

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

PRIVATE SECTOR FOUNDATION OF LESOTHO APPLICANT

AND

MEI & MEI ATTORNEYS Inc

1st RESPONDENT

STANDARD LESOTHO BANK

2nd RESPONDENT

DEPUTY SHERIFF – MR M. RAMALEFANE

3rd RESPONDENT

ATTORNEY GENERAL

4th RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 21st November, 2014
Date of Judgment: 15th May, 2015

SUMMARY

Rescission of Judgment – Default judgment in respect of costs – Summons not served on defendant – Defendant having shown clear intention of defending the matter – Principles and law to be applied – bona fide defence with some prospects of success – Applicant entitled to the relief sought.

ANNOTATIONS

CITED CASES

Chetty v Law Society Transvaal 1985 (2) SA 756

Letsoela v Chief of Kolojane and Another LAC (1995-1999) 280

Melane v Santam Insurance Co. Ltd 1962(4) SA 531 & 532

**Moshal Geviseer (Trade Market) Ltd v Midlands Paraffin Co. 1977(1) SA
64**

**Koe Tsie v SA Council of Cape Town and Regional Plannery 1997(4) SA
735**

STATUTES

High Court Rules 1980

BOOKS

- [1] The Applicant seeks rescission of a judgment granted by this Court in default of appearance. It was respect of taxed costs in the sum of M40,684.86. (Forty Thousand, Six Hundred and Eighty Four Maloti, Eighty Six lisentes).
- [2] An attempt by the deputy sheriff to find assets to execute was fruitless because defendant had no tangible assets, but on investigation it was discovered that Applicant had a bank account with 2nd Respondent, which the 1st Respondent attached and had transferred to its own trust account through a garnishee order.

- [3] The cause of the indebtedness was fees due in separate proceedings instituted on behalf of the Applicant by 1st Respondent in the High Court of Lesotho under CIV/APN/311/2012 and CIV/APN/431/2012. The Applicant refused to settle the bill for CIV/APN/431/2012.
- [4] Applicant relied on a number of grounds for the rescission of judgment. They included lack of proper service; lack of jurisdiction, irregular garnishee order; good prospects of success and prejudice suffered by Applicant in that its operations were brought to a stand still after it was deprived of the funds.
- [5] I am of the view that where two of these important elements are proved the judgment may be rescinded. The two essential aspects to prove are lack of proper service and prospects of success the defence of the matter.

Lack Of Service

- [6] It is common cause that the Bill of costs in the matter of CIV/APN/431/2012 was taxed in the amount claimed and then a letter of demand was sent to the Private Sector Foundation of Lesotho for payment of the amount due.
- [7] In response to the letter of demand, the Private Sector Foundation stated through its CEO, Mr Thabo Qhesi;

“Your letter of demand comes to us as a great surprise. We do not have any records or knowledge of instructing your firm to represent the PSFL in any matter whatsoever, it is therefore mind boggling that you send this demand for M40,684-86

The Board and indeed the President and I have no indebtedness to your firm, we therefore deny any liability whatsoever and demand legitimate proof thereof.

Should you intend to institute any legal action, we will expect proper notice as we shall definitely oppose and or defend whatever action brought against PSFL”.

[8] The Applicant denies ever receiving the summons. The return of service itself confirms this fact as the deputy sheriff stated therein that

“I served the defendant with the summons by pushing it under the door at the given address there was nobody at that moment”.

[9] The opposing Affidavit by **Mr Letsika** also states that when summons was served the first respondent was not aware that the Applicant had changed its offices. It can thus be accepted as a fact that the summons was never served on the Applicant.

[10] In any event, in my view it would be required of the 1st Respondent to ensure that summons was properly served and did reach the Applicant in view of the fact that Applicant had already made it clear that it would defend the case. Furthermore, as will appear hereunder, the 1st Respondent was well aware of the ruling of the High Court by **Mahase J and Peete J** which were both confirmed on appeal to the Court of Appeal.

Prospects of success

- [11] The first matter; under case number CIV/APN/311/2012 was between Private Sector Foundation of Lesotho; and Thabo Qhesi, Osman Moosa and nine other respondents. Applicants therein sought to be confirmed as the executive committee of PSFL.

- [12] The respondents in that matter denied that the Private Sector Foundation of Lesotho was the Applicant. It was alleged that the applicant was a faction of the PSFL which had unlawfully and contrary to the constitution of the PSFL ousted its chairperson and all members of its executive committee.

