

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 25/97
LC26/97

HELD AT MASERU

IN THE MATTER OF:

SIMON MOTOLO

APPLICANT

EDMUND BOROTHO

APPLICANT

AND

LESOTHO HIGHLANDS PROJECT CONTRACTORS

RESPONDENT

JUDGMENT

In both these cases the respondent filed its Answer late. Mr. Woker for the respondent filed an application for condonation. The Court instructed the condonation application be addressed together with the merits so that should the condonation application succeed the Court will proceed to deliver judgment on the merits without need for a second sitting.

The Originating Applications in the two matters were filed out of this Court on the 12th March 1997. They were personally served on Mr. Conning of the respondent on the 13th March 1997 by Mr. Mokhethi of O.K. Mofolo & Co. Mr. Conning confirmed receipt by signing his name on the front page of each of the Originating papers and Mr. Mokhethi filed a return of service with the Registrar. The Registrar

also posted the two applications to the respondent on the same date that they were filed.

On the 17th April, the applicants filed applications for default judgment. Mr. Mofolo filed notice of intention to amend prayer (a) of his Originating Application. The notice of intention to amend was served personally on Mr. Darcy who is the senior most officer of the respondent in Lesotho. He acknowledged receipt by signing his name.

On the 5th May 1997, the Registrar wrote to the respondent advising them that due to their failure to answer the applicants have instituted applications for default judgment. She informed them that her office had requested the applicants to hold their applications in abeyance pending the office's enquiry regarding the problem they (the respondent) may be having. She went further to say that *"being a court of equity, we are more eager to dispose of matters on their merits than on legal technicalities."* She then gave the respondent seven days from the receipt of the letter to answer failing which applicants' applications for default judgment would be entertained. The letter seems to have been served on the respondent the following day i.e. 06/05/97 even though the person who received it has signed that he or she received it on the 6th April 1997. This is clearly an error, he must have intended 6th May 1997.

This letter does not seem to have elicited any reaction from the respondent. On the 26th May 1997 the Registrar issued notices of hearing of default judgment applications on the two matter on the 30th May 1997. The notices were served on Mr. Conning of the respondent on the 27th May 1997. On the 29th May 1997 the respondent filed its Answer which was accompanied by an application for condonation of the late filing. For reasons that are not clear neither the default judgment applications nor the condonation application proceeded on the 30th May 1997. Both applications remained pending until when they were jointly heard on the 24th June 1997.

At the start Mr. Woker for the respondent moved the applications for condonation which were vigorously opposed by Mr. Mosito on behalf of the applicants. Mr. Worker relied on the affidavit of Roberts, an attorney for the respondent, who states that the delay was caused by communication breakdown in his office. He says that he had written an inter office memo to his partner Mr. Moiloa, who was already handling matters similar to those of the applicants herein on behalf of the respondent; to handle these two applications as well. The memo was never received by Mr. Moiloa and they only became aware of this when they were reminded by the respondent after they (the respondent) were served with an application for default judgment.

Mr. Woker contended further that rule 27(2) of the rule of the court which empowers the Court to condone any failure to observe the provisions of the rules if

it is in the interests of justice to do so gives the Court much wider discretion than in cases where the Court is to condone non-compliance on “*good cause shown.*” In the case of *Khotso Sonopo .v. Lesotho Telecommunications Corporation LC67/95* (unreported) this Court decided that it can only be able to determine if it is in the interests of justice to condone non compliance with the rules if the defaulting party shows good cause. They are not therefore mutually exclusive but rather complementary.

In determining whether good cause has been shown this Court has always been guided by the principles enunciated in *Melane .v. Santam Insurance Co. Ltd 1962 (4) SA531(A)*. It is now well known that there are essentially three factors to be considered namely, the degree of lateness, the explanation therefor and the prospect of success. At particular importance is that these factors are not individually decisive. They are interrelated and as such they must be considered in their entirety.

DEGREE OF LATENESS

It is common cause that an Answer has to be filed within fourteen days of the receipt of the Originating Application. The respondent herein received the Originating Application on the 13th March 1997. The Answer was filed on the 29th May 1997. This was two months and some fifteen days after the receipt of the Originating Application. This is undoubtedly an inordinate delay.

EXPLANATION

The respondent itself has not advanced any explanation. Only Mr. Roberts has filed an affidavit explaining why there was a delay. Mr. Mosito contended that the respondent should have made an affidavit explaining that it was not responsible for the delay. He contended further that Mr. Roberts’ affidavit is a non-affidavit as it is not sworn to. In the view of this Court there is merit in both of these arguments.

Mr. Woker contended that there is no obligation for a defaulting party to make an affidavit. Condonation application is an indulgence. The view that this Court holds is that the party seeking the indulgence of the Court like is the case in *casu* owes it to the Court to explain his failure to comply with the rules on oath. Not every utterance will be sufficient for the Court to condone non-compliance with the rules. A sworn affidavit is therefore a requirement. The conclusion to which we arrive at is that the respondent has not explained its failure to comply with the rules of this Court.

Assuming that we are wrong in the view we have held that Mr. Roberts’ affidavit be thrown out it seems to us that result would still be that respondent’s explanation is not satisfactory. The reason for this finding is that Mr. Roberts’ explanation that

they were briefed on time, appears to be untrue. As far back as the 6th May 1997, the respondent was told by the Registrar of this Court that it had not filed Answers in the two matters. That should have prompted the respondent to inquire from the attorneys what the progress was with making Answers in the two matters. Nothing was done. It seems to this Court that this was a case of clear carelessness on the part of the respondent.

PROSPECTS OF SUCCESS

It seems the respondent does have bona fide defence to the applicants' claims. However as we have stated these factors are not individually decisive. The fact alone that the respondent may succeed on the merits is not sufficient for the Court to exercise its discretion in respondent's failure.

As we have pointed out evidence on the papers before Court is that the respondent's attitude was one of not caring. Even after being given a seven days grace period by the Registrar and the letter being served personally on them the respondent still took no action. As if that is not enough the respondent has not bothered to explain to this Court why it has not been able to comply with the time limits stipulated by the rules. This Court will not be part of setting its stamp of approval for parties wanton disregard of the rules of this Court. For these reasons respondent's application for condonation is refused and judgment is entered in favour of applicants as prayed in their respective notices of motion.

Whilst the applicant in LC25/97 filed a notice of amendment of prayer, this application was never moved. Judgment is therefore entered for the applicant in LC25/97 without the amendment.

THUS DONE AT MASERU THIS 6TH DAY OF JULY, 1998.

L.A LETHOBANE
PRESIDENT

M. KANE

MEMBER

I AGREE

K.G LIETA

MEMBER

I AGREE

FOR APPLICANT :

MR MOSITO

FOR RESPONDENT:

MR WOKER