CIV/APN/393/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOCHONE STANZA MATLOSA	APPLICANT
and	
ZAKHURA BROTHERS (PTY) LTD.	1ST RESPONDENT
HIS WORSHIP MR. M.B. MABEJANE (MAGISTRATE COURT)	2ND RESPONDENT
THE MESSENGER OF COURT (MAFETENG MAGISTRATE COURT)	3RD RESPONDENT

R U L I N G

Delivered by the Honourable Mr. Justice G.N. Mofolo on the 1st day of December, 1995.

This is an application wherein the applicant asked this court for an order in the following terms:-

1. That a RULE NISI be issued calling upon the Respondents to show cause, if any, on the date and hour to be determined by the Honourable Court why:-

   (a) the proceedings in a certain case No.C.C.120/95, a case of the Mafeteng Magistrate's Court presided over by the 2nd Respondent, shall not be stayed pending the determination of this application;

   (b) the Interim Order made by the 2nd Respondent on the 10th day of November, 1995 in the said case shall not be reviewed by this Honourable court and set aside in terms of Rule 50 of the Court Rules;

   (c) The 3rd Respondent shall not be restrained from executing the abovementioned order pending the determination of this application;

(d) The 1st Respondent shall not be ordered to pay costs of this application on an attorney-and-client scale;

(e) Granting applicant further and/alternative relief.

2. That the time and normal modes prescribed by the Rules of Court be dispensed with regarding the urgency of this matter.

3. That prayers 1(a) and (c) should operate with immediate effect as an interim interdict.

4. That the 2nd Respondent herein is ordered to dispatch within fourteen (14) days of the receipt of this order to the Registrar of this court the record of proceedings referred to in 1(a)

There was also a certificate of urgency couched in the following terms:-

"I,

BIKARAMJITH SOOKNANAN

Attorney of the High Court of Lesotho do hereby certify pursuant to Rule 8(22) (c) of the High Court Rules, 1980 that I have considered this matter and bona fide believe it to be a matter for urgent relief."

From the record of proceedings, it does not seem that Mr. Sooknanan for the applicant curtailed the period within which the magistrate could bring the record of proceedings before this

court and in his address, although Mr. Sooknanan had specifically asked for shorter periods of service or that these be dispensed with, before me he appeared to be still lingering after the notion that the rules allowed the magistrate to drag his feet in submitting the record of proceedings.

Where this court has granted an application as contemplated and periods of service have been curtailed or dispensed with altogether, it is incumbent on all parties concerned to proceed with maximum speed if orders of this court are not to be brought into disrepute. It is, in my view, flouting orders of this court for any party, including counsel, to drag its feet.

When the 1st respondent received applicant's papers he appears to have immediately proceeded to his lawyer and instructed him to act.

Fully understanding the import of the application Mr. Nthethe attorney for the 1st respondent opposed the application and lodged a notice to anticipate the rule.

Before me and probably oblivious of the tenor and implication of his own application, Mr. Sooknanan seemed to be of the view that Mr. Nthethe should have adverted to sub-rule 18 of Rule 8 of the Rules of Court. This, in my view, cannot be as the time and normal modes prescribed by the Rules of Court were

dispensed with by prayer 2 of the applicant's rule nisi. Applicant having dispensed with time and periods of service this, on the basis of reciprocity, goes for the 1st respondent.

I have reiterated above the rule which the respondent in these proceedings sought to anticipate.

In his opposing or answering affidavit the applicant took the following points in limine :

(a) Non-disclosure.

(b) Lack of good faith.

(c) The Notice of Motion is not in conformity with Rule 50(b) of the High Court Rules, 1980.

Regarding (a) above, it was alleged that Applicant has not disclosed to this court that proceedings in Mafeteng Magistrate's Court C.C.120/95 were based on applicant's failure to pay monthly rentals in the sum of M220-00 per month for months October and November, 1995 and that if applicant had paid any one month, say October, 1995 he could have at least annexed a receipt as prove of payment and proof, at least, of bona fides on his part and consequently that failure to do this by the applicant amounted to bad faish.

