application *a quo*, according to Lugy's, FNB's Mr Black, then Head of Business and Commercial, stated that Lugy's application for an interim interdict:

> 'was a clear fabrication and the application was intended to stop the payment when [Lugy's] was not entitled to make such a demand and consequently it had no cause of action whatsoever to obtain the interdict. The interdict was manufactured to pass loss on to [FNB].
> …
> It is admitted that [FNB] did not reverse the entry into the account of [Lugy's] and that [FNB] is entitled to do so."

[14] Some 54 days after the final order, FNB lodged an application to rescind the order of the High Court. That rescission application includes a prayer for stay of execution of the final order granted by the High Court. The application was opposed by Lugy's who, simultaneously, lodged a 'counter application' in two parts: first a stay of the application for rescission and, secondly, an order holding FNB in contempt. The order Lugy's seeks reads:

> *"Stay of rescission launched by [FNB] pending the finalisation of the counter-application launched by [Lugy's].*
> *1.2 Rule nisi issue returnable on a date to be determined calling upon FNB to show cause why-*

It should not be ordered to purge its contempt within 7 days by complying with the final Court Order granted on 23 May 2017, and to release to [Lugy's] the sum of M3,528,091.11 that remains blocked by [FNB] on the financial facility granted to Lugy's…on 11 October 2016 as a result of the debit made on its account…''

[15] When both applications were ripe for hearing, FNB sought a ruling from the High Court that its rescission application be heard before that of Lugy's counter-application. It is to that request that Molete J made the order that is the subject of the present application for leave to appeal.

[16] Where a court is faced with a main application and a counter-application, rule 18(17) states:

> [T]he court may in its discretion post-pone the hearing of the [main] application so that it be heard together with the counter-application".

The Law

[17] In terms of section 16 of the Act:

"An appeal shall lie to the court –

(a) from all final judgments of the High Court;

(b) by leave of the court from an interlocutory order, an order made ex parte or an order as to costs only."

[18] Since this is an application for leave to appeal, the applicant must demonstrate that it has prospects of success in respect of the High Court's ruling.

[19] It is trite that a ruling on interlocutory proceedings or on a procedural issue, is generally not appealable. Apex courts discourage piecemeal appeals on matters pending before a trial court. The rule has been expressed in Namibia in the following terms:

> *'The rational of the non-appealability of interim orders is to avoid piecemeal appeals which is unnecessarily expensive and that it is desirable that such issues be resolved by the same court and at one and the same time.'*[1]

[20] Where, however, the trial court authoritatively interprets a provision which leads to the interlocutory ruling it makes, an appeal court has allowed an appeal if the interpretation is erroneous.[2]

[21] Mr *Louw* for the respondent has argued that the latter line of authority is distinguishable because the judge *a quo* did not interpret rule 18(17) but only exercised a discretion on the facts before him. I find it unnecessary to decide if indeed the judge interpreted the rule erroneously in view of the conclusion to which I come that the order made by the judge a *quo* does not preclude FNB from resisting the

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[1] *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) at 174D-176C; Ministry of Finance v Hollard Insurance Company of Namibia (P8/2018)[2019] NASC (28 May 2019).
[2] CUSA v Tao Ying Metal Industries 2009 (2) SA 204 (CC) at 225A-C, para 68.

contempt application based on the averments and contentions (both of fact and law) made in the rescission application.

The High Court

[22] Molete J took the view that when the contempt application is heard, FNB will have the opportunity to show cause why it should not be held in contempt. By hearing the contempt application first, the learned judge stated, FNB will not be denied 'an opportunity to put forth its reasons for failure to comply, hence, in a way, their reasons for rescission will still be heard while arguing contempt.'

[23] The judge's approach took into consideration the fact that if it were otherwise, and FNB was allowed to have the rescission determined before the contempt application, it would be encouraging disobedience of court orders. As the learned judge *a quo* put it, doing so 'would render orders made by this court frivolous and ineffective and to be obeyed by parties only when it suits them'. The judge made that comment against the backdrop of the common cause fact that FNB, although having notice of the interim order returnable on a stated date, chose to simply ignore the consequences that would flow from it being made final and took a considerable period of time before it sprang into action to set it aside.

Submissions on appeal

[24] Mr. *Mpaka* appeared for FNB and Mr *Louw* (assisted by Mr *Molapo*) for the respondent. According to Mr *Mpaka*, it is necessary for this court to grant leave to appeal in order to give guidance to the High Court on the proper interpretation of rule 18 (17). Counsel argued that the order of the judge a *quo* in relation to rule 8(17) offends a settled principle that where there is a main and a counter-application, the former should be heard first or that the two applications be heard together.

