CIV/APN/420/87

IN THE HIGH COURT OF LESOTHO

In the Application of :

CARRINGTON MOEKETSI MASOABI — Applicant

V

JOSEPH TEBOHO MOILOA — 1st Respondent
DEPUTY SHERIFF (LEMENA) — 2nd Respondent
LESOTHO BANK — 3rd Respondent

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 27th day of February, 1989.

On 16-2-89 when this application was called in Court Mr. Moiloa for respondents relying on Notice in terms of Rule 8(10) (c) at page 613 of the record raised four points in limine i.e. that

(a) the applicant's motion is in breach of Rule 8(22) in that the leave of the court was not sought and obtained to dispense with the forms and service provided for in the rules of court;

(b) the application was not in fact urgent and did not merit approach to court on an urgent basis in terms of Rule 8(22);

(c) the applicant has failed to make full disclosure of all material facts known to him in his founding affidavit at the time of launching his application in as much as he failed to inform the court that he had sold Plot 12291-023 to Yeats' family;

(d) the applicant has failed to establish that he has a clear right against the respondents to which he is entitled to the protection of the court or to the relief which he seeks in the notice of motion.

The main application involved attachment of applicant's bonded property number 12291-023. The

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attachment was effected by 1st Respondent following an application which had previously been moved in this Court. The property in question was bonded to 3rd Respondent.

The first respondent in argument brought to the Court's attention that this property was sold by the applicant to Yeats' children and the transfer thereof was effected on 10th March 1988 according to the deed of transfer. Mr. Moiloa pointed out that this transfer was effected while the instant application was pending in Court. The applicant confirmed this fact but pointed out that the sale and transfer of the property were made on the basis of the instructions of Mr. Webber of whose firm 1st Respondent is a partner and member.

Pointing out that applicant himself acknowledged on 21st June 1988 that the notice in terms of Rule 8(10)(c) was misconceived he referred me to page 611B of the record: Paragraph 10 thereof. However respondents had been compelled to react to papers served on them on the basis of urgency as early as 8th June 1988. It was for this reason that even though applicant said he was no longer proceeding on the basis that his application was urgent, 1st Respondent however reacted by submitting that on behalf of all the respondents he was reserving the right to respond to prayers 3 and 4 abandoned in terms of submissions made by applicant earlier in the day.

Mr. Moiloa submitted that no leave was sought by applicant and granted by court to dispense with the form and notice periods provided in terms of Rule 8(22).

It is the essential part of this rule that when an application is moved in terms of which directives given in the rules are disregarded a proper application for dispensing with the rules must first be sought by the party and granted by the Court. Failure to observe this rule may result in the dismissal of the application on the basis that if forms are neglected causes are lost.

/C/F

C/f C. of A. (CIV) No. 16 of 1984 Kutloano Building Construction vs 'Maseele Matsoso & 2 Others (unreported) at page 7 where the Court said

> "But forms are often important and the requirements of the sub-rule are such."

I have noted that the Notice of Motion before me does not request the Court's indulgence to have the form and notice periods dispensed with.

I have also observed that according to the file note respondents appeared before a Judge of this Court on 21st December 1987. I am informed that 1st respondent was served with papers at 12.45 pm. of that day approximately. I have taken judicial notice of the fact that the day in question falls outside the normal Court session which ends on 15th of that month.

It is the essential requirement of rule 8 that applicant is obliged to specifically set out in affidavit that the application is urgent. See CIV/402/86 Khoboko vs. Khoboko & 2 Others (unreported) at page 7.

It was further submitted that applicant approached this Court on an urgent basis without making full disclosure of relevant and material facts known to him at the time of launching this application. See CIV/APN/186/86 Moaki vs Moaki (unreported) at p. 3. Also C of A (CIV) No. 5/87 Lieta vs Lieta.

It is important to note that a party who seeks urgent relief on the basis that if the court is not approached for a ruling granting relief or protection he will suffer irreparable harm our rules provide that such a party must comply with the Rules. My perusal of the founding affidavit has not succeeded in bringing to my attention that applicant has made a statement in it revealing that he sold plot 12291-023 to Yeats' family. It has not been disclosed why property designated as 437 Europa came to be attached again.

Mr. Moiloa made much of the fact that the practice of passing transfer cannot come about without power of

/attorney.

attorney. What this implies is that the deeds registry needs must have been approached by the person seeking to effect the transfer: in this instance the applicant. If so how could he not be aware of this position? If he is, how come he has not disclosed it?