Concerning applicant's Founding Affidavit before this court, I have perused the same and have found that nowhere is the matter of non-payment of rent or payment of the same by the applicant

raised. I find this flabbergasting to say but the least for this is the reason, at the end of the day, for the applicant to come to this court asking for its intervention in that though the applicant is paying rent the 1st respondent is harassing him.

As to payment of rent I agree with Mr. Nthethe that the onus rested squarely on the applicant who is the assertor that he in fact pays rent and could have satisfied this court by annexing a receipt to this effect in compliance with remarks of Kheola J. (as he then was) in BOFIHLA NKUEBE and MOLEBATSI KHAILE & 3 ors. CIV/APN/49/94 (unreported) in which the learned judge said

> "Now the most serious flaw in the applicant's case is his failure to produce a receipt. The procedure which is prescribed in the constitution provides that when you pay your subscription you will be given a receipt. The applicant has not done that, well, I will not use the word "stupid" but he is not a man who can part with his money without receiving a receipt ."

Nor do I think that the respondent is so daft as not to demand a receipt as proof of payment of rent. Applicant's defence appears to be he did not know in respect of what the ejectment order was served on him notwithstanding the fact that the Court Messenger of Mafeteng Magistrate's court has submitted and affidavit accompanied by his return of service that he did serve applicant all necessary papers in this application.

What I find strange is that notwithstanding the fact that rules of court do not admit of documents which should have been

submitted in the founding papers to be submitted in replying affidavits, because the applicant, as he says was not furnished with founding papers he could have, in reply to respondent's answering affidavit submitted his rental receipt and asked this court to wave its late submission.

With regard to the fact that the application is not in accordance with Rules 50(b) of the High Court Rules, 1980, Mr. Nthethe probably had in mind the fact that nothing in the original type-written record was said about the dispatch of the record of proceedings from the Magistrate's Court. This could well have been so though there is a hand-written insertion in my record to this effect.

I took Mr. Sooknanan applicants counsel to task as to why seeing that the application was extremely urgent in approaching this court on 13 November, 1995 he extended the rule to 27 November, 1995 thus giving the impression that the application was not, afterall, urgent. I have had no satisfactory explanation to this query nor has Mr. Sooknanan satisfied me why instead of bridging the period within which a record of proceedings is to be submitted to this court by the Magistrate's Court he has resorted to ordinary periods of service as if the application was an ordinary application.

When applications are deemed urgent and there is a

certificate to this end, it is desirable that their urgency should be manifest for otherwise the suspicion will be that such applications have been brought for the purpose of buying time and thus abusing court procedures.

I am much indebted to some of the authorities MR. NTHETHE for the 1st respondent has given me for not only are they enlightening and to the point, but have made the task of this court much easier.

Thus in DE JAGER v. HEILBRON AND OTHERS, 1947(2) S.A. 415 (W) it was said it had been laid down in several cases that the utmost good faith must be observed by litigants making ex-parte application and that all material facts must be placed before the court.

Further,

> "If an order has been made upon an ex-parte application, and it appears that material facts have been kept back which might have influenced the decision of the court whether to make the order or not the court has discretion to set aside the order on the ground of non-disclosure."

In LEYDSDORP an PIETERSBURG ESTATES Ltd above it was said:

> "It is not necessary that the suppression of the material fact shall have been wilful or mala fide."

as where, in the above case, the respondent having undertaken to sell his property to pay applicant had in fact sold his property but refrained from disclosing full facts of the sale including the fact that there was not complete agreement between the seller

and the purchaser on the terms of the sale. Said in this case a rule nisi had been granted on the assumption that full facts had been disclosed but that if at the time of granting the rule the court knew of the true state of affairs the rule would not have been granted.

In this application I must confine myself to points in limine raised by 1st respondent's attorney and the reply thereon by counsel for the applicant.

Applicant's counsel view seems to be that even were it necessary to disclose there was no such opportunity because:

(a) necessary papers were not served on the applicant

(b) applicant was given no chance to be heard as the order of ejectment was immediate.

I have already extensively addressed myself to (a) above and need only to add that this is the difficulty inherent in applications for where dispute of facts arises as has arisen in this case they may not be decided on paper.

As for (b) the case of RUBY'S CASH STORE (PTY) LTD. v. ESTATE MARKS & ANO. 1961(2) S.A. 121 (T.P.D.) sheds light on this. Jansen J. has quoted copiously from the law of Holland and especially Voet. It is said that in making the application it was usual for the appellant to apply for the insertion in the mandament of a "clausule van inhibitie, i.e. an order for the

suspension of execution and that the application for the mandament (and the clause) was made without notice to the respondent and usually granted as of course but that it was not that the respondent had no remedy for he could apply for the setting aside of the order and that a successful party could in the same proceedings even anticipate a possible application for a mandament with suspesion of the execution and file an application in advance for the refusal of the suspension and that in the event the application were read together. This is precisely what has happened in this application which shows not only how much we have developed from our Dutch law, but how our present remedies are taken almost verbatim from our early pedigree.

Postponement of execution was apparently refused if it would inflict irreparable loss upon the winning party against whom it is sought. Voet is quoted as having said where the matter brooks no delay execution should proceed.

In his judgment in Ruby's case above, Jansen J. went on to say that:

> "the granting or refusal of such application is a matter of discretion ."

and as was held in AFRICAN CONGREGATIONAL CHURCH Co. LTD. AND AFRICAN CONGREGATIONAL CHURCH v. DUBE, 1944 W.L.D. 204 at p.205:

> " the Judge must ask himself where does the equity of the case lie as between the two parties.

Effectively, and although I have eschewed going into the merits

of the application, this case is about stay of execution and whether I decide the application on the preliminary objections raised by the 1st respondent I will still have to answer whether, even should I agree or disagree with the 1st respondent I will allow stay of execution.

In the particular case of Ruby's cash store above, Jansen J. seemed in a bit of a quandary for while the balance of hardship favoured the 1st respondent by reason of the premises subject matter of the application being business premises, it appeared that the applicant from the papers, had not had enough time to come up with a valid defence.

This is the problem facing this court, namely, whether in view of there having been no disclosure the applicant should be given to the wolves notwithstanding that he may, if viva-voce evidence is called, have such a defence.

While applicant has not satisfied me that equities favour the suspension of execution pending review by reason of applicant having failed to make necessary disclosures and the onus being on him to make such disclosures already adverted to, I cannot, on the other hand, ignore the fact that applicant may have been at a disadvantage for lack of notification, possibly non-service of court processes as alleged by him and the fact that he had very little time at his disposal or disposal of his counsel.

I will give a short suspension of the execution with an order that applicant:

(a) causes the record of proceedings in Mafeteng Subordinate Courts C.C.120/95 to be immediately submitted to this court following applicant's application.

(b) both the applicant and 1st respondent choose and agree on matters on which viva voce evidence will be necessary and to call witnesses to the effect.

(c) review proceedings to have been completed within two (2) weeks of the granting of this order unless applicants' efforts will have been frustrated by the Magistrate's Court, Mafeteng in remitting proceedings to this court in which case the applicant will approach this court for an extension of time.

(d) In the event of this application being delayed by factors other than those spelled out in (c) above the ruling in MPHANYA v. LEMENA & Or. - CIV/APN/344/95 will apply namely, the creditor/1st respondent may proceed to execute without necessarily applying to court again.

As the applicant has obtained merely a special indulgence which should not be at the expense of the first respondent, applicant is ordered to pay 1st respondent costs of this application.

G.N. MOFOLO
JUDGE
1st December, 1995.

For the Applicant: Mr. Sooknanan
For the 1st Respondent: Mr. Nthethe