CIV\APN\15\93

IN THE HIGH COURT OF LESOTHO

In the matter between:

MASHEANE MAHLOANE — Applicant

and

THABANG MOTEANE — 1st Respondent
W. LEMENA DEPUTY SHERIFF — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice J.L. Kheola on the 6th day of January, 1995

This is an application for an order in the following terms:

1. A rule nisi do hereby issue calling upon the respondents to show cause, if any, on 8th day of February 1993 at 9.30 a.m. in the forenoon or so soon thereafter as the matter may be conveniently heard why:-

   (a) The writ of execution issued out of the office of the Registrar on the 6th November, 1992 against Applicant's immovable property

shall not be set aside pending the determination of this application;

(b) The intended sale of Applicant's immovable property on the 9th January, 1993 shall not be stayed pending the determination of this application;

(c) Respondents herein shall not be directed to pay the costs hereof;

(d) Granting Applicant such further and\or alternative relief as this Honourable Court may deem fit.

2. That Rule 1(b) should operate with immediate effect as a temporary interdict.

The facts of this case are that in 1990 and in CIV\T\557\84 the first respondent obtained a default judgment against the applicant. Several writs of execution were issued but the debt has never been liquidated. On the 4th December, 1991 another writ (Annexure "MM1" to the summons) was issued The deputy

sheriff served it upon the applicant on the 25th February, 1992. The return of service (Annexure "A" to the second respondent's opposing affidavit) reads as follows:

> "the defendant failed to show me whether he has any assets to satisfy the demands of the writ."

What the return of service shows is that the second respondent asked the applicant to show him his assets. The latter failed to show the former his movable assets. That was all and the second respondent made a nulla bona return (Annexure "A"). It is interesting to note that in his opposing affidavit the second respondent now says that:

> "Some time in February, 1992 the writ of execution was re-issued and handed to me for execution. I again went to the applicant and asked him to show me his movable assets. He said he had none. I then made a nulla bona return." (My underlining).

There is a difference between what appears in the return of service and what appears in the affidavit. If the judgment debtor says that he has no movable assets, that is different from

when he fails to point out such assets. Be that as it may the crucial issue is whether or not in the execution of the writ in the present case the second respondent followed the procedure set out in our High Court Rules 1980. Rule 46 reads as follows:

> 1. A party in whose favour any judgment of the court has been given may, at his own risk, sue out of the office of the Registrar one or more writs for execution thereof as near as may be in accordance with Form V(1) of the First Schedule annexed hereto,
>
> Provided that, except where by judgment of the court immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the Registrar perceives there from that the said person has not sufficient movable property to satisfy the writ. (My underlining)
>
> 2. ----------

(3) Whenever by any process of the court the sheriff or deputy sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling house or place of business or employment of such person, unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached, and there

(a) demand satisfaction of the writ and failing satisfaction,

(b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,

(c) search for such property."

The procedure described in Rule 46 is mandatory and must be followed by the deputy sheriff before he can make a nulla bona return. He must first demand satisfaction of the writ. In other

words the deputy sheriff must ask the judgment debtor to pay, the amount stated in the writ. If he fails to pay the deputy sheriff must demand that he points out his movable and disposable property. If the judgment debtor fails to point out such property, it is then the duty of the deputy sheriff to search for such property himself.

In **Moodley v. Hedley** 1963 (3) S.A. 453 (N.P.D.) the headnote reads as follows:

> "A proper return of service of a writ of execution should show that the execution officer first presented the writ to the debtor, asking for satisfaction thereof or for an indication of sufficient disposable property wherewith to satisfy it. If he could not find the debtor and was consequently unable to demand of him that he satisfy the writ or indicate sufficient disposable property, that fact should be reflected in the return of **nulla bona** for the execution officer's failure in such circumstances to find sufficient disposable property would constitute the second of the two acts of insolvency visualised by section

> 8(b) of Act 24 of 1936. To that extent the second act of insolvency is dependent upon the first in the sense that it is only where the first cannot be established that the second may be committed. A return of service, therefore, which contains no information other than that the execution officer, after diligent search, was unable to find sufficient disposable property to satisfy the writ, would not establish an act of insolvency."

In the present case the return of service of the writ of execution seems to indicate that the first thing the deputy sheriff demanded was that the applicant must point out his movable assets to satisfy the demand of the writ. He never demanded satisfaction of the writ in terms of Rule 46(a). