CIV/APN/431/2011

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

LOUIS KULEHILE RAMOKHITLI **APPLICANT**

And

MALATALIANA MOROMOLI **1ST RESPONDENT**

DIRECTOR OF TEACHING DEPARTMENT **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Coram : Hon. Majara J

Date of hearing : 15th October 2013

Date of judgment : 4th February 2014

Summary

Application for rescission of default judgment – onus on applicant to establish three essential elements – applicant's averments establishing that while default

was more negligent than willful, he has no bona fide defence with prima facie prospects of success on the merits – application dismissed with costs.

ANNOTATIONS

STATUTES

1. Rule 27 (6) of the High Court Rules No 9 of 1980

CASES

1. Champ Construction v Isowall Southern Africa (Pty) Ltd CCT/T/11/2008 (unreported)
2. Grant v Plumbers Pty Ltd 1949 (2) SA 40
3. Majantja Football Club v Matlama Club CIV/T/359/97 (unreported)
4. Brown v. Chapman 1938 T.P.D. 320

[1] This is an application for rescission of a judgment of this Court which was delivered on the 23rd April 2012 having been heard on the 14th March 2012. On the date the matter was heard, only Counsel for the 1st applicant in the main appeared before the Court and there was no appearance for the 1st respondent who had signaled his intention to oppose the application.

[2] For convenience, the parties will be referred to as they appear in the main application i.e. the applicant for rescission will be referred to as the 1st respondent and vice versa. In his notice of motion in this rescission application, the 1st respondent avers that he was not in willful default as evinced by the fact that after he was served with the notice of motion in the main, he instructed his Counsel to oppose the matter which he did. He adds that the matter was set down for hearing

on the 12th March 2014 and it was agreed that the applicant's Counsel would serve his with a notice of set down but this never happened.

[3] Further that on the appointed date of hearing, his Counsel and **Adv. Masasa** from applicant's Attorneys of record appeared before the Court but the Judge was not present and the matter did not proceed.

[4] The 1st respondent adds that it was agreed by Counsel that **Adv. Masasa** would approach the Court any day after that to secure a fresh date of hearing and that this would be communicated to his Counsel of record who operates from Leribe. In this regard he adds as follows in relevant parts of his affidavit:-

> *"Surprisingly while we were awaiting* (sic) *my Counsel of record received a call from Mr. Fosa on the 14th March 2012 around 11.00 am saying that they should be before Court for hearing and my Counsel of record did not know of that save to say that he was very far at Leribe since that date was never communicated to him by Adv. Masasa who had been handling the matter from scratch. Mr. Fosa only appeared on the day of obtaining default judgment. I am advised by my counsel of record it will be in the best interests of justice for this honourable court to rescind judgment granted in default as I was not in willful default owing to the fact that I have a reasonable explanation. Default judgment has not been granted as a result of my own mistake."*

[5] It is also the case of the 1st respondent that he has prospects of success and a bona fide defence in the main case which he had opposed on time and would have presented had his Counsel been properly informed of the date of hearing. He adds that his Counsel did not receive a copy of the Court Order as otherwise he would have filed this application right after the judgment was delivered.

[6] The 1st respondent avers further that on the 16th March 2014, his Counsel of record approached the Clerk of Court to verify the fact of the default judgment

after which they awaited judgment so that they could file this application for rescission. He adds that at all material times it has been his wish to defend the main application and that he is making this application bona fide and not with the intention of delaying execution of judgment in favour of the applicant.

[7] Further that he stands to suffer irreparable harm if the default judgment is not stayed as he is the rightful person to get the disputed gratuities the subject matter of these proceedings. He also undertook to file security for costs with the Clerk of Court.

[8] The application is opposed and the answering affidavit is deposed to by **Mr. Fosa** who is the applicant's Counsel. It is his assertion that the 1st respondent has abridged the summary of what happened in the main matter including the fact that the rule nisi that had been granted had to be revived on the 24th October 2011 when it was extended to the 12th March 2014 for the hearing of the matter.

[9] Counsel for the applicant also disputes the fact that the 1st respondent's Counsel was not served with the notice of set down and avers that it was served on the instructing Attorney of the applicant's Counsel **Mr. Mabulu** on the 27th October 2011. He adds that on the 12th March 2012, **Adv. Masasa** had long stopped handling the matter and on that date he, the deponent was personally at the High Court where he met Ms Sehapi, my Judge's Clerk who had misplaced her diary.

[10] **Mr. Fosa** also disputes that Counsel agreed that **Adv. Masasa** would approach the Court on any day to secure a date of hearing to be communicated to the 1st respondent's Counsel in Leribe as he and not **Adv. Masasa** appeared before the Court on the appointed day. He also disputes that Leribe is so far away as to hinder communication of the date of hearing to **Mr. Potomane** the 1st respondent's

Counsel. It is his assertion that the 1st respondent was in willful default and that his Counsel handled the mater in a cavalier manner and did not seem to care when he had gone out of his way to call him informing him that the matter was going to proceed.

[11] The applicant's Counsel also avers that the 1st respondent has no prospects of success in the face of the copy of a marriage certificate between himself and one Joyce Mcunu which marriage has never been dissolved, as well as the document **"MM 4"** which has not authority at all.

[12] He further disputes that the 1st respondent has a bona fide defence for the fact that he opposed this matter or that it is urgent as he admitted in his affidavit that they only moved this application for rescission three months after they became aware of the default judgment that was granted against them.

[13] The long and short of the respective assertions in this application is that both sides are in dispute with respect to what actually took place before and post the first date the matter was enrolled for hearing up until the day the default judgment was granted. What seems to be common cause is that on the initial date of hearing, the matter could not proceed because I was not present a fact I can attest to as I arranged with Ms Sehapi to give the parties an alternative date not long after the 12th March 2014.

[14] While, I agree with some of the assertions by the applicant's Counsel with respect to the apparent casual manner in which the 1st respondent's Counsel displayed at times, as well as the fact that as evinced by the minutes in the Court's file when the matter was enrolled, he was before the Court, I am however cognizant that my absence on the date of hearing as well as the misplaced diary of

Ms Sehapi on that date partly caused the confusion in so far as the next date of hearing was concerned when both parties would have attended the proceedings.

[15] However, I cannot ignore the assertions of the 1st respondent's Counsel in his answering affidavit which are supported by those of **Adv. Masasa** in his affidavit with respect to the fact that there was service of the notice of set down on the 1st respondent's lawyers. This is more so when as it appears in my typed judgment, that even on the first appointed day, there was no appearance for the 1st respondent.

[16] In addition, the 1st respondent does not aver that either he or his Counsel were in attendance on that initial date when the matter did not proceed. However, the notes in the Court's file reveal that his Counsel **Adv. Potomane** was present when the matter was set down by consent. On that day, both parties were also put to terms with respect to when to file their respective heads of argument which the 1st respondent failed to do. I am therefore persuaded that given all these factors while probably not willful, the 1st respondent's default was due to some negligence on the part of his Counsel.

[17] Over and above that, it is common cause that it took them over three (3) months before moving this application in stark violation of the rules[1] which clearly show that a party should do so within 21 days after he has knowledge of such judgment.

[18] However, it is trite that in an application for rescission the onus is on the applicant to establish not one but three essential elements[2] namely;

(a) The applicant must give a reasonable explanation for his default;

[1] Rule 27 (6) of High Court Rules No.9 of 1980
[2] Champ Construction v isowall Southern Africa (Pty) Ltd CCT/T/11?2008

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

(c) The applicant must show that he has a bona fide defence to the plaintiff's claim, it being sufficient if he sets out averments which if established at the trial, would entitle him to the relief asked for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.[3]

[19] It has also been laid down that these elements must not be considered compartmentally which in turn calls for a determination of the question whether or not the 1st respondent (applicant in the rescission application) has a *bona fide* defence. It is also a trite principle of law that in considering this, the Court does not have to be satisfied that the applicant will win the case. Suffice it for him to show that such a defence exists and that it *prima facie* carries some prospects of success.[4]

[20] This principle was laid down as far back as in *inter alia*, the case of **Grant (supra)** where Brink J, in quoting with approval the sentiments that were expressed in the earlier case of **Brown v. Chapman**[5] had this to say:-

> *"It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial would entitle him to the relief he asked for.* ***He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."*** (emphasis mine)

[21] *In casu*, as my judgment will show, I have adequately dealt with the 1st respondent's defence at length when I granted the default judgment as I actually

[3] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470
[4] Majantja Football Club v Matlama Club CIV/T/359/97 (unreported)
[5] 1938 TPD 320

went into the merits of the case on the basis of the parties' respective assertions in their papers in which I dismissed his defence. It is my therefore my view that in the light of that factor, the 1st respondent's defence has no prospects of success which effectively means that he has failed to successfully establish this important element. It therefore stands to reason that granting the application would only serve to delay execution of the judgment in favour of the applicant.

[22] I might also add that in the light of the above reason, it would not be in the best interests of justice for the 1st respondent to be granted the prayers sought in the notice of motion.

[23] For all the foregoing reasons, I hereby make the following order:

The application is dismissed with costs.

N. MAJARA
JUDGE

For the applicant : Mr. T. Fosa (Attorney)

For the 1st respondent : Adv. Potomane