CIV/APN/44/83
CIV/T/42/81

IN THE HIGH COURT OF LESOTHO

In the Application of :

MALEFETSANE MOFOKENG — Applicant

v

1.W. A. J. SWANEPOEL
2.MESSRS S.C. HARLEY & CO.
3.DEPUTY SHERIFF OF THE HIGH COURT — Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 16th day of May, 1983

On the 24th February 1983 the Court was urgently moved ex-parte by the applicant who sought relief in the following terms :

"2.(a) A RULE NISI returnable on a date to be determined by the above Honourable Court calling on the All Respondents to cancel the sale in execution of immovable property at cite plot No.599 of Hoohlos, Maseru at the front entrance of the above Honourable Court on the 26th February 1983, and there and then to show cause, why:-

(b) An order Directing Second Respondent to account for the R1000-00 paid in his offices by applicant herein on the 22nd September 1981 should not be granted.

(c) An order directing all the Respondents to account for the return of sales of movable property attached per writ of the above Honourable Court and auctioned about October 1981, should not be granted.

(d) An order directing the third Respondent to

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include the truck as one of the items attached, which must appear in the return of service dated 31st August 1981, should not be granted.

(e) An order directing the respondents to pay the costs of this application each paying each other to be absolved should not be granted.

(f) An order granting such further and or alternative relief as the above Honourable Court deems fit should not be granted.

2. Prayer 1.(a) to operate with immediate effect as an interim interdict."

The interim order stopping the sale of applicant's immovable property was granted. On the return date Mr. Harley, an attorney of this Court, who was cited as second respondent, made an appearance and conceded that the sale of the applicant's immovable property should be cancelled, but resisted, as against his client and himself personally, that costs be awarded against them. The 3rd respondent who is the deputy sheriff (Mr. Mojaki) did not see fit to respond.

After perusing a number of files pertaining to this matter a strange state of affairs has emerged which can be summarised as follows :-

1. The 1st respondent, represented by Mr. Harley, obtained a default Judgment against applicant in CIV/T/42/81 in the sum of approximately M7800. This was on 29th June 1981 before Molai AJ as he then was.
2. On the 13th day of July 1981 a writ of execution on the movables of the applicant (and judgment debtor) was issued out of the office of the Registrar at the instance of Mr. Harley. At the back of this writ (annexure A to the founding affidavit) the deputy sheriff (Mr. Mojaki) purports to have certified that he had attached the applicant's (and judgment debtor's) movables (items enumerated) and these included "one truck".
3. In the official return of the same deputy sheriff (annexure B to the founding affidavit) he certified that he attached the applicant's(and judgment debtor's) movable property (items enumerated and almost the same as at the back of

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the writ (annexure A) but there was no mention that these items included "one truck". The deputy sheriff certified however that he estimated the value of the movable property attached (without the truck) to be M10,000 and he levied his commission fees on this basis. In the body of this return the deputy sheriff says the attachment took place on the 31st September 1981, but at the bottom of the page the date is put as 31st August 1981. Since the month of September has 30 days the chances are that the deputy sheriff made a mistake and I will have to assume that the attachment in fact took place on 31st August 1981.

4. The applicant(and judgment debtor) was aware of the default judgment and of course the attachment and proceeded to Mr. Harley's office to make a deal and on 22nd September 1981 an agreement was concluded for the settlement of the judgment debt by instalments. The settlement provided that in the event of default the whole amount outstanding became payable. The applicant paid Mr. Harley R1000 on account of the judgment debt. Mr. Maqutu (on applicant's behalf) conceded in chambers before me at the ex-parte proceedings that from papers at his disposal in the client's file the applicant had indeed defaulted on this agreement.

5. It would appear from paragraph 5 of Mr. Harley's affidavit (which he was asked to provide) resisting the award of costs (dated 17th March 1983) that the deputy sheriff remitted to him the sum of M1030, purporting to be the proceeds of sale of the attached movable property but Mr. Harley gave me no date of receipt of this sum by him or his office and he did not have any idea when the sale of the applicant's(and judgment debtor's) movables had taken place. The applicant says it was in October 1981 but did not say if, at that date,he had been in default of the terms of settlement.

On the 11th October 1982 Mr. Harley moved the Registrar to issue a writ of Execution against the applicant's (and judgment debtor's) immovables. In that writ he stated as follows at paragraph 2 :-

> "And whereas your return of service dated 30th September 1981 indicated that the debtor has no attachable movable assets to satisfy the above mentioned debt" etc...

