IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CIV/T/58/2002

In the matter between:

THE LIQUIDTOR LESOTHO BANK **APPLICANT**

And

FLORA SELLOANE SELESO **RESPONDENT**

JUDGMENT

Coram : Honourable Justice J.D. Lyons (a.i.)
Dates of Hearing : 20 September, 2012
Date of Judgment : 20 September 2012.

Summary

Recission – dismissal for delay – abuse of rules – inherrent power of court to dismiss for want of prosecution where it amounts to an abuse of the court – individual docket system – impartiality.

Authorities: ***Allen v Sir Alfred McAlpine & Sons.*** [1969] 1 All ER 543, ***Birkett v James*** (1978) A.C. 297), ***Lindholm v. Pollen*** [1986] 3 BCLR 23, ***Grovit Vs. Doctor*** (1997) 1 WLR 640, ***Arbuthnot Latham Bank Ltd. Vs. Trafalgar Holding Ltd.***

(1998) 1 WLR. 1426, ***Thato Joseph Rankoane t/a Pro Link Systems v The Liquidator Lesotho Bank*** (in Liquidation) C of A (Civ) No. 51/2011).

LYONS J. (A.J)

[1] On the 3 of September 2012 on hearing of a summons filed by the respondent to the original action (Ms Seleso) on 28 August, 2012 seeking dismisal of the applicant bank's' case for want of prosecution, I ordered the dismisal as prayed for by Ms Seleso. This was done in default of appearance by the applicant bank.

[2] On the 12 September 2012 the applicant bank filed a Notice of Motion seeking recission of that default order. It was set down for hearing on 20 September.

[3] On 20 September 2012 counsel for the respondent arrived on time. The matter was called on. There was no appearance for the bank. Initially the Notice of Motion was dismissed for want of appearance. Having dismissed the application for recission due to the non-appearance by counsel for the applicant bank, counsel for Ms. Seleso was just leaving my chambers when counsel for the bank arrived. The matter was set for 9:30a.m. It was well after 10:00a.m when he arrived. No advance message was given to my clerk that would have advised the court that counsel was running late. My clerk has both an e-mail address and a cell phone number that have always been made available to counsel.

[4] Cousel for the applicant handled me his Heads of Argument. Exactly why these were only handed to the Judge on the morning of the hearing (and then late) was unexplained. Counsel for the respondent had filed his 2 days earlier, thus giving me the chance to read, research, consider and contemplate his submissions.

[5] Counsel for the applicant asked me to hear him and, in effect, vacate my order dismissing his clients' application for rescission. Initially I declined but then relented. Notwithstanding his submissions I determined that the application for recission should be dismissed with costs. Herewith are my reasons.

A line has to be drawn in the sand here.

Firstly there is the important matter of court protocol.

[6] Chambers start at 9:30a.m. This has been my constant practice. Counsel is well aware of that. Hopefully chamber matters can be determined quickly so that court starts at 10a.m. or shortly therafter. Counsel for the applicant appears in the commercial court regularly. He knows the drill.

[7] If for some reason counsel is detained elsewhere they are expected to call ahead. The means of communication are always open.

[8] Counsel do not simply set their own time. If they are busy, they know to advise the Judge's Clerk or make some other holding arrangment.

[9] It really is as simple as the Court, having made available the time and the means of communication, requiring the observance of courtesy.

[10] If counsel is late or does not turn up at all without calling ahead or making some other arrangment, they can expect their matter to struck out or the matter at hand being determined in their absence.

[11] This matter is a simple mortgage action. Yet it has dragged on since 13 February, 2002 – over 10 years.

[12] The original Deed of Hypothecation was signed on 9 September, 1987. Between The Lesotho Building Finanace Corporation and Ms. Seleso.

[13] The Summons herein was filed on 13 February. 2002. The date of the alleged default is not pleaded. Nor is it pleaded as to how the applicant bank is apparently standing in the place of the Lesotho Building Finance Corporation.

[14] The Notice of Appearance was filed on 15 February, 2002 and the Plea followed one week later (22 February, 2002).

[15] The action then ran foul of the Dismissal Roll (rule 45 A). On 25 February 2008 the Chief Justice removed it from that Roll (on application by the applicant bank) and put it back into the active roll. In so doing, the Chief Justice noted the file that "the plaintiff should vigourously pursue its rights in accordance with the time frames set out in the rules instead of sitting back hoping that the matter would resolve itself".

