

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CCA/23/2012

In the matter between:

NTEBOHENG PALIME & 103 OTHERS

APPLICANT

And

MAKHULONG MULTI FINANCE (PTY)LTD

1 RESPONDENT

THE ACCOUNTANT GENERAL

2 RESPONDENT

THE NATIONAL TREASURY

3 RESPONDENT

THE ATTORNEY GENERAL

4 RESPONDENT

JUDGMENT

Coram : Honourable Justice J.D. Lyons (a.i.)

Dates of Hearing : 8 October, 2012

Date of Judgment : 8 October, 2012

Summary

Recission – mistake of fact – extent of court’s discretion.

Authorities: Afrisure Finance and Another v Lechaka and Others, Makhulong Multi Finance (Pty) Ltd t/a B. Blue Financial Services v Nona and Others, Select Management Services Lesotho (Pty) Ltd v Ratlali and Others (C of A (CIV)

29/09, C OF A (CIV) 30/09, C of A (CIV), Nyingwa v Moolman No 193 (2) SA 508), Phillips v National D.P.P. 2003 (6) SA 447, Arbtzen vs Nedbank Limited Case no. 2333/2012 Kwazulu – Natal High Court 28 September,2012, (found at www.saflii.org/za/cases/ZAKZPHC/2012/66.html) and Schlesinger v Schlesinger [1979] (4) SA 342.

LYONS J. (A.J)

[1] On 8 October,2012 I rescinded the judgment of 28th May, 2012. I gave my short reasons orally. Herewith are those expanded reasons in writing.

On 25 April 2012, I made the following publication order

The normal modes and periods of service provided by the Rules of Court are dispensed with

That service of the application be effected on the borrowers cited as Fourth Respondent in the following way:

(a) By publishing in the newspapers Public Eye and Lesotho Today and by broadcasting on two consecutive days on Radio Lesotho notices to the effect that the Applicant has filed an application in the High Court seeking orders that deductions again be made from salaries of borrowers who had borrowed money from the Applicant, which deductions have been recalculted in accordance with the directives of the Court of Appeal and which application papers and deductions may be examined at the offices of the Applicant at LNDC Building, Shop nr 5, kingsway Maseru, and that any

*borrower wishing to oppose the application, be required to give such notification in writing on or before **23 May 2012** at the offices of Applicant's attorneys at Metropolitan Life Building, second Floor, Kingsway, Maseru, and within Fourteen (14) days after such notification to file opposing affidavits to the applicaiton accordingly, failing which the applicaiton will be made on Monday **28 May 2012** at 09h30.*

On the 28 May 2012 this court ordered as follows:-

- (1) That the First and Second Respondents be authorised and ordered to deduct from the monthly salaries of the respective Fourth Respondent the respective monthly instalments indicated in **Annexure "A"** hereto.*
- (2) That the First and Second Respondents be authorised and ordered to make such deductions as from **1 June 2012**, or as soon thereafter as may be deemed practical, and thereafter on every consecutive salary day, until such time as the outstanding balance of each respective borrower, as indicated in **Annexure "A"**, has been paid in full.*
- (3) That the First and Second Respondent be authorised and ordered to pay over to the account of the Applicant the monthly instalments so deducted from the salary of each respective borrower.*

[2] This order was made in default of appearance. The order had annexed to it a list of 6353 persons who entered into loan contracts with the lender, Blue Financial Services ('Blue').

[3] Two applications for rescission of that order have been filed and now fall for determination.

[4] The first of these was filed by Legal Aid Chambers on 9 July 2012. The applicants to that application are Malikoli Ratalane, Khoboso Motsetse, Lieketseng Matsoetlane, Puleng Semoli, Mapulane Thaisi, Mangaka Alina and Rose 'Matokelo Molise.

[5] These applicants (I shall refer to them as Borrowers L.Aid) sought the following relief:-

1. That a rule nisi issue calling upon the respondents to show cause if any why;

(a) The rules of this court pertaining to modes and periods of service may not be dispensed with on account of the urgency hereof.

*(b) Execution of the order of this court **(CCA23/12)** dated the 28 May 2012 may not be stayed pending finalisation hereof.*

(c) The above mentioned order of this court may not be rescinded.

(d) That prayers (1) (a) & (b) operate with immediate effect as an interim relief.

(e) Further and/or alternative relief.

