

IN THE HIGH COURT OF LESOTHO

CIV/APN/133/2010

In the matter between:-

PROSPERITY INSURANCE BROKER (LTD) LESOTHO APPLICANT

AND

CENTRAL BANK OF LESOTHO 1ST RESPONDENT

ALLIANCE INSURANCE CO. (PTY) LTD. 2ND RESPONDENT

PROSPERITY INSURANCE CO. LTD. LESOTHO 3RD RESPONDENT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : Various Dates
Date of Judgment : 22 August, 2012

Summary

*Civil Procedure – Application proceedings – Application for rescission –
Elements to be proved – Provisions of Rule 45 of the Rules of this Court.*

ANNOTATIONS:-

CITED CASES:-

- **Ratau v. Monese and Another – LAC 2000 – 2004 page 736 at 741D**
- **Letsoela v. Chief of Kolojane and Another – LAC 1995-1999 page 280 at 288**
- **Dawson Fraser (PTY) Ltd. v. Havenga Construction (PTY) Ltd. 1993 (3) S.A. 397**

- **National Independent Party and Two others v. Anthony Clovis Manyeli and Two others, C. of A (CIV) No. 1 of 2007 pp 5 – 7 thereof**
- **Stadium Supermarket v. BB Alert C. of A. (CIV) No. 26 of 2009 at page 8**

STATUTES:-

- **High Court Rules No. 9 of 1981
Rules 8 and 45**
- **Legal Notice No. 17 of 1985 (Insurance Regulations 1985) Regulation 21
(3)**

BOOKS:-

- **None**

- [1] This is an application for rescission of the default judgment which was granted against the third respondent by this Court on the 26th March 2010. Refer to page 24 of the paginated record.
- [2] In a nutshell, the third respondent has been interdicted and restrained from falsely publicizing that:- applicant's licence has been revoked
(prayer 1)
- To retract as false its public notices in different publications to the effect that applicant's licence has been revoked; (prayer 2)
- [3] The facts of this case have been clearly outlined at pages 2 and 3 of the third respondent's heads of argument. In brief they are that the third respondent which is a registered insurer in Lesotho, and the applicant in the main application which was also a registered Broker had a business relationship.

- [4] In that relationship, the applicant in the main application was, among others, placing insurance business with the third respondent, the insurer. Being registered companies in Lesotho, both the applicant and the third respondent are subject to the control and supervision of the first respondent; the Central Bank of Lesotho.
- [5] Later on, the business relationship between the applicant and the third respondent became troubled. The reason for that being that the applicant allegedly failed to pay over insurance premiums collected by it in respect of business placed by it with the third respondent.
- [6] At around the same time, the third respondent was advised by the Central Bank of Lesotho/ the first respondent that the broker's licence issued to applicant to do business as an insurance broker had been revoked. Refer page 11, annexure "SM2" – main application.
- [7] Subsequent to the revocation of a licence of the applicant, the third respondent decided to stop its business with the applicant. All prospective clients were then notified about this development in the Public Eye Newspaper of the 5th March 2010, and also on Moafrica FM as well as on their website.
- [8] Having also seen that article, the application approached this Court on an urgent, ex parte basis on the 10th March 2010, seeking a Rule nisi referred to above. The applicant was successful in its application. Refer to the order of court dated the 10th March 2010 per my sister Hlajoane J. This order and other related papers were subsequently served on the third respondent.

- [9] Third respondent then contacted the first respondent, and the first respondent advised the third respondent that the application would be opposed. Refer to paragraph 2.7 of the third respondents in which it indicated that having been advised by the first respondent it (third respondent) assumed that it was not necessary for it to also oppose the application. As a result, the third respondent did not oppose the application, nor did it attend court on the return date; viz the 26th March 2010. Not only that, the third respondent did also not appoint an attorney of record to represent it in this proceedings.
- [10] I pause to observe that no reasons nor a good cause have been stated why the third respondent made an assumption that it was not necessary for it to oppose the application nor to appoint an attorney to represent it in this proceedings. The first and third respondents are completely different entities in law with separate existence and duties from each other.
- [11] That is why they were separately or individually cited and later each served with the Court process in question. Refer to return of service dated the 10th March 2010. In other words, only the first and second respondents filed notices to oppose the main application which was filed in this Court on the 10th March 2010. No such notice was ever filed by or on behalf of the third respondent. To be precise, the said first and second respondents' notice to oppose were filed by the office of Webber Newdigate. The third respondent has clearly not invoked the provisions of Rule 8 (10) of the Rules of this Court with regard to the main application.
- [12] However, the third respondent has since instructed the above same firm of attorneys to launch the application for rescission filed in this Court on the

28th April 2010. It is however a matter of common cause that the third respondent did not oppose the main application which resulted in the judgment which the third respondent is now applying to have rescinded (prayer 1). He has also applied that he be granted leave to file an answering affidavit within seven (7) days of rescission.

[13] The third respondent concedes that it was served with the notice of motion and the interim court order dated the 10th March 2010. However, the only reason which it gives as a justification for having not filed any notice to oppose the main application is only that it assumed that it was not necessary for it to do so merely because the first respondent had advised it (third respondent) that the application would be opposed. Now, the question is, is this a valid, justifiable or a bona fide reason in the circumstances of this case? The third respondent does not deny having been duly and formally cited herein and later being served with an interim court order and other process which clearly indicated that the rule nisi therein was returnable on the 26th March 2010 at 9.30 hours.

[14] The third respondent does not deny that the other two respondents duly opposed the application. This in itself should have been an indication to it that it too had to do the same but it failed to do so even after the matter was, by agreement, postponed. The third respondent only states that an application for the granting of the default judgment against it was moved in its absence. Refer to paragraphs 2.7, 2.8 and 2.9 of third respondent's heads of argument in the instant case. Up to this stage, the third respondent has still not explained why it had not indicated its intention to oppose the main application and why it had not appointed an attorney to represent it. Neither

has it explained nor offered a reasonable justification in law for its failure to oppose this main application.

- [15] It says at paragraph 2.10 that the order it now seeks to be rescinded was obtained in its absence, in error, while it has a good defence to the main application; but it has still not furnished the reason(s) for it having neglected or failed to file the opposing papers even though it had been duly served with the interim court order as well as with all the founding papers and the certificate of urgency. There is no indication nor an explanation regarding which kind of error this court committed in granting that order against a party, which although formally cited and duly and timeously served with all court process, as well as the other co-respondents, it alone and with impunity neglected and failed to comply with the Rules of this Court. In fact and to be precise, the third respondent ignored an order of this Court dated the 10th March 2010 to its peril. This Court could not speculate or assume that the third respondent had a good defence to that application in the absence of a notice to oppose same filed by or on behalf of the third respondent.
- [16] The third respondent does not deny that it was duly cited and later served with all the court process herein. Its explanation as to why it did not file any opposing papers falls far too short of the required standard; and or it does not meet any of the elements entitling it to an order for rescission. The fact that the third respondent was cited, duly served with an interim court order referred to above; as well as with the notice of motion, is a matter of common cause. Refer to its replying affidavit sub-paragraph 6.2.

- [17] It is the considered view of this Court that in the circumstances of this case, and regard being had to the attitude of the third respondent after it came to know about the existence of the interim court order in question; this court will be stretching the provisions of Rule 45(1) (a) far too much to an extent of tolerating the kind of conduct which the applicant has alluded to in its heads of argument at paragraphs 6 and 7; namely, that of ignoring an order of court as well as deliberate non-compliance with the provisions of the Rules of this Court.
- [18] The third respondent has no one else to blame for his unexplained failure to instruct an attorney to appear in court on its behalf on the return date. With respect, it is not correct that this Court has prejudged any issues between the respondents in this application.
- [19] Indeed, there is no reasonable explanation of applicant's default, except that he made an assumption not supported by any known principles of law or that which is envisaged by the provisions of the Rules of this Court with regard to application or motion proceedings. Vide **Letsoela v. Chief of Kolojane and Another LAC 1995 – 1999**.
- [20] The third respondent does not say in support of this application for rescission, that it was either not cited, nor does it say that it was improperly or incorrectly cited, neither does it say it was never served with the interim order of court and the founding papers at all. It has offered no explanation at all, (reasonable; or bona fide) in support of its failure to file a notice indicating its intention to oppose this application. Refer to case of **Dawson**

Fraser (PTY) LTD. v. Havenga Construction (PTY) LTD 1993 (3) S.A. 397.

- [21] In the instant application, the third respondent has not at all indicated or signified its intention to oppose the application. Its reliance on the alleged assurance given by the first respondent that the application would be opposed is untenable, because the first respondent is cited herein as a separate entity from the third respondent. In fact it is the third respondent which first went ahead to make public notices which applicant alleges are highly prejudicial to the applicant's business and good name. Refer to applicant's founding affidavit. Other respondents later did the same. This they did all being aware that the applicant had appealed the decision of the revocation of its licence to the Minister of Finance. Vide paragraph 8 of founding affidavit,
- [22] The third respondent argues that there is no apparent material prejudice to the applicant if the third respondent is allowed to oppose the application etc. With respect, this is mind boggling because as a result of their actions (respondents), the applicant is no longer in business. On the contrary, and from a proper reading of the papers herein filed, the three respondents have made it impossible for the applicant to carry on with its brokage business e.g. refer to third respondent's heads of argument sub-paragraph 2.4. None of the respondents have alleged any prejudice on their part as a result of their having stopped conducting business with the applicant and also as a result of the licence revocation of applicant by the first respondent. In fact, none of the respondents has suffered any prejudice as a result of that licence revocation because they – (especially) the second and third respondents have

taken over that business of the applicant much to the prejudice of the applicant.

[23] The third respondent has cited, in support of its application, the case of **the National Independent Party and Two Other v. Anthony Clovis Manyeli and Two Others, C. of A. (CIV) No. 1 of 2007 at pp 5 – 7** thereof. With the greatest respect, the above cited case is distinguishable from the instant case because; in that case, the parties therein/appellants had clearly signified their opposition to the application filed on behalf of the applicant. Also, in the instant application, the respondents have briefed the same attorney, while that was not the case in the above case. This signifies that, in fact the respondents herein are working together against the applicant. They have a common purpose and as such rescission at the instance of only one of them will not serve any good purpose.

[24] In the instant application, only the first and second respondents have indicated and filed their notices to oppose the application. On the other hand, the third respondent has not at all filed nor indicated that it wished to oppose the main application. In other words, the provisions of Rule 8 (13) of the Rules of this Court do not apply to the third respondent because it has neglected or failed to comply with all the provisions of Rule 8 (10) (a), (b) and (c).

[25] Last but not least, this Court has not; contrary to what the third respondent alleges, granted default judgment. It confirmed the rule nisi that was issued by my sister Hon, Hlajoane J. on the 10th March 2010.

[26] The fact that the third respondent concedes that the decision by the first respondent might be a subject of appeal, coupled with the fact that indeed such an appeal has been lodged on behalf of the applicant, is a further clear indication that the second and third respondents have been instrumental in the demise of the applicant because they did not wait for the outcome of the appeal before they publicized such prejudicial information about the applicant. Refer to third respondent's heads of argument page 4, subparagraph 4.1.

[27] It is for the foregoing reasons that the third respondent's application for rescission of the "default judgment" should be and is accordingly dismissed with costs to the applicant.

M. Mahase

Judge

For Applicant:- Mr. Fosa with Mr. Masasa

For Respondents: Mr. Molyneaux/Mr. Grundlingh