CIV/APN/136/87

IN THE HIGH COURT OF LESOTHO

In the matter of

JEROME RAMORITING	1st Applicant
RAMOSOBELA RAMORITING	2nd Applicant

and

LESOTHO BANK - NATIONAL DEVELOPMENT BANK	Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice Sir Peter Allen
on the 18th day of February, 1988

This is an application by notice of motion for rescission of this Court's summary judgment in CIV/T/3/87 by Molai J. on 23 March 1987 in the absence of the defendants and their attorney.

In the above case the parties were different. The present respondent was the plaintiff and there were three defendants, namely (1st) Gerard Ramabela Ramoriting, (2nd) Jerome Ramoriting and (3rd) Motlaopa Ramoriting. Thus the present second applicant was not mentioned. It turned out that he was in fact the same person as the third defendant, Motlaopa Ramoriting merely causing confusion by using another of his names. Consequently the present two applicants were the second and third defendants in CIV/T/3/87 But this would have been made clear from the start if the notice of motion had been more carefully prepared and drafted.

/The first ..

The first defendant in CIV/T/3/87 was Gerard Ramoriting. He was employed by the respondent bank in 1984 and, in the course of his employment, he misappropriated large sums of money from various accounts under his control and transferred the money into his own account, causing the bank to sustain a loss of M.210,547.04.

This was discovered and the defendant was confronted with the deficiency. On 14 August 1984 he wrote a letter to the bank manager confessing and listing the accounts and amounts which he had taken. He agreed to reimburse the bank. His hand-written letter was said to have been written of his own free will and it was signed in the presence of two witnesses (see Annexture 'B').

A few days later, on 19 August 1984, his father, the first applicant, wrote a document in Sesotho entitled "The feelings of the family" in which he asked the bank for three months in which to pay and suggested various ways in which they might raise the amount required.

There was then a meeting between the General Manager of the Bank, Mr Mafike, and Gerard Ramoriting and his father and uncle (the two applicants) As a result they all signed a memorandum of agreement on 27 August 1984 which was witnessed by two persons (see Annexture 'A'). It reads as follows

MEMORANDUM OF AGREEMENT

ENTERED INTO BY AND BETWEEN

LESOTHO BANK

(A statutory Bank represented herein by Pascalis Tseliso Mafike in his capacity as General Manager and hereinafter referred to as the Bank)

/ and ....

and

GERARD RAMABELA RAMORITING

(hereinafter referred to as the principal debtor) and

JEROME RAMORITING (THE FATHER)

MOTLAOPA RAMORITING (THE UNCLE)

(hereinafter referred to as Ramoriting family)

Whereas the parties are anxious to normalise certain identifiable financial arrangement that is directly related to the various debts owed to the Bank by the principal debtor in terms of his statement dated 14/8/84 and

whereas the Ramoriting family in terms of their letter dated 19/8/1984 are anxious to assist in the repayment arrangements as detailed in that letter, and

Whereas the parties are anxious to put the terms and conditions of this agreement in writing,

Now, therefore, the parties have decided to agree and hereby agree as follows.

1. The principal debtor agrees and acknowledges that he is indebted to the Bank to the tune of M210,547-04 (two hundred and ten thousand five hundred and forty seven Maloti four Licente) which amount represents the total of all mis-appropriated amounts from the various savings bank books which were under his control.

2. The principal debtor also agrees and confirms that the statement of admission of guilt written and signed by him on 14/8/84 represents a true statement which was made freely, of his own free will and without any force or pressure from anybody whatsoever.

3. The principal debtor would like to repay the whole amount as reflected in clause No.1 as it rightly does not belong to him.

4. The principal debtor has identified numerous assets which have been created by these funds and which assets he has requested the Ramoriting family to assist him with in order to be able to repay the Bank in the shortest possible time. It being agreed that this is

/the best ..

the best alternative line of action which will guarantee full payment of the amount owed.

5. That the Ramoriting family is fully aware of all the circumstances that led to this agreement and that it is their specific request to the Bank that the matter be treated in this manner.

6 It is a specific request of the principal debtor and the Ramoriting family that they be allowed 3 (three) months within which to demonstrate their willingness and efforts to repay this debt and the Bank has acceded to their request.

7. The Ramoriting family has submitted to the Bank and the Bank has accepted the conditions and the line of action contained in their letter dated 19/8/1984 which forms part of this agreement and is referred to as annex "A".

8. The letter dated 14/8/1984 detailing certain assets bought with these funds also forms part of this agreement and is referred to as annex "B".

9. It is agreed by all parties to this agreement that the Bank in order to provide security for the amount owed to it by the principal debtor will register a bond over the fixed residential property of the principal debtor in Teyateyaneng reserve as soon as possible. In addition, the Bank will register a notarial covering bond over all movable assets of the principal debtor to cover the debt.

10. The principal debtor and the Ramoriting family undertake to hand to the Bank all legal documents of title to the fixed property and the movable vehicles to enable a speedy registration of the bonds.

11. Should the necessary conditions of this agreement not be fulfilled by the principal debtor and the Ramoriting family, the Bank will be free to take legal action against the principal debtor and/or the Ramoriting family.

12. As soon as the principal debtor has fully paid off his debt the Bank will be obliged to cancel all bonds and to return all documents to the principal debtor.

13. Should the Bank have sufficient reasons to believe that the spirit of this agreement is being undermined by the principal debtor and/or the Ramoriting family, the Bank will be free to take whatever course open to it including legal action against one or both parties."

/Mr Matete ...

Mr. Matete for the applicants submitted that the applicants had been wrongly included in the CIV/T/3/87 suit because they were only responsible for seeing that the principal debtor paid the debt and that they had in no way undertaken to pay that debt. If that is so then I am unable to understand the purpose of paragraphs 11 and 13 in the above agreement. These specifically allow the bank to bring court action against the applicants on the failure of the principal debtor to comply with the terms of the agreement. He had not repaid the debt, or any part of it, within the three months period allowed (para 5), and paras 9 and 10 had not been complied with due to the fault of the principal debtor.

The document was not drawn up as a proper suretyship agreement ought to have been, possibly because no attorney was involved then, but in my opinion the spirit of the agreement (referred to in para 13 of the document) was clearly in the nature of a suretyship on the part of the two applicants.

According to Maasdorp's Institutes (vol 3), by a contract of suretyship the surety makes himself liable to an action for the fulfilment of the principal obligation or for damages for its non-fulfilment, in the same way as the principal debtor. There was no agreement here regarding damages so that part is not relevant.

Under the agreement the applicants quite clearly submitted themselves to legal action in the event of failure to carry out the terms of it. They signed the agreement and they cannot now go behind it and wriggle out of their undertaking and liability. They enjoyed

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the benefit of the agreement and the extra time allowed under it but they apparently do not want to perform or honour their part. They are blowing hot and cold, and this cannot be permitted.

With regard to the entering of summary judgment in CIV/T/3/87, the applicants claimed that they failed to file an Opposing Affidavit in time as they came from a long distance away. In fact they came from Teyateyaneng in Berea District, only 40 kms. from Maseru. Their attorney who should have filed the affidavit was in Maseru. But that does not explain why neither the applicants nor their attorney appeared in Court on the date fixed. The Court required a reasonable explanation of their absence from both the applicants and their attorney, and none that was acceptable was offered.

It is the practice in this Court to require that sufficient cause be shown for rescission of judgment. This may be under the Common Law or under rule 27(6) of the High Court Rules for rescission of a judgment in default, or under rule 45 for rescission of judgments entered erroneously or by mistake.

By "sufficient cause" is meant (i) that the party seeking the relief must offer a reasonable and acceptable explanation of his default, and (ii) that on the merits such party has a bona fide defence which prima facie carries some prospect of success (see Chetty v Law Society, Transvaal 1985 (2) SA 756 at 765 and De Wet & Ors v. Western Bank Ltd 1979(2) SA 1031).

It is not sufficient if only one of these two requirements is met. For obvious reasons a party showing

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no prospect of success on the merits will fail in an application for rescission of judgment, no matter how reasonable and convincing the explanation of his default. Moreover, a party which simply disregards the court's procedural rules, with no acceptable explanation, cannot be permitted to have a judgment against him rescinded merely because he had reasonable prospects of success on the merits.

In the present instance I find that not only was there no reasonable and acceptable explanation of the default or failure on the part of the applicants, but also that they would have had no prospect of success on the merits anyway.

For these reasons this application cannot succeed and it is dismissed with costs to the respondent.

P. A. P. J. ALLEN
J U D G E

18th February, 1988

Mr. Matete for the applicants
Mr. Redelinghuys for the respondent