IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 03/2020**

CIV/APN 254/2016

In the matter between:

GLORIA MAPHOKA MAKAKOLE	**1ST APPELLANT**
PHOKA MAKAKOLE	**2ND APPELLANT**

AND

MAKHABANE MAKAKOLE	**1ST RESPONDENT**
MAILI MAPOLO MORETLO	
(Born MAKAKOLE)	**2ND RESPONDENT**
MAMOEKETSI SEHOLOHOLO	
(Born MAKAKOLE)	**3RD RESPONDENT**
MASTER OF THE HIGH COURT	**4TH RESPONDENT**
ATTORNEY- GENERAL	**5TH RESPONDENT**

CORAM **P.T. DAMASEB, AJA**

Dr J. VAN der WESTHUIZEN, AJA

N.T. MTSHIYA, AJA

DATE HEARD: **18 MAY 2020**

DATE DELIVERED: **29 MAY 2020**

Summary

Civil procedure- rescission application agreement by consent made an order of court- grounds for rescission being that the legal representative of appellants had no mandate to enter into the compromise agreement and to apply that it be made an order of court- whether there is proof that legal representative had no mandate to enter into the compromise agreement and thus justifying application for rescission- can application for rescission be considered without condonation being granted- appeal dismissed for want of condonation in the court a quo.

JUDGMENT

MTSHIYA AJA

INTRODUCTION

[1] This is an appeal wherein the parties have, in terms of rule 30 (5)(b) of the Court of Appeal (Amendment) Rules 2020, agreed that the court determines the matter on the basis of the record and submissions.

The proceedings were commenced by way of civil summons. The appeal is against the judgment of the High Court wherein it ruled in favour of the respondents who on 17 August 2017 succeeded in having a deed of settlement signed by the parties' legal representatives on 16 August 2017 being made an order of court by consent. The order was granted in the presence of both parties' legal representatives.

The Deed of Settlement which became an order of court provided as follows:

> "Whereas this matter is opposed:
>
> Now wherefore the parties' agree as follows and are desirous of having this Deed of Settlement made an order of court:

1. The parties agreed to abandon all facts and allegations made in their exchanged Affidavits excerpt those in support of the late reporting of death and estate of the late Lebenya Nicolas Makakole and Mamaili Jusina Makakole.
2. The parties further agreed that the estate of the late Lebenya Nicolas Makakole and Mamaili Justina Makakole should be administered in terms of **Administration of Estates Proclamation no.19 of 1935**.
3. The applicants be granted prayer 1 by consent and upon the discretion of this Honorable Court."

[2] On 19 February 2019, the appellants filed a Notice of Motion seeking the following relief:

> "1. Dispensing with the operation of the rules of court pertaining to modes and periods of service owing to the urgency hereof.

2. That Rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:

a. The execution in **CIV/APN/254/2016** shall not be stayed pending finalization of rescission application.
b. The court order in **CIV/APN/254/2016** shall not be set aside and rescinded as having been erroneously granted.
c. Condoning the late filing of the present application.
d. The respondent shall not be ordered to pay costs of this application.
e. Granting applicant such further and/or alternative relief as this Honourable Court may deem fit.

1. That prayer 1 and 2(a) operates with immediate effect as an interim court order."

On 13 December 2019, the High Court, after considering the merits of the case and the application for condonation issued the following order:

"1. The application is dismissed with costs.

2. The interim order granted on 18 September 2019 is discharged."

[3] Displeased by the court a quo's decision given above, the appellants now appeal against that decision. The grounds of appeal are listed as follows:-

"1. The Learned Judge in the Court a quo erred/ misdirected himself by deciding as he did that the appellants had given legal mandate to their legal representative to enter and sign a deed of settlement, which was made an order of court. The court misdirected itself in this regard as the court disregarded the pleadings of the appellants presented before the court.

