CIV/APN/204/81

IN THE HIGH COURT OF LESOTHO

In the Application of :

PAUL MARE KHORORO — Applicant

V

TANKI FIEE — 1st Respondent
W. LEMENA — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 28th day of January, 1983.

An urgent application in the following terms was placed before me:

1. That a rule nisi be issued calling upon the 1st and the second Respondents to show cause on a date to be determined by this Honourable Court, Why:-

   (a) Second Respondent should not forthwith restore possession to the applicant of the items of furniture stated in paragraph 5 of the founding affidavit.

   (b) Second Respondent should not transport back to Tsatsa-le-Moea the goods referred to in paragraph 5 of the founding affidavit at Second Respondent's costs.

   (c) First and Second Respondents should not pay the costs of this application.

and the following order was granted:

That a rule nisi issues returnable on the 11th January 1982, calling upon the 1st and 2nd Respondents to show cause why:-

(a) Second Respondent should not forthwith restore possession to the applicant of the items of furniture stated in paragraph 5 of the founding affidavit.

/(b)

(b) Second Respondent should not transport back to Tsatsa-le-Moea the goods referred to in Paragraph 5 of the founding affidavit at second Respondent's costs.

(c) First and Second Respondents should not pay the costs of this application.

In his founding papers Paul Mare Khororo (hereinafter referred as the Applicant) deposed, under oath, that he had three dwelling houses. In the said houses he had some items of furniture (which he listed in Annexures "A" and "C" to his founding affidavit). Some of these items he had paid for in full but others were still covered by the terms of a Hire Purchase Agreement. He, was employed in the Republic of South Africa and during the course of that year (i.e. 1981) he "engaged the services of one SEHEHERE MARE, an ageing relative of mine to look after my homestead," to his site.

On the 6th December 1981 a relative called Malefetsane Mare arrived in Vereeniging and advised him that "certain Court officials have removed the furniture from his place." He immediately requested leave of absence and left for his home. On his arrival home he was informed that the second Respondent had attached his property on the 21st November 1981 and that he had also left a "warrant of execution in a case numbered CIV/T/108/76." His employee, Sehehere Mare "was a third defendant in that case."

The property which has been attached is his personal property and that his employee "is not even working and could ill afford to buy the said property."

He states that he was in lawful and undisturbed possession of the attached goods.

Sehehere Mare in his supporting affidavit states briefly:

That on the 21st November 1981 a warrant of execution was

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served on him but as he was not working but a man of straw, he was unable to pay. However, for his living he works for the Applicant who has left nobody at home. The second respondent attached the property in the houses of the applicant. He protested that the property did not belong to him. He confirms the affidavit of the applicant which he has read.

The furniture was only removed by the Court Officials on the 5th December 1981 together with keys to certain items of furniture (not mentioned).

Malefetsane Mare deposes that he was present when Court Officials removed the furniture in terms of a "Court Order". He says that Sehehere Mare did "in fact tell the officials in the presence of myself and others" that the houses and the furniture which "was removed" all belonged to the Applicant.

He knew "even at that time that Sehehere Mare was not the owner of the furniture but observed that the High Court Officials were not interested in that aspect of the matter. He says they did not "verify with" him or anyone present.

He confirms the affidavit of the Applicant in so far as it concerns his trip to Vereeniging; he also "confirms what has been said by Sehehere Mare regarding attachment."

The first Respondent briefly stated that he was the plaintiff in a certain CIV/T/108/76 in which he had claimed damages in the sum of R3,000.00 for unlawful arrest and detention against the present 3rd defendant (Sehehere Mare) and judgment was entered in his favour.

The second Respondent (Deputy Sheriff) says in his affidavit:

He starts off by saying that he has read the affidavits of the Applicant and Sehehere Mare. He says that he carried his duty in goodfaith and the property he attached was as a

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result of a writ against Sehehere Mare who is a third defendant in CIV/T/108/76. It was not the first time he levied execution on the property of Lebamang Ntisa, Phethang Merafo and Sehehere Mare who are defendants in the last mentioned case. The first time that execution led to CIV/APN/207/79 in which they "falsely claimed they had no property." The property was eventually sold.

On 21st November 1981 he came to Sehehere Mare with the chief's messenger Hlabaki Mokanetso who represented Petrose Mohalinyane the headman. The said messenger showed him Sehehere Mare's houses and property. He was shown three houses and furniture. The latter was attached.

Sehehere Mare said that while the houses were his, the furniture belonged to his son. He was told that proof of that was needed. Sehehere Mare was unable to produce any. He was again told that the furniture would be fetched after a week and during that period he could bring proof that the said property did not belong to him. He was also informed about interpleader proceedings in the High Court. If no satisfactory proof was forthcoming or placed before him, (i.e. the second respondent) he would remove the furniture.

