CCT81/2010

IN THE HIGH COURT OF LESOTHO

In the matter between:

BONGATA HARDWARE (PTY) LTD	**1st Applicant**
CHRISTINA MAMOIPONE PHAKISI	**2nd Applicant**
THABISO NELSON PHAKISI	**3rd Applicant**
THABO JOHANNES TSEKI	**4th Applicant**

and

THE SPAR GROUP LIMITED	**Respondent**

Coram: **Hon. Hlajoane J**

Date Heard: **5th September, 2011.**

Date of Judgment: **24th October, 2011.**

Summary

Application for rescission – whether the three basic requirements for rescission were satisfied – satisfactory explanation of default - application granted.

JUDGMENT

[1] Summons were issued against the present applicants by the respondent on the 5th November, 2010. Respondent claimed in the summons against the applicants payment of an amount of M2, 716, 163.89 (two million seven

hundred and sixteen thousand one hundred and sixty three maluti eighty nine lisente).

[2] Per the agreement between the respondent and the 1st applicant copy of which has been attached to the papers, the two parties had concluded a written agreement of a franchise. The agreement was for sale and delivery of goods by the respondent to the 1st applicant. The alleged indebtedness resulted from that agreement of sale.

[3] Respondents summons further showed that the rest of the other applicants had bound themselves as surety for and co-principal debtors.

[4] The summons was served on 11th November 2010. It is reflected in the return of service that the papers were served on 3rd applicant on behalf of 2nd and 4th applicants as 1st applicant does no longer exist.

[5] Some four months later, on the 7th March, 2011 the matter was set down under uncontested motion as up to that time there had been no appearance to defend filed. The matter however was not heard on the 7th of March. A set down for the 14th March was prepared and filed still under uncontested motion.

[6] Counsel for plaintiff appeared before Court on that day. The 2nd applicant was also before Court in person and intimated to the Court that they were prepared to make an offer. The matter was stood down for two days.

[7] On the 16th March, 2011 respondent's counsel and 2nd applicant in person were before Court. The Court was told that the offer that the applicants wanted to make was just too little considering the amount of money involved. Judgment was thus granted by default as was requested.

[8] A writ of execution was issued on the 6th April, 2011. It must have been served on the applicants as an urgent application was filed on the 9th June, 2011 for stay of execution and rescission. Amongst the reasons advanced for urgency was that the deputy sheriff was intending to remove the attached assets on the 8th June, 2011.

[9] The application for rescission was of course opposed. The necessary set of affidavits were duly filed and the date for argument allocated.

[10] On the date of the hearing of the matter counsel had decided to abandon arguing the points *in limine* but to go straight to the merits of the rescission application.

[11] The requirements for satisfying a Court of law for granting a rescission application have been clearly spelled out in the case of **Loti Brick (Pty) Ltd v Mphofu & Others**[1] **.**

(a) The applicants must give a reasonable explanation of their default.

(b) The application must be *bona fide* and not made with the intention of merely delaying the successful plaintiff's claim.

1 1995 – 96 LLR & LB 446 at 450

(c) The applicants must show that they have a *bona fide* defence to plaintiff's claim, it being sufficient if they set out averments which if established at the trial would entitle the applicants to the relief claimed.

[12] On Reasonable Explanation

Though 2nd applicant had shown in her papers that she only came to know about the service of summons on them in February, the correspondence which the respondent has attached to his papers reflect that 2nd applicant became aware of their indebtedness as far back as November, 2010.[2]

[13] The correspondence further show that 2nd applicant immediately approached counsel for respondent for settlement. There was some correspondence thereafter between the parties as it would seem that they were not agreed on the large amounts said to be still outstanding. Parties even continued with settlement negotiations even after obtaining judgment by default. It was only when parties could not agree on the amounts still owing that respondent proceeded with execution.

[14] Following on the authority cited by my sister Majara J in **Burton v Thomas Barlow & Sons**[3] in the judgment **Lesotho Brewing Company v Mafa Sechaba Moletsane**[4], that;

"Some allowance must be made for bona fide errors and omissions. As the cases on the earlier Rules of Court show, fault on the part of the defendant does not preclude relief unless the failure to comply with the requirements . . . has been intentional or due to indifference or gross negligence."

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[2] Return of Service dated 11/11/2010, Letter AA3 dated 17/11/10 p.77
[3] 1978 (4) S.A 795 at 797 C-D
[4] CIV/T/621/2009 at p.16

[15] On the facts of this case it cannot therefore be said the explanation by the applicant, in particular the 2nd applicant has been unreasonable. She did not sit back but had been negotiating with the respondent from the time of service of the summons.

[16] On the second requirement of being *bona fide* and not merely playing delaying tactics, applicants have attached to both founding and replying papers documents from Nedbank reflecting monies paid intended to reduce their indebtedness to the respondent.[5]

[17] From the correspondence between the parties it will be observed that applicants only wanted proof of indebtedness after some payments were made. Applicants have shown that the draft agreement could not agree on amounts still outstanding.

[18] The Court in **Breitenbach v Fiat S.A (EDMS) BPK** [6] said that, "all that is required in deciding whether the defendant has disclosed the nature and grounds of his defence and whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law."

Applicants have not only alleged payment but have attached documents as proof of such payments.

[19] The last requirement being that of showing a *bona fide* defence, which *prima facie* carries prospects of success. In considering the prospects of success it

[5] MP12 page 141, MP13 page 142
[6] 1976 (2) S.A. 226 at 227

is not the requirement of the law to even think of whether or not, the applicant is going to win. It is enough just to show that such a defence does exist, **Grant v Plumbers (Pty) Ltd.**[7]

[20] Applicants have shown that there have been payments made even after the issuance of the writ. That even if there may be amounts owing, they must be far less than the amounts in the writ.

[21] For the reasons shown above, it would only be fair to allow for ventilation of all the transactions in order for the Court to be able to come to the right decision. If judgment as granted and reflected in the writ is allowed to stand yet it has not been disputed that there were payments that were effected even as recently as March and April 2011which clearly was after the writ had been issued.

[22] The applicants have successfully managed to make out a case for rescission of application. The application for rescission is thus granted in terms of prayer 2 (a) of the notice of motion.

[23] The applicants to file their plea within the period as prescribed by the Rules of Court from the day after this judgment.

[24] Costs will follow the event since the matter has yet not reached finality.

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[77] 1949 (2) S.A 470 at 476-7

A. M. HLAJOANE
JUDGE

For Applicants: Mr Letsika

For Respondent: P.U. Fischer SC