C. OF A. (CIV) 8/1993

IN THE LESOTHO COURT OF APPEAL

In the matter between:

GERTRUDE N. MTHEMBU	APPELLANT
AND	
THABO F. LEHOLA	RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN, JA
BROWDE, JA
KOTZÉ, JA

JUDGMENT

BROWDE J.A.

On 17 December, 1991 the parties concluded an agreement of sale in terms of which the appellant sold her interest in certain fixed property and a hotel business to the respondent for the sum of M600,000. Payment was to be made by respondent by taking over a bond and the balance in monthly instalments.

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The respondent defaulted and the appellant, after issuing summons, obtained summary judgment in the High Court for the sum claimed plus interest and costs.

Pursuant to that judgment a writ of execution was issued in response to which the deputy-sheriff made a *nulla bona* return. This was done after the writ was personally served on the respondent on 14 January, 1993.

On the basis of the judgment debt and the *nulla bona* return a provisional order of sequestration against the respondent was granted to the appellant on 29 January, 1993. The record shows that the provisional order was served on the respondent and, according to the respondent himself received by his attorney, on 4 February, 1993.

The respondent filed no papers and on 8 March, 1993 a final order of sequestration was granted on an unopposed basis.

On 8 May 1993 an application was brought before the High Court in which the respondent sought rescission of the sequestration order. Although the basis of the application in the founding affidavit was apparently the alleged non-disclosure by the appellant of an action which had been

instituted against her by the respondent, the latter in reply, for the first time, made the submission that the original action by the appellant was based on a nullity because the sale was concluded without ministerial consent as required by Section 35 read with Section 36 of the Land Act 1979.

Kheola J., who heard the application for rescission, pointed out:

(i) That the respondent's attorney stood by in Court when the final order of sequestration was granted.

(ii) That despite the fact that respondent on 8 March, 1993 had knowledge of the final order he took no steps to have it rescinded for a period of two months.

(iii) The respondent gave no reason for not taking steps to have the order rescinded within the time required by the rules of Court.

Despite the foregoing Kheola J. felt himself

constrained to find that because of the alleged lack of Ministerial consent there was no basis for the default judgment and consequently that he was obliged to rescind the final order of sequestration. This he did and it is against that decision that this appeal is brought.

Dr. Tsotsi, who appeared on behalf of the appellant (the respondent did not appear at all) submitted that the summary judgment was neither appealed against nor rescinded and that consequently it could not properly be declared invalid merely because, in reply, the respondent alleged that ministerial consent was not obtained. I agree with that submission. The question was not only not fully dealt with on the papers before the Court but, as Dr. Tsotsi correctly pointed out, it is not even clear that the Land Act applies to the transaction. It is certainly not clear that appellant was a lessee; nor did the sale relate only to land because included in the *res vendita* was the hotel business.

In any event I think the respondent cannot properly be permitted to raise the issue of Ministerial consent after failing to raise it in resisting summary judgment, permitting a *nulla bona* return to be made, not referring to the point and indeed standing by and acquiescing int he

final order of sequestration being issued by the High Court and finally offering no reason for the inordinate delay in moving the application for rescission.

I believe that the respondent was estopped from raising the point in the perfunctory manner in which he did and then not in his founding papers. In any event, until the summary judgment is rescinded or otherwise set aside in proceedings instituted for that purpose, no reason exists to interfere with the *nulla bona* return which was the act of insolvency relied upon by the appellant. I agree with Dr. Tsotsi that while that judgment stands it can properly support execution and sequestration.

Consequently the appeal must succeed and the judgment of the High Court must be set aside and substituted by an order refusing the application for rescission with costs. Respondent must pay the costs of appeal.

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J. BROWDE
JUDGE OF APPEAL

I agree .....
J.H. STEYN
JUDGE OF APPEAL

/...

I agree .....

G.P.C. KOTZÉ
JUDGE OF APPEAL

Delivered at Maseru This 22nd Day of January... 1994.