> 2. The Learned Judge in the Court a quo erred/ misdirected himself in deciding that, the appellants attended a meeting of the 7th of February 2019, called by the 4th Respondent. This is more so as the pleadings before the court does not make reference to appellants attending the said meeting.
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> 3. The Learned Judge in the Court a quo erred/ misdirected himself in holding as he did and dismissing rescission application, the learned judge erred on the basis that the rescission application was based on consent order which consent order was fraudulently obtained.
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> 4. The Learned Judge in the Court a quo erred/ misdirected himself in refusing to set aside the court order that was erroneously granted as a result dismissing rescission application.
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> 5. The appellant reserves the right to file such further and or better grounds of appeal after it has received written judgment and as permitted by the Rules of the Honorable Court."

It is important at this stage to note that under prayer 2 (c) in the Notice of Motion, the appellants sought condonation for late filing of the rescission application. However, the above grounds of appeal are silent on the issue of condonation, which the *court a quo* did not grant. We shall come to that issue later.

BACKGROUND

[4] The facts of this case are that the first appellant, who resides in Pretoria in South Africa, is the widow of the late Ikaneng Makakole who was one of the beneficiaries to the estate of the late Lebenya Nicolas Makakole. The second appellant is the son of the first appellant.

The first to the third defendants are the children of the late Lebenya Nicolas Makakole and Mamaili Jusina Makakole, whose estate is in dispute. The fourth respondent is the Master of the High Court, whose duty is to administer deceased estates and the fifth respondent being an arm of the Government who are the Government's legal advisors and practitioners.

[5] Under their marriage, the late Lebenya Nicolas Makakole and Mamaili Jusina Makakole were blessed with five children, namely:

1. Maili Makakole
2. Ikaneng Makakole (deceased) –Gloria Maphoka Makakole(widow &executor)
3. Makhabane Makakole
4. Mamaphathe Makakole
5. Thato Makakole

[6] Lebenya Nicolas Makakole passed away before his wife who then became the executor of the estate. Mamaili Justina Makakole then also passed away without a will.

[7] After the deaths of the parents Ikaneng Makokale assumed the role of executor before he passed away. Upon his death, his wife who is the first appellant in this case then assumed the role of her late husband by becoming the executrix of the estate of her parents' in-law.

[8] A dispute then arose resulting in the consent order of 17 August 2017. The dispute prior to the Deed of Settlement is not fully explained in the papers. What we only have is the following from the first appellant who in her founding affidavit, in part, states:

> "4.1 I am the first respondent in the main matter and the now 2nd applicant is the 2nd respondent in the main, and the 1st to 3rd respondents are the applicants in the main matter. The main matter involves the prayers by the applicants (now respondents) whereby the applicants seeks the order in that the court condone the late reporting of the estate of the late Lebenya Nicolas Makakole and Mamaili Justina Makakole. The said application was vehemently opposed and the necessary papers were duly filled, I have been advised and verily belief the same to be true and correct."

[9] It is common cause that the Deed of Settlement which became a consent order was signed by the parties' respective legal representatives. It is also common cause that it is the parties' legal representatives who, on 17 August 2017, moved the *court a qu*o to turn the Deed of Settlement into a court order.

[10] The appellants profess lack of knowledge about the existence of both the Deed of Settlement and the court order. It is precisely because of this position of the appellants that we now have this appeal wherein the main reliefs sought are:

a. Stay of execution of the court order.
b. Setting aside the court order for the reason that it was erroneously obtained.

[11] On their part the respondents argue that the appellants where aware of the court order as far back as 2nd November 2017. To that end, the respondents, in their answering affidavit aver, in part, as follows:

> "4.2 It is amazing to note that the applicants are praying this Honorable Court to treat this matter as one of urgency because the court order made on the 17th August 2017 which was executed while they are, the 1st applicant in person, part of the executors of the said order for the fact that she attended to the meeting at the Master of the High Courts' offices in terms of Legal Notice No 41 of 2017, held in compliance with the said court order.
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> 4.3 The 1st applicant also personally appointed the court executor of the estate of the late Lebenya Nicholas and Mamaili Justina Makakole. I beg leave to attach a copy of the Government Gazette to that effect as well as the minutes and attendance list of the Master of the High Court's meeting held on the 2nd November 2017 and mark them annexure "A", "B" and "C" respectively. This clearly shows that this application is not urgent stand to be dismissed.
>
> 5.1 The 1st applicant had appointed a Legal Representative, the Erstwhile, Advocate Koto who represented her in a Land Court matter under LC/APN/42/2013. She also appointed Advocate Koto in this matter which was lodged in the 5th July 2016 which was finalized on the 17th August 2017, still under her valid mandate.
>
> 5.2 At all material times the Applicants were well aware that there is a dispute before the court between the parties and had an obligation to follow up their court case and cannot ow be heard to say counsel was not instructed, while they were aware that an order of court was granted hence the 1st applicant appeared before the Master of the High Court during the Estate's first meeting."

In the circumstances, the 1st to 3rd respondents pray for the dismissal of the appeal.

The issues for determination

[12] Assuming the appellants were properly before the *court a quo,* an analysis of the grounds of appeal as read with the heads of argument from both sides suggests that the central issues for determination in this appeal are whether or not the appellants legal representatives had a mandate to secure the consent order of 17 August 2017 and whether or not the appellants were aware of the order when it was granted.

My view is that answers to the above questions would assist in determining whether or not the court order of 17 August 2017 should be rescinded.

The law

[13] The applicants in *casu* apply for rescission of the High Court order of 17 August 2017 and stay of execution of that order. The reason given for seeking to set aside the High Court order is that it was erroneously granted. Indeed, the High Court Rules 1980 allow for that relief. The High Court Rules also allow for stay of execution of its orders were appropriate.

With respect to the application for rescission, rule 45 of the High Court Rules 1980, that the appellants rely on, in full provides as follows:

> "45. (1) 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-
>
> a. An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;
> b. An order or judgement in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission.
> c. An order or judgement granted as a result of a mistake common to the parties.
> 2. Any party desiring any relief under this rule shall make an application therefore upon notice to all parties whose interests may be affected by any variation sought.
> 3. The court shall not make any order rescinding or varying any order or judgement unless satisfied that all parties' whose interests may be affected have notice of the order proposed.
> 4. Nothing in this Rule shall affect the rights of the court to rescind any judgement on any ground on which a judgement may be rescinded at common law."

The above rule does, however, not indicate the period within which an application should or can be made under sub rule 2. However, generally in cases of rescission rule 27 (6) of the same rules states:

> "6 (a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case maybe, may within 21 days after he has knowledge of such judgement apply to court, on notice to the other party, to set aside judgment."

I therefore believe that the 21 days given above is normally regarded as the reasonable time within which a party can apply for the rescission of a judgment.

Condonation

[14] The appellants, appellants being aware of the delay in filing their application prayed for condonation in the Notice of Motion (i.e paragraph 2 (c) thereof). It is therefore important to see how the court dealt with that issue.

I believe that the court should have started by dealing with the application for condonation because without condonation there was no application before the court. It is only upon establishing that there was a proper application before the court that issues referred to in paragraph 10 above can then be addressed or interrogated. Admittedly in addressing the issue of condonation, the court would have to look at the merits in order to ascertain whether or not any prospects of success exist in favour of the applicants. Hence in **Motake v. Moqhoai and 7 others C of A (CIV) No. 5 of 2009**, a case relied on by the respondents, the court said the following:

> "In essence, the applicant must satisfy two requirements, namely (1) that there is sufficient explanation for the delay in question, sometimes expressed as "sufficient cause" and (2) that there are prospects of success of appeal. It must further be borne in mind that an application for condonation is a matter which lies pre-eminently within the discretion of the Court."

Clearly, it is therefore not irregular for a court to visit the merits in an application for condonation.

I am, at this stage, compelled to ask the question: Was there a proper application before the *court a quo?* That indeed should be the first issue to have been determined by the High Court. It therefore also falls to be the first issue to be determined by this court.

I now detail here below the reason why I posed the above question.

[15] At paragraphs 26 and 27, the judge in the *court a quo* reasoned and ruled as follows:

> "[26] The issue of delay also comes into the balance for purposes of condonation. The application for rescission was filed in court on 26 February 2019. This is after one year and six months after the Deed had been made an Order of Court. The explanation for this inordinate delay is that the previous legal representative failed to carry out instructions to set aside the order. The applicants do not take the court in their confidence about any circumstances or factors that disabled the previous lawyer from approaching the court with due haste. The applicants are only content to say that they were taken by surprise to learn of their lawyer's failure when they received the Master's second notice of 8 January 2019 that they attend the meeting of 7 February 2019.
>
> [27] No legal steps were taken upon receipt of the notice to either have that meeting postponed or interdicted if the Master was not amenable to its postponement. All this speaks to the lack of bona fides and unreasonableness of the delay in bringing this application. Absent any adequate explanation for the delay from November 2017, there is no basis to even consider its reasonableness. Nthane Brothers Pty Ltd v. Tsiu C of A (CIV) No.44/2015 (20 October 2016)."

[16] The above 2 paragraphs in the *court a quo's* judgment answer the question I posed. The judge, notwithstanding the fact that he went into the merits of the matter, actually refused to grant condonation due to the inordinate delay in filing the application. Without condonation having been granted the applicants were clearly not before the court. Accordingly, once the judge had rejected condonation that was the end of the matter. With the judge having decided that condonation was not available to the appellants, there was no need to delve into the merits of the application except for the purposes of determining prospects of the success. In fact, I wish to state that the starting point was for the court to make a decision on the application for condonation. It was only after establishing that the appellants were properly before it that it could then proceed to look at the merits of the rescission application.

[17] Whereas the respondents make submissions on the issue of condonation, for some unknown reason, the appellants do not say a word about it. That probably explains why the issue is not included in their grounds of appeal. I therefore find it difficult to go further than merely noting that with the court having refused to grant condonation, there was never a proper rescission application before the *court a quo.* The refusal to grant condonation has not been appealed against. Accordingly, this court is not being called upon to interrogate the reasoning of the *court a quo* in deciding to deny condonation.

[18] The appellants were always alive to the need for condonation. In paragraph 6 of her founding affidavit the 1st appellant avers, in part,:

> "I aver further that I did not willfully disregard the rules of this Honourable Court as I have been advised and only believe same to be true and correct that I ought to have instituted the present application within the time prescribed by the rules of this court. The late institution of this application was not willful but it was due to the reasons advanced above."

The reason advanced was that until 2 November 2017 she was not aware of both the consent order and the Deed of Settlement.

[19] On their part, the respondents also state:

> "18.3 I also deny that the Applicant obey the Rules of this Honourable Court because the 1st Applicant willfully and intentional brought this application out of time. She is also quite clear that the Court Order she is seeking to be rescinded has already been executed with her contribution and initiation. She also participated in appointment of Executors after the Assistant Master of the High Court had explained the whole processes and procedures to all of us in her presence. The reasonable time to approach the Court in this manner had lapsed. This application is only intended to delay and derail the process to the prejudice of all beneficiaries."

I find that it is not out of place for the respondents, after having examined the issue of condonation, to make the following submission:

> "It is therefore submitted that the High Court rightly exercised its discretion of refusing to condone the late filing of the Appellants' application; more especially because the interests of justice did not warrant that."

In view of the foregoing, this appeal cannot succeed.

Costs

[20] On the issue of costs, l am inclined to agree with appellants' submission that this is a family matter were the family relations should continue to be retained. However, notwithstanding the exercise of the court's wide discretion when it comes to costs, l do not think this is a proper case to depart from the normal rule that costs follow the result. I would therefore rule that the appellants pay costs.

[21] I therefore order as follows:

1. The appeal is dismissed with costs.

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N.T. MTSHIYA

ACTING JUSTICE OF APPEAL

I agree:

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P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

....

DR J. VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: **N.B PHEKO**

FOR RESPONDENT: **T.A LESAOANA**