[16] The applicant filed its affidavit of Discovery on 26 March, 2008. The respondent filed hers on 4 April, 2008.

[17] Notice of expert summary and witnesses statements were filed by the applicant and respondent on 29 April, 2008 and 3 September, 2008 respectively.

[18] On 6 May, 2008 a notice seeking a pre-trial conference (rule 36) was filed. The conference subsequently proceeded on 19 August, 2008. The file note reflects that 'witness statements have been filed by the plaintiff'.

[19] On 8 May, 2008 and again on 3 December, 2008 the applicant filed a notice seeking a trial date (rule 36).

[20] On 1 December, 2009 the applicant filed and indexed brief of the pleadings.

[21] Nothing happened after that until 19 November 2011 when the case was set for trial. The file is noted that the defendant

(respondent) was not ready. The judge adjourned the case sine die. I note that there was no bundle of documents filed as was the plaintiff's (applicant) obligation pursuant to (then) rule 5 of the High Court (Amendment) Rules 2000 (now rule 17, 2011 amendment). These rule changes amended rule 34 of the High Court Rules making the presentation of the bundle a requirement of all litigation cases, not just commercial actions. I also note there were no Heads of Argument filed by the applicant.

[22] I also note that on perusing the documents annexed to the applicant's discovery affidavit (filed 26 March, 2008) there appears a handwritten ledger account which, I assume, purports to be the ledger of the Lesotho Building Finance Corporation and the respondent. The admissibility of this document is highly questionable. It appears to be a handwritten copy of an original document. Attaching it to an affidavit of discovery does not render a document admissible as evidence. Placement in a bundle of documents under the rules may well do that. There is no witness statement of the person who copied it filed that could be said to overcome this evidential difficulty in the applicant's case. Notwithstanding the judge's file note, I am caused to wonder if the applicant was ready for trial.

[23] I also note that this purported 'ledger' document (if ever proven) suggests that the respondent has not made any payment on the loan since perhaps October, 1988. The respondent in her plea (filed 22 February, 2002) raises a special plea of prescription and, tangentially at least (ad para 8 p.9), application of the 'in

duplum' rule. The date of actual default is critical to both these pleas. No such date is pleaded by the applicant. A strongly suggestive reason for that leaps out on even a cursory reading of the pleadings.

[24] Then by notice filed 12 June, 2012, the applicant's sought to have this case allocated as a commercial case (rule 11 of the 2011 amentment). I note that this case was obviously a commercial case as defined by rule 5 (1) (3) of the High Court (amendment) Rules 2003., yet only in 2012 was a request made to designate it a such. When originally filed, rule 7 of the 2000 rules would have applied to designation of this original action.

[25] The applicant did nothing else until served with the dismissal order of 3 September, 2012. This is important. The applicant cannot be heard to say that the mere request for allocation to the commercial division was a step forward. The case stood adjourned sine die. It was therefore incumbent on the applicant to bring an application in the prosecution of the case immediately to cause the court to remove it from the inactive 'adjourned sine die' status and return it to an active status.

[26] The individual docket system is now in place in the High Court. It has been thus since at least the end of 2010. That means that instead of many judges dealing with a case as it progresses through the court, each case is allocated to a judge as soon as it is defended. That judge then individually handles the case until it is complete.

[27] The way it works is that once an action is defended and is thus active, the Registrar allocates this active case to a judge. The judge then maintains its activity by supervising its progress. This forward progress is largely determined by the time limits set by the rules. For example, once a case is defended, generally the next step is either replication, hearing of a special plea or discovery. The judge will give directions and adjourn the matter to a future date for review or hearing of an intelocutory matter. At all times the case must be adjourned to a **fixed** date for further review and directions. That way the case is kept active and remains properly before the court. Adjournments sine die or to a date to be fixed are studiously avoided.

[28] If a case is adjourned sine die (as in this case), it falls out of the active list. To be returned to the active list of the judge to whom it is allocated, an application for some type of relief must be filed so as to move the court to, in effect, bring the matter from the inactive 'sine die' list to the active case management list. The court must not, of its own motion, retrieve the file and put it in the active list. If it were to do that the court would be prosecuting the matter and doing the job of the plaintiff/applicant. The court, by so doing, would compromise its impartiality. (Rule 45 dismissal is an exception – but even that rule has a qualification of 'after being entered for trial').

