

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C of A (CIV)
33/2022
CCT/0378/2015**

In the matter between:

**MIN ZHU ENTERPRISE
(PTY) LTD t/a GOLF
APPELLANT
MR XIAOHUA ZHANG
APPELLANT**

FIRST

SECOND

AND

**OVK
RESPONDENT**

BEDDYF

BPK

CORAM: K. E. MOSITO P
J VAN DER WESTHUIZEN
NT MTSHIYA AJA

HEARD: 13 OCTOBER 2022
DELIVERED 11 NOVEMBER 2022

SUMMARY

Appeal in an action for recovery of money for goods sold and delivered - High Court having allowed amendment from the bar in violation of Rule 33 of the High Court Rules 1980 - and where the defendant raises a special defence-the onus of proving the special defence is on the defendant-Postponement of proceedings-Principles applicable restated and applied. Appeal succeeds with costs.

JUDGMENT

K. E. MOSITO P

Introduction

[1] The appellant appeals against the judgment and order of the High Court (Mokhesi J) delivered on 18 August 2022. The respondent, OVK BEDRYF BPK, had brought an action to recover the purchase price for goods sold and delivered to the first appellant. The respondent is a South African company registered and incorporated in terms of the laws of that country. It carries on its business at Ladybrand. The first appellant is a company registered and incorporated in terms of the laws of the Kingdom of Lesotho. The second appellant is a businessman who is a surety of the first appellant's debt to the respondent. The action against the second appellant is based on his suretyship for the debt of the first appellant to the respondent. In the High Court, the respondent claimed judgment against both appellants jointly and severally, the one paying the other to be absolved.

[2] The facts giving rise to the litigation are that the first appellant, through the second appellant, applied for a Credit Facility from the respondent. The application was successful. Among its terms, the application required the debtor to settle the accounts monthly. The parties signed the agreement on 30 August 2013. Suretyship was signed by the second appellant on 14 December 2011, binding himself, in terms of clause 3, in his personal capacity as surety and co-principal for the first defendant's indebtedness. A certificate of Indebtedness was signed and issued on 31 August 2015, showing the extent of

the first appellant's indebtedness. It was stated in that certificate that the first appellant owed an amount of R209,195.25 plus 17.5% per annum from 1 September 2015 until the date of full and final payment. The claim was pleaded as follows: (a) payment in the sum of M209, 195.25 (Two Hundred and Nine Thousand One Hundred and Ninety-Five Maloti and Twenty Five Lisente); (b) interest on the aforesaid sum at the rate of 17.50% per annum calculated from 1 September 2015 to date of final payment; and, (c), costs of suit on attorney and client scale.

[3] The judgment of the High Court reveals that initially, the amount claimed was as reflected above, but on 19 May 2022, Adv. P. R. Cronje, for the present respondent, made an application from the bar to amend the amount and revise it downwards to M175,600.00. The application was granted. It is worth noting at this stage that the action was defended by the appellants at all times, material to this case.

[4] In the High Court, the case was numerously postponed. On 19 May 2022, the matter proceeded before Mokhesi J. The Counsel for the appellants (advocate Potsane) raised several issues that the learned Judge viewed as “opportunistic at best and a delaying tactic at worst.”¹ These issues were all rejected by the Court *a quo*. The Court forged ahead with the case, and as a result, the learned Judge ordered:

¹ See para 11 of the High Court judgment in *OVK BEDRYF BPK V MIN ZHU ENTERPRISES (PTY) Ltd* (CCT/0378/2015) [2022].

Judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

- (a) Payment in the sum of M175,600.00 (One Hundred and Seventy-Five Thousand and Six Hundred Maloti);
- (b) (b)Interest on the aforesaid sum at 17.50% per annum, calculated from 1 September 2015 to a final payment date.
- (c) (c)Costs of suit on attorney and client scale.

[5] It is against the foregoing order that the present appeal has been brought.

Grounds of appeal

[6] On 1 July 2022, the appellants approached this Court on appeal. The four original grounds of appeal on which they relied were:

- (a) The Court *a quo* erred and misdirected itself in granting the respondent's claim without allowing the appellants to prove their defence as pleaded.
- (b) The Court *a quo* erred and misdirected itself in granting the interest at the rate of 17.5 per cent, worse without hearing oral evidence in as much as the now respondent had undertaken to lead evidence to that effect.
- (c) The Court *a quo* erred and misdirected itself in refusing to grant the postponement in the circumstances which were befitting to allow, thereby failing to exercise its discretion judicially as expected.
- (d) The Court *a quo* erred and misdirected itself in granting amendment of the summons and declaration

applied from the bar at the hearing date without any notice per the rules.

[7] On 8 September 2022, the appellants augmented their grounds of appeal with three more. The additional grounds for appeal are:

- (e) The Court *a quo* erred and misdirected itself in declining that the appellants bore the onus to prove their defence and thereby absolving the plaintive from adducing evidence to sustain its claim, which had changed its cause of action - the plaintiff during the proceedings appeared claiming the balance of the invoice. At the same time, on the declaration, the case was on goods delivered and invoices not honoured.
- (f) The Court *a quo* erred and misconstrued the application of Rule 41 in its justification to grant judgment against the defendants.
- (g) The Court erred and misdirected itself in awarding costs on attorney and client scale without any legal justification except that in clause 16 of the agreement, the defendants have bound themselves.

[8] I detailed the grounds of appeal. There will is a need to define the issues. The grounds of appeal define the issues.

Issues for determination

[9] Arising out of the above grounds of appeal. The following issues fall for determination:

- (a) Whether there was a denial of a fair trial in the Court *a quo* resulting from how the trial was conducted.
- (b) Depending on the outcome of (a) above, it will be necessary to determine the fate of this case.

