IN THE HIGH COURT OF LESOTHO

CIV/A/26/14

IN THE MATTER BETWEEN

LEHANA MANDORO **APPELLANT**

And

LIBE MOHONO **RESPONDENT**

JUDGMENT

Coram : Hon. N. Majara CJ
Date of hearing : 31st March 2017
Date of judgment : 4th May 2017

Summary

Appeal against the judgment of the Magistrate Court refusing an application for rescission – Record revealing appellant was duly served and entered a notice of appearance to defend and notice to file his plea – Appellant having failed to successfully establish the legal requirements, the court a quo was correct in its decision to refuse the relief sought - Appeal dismissed.

ANNOTATIONS

CASES

1. Taish SA (Pty) Ltd v Molemelo (465/2007)(2008) ZAFSHC
2. Loti Brick Ltd v Mphofu & Others 1995 -96 LLR 450
3. Napo Thamae & Another v Agnes Kotelo & Another C of A (CIV) No. 16/2005

4. Grant v Plumbers (Pty) Ltd 1949 (2) SA 470
5. Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612

[1] This is an appeal against the decision of the court a quo refusing to grant rescission of a default judgment granted by Magistrate Monethi in CC/850/2011 on the 9th December, 2011.

[2] Sometime in 2011, the plaintiff whom I shall refer to as the respondent herein issued summons in terms of which he sought for an order of eviction against the defendant (appellant herein) before the Maseru Magistrate Court. The record reveals that the appellant filed a notice of intention to defend the action as well as a notice to file his plea. However, the plea was never filed. The respondent set the matter down for hearing and the appellant did not make an appearance on the date the matter was enrolled for hearing. The respondent then applied for judgment by default which was accordingly granted on the 9th December, 2011. Being dissatisfied with the judgment of the learned Magistrate, the appellant filed an urgent application for stay of execution and rescission thereof and this was about a year later.

[3] In the application, the appellant contended that the order for rescission was erroneously granted against him as he was never served with the summons but only with the eviction order issued pursuant to the default judgment. He also made the submission that he had a good defence which carried with it prospects of success.

[4] In response, the respondent argued that the appellant was not candid with the court as the record showed that he was served with the summons pursuant to which, he filed a notice of intention to oppose together with a notice to file a plea which allegation appellant conceded. The respondent went further to show that the appellant failed to satisfy the requirements of a rescission application as required by the law namely; that he was not in willful default and had a bona fide defence which he also did not disclose. Having heard the arguments from both sides, the learned Magistrate dismissed the application for rescission.

[5] It is that against that decision that the appellant noted the present appeal on the following grounds:

(a) That the court a quo should not have decided in favour of the respondent as he had failed to establish his right.

(b) That the court a quo erred and misdirected itself in granting an order for rei vindication in the absence of proof of allocation of the site in issue to the respondent.

(c) That the court erred and misdirected itself in finding in favour of the respondent in the absence of proof of demarcation and dimensions to the respondent's alleged site.

[6] In my opinion, the present appeal introduces a new case different to the one that was before the court a quo as it goes into the merits of the main case instead of dealing with the issue whether or not the Magistrate had misdirected himself by not granting the appellant an order for rescission. In other words, it is before the trial court that these issues ought to have been placed before the

court after the appellant was served with the summons not in an appeal against its refusal to grant a rescission order. There is no doubt that the new case made in the grounds of appeal has completely altered the nature of the case that was placed before the court a quo, i.e. in the application for rescission.

[7] It must be noted that generally, an appellate court will be loathe to decide a case on the issues that were never pleaded or raised in the lower court and can only deal with those that were fully canvassed and require no further evidence for its decision. The reason is simply that it would be unfair to the party against whom they are raised. See in this regard, the case of **Taish SA (Pty) Ltd v Molemelo**[1]**.**

[8] In a similar vein, the grounds that have been raised herein ought to have been raised in the court a quo except the appellant denied himself the opportunity to justify the rescission application so that he could defend his case. It is only then that he would be suited to bring up these issues and not to do so for the first time and in an appeal against a judgment refusing to grant a rescission order.

[9] It is now settled law that an application for rescission must establish at least three main requirements namely;

(a) The applicant must give a reasonable explanation to show that he was not in wilful default.

(b) The application is brought bona fide and not merely with the intention to delay the plaintiff's claim.

1 (465/2007)(2008)ZAFSHC 142

(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 sought. He need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.[2]

[10]In the light of the above principles, the first question to determine is whether the appellant successfully established in the court a quo that he was not in willful default in not defending his case before the trial court. At paragraph 5.1 of the founding affidavit to the rescission application he stated as follows;

> *"I must inform the Honourable Court that I was shocked by the said order as I had not been served with the application that gave rise to the default judgment granted against me'.*

He added that he was not served and/or the summons was never brought to his attention. This appears at page 16 of the record.

[11] In response , the respondent averred that the summons were duly served on the appellant as proven by his having filed a notice of intention to oppose the matter on the 9thSeptember, 2011, followed by a notice to file plea on the 11th October, 2011. Indeed at paragraph 8 of his reply, the appellant confirmed these averments. In the premise it is my view that he failed to successfully satisfy the first requirement but instead opted to mislead the court a quo by stating on oath that he was not notified and/or served with the summons.

[12] However, the enquiry does not end there because although the appellant failed to satisfy the court that he was not in wilful default, it is a trite principle that the requirements for a successful rescission application are not to be

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2Loti Brick (Pty) Ltd v Mphofu & Others 1995-96 LLR 450

considered in isolation or piecemeal, but that a good defence may compensate for a poor explanation or vice versa.[3] Hence, in the case of **Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd**[4] the learned Judge instructively stated as follows;

> *"It is clearly necessary for the applicant to furnish an explanation of his default, and if it is to be of any assistance to the Court in deciding whether "good cause" has been shown the explanation must show how and why the default occurred. If such an explanation is furnished the correct approach, I think, is to consider all of the circumstances of the case, including the explanation, for the purpose of deciding whether it is a proper case for the granting of relief."*

[13]I respectfully agree with the learned Judge. *In casu*, the appellant has failed to successfully show that he was not in wilful default. However, on the basis of the above quoted principle I proceed to consider the question whether the appellant stated with sufficient detail that he had a bona fide defence which carries with it the prospects of success. From what appears from the record, the appellant only stated that he has a good defence but fell short of stating what his defence was such as for instance, whether he has proof that the site was lawfully allocated to him but he did not do so.

[14] The reason why a defence should be set out is because a good defence might outweigh the lack of explanation or the shortcomings of the one advanced by the appellant. It is therefore insufficient for the applicant to merely state he has a good defence because any party can aver that. He must also indicate what his defence is without necessarily getting into its details or into the merits of the case. This is to avoid a situation where a rescission application is only made for purposes of harassing the respondent or frustrating him in the execution of the

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3 Napo Thamae & Another v Agnes Kotelo and Another C of A(CIV)NO.16/2005; Grant v Plumbers (Pty) Ltd 1949 (2) SA 470

4 Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers(Pty) Ltd 1975 (1) SA 612 @ 714-615

order[5]. Having carefully considered these guidelines it is my view that the court a quo was correct in finding that the present appellant failed to satisfactorily establish the requirements for a rescission order.

[15]It is on the basis of all the foregoing reasons that I find that the appeal cannot stand. Consequently, I make the following order;

1. The appeal is dismissed. There is no order as to costs, the respondent having not opposed the appeal.

N. MAJARA
CHIEF JUSTICE

For the appellant : Mr. Thejane

For the respondent : No Appearance

5 Loti Brick (supra)