CCT/209/2012

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

In the matter between:

LESOTHO NATIONAL DEVELOPMENT CORPORATION **PLAINTIFF**

AND

SHAKE UNIVERSARY (PTY) LTD **DEFENDANT**

RULING

Coram : L. Chaka-Makhooane J
Date of Hearing : 24th September, 2015
Date of Ruling : 10th November, 2016

SUMMARY

Application for stay of execution and rescission following the granting of default judgment – Defendant further lodging application for release of its property in plaintiff's premises – Points of law raised – Whether rescission application made in terms of Rules 27 (6) or 45 (1) (a) – Disputes of fact established – Application for stay of execution and

rescission partially succeeds – disputes of fact referred for hearing of oral evidence – Application for release of defendant's remaining property granted with costs.

ANNOTATIONS

STATUTES

High Court Act of 1978.

Land Act No. 8 of 2010.

High Court (Commercial Court) Rules No. 76 of 2011.

High Court Rules No. 9 of 1980.

CITED CASES

1. Attorney General v Teka Teka LAC (2000-2004) 367.
2. Barclays Bank PLC v Thabang Nyeoe & Twom Others CIV/T/647/85 and CIV/T/648/85 (Unreported but available on Leslii).
3. Central Bank of Lesotho v Mputsoe LAC (2009 – 2010) 292.
4. CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 – 2008) 463.
5. Commander LDF v Masokela LAC (2000-2004) 1013.
6. James and Brown and Hamer (Pty) Ltd v Simmons N.O. 1963 (4) SA 63.

7. Kalinyane Mohanoe v 'Mamoeketsi Mohanoe CIV/APN/516/07 (Unreported but available on Leslii).
8. Lesotho Housing and Development Corporation v M & C Construction (Pty) Ltd CIV/APN/666/10 (Unreported).
9. Lesotho National Olympic Committee v Morolong LAC (2000-2004) 449.
10. Maki Mohapi v Lipuo Lydia Sekasha C of A (CIV) No. 37/2014.
11. Mary Malisemelo Sefotho v Monaheng Sefotho CIV/APN/292/05 (Unreported).
12. Maseru Business Machines (Pty) Ltd v Lesotho National Development Corporation and Four Others CCA/049/2014 (Unreported).
13. Moteane v Moteane LAC (1995-1999) 307.
14. Nkhabu v Minister of Interior and Others LAC (1990 -94) 547.
15. Nyingwa v Moolman 1993 (2) SA 508.
16. Ramaisa and Another v Ramaisa LAC (1990 – 94) 589.
17. Raymond E Carmichael v Rosemary M Carmichael Civil Case No. 2060/10 (Unreported).
18. Roma Valley Corporative Society v Leseteli Malefane & Six Others CCT/24/2012 (Unreported).
19. Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) SA 532 (C).
20. Total Lesotho v Lephema C of A (CIV) 36/14 (Unreported).
21. Tšehlana v National Executive Committee of the LCD and Another LAC (2005 – 2006) 267
22. Van Aswegen v McDonald Forman & Co. Ltd 1963 (3) SA 197 (O).

[1] This is an application by the defendant for stay of execution and rescission of default judgment granted on the 5th June, 2013. The plaintiff had instituted action proceedings against the defendant on the 16th November, 2012. The summons were couched in the following manner:

> "*(a) Payment of the sum of two hundred and sixty-two thousand seventy-eight maloti and sixty lisente (M262, 078.60) which is rental arrears owing and payable to the Corporation.*
>
> *(b) Payment of interest at the rate of 18.26% a (sic) per annum.*
>
> *(c) Payment an amount (sic) of an amount of fifteen thousand maloti (15, 000.00) which is costs (sic) of repairs of the parking shelter at Thetsane Mini.*
>
> *(d) Ejectment of the defendant from the property, to wit, Thetsane Mini.*
>
> *(e) Such further and/or alternative relief.*
>
> *(f) Costs of suit at attorney and client scale.*"[1]

[2] Having heard plaintiff's counsel, **Mr Mothibeli**, and after the defendant had seemingly shown no intention to defend the action, default judgment was granted against the defendant. On the 12th July, 2013 the defendant filed the present application for stay of execution and rescission of the default judgment.[2] In that application, **Mr Setlojoane** appeared for the 1st defendant

[1] See Summons; page 1-2 of the record.
[2] See rescission application; pages 17-27 of the record.

and having heard his submissions, the Court confirmed prayer 1 (a) only, which prayer implored that the application be heard on an urgent basis.

[3] The prayers in the defendant's application for stay of execution and rescission of default judgment appeared in its Notice of Motion in the following terms:

> *"1. That rule nisi be issued returnable on … day July, 2013 at 9.30 am calling upon the Respondent to show cause if any; why the following orders should not become absolute:*
>
> *(a) That rules, modes and periods pertaining to service of this application be dispensed with owing to the urgency of this matter;*
> *(b) The execution of the Order granted in CCT/209/2012 be stayed pending the finalization of this matter;*
> *(c) The final Court Order granted in CCT/209/2012 be reviewed, rescinded and corrected and put aside;*
> *(d) The First Respondent be directed to pay costs of this application in the event of opposition;*
> *(e) That Applicant be granted other alternative relief."*
>
> *2. That prayer 1 (a) and (b) operate with immediate effect as the Interim Order of this Honourable Court.*

The application is vigorously opposed.[3]

[4] It is to be noted that on the 29th August, 2013 the above rescission application was struck off the roll of cases awaiting hearing, for want of prosecution. On

[3] See Opposing Affidavit; pages 30-49 of the record.

the 20th December, 2013, some five (5) months after the rescission application was lodged, the defendant filed an interlocutory application purporting once again to stay the execution of the default judgment, pending the reinstatement of the initial rescission application.[4] The prayers in the latter application concerning the stay of execution and rescission, are couched in more or less the same manner as the above mentioned prayers.

[5] It is apparent that, through the latter application, the defendant had also sought to retrieve some perishable goods from the defendant's premises. Following the filing of the application, the goods were released to the defendant. The defendant alleged that since the goods could not be accessed for a considerably long time, it incurred losses in excess of M300, 000.00.[5] As a result of the default judgment granted on the 5th June, 2013 the defendant was ejected from the premises and they remained locked afterwards, with the perishable goods inside the premises.

[6] Furthermore, on the 11th September, 2014 the defendant instituted another interlocutory application against the plaintiff for the release of the rest of its property seized by the plaintiff.[6] In the same vein, the application was opposed.[7] The properties included three (3) container fridges and a Nissan motor vehicle. Nonetheless, it is common cause that the plaintiff voluntarily released the Nissan motor vehicle to the defendant. It is also not denied in the

[4] See application on pages 40-47; in the initial pagination.
[5] See paragraph 7 of the 1st defendant's Founding Affidavit; page 53 of the record.
[6] See application on pages 50-56.
[7] See 1st defendant's Answering Affidavit; pages 60-70 of the record.

papers that the rest of the items belonging to the defendant are still in the plaintiff's premises.

[7] On the 15th September, 2014 the plaintiff subsequently filed a notice in terms of **Rule 48** of the **High Court Rules**[8] ("Rules") wherein the plaintiff required the defendant to pay security for costs in the amount of M75, 000.00 for the rescission application.[9]

[8] Furthermore, on the 8th September, 2015 the defendant filed a "notice to raise, advance and argue additional points of law".[10] Similarly, the plaintiff raised its own points of law for determination. *In casu*, the Court is faced with dealing firstly with, an application for rescission of the default judgment, secondly, an application for the release of the defendant's property in the plaintiff's custody and thirdly, the points of law raised by both parties.

[9] It is fitting at this juncture to briefly examine the factual background in the present matter. On the 1st November, 2004 the plaintiff entered into a sub-lease agreement with the defendant, wherein the latter was to occupy the former's premises situated at Ha-Thetsane, Maseru for purposes of storage. It is apparent that the defendant was not consistent in its payment of rentals. In addition, the defendant's driver allegedly drove into a parking shelter on the property, causing damage thereat.

[8] Legal Notice No. of 1980.
[9] See Notice on pages 58-59 of the record.
[10] See pages 71-72 of the record.

[10] The plaintiff claimed that the parties were engaged in numerous negotiations and settlements, however, according to the plaintiff the defendant continued to dishonor the terms of the agreements they had and had therefore, failed to service the debt on rentals. This fact has not been denied, save that the defendant showed that the negotiations were still in progress when the rescission application was lodged. According to the plaintiff, therefore despite demand of the due rentals, the defendant refused to pay the rentals, hence the lodging of the action proceedings.

[11] I now proceed to deal with the above issues for determination, and since they appear to be intertwined, they shall be considered holistically. **Mr Mothibeli** submitted that since the rescission application had been brought in terms of **Rule 27 (6)** of the **Rules**, the defendant ought to have filed security for costs in the amount of M75, 000.00. The rule provides that:

> "*27. (6)(a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgment apply to court, on notice to the other party, to set aside such judgment.*
>
> *(b) The party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for rescission of such judgment.*

(c) 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."

[12] Conversely, **Mr Setlojoane** argued that the defendant's application had been lodged in terms of **Rule 45 (1) (a)** and not **Rule 27 (6)**. **Rule 45 (1)** provides that:

"*45. (1) The court may, in addition to any other powers it may have **mero motu** or upon the application of any party affected, rescind or vary –*

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[13] It is common cause that the default judgment was granted in the absence of the defendant. What remains to be determined is whether the order was or erroneously sought and granted. The burden of showing the error, as shown, lies squarely with the defendant. Consequently, before making a determination on whether the present application had been lodged through **Rules 27 (6)** or **45 (1) (a)**, it is prudent to first assess whether the defendant had satisfied the requirements of **Rule 45 (1) (a)**.

[14] **Mr Setlojoane** attributes the error as required by **Rule 45 (1) (a)**, to the fact that at the time when the order was granted, the present parties were engaged in negotiations. In addition, he submitted that the defendant had made some payments towards the debt. The defendant alleged that it only became aware

of the default judgment on the 10th July, 2013.[11] It further stated that it had paid amounts of M120, 000.00, M10, 000.00 and M140, 000.00 on the 3rd June, 2013, 17th June, 2013 and 18th June, 2013 respectively.[12] The defendant claimed that as a result of the payments made, the amount due to the plaintiff had then decreased to M26, 804.48.[13]

[15] On the other hand, **Mr Mothibeli** argued that the only legitimate payment received by the plaintiff is that of M10, 000.00 and that the other two payments were considered as non-payments because they turned out to be fraudulent. He further indicated that the two receipts supposedly issued to the plaintiff showing payments of M120, 000.00 and M140, 000.00 respectively, were forged. According to the plaintiff, the only payment received on the 3rd June, 2013 was in the amount of M50.00.[14] To prove these assertions, the plaintiff filed supporting affidavits of **Selebalo Lekokoto** and **Khahliso 'Meko** respectively.

[16] On the 3rd June, 2013 a disputed receipt in the amount of M120, 000.00 was seemingly issued by the defendant to the plaintiff.[15] This amount, together with the amount of M140, 000.00 were reflected in the statement issued to the defendant.[16] Furthermore, the plaintiff's financial statement showed that on the same date, a similar amount of money was received by the plaintiff.

[11] See paragraph 10 of the Founding Affidavit; page 22 of the record.
[12] See paragraphs 7, 8 and 9 of the 1st defendant's affidavit and annexures "TR1", "TR2" and "TR3" respectively.
[13] See annexure "TR4" on page 27 of the record.
[14] See paragraph 4 of the Opposing Affidavit; page 31 of the record.
[15] See annexure "TR1"; page 24 of the record.
[16] See annexure "TR4".

However, on the 10th June, 2013 the same statement revealed that the M120, 000.00 was "reversed because the amount does not reflect in the statement".

[17] It is upon this background that the defendant has further averred that it has satisfied the requirements for rescission in that it has a *bona fide* defence which carries along with it, prospects of success.

[18] It is to be noted that the defendant does not deny that it was indebted to the plaintiff for failing to pay rentals. What remains as an issue is whether the defendant had paid the debt as claimed, and to what extent had the debt been reduced. It became apparent that the issue of whether the defendant paid the amounts of M120, 000.00 and M140, 000.00 respectively to the plaintiff was essentially material in the present matter. Over and above that, this fact is clearly in dispute.

[19] In order to ascertain whether an error has occurred, or that the rescission application had been lodged in terms of either **Rule 27 (6)** or **Rule 45 (1) (a)** or even under common law,[17] the dispute over payments should, in my view, be resolved first. Where a genuine dispute of fact cannot be resolved on the papers, the court has the discretion as to what course to follow.[18] In the event that the dispute was not genuine and was clearly foreseeable, the case should

[17] See **Rule 45 (4)** of the **Rules**.
[18] See **Rule 8 (14)** of the **Rules**. See also **Nkhabu v Minister of Interior and Others** LAC (1990-94) 547 at 551 B-C and **Ramaisa and Another v Ramaisa** LAC (1990-94) 589.

be dismissed.[19] In **Ramaisa and Another v Ramaisa**[20] the Court, having found that genuine disputes of fact existed, referred the matter for hearing of oral evidence on specific points to be addressed at trial.[21]

[20] In **Dambha v Makhaba**[22] the authenticity of a ninety-nine (99) year old sub-lease agreement was in question after the respondent had alleged that the agreement had been forged. The Court of Appeal found that this issue could not properly be decided on the papers without oral evidence, as a result thereof the matter was referred to trial only on that issue. It is clear that the alleged payments *in casu* are questions of fact and they are not questions which can properly be decided on the papers, without evidence.

[21] In trying to justify that there was an error in terms of **Rule 45 (1) (a)**. **Mr Setlojoane** argued that prayers (a) and (c) in the summons should not have been granted since they involved amounts which were not liquidated. He further submitted that **Rule 27 (5)** requires evidence to be led where the claim is unliquidated. The rule provides that:

> *"27 (5) Whenever the plaintiff applies for judgment against a defendant in terms of sub-rule (3) herein, the court may grant judgment without hearing evidence where the claim is for a liquidated debt or a liquidated demand. In the case of any other*

[19] **Ts'ehlana v National Executive Committee of the LCD and Another** LAC (2005-2006) 267.
[20] Supra.
[21] See also **Central Bank of Lesotho v Mputsoe** LAC (2009-2010) 292, where the matter was referred to oral evidence after serious disputes of fact emerged at the hearing of the case.
[22] LAC (2009-2010) 84.

claim the court shall hear evidence before granting judgment, or make such order as it seems fit."

[22] In **CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd**[23] a liquidated claim or demand was defined as follows:

> "*In S A Fire and Accident Insurance Co. Ltd v Hickman 1955 (2) SA 131(C) at 132(H) it was held that in order to be a liquidated demand a claim must be so expressed that the ascertainment of the amount is a mere matter of calculation. The words "liquidated demand" are derived from the English Rules, where they are afforded the following meaning:*
>
> > *'A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a defined figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes damages.'*"[24]

[23] Prayer (a) involves a claim for payment of rentals which were agreed upon from time to time by the parties in dispute. Other foreseeable charges and accruals were also added in the sub-lease agreement. The authenticity of this agreement has not been challenged, nor the accuracy of the amounts which

[23] LAC (2007-2008) 463.
[24] Ibid; at pages 473(I-J) – 474(A-D).

appear in the agreement. Therefore, calculations on rentals could be ascertained without the leading of oral evidence. In my view, prayer (a) involves a liquidated claim payable under a contract and it is capable of being ascertained.

[24] The same cannot be said in relation to with prayer (c) in the summons. It relates to costs incurred by the defendant in repairing the damaged parking shelter. As already shown elsewhere in this judgment, a liquidated claim is clearly a demand that can be ascertained by mere calculation. In my opinion, the claim in prayer (c) was not a liquidated one, therefore, oral evidence should have been led in order to ascertain the correctness of the amount claimed.

[25] It was further argued on the defendant's behalf that prayer (d) was erroneously sought and granted because issues of ejectment are justiciable in the Subordinate Courts, unless leave is granted by that Court. In the alternative, it was submitted that prayer (d) was justiciable in the District Land Court since it is not a commercial matter. In **Total Lesotho v Lephema**,[25] **Howie JA** made the following instructive remarks:

> "*[27] This analysis shows that Total is not claiming title (it has no basis on which to do so) and it is not claiming a right which overrides title (it already has such right). Accordingly its claim does not "relate to" or "concern" land within the meaning of*

[25] C of A (CIV) 36/14 (Unreported)

the Land Act. If its claim succeeds, title will be involved but only in so far as an invalid register entry will be erased and the valid one restored. It follows that the counter-application did not have to be brought in the Land Court.

[28] I should add that there is nothing in the Act which bars a claim such as Total's (assuming it did have to be brought in the Land Court) being the subject of a counterclaim in another court. The only question then would be whether the counter-application is a proceeding within the business of the Commercial Court.

[29] There can be no question that the counter-application concerns subject matter within the ambit of the business of the Commercial Court. Central to Total's claim is the sub-lease with MP which is, in the words of rule 10 (1) of the Commercial Court Rules (Government Gazette 76 of 2 December 2011, Supplement No. 2) "a business contract" which has given rise to a "relationship of a commercial or business nature" and the counter-application is "connected with" such relationship."

[26] It then follows from the above passage that, by virtue of the fact that the sub-lease agreement between the present parties involved "a business contract", the Commercial Court has the necessary jurisdiction to entertain this matter.[26] The relationship between the parties was undoubtedly of a commercial or business nature. In my view, the case of **Roma Valley Corporative Society v Leseteli Malefane & Six Others** which was cited by **Mr Setlojoane** is distinguishable from the present matter, since that matter involved a pure land

[26] See Rule 10 (1) of the Commercial Court Rules 76 of 2011.

dispute which had no bearing on commercial issues whatsoever. In that regard this point cannot succeed.

[27] The plaintiff indicated that the defendant's application for the release of its property had been incorrectly filed with the Commercial Court. According to the plaintiff, the application should have been filed in the Subordinate Court. I disagree. This matter was properly brought before the Commercial Court which has jurisdiction. The point also stands to be dismissed.

[28] Rescission in Prayer (d) in the summons, which involves ejectment of the defendant from the plaintiff's property, in my view has clearly been overtaken by events because, it is common cause that the defendant no longer occupies the plaintiff's property.

[29] The defendant also prayed for an order on review in prayer 1 (c), whose effect would have seen the Court reviewing its own order. Indeed the present Court has no jurisdiction to review its own orders[27], as **Mr Setlojoane** candidly conceded when he showed that the inclusion of the word "review" was a mistake on their part. Since he had indicated from the onset that the rescission application was made in terms of **Rule 45** and not **Rule 50** (which deals with reviews), he should be given the benefit of the doubt that the word "review" was a mistake on their part. As such the word "review" in prayer 1 (c) must consequently be removed.

[27] See Kalinyane Mohanoe V 'Mamoeketsi Mohanoe and Another CIV/APN/160/13 (Unreported)

[30] **Mr Mothibeli** submitted that the 1st defendant had, in its application for the release of its property, alleged that the matter was urgent, yet they failed to file a certificate of urgency. According to him, this omission was fatal to the application. Customarily, where an application is filed on an urgent basis, a prayer seeking condonation that the rules, modes and periods pertaining to service should be dispensed with, would normally appear in the application. *In casu*, there is no such prayer.[28] In my view, the application was never intended to be treated as urgent, save for the defendant's averments that "the matter is of urgency".[29]

[31] The plaintiff alleged that since the defendant was aware that another unknown tenant had occupied the property at Thetsane Mini, it ought to have joined that new tenant to the proceedings for the release of the property.[30] It was further claimed that since the defendant had discovered that the tenant was using its property, it was more the reason why it should have been joined in the present proceedings.[31]

[33] It is common cause that the plaintiff and the defendant had entered into a sublease agreement and following the granting of the default judgment on the 5th June, 2013, the defendant was ejected from the premises, leaving its property in the plaintiff's premises. There was no prejudice which was alleged that the 3rd party would suffer due to the fact that the party had not

[28] See Notice of Motion; page 50 of the record.
[29] See paragraph 11 of the Founding Affidavit; page 55 of the record.
[30] See paragraph 3.1 of the Answering Affidavit; page 61 of the record.
[31] Ibid.

been joined to the proceedings. Moreover, since the defendant's property still remained in the plaintiff's premises, it was, in my opinion, not necessary to have joined the 3rd party to the application.

[34] In taking note of the intrinsic nature of the present matter, together with all the uncertainties which have emerged, it would be prudent to call for the leading of oral *viva voce* on specific issues. Most importantly the evidence that has to be led should be on the disputed various amounts allegedly paid by the defendant to the plaintiff. Plaintiff has alleged fraud in relation to these payments

[35] It is for the foregoing reasons that the following order is made:

(a) Prayer (a) in the summons is stayed and the application for rescission in so far as this prayer is concerned is referred for the hearing of oral evidence. The hearing of evidence in this regard should be limited to the extent of the alleged negotiations that led to the failing of the defendant to oppose the application for default judgment, proof of the alleged payments by the defendant and proof of the fraud alleged by the plaintiff.

(b) Prayer (c) in the summons is rescinded as prayed for with costs.

(c) Prayer (d) in the summons has been overtaken by events as far as the rescission application is concerned.

(d) The application for the release of the defendant's property is granted with costs.

_____

L. CHAKA-MAKHOOANE
JUDGE

For Plaintiff : **Mr Mothibeli**

For Defendant : **Mr Setlojoane**