CIV/T/117/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO BANK	PLAINTIFF/1ST RESPONDENT
THE DEPUTY SHERIFF, HIGH COURT	2ND RESPONDENT
AND	
BASOTHO NATIONAL PARTY	DEFENDANT/APPLICANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 12th day of August, 1995.

These are the reasons for judgment in an application for an order in the following terms:

"1 - Dispensing with the Rules of this Honourable Court concerning notices and service of process in this matter on account of the urgency of this matter;

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2 - A *Rule Nisi* issue calling upon Respondents to show cause if any, on a date and time determinable by this Honourable Court, why

a - the writ of attachment issued at the instance of First Respondent in CIV/T/117/88 and in the hands of Second Respondent shall not be stayed pending finalisation of this application;

b - Second Respondent shall not be restrained from proceeding with the sale of plot No. 225 Maseru Central, the property of Applicant, in pursuance of the writ of attachment issued by First Respondent herein, pending finalisation of this application;

c - Judgment of this Honourable Court granted against Applicant in CIV/T/117/88 shall not be rescinded;

3 - Directing Respondents to pay the costs of this application in the event of their

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opposing same;

4 - Granting Applicant further and/or alternative relief.

5 - Prayer 2 (a) & (b) to operate with immediate effect as an interim order."

I took the view that the ends of justice would be better served if the application was on notice not *ex parte*. consequently I made the following order:

(a) That the normal Rules of Court be dispensed with on account of the urgency of this matter;

(b) Applicant is directed to serve the Respondents with the application;

(c) Respondents are directed to file opposing papers by the 1st September, 1995;

(d) Applicant should have filed its replying

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affidavit by the 4th September, 1995;

(e) This application will be argued on the merits on the 6th September, 1995 at 2.30 p.m.

On the 6th September, 1995 this application was argued. Mr. *Ntlhoki* appeared for Applicant while Mr. Geldenhuys appeared for Respondents.

In view of the urgency of the matter, I had to announce my decision immediately after argument in the following terms:

(a) The judgment dated 12th August, 1988, has superannuated in as much as the writ of execution was only issued on the 22nd February, 1988 which is over three years from the date of judgment. Because this judgment was not revived, the writ was issued irregularly. Consequently the Notice of Sale is set aside and the sale in execution of Site 225 situated at Maseru Urban Area that would take place on the 23rd September, 1995 is thereby cancelled.

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(b) The application for rescission of judgment is refused.

(c) There is no order as to costs. (Each party to pay its costs).

(d) Reasons for judgment will be given on the 12th August, 1995.

These are the reasons for judgment.

Rule 57(1) of the *High Court Rules* 1980 provides:

> "After the expiration of three years from the date on which a judgment or order was pronounced, no writ of execution may be issued pursuant of such judgment or order unless the debtor consents to the execution of a writ or the judgment has been revived by the court."

The next sub-rule provides that the debtor be given not less than seven days' notice that application will be made for the revival of such judgment. Rule 57(3) further provides that:

> "in any application for revival of any judgment, the court shall not require new proof of the debt on which the judgment is based."

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It is not disputed that judgment was taken on the 12th August, 1988 and that the writ was first issued on the 22nd February, 1995. This date is almost seven years from the date of judgment. Undoubtedly there has been superannuation in respect of this judgment.

Applicant among other things was not satisfied with the fact that the debt that did not seem to have gone down despite the fact that the First Respondent, the Lesotho Bank, had been collecting rents. The judgment debt was huge, about M730,000.00. Interest in terms of judgment was 15% per annum. It is common cause that payments were made by Applicant to the First Respondents. Applicant wanted me to go into this because he felt that since Applicant had been collecting rents, the debt should have gone down. I could not do this as this would have been a waste of time as the writ on which the sale in execution was based could not stand.

In passing, I merely pointed out that since interest would be over M100,000.00 (One Hundred Thousand Maloti) per annum and probably interest increased faster than rentals reduced the debt. I added that it was Applicant's right to know the state of his bank account. I was nevertheless surprised to see a writ which was issued

after a long time in which payments made are not deducted and interest that accrued over the years added. As already stated, where the judgment has superannuated, "the judgment remains as if there had been no writ". Per Innes CJ in *Cooper v Registrar of the Supreme Court* 1908 T.S. 756 at 759. Therefore that writ had to be set aside.

Superannuation of judgment as a procedural device is not intended to prejudice either party. As Howie J put it in *Segal and Another v Segil* 1992(2) SA 136 at page 143 CD:

> "Superannuation causes executability to lapse... Upon revival executability is restored and can take place."

Where the judgment creditor has not executed judgment for a long time Harms *Civil Procedure in the Supreme Court* 08 at pages 421 and 423 said:

> "the object of the rule is to prevent the judgment debtor from being surprised by a sudden execution."

In the case of *Milne v Friedman* 1911 TPD 935 at page 939 where Smith J was dealing with a magistrate court period of superannuation after one year correctly put the

principle as follows:

> "The revival of a superannuated judgment is a matter of procedure only, a step to be taken to obtain the issue of a writ of execution, the object being to insure that in the case of a judgment in respect of which no writ of execution has been taken out for at least a year, the person affected by the judgment shall have notice before the issue of a writ. It would thus appear to me *prima facie* to be a step in continuation of former proceedings in which judgment sought to be executed was pronounced."

The court hearing an application of the revival of a judgment whose executability has lapsed is obliged to revive it unless as Mathew J said in *Sulaman & Co.* v Vahed 1928 49 NLR 492 at 493 the judgment debtor proves "that owing to lapse of time a position has arisen which has made it undesirable that the judgment should be revived, in that the revival would serve no purpose because enforcement would be illegal or futile". Such a situation is in the course of things very rare. There is no more any need to prove the judgment debt but when an application for revival of a superannuated judgment is made, the judgment debtor must be given notice:

> "the object is to prevent defendant being taken by surprise, and this is accomplished by notice of motion..." per Innes CJ in *Mosenthal & Co. v Hellman* 1903 TS 556 at 557.

In the light of the aforegoing when there was a writ

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based on a superannuated judgment the following words from Innes CJ in *Cooper v Van Rhyn Goldmines Estates & Another* 1908 TS 698 at 700 came to mind:

> "But assuming the judgment to be superannuated, it follows that no writ can issue in respect of it, until it has been revived."

There being no valid writ on the basis of which execution could issue, I declared the writ on which the sale in execution was based to be null and void and cancelled the Notice of Sale accordingly.

Another disturbing feature of this case is the notice of sale. It did not describe the property to be sold in execution fully. It also did not put all its good points so that it could attract buyers. It seems to me this has to be done. If this has not been done, the sale in execution will not attract enough prospective buyers. The property will realise very little money. This is to the detriment of both the judgment creditor and the judgment debtor. The reason being that the debt will not be discharged, both the judgment debtor and the judgment creditor might thereby be ruined or prejudiced unnecessarily.

In the case of *Mokotso v Mojaki & Others* 1977 LLR 119 at pages 126 to 127 Cotran CJ quoted with approval from the following words from *Messenger of the Magistrate Court Durban v Pillay* 1952 (3) SA 678 at 680:

> "the scope and object of the provisions of the rule is to provide every security against the property being sacrificed at a sale. If the requirements regarding advertisement are ignored, the result is, in effect, a fraud against the judgment debtor and his creditors."

This South African case involved immoveable property while *Mokotso v Mojaki* involved a motor vehicle. The deputy sheriff was ordered by Cotran CJ to hand over to the judgment debtor (who had by then paid the judgment debt) the moveable property that had been bought at a sale by a purchaser, because the sale was defective.

Rule 47(7)(b) of the *High Court Rules* 1980 provides:

> "The execution creditor shall, after consultation with the deputy-sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale..."

Van den Heever JA in *Messenger Magistrate Court Durban v Pillay* (*supra*) at pages 683 and 684 after doing a comparative study of the law with other countries,

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dealing with a case whose advertisement for sale in execution was similar to this one said:

> "To the man in the street it might reasonably convey that a piece of unimproved land situated outside any built up area was going to be sold in execution. The provisions of Rule 40 were conceived in the interest of the judgment debtor and the judgment creditor. Disobedience to its directions may cause the debtor to be despoiled without a corresponding reduction of his liabilities and satisfaction of his creditors."

Cotran CJ in *Michael Mthembu v Deputy Sheriff & Others* CIV/APN/160/80 (unreported) after citing the above passage with approval concluded:

> "Whether landed property, be vacant or with buildings on, or a farm, has been described with sufficient detail depends on the circumstances of a particular case."

In the papers before me, I have only the number of the site in Maseru and the other conditions of sale. The description of the property in the Notice of Sale being incomplete because of non-description of the property would not be allowed to stand. I would therefore not have allowed the sale to proceed on this ground as well.

The next issue I was obliged to deal with was the application for rescission of judgment. An application

is governed by principles that apply to all applications. Herbstein and Van Winsen in *Civil Practice of the Superior Courts of South Africa* 3rd Edition at page 80 to 81 dealing with *ex parte* applications such as this one was intended to be said:

> "The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court; so much so that if an order has been made upon an *ex parte* application and it appears material facts have been kept back, whether wilfully or negligently, which might have influenced the court ... the court has a discretion...to dismiss the application."

In the founding application the Applicant's deponent had stated that he was bringing an application to rescind a default judgment. It turned out there had been an entry of appearance by the Applicant. This was followed by an application for summary judgment. While the application for summary judgment was pending, Applicant suddenly consented to judgment. I had through negligence of Applicant been misled, what was being rescinded was a judgment by consent. This fact caused me some worry because a man whose memory is not good is obliged to check records.

This is what the same deponent who was then acting

secretary general and is now the secretary general stated in his affidavit sworn on the 5th April, 1988:

> "I aver at all material times in relation to this matter, Mr. Sooknanan has acted on our authority and under our instructions.
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> I am aware of the agreement between plaintiff and defendant to the effect that defendant should service interest over the capital and that I instructed Mr. Sooknanan to agree to this agreement. I have been fully informed by Mr. Sooknanan's office, and I have also checked the bank statements, that, the interest is being serviced as agreed upon."

On this occasion Applicant, through the same deponent, now informs this court that he was not authorised to defend the action and to consent to judgment. The Applicant's deponent has already shown that he has a poor memory. I do not have to disbelieve him, but I have very good grounds to doubt what he now says. In any event, nothing else has been put before me to prove that Applicant had

not authorised the deponent to act for Applicant as he in fact did. In application proceedings, a party stands or fails by its affidavits.

Even assuming applicant did not know that there was a judgment against it, a fact that its deponent always knew save that he had forgotten he consented to judgment. On the 4th July, 1995 a letter was written by First Respondent to applicant in which the Chairman of applicant was informed that the Lesotho Bank (First Respondent) "intends to execute the writ and sell the property at the end of this month".

Rule 27(6)(a) of the *High Court Rules* provides that:-

> "Where a judgment has been granted against defendant in terms of this rule as the case may be, may within twenty one days after he has knowledge of such judgment apply to court on notice to the other side, to set aside such judgment."

This rule applies to a judgment on confession like this one and default judgments. Twenty one days elapsed without the Chairman doing anything. Furthermore the writ of execution on the basis of which this application was brought before this court was received by Applicant on the 26th July, 1995. Still another twenty one days were

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allowed to elapse before the application for rescission of judgment was brought. This application for rescission of judgment is time barred, whatever angle it is approached from.

If we take into account Applicant's deponent's affidavit of 5th April, 1988 (it is clear that the judgment debt has not been going down, only interest was being serviced) then the debt could not go down. it would seem there were no prospects of success in the main action. The debt remains owing therefore no *bona fide* defence was disclosed on the merits.

Mr. *Ntlhoki* for Applicant urged me to find that applicant was barred from defending itself because of the *Suspension of Political Activities Order No.4* of 1986 Section 3(1)(a) which provides that:

> "No person shall manage, take part in, collect subscriptions for, raise funds for or otherwise encourage the management of any political party."

Mr. *Ntlhoki* urged me to take a generous interpretation of this Order against human rights.. If I followed this line of reasoning I would then hold that Applicant's deponent was wrong in defending the action and consenting to

judgment. It was in Mr. *Ntlhoki*'s view a breach of the law for officials of applicant to manage the affairs of the Applicant in any way while *Order No.4* of 1986 was in operation.

I did not have to decide whether or not Applicant should benefit from his own wrong doing (if at all it was) on the basis that estoppel cannot be permitted to produce results contrary to or inconsistent with the law. The reason being that as Hoexter AJA said in *Trust Bank van Suid Afrika v Eksteen* 1964 (3) SA 402 at 416 A:-

> "The court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand."

I am of the view that this belated extension of the *Order* by Mr. *Ntlhoki* to the realm which has no connection with political activity *per se* is not justified.

All statutes that abridge existing rights are given a strict interpretation. This was how Applicant and its attorney Mr. *Sooknanan* Advocate *Fick* interpreted this law. They therefore took the *Order* as allowing them to defend legal proceedings and to manage the properties of Applicant. The reason being that the *Order* neither disbanded

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political parties or seized their properties. Cotran J (as he then was) in *Malebanye v Goliath* 1974-75 LLR 276 at page 280 C said about laws that seem to take away or abridge existing rights:-

> "It is a well-known rule of construction that express and unambiguous language is absolutely indispensable in statutes passed conferring new rights or taking away existing rights."

Cotran J then went on to show that there is a presumption against the legislature altering the common law. It seems to me that since *Order No.4* of 1986 merely suspended political activity but did not expressly take away the right to defend actions and to manage properties, it would be wrong to read more into it than it contained. *Order No.4* of 1986 did not even disband political parties, it only suspended political activity. It would seem it is the new interpretation that Mr. *Ntlhoki* is advancing that ought to be faulted because:-

> "It must also be shown that the legislature have authorised the thing to be done at all events, and irrespective of its possible interference with existing rights." *Vide Western Countries Ry v Windsor* (1882) 7 AC 189-as approved by Cotran J in *Malebanye v Goliath* (*supra*).

It is not even necessary to decide this point because the application for rescission of judgment is time barred.

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It is significant that the papers do not disclose Applicant ever repudiating the actions of its deponent.

In the light of the aforegoing, I had to refuse the rescind judgment because I could not rescind it contrary to the rules of court.

Both parties have succeeded and failed in these proceedings. I made an order that each party should pay its costs or alternatively there was no order as to costs.

W.C.M. MAQUTU
JUDGE

For the Plaintiff/1st Respondent : Mr. *Geldenhuys*
For the Defendant/Applicant : Mr. *Ntlhoki*