[6] The application was supported by an affidavit of Malikoli Ratalane and further supported by confirming affidavits from Khoboso Motsetse, Lieketseng Matsoetlane, Puleng Semoli, 'Mapulant Thaisi, Libuseng Masoatsa, 'Mangaka Alina and Rose 'Matokelo Molise. All the deponents occupations are listed as "civil servant".

[7] The crux of the borrowers L.Aid is claim is in Ms Ratalane's affidavit. It reads:

I and my co-applicants are the 1st respondents' clients; we have borrowed some money from the company and are aware of the directive for the Lesotho Court of Appeal in C of A (CIV) 30/09 a case in which we were the appellants. Some day in the first week of July 2012 I and my co-applicants heard rumours that the 1 respondent will on the strength of some court order deduct some money from our monthly salaries at the end of July 2012. We as soon as practical instructed our counsel of record to follow up on the rumour; he did and informed us that there indeed exists an order of this Honourable court in terms of which the 2 and the 3 respondents are to deduct certain amounts of money from our salaries.

3.1 Our advice is further that the said deductions have not taken effect yet but are in terms of the court order to take effect as soon as practical after 1 of June 2012. We believe our counsel of record and have confidence in him. The order was obtained behind our

backs. We were not served with the application papers. Our counsel whom we honestly believe advises us that this is contrary to the relevant rules of this court and/or established practice. We are apprehensive that the deductions will commence on the 1st July 2012.

3.2 We are lowly paid civil servants and the deductions if made will leave us almost destitute hence our prayer that the court treat this our matter as urgent.

[8] Notice of Intention to oppose was filed by Blue's attorneys on 9 July 2012.

[9] An affidavit of Jaques Janse Van Rensburg opposing the borrowers L.Aid application was filed on 25 July 2012.

[10] A replying affidavit by Ms Ratalane was filed on 29 August 2012. Deponents Ms Motsetse, Ms Semoli, Ms Masoata, and Ms Alina filed confirming affidavits in reply on the above date.

[11] The second application was filed on 7 September 2012. It was filed by 104 applicant/borrowers. As far as can be determined many of there were the borrowers who took the original case to the Court of Appeal. Whilst in this judgment the applicants for recession will be generally referred to as 'the borrowers', where it is necessary to destiguish the applicants from such other, I shall refer to these second applicant/borrower to 'borrowers C of A'. All are public (civil) servants.

[12] The Notice of Motion filed 7 September 2012, seeks the following:-

1. *Dispensing with the ordinary rules pertaining to the modes and periods of service by reason of the urgency of this matter.*
2. *A 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 order granted by this Honourable Court on the 28 day of May 2012 in CCA/23/2012 shall not be stayed pending finalization hereof.*
 - b. *The order granted by this Honourable Court on the 28 day of May 2012 in CCA/23/2012 shall not be rescinded.*
 - c. *The 2 and 4 Respondents shall not be interdicted from continuing to make further deductions from Applicants salaries until proper recalculations and reconciliations would have been made in accordance with the Court of Appeal decision in Afrisure Finance and Another v Lechaka and Others, Makhulong Multi Finance (Pty)Ltdt/a B Blue Financial Services v Nona and others, Select Management Services Lesotho (Pty) Ltd v Ratlali and others (C of A (Civ) 29/09, C of A (CIV) 30/09, C of A (CIV) 31/09.*
 - d. *Applicants shall not be granted such further and/or alternative relief as the Honourable Court may deem meet.*
 - e. *Respondents shall not be ordered to pay costs of this application on attorney and client scale only in the event of*

opposition hereto, and such costs to include the costs consequent upon the employment of one instructing attorney and two counsel.

3. That prayers 2 (a) operate with immediate effect as interim relief pending finalization hereof.

[13] The founding affidavit is by Nteboheng Palime.

[14] Supporting affidavits were filed on 7 September 2012 by ‘Marethabile Mosala (Applicant 57 borrower C of A), ‘Mathabang Motjotji (applicant 96 borrower C of A), Lineo Ntsitsi (applicant 51 borrower C of A), ‘Mapaballo Ntaote (Applicant 14 borrower C of A) Tankiso Rannetla. (Applicant 50 borrower C of A) and Limakatso ‘Makhotso Tlhaole-Ramarou. Ms Tlhaole Ramarou is a secretary in the chambers of K.E.M. Chambers – the chambers of Adv. Mosito K.C.

[15] An answering affidavit by Mr. Van Rensburg was filed on 12 September,2012.

[16] A second answering affidavit by Mr. Van Rensburg was filed on 1 October 2012.

[17] An affidavit in reply to those of Mr. Van Rensburg was filed on 2nd October 2012 and deposed by Nteboheng Palime.

[18] The applicant borrowers C of A Heads of Argument were filed on 1 October, 2012.

[19] The Head of Arguments from Blue was filed on 5 October.2012.

[20] The original application (from which the order of 28 May emanated) and affidavit were filed on 23 April 2012. The founding affidavit thereto was by Mr. Van Rensburg with a confirmatory Affidavit by Mr. Kenneth Hlasa. In part these were annexed to the founding affidavit of Ntebaleng Palime of 7 September 2012. I take it as to be read in the application by the borrowers C of A.

[21] I shall refer in greater detail to all this material, where necessary, later in this judgment.

[22] These original proceedings and supporting materials (of 23 April) were all personally served the Accountant General, the National Treasury and the Attorney General. Neither of these is a party to the application for rescission.

[23] It is the manner of service on the borrowers that is the subject of this controversy.

[24] To dertermine this, one has to start at the very beginning of the service process.

[25] In paragraphs 6.1 and 6.2 of the founding affidavit to the application for substituted service (filed 23 April), the deponent, Mr. Van Rensburg said this:-

*The Fourth Respondent consists of six thousand three hundred fifty three money borrowers who have borrowed different amount of money from the Applicant. Since Adv **Mosito** KC has represented some of the borrowers cited First Respondent herein in previous proceedings, to which I will refer shortly, and since it would be totally impractical to try and effect service of these papers on borrowers cited Fourth Respondent, the Applicant has initially made an attempt to serve this application on the chambers of Adv **Mosito** KC in Maseru for notification of the borrowers, but unfortunately he refused to accept such service.*

In such circumstances I respectfully submit that the only practical mode of service upon the six thousand three hundred fifty three borrowers, is the mode prayed for in the Notice of Motion.

[26] In response to this assertion that an attempt to serve the respondents via service on the chambers of Mr **Mosito** KC, Ms Tlhaole – Ramarou deposed as follows:

I am an adult Mosotho female and Secretary in the K.E.M. CHAMBERS, which are chambers of Advocates headed by Advocate K.E. Mosito KC at Lenyora House in Maseru. The facts to which I depose herein are unless the context otherwise indicates, within my personal knowledge and, are to the best of my belief and recollection true and correct. I am therefore entitled to depose to this affidavit.

I have been the Chambers aforementioned since 2000 and I have become familiar with the service of court process and receipt thereof in legal practitioners offices. This is so notwithstanding that I am neither a legal practitioner nor a lawyer myself.

*On the 25 day of January 2012, a Deputy Sheriff of this Honourable Court one 'Mapalesa Pakisi arrived at the Chambers aforementioned attempting to serve papers in case Nr: CAA/03/2012. I annex a copy of the Notice of Motion that was attempted to be served on the said Chambers hereunto and I mark the same **ANNEXURE "LMT1"** and the same is self-explanatory.*

When I looked at the Notice of Motion before accepting service thereon, I realized that some of the names that appeared in the list of respondents were those of the clients of the aforementioned chambers. Somer of the respodnents such as for example, and most notably, 1. 2 amd 3 respondents were not clients that had been served by K.E.M. Chambers and therefore they had no files in the chambers.

When I realizzed this anomaly, I immediately checked the electronic system to find out whether the chambers had clients of the descriptions refleted in the Notice of Motion and whether there was a case Nr CCA/3/2012 that the chambers were handling. I discoverd that there was no such a case.

I then informed the Deputy Sheriff that while I was aware that some of the respondents were our clients, I could not accept the

process because it was clear that this was a totally new case. I told the Deputy Sheriff that because this was a totally new case, it was advisable to go and serve the papers on the respondents themselves so that they could decide if they wanted to go to other lawyers or they would like to remain the chambers. I said this because in my experience, Advocate's chambers do not accept original process handed over to them by Messenger of Court or Deputy Sheriffs unless a prior instruction emanating from an attorney would have reached the chambers and I would have been given instructions to receive such process by an Advocate in the chambers. This was not such a case. I therefore declined to receive the process on behalf of the respondents.

I must say that at the time when the process reached the chambers, Advocate Mosito KC was out of the chambers and to my recollection there was no lawyer in chambers. It is therefore incorrect that Advocate Mosito KC refused to accept service of the process on him. In any event I know that he would not have accepted it for the reasons outlined in paragraph 6 above. It is not correct that the process in CCA/23/2012 was ever attempted to be served on our chambers at any stage because I would have known as one of my duties is to receive the process that is served on the chambers from other lawyer.

I am making this affidavit to explain away the averments in CCA/23/2012 that an attempt had been made to serve the papers on Advocate K.E. Mosito KC but he refused to accept service. In fact the effect of the Return of Service filed of record in

CCA/3/2012 that KEM CHAMBERS refused to accept process in that matter is correct to the extent that it should be understood in the light I had explained above. Although I have seen a copy of the Return of Service in that matter, I am unable to annex it hereunto because it is not sufficiently legible for consumption by this Honourable Court. A copy of the return of service will be brought to the attention of this Honourable Court at the hearing hereof.

I wish to emphasize that there was never an occasion when either the process in CCA/01/2012 or CCA/23/2012 were ever attempted to be served on K.E.M. CHAMBERS at any stage and/or day in the year 2012.

[27] In Mr. Van Rensburg's affidavit filed 1 October the deposed (in reply to Ms Tlhaole –Ramarou's assertion) as follows:-

*I take note of the allegations and sentiments expressed in these paragraphs. I repeat that there was an attempt to serve the papers in the main application on the chambers of Adv **Mosito** KC, but this aspect is not mentioned in order to put any blame on the said advocate. This non-service was only mentioned in the main application to show that there was no other means of serving the application papers than by the substituted service sought from the Court.*

[28] I make the finding that Ms Tlhaole-Ramarou's assertion that it was not the application in **this** case that was attempted to be served on Mr. Mosito's chambers to be more likely the truth than

not. On balance I find that the application in **this** matter was not attempted to be served on Mr. Mosito's chambers. Mr. Van Rensburg was mistaken on this fact. But the court, in granting the order of 25 April, relied on this fact.

[29] The question then is what is the effect of a court acting on a mistaken fact?

[30] The test must be whether the mistaken fact on which the court acted was material to its decision. If so, then it must be rectified. If the mistaken fact was not material, the court, in its discretion, can overlook the error. (see, for example : **Nyingwa v Moolman No 193 (2) SA 508**)

[31] As a matter of public policy, courts must decide cases on the evidence. This requires the determination of (and reliance on) found facts. A court cannot allow decisions to remain in force that were reached on consideration of mistaken facts that were material to it - even if this was discovered after the decision. If (in such circumstances) it were the case that the decision were to remain untouched the integrity of the court's decision would be seriously, compromised – as would the court's reputation and standing.

[32] In considering this in instant case, two other issues call for consideration.

[33] Firstly the overall application seeks the High Courts approval of a process undertaken by Blue so as to satisfy a Court of Appeal judgment. The Court of Appeal is the superior court. Any application brought in the High Court designed to give practical effect to the superior Court judgment must be presented thoroughly with all relevant issues covered, as is the expression – “with the i’s dotted and t’s crossed.

[34] Secondly, Blue sought to proceed by *ex parte* application. It is trite law that an *ex parte* application requires the utmost good faith. (see: **Phillips v National D.P.P. 2003 (6) SA 447** – SCA para 29); followed in *ex parte* application **Arbtsen vs Nedbank Limited** - Gorven J, case no. 2333/2012 Kwazulu – Natal High Court 28 September, 2012 at www.saflii.or/za/cases/ZAKZPHC/2012/66.html).

[35] In respect of an *ex parte* application, the principles were succinctly stated by the Roux J in **Schlesinger v Schlesinger [1979] (4) SA 342** and followed by Gorven J in *Arbtsen* (supra)]. These principles are:-

- “(1) *In ex parte applications all material facts must be disclosed which might influence a court in coming to a decision;*
- (2) The non-disclosure or suppression of facts need not be wilful or mala fide to incurr the penalty of rescission;*
- (3) The Court, apprised of the true facts, has a discretion to set aside the formal order or to preserve it”*

[36] In instant case the non-disclosure or suppression of facts (caused by mistake of fact) that **this** application was not attempted to be served on Mr. Mosito's chambers. This was in all probability not wilful. In all likelihood a simple error or some confusion occurred.

