

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No.: 47/2022

In the matter between:

LESELI HUB LIMITED

APPELLANT

AND

**LEGALIZE DAILY
SHERIFF OF THE HIGH COURT
RESPONDENT**

**1ST RESPONDENT
2ND**

CORAM: DAMASEB, AJA
MUSONDA, AJA
CHINHENGO, AJA

HEARD: 14 OCTOBER 2022
DELIVERED: 11 NOVEMBER 2022

SUMMARY

Appeal against dismissal of a rescission of default judgment application. Rescission application was filed 2 months after service of default judgment on appellant, without any application for condonation. No plausible explanation for delay in bringing application. Concession by appellant's counsel on appeal that the delay was willful and egregious and not bona fide. In the light of concession, unnecessary to consider prospects of success. Appeal dismissed, with costs.

JUDGMENT

PT DAMASEB, AJA:

Introduction

[1] We have before us an appeal against a judgment and order of the High Court (Kopo J) refusing a rescission application brought by the appellant, a company, following a default judgment that was granted against it.

Factual Background

[2] The 1st respondent instituted summons against the appellant, which was served on the appellant on 12th April 2022. The summons was served on an employee of the 1st appellant, a certain Mrs. Mpho Nyane. The service was in terms of High Court Rule 4(d) which permits service of process on a company *'by delivering a copy of the process to some responsible employee . . . at the registered office or principal place of business of such company'*. It is not in dispute that the rule was duly complied with and that the appellant had proper notice of the process.

[3] The dispute arose from a contract allegedly entered into between the parties in terms of which the 1st respondent provided consultancy services to the appellant for the production of a company prospectus at the appellant's special instance and request. In its declaration, the 1st respondent alleged that it provided the consultancy services but that the appellant refused to pay the agreed consideration. The 1st respondent therefore sought the following relief against the appellant:

- 'a. Cancellation of the contract for the development and registration of the defendant's company prospectus and for the public offer of its shares:
- b. Payment of Thirty Thousand Maloti (30, 000.00) being the amount charged for the services rendered towards the registration of company's prospectus for the public offer of its shares;
- c. Payment for damages due to the cancellation of the contract, valued at Fifteen Thousand Maloti (M15, 000.00):
- d. Further and/or alternative relief: and
- e. Costs on /attorney and own client scale.'

[4] No appearance to defend having been entered by the appellant, the 1st respondent filed an application for default judgment, which was duly granted in part on 10th May 2022. The prayer for cancelation damages (prayer (c)) was not successful and costs were granted on the normal scale.

[5] Once granted, the default judgment was served on the same employee, Mrs. Mpho Nyane, on 25th May 2022.

[6] The 1st respondent then proceeded to have the judgment executed. Catapulted into action by the execution process, on 28 July 2022 the appellant approached the High Court on urgent basis for a stay of execution pending the finalization of the proceedings, and for the rescission of the default judgment. The urgent application was brought two months after service of the court order on the appellant and without an application for condonation.

[7] The application for rescission by the appellant sought relief in the following terms:

- 'a. That the Rules of this court pertaining to the normal modes and periods of service be dispensed with on account of urgency:
- b. That a rule be and is hereby issued returnable on the date to be determined by the Honourable Court calling upon the respondents to show cause (if any) why an order in the following terms shall not be made final, to wit:
- i. That the execution of the judgment in CCT/0141/2022 be stayed pending finalisation of these proceedings.
 - ii. That the final order in CCT/0141/2022 be rescinded
 - iii. That the applicant be given leave to file its defence within fourteen (14) days
 - iv. That the Respondent should not pay costs of suit in the event of opposition
 - v. That the applicant be granted further and/or alternative relief.'

[8] In support of the rescission application, the appellant's director deposed that, firstly, the default was not wilful; that it is not indebted to plaintiff and that it had a *bona fide* defence. It is alleged that the delay in opposing the summons was because the recipient of the summons never presented it to the appellant's directors. There is no explanation why the urgent application was only brought two months after the appellant had knowledge of the default judgment.

[9] First respondent opposed the urgent application and amongst others raised points *in limine*: that there was non-compliance with rule 27(6) (a) of the High Court Rules; lack of

urgency and absence of a cause of action. The reference to rule 27(6) (a) is important in that it provides that a defendant against whom judgment has been granted by default may *'within twenty-one days after he has knowledge of such judgment apply to court, on notice to the other party, to set aside such judgment'*.

[10] The 1st respondent's complaint was that the appellant failed to bring the rescission application within twenty-one days after it had knowledge of the default judgment. In the view I take of the outcome of the appeal on that single issue, I find it unnecessary to refer to the other grounds of objection to the rescission raised by the 1st respondent, including the merits.

The High Court

[11] Kopo J found that the appellant had not complied with rule 27(6)(a), and considered whether it had any reasonable grounds for condonation for non-compliance with that rule. The learned judge wrote:

"It is therefore apposite to [consider] if Applicant [now appellant] complied with Rule 27(6)(a)...If it has not, are there grounds for condonation for none compliance (sic) with the said rule. Applicant was served with the order of this court on the 25th day of July 2022. This is common cause and apparent ex facie the record. This makes the days equivalent to more than two (2) months the

Applicant had known about the judgment against him and not having done anything about it.”

[12] It is common cause that the appellant sought no condonation in the founding affidavit deposed to on its behalf by its director. When its non-compliance with rule 27(6)(a) was raised in the 1st respondent’s answering affidavit, the appellant sought (impermissibly) to cure the defect by dealing with the issue in the replying affidavit. Impermissibly because a party is required to make its case in the founding affidavit and not in reply.

[13] Be that as it may, the deponent to the appellant’s founding affidavit explained the delay in its replying affidavit in the following terms:

“I reiterate that I got sight of the summons together with a court order and hurriedly perused the court’s file, consulted fellow directors of the company and thereafter consulted my legal counsel of record. I aver that my legal counsel of record speedily filed this application upon issuing instructions for them to institute the current proceedings. I aver that the Rules of court were not wilfully contravened and thereby apply for condonation by this honourable court if it may find any non-compliance hereof.”

[14] The court *a quo* held that the explanation offered by the appellant for the delay in filing the application, and its flagrant non-compliance with the rules, is an indication that the appellant took it that condonation was there for the asking. The

court also noted that there was no formal application for condonation filed, and that some suggestion of it only came in its replying affidavit.

[15] According to Kopo J:

“In casu, the applicant does not apply for condonation formally. The semblance of a condonation application comes in its replying affidavit. Needless, this was after the 1st respondent had already raised a point in limine on no-compliance (sic) with the rules of court. From [Christoffel Smith v Tsepong Propriety Limited C of A (CIV) No.: 22/2022] it is clear that the ‘condonation must be brought as soon as the non-compliance has become apparent’.

[16] The court *a quo* held that the condonation application was not brought as soon as the appellant became aware of the default judgment, as required by law, neither was the application *bona fide*.

[17] Although the court *a quo* was satisfied that the appellant had not sought condonation for the non-compliance and, in other words, could not succeed with its rescission application on that basis alone, it proceeded to consider the issue of urgency - found it was self-created and therefore the application was liable to be struck off the roll - and proceeded to consider the merits which it also found against the appellant.

[18] It is important to provide guidance for the future. Once the court was satisfied that the matter was not urgent, that issue should have been decided upfront and the application struck off the roll without the need for the consideration of the other issues. Similarly, if urgency was not an issue and the court had to consider the next issue, that of non-compliance with rule 27(6)(a) and took the view that the application ought to be dismissed simply because condonation had not been sought, it would have been unnecessary to consider the merits - unless the court wished to consider the condonation application against the backdrop of prospects of success. If the latter course is chosen, the court should make that clear in its judgment.

The appeal

[19] The appellant does not challenge the High Court's conclusion that the matter was not urgent. In my view, that ought to have been the end of the matter.

[20] The two grounds of appeal relied upon are that the court *quo* erred in finding that it had not shown 'good cause' for rescission and that the court erred in finding that the appellant did not have a *bona fide* defence.

Discussion

[18] As I previously stated, this appeal turns on whether the appellant's rescission application was properly dismissed without regard to the merits because the rescission application was brought without any formal application for condonation. It

is trite that where there has been non-compliance with the rules, an application for condonation is required, and it must be brought as soon as possible and a full and frank disclosure must be made of the reason for non-compliance. The High Court was satisfied that the appellant failed to live up to that requirement.

