

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0381/2020

In the matter between:

**BONANG SEISA T/A BAFOKENG
GENERAL CAFÉ**

APPLICANT

**FIRST NATIONAL BANK LIMITED
LESOTHO NATIONAL DEVELOPMENT
CORPORATION
THE DEPUTY SHERIFF**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Neutral Citation: Bonang Seisa t/a Bafokeng General Café v FNB Ltd & Others [2022] LSHC 140 Comm. (25 AUGUST 2022)

CORAM:

MOKHESI J

DATE OF HEARING:

28TH APRIL 2022

DATE OF JUDGMENT:

25TH AUGUST 2022

SUMMARY

CIVIL PRACTICE AND PROCEDURE: *Abuse of urgency procedure- application dismissed on that basis alone- requirements of application for rescission lodged in terms of Rule 27 of the High Court Rule.*

ANNOTATIONS:

STATUTES

High Court Act 1980

CASES

Commissioner South African Revenue Service v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA)

Exarro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another (Case NO. 169/2021) [2022] ZASCA 76 (27 May 2022)

Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)

LNDC v LNDC Employees and Allied Workers, Union LAC (2000 – 20004) 315

Vena and Another v Vena and Others 2010 (2) SA 248 (ECP) (28 May 2009)

Vice-Chancellor of NUL and Another v Putsoa LAC (2000 – 2004) 458

JUDGMENT

[1] Introduction

This application was lodged on an urgent basis seeking the following reliefs:

“1. That rules pertaining to periods and modes of services be dispensed with due to urgency of this matter;

2. That rule nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon Respondents to show cause (if any) why;

(a) The execution of Judgment in CCT/038/2020 granted on the 16th day of December 2020 shall not be stayed pending finalization thereof.

(b) That the aforementioned Judgment in CCT/0381/2020 granted on the 16th Day of December 2020 be rescinded and set aside and that the Applicant be granted leave to defend the main action accordingly.

Alternatively

(c) That the aforementioned Judgment in CCT/038/2020 be varied accordingly

3. Prayers 1, 2(a) and to operate with immediate effect as interim relief.

4. Costs of this application should be awarded to the applicant in the event of unsuccessful opposition.”

[2] Factual Background

The application is opposed. Before I deal with each party's case, it is important that I set out the factual background to the case. The applicant

had sought and was advanced a loan facility by the 1st respondent on the 14 October 2014. An amount of M421,351.00 (Four Hundred and Twenty-One Thousand, Three Hundred and Fifty-One Maloti) was advanced for the purpose. As a form of security Covering Bond to the tune of M510,000.00 over plot no. 13351 – 001 situated at Ha – ‘Mantšebo Maseru, Rural (residential) was ceded to the 1st respondent; Material Damage Insurance Policy No. P01014474 dated 27/11/2013 held with Alliance Insurance over stock, the sum insured being M500,000.00 was also ceded to the 1st respondent; A Government of Lesotho LNDC partial credit guarantee to cover 50% of the short fall. The debt was expected to be fully repaid in April 2018. However, the applicant fell into arrears, necessitating the 1st respondent to activate debt recovery process.

- [3] The applicant sued out summons in this court on the 02 November 2020 to recover the said outstanding amounts. Applicant did not enter appearance to defend the matter within the timeframes provided by the Rules of this Court, thereby prompting the applicant’s attorney to move an application for default Judgment, which was accordingly granted on the 16 December 2020. On 05 March 2021 the applicant was served with a Court Order and writ of execution. On the 30 April 2021 the bonded property was enlisted for sale in execution on the 30 April 2021. However, on the 19 April 2021, the applicant authored a plea to the 1st respondent’s attorneys to be allowed to pay the amount ordered by the court, in instalments. In the said letter he said:

“I realize that my plot bearing number 13351 – 001 is likely to be sold for my debt. I make proposal that I be allowed to pay instalment of M13,000.00

(Thirteen Thousand Maloti) per month so that I prevent sale of the place. I hereby undertake to pay the Bank until has been paid” (fair translation).

[4] The applicant’s plea was heeded, and the proposal turned into a settlement. However, despite this accommodation, the applicant failed to pay regularly as expected.