[37] The court's discretion to rescind or continue the order is not unfettered. It depends, as I have said, on whether or not the suppressed fact was material to the court's decision. In other words if the suppressed fact (the mistake as I found it) had been known to the court at the time of making the order, would the court have still granted the order?

[38] In this case I am referring to the original order of substituted service by publication made 25 April.

[39] Blue came to the court seeking to invoke HCRule 4 (6). HCRule 4 (6) states (as it relevant) '*if it is not **possible** to effect service in any manner aforesaid, the court may, upon application of the person wishing to cause service to be effected give directions for such service.*' (my emphasis).

[40] The '*manner aforesaid*' includes personal service and service by service on another in place of the actual person to be served (e.g an agent or adult person who is likely to bring the process to the defendant's attention – HCRule 4 (1).

[41] Blues' case was two fold:-

- (a) It was impractical to personally serve the defendant/respondent; and
- (b) That the intended agent of the defendant/respondents (Mr. Mosito KC) could not be served. But, importantly, service was attempted on Mr. Mosito (so claimed Blue) but it was refused.

[42] Blue cannot escape from this. Mr. Van Rensburg's evidence is very clear and conclusive. The evidence of attempted service of this application was refused. Therefore it was '*not possible*'. To serve the defendant/respondent '*in the manner aforesaid*'.

[43] There is no doubt in my mind about that.

[44] Consequently the attempt at service of '**this application**' (Mr Van Rensburg's words) was very material, even critical, to the application for substituted service by publication.

[45] The fact is that there was not an attempt to serve '**this application**' on Mr. Mosito. Had the court known this at the time of granting its order for publication, it would not likely not granted the order. As Adv. Mosito K.C. submitted, the court would have probably told Blue to go and make a *bona fide* attempt to serve his chambers with '**this application**'.

[46] Having been caught short Blue cannot now be heard to say that its application for substituted service was brought because of impracticality of service by conventional means as distinct

from the ‘impossibility’ of service. That would be an exercise in semantics. Whilst it tries to say that in its material, it did not approach the application with evidence in support of such an approach. In the terms of this case, matters pertaining to impracticality require evidence of cost-ineffectiveness, untimeliness and unacceptable delay likely to be caused given the need to fulfil the Court of Appeal’s judgment in a timely manner. It also would require evidence of as many means as possible to notify the defendant/respondents most of whom, I understand, are civil servants.

[47] This was not the evidential thrust of Blue’s application. The thrust of the application was that service by normal means including service on an agent was impossible – as in HCRule 4 (6). As service on an agent was included, then the evidence must demonstrate an actual attempt to serve the relevant application on the agent was tried, but failed. In fact no such attempt was made.

[48] The upshot of all this is that the court must, in the exercise of its discretion, rescind the substituted service order of 25 April for mistake of a material fact. Consequently the purported service by publication was an irregularity. There existed no valid order for such mode of service.

[49] This irregularity as to service adversely affects the judgment of 28 May. It becomes a judgment irregularly entered. As of

right, the borrowers' application for rescission must be granted without terms.

[50] The judgment of 28 May is hereby rescinded. The borrowers are entitled to their costs to be taxed if not agreed.

[51] I decline to issue an interdict as was prayed for in the borrowers (C of A) application. I refer to the Court of Appeal judgment at **Afrisure Finance and Another v Lechaka and Others, Makhulong Multi Finance (Pty) Ltd t/a B. Blue Financial Services v Nona and Others, Select Management Services Lesotho (Pty) Ltd v Ratlali and Others (C of A (CIV) 29/09, C OF A (CIV) 30/09, C of A (CIV)** para: 42.

It states: *'It is clear that the interim interdict granted in paragraph 2 of the orders made in the court a quo has fallen away, as the applications have been finally determined. I trust, however, that in future when the Accountant General and his subordinate officers and the National Treasury make deductions from the salaries of the respondents in the three appeals pursuant to the stop orders signed by them only amounts due in respect of the capital and interest adjusted in the light of what is said in the previous paragraph will be deducted.'*

[52] An interdict is unnecessary. The parties need to follow the spirit of the superior Court's decision.

J.D. LYONS

JUDGE (A.i)

For Applicant(borrowers) : Mr. Mosito K.C. & Mr. Rafoneke

For Defendant(Lenders) : Mr. Loubser (inst. by Webber
Newdigate)