

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/351/2021

In the matter between:-

RETHABILE MOKAEANE

APPLICANT

v

LINEO PALIME

RESPONDENT

Neutral citation:- Rethabile Mokaeane vs Lineo Palime [2022] LSHC 169 Civ
(29 June 2022)

CORAM : **M. P. RALEBESE J.**

HEARD : **03RD JUNE 2022**

DATE OF JUDGMENT: **29TH JUNE 2022**

SUMMARY

Application for rescission of an order dismissing a rescission application for want of prosecution – Application opposed – Urgency not established but 1st respondent acquiesced to the urgency – Despite lack of urgency court exercised discretion to deal with merits – Grounds for rescission under Rule

45(1)(a) not established – Counsel lacking authority to institute or oppose application (obiter dictum)– Application dismissed- Each party to bear its own costs.

ANNOTATIONS

CITED CASES:

LESOTHO

Joshua Lehloka vs Thabo Lehloka CIV/APN/282/06

Liquidator Lesotho Bank v Seleso (CIV/T/58/2002) [2012] LSHC 59 (20 September 2012)

LUTARU v National University of Lesotho LLR&LB (1999-2000)

Ramainoane and Another vs Sello and Others (CIV/T/19/97) [2000] LSCA 75 (12 June 2000)

SOUTH AFRICA

Beukes v Kubitzausboerdery (Pty) Ltd (SA 18-2019) [2020] NASC (1 July 2020)

De Wet and Others v Western Bank Ltd 1979 (2) 1031 at 1038 - D-G

Fisher and Another v Ramahlele and Others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (4 June 2014)

Masako v Masako (724/2020) [2021] ZASCA 168; 2022(3) SA 403

Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO and Another (542/2004, 543/2004) [2004] ZASCA 122 (20 December 2004)

United Watch and Damon Co. Pty Ltd and others v Disa Hotels Ltd and Another 1972 (4) SA 409

OTHER JURISDICTIONS

Beukes v Kubitzausboerdery (Pty) Ltd (SA 18-2019) [2020] NASC (1 July 2020)

STATUTES / PUBLICATIONS:

High Court Rules No.9 of 1980

Practice Directive No.1 of 2014

Practice Directive No.1 of 2016

JUDGMENT

Background

1. This is an opposed application for rescission and reconsideration of the order granted on 24th May 2022 dismissing an application for rescission of the default judgment granted by **Monapathi J.** on 13th September 2021. The application was brought on urgent basis.
2. The background to this application is that sometime in May 2021 the respondent herein (then plaintiff) **Palime** instituted summons against the applicant (then 1st Defendant) (**Mokaeane**) and the 2nd Respondent herein (then 2nd defendant) (**Molisa ea Molemo FM**) claiming certain sums as damages for defamation. Judgment was granted on 13th September 2021 by default against applicant only.
3. Around May 2022 the sheriff served the applicant with a writ of execution. That prompted applicant to institute an application for rescission of the default judgment on 17th May 2022 on urgent basis. In terms of the notice of motion, the application was to be moved on 20th May 2022. That rescission application was opposed by the 1st respondent who filed a notice of intention to oppose on 19th May 2022 and the answering affidavit on 20th May 2022.
4. The file was allocated to me on 20th May 2022 and I was alerted by my **Judge's Clerk** that the two counsel in the matter would appear as soon as the file would be paginated and indexed. No appearance was made by either counsel on 20th May 2022.

5. On Monday 23rd May 2022, **Advocate Senatsi** for the 1st respondent appeared before me and moved an application for dismissal of the rescission application for failure by the applicant to prosecute it. I stood down the matter to 24th May 2022 at 8:30 am as I was yet to study the file in order to appreciate the application by **Advocate Senatsi**. On 24th May 2022 **Advocate Senatsi** appeared and continued with the application for dismissal of the rescission application as applicant had failed to move it despite its alleged urgency.
6. The Court was persuaded by **Advocate Senatsi** and it did dismiss the application for want of prosecution with costs. It is against this order that applicant has instituted a reconsideration and rescission application on urgent basis. The prayer for stay of execution was abandoned as **Advocate Shakhane** conceded that it served no specific purpose. The application has been instituted in terms of **Rule 45 (1) (a)** of the **High Court Rules 1980**.
7. Before dealing with issues raised by the parties in this matter, it is opposite to highlight that both counsel for the applicant and for the 1st respondent have deposed to affidavits instituting and opposing the application. I will get back to this issue later in this judgment.

Urgency

8. The application has been opposed by the 1st respondent only who has raised a point *in limine* that the application was not urgent. In reply applicant submitted that the application was urgent as her property was

about to be attached pursuant to a default judgment granted on 13th September 2021.

9. Having perused applicant's papers, it is indisputable that the application was not urgent. Applicant has failed to establish the urgency of the matter as no grounds whatsoever of the alleged urgency have been averred anywhere in the founding affidavit¹. Nonetheless, the issue of lack of urgency becomes less material as 1st respondent was able to file the opposing papers within the compressed timelines dictated by the applicant and she did not allege any prejudice she has suffered as a result thereof. 1st respondent in a way acquiesced to the alleged urgency (Vide: **Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO and Another**² and **Beukes v Kubitzausboerdery (Pty) Ltd**³)
10. Notwithstanding the apparent lack of urgency of the matter, and in view of lack of prejudice to the respondent, the court exercised its discretion to overlook the issue and to entertain the matter in its merits.
11. The basis for the instant rescission application is that it was erroneously granted in the absence of the applicant. The grounds relied upon by applicant are that:

¹ **LUTARU v National University of Lesotho LLR&LB (1999-2000) 52** where the Court of Appeal per Leon JA said "No word appeared in the founding affidavit as to why applicant could be afforded substantial relief at a hearing in due course."

² (542/2004, 543/2004) [2004] ZASCA 122 (20 December 2004)

³ (SA 18-2019) [2020] NASC (1 July 2020)

- (a) the Court erred by dismissing the application that had not yet been moved;
- (b) the Court erred by proceeding to dismiss the application on 24th May 2022 while no notice had been given to applicant that the matter was proceeding;
- (c) that the normal working hours for the Court is from 9;00am yet 1st respondent's counsel was heard at 8.30am; and
- (d) that the 1st respondent's counsel was allowed to proceed with the file that was not court ready contrary to the practice directives.

12. The elements of rescission pursuant to **Rule 45 (1) (a)** are that the order must have been granted in the absence of the applicant; applicant must have been directly affected by the order; and the order must have been granted erroneously.

13. It is common cause that the rescission order being sought to be rescinded was granted in the absence of applicant and that **Ms. Mokaeanne** (applicant) was directly affected by the order.

Whether the Judgment was Erroneously Granted

14. The grounds that applicant relies on for the submission that the judgment was erroneously granted are dealt with herein in seriatim. The first one is that the court could not dismiss the application that had not yet been moved or enrolled. This submission that the application had not been enrolled is misconceived as the application became pending before court when it was served on the respondents and it was subsequently filed. As an indication that the application was pending before court, it was allocated to me on 20th May 2022 which is the date on which it had been

enrolled by applicant to be moved. It follows therefore that pursuant to the individual docket system that is operational pursuant to **Practice Directive No.1 of 2014**, I could deal with the application on the request or solicitation by the other party, the 1st respondent in this case.

