

CIV/APN/343/91

IN THE HIGH COURT OF LESOTHO

In the Application of :

AGATHA BITSANG KASINJA (born Theoane) ... Applicant

and

CHARLES KASINJA..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai

on the 25th day of November, 1991.

On 28th October, 1991 the Applicant obtained, ex-parte, an order framed in the following terms:

- "1. A rule nisi issue calling upon the Respondent to show cause, if any, on 11th day of November, 1991 at 9.30 in the forenoon or so soon thereafter as the matter may be conveniently heard why:-
 - (a) The deputy sheriff shall not be commanded to apprehend Respondent and to detain and bring him before this Honourable court in order to enable Respondent to show cause, if any, why:-
 - (i) Respondent shall not be committed to prison for contempt of court;
 - (ii) Respondent shall not be directed to

pay the costs hereof.

(b) Granting applicant such further and/or alternative relief.

2. That rule 1(a) operates with immediate effect as a temporary interdict."

The Respondent was, on 29th October, 1991 personally served with the rule nisi which was accompanied by a writ of arrest framed in accordance with Form "F" of the First Schedule to the High Court Rules 1980. He intimated intention to oppose confirmation of the rule and anticipated the return day to 4th November, 1991. Affidavits were duly filed by the parties.

In the interest of clarity it may, perhaps, be mentioned at this stage that Respondent and Applicant are husband and wife married by civil rites in community of property. On 23rd October, 1991 the applicant had obtained, against the Respondent, another rule nisi calling upon the latter to show cause, on 11th November, 1991, why inter alia:

"1. (a) Respondent shall not be interdicted forthwith from selling, alienating or otherwise disposing of the assets of the joint estate otherwise than in connection with business pending the finalization of CIV/T/347/91;

(b)

(c)

(d)

2. That rule 1(a) operates with immediate effect as a temporary interdict."

In as far as it is relevant to the present application, it seems to be common cause from the affidavits that on 23rd October, 1991 and following summons commencing a divorce action instituted by the Applicant against the Respondent under CIV/T/347/91, the latter started selling away some of the assets of the joint estate.

In her founding affidavit the applicant averred that she had been reliably informed and verily believed that when he sold away some of the assets of the joint estate the Respondent was aware that she was about to approach this court for the interim order, which was granted against, and served upon, him on 23rd and 24th October, 1991, respectively. In selling away some of the assets of the joint estate, as he did, the Respondent, therefore, acted in contempt of the court order. Hence the application for his committal to prison.

In his answering affidavit, the Respondent denied the applicant's averment that she was reliably informed and verily believed that when he sold away some of the assets of the joint estate he was aware that she was about to approach the court for the interim order granted against him on 23rd October, 1991. However, in her replying affidavit the applicant reiterated the averment she had made in her founding

affidavit and pointed out that on 21st October, 1991 'Matheko Letsa, an employee at a butchery business jointly owned by the Respondent and the Applicant, informed her that the Respondent and a certain white lady who was accompanied by a coloured man had been busy taking an inventory of the property at the butchery.

According to her, on 22nd October, 1991 the applicant informed 'Matheko Letsa and other employees at the butchery that she would approach this court for the interim order which she obtained against the Respondent on 23rd October, 1991. One of the employees advised the Respondent about the order before it could be served upon him on 24th October, 1991 and that explained why the latter started selling away some of the joint assets at the butchery.

In support of the applicant's replying affidavit 'Matheko Letsa deposed to an affidavit in which she averred that on 21st October, 1991 a white lady and a coloured man had arrived and taken inventory of some equipment at the butchery in the presence of the Respondent. On 23rd October, 1991 some of the equipment was loaded away in a truck, again in the presence of the Respondent. On 24th October, 1991 she and other employees removed the contents of the fridges and stoves on the instructions of the Respondent who told them that they would be paid off at the end of the month. Subsequently a light

delivery van arrived and, in the presence of the Respondent, loaded away two stoves, one big kettle and some food stuff. When it came for the second time the van found that the business place had been closed, presumably by the deputy sheriff.

It is trite law that in applications of this nature an applicant must take the court into his full confidence and disclose all material facts that may assist the court in deciding whether or not to grant an order sought ex-parte. It is, however, significant to observe that, in the instant application, the applicant did not, in her founding affidavit, disclose the source of her information that when he sold away some of the assets of the joint estate the Respondent was aware that she was about to approach the court for the interim order which she obtained on 23rd October, 1991. It was only in the replying affidavit and after the Respondent had filed his answering affidavit that the applicant disclosed that she had received the information from 'Matheko Letsa who also introduced facts which should have been averred in the found affidavit.

The introduction in the replying affidavits and after the Respondent has filed his answering affidavit of the fact which should have been averred in the founding affidavits is for obvious reasons highly prejudicial to the Respondent's case.

cannot, in my finding, be properly allowed.

Even if I am wrong in my finding and it is held that the applicant was, in the circumstances of this case, entitled to introduce in her replying affidavits, facts that had not been averred in the founding affidavits, it is to be remembered that, according to the facts disclosed by affidavits, the order of which the Respondent is alleged to be in contempt was served upon him on 24th October, 1991 after he had already sold away the assets, the subject matter of this dispute. If at the time he sold away the assets of the joint estate the Respondent had not yet been served with the order, I am not convinced that he was aware of the order and had, therefore, sold away the assets in its defiance. He was, at the most, trying to frustrate the pending decision in CIV/T/347/91. That is, however, not the basis for the contempt of court alleged against the Respondent.

It may also be mentioned that on 7th November, 1991 and after the replying affidavits had been filed, the applicant apparently filed with the Registrar of the High Court another document styled : Supplimentary Replying Affidavit. As far as I am aware, in application proceedings only three (3) sets of affidavits may be filed viz. the founding, the answering and the replying affidavits. If a party wishes to file supplementary or a further set of affidavits, it must do so

with the authorisation of the court which will have to ensure that the other party is afforded the opportunity to reply if it wished to do so.

In the present case, the supplementary replying affidavit has, however been filed in total disregard of the authorisation of this court and the Respondent has not been afforded any opportunity to reply to the contents thereof if he so wished. In the circumstances, I am not prepared to consider the supplementary replying affidavit which has, in my opinion, been irregularly placed before this court.

From the foregoing it is obvious that the view I take is that this application ought not to succeed. The rule nisi granted on 28th October, 1991 is accordingly discharged.

This being a family dispute, I would make no order as to costs.

B.K. MOLAI

JUDGE

25th November, 1991.

For Applicant : Mr. Pheko

For Respondent : Mr. Mda.