The Law

[10] For this appeal, only three sets of principles will help resolve this matter. They are those relating to amendment of pleadings, postponement and fair hearing. The amendment of pleadings is governed by Rule 33 of the High Court Rules 1980.

The Rule provides that:

33 (1) Any party desiring to amend any pleading or document, other than an affidavit filed in connection with any proceeding, may give notice to all other parties to the proceeding of his intention to amend.

(2) Such notice must state that unless objection in writing is made within fourteen days to the said amendment, the party giving the notice may amend the pleading or document accordingly. (3) If no objection be so made, the party receiving such notice shall be deemed to have agreed to the amendment.

...

(5) Whenever the Court has ordered an amendment or no objection has been made within the time specified in sub-rule (2), the party amending shall deliver the pleading or document as amended within the time specified in the Court's order or within seven days of the expiry of the time prescribed in sub-rule (2) as the case may be.

[11] The foregoing is the only way in which an amendment pleading or document, other than an affidavit filed in connection with any proceeding, may be brought before the High Court.

[12] The second set of principles worth restating relates to a postponement. It is now settled that '[t]he postponement of a matter set down for hearing on a particular date cannot be

claimed as right. An applicant for a postponement seeks an indulgence from the Court. The postponement will not be granted unless [the] Court is satisfied that it is in the interests of justice to do so. In this respect, the applicant must show good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Therefore, whether a postponement will be granted is at the Court's discretion and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account several factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.¹² When confronted with an application for postponement, these principles will assist the Court in deciding whether or not to grant a postponement.

[13] Regarding a fair hearing, any court or other adjudicating authority prescribed by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial. Where any person institutes proceedings for such a determination before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.³ The central point here is

² National Police Service Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC) at 1112C – F.

³ Section 12(8) of the Constitution of Lesotho, 1993.

that courts of law in Lesotho must uphold the culture of a fair trial, with particular emphasis on a fair hearing.

Consideration of the appeal

[14] The first ground of appeal is that the Court *a quo* erred and misdirected itself in granting the respondent's claim without allowing the appellants to prove their defence as pleaded. As Willis JA pointed out, the topic has vexed many judges here and abroad: there is no shortage of instances where debt recovery has been troublesome, requiring judicial attention. The *onus* is critically relevant: once the indebtedness to the creditor has been *prima facie* established, the *onus* is on the debtor to show that the indebtedness is disputed on *bona fide* and reasonable grounds. Whether the proven facts, i.e. those accepted by a court, allow for the conclusion by that Court that a party has discharged its *onus*, is a matter of adjudication according to the principles of the law of evidence. In the present case, the appellants bore the evidentiary burden of showing that they had settled the debt. They could only do that if they were allowed to adduce their evidence. The learned Judge ought to have permitted them such an opportunity by a reasonable opportunity to bring in their witness. An application for postponement for the purpose was sought but denied. In so doing, the appellants were denied a fair trial.

[15] The second complaint by the appellants is that the Court *a quo* erred and misdirected itself in granting amendment of the summons and declaration applied for from the bar at the hearing

date without any notice per the rules. There is merit in this ground of appeal. Rule 33 (1) requires that any party desiring to amend any pleading or document, other than an affidavit filed in connection with any proceeding, may give notice to all other parties to the proceeding of his intention to amend. Sub-rule (2) requires that such notice must state that unless objection in writing is made within fourteen days to the said amendment, the party giving the notice may amend the pleading or document accordingly. (3) If no objection be so made, the party receiving such notice shall be deemed to have agreed to the amendment. There was no compliance with this rule. The Court *a quo* ought not to have entertained such a strange procedure.

[16] The third ground of appeal is that the Court *a quo* erred and misdirected itself in refusing to grant the postponement in the circumstances which were befitting to allow, thereby failing to exercise its discretion judicially as expected. It appears from the judgment of the Court *a quo* that, in order for an applicant for a postponement to succeed, he must show a 'good and strong reason' for the grant of such relief.⁴ There can be no doubt that the postponement of this matter sought on 19 May 2022 could not be claimed as of right. The appellants were seeking an indulgence from the Court. In my opinion, the Court's declination to allow the appellants to go and consult their witnesses constituted an unjudicial exercise of discretion.

[17] The view of Mokhesi J (referred to in [4] above) that the issues raised in the High Court on behalf of the appellant were

⁴ Centirugo AG v Firestone SA (Pty) Ltd 1969 (3) SA 318 (T) at 320C - 321B.

"opportunistic at best and a delaying tactic at worst" is understandable in the light of the history of postponements in this matter. As stated by Willis JA (referred to in [14] above), debt recovery has often been troublesome. Care must be taken though that the frustration of the judge does not result in an overly robust approach. The rules and principles of fair litigation exist for a reason and must be observed at all times. This may sometimes create further opportunities for delays and other questionable tactics. It is the price a legal system has to pay for its adherence to rules and procedures in the interest of fairness and justice.

Disposition

[18] It is obvious from the foregoing reasons that this appeal is bound to succeed. There was a clear mistrial in this action.

Order

[19] The following order is made:

- (a) The appeal succeeds with costs.
- (b) The order of the Court *a quo* is set aside.
- (c) The matter is remitted to the High Court to proceed before another judge.



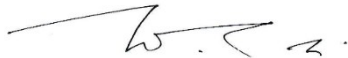
K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



**J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

I agree:



**N T MTSHIYA
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADVOCATE T. POTSANE

FOR RESPONDENT: MR N. FRASER