CIV/APN/204/2007

IN THE HIGH COURT OF LESOTHO

In the matter between:

STANDARD LESOTHO BANK **APPLICANT**

AND

MATŠELISO RASETHUNTŠA **RESPONDENT**

RULING

Coram : **L. Chaka-Makhooane J**
Date of Hearing : **4th September, 2018**
Date of Ruling : **12th April, 2019**

SUMMARY

Respondent having obtained judgment by default – Applicant seeking rescission in terms of Rule 45 – Rescission sought on ground that judgment was erroneously granted – Rescission application granted based on Rule 45 (1) (a) that at the time of issue of default judgment there existed facts of which the court was unaware and which would have precluded the granting of judgment if the court had been aware.

ANNOTATIONS

CITED CASES

1. Chetty v Law Society Transvaal 1985 (D) SA 756 AD.
2. Commander of Lesotho Defence Force v Matselliso Matela C of A (CRI) NO. 3/99 – C OF A CIV/504/98.
3. Ex parte S & U TV Services (Pty) Ltd in Res & U TV Services (Pty) Ltd 1990, (4) SA 88.
4. Nyingwa v Moolman NO. 1993 (2) SA 508.
5. National Independent Party v Manyeli & Ors C of A (CIV) No.1/2009.

BOOKS

Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th Edition Vol. 1 Juta & Co. Ltd 2012.

STATUTES

High Court Rules, 1980.

[1] This is an application for rescission in terms of **Rule 45**.[1] It is the applicant's case that the order obtained by the respondent was sought and granted erroneously in the absence of the applicant, alternatively, due to a mistake common to the parties.[2]

[1] High Court Rules of 1980.
[2] See the Founding affidavit at paragraph 5 – 6 at pages 5-6 of the record.

[2] The prayers sought by the applicant were couched in the following manner:

1. *Interdicting and restraining the Respondent from executing, and/or demanding compliance with an order of this Honourable Court dated the 6th of December 2017 pending the outcome of this application; and*
2. *Setting aside and rescinding the judgment granted in favour of the Respondent on the 6th of December 2017 to allow access to the Respondent to account number 014-0070-243-801; and*
3. *Directing that the Respondent pay the costs of this application; and*
4. *Granting such further and/or alternative relief as this Honourable Court may deem necessary in the circumstances.*

[3] It is important to note that the applicant abandoned prayer 1 at the outset.

[4] It is the applicant's case that the respondent failed to disclose certain material facts which would have influenced the court not to grant the order as it did. The material facts referred to are *inter alia* that;

a) fraud charges were pending against the respondent;

b) the applicant had already instituted action proceedings in CCT/0196/2015 against the respondent for the payment of three million five hundred and sixty thousand Maloti (M3, 560,000.00) and that she (plaintiff) had already been barred from pleading in those proceedings;

c) there is a provisional sequestration order against the respondent, which effectively denies her access to her bank accounts, as these were frozen together with some of her other assets;

d) there were discussions and negotiations to repay the alleged misappropriated funds belonging to the applicant. The negotiations resulted in various postponements and;

e) in some of the various discussions and correspondences between the parties' legal representatives, it was brought to the attention of the respondent that all the funds in her accounts would be used to settle her alleged indebtedness to the applicant and that those accounts would be closed.[3] The applicant contends that had the court been informed of the many endevours of trying to solve the matter without necessarily going back to court, it would not have granted the order sought by the respondent.

[5] On the other hand the respondent's case is that, the application is fatally flawed in that it does not address the elements for rescission. The respondent further shows that the applicant simply wants to frustrate the legal system as it did when it initiated an *ex parte* application which it never prosecuted until she had no option but to have it removed.

[6] When the applicant failed to prosecute its case, that resulted in the *rule nisi* lapsing thus disentitling the applicant to control her account. It is the respondent's case also that the applicant should shoulder the blame for its laxity to prosecute the fraud case against her for ten (10) years. In the same breadth it is the applicant's problem that it failed to respond to the current application. Since the applicant was aware that the matter that had brought about the current application had been set down for hearing on the 6th

[3] See the Founding Affidavit from page 6 -12 and paragraphs 7-10.

December, 2017, there can be no error as alleged by the applicant when the applicant's lawyers decided not to make an appearance before the court.

[7] The applicant's case is that it has come to court for an application premised on **Rule 45 (1) (a).** This reads in part;

> "*46.(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 effected thereby;*
> *(b) …*
> *(c) …*
>
> *2. Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
>
> *3. The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected by any variation sought.*
>
> *4. Nothing in this Rule shall affect the rights of the court to rescind any ground on which a judgment may be rescinded at common law. "*

[8] At the time that the court granted the order in question, only the respondent's counsel was before the court and the judgment was granted by default. Clearly certain facts were not revealed to the court at the time. It is the respondent's contention that there was no need to reveal to the court any further facts apart from those already before the court.

[9] I must disagree with the respondent's counsel. The applicant has persuaded the court that the judgment was sought and granted erroneously, since at the time it was issued there existed facts as they appear in the applicant's Founding Affidavit, of which the court was unaware and these are facts which could have induced the court not to grant the judgment, if it had been aware of them.[4]

[10] This being an application for rescission in terms of **Rule 45**, this court in addition to any powers it may have, rescinds the order granted by default on the 6th December, 2016, erroneously granted in the absence of the applicant.

[11] It is for the forgoing that I make the following order:

The application for rescission is granted in terms of the prayers as they appear in the Notice of Motion with costs.

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L. CHAKA-MAKHOOANE
JUDGE

Appearances:

For the Applicant : **Mr T. Mpaka**

For the Respondent : **Ms T.G Nqhae.**

[4] Nyingwa v Moolman No. 1993 (2) SA 508 at 509.