[29] In this case, once the applicant had the designation requested, it was incumbent on it to immediately move the court,

by an application of setting for hearing or such, to retrieve the action from the inactive list and bring it to the active one.

[30] Instead the applican did nothing. It just sat 'back hoping that the matter would resolve itself'. That is precisely what the Chief Justice said the applicant should not do – and that was 5 years ago in 2008.

[31] The leading case on *want of prosecution* is a British decision of 1969, ***Allen v Sir Alfred McAlpine & Sons.*** [1969] 1 All ER 543 which sets out a three part test:

(a) inordinate delay;

(b) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable;

(c) and the defendants are likely to be seriously prejudiced by the delay. (see also ***Birkett v James*** (1978) A.C. 297)

[32] In the Canadian case of ***Lindholm v. Pollen*** [1986] 3 BCLR 23, Justice Gow wrote these words of wisdom:

> *"The animating principle lying back of any system of administration of justice is that litigation be proceeded with diligence and expedition. This principle is expressed in (the rules of court) that the object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and echoed in s. 11 of the Charter of Rights and Freedoms, which speaks of the right to be tried within a*

reasonable time. A just determination can only be attained if an action is tried while the facts are still within the recollection of the witnesses."

[33] Arguably, and although reference is made to criminal offences only, the rights echoed in s.11 of the Charter of Rights and Freedoms Justice Gow speaks of are inferred in s.12 of the Lesotho Consitution. If not, then it is certainly a public policy that litigation matters come to conclusion within a reasonable time. 10 years is way beyond what could be described as a reasonable time – and then it is still soem way from conclusion.

[34] What really concerns me with this matter at hand is the conduct of the applicant bank generally throughout this litigation. Looking at it overall, can it be said that the applicant really wants to press this for trial?

[35] The cause of action appears to stem from as far back as 1988. The evidence from the applicant appears to be questionable as to admissibility. The prospects of prescription being succesfully raised must have occurred to the applicant. The application of the 'in duplum' rule must also have occurred to the applicant. Yet a sum in of M645,238.44 is claimed owing on an original loan of M136,273 on which (at least on the face of the applicant's discovered material) default was made (at best) just over 12 months from when the initial loan was advanced.

Grovit Vs. Doctor (1997) 1 WLR 640 Lord Woolf (with whom the other judges agreed) said;

> *"… I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action.* ***The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v. James [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings."*** *(my emphasis).*

[36] In the case ***Arbuthnot Latham Bank Ltd. Vs. Trafalgar Holding Ltd.*** (1998) 1 WLR. 1426 the Court of Appeal, applying the same principles as in Grovitt, struck out two sets of proceedings on for considerable delay in moving the proceedings

to conclusion. The court was of the view that the plaintiff showed a "total disregard of the rules" amounting to an abuse of process. This case also determined that the conduct of a defendant in the action is prima facie irrelevant to the court's decision as to whether or not to dismiss (see: **Arbuthnot** at p. 1435 H). (see also the Court of Appeal judgment in ***Thato Joseph Rankoane t/a Pro Link Systems v The Liquidator Lesotho Bank*** (in Liquidation) C of A (Civ) No. 51/2011).

[37] I considered permitting the applicant to proceed and holding the applicant to terms by ordering an 'unless' or 'guillotine' order. However on consideration of the substantial delays in prosecuting this matter (it seems from about 1988 to present), the Chief Justice's comments, the continued delays and non-appearances, I came to the opinion that an unless order would be inappropriate in the circumstances of this case.

[38] In my opinion, considering the conduct of the applicant overall and the delays in prosecuting this case, it can be said that the conduct on balance amounts to an abuse of process and that the applicant's case should be dismissed.

[39] As a direct consequence the application for recission is dismissed with costs to be taxed if not agreed.

[40] This is only pyrrhic victory for the respondent. The Deed of Hypothecation remains – with its remedies for any breach. It is back to the drawingboard for the applicant. I realize that counsel for the applicant 'inherited' these Lesotho Bank (in liquidation)

matters – 'warts and all', as the saying goes. However, (and we have had this conversation before), this 'one size fits all' approach to pleadings and evidence in fraught with risk. Cases are determined on their own merits and facts. When returning to the drawingboard, counsel needs to be alert to this – and the need to be guided by the law, both in the setting up the action and after its commencement.

J.D. LYONS

JUDGE (A.i)

For Applicant : Mr. Mabathoane

For Respondent : Mr. Ntlhoki