IN THE HIGH COURT OF LESOTHO

CIV/APN/518/2011
CIV/T/597/2002

In the matter between:-

LERIBE MOTORS (PTY) LTD. T/A ROAD HOUSE — **APPLICANT**

AND

THE LIQUIDATOR LESOTHO BANK (IN LIQUIDATION) — **1ST RESPONDENT**

THE DEPUTY SHERIFF — **2ND RESPONDENT**

JUDGMENT

Coram : **Hon. Mahase J.**
Date of hearing : **Various dates**
Date of Judgment : **16th October, 2012**

Summary

Civil Procedure – Application proceedings – Rescission of a judgment granted by default – Requirements for rescission application.

ANNOTATIONS:-

CITED CASES:-

- **De Witt Auto Body Repairs (PTY) Ltd. v. Fedgen Insurance 1994 (4) S.A. 705 at 711**
- **Building Improvement Finance Co. (PTY) Ltd. v. Additional Magistrate, JHB 1978(4) S.A 790**
- **Behuncke v. Winter 1925 SWA 59**

STATUTES:-

BOOKS:- None

[1] This is an application for stay of execution and rescission of judgment of this Court dated the 3rd May 2004.

[2] This case has a protracted history as it has been pending court since around the year 2002. The reason explaining why this is so will be clear from the facts of it.

[3] Issues for determination in this application are in a nutshell:-

- Whether the applicant has made a case for rescission?
- Has it got a bona fide defence?
- Was the default willful or not
- Is the applicant not time barred?
- Is it not approaching the Court only for purposes of delaying execution?

[4] Briefly the facts of this case are that sometime in May 2004 default judgment was granted against the applicant in the instant application. This was later rescinded with prayer iii thereof, being rescinded by consent.

[5] It is clear from the summary of the facts of this case as contained in the respondents' heads of argument that the said prayer iii was so rescinded because property which had been attached had been erononeously attached because among other reasons it had been specially mortgaged. It also transpired that that property described as Plot No. 12284 – 440 situate at

Europa in the Maseru district is not same site on which the applicant is situated.

[6] The site upon which the applicant is situated and from where it conducts its business is at Hlotse in the Leribe district. These are therefore two different sites.

[7] The applicant denies that it was in wilful default and says that it has a bona fide defence. The applicant allegedly owes the first defendant a substantial amount of money which indebtness has allegedly been outstanding fro several years. Refer to the summons as well as to the respondents' heads of argument.

[8] I observe that the applicant argues that even if it could be said that it owes the first respondent any money (which fact it denies) the first respondent contradicts itself with regard to the exact amount of money it claims to be owed by the applicant.

[9] As has been alluded to above, this case has a long history and has been pending before this Court for many years.

[10] It has been dealt with before different Judges of this Court. Regrettably, this Court has not been furnished with the old file, and as such it is not in a position to glance at the facts as may be contained in that main trial in CIV/T/597.2002.

[11] Neither has a copy of the judgment, subject-matter in the instant application been availed to this Court. Be that as it may, it is a matter of common cause that this case was once dealt with by or before various Judges of this Court and that the judgment in question is dated the 24th May 2004.

[12] The first respondent has raised a point of law; to wit, that the applicant is time barred in terms of the provisions of the Rules of this Court, in particular sub-rule (6). There is no indication to the effect that in terms of the provisions of this Rule the applicant has been time barred from applying for rescission of the default judgment.

[13] The deponent to the founding affidavit filed on behalf of the applicant denies that he knew of the above judgment. He says he got to know about its existence on the 17th September 2010 when he came across a notice of sale in execution in respect of site No. 25122-114 situated at Hlotse in Leribe, dated the 31st August 2010. Refer to annexure "LM5" page 15 of the record.

[14] There is no indication that the applicant was ever served with this notice although it is addressed to it. Having come across that notice, the applicant moved the court as he has done on the 20th September 2010.

[15] Court process was duly served upon the respondents who then indicated and filed their notice to oppose this application.

[16] The deponent to the founding affidavit does not only make a bare denial of the fact that he or applicant never knew of the case in CIV/T/597/2002, but he has clearly spelt out what he discovered when he and his counsel then

perused the court file in this main trial. Refer to the applicant's founding affidavit, paragraph 8.

[17] The deponent to this affidavit also denies knowledge of one Mats'osane Mosoeunyane who is allegedly the lady who was served with the originating summons in CIV/T/597/2002.

[18] He also challenges the mode of service of court process relating to applicant, through Public Eye newspaper at Europa. It is his argument that no nexus has been made between Public Eye newspaper and the applicant which operates business at Hlotse, Leribe.

[19] In other words, applicant is challenging the publication of the sale in execution of the site in question in the local newspaper. It is noted by this Court that in fact this is the procedure provided for by the Rules of this Court. There is nothing wrong with such publication as it is the means through which members of the public, including the affected party, are notified of the intended sale in execution of property in pursuance of the judgment of this Court. The provisions of Rule 18(4) of the Rules of this Court come into play.

[20] The applicant denies, therefore that for reasons stated in the above-indicated paragraphs in his founding affidavit, that he was in wilful default of non-appearance to defend the main action.

[21] As alluded to above, the first respondent has raised a point of law to the effect that the applicant's application is time barred in terms of the Rules of

this Court. It is accordingly argued that for the above reason, this application should be dismissed with costs.