[25] Mr Louw for Lugy's argued that the order made by Molete J is in the nature of a non-appealable ruling on a procedural matter which has no final effect and is not definitive of the parties' rights. Counsel submitted that the tenor of section 16 of the Act is that this Court should not interfere in matters that have not been finalised, unless circumstances warrant interference. Relying on *Zweni v Minister of Law and Order*[3], counsel argued that an interlocutory order which is not final, not definitive of the rights of the parties and not having the effect of disposing of at least a substantial portion of the relief claimed in main proceeding, is not appealable. He concluded that the order of the 23 May was a mere procedural ruling or directive with no final effect and thus falling outside the purview of s 16.

Discussion

[3] 1993 (1) SA 523 (A) at 535-536

[26] As I already demonstrated, the learned judge a *quo* made clear in his ruling that when the contempt application is heard, FNB will have the opportunity to rely on averments made in the rescission application to resist it. In my view, that is a very practical and common–sense approach.

[27] The ruling by the learned judge that the rescission application will only be 'heard' after the contempt application must be understood in its proper context: that the court will not determine its merits by giving a legally binding and final order thereon until it has first considered the question whether FNB wilfully and without good cause disobeyed a court order. What it does not mean is that, if the case (both in law and in fact) made by the applicant in the rescission application throws serious doubt on the contempt application, the trial judge can ignore it. In fact that was correctly accepted by Mr *Louw* for the respondents as the correct position.

[30] The real complaint by FNB is not so much that it wants both matters heard together (*that* it is being effectively afforded by the judge) but that it wants the rescission application to precede the contempt application. I agree with the learned judge *a quo* why that is not desirable.

[31] The mischief behind the rule against piecemeal appeals is so acutely demonstrated by the facts of this case. If we grant leave to

appeal, the appeal against the High Court's ruling will be set down for hearing, probably in the April 2020 session of the Court of Appeal. When the appeal is actually heard next year, this court will have to determine whether or not to allow the appeal against the judge's ruling.

[32] If the appeal is allowed (or dismissed for that matter) the parties will return to the trial judge for the determination of the competing applications, either in the order determined by this court (if the appeal succeeds) or in the order already determined by the High Court if the appeal fails.

[33] The outcome of the court's adjudication on whatever application is determined by the High Court (rescission or contempt, or both) will then be appealable to this court, in all probability in the second session of the Court of Appeal in 2020. That is a most undesirable state of affairs which adds to why the present application should not be allowed, if regard is had to the fact that FNB is not precluded from resisting the contempt application on the strength of it rescission application.

Conclusion

[34] The ruling made by the High Court does not finally dispose of the rights of the applicant. FNB is not precluded by the ruling to rely on its case in the rescission to resist the contempt application. All

that the court will not do is to determine the rescission application finally on the merits.

[35] I am satisfied therefore that there are no prospects that this court will reverse the ruling of the High Court as regards the sequence in which the competing applications are to be heard. The application for leave to appeal must therefore fail and costs must follow the result.

[36] Lugy's counsel requested that we grant a special costs order against FNB for the reprehensible manner in which it conducted itself both in respect of its attitude towards the orders of the High Court and the inept manner in which the present proceedings were pursued. I am reluctant to agree to that request considering that the matter will proceed before the High Court to hear the competing applications in the sequence that court ordered.

[37] It will be prejudging the issue if we imposed a special costs order on the basis advanced by Mr *Louw*. The High Court will be better placed to make that judgment having considered the matter in its totality. As for the inept manner in which the application for leave to appeal was pursued, I am not satisfied that an ordinary costs order will not be a sufficient recompense to Lugy's.

Order

[38] I therefore make the following order:

1. The application for leave to appeal is refused.
2. The applicant shall pay the respondent's costs.

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P.T DAMASEB

ACTING JUSTICE OF APPEAL

Chinhengo AJA:

[39] I am in agreement with the reasoning and conclusion of my brother Damaseb AJA, but I think it is necessary for the future guidance of the High Court to deal directly with Molete J's direction on the procedural issue before him. In dealing with Mr *Louw*'s argument (at paragraph [21] of the lead judgment) that 'the latter line of authority is distinguishable because the judge *a quo* did not interpret Rule 18(17) but only exercised a discretion on the facts before him', the learned judge of appeal said-

> "I find it unnecessary to decide if indeed the judge interpreted the rule erroneously in view of the conclusion to which I come that the order made by the judge a *quo* does not preclude FNB from resisting the contempt application based on the averments and contentions (both of fact and law) made in the rescission application".

[40] I respectfully take a slightly different view of the matter. Molete J stated the following in the last two paragraphs of his ruling -

> "[21] The result is therefore that an application for rescission of a court order cannot be heard until contempt application has been heard and finalised. Failure to do so would render orders of this court frivolous and ineffective and to be obeyed by the parties only when it suits them.
>
> [22] We will proceed then to hear the contempt application and the question of costs is reserved."

[41] Rule 8(17) provides one and only one way of handling a main application and a counter-application. It states in clear terms that –

> "The period provided with regards to applications shall apply *mutatis mutandis* to counter-applications;
>
> Provided that the court may in its discretion postpone the hearing of the application so that it be heard together with the counter-application."

