C of A. (CIV) No.2 of 1983

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

PAUL MARE KHORORO	Appellant
and	
TANKI FIEE	1st Respondent
W. LEMENA	2nd Respondent

HELD AT MASERU

Coram:

MAISELS, P.
SCHUTZ, J.A.
SCHREINER, A.J.A.

JUDGMENT

MAISELS P.

On the 7th March 1983 an appeal was noted by the appellant against a judgment of the High Court dated 28th January 1983 discharging with costs a rule nisi granted in favour of the Appellant against the respondents. On 29th December 1981 Mofokeng J. had granted a rule nisi returnable on 11th January 1982 calling upon the respondents to show cause why:

/(a) .....

(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 cost.

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

It was this rule which, after the matter had been postponed from time to time, was as stated above discharged on 28th January 1983.

It should here be stated that the first Respondent was the plaintiff in an action in which he had claimed and was awarded damages against three persons one of whom is Sehehere MARE. As the judgment was not satisfied a writ of execution was issued, and the second Respondent as Deputy Sheriff, pursuant thereto attached on the 21st November 1981 the furniture which is referred to in paragraph 5 of the founding affidavit of the appellant. This furniture was in the possesion of Mare but the appellant claimed that the furniture in question was his. It was not disputed that, when the second Respondent attached the furniture in question, Mare told him that the furniture belonged to the appellant. The second Respondent did not believe Mare and told him that, unless he could bring proof that the furniture was not his, the furniture would be removed. It was so removed on 5th December 1981. The second Respondent says he also informed Mare that the owner of the property would have to institute

/interpleader ....

interpleader proceedings in the High Court in order to claim the property if he (the second Respondent) was not given satisfactory proof that the furniture belonged to the appellant before he removed the property.

The appellant works in Vereeniging in the Republic of South Africa: He stated in his founding affidavit, and this is not disputed, that the first he heard of this attachment and removal was when a relative of his arrived at his place of work on or about the 6th December 1981 and informed him of what had occurred. He requested leave of absence from his employers to investigate why what he claimed was his furniture had been removed from Mare, who, he claimed, was looking after it on his behalf. Proceedings were launched on the 28th December for the relief set out supra.

The second Respondent claimed that he was entitled to attach and remove the furniture in question for two reasons. The first was that on a previous occasion when he levied execution on certain property against the three persons among whom is Mare "they falsely claimed they had no property" and this property was eventually sold. This reason is of course unsupportable. The second is that he was told by a Chief's messenger one Hlabaki MOKANETSO who represented Petros Mohalinyane, the Headman, that the property in question belonged to MARE. No affidavit was filed by Hlabatsi Mokanetso and it is plain that there was no admissible evidence that the property belonged to MARE. Hlabaki Mokanetso's

statement to the second Respondent was hearsay. For good measure I should add that PETROSE MOHALINYANE swore an affidavit that he is the gazetted Headman and that he told Hlobatsi on the 21st November 1981 to accompany the second Respondent who had informed him that he was going to execute against the property of MARE. The Headman says that he told the second Respondent that MARE had no property to be attached, but this notwithstanding the second Respondent attached and removed the Appellant's property.

There is in the affidavits no evidence whatsoever to contradict the Appellant's sworn affidavit that the furniture attached was indeed his or which he was lawfully entitled to hold pursuant to certain hire purchase agreements he had entered into.

The contention by the second Respondent that the Appellant had to institute interpleader proceedings is without substance. It was he, and not the appellant who had, in a case such as the present, to do so. The plain meaning of Rule 51(1)(a) and 51(1)(b) of the High Court Rules makes this clear.

It is true that the notice of Motion states "AND in the matter of an application for Mandament van Spolie", but there can be no doubt that the appellant's claim was really a vindicatory one. This appears clearly from the papers filed by him. The fact that a different label was placed on the nature of the proceedings is irrelevant. de Jager and others v FARAH and NESTADT 1947(4) S.A. 28 at 36(W).

/ As stated ....

As stated above the appellant duly noted an appeal against the judgment of the High Court discharging the rule and this appeal was set down for hearing at the last session of this Court in July 1983. Shortly before the matter was to be heard, by notice dated and filed on 5 July 1983, the appellant, by his attorney Mr. Kolisang stated that he did not intend to prosecute the appeal and he withdrew it. The appeal was consequently dismissed and the appellant was ordered to pay Respondents' costs. A day or two later, i.e. during the same session, Mr. Kolisang appeared before us and explained that he had acted in error in withdrawing the appeal and asked for it to be reinstated. This the Court refused to do in the absence of a formal application supported by affidavit. On the 15th July 1983, i.e. after the July session had been concluded a notice of motion was served and filed on the respondent's attorneys in which it was stated that the Appellant intended to apply to this Court for an Order that:

1) his appeal be reinstated.

2) the appellant's attorney pay the costs de bonis propriis, and

3) the Respondents pay the costs of that application in the event of their opposing it.

The notice of Motion requested the Respondent, if he intended opposing the application, to notify the appellant in writing on or before the 27th July 1983 and to file his answering affidavit, if any, within fourteen days of such notification. The Respondent on the 27th July 1983 did

/notify ....

notify the appellant's attorney of his intention to oppose the application but filed no answering affidavit.

It is my opinion abundantly clear from the affidavit of Mr. Kolisang, the Appellant's attorney, that there was a bona fide error on his part in filing the notice of withdrawal referred to supra. There is not the slightest ground for not accepting his affidavit as truthful and for that matter the appellant's own affidavit. Moreover, and this is important, there was no delay in launching the application. In addition in considering a matter of this nature the Court takes into account the question as to whether there are reasonable prospects of success in the appeal itself.

From what I have said this requirement has been satisfied. Mr. Maqutu, who appeared before us for the Respondents did not persist, and rightly so, in his opposition to the reinstatement of the appeal. Reinstatement was consequently ordered.

It follows from what has been stated that the learned judge a quo erred in discharging the rule. In view of the long delay that had occurred between the High Court judgment and the present hearing, the Court, on the 25th April 1984, enquired as to whether the furniture that had been attached and removed by the second Respondent had been sold in execution. Mr. Maqutu told us it had, Mr. Kolisang said it had not. In order to resolve the dispute the Registrar was requested to arrange for the second Respondent, the

/Deputy .....

Deputy Sheriff, to be present in Court on the following morning, i.e. the 26th April. The following facts emerged:

1) Despite the fact that on the 7th March 1983 an appeal was noted against the judgment of Mofokeng J and notice was served on the Respondents' attorney on that day, the latter on the self same day instructed the second Respondent to proceed with a sale in execution of the goods attached.

2) This the attorney was entitled to do, as the noting of an appeal does not, under the Rules of the High Court, operate as a stay of execution of the judgment appealed from - vide Rule 6(1).

3) The sale in execution duly took place on 26th March 1983.

4) The relevant portion of Rule 46(7) reads:
"Where any movable property is attached as aforesaid the deputy sheriff shall where practicable (unless there is an interpleader action pending) sell it by auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen days from the date of seizure thereof."
The deputy sheriff, i.e. the second Respondent, told the Court that there had been no advertisement as required by the Rule. In fact, to the Court's astonishment, he informed us that, despite the fact that he had been a deputy sheriff for 16 years, he was quite unaware of the Rule. One wonders how many irregular sales in execution have taken place. It is of the utmost importance that this Rule and indeed other Rules affecting him should be known and adhered to by the Deputy Sheriff. The prejudice both to a judgment creditor and to a judgment debtor as a result of non adherence to the Rules is self evident.

5) The proceeds of the sale in execution, so Mr. Maqutu informed us, had not been paid over to him or the judgment creditor the first Respondent, because an employee of the Deputy Sheriff had allegedly stolen them, i.e. the proceeds.

It is obvious from these facts that this Court cannot now simply uphold the appeal by setting aside Mofokeng J's order discharging the rule nisi and confirming it. This would be a brutum fulmen. All that this Court is able now

/to do ....

to do is to make appropriate orders for costs. These are

1. The order of Mofokeng J. ordering the appellant to pay the Respondents' costs in the High Court is set aside and there is substituted therefor an order that the Respondents are jointly and severally to pay the appellant's costs in that Court.

2. The order of this Court of 6th July 1983 that the appellant pay the Respondents' costs is to stand.

3. The costs of the application for reinstatement as on an unopposed basis are to be paid by the appellant's attorney de bonis propriis.

4. The respondents jointly and severally are to pay the appellant's costs of this appeal, subject of course to what is stated in paragraph 2 supra.

The appellant is of course entitled to pursue such other remedies as may be available to him as a result of the events that have occurred and have been summarised in this judgment.

I.A. MAISELS
PRESIDENT

I agree

W.P. SCHUTZ
JUDGE OF APPEAL

I agree

W.R. SCHREINER
ACTING JUDGE OF APPEAL

Delivered this 27th day of April, 1984

Counsel for Appellant : Mr. Kolisang

" " Respondents : Mr. Maqutu