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Well now this statement in October 1982 runs counter to Mr. Harley's affidavit dated 17th March 1983 that the deputy sheriff paid him a certain sum of money from the proceeds of sale. Although there is some confusion in the dates it is evident that even if the truck was not included in the return of service of attachment in the hands of Mr. Harley he had nevertheless a valuation on the property attached put at M10,000.

It is clear therefore that from the date (not disclosed) of receipt of the M1030 and M1000 by Mr. Harley's office and the issue of the writ of execution on the applicant's immovables dated 11th October 1982 (that the debtor has not attachable movables) that something had gone amiss. This has been recognised by Mr. Harley as I have said and hence his consent to the confirmation of the rule cancelling the sale in execution of the immovable property but he submits that neither he nor his client should be mulcted with the costs of the application and that it should be borne by the deputy sheriff alone.

If I may digress for a moment Mr. Maqutu had also raised the point in the ex-parte hearing that the description of the property advertised for sale does not conform to the rule laid down in Mthembu v Deputy Sheriff 1980(2) LLR p. 383. Mthembu's case supra did not purport to lay down a universal "rule" that is applicable to every situation. There the improvements on the site were quite substantial and included buildings for commercial purposes. It would not have been fair in that case for either the judgment debtor or the judgment creditor (and other creditors) to allow the sale to proceed immediately. I need not decide this point in the present case, but Mr. Harley should take heed of the fact that an advertisement of the nature he caused to be published may be held to be inadequate. Even though the site is residential it is always wise to describe, even if in brief form, the nature of the improvements made thereon for the benefit of all concerned.

In the present case there was, in my view, negligence

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that must be laid on Mr. Harley's office and the deputy sheriff. The writ on the applicant's (and judgment debtor's) immovables ought not to have been issued. Mr. Harley should have been (and was indeed) on guard because he had already made an agreement with the applicant(and judgment debtor)subsequently to the default judgment and the attachment of his movables. One implication of such an agreement is that Mr. Harley had allowed lifting or partial lifting of the attachment. I don't know what happened, Mr. Harley says he does not know what happened, and the deputy sheriff is silent. Where, after the issue of a writ of execution and attachment the judgment creditor (or his attorney) reach an agreement of settlement of the judgment debt otherwise than by sale of the attached property it seems to me that that agreement supercedes the writ and the latter is extinguished, and the Registrar and deputy sheriff must be informed accordingly. The judgment creditor may then have to sue on the agreement or revive the writ but whatever the legal position is, if the words "at his own risk" appearing in Rule 46 of the High Court Rules mean anything they must mean surely that a judgment debtor ought not to be penalised beyond the extent of the judgment debt. Both the judgment creditor and his attorney as well as the deputy sheriff, owe him (and third parties) a duty of care. It is not an absolute duty according to the authorities (see Nathan Barnett and Brink - Uniform Rules of Court 2nd Ed. page 294) but, and I quote:-

> "The position has always been (I take it at common law) that if a judgment creditor has authorised an attachment which causes damage to the judgment debtor or a third party,the creditor and not the sheriff is liable therefor, but if the sheriff has acted outside the scope of his authority he and not the creditor is liable".

I am here only dealing with costs of the application however and no question of liability for damages arises but it seems to me that costs must follow the event for no case has been made out why I should depart from the general rule.

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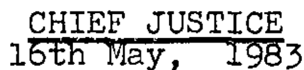
The actions of the deputy sheriff Mojaki are most suspicious and apart from conflicting returns he did not see fit to file an affidavit of what actually happened.

The 2nd respondent(de bonis propriis in terms of Rule 61 of the High Court Rules) and 3rd respondent must pay costs of this application jointly and severally the one paying absolving the other. I attach no blame on 1st respondent and Mr.Harley should refrain from charging this item on his professional fees to his client.

I direct the Registrar to cause an enquiry to be made on the sale of this applicant's (and judgment debtor's) property by the deputy sheriff. If the Registrar's investigations reveal that there was negligent or criminal disposal of his property by the deputy sheriff he should dispense with his service, or a complaint should be lodged with Criminal Investigation Department, as the case may be. In either case he should let me know the results of his investigation.



CHIEF JUSTICE
16th May, 1983

For Applicant : Mr. Maqutu & Mr. Gwentshe
For 1st & 2nd Respondents : Mr. Harley
No appearance by deputy sheriff

copy: Registrar : to take action as indicated please.