[22] According to the first respondent's answering affidavit, the applicant knew about the judgment on or around the 23rd June 2004. He refers to CIV/T/279/2004 and has annexed "LLB1". He also makes reference to CIV/T/597/2002 in paragraph 4 of the same answering affidavit.

[23] I pause to note that although the deponents to the answering affidavit both refer to CIV/T/597/2002; the parties in CIV/T/279/2004 referred to by the deponent to the answering affidavit (Anthony Scott Mcalpine) are completely different parties from those cited in CIV/T/597/2002. The applicant in the instant application; CIV/T/518/2010 is Leribe Motors (PTY) Ltd. T/A Road House. I note further that parties in CIV/T/279/2004 (cross reference number in this case) are not the same as in CIV/T/597/2002. The applicant in the instant application is definitely not a party to CIV/T/279/2004.

[24] It is not the case of the first respondent that, nor that of the deponent to the first respondent's answering affidavit that the applicant and Fobokoane 'Mota have a business connection in anyway. He does not at all say what or which business relationship the application has with the applicant in CIV/T/297/2002.

[25] Put differently, the applicant in both annexures "LLB1 and LLB2", which documents have been filed in support of the first respondent's case is not

Leribe Motors (PTY) Ltd T/A Road House. Contents in the respondent's answering affidavit – paragraph 4 thereof do not advance its case in anyway.

[26] The deponent to the founding affidavit has ably and clearly described himself as being a director and shareholder of the applicant in the instant application. He also describes how he got knowledge of the facts he is deposing to. Refer to paragraphs 1 and 2 of same. The first respondent, through the deponent one Anthony Scott McAlpine only makes a bare denial of the said averments and does not indicate the position of the applicant's relative in the applicant; neither does he say what the name of that relative of applicant is. He has not been supported in anyway to the effect that indeed that relative, and the applicant have ever authorized that relative to handle the affairs of the applicant.

[27] The averments of Patric 'Mota as appear in paragraph 1 of his founding affidavit as well as those in paragraphs 9 and 10 remain unchallenged. It is trite that in cases such as the instant one, reasons for applicant's absence or default to enter appearance must be set out in the application.

[28] It is the applicant's case that it was never served with the summons as it does not know the lady of the names of Mats'oasane Mosoeunyane indicated in annexure "LM6" to his founding affidavit.

[29] The first respondent has equally made a bare denial of this averment. Indeed there is nothing on "LM6" indicating the nexus or relationship between Mats'osane and the applicant. There is nothing indicating how she is related

to applicant and whether or not she and the deponent to the founding affidavit knew each other. There is no explanation about who she is.

[30] The deponent to the founding affidavit states that the applicant has a bona fide defence to the main action. Refer to paragraph 10 of his founding affidavit.

[31] This Court has already alluded to the fact that parties in CIV/T/279/2004 and CIV/T/297/2002 are not the same parties as in the instant application. This, taken together with the contents of paragraph 6 up to 9 of the founding affidavit, clearly reveal that the deponent to the founding affidavit who is a director and a share holder to applicant did not know of the existence of the case and summons issued against the applicant by the first respondent. These have not been denied.

[32] The applicant cannot therefore be said to have been in wilful and deliberate default when he had never been served with any court process and so he cannot be said to be time barred to apply for rescission of the said default judgment for the reasons he has raised in his founding affidavit. The deponent to the founding affidavit approached this Court for the relief herein within three days after he saw a notice of sale in execution of the applicant. Refer to paragraph 5, 6, 7 etc of his founding affidavit.

[33] The first respondent has attached "LLB2" as proof or in support of its argument that the applicant knew about this proceedings in CIV/T/597/2002. The deponent to the replying affidavit has dealt with the said "LLB2". I

need not repeat same. Suffice it to note that contents therein are of a general nature. Nowhere is any specific mention made of or about the applicant.

[34] One cannot just assume that the writer of that annexure, be it the deponent to the founding affidavit or not was referring to the applicant. There is nowhere in this annexure where it is indicated how applicant and Mosiuoa 'Mota are related or connected. Indeed, there is no specific mention of the claim in CIV/T/597/2002 and as such an assumption that applicant is subject-matter there in will be stretching the contents of that annexure too far.

[35] In the circumstances, this Court has come to the conclusion that the application has not wilfully defaulted in defending this case.

[36] The issue raised as a in limine to the effect that the applicant is time-barred because he has not filed this application within 14 days since when he knew of the default judgment fell off once it became clear that the applicant was never a party to any of the civil trials referred to above including CIV/T/597/2002.

[37] In any event, there is no time-limit specifically set down in the provisions of Rule 45 of the Rules of this Court, indicating when actually from date of default judgment to date of his knowledge of same, one must apply for rescission once he gets to know of such judgment.

[38] While it is trite that there must be an end to litigation, it is equally trite that a party who is aggrieved by the granting of a default judgment should, where he has successfully shown that he was not in wilful default, then, be granted

rescission so as to allow the merits of a case to be investigated wherever possible. This is the one and only way in which a court of law will be able to balance the interests of the parties and do justice between them. Of course, each case has its unique circumstances.

[39] For the foregoing reasons, the applicant's application for rescission is granted as prayed with costs against the first respondent.

M. Mahase

Judge

For Applicant - Adv. P.V. Tšenoli

For Respondents - Adv. H.J. T. 'Mabathoana