**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.49/2017**

In the matter between:

**LEBOHANG MONAHENG** **APPELLANT**

**AND**

**MOJALEFA MAPILOKO** **RESPONDENT**

**CORAM:** K.E. MOSITO P

P.T. DAMASEB AJA

P. MUSONDA AJA

**DATE HEARD:** 18 OCTOBER 2019

**DELIVERY:** 01 NOVEMBER 2019

***SUMMARY***

*Civil Procedure – application of High Court Rule 45(1)(a) in terms of which a court is empowered to set aside a default judgment erroneously sought and granted in the absence of a party affected thereby. Rescission of default judgments –Interpretation of Rule 45(1)(a) – order granted in the absence of the appellant.*

*Company law – 'Pierce' or 'Lift' – Why 'Pierce' or 'Lift' the Corporate Veil – The court a quo was not justified to have sought to lift or pierce the veil.*

*Pleadings – parties had to be strictly held to their pleadings – Negligence having been the only cause of action pleaded, plaintiff had to be strictly held thereto.*

*Appeal upheld and matter remitted to the High Court – application for rescission granted – Costs of the appeal and application for rescission to be costs in the costs.*

**JUDGMENT**

**K.E. MOSITO P**

**Introduction**

[1] This is an appeal against the dismissal of an application for rescission of an order for default judgment. The present respondent sued the appellant for damages in the High Court, arising out of a motor vehicle collision which occurred on 10 August 2017. In the summons and declaration in CIV/T/755/15, the plaintiff approached the High Court in an action in which he claimed:

> *"1. Payment of the sum of M1,500.00 for pulling the car from the accident scene to the place of repair.*
>
> *2. Payment of the sum of M57,623.13 as damages for fixing the car.*
>
> *3. Payment of the sum M49,136.49 as damages for fixing the car dash board.*
>
> *4. Payment of the sum M97,206.87 as damages for loss of income for two months, and eight days.*
>
> *5. Payment of the sum of M9,500.00 as damages for expenses for the (driver) employee. (Present and future).*

6. *Payment of the sum of M7,200.00 as salary for the E2 driver, which the Plaintiff still pays to him.*
7. *18.5% interest from the date of judgment to the date of payment thereof.*
8. *Cost of suit.*
9. *Further and/or alternative relief."*

[2] The appellant did not oppose the action and the learned judge *a quo* granted a default judgment on 13 June 2016 against the appellant. What seems to have happened is also that, the learned judge lifted the veil of incorporation of a company which was not a defendant and granted judgment against the appellant on the basis that, the appellant was the owner of the vehicle which had caused the accident. More about this later.

[3] The plaintiff's attorney set the case down for default judgment and in due course, on 13 June 2015, Nomngcongo J ordered default judgment against the appellant. In due course, on 11 July 2016, the appellant moved an application for rescission of the said default judgment in terms of rule 45(1)(a) before Monapathi J. A *rule nisi* was issued returnable on 8 August 2016. The application was opposed by the present respondent and it served before Nomngcongo J on 9 August 2016 and he dismissed it with costs. The appellant was not satisfied with the dismissal of the application and he came on appeal to this Court.

**Parties**

[4] The present appellant is Lebohang Monaheng, an adult Mosotho male of Maqhaka, in the district of Berea. He was a defendant in the court a quo. He was the owner of a motor vehicle, with registration number D 5425, which was involved in a collision with a motor vehicle, with registration number A 5478. The present respondent, Mojalefa Mapiloko, was the plaintiff. He is a male Mosotho adult of Ha Abia, in the district of Maseru. He was sued by the present respondent, allegedly as the owner of a motor vehicle, with registration number A 5478.

**Factual matrix**

[5] The facts are not complicated. The present appellant was the defendant in an action instituted by the present respondent in which default judgment was taken against him. They are that, on 12 August 2015, and at and near the Teya-Teyaneng river [in the Berea District], a motor vehicle collision occurred between a motor vehicle bearing Registration No.D5424 and one bearing Registration No. A 5478. The vehicle bearing Registration No.D5424 was being driven by the plaintiff's driver, one Makhoromeng Mpholo while vehicle A 5478 was being driven by a driver whose name is not disclosed.

[6] According to the declaration, the collision was due to the sole negligence of the driver of vehicle, A 5478. As a result of the said collision, plaintiff claimed damages in the High Court in the sum of M222, 166.49 (Two hundred and twenty two thousand, one hundred and sixty six maloti, and forty nine lisente).