15. Applicant's submission that the court erred in dismissing the rescission application that had not yet been moved by applicant is also without substance. Failure by the applicant to move the application, which was allegedly urgent, on the date on which it was enrolled and soon thereafter is the ground on which it was actually dismissed. The 1st respondent as the party against whom the application had been instituted, was entitled to approach the court to have the application dismissed where she deemed that applicant was not taking steps to move the application yet it had been instituted on urgent basis. In **Liquidator Lesotho Bank v Seleso**⁴ (**Lyons J** dismissed the application for rescission for lack of prosecution and said;

“In my opinion, considering the conduct of the applicant overall and the delays in prosecuting this case, it can be said that the conduct in balance amounts to an abuse of process and that the applicant's case should to be dismissed. As a direct consequence the application for rescission is dismissed with cost to be taxed is not agreed.”

16. The application had been enrolled to be moved on urgent basis on 20th May 2022. There was no appearance on that day as the file was not court ready. It is common cause that applicant had been informed by the **Judge's Clerk** to paginate the record and prepare an index and get back to appear before a **Judge**. This did not happen on 20th May 2022 (Friday), the 23rd (Monday) and 24th (Tuesday). Applicant's counsel submits in the

⁴ (CIV/T/58/2002) [2012] LSHC 59 (20 September 2012)

founding affidavit that he took it upon himself that he would appear before Court on 27th May 2022. This he says in total disregard of the fact that the application had been enrolled for the 20th May 2022 on urgent basis; and the provisions of **Practice Directive No.1 of 2016** which provides under paragraph (i) that:

“Every case that has been enrolled for hearing shall not be postponed by and between Counsel without the involvement of the Presiding Judge otherwise it will be struck off as is provided for by the Rules of Court.”

17. The 1st respondent’s counsel was justified to approach the court as she did to apply for dismissal of the application on grounds of inexplicable delay by applicant to prosecute it, yet it had been alleged to be urgent. The court in the same breadth did not err in entertaining 1st respondent’s counsel and dismissing the application. Whether or not the decision was legally tenable is not in issue in this case where rescission is being sought.

18. The next issue is whether the court erred when it dismissed the rescission application while 1st respondent had not notified applicant that she would move the application for dismissal on 24th May 2022. Counsel for the 1st respondent (**Advocate Senatsi**) informed the court when she appeared on 23rd May 2022 and on 24th May 2022 that she had been calling counsel for the applicant (**Advocate Shakhane**) that they should appear before court to no avail. She informed the court that **Advocate Shakhane** was aware that she had been coming to court from 20th May 2022 ready to appear before a judge. This is confirmed by **Advocate Senatsi**’s averment which I accept as truthful, that on 23rd May 2022 she conversed with **Advocate Shakhane**’s colleague, one **Advocate Phohlo**, about appearance before a judge in the matter and the response she got after

Advocate Phohlo had called **Advocate Shakhane** was that the matter could not proceed on that day as he was yet to file a reply. **Advocate Senatsi** informed Advocate **Phohlo** that she was going to make an appearance on that day. This has been corroborated by **Advocate Phohlo** in the supporting affidavit to the replying affidavit. It is clear therefore that **Advocate Shakhane** was aware that **Advocate Senatsi** was going to appear before a **judge** in the matter on 23rd May 2022. **Advocate Senatsi** was therefore under no obligation to issue any formal notice to applicant, who was *dominis lititis*, and who had abandoned its urgent application, that she was going to seek dismissal of the application. I therefore find that the court did not commit any error in dismissing the rescission application as it did under the circumstances. I find the following words of **Trengove AJA** in the case of **De Wet and Others v Western Bank Ltd**⁵ apposite in the circumstance of this case:

*“It was accordingly, contended that the proceedings before Van Reenen J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention... There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellant’s attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondents to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before Van Reenen J neither the appellants nor their legal representative were present in court, and in the circumstances, the respondent’s counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of **Rule 39(3)** in respect of the appellants’ claim and to move for judgment against the appellants under **Rule 39(1)** on the*

⁵ 1979 (2) 1031 at 1038 - D-G

*counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provision of **Rule 42(1)(a).**”*

19. The submission that it was erroneous for the court to have directed counsel for the 1st respondent to appear at 8.30am is without merit. In any case, it was not even substantiated or pursued any further by applicant’s counsel during arguments.

