

CCT/0479/14
CCT/0023/15

**IN THE HIGH COURT OF LESOTHO
(Commercial Division)**

In the matter between:

**ISAAC JOSEPH t/a ISAACS FOOD SUPPLIERS
(PTY) LTD**

APPLICANT

AND

**BATLOUNG TSABI'S AND GREEN HOUSE
JOINT VENTURE
MINISTRY OF HEALTH
PRINCIPAL SECRETARY MINISTRY OF HEALTH
MINISTRY OF FINANCE
PRINCIPAL SECRETARY MINISTRY OF FINANCE
ATTORNEY GENERAL**

1st RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

6TH RESPONDENT

JUDGMENT

**Coram : L. Chaka-Makhooane J
Dates of Hearing : 9th September, 2015
Date of Judgment : 10th December, 2015**

SUMMARY

Application for rescission following a judgement in default – Points in limine raised on locus standi in judicio and non compliance with Rule 27(6) of the High Court Rules – Application dismissed on the points in limine with costs.

ANNOTATION

CITED CASES

1. Abraham v City of Cape Town 1995 (2) SA 319 (c)
2. Afrox Healthcare v Provincial Administration 1974 (3) SA 506 (A)
3. Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)
4. Central Bank of Lesotho v Phoofole LAC (1985 – 89) 253 at 259 b
5. Excel Health Pty Ltd v Masia and Others CCA/08/2012
6. Kwena & Mangope v SAFA SA 2010 1132.
7. Lesotho Apparel (Pty) Ltd v Manica Lesotho (Pty) Ltd & Another
1991 – 1996(1) LLR
8. Lloyds Bank v Bundy 1975 QB 326 at 445 Lord Denning Mr
9. Majantja Football Club v Matlama Football Club 1977 – 1998 LLR
& LB
10. Naidoo v Cavebdush Transport (Pty) Ltd
11. Novick v Comair Holdings Ltd 1979(2) SA 116
12. Nqoko v Morreira LLR 1976 at page 137
13. Num v Freegold Consolidated Mines (1998) BLLR 712 and 716
14. Percival v Wright (1902) 2 Ch 421 (195)
15. S v Hepker 1973(1) SA 472
16. Sanderson Technitool (Pty) Ltd v Intermema (Pty) Ltd
17. Sandown Travel v Cricket SA 2013 VX 2 SA
18. Sefotho v Sefotho CIV/APN/292/05
19. Spring Forest Trading 599CC v Wilbery (Pty) Ltd t/a Ecowash &
Amo No. 725/2013
20. Toyota Marketing Company v B Mahase & Another
CIV/APN/220/78
21. Treasure Trove Diamonds Ltd v Hyman 1928 AD 464

22. Wing on Garment (Pty) Ltd v LNDC and Another 1999-2000 LLR & LB 72
23. Zhai Feng Fu v Lesotho Stone Enterprises and other C of A CIV/07/11

BOOKS

1. Hahlo's South African Company Law and through cases, 6th Edition page 278-279
2. Jill Poole on casebook on contract page 453
3. Principles of the Law of Contract AJ. Kerr 5th Edition page 175 par6

[1] This is an application for recession of the order of this court granted on the 9th February, 2015 by default and stay of execution. Initially there were two (2) matters before me styled CCT/0479/14 and CCA/0023/15 respectively. These matters were consolidated by consent of the two parties.

[2] Interim orders were granted in terms of prayers 1 and 2 (a) and (b) in CCA/0023/2015 and prayers 1 (a) and (b) in CCT/0479/2015 respectively. In effect a stay of execution was granted as interim relief.

[3] The respondents raised points *in limine* which I choose to deal with first for convenience. These are *locus standi in judicio* and non-compliance with **Rule 27 (6) (b)**.¹ Mr Molapo Counsel for the respondents argued that the

¹ High Court Rules, 1980

deponent to the supporting affidavit had no *locus standi* to attest to the affidavit as a Managing Director (MD) of the applicant. **Mr Molapo** further argued that there is no resolution of the directors authorising her to either defend the matter on their behalf or one that authorises a firm of Attorneys to represent the applicants in this matter. According to **Mr Molapo** the deponent ‘Maletšabisa Lerotholi, has no *locus standi* to attest to an affidavit where there is no resolution by the shareholders for her to have any say in the litigation for or against the applicant. As a result, the contents of her affidavit cannot be relied upon to support or disprove allegations made against the applicant. The court was referred to the case of **Wing on Garment (Pty) Ltd v LDNC and Another**².

[4] On the point of non-compliance with **Rule 27 (6) (b)**, **Mr Molapo** submitted that the applicants have not furnished security for costs pursuant to the provisions of **Rule 27 (6)**. **Mr Molapo** argued that as a matter of principle the applicants had no right to appear before the court without complying with the rules of Court. On his point the court was referred to the case of **Sefotho v Sefotho**³.

[5] On the issue of *locus standi* the court was referred to a resolution⁴ by the Directors of the applicant company of the 10th April 2013, whereat one ‘Maletšabisa Lerotholi was appointed as the Managing Director of the company. The court was also referred to another (special) resolution⁵ of the 19th March, 2015 where the same ‘Maletšabisa Lerotholi was to sign

² 1999 -2000 LLR & LB 72. See also Alfa Construction (Pty) Ltd v Wesa Construction Ltd APN 189/07 (unreported).

³ CIV/APN/292.05 (unreported) Available on LESLII.

⁴ Annexure B6 at page 90 of the record in CCT/0479/14.

court documents and affidavits and also to instruct Attorneys to either institute or defend the company in any litigation on behalf of the applicant.

[6] On the issue of security for costs, **Mr Lerotholi** Counsel for the applicant responded by showing that indeed they ought to have complied with the provisions of **Rule 27 (6) (b)** however, the applicant felt strongly about paying security to the same people who they allege had defrauded them. According to **Mr Lerotholi** the court ought to bend the rules where it is necessary, such as in their case. **Mr Lerotholi** prayed for condonation thereof.

[7] In dealing with the points *in limine* I must show my displeasure at how easily the rules of court are being flouted without any cave. **Rule 26 (6) (b)** is there for a purpose. It is a requirement for payment of security for costs where a party seeks to have a judgment granted by default, rescinded. This provision is worded in mandatory terms and it reads thus:

*“The party so applying **must** furnish security to the satisfaction of the Registrar for the payment to the other party of the costs by the default judgment and of the application for rescission of such judgment.” (My emphasis).*

[8] The applicants did not make any provision to be exempted neither did they pray for condonation in their papers. This matter was raised for the first time in court, in a manner that was not so convincing. Unfortunately, that **Mr Lerotholi** was not allowed to give evidence from the bar. I respectfully agree with the learned Majara J (as she then was) in **Sefotho V Sefotho**⁶

⁶ CIV/APN/292/05 (supra).

that, non-observance of the provisions of **Rule 27 (6) (b)** “renders the papers not properly before the court...” This point *in limine* is upheld.

[9] On the issue of *locus standi in judicio*, it appears from the record that the summons were first served and received by one Matšumunyane on the 2nd December, 2014⁷. The applicants do not deny that they were served and that this was proper service. The applicants’ only problem is that this Matšumunyane was not the (MD) at the time and that the said Matšumunyane had committed fraud against the company. The Notice of Motion papers were served and received by the same Matšumunyane and this time, it does not show the date, however, on perusing the document, the other respondents were served on the 20th March 2015. According to annexure B6, the MD of the applicants’ company was appointed on the 10th April, 2013. What is not clear is why Matšumunyane kept receiving court process on behalf of the company. This is not clear from the record.

[10] According to the respondents, ‘Maletšabisa Lerotholi had no *locus standi* because she had not been authorised to represent the company in that regard. They (respondents) reject the special resolution mentioned earlier in this judgment as a proper document since it was not even properly annexed. The applicants admit this as a mistake and insist that this was a proper resolution.

[11] It seems to me that even if the applicants were to be believed, that ‘Maletšabisa Lerotholi had *locus standi*, she seems to have been appointed after litigation had already begun, if it was in March 2015. Litigation in this

⁷ See a copy of the summons at page 1 of the record CCT/0479/14

matter started in December, 2014. The summons was first served and was received by the applicants on the 2nd December, 2014 by Matšumunyane who even signed and stamped the original summons. It is doubtful that at that time she did not have authority if she even had access to the company stamp. Infact, the applicants do not deny that she received process on their behalf except to show that ‘Matšumunyane as one of the directors, did not bring the summons to the attention of the Board of Directors. I find that even on this point the applicants are unable to convince the court that ‘Maletšabisa Lerotholi had *locus standi*. This point *in limine* is also upheld.

[12] It would be an academic exercise to get into the merits when the two (2) points *in limine* have effectively disposed of this application. It is therefore, my order that the application is dismissed on the points *in limine*, with costs awarded to the respondents in the matter of CCT/0479/14 and applicants in CCA/0023/15.

L. CHAKA-MAKHOOANE
JUDGE

For Applicants : **Mr Lerotholi**

For Respondents : **Mr Molapo**