[7] The appellant then brought the rescission application complaining that the default judgment had been granted erroneously against him, as he was not the registered owner of the motor vehicle, A5478. He also further complained that he had sold the said vehicle to one Sello Mofokeng; and, annexed a letter of sale to his affidavit. He further averred that even the driver of the vehicle at the material time of the accident, was not performing any act within the scope of the appellant's employ and as such, the appellant was not vicariously liable for the negligence of the driver.

**Issues for determination**

[8] There are three issues. The first is whether the judgment can properly be rescinded in terms of rule 45(1)(a). The second issue is whether the appellant has shown sufficient cause for rescission of the default judgment. The third issue is whether the High Court was entitled to find against the appellant simply because it considered him the owner of the offending motor vehicle.

**The law**

[9] The application for rescission before the learned judge was based on rule 45 (1) (a) of the High Court Rules. Rule 45(1)(a) provides that the High 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. The prerequisites that the Applicant requires to satisfy under this sub-rule are the following:

8.1 the default judgment must have been erroneously sought or erroneously granted;
8.2 such judgment must have been granted in the absence of the Applicant; and

8.3 the Applicant's rights or interest must be affected by the judgment.

[10] The question thus arises what is the meaning of the words *"erroneously granted"*? The first meaning of the words is dealt with in **Bakoven Ltd v G J Howes (Ptv) Ltd** [1] where it is stated:

> *"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."*

[1] Bakoven Ltd v G J Howes (Ptv) Ltd 1990(2) SA 446 at page 471 E to H.

[11] The second meaning of the words is dealt with by Chinhengo, AJA in this Court in ***Leen v First National Bank (Pty) Ltd***,[2] where it is stated:

> *[28] … A judgment is granted in error if, as stated in Nyingwa v Moolman 1993(2) SA 508 at 510 (referred to by the judge a quo) 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 not disputed that on the day that the application for rescission was dismissed the appellant was not present, neither was his counsel and that on the day that the application was first heard and then adjourned appellant's counsel had only made part of his address to the court.*

[11] Accordingly the words *"erroneously granted"* have two meanings: the first meaning is that, the Court must have committed a mistake in law, which appears from the record of the proceedings itself. The second meaning is that, at the time of the issue of the judgment there existed a fact of which had the judge been aware, he would not have granted the judgment. In ***Mutebwa v Mutebwa and Another***[3], Jafta J stated that:

> *"Although the language used in rule 42(1) [our Rule 45(1)] indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act mero motu or upon application by an affected party. The Rulemaker could not have intended to confer upon the Court a power to refuse rescission in spite of it being clearly established*

[2] Leen v First National Bank (Pty) Ltd (C of A (CIV) 16A of 2016.
[3] Mutebwa v Mutebwa and Another 2001(2) SA 193 at page 194 E-G.

> *that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby a rescission judgment of the judgment should be granted."*

[12] Accordingly the discretion the Court has to grant rescission under this Rule is an extremely narrow one. Once an Applicant has established the prerequisites in terms of Rule 45(1)(a), the Court is obliged to grant rescission of judgment where there is an error of law *ex facie* the summons and declaration and, accordingly if default judgment was granted by the Court, it was erroneously granted.

[13] Thus, the rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially.[4]

**Evaluation of the appeal**

[14] I turn now to a consideration of the grounds of appeal. It is an indubitable fact that, the grounds of appeal are somewhat inelegantly drafted and long-winded. It is however, discernable as to, upon which aspects of the decision of the learned judge the appellant has predicated his complaints. The first ground

[4] *Theron NO* v *United Democratic Front (Western Cape Region) and others 1984 (2) SA 532 (C) at 536G; and Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another 1992 (4) SA 852 (A) 862J – 863A.*

of appeal is that, the learned Judge erred in refusing to grant rescission while at the same time ignoring the appellant's evidence that the vehicle registered A5478, which used to belong to appellant had been sold to one Sello Molelekoa. The ground goes further to state that, at the time of the accident, appellant was neither the owner nor possessor of the said vehicle, nor was he employed as a driver of the appellant. It is further asserted that, the vehicle belonged to a company of which appellant was a sole director. Thus, the complaint is that, it was wrong for the court to have held that it was mandated to only look at the title of the said vehicle. The ground concludes that, the appellant could therefore, not be held personally liable.