[21] The position in respect of a condonation application has recently been restated by this Court in *Smith v Ts'epong Proprietary Limited*¹ thus:

'A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the default was not wilful. The court enjoys a very wide discretion. It is a matter of fairness to both sides. The condonation application must be bona fide, and the applicant must make a full and frank disclosure of all the relevant facts that led to the non-compliance. Every period of the delay must be explained and the application for condonation must be brought as soon as the non-compliance has become apparent, including setting out the prospects of success.'

[22] The High Court quite correctly relied on that judgment which was binding on it. Although, generally, the court will consider the prospects of success in adjudicating an application for condonation, it may dismiss the application if the breach of the rules is flagrant and unreasonable. The same applies to a rescission application in terms of rule 27.

¹ *Smith v Ts'epong Proprietary Limited* (C of A (CIV) 22/2020) [2021] LSCA 11 (14 May 2021).

[23] In terms of Rule 27 of the High Court Rules a party applying for rescission of a default judgment must show good cause why such judgment should be rescinded. Under the common law, the court has a judicial discretion whether or not to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown.²

[24] Advocate Molati for the appellant in argument also relied on rule 59 of the High Court Rules which provides:

'Notwithstanding anything contained in these Rules the court shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which the provisions of these rules are not followed.'

[25] It is not possible to give a precise and comprehensive definition of the term "good cause". The following principles stated by Miller JA in *Chetty v Law Society, Transvaal*³ are now trite, i.e. the two essential elements of sufficient or good cause for rescission of a judgment by default are:

- (i) *That the party seeking relief must present a reasonable and acceptable explanation for his default; and*
- (ii) *That on the merits such party has a bona fide defence which, prima facie, carries some prospects of success.*

² *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765

³ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.

[26] Both those requirements must be met. In this regard, it has been sated as follows in *Chetty v Law Society, Transvaal*:

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980.' (Own Emphasis)

[27] In *Chetty v Law Society, Transvaal* the court went on to point out that:

"The circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation

of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits.

(Own Emphasis)

[28] An application for rescission is not confined to a consideration whether or not to penalise a party for failure to comply with the rules and procedures laid down for civil proceedings. The true test is whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for rescission is not *bona fide*.

[29] During oral argument, Adv Molati for the appellant conceded that the delay in bringing the rescission application was willful and egregious. In the light of that concession, it is unnecessary to consider the arguments relating to the appellant's prospects of success. A rescission application that lacks bona fides may be dismissed on that basis alone, unless there are exceptional circumstances to justify consideration of the merits. It is clear from rule 59 that in its exercise of the discretion whether or not to condone non-compliance with rules of court, "*interests if justice*" is an important consideration.

[30] The court must therefore consider wider public interest considerations such as the importance of the matter both to the parties and the administration of justice generally, the importance of finality to proceedings and the additional

expense to which the parties will be subjected should the matter not be speedily brought to an end.

[31] In that context, the value of the claim is not high and yet substantial legal costs have already been incurred and costs are bound to escalate should proceedings continue beyond this appeal. This weighty public interest consideration militated against the High Court exercising its discretion in favour of condoning the appellant's willful default.

[32] An appellate court will not lightly interfere with the first instance court's exercise of a discretion. It will do so only where the first instance court materially misdirected itself, approached the matter on wrong principle, failed to act judicially in the sense of not acting for sufficient cause or took into account extraneous factors or ignored relevant ones. None of these are alleged in the grounds of appeal or been demonstrated by reference to the record.

[33] In his heads of argument Adv. Molati for the appellant reminded us, counter-intuitively, of the importance of bringing finality to litigation by quoting at the very outset of those heads the following dictum from a South African case:

*'Like all things in life, like the best of times and the worst of times, litigation must, at some point come to an end.'*⁴

⁴ *Zuma v Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28 para 1.

[34] I could not agree more. Counsel's wish on behalf of his client must be granted. This litigation must end.

[35] The appeal is dismissed, with costs.



**PT DAMASEB
ACTING JUSTICE OF APPEAL**

I agree:



**P MUSONDA
ACTING JUSTICE OF APPEAL**

I agree:



**M CHIHENGO
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADV. L A MOLATI
FOR RESPONDENTS: ADV. B T MOKOBORI