- [13] They argued that a meeting of the PSFL of the 24th May 2012 in which Applicant purportedly installed themselves as the executive committee of the foundation was unlawful and consequently the resolutions arrived thereat void and of no legal force and effect.

- [14] After hearing argument and submissions of the parties, **Mahase J** found that the meeting called by the Private Sector Foundation to oust the Respondents and all other members of the executive committee was unlawful. The rule in the application was discharged and costs awarded to the Respondents.

- [15] The Applicants again made Application to court, before **Peete J** this time. They sought similar relief. This was now under CIV/APN/431/12. It is the costs of that matter which are the subject of the dispute before me.

[16] The learned Judge after considering the matter concluded that it was *Res Judicata*, as **Mahase J** had already decided the case. He accordingly also dismissed the application.

[17] Respondents were not satisfied with the outcome and appealed the decision, to the Court of Appeal.

[18] The Court of Appeal said the following which is relevant to the matter before me;

“The principal issue in this appeal is accordingly the validity of the election of the executive committee on 31 August 2012. The outcome of the inquiry will also determine whether the PSFL could have authorised the proceedings being brought in its name”.

[19] The Court of Appeal dismissed the appeal and upheld the decisions of both **Mahase J** and **Peete J**.

[20] The unavoidable result is that all three of the courts found that the persons who brought the Application in the name of the PSFL had no mandate from the Legitimate Executive Committee to do so. These are the people who sought the services of 1st Respondent. It therefore comes as no surprise that applicant denies any contractual relationship with the 1st Respondent.

[21] Respondents in this matter before me raised a number of points in opposing the Rescission Application. They contended that the application is

time barred; that Applicant has failed to show good cause and lacked a proper explanation for the default.

[22] Rule 27(6) (c) of the **High Court rules** provides as follows on the hearing of a Rescission Application;

“At the hearing of the Application the court may refuse to set aside the judgment or may on good cause shown set it aside on such terms including any order as to costs as it thinks fit.¹”

[23] “sufficient or good cause” means that the party seeking relief must offer a reasonable and acceptable explanation for its default and that on the merits such party has a bona fide defence which prima facie carries some prospects of success. The law and authorities are settled on that.

Chetty v Law Society Transvaal²

Letsoela v Chief of Kolojane and Another³

[24] In **Melane v Santam Insurance Co. Ltd⁴** **Holmes J.A** said;

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon consideration of all facts and in a manner of fairness to both parties.-----ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a

¹ Rule 27(6) (c)

² 1985 (2) SA 756

³ LAC (1995-1999) 280

⁴ 1962 (4) SA 531 at 532 (AD)

true discretion -----. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.”

[25] In this case applicant has presented the facts which indicate to this Court that there was no service of the summons. The court granted judgment on the understanding that the defendants continued to occupy the premises. They had vacated by that time.

[26] Applicants case is further that no contractual relationship existed between the organisation and the attorneys firm because the attorney knew or should have known that **Mahase J’s** judgment stripped their clients of the power to represent the organisation. That judgment was never overturned or varied in any way. This is a defence which prima facie carries some prospects of success.

[27] What 1st respondent should have done was to require cover for the fees and disbursements that would be incurred after the decision of **Mahase J**.

[28] On the question of costs; each party asked the court to award costs against the other on the attorney and client scale.

[29] They supplied authorities which support their request. The Court is at liberty to award costs on the higher scale where the conduct of one party is remiss, unreasonable, vexations or amounts to abuse of the court process.

Moshal Geviseer (Trade Market) Ltd v Midlands Paraffin Co.⁵

⁵ 1977 (1) S.A. 64

Koe Tsie v SA Council of Cape Town and Regional Plannery⁶

[30] I would only warn 1st Respondent that the manner in which it persisted in this matter despite a number of clear indications that it was not justified to act in that way; was unreasonable and unbecoming.

[31] I make the following order;

- (a) Rescission of judgment is granted and the judgment of the court granted on the 30th September 2013 is set aside.
- (b) The 1st Respondent is ordered to pay the costs of this application on the ordinary scale.
- (c) The applicant is allowed to file further process and pleadings in terms of the High Court Rules.

L.A. MOLETE

JUDGE

For Applicant : Adv. S. Tšabeha

For 1st Respondent : Adv. S. Shale

⁶ 1997 (4) S.A. 735