On the 5th December 1981 the furniture was removed to Maseru to prepare for a sale in satisfaction of the judgment in CIV/T/108/76. There had been no proof forthcoming as requested.

He says that while it may be true that the table, side board and six chairs belong to the applicant, he should have proceeded by way of interpleader summons so that the representative of the headman who identified Sehehere Mare's property could be subpoenaed to give evidence.

He says that because he attached the goods timeously

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and no action was taken before he removed them he cannot be faulted consequently he should not be mulcted in costs as he acted bona fide.

Except for the goods that are on Hire Purchase, there is no evidence that the rest of the goods so removed belong to Applicant. At the time the warrant was executed Sehehere Mare had said he had no home but the headman's representative said the place was his. But now applicant says Sehehere Mare has a place adjacent to his. Sehehere Mare did not say that to him.

He requested that the Rule nisi be discharged with costs.

The Applicant has filed what is styled a Replying Affidavit. The function of this affidavit is to deal with a new matter that the Respondent(s) might have raised in his or their opposition. It is not intended to be a second bite at the cheery by the applicant. For an example, in Paragraph 2 AD PARA 3(c) (3) there is a reference to a letter from the chief mentioning something. This is an entirely new matter which Applicant is not allowed to raise at this stage of the proceedings.

There is an affidavit of one Petrose Mohalinyane styled "Supporting Affidavit." It was drawn on the 29th March 1982 and sworn to the same day. It was served on the Respondents' attorneys on the 30th March 1982 and filed with the Registrar on the 31st March 1982. Who sanctioned the filling of this affidavit after the pleadings were closed I do not know. There is no explanation as to why this affidavit was not available together with other founding affidavits. I have been requested by Mr. Gwentshe to expunge it from the record and I have no alternative (in my discretion) but to grant it.

/The affidavit

The affidavit of Petrose Mohalinyane dated 29th March 1982 cannot, therefore, be considered in this judgment. Evidence cannot be obtained peacemeal and, as it were, through the back door. The court must always be fully informed and its consent in these matters must first be obtained. Neither can parties come to an agreement to disregard the law or the Rules of the Court.

There was filed into court, also, a document purporting to be a Hire Purchase Agreement. It is not an annexure to any of the documents before court neither is it accompanied by any affidavit. Why it was filed, who filed it, is not explained. It shall also be ignored.

In fact the endorsement on the Court's cover read: "Order Struck off the Roll." 29/3/82. The matter was struck off again on the 18/5/82. It was again struck on the 19/8/82. Thereafter there was no Rule Nisi. It was discharged. (R.T. Morrison (Pty) Ltd v Belle, 1981(1) LLR. 206 at 207). Then on 1/11/82 the Rule was "reinstated and re-extended" to 8/11/82.

The Applicant was not quite open with the Court. He refers to Sehehere Mare as an "ageing relative" whereas in truth, it is his own father. He says Sehehere Mare's site is "adjacent to his site." The headman's representative said the opposite. But as is now well-known in this country a deputy sheriff or a messenger never enters a village to execute except when accompanied by the chief or his representative. I have no doubt in this case that the second Respondent followed this well-established practice. It is trite law that in an ex parte application that an Applicant must observe the utmost goodfaith and put before

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the court all material facts (per Tebbutt, J.A. in Lesotho Electricity Corportation v Forrest Construction Company (Proprietary) Limited, 1979(2) LLR.). It is noticed, with considerable regret, that many a counsel expects the applications in such circumstances i.e. where the barest of facts are given, to be referred to trial. However, the procedure, initially preferred by the Applicant, is meant to be most expeditious. There are conflicts but the applicant has not called for viva voce evidence. The matter must be adjudicated on the papers as they stand. (Mankowitz v Loewenthal, 1982(3) S.A. 75 (A.D.) at 763A). The facts in the present case are not similar to those in the case of Issa v The deputy sheriff, 1978(1) LLR. Although the goods attached were alleged to belong to another person i.e. the wife of the judgment debtor, the remedy sought was to "stop any removal" of her property "pending the decision upon the interpleader." Whereas in the present case the remedy sought is immediate and is dependant solely upon the question of possession.

Sehehere Mare asserts that he explained to the second Respondent that the goods did not belong to him. Malefetsane Mare (be it noted a relative) only confines himself to the occasion when he was present. This was on the 5th December 1981 when the goods were being removed to Maseru. He mentions that protestations were made by Sehehere Mare about the furniture not being his own property. Well, Sehehere, does not mention anything of the sort. Just to give a lie to what this gentleman observed: The goods were removed on the 5th December 1981 and the protestations by Sehehere Mare were made on that date, but then his affidavit (i.e. Malefetsane's) had already being sworn to on the 3rd December 1981 (ahead of the event!).

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In my view so far it cannot be said that the second Respondent removed Applicant's goods by force, fraud or stealth. It has not been categorically denied that Sehehere Mare was not given a reasonable time within which to prove that the goods did not belong to him.

When the second Respondent served a warrant of execution on Sehehere Mare that was in pursuance of a Court's Order in CIV/T/108/76 against, amongst others, Sehehere Mare and what was done pursuant to that writ of execution was prima facie lawful and particularly so in this matter because the headman's representative had said the houses and everything in them was the property of Sehehere Mare. (Makhubelu v Ebrahim, (1947(3) S.A. 155) where it was held that where judgment was valid at the time of execution, spoliation would not avail. Moreover, the courts ought to protect their Sheriffs and deputies who execute court orders because they do not fall into categories of people who take the law into their hands. They are agents of law enforcement and execution of courts judgments.

The first Respondent is not a spoliatior in the sense that he never disturbed anybody's possession of his goods. All he did was to invoke the machinery of the law, which all along, refused him from resorting to self-help. How can it adapt him a spoliator when he does what the law expects of him and the court be asked to mulct him with costs?

The Applicant, has made one point quite clear and that is, the judgment debtor was in possession when the goods were removed. The person who was in physical possession was Sehehere Mare that is not disputed. If that were so the whole application is misconceived because the person who

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should have brought the present proceedings is Sehehere Mare (Yeko v Qana, 1973(4) S.A. 735 at 739). It should, therefore, on that ground alone be dismissed with costs. It is not enough for the judgment debtor to say that the goods belonged to another person. In that case execution is to proceed and not be defeated by a plea jus tertii. (See Bruce v Josiah Parkes & Sons, 1972(1) S.A. 68 at 70D-E).

The Applicant annexed certain documents, purportedly to prove his ownership of the goods under review. In the spoliation applications, such as the present, the question of ownership never comes into play because in certain circumstance even a thief can avail himself of that remedy. What the remedy protects is possession and not ownership. (Ngojane v Liphoto & Others, 1980(1) LLR. 51 at 57). The raison d'e'tre for the remedy is to prevent persons, including the true owner, from taking the law into their own hands. It is a unique remedy available even against the true owner in favour of a thief. Another characteristic of this remedy was described by Addleson, J. in Runsin Proporties v Ferreira, 1982(1) S.A. 658 at 670F being "..... a robust one. Discretion and considerations of convenience do not enter into it." I entirely agree.

It is trite law that in applications of this nature the Applicant has to prove two facts, namely that he was in possession and that he had been despoiled of possession by the Respondent. The policy of the law is spoliatus ante omnia restituenda est. (See Wille's: Principles of South African Law, 7th Ed. at 199).

Rule 51(b) reads:

/"(b)

> "(b) Where there are conflicting claims as regards property attached in execution, the sheriff or deputy-sheriff shall have rights of an Applicant and the execution creditor involved shall have the rights of a claimant."

This sub-rule reads exactly the same as the latter part or concluding part of Rule 58(1) of the Rules and Practice of the Supreme Court of South Africa, by Nathan, Barnett and Brink. The interpretation given to that part of the rule is that it refers to a situation where a third party claims property that has been attached in execution. In my view, I see no reason why the same interpretation should not be adopted in dealing with our sub-rule. The sheriff interpleader is resorted to, then, where a sheriff seizes or intends to seize goods by way of execution and a person (other than judgment debtor) claims them. The sheriff initiates proceedings to determine whether the property belongs to the judgment debtor or claimant. (Rule 51(3) (5) & (6); See also Jacobs and Others, Supreme Court Practice, 1979 Vol. 1 p. 248).

Finally, the liability of a messenger or deputy sheriff applying the principles of Roman-Dutch Law was stated by Juta, J.A. in Weeks & Another v Amalgamated Agencies Ltd., 1920 A.D. 218 at 238 as follows:

> The position of a messenger who attaches the goods of a third party.
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> "If he attaches them while in the possession of the judgment debtor they are presumed to belong to the latter, and the messenger is not liable to the owner for such attachment.
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> "If on attachment or thereafter before they are sold, they are claimed by a third person, his duty is to take out interpleader summons. If he neglets to do so he is answerable to the owner of the goods.

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> "If he attaches goods which are not in the possession of the judgment debtor which belong to a third person, he does so at his risk, and is answerable to the owner." (See Lemena v Potsane & Another 1976 LLR. 106).

The principles are quite clear and practical. The delivery of a notice called "an interpleader notice" is discretionary because the word "may" is used (Rule 51(1): "the applicant (sheriff) may deliver a notice ..." The application fails on two grounds, namely, that the wrong person launched an application for a spoliation order. Secondly, no attempt was made to comply with the provisions of the Rules of this Court.

For the reasons given above the Rule Nisi is discharged with costs to the Respondents.

M.P. MOFOKENG.

For the Applicant : Mr. Kolisang

For the Respondents: Mr. Maqutu