[42] The Rule quite clearly provides that where an application has been set down and a counter-application is launched in relation thereto, ordinarily the main application must be heard first and then the counter-application. However, the Rule goes further in the proviso to give the court a discretion to postpone the hearing of the main application so that it can be heard together with the counter-application. The exercise of discretion is therefore restricted by this

Rule to two approaches only: either the court hears the main application first and disposes of it and then hears the counter-application OR it postpones the hearing of the main application and hear it together with the counter-application. Concerning this issue and dealing specifically with claims and counter-claims, Van Winsen in *The Civil Practice of the Supreme Court of South Africa*, 4ed. at p511-512says-

> "The rule that judgment on a claim in convention may be stayed pending the decision of a counter-claim was applied by the courts before express provision to that effect was introduced by the uniform rules of court. It has been held that the common-law rule is still applicable to motion proceedings.
>
> The premise of the rule is that the claim and counter-claim should be adjudicated *pari pasu*, but the court has a discretion to refuse to stay judgment on the claim in convention. The discretion is wide, and is not limited to cases in which the counter-claim is frivolous or vexatious and instituted merely to delay judgment on the claim in convention…
>
> Generally the attitude of the courts is that claim and counter-claim should be adjudicated upon together, and that even when the claim is admitted there should not be a separate judgment in respect of the claim in convention, but that this should wait until the counter-claim has been decided upon. The desirability of following such a procedure was stressed in the case of *Mauritz Marais Bowers (Pty) Ltd v Carizette (Pty) Ltd* [1986 (4) SA 439 (O)], more especially in view of the potential danger of arriving at conflicting findings should the case proceed piecemeal."

[43] Rule 8(17) has changed the position at common law by making specific provision as to how a court must handle an application and a counter-application: either an application is heard first or in exercise of the court's discretion, it is postponed and heard together with the counter-application. I am of the view that the following statement by my Brother sustains view I take of the matter:

> "[26] As I already demonstrated, the learned judge a *quo* made clear in his ruling that when the contempt application is heard, FNB will have the opportunity to rely on averments made in the rescission application to resist it. In my view, that is a very practical and common–sense approach.
>
> [27] The ruling by the learned judge that the rescission application will only be 'heard' after the contempt application must be understood in its proper context: that the court will not determine its merits by giving a legally binding and final order thereon until it has first considered the question whether FNB wilfully and without good cause disobeyed a court order. What it does not mean is that, if the case (both in law and in fact) made by the applicant in the rescission application throws serious doubt on the contempt application, the trial judge can ignore it. In fact that was correctly accepted by Mr *Louw* for the respondents as the correct position.

[44] The above statement acknowledges the fact that the two applications will in substance be heard together, hence at paragraph [30] the learned judge of appeal states that the hearing together of the two applications has been "*effectively afforded*" to the applicant.

[45] Whilst I agree entirely that the application for leave to appeal should not succeed for all the reasons given in the lead judgment, I consider that it is only proper that a correct interpretation of Rule 8(17) should be given by this Court: it is that where in response to an application, a counter-application is filed, the rule gives the court the discretion to hear the application on its own or to postpone the hearing so that that application can be heard together with the counter-application. The Rule does entitle a judge, in exercise of discretion, to order or direct as did the judge *a quo,* that "the rescission of a court order cannot be heard until contempt application *has been heard and finalized*."

[46] Where a wrong interpretation has been given to a rule of procedure and the potential exists, as in this case, that other judges may follow that interpretation, there would be no harm for this Court to give the correct interpretation. To me it really does not matter that the need for it arises as an appeal proper. It can arise in an application for leave to appeal as has happened here. I am particularly attracted to the view expressed in the lead judgment at paragraph [20] that if "the trial court authoritatively interprets a provision which leads to the interlocutory ruling it makes, an appeal court has allowed an appeal if the interpretation is erroneous." And that is the case here. The High Court has authoritatively interpreted Rule 8(17) and that interpretation is erroneous. There is no other Rule, apart from Rule 8(17), in terms of which the learned judge would have given the directions. In my view, his interpretation has to

be corrected even though that interpretation is not squarely before this Court, as ably demonstrated by my Brother. Not only is there *the potential* of giving conflicting judgments if the applications are heard separately, but there is also the potential that other judges and legal practitioners may adopt that erroneous interpretation. The correct interpretation of the Rule appears at paragraph [45] above. Otherwise I totally agree with the reasons and order prepared by my Brother.

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M H CHINHENGO

ACTING JUSTICE OF APPEAL

I agree,

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T. MTSHIYA

ACTING JUSTICE OF APPEAL

For the Appellant: Adv. T Mpaka

For the Respondent: Adv. H. Louw

(Assisted by Adv. L Molapo)