I am satisfied that notwithstanding earlier protestations to the contrary applicant approached this court seeking that the attachment order made in favour of 3rd respondent be removed.

In reply Mr. Masoabi stated that it had been acknowledged that the application was not urgent for the Court had made such a ruling earlier. I may just point out that if it had to take the Court to make a ruling that a party's application is not urgent then certainly the other party was not spared the pressure of responding to the application in an urgent manner before the ruling was made. C/F CIV/APN/318/88 Tsekoa vs Lesotho Flour Mills & Others. Conversely if it has to take the Court to rule that indeed a matter was urgent as conceived by the applicant and this fact was resisted by respondent the court has the discretion in confirming the rule to grant the successful party the corresponding costs. See Tsekoa & 3 Others vs Lesotho Flour Mills & 4 Others (unreported above at pp. 2, 3 and last paragraph at p. 24.

The court was told that applicant approached the court because he wanted to avoid the escalating interest he had to pay on his bonded property while respondents seemed to be disinclined to relieve him by selling it to the ready and willing buyers. In other words applicant wanted to have the bond cancelled. He further said he came to court thinking that property 437 was attached at the time of moving the application. He only learnt through Mr. Webber of 1st Respondent's office that it was not attached hence applicant's abandonment of prayer 4 in his notice of motion. He referred me to page 600 of a document styled "consent to cancellation" at the right top corner of which is decipherable what applicant submitted is Mr. Webber's

/signature

signature. It is indicated that Mr. Webber acted in the capacity of a conveyancer in this regard. Mr. Masoabi submitted that the cancellation was effected on 27-1-87 and that summons suing him was dated April 1986. Therefore if he knew that the bonded property had been cancelled he would have revealed this fact. I fail to see the significance of this elaborate submission in view of the fact that the application which was moved by Mr. Masoabi and the contents of which he has sworn in his founding affidavit that he knows came much later than dates referred to above. This application was moved and filed on 21st December 1987. There can be no question of the applicant having not been aware of the things bearing on his interest in the matter having been done before moving this application.

He proceeded to deny that material facts which were in his possession were not disclosed and disapproved of the submission that he came to court without clean hands.

He further brought attention to the significance of the fact that the deed of sale between him and the Yeatsi, and the transfer thereof was meant to be effected by Messrs Du Preez Liebetrau and Company and called in question the fact that Mr. Webber could be willing and ready to absolve him without his knowledge and authority.

He also called in question the significance of the fact that the party he is said to have failed to disclose the sale to has not come to court to object. He reiterated that he wants to pay and is ready to do so but the payee does not want to be paid. He emphasised that dismissal of his application would benefit neither the Bank nor himself. He stressed that he would like to have Mr. Mafike the 3rd Respondent's Manager, Mr. Webber and 2nd Respondent allowed to give evidence for clarifying certain things that would cast a commendable hue on his case.

/Mr. Moiloa

Mr. Moiloa in turn observed that applicant failed to address himself to points raised in limine. Further that he didn't seek to raise again the question of urgency, even though granted the opportunity to do so.

Consequently he prayed that this court should confirm the earlier ruling that there is no urgency in this matter.

Indeed the question of sale to the Yeats' family appeared for the first time in annexure "D" to the Answering affidavit.

Page 69 paragraph (2) b(i) shows that a sum of M25,000.00 was paid to the seller on 10th May 1983 and that a further sum of M1200.00 was received by the seller from the present tenant as rental for the months of May and June 1983. It is not without basis that I come to the conclusion that the main application is characterised by lack of candour.

Nowhere has this question of receipt of the above-mentioned sums been disclosed by applicant in his founding affidavit.

Mr. Webber's letter to Messrs Du Preez Liebetrau and Co. dated 15th January 1987 shows in paragraph 2 that Mr. Masoabi had been contacted and that he signed the necessary documents for the transfer to pass and the declaration to be submitted. See page 78 of the record. Yet this was not disclosed either. I am disinclined to allow oral evidence sought by applicant in these proceedings. The applicant must either stand or fall by what is in his papers.

I have no hesitation in upholding the points raised in limine with costs on attorney and client scale.

J U D G E.

27th February, 1989.

For Applicant : In Person
For Respondent : In Person.