[15] It was common cause in this Court that the judgment had, in the circumstances of this case, been erroneously granted. We were informed that the driver of the vehicle, *registered A5478,* had not been joined as a party in the action. A careful perusal of the declaration reveals that in terms of paragraph 4.4 of the declaration, 'the collision was caused by the sole negligence of the E1 driver [driver of vehicle Reg. No. A 5478].' However, *ex facie* the record, the said driver does not come into the picture as a party to the action. This was a mistake in a matter of law appearing on the proceedings of a Court of record. This [non-joinder] is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be

interested, but who have had no opportunity to present their case.[5] Even on this basis alone, the default judgment had been granted in error.

[16] The appellant complains that, it was wrong for the learned judge to lift the veil of incorporation of a company which was not even before him as a party. There is of cause no doubt that in our law, the separate personality of a company may be ignored if the company is a mere 'sham' or 'façade'. As Lord Macnaghten said in ***Salomon v A Salomon and Co Ltd***[6]:

> *"The company is at law a different person altogether from the subscribers and though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are the members liable, in any shape or form, except to the extent and in the manner provided by the Companies Act."*

[17] The separate personality of a company may be 'pierced' if public policy makes it undesirable to recognise such separate personality, and then only to the extent of avoiding the undesirable effects. The 'piercing' or 'lifting' of the corporate veil

[5] *Jonathan v Lephole (C of A (CIV) 5 of 2017) 2018. See also Masopha v Mota 1985 – 1989 LAC 58. Basutoland Congress Party and Others v Director of Elections and Others 1995 – 1999 LAC 587at 599; Theko and Others v Morojele and Others 2000 – 2004 LAC 302 at 313 – 314. Lesotho District of the United Church v Rev. Moyeye and Others 2007 – 2008 LAC 103; Nalane (born Molapo) and Others v Molapo and Others 2007 – 2008 LAC 457 at para [17].*

[6] Salomon v A Salomon and Co Ltd [1897] AC 22.

can be done in terms of common law principles or in terms of statutory provisions.

[18] The court's power to ignore the separate personality of a company was evident from the Salomon case itself when Lord Watson said that he was prepared to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequences incur personal liability.[7] Nevertheless, there is considerable judicial and academic consensus in favour of limited veil-lifting principle for purpose of relevant wrongdoings, to avoid abuse of separate personality.[8]The rational for a veil-lifting principle in company law is the law's fundamental assumption of honest dealings, that is, that the normal incidents of legal relationships between persons will not necessarily be expected where their dealings have not been honest. In the case of ***United States v Milwaukee Refrigerator Transit Co***,[9] the court expressed the principle as follows:

> *"If any general rule can be laid down … it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to contrary appears, but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud,*

[7] Cheng-Han T (1999) "Piercing the Separate personality of the Company: A Matter of Policy?" Singapore Journal of Legal Studies at 533.
[8] Bull S (2014) "Piercing the corporate veil in - England and Singapore" Singapore journal of Legal Studies at 28.
[9] (1906) 142 F 247 at 255.

> *or defend crime, the law will regard the corporation as an association of persons."*[10]

[19] The scope of the principle is limited to evasion and concealment. Evasion of existing obligation occurs when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he or she deliberately frustrates by interposing a company under his or her control.[11]

[20] Thus, from a civil procedure perspective, it seems to me that 'lifting' and 'piercing'[12] must be preceded by either an application to the court or as a result of the court having invited the parties to address it on why it should not lift or piece the veil. In the present case, there was neither an application for the lifting of the veil, nor were the parties invited to address them thereon. In the English case of ***Faiza Ben hashem v Shayif*** [13]the court set the following principles regarding when a court may 'pierce' the corporate veil:

(a) Ownership and control of a company are not of themselves sufficient to justify 'piercing' the veil.

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[10] Cheng-Han T (1999) "Piercing the separate personality of the company: A matter of policy?" Singapore Journal of Legal Studies at 541.
[11] Bull S (2014) "Piercing the corporate veil in - England and Singapore" Singapore journal of Legal Studies at 29.
[12] In Atlas Marinetime Co SA v Avalon Maritime Ltd, The Coral Rose (N0 1) [1991] 4 AII SA 769 the two concepts are not synonymous. Staughton LJ defined 'piercing' or 'lifting' the corporate veil as: "To 'pierce' the corporate veil as the expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities of its shareholders. To 'lift' the corporate veil or look behind it , on the other hand, should mean to have regard to the shareholding in a company(in other words to its controllers) for so me legal purpose." See also, PwC South Africa (2013) "Piecing the corporate veil: Section 20 (9) of the Companies Act 2008" Tax Professional (Quarter 2) at 12.
[13] [2008] EWHC 2380 (Fam).

(b) The court cannot 'pierce' the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interest of justice.
(c) The corporate veil can only be 'pierced' when there is some impropriety.
(d) The company's involvement in an impropriety will not by itself justify a 'piercing' of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability.
(e) It follows that if the court is to 'pierce' the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing.
(f) A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as façade at the time of the relevant transaction(s).
(g) The court will 'pierce' the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court 'pierces' the veil for one purpose does not mean that it will necessary be 'pierced' for all purposes.

[21] On a similar note, in the most recent judgment of ***Prest v Petrodel***[14], Sumption J. confined the lifting of the veil to only two situations, namely, (a) the "concealment principle", akin to the sham or façade exception; and (b) the "evasion principle", being the fraud exception.[26] Deciding not to pierce the corporate veil on the facts, this case once again reinstated the Salomon rule.

[22] In light of the foregoing principles, which I would adopt in this case, I am of the view that, the learned judge was not entitled to pierce or lift the veil of incorporation of the said company so as to enable the court to get at the appellant. In

[14] 2013 UKSC 34.

addition, the appellant was not the driver of the said vehicle. All these render what occurred completely inexplicable.

[23] There is one other reason why the rescission application ought to have been granted. It is this that, the learned judge had granted the default judgment against the appellant, not on the basis that the appellant was in any way negligent in driving the vehicle, but rather that he was the owner of the vehicle. This was wrong in law. The heart of the dispute in the case before the learned judge *a quo* was negligence resulting from a motor vehicle accident. Regrettably, what started off as a simple motor collision dispute between the parties degenerated into a ding-dong legal contest, even touching on the lifting or piercing of the veil of incorporation of a company which was not a party to the litigation.

[24] It must be said at once that the court a quo's remarkable *volte face* is, with respect, even more puzzling when approached in the light of the clear allegations of negligence pleaded in the declaration. The issue which remains arises for determination in this appeal in these circumstances is, therefore, whether the court a quo was justified in adopting this approach? Put differently, was it proper for the court a quo to determine the issue on the basis of a cause of action preferred by the court and not on the basis of the cause of action as pleaded by the parties to the litigation?

[25] It is trite that a case can only be decided by the court on the pleadings and evidence before it. It is not for the court to make out a case for the litigants. Nor can this Court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded (See ***Voet 5.1.49 Gane's Translation Vol.2 at 60)***.[15] In ***Durban v. Fairway Hotel Ltd***[16],Tredgold J stated that, the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed. Thus, I consider that the plaintiff ought to have been restricted to the cause of action which he relied upon in his declaration, just as if he had stated in a pleading that that was his only cause of action.

[26] Negligence is a cause of action for delictual liability. The plaintiff must allege and proof that the defendant was negligent in driving the motor vehicle in the manner he did resulting in the accident in question.[17] The onus is on the plaintiff to establish that a reasonable person in the position of the defendant: (i) would foresee the reasonable possibility of his conduct (whether an act or omission) injuring another in his person or property and causing him patrimonial loss;(ii) would

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[15]In *Robinson v. Randfontein Estates G.M. Co. Ltd 1924 AD 173* at 198 Innes CJ stated the principle on pleadings in these terms:- *"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."*

[16] *Durban v. Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082* Tredgold J expressed the principle in these terms:-

[17] Eversmeyer (Pty) Ltd v Walker (3) SA 384 (T).

take reasonable steps to guard such occurrence and that the defendant failed to take such steps. Thus, the negligence of the driver of the motor vehicle A 5478 was the only cause of action.

[27] In fairness to Advocate Hlaele for the respondent, she properly and immediately conceded that the appeal should succeed for the non-joinder of the driver; the impropriety of lifting the veil as well for the presence of prospects of success. She went further to suggest that the court should permit the rescission application; remit the matter to the High Court to be proceeded with in the ordinary order of things and that costs be costs in the cause.

**Disposition**

[28] In the light of the above discussions, the following orders are made:

1. The appeal is upheld.
2. The order of the Court a quo is set aside and substituted with the order that, “the application for rescission is granted.”
3. The matter is remitted to the High Court to be proceeded with in terms of the procedures of that Court.
4. Costs of the application for rescission and costs of this appeal shall be costs in the cause.

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**K.E. MOSITO**

**PRESIDENT OF THE COURT OF APPEAL**

I agree:

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**P.T. DAMASEB**

**ACTING JUSTICE OF APPEAL**

I agree:

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**P. MUSONDA AJA**

**ACTING JUSTICE OF APPEAL**

**For Appellant:** Adv L. Ketsi

**For Respondent:** Adv M. Hlaele