[5] **Respective Parties’ Cases**

Applicant lodged this application on an urgent basis on the 13 April 2022 with the certificate of urgency, signed by Adv. Kabelo Nomngongo stating the matter be treated as urgent because:

“I have considered the above matter and bona fide believe it to deserve urgent relief because the 3rd Respondent is now armed with the Writ of Execution and has already attached the Applicant’s property to her detriment, the judgment if executed would be highly prejudicial and/or detrimental to the Applicants liberties.”

[6] Essentially the same allusions are repeated in the founding affidavit. The applicant says the default judgment should be rescinded because he was not in wilful default as (AD paras.4.8 and 4.9)

“4.8 his explanation is reasonable and not in wilful default as he was under the reasonable explanation that he was settling his debt per Annexure “E” but was wrong as the settlement has never been signed by the 1st Respondent and turned into an order of court.

“4.9 The Applicant has a prospect of success should he be given an indulgence to defend the main action simply because of the fact that he was still paying the 1st Respondent all along and even told the 1st Respondent of the business crisis/or armed robberies and ANNEXURE “C” as it has

covered his default payment remaining balance which 1st Respondent and their agents are denying him...”

[7] In a nutshell, the applicant is saying he is not in wilful default because he thought he was settling the matter. He avers that he has the prospects of success because of the existence of the ‘Partial Credit Guarantee facility (Annexure “C”) and for the reason that his business suffered from a spate of robberies which crippled it, making it harder for him to repay the loan amount. I revert to these issues in due course.

[8] **Urgency:**

Rule 8(22) of the Rules of this Court needs finds application in this matter. It is concerned with the abridgment of times and form requirements decreed by the rules. The applicant must explicitly state the circumstances which she/he says render the application urgent and also reasons why he claims that he could not be afforded substantial relief at a hearing in due course if the application were to be treated ordinarily. Allied to this is the requirement that every urgent application be accompanied by a certificate of urgency setting out, by an advocate or attorney, that he considered the matter and that he *bona fide* believes it to be a matter worthy of urgent treatment. This procedure, it is trite, should be resorted to when there are “...extraordinary circumstances...to prevent immediate and serious damage, prejudice or harm being caused...” (**LNDC v LNDC Employees and Allied Workers, Union LAC (2000 – 20004) 315 at 325 B – C**). Failure to adhere to the requirements of this Sub-rule might in some cases amount to abuse of court process justifying dismissal of applications and cost order *de bonis propriis* against counsel implicated (**Vice-Chancellor of NUL and Another v Putsoa LAC (2000 – 2004) 458 at 462 F – I**). One would have hoped that after

repeated admonitions by the courts against abuse of this procedure, counsel would have heeded and changed course, but there does not appear to any change in the attitude.

- [9] It is true, as stated earlier, that, urgency relates to abridgement of periods and forms prescribed by the rules and not substance of the dispute and as such it is not “a prerequisite to a claim for substance relief” (**Commissioner South African Revenue Service v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at para. 9**). In this case it was stated that where no urgency exists, the appropriate order to make is to strike the application from the roll, not dismissal of the case (**ibid**). However, where, as we have seen in **Vice Chancellor NUL v Putsoa**, employment of urgency procedure amounts to its abuse, the court will be entitled to dismiss the case and order cost *de bonis proprii* against counsel involved. This view is hardly surprising, as this court has an inherent power to “protect itself and others against abuse of its processes” (**Beinash v Wixley 1997 (3) SA 721 at 734 D – E**. In this case an abuse of court process was said to be: (**ibid 734 F – G**)

“What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”

- [10] Despite what was stated in **Commissioner SARS v Hawker Air Services (Pty) Ltd**, that where the matter lacks urgency, the appropriate order to make is the removal of the matter from the Roll, it will be observed that what was in issue was not what should happen where the

invocation of this procedure amounts to abuse of court processes. Where there is abuse of court processes, **Vice-Chancellor NUL v Putsoa**, gives this court a discretion to dismiss the application and to order cost *de bonis propriis* against counsel (expressing a similar view, see :**Vena and Another v Vena and Others 2010 (2) SA 248 (ECP) (28 May 2009)** at paras. 5 – 7).