20. Contrary to applicant’s counsel submission that the file was not court ready on 24th May 2022 when 1st respondent’s counsel appeared, the file was ready as it had been properly paginated and an index had been prepared and filed by 1st respondent’s counsel on 23rd May 2022. Nonetheless, this cannot be a ground for the contention that the judgment of the 24th May 2022 was erroneously granted or a justification for the application for rescission.

21. In the circumstances, I find that the order granted by default on 24th May 2022 had not been erroneously granted as anticipated in **Rule 45(1) (a)** and the application stands to be dismissed.

Authority of Deponents

22. Though I have already made a conclusive decision on the merits in this matter, I find it necessary to comment parenthetically on the issue that counsel for the parties have deposed to the founding and opposing affidavits respectively. The court raised the issue with the counsel and

they were both invited to make submissions on whether they had the necessary authority to institute and oppose the application as they had done. Both counsel submitted that by virtue of having been appointed as legal representatives and advocates of record for their respective clients, they thereby, duly had authority to act for their clients. Both counsels submitted further that they had personal knowledge of the facts in the matter and were therefore better placed to depose to the affidavits.

23. The issue is not per se whether counsel had authority to depose to the affidavits. There is no doubt that they were better placed to know the facts better than anyone else (Vide: **Masako v Masako**)⁶. The issue is whether the counsel had been duly authorised to institute, prosecute and defend the application.

24. **Advocate Shakhane** for the applicant in the founding affidavit deposes under paragraph 1 that:

“I am the applicant herein, a duly admitted advocate of this Honourable Court... I represent the applicant in rescission application and in the present case. I am duly authorised to depose to this affidavit on behalf of the applicant”.

In the replying affidavit under paragraph 2 he says *“...I am duly authorised to depose to this affidavit on behalf of the applicant herein.”* It is apparent from **Advocate Shakhane’s** affidavits that **Rethabile**

⁶ (724/2020) [2021] ZASCA 168; 2022(3) SA 403 at paragraph 11 where the South African Supreme Court of Appeal found that “Ms Moduka alleged that her reason for deposing to the founding affidavit was that the facts that gave rise to the need for a rescission application lay squarely within her knowledge as the attorney who was dealing with the matter. It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client.”

Mokaeane, the party affected⁷ by the order made on 24th May 2022, never authorised institution of the instant application. Nowhere does **Advocate Shakhane** allege that **Rethabile Mokaeane** authorised him to institute the instant application on her behalf. In fact he says he is the applicant in the matter under paragraph 1 of the founding affidavit.

25. **Advocate Shakhane** cannot be an applicant in the instant rescission application in his own right. He does not qualify as the person directly affected by the decision sought to be rescinded as anticipated in **High Court Rule 45(1)**; and he does not have the direct and substantial interest in the decision being sought to be rescinded. In **United Watch and Damon Co. Pty Ltd and others v Disa Hotels Ltd and Another**⁸ **Corbett J** said:

“In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject matter of the judgment or order differently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted....”

Advocate Shakhane does not have interest in the right which was the subject matter in the initial rescission application. His interest is limited to being a legal representative of the applicant. He therefore does not qualify to bring the instant application in his own right.

26. Even if **Advocate Shakhane** instituted the application on behalf of **Rethabile Mokaeane**, there is no proof or allegation of authority given to him in that regard. In view of the fact that **Advocate Shakhane** is an advocate, he could not even be authorised directly to institute the

⁷ Rule 45 (1) of High Court Rules 1981

⁸ 1972 (4) SA 409 at 415

application, unless at the instruction of an attorney pursuant to Rule 17 (1) (c) of the **High Court Rules** (Vide: **Joshua Lehloka vs Thabo Lehloka**⁹ **CIV/APN/282/06**).

27.I find the following words of **Lehohla J** in the case of **Ramainoane and Another vs Sello and Others**¹⁰ wherein counsel for the applicants had deposed to founding papers in an application for review of taxation and stay of execution relevant *in casu*:-

“There is no indication either that the 1st applicant authorised the deponent in these proceedings. The deponent himself has given no evidence that he has been authorised by the 1st applicant. He only contents himself with saying he has a power of attorney to represent the applicants. But the power of attorney which related to proceedings of the trial is not evidence as envisaged in applications of the instant nature. Indeed the power of attorney entitles the legal practitioner to represent his client in pursuing or defending a legal case. That should not be understood to mean he is thereby entitled to give evidence on his client’s behalf in application proceedings without stating in evidence or production of a resolution the authority his principal has granted him. There is a vast difference therefore between a power of attorney and a resolution including the requirement that in evidence it should be borne out that the witness has authority to represent the other. Unfortunately it seems this distinction is incomprehensible to the applicants’ deponent. I accept therefore Mr Phafane’s submission that the affidavit filed in support of the present application has to be thrown out as having been deposed to by an uninvited witness.”

There is no proof, indication or allegation whatsoever that the current application has been brought by **Rethabile Mokaeanne** or at least on her authority. Counsel for the applicant lacks legal standing to bring the instant rescission application in his own right as he has no substantial interest in the decision being sought to be rescinded. He also lacks

⁹ CIV/APN/282/06

¹⁰ CIV/T/19/97) [2000] LSCA 75 (12 June 2000) para 15-16

authority to represent **Rethabile Mokaeanne** in instituting this application. His mandate is limited to that of counsel for **Rethabile Mokaeanne**.

28. The same finding is apposite regarding the opposition that has been brought by **Advocate Senatsi** as counsel for the 1st respondent. In her answering affidavit, she merely deposes as follows under para 1:

“1.1 I am an adult Mosotho female and duly admitted advocate of this Honourable Court The facts to which I depose to herein are within my personal knowledge and belief same to be true and correct unless where the context indicates otherwise.

1.2 I am duly authorised to depose to this affidavits on behalf of the 1st respondent.”

29. Nowhere does counsel allege authority given to her by 1st respondent to defend the proceedings on her behalf. While there is no doubt that she was in a better position than anyone else to depose to the affidavit in the instant

proceedings for being privy to the relevant facts, counsel has failed to allege or to prove that she has been authorised to defend the application on behalf of 1st respondent.

30. I have already indicated that my observations on this latter issue are extraneous to the decision I have reached on the merits of this application. This is primarily because both counsel seemed unwilling to consider the issue as material and they seemed to be *ad idem* that neither party suffered any prejudice arising from the said irregularity. I take this position in view of the right that parties have to define issues for the court's determination in their case. In **Fisher and Another v Ramahlele and Others**¹¹ the

¹¹ (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (4 June 2014) at paragraph 14

South African Supreme Court articulated the parties' liberty to define issues they wish to litigate in the following words of **Theron and Wallis JJA:**

“It is not for the Court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.”

Costs

31. In view of the foregoing dictum that neither the applicant nor the 1st respondent had apparently authorised institution or opposition of this application, it is my considered view that it would be unfair to burden either of them with costs relating to proceedings they had not authorised. Each party should therefore bear its own costs occasioned by institution and opposition of this application by their respective counsel.

Disposition

32. The following disposition is therefore made:

- (a) The applicant failed to establish the urgency of the matter. The court however overlooked the issue and exercised its discretion to deal with the matter in its merits.
- (b) Applicant has failed to establish the ground for rescission pursuant to **High Court Rule 45(1)(a)**.
- (c) Deponents to the founding and answering papers did not have the necessary authority to institute and defend the application (*obiter dictum*).
- (d) The application for rescission is dismissed and each party to bear its own costs.

M. P RALEBESE J
JUDGE

For the applicant : **Advocate Shakhane**
For the respondents: **Advocate Senatsi**