[11] Reverting to the facts of the instant matter, it is without doubt that there is no urgency in this matter, at best it is self-created. Judgment by default was granted on the 16 December 2020 and Writ of Execution issued on the 17 February 2021. The applicant did not pay the arrears nor settle the whole debt by then, instead he sought payment restructuring which was embodied in a Deed of Settlement. He did not repay the loan even in terms of his proposed manner. Execution was scheduled to proceed on the 30 April 2021, however, heeding to his pleas, it was not proceeded with. More than a year later, the applicant comes rushing to court crying urgency basing himself on the fact that 1st respondent is armed with the Writ of Execution. It should be recalled that such a writ was issued on the 30 April 2021. The certificate of urgency and the reasons advanced for its invocation is therefore an abuse of court process which justifies the dismissal of the application and consequent punitive costs order.

[12] Not only is the application dismissible on the basis of the above reasons, even on the merits, it should suffer the same consequences as will be demonstrated in the ensuing discussion. This application is in terms of Rule 27 of the rules of this court, which states that:

“25(6)(a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to the

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 such 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 may think fit.”

- [13] The requirements of Rule 27(6) (c) that the applicant show good cause for his/her default, were stated in the off-quoted decision in **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476 – 7**, where the court stated the following:

“(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His explanation must be bona fide and not made with the intention of merely delaying plaintiff’s claim.

(c) He must show that he has a bona fide defence to plaintiff’s claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

- [14] In the present matter the applicant does not say a word why after being served with summons, failed to file a Notice of Appearance to defend,

resulting in the default judgment being granted against him. The application is dead-silent on this issue. Instead, in the body of his founding affidavit, he deals with the reasons relating to his failure to make regular/or no payments at all in terms of the loan agreement, and why the 1st respondent should not proceed to sell the bonded property in execution of judgment. At para. 4.9 of his founding affidavit he says:

“4.9. The Applicant has a prospect of success should he be given an indulgence to defend the main action simply because of the fact that he was still paying the 1st Respondent all along and even told the 1st Respondent of the business crisis/or armed robberies and ANNEURE “C” as it has covered his default payments remaining balance which 1st Respondent and their agents are denying him...”

- [15] In part, as it is apparent from the above excerpt, the applicant relies on the fact he had been paying until he was handicapped by armed robberies. This does not go anywhere near to satisfying the requirements of the sub-rule in terms of providing a substantial defence to the claim. Allied to this is the allusion to “Annexure “C”. Annexure “C” is the Credit Guarantee Certificate. The applicant’s understanding, though flawed, of this certificate, is that it covers his default of payment. The context in which the credit facility was extended to the applicant should be understood: The applicant is a small and medium enterprise businessman (SMES) who did not have enough security to secure loans to grow his business. The Government of Lesotho, upon realising the existence of financing gap due to lack or insufficient collateral on the part of the SMES, through the 2nd respondent, introduced an initiative which is known as the Partial Credit Guarantee Fund. This initiative is run through the 2nd respondent.

[16] What the 2nd respondent does is to provide partial collateral for the loan. It only covers 50% of the shortfall on the final loss, meaning that, in case of default the 1st respondent will proceed to execute collateral which was provided by the applicant and then proceed to the partial credit guarantee if the collateral is not sufficient to cover its losses. The 1st respondent is not precluded from recovering its loan through collateral which was provided by the applicant as he seems to think. The Partial Credit Guarantee is a demand guarantee which establishes a contractual obligation between the 1st and 2nd respondents to pay 50% of the 1st respondent's final loss on loan recovery. This agreement is independent of the agreement between the applicant and the 1st respondent as was stated in **Exarro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another (Case NO. 169/2021) [2022] ZASCA 76 (27 May 2022)** at para. 10 where the Court said:

“[10] ... [A] demand guarantee is akin to an irrevocable letter of credit, which establishes a contractual obligation on the part of the bank to pay the beneficiary on the occurrence of a specified event, and is wholly independent of the underlying contract of sale between the buyer and seller ...”

[17] In the result therefore;

(a) The application is dismissed with costs on attorney and client scale.

MOKHESI J

For the Applicant:

Adv. T. Peete instructed by K. D Mabulu & Co. Attorneys

For the 1st Respondent: Mr. K. Ndebele

For the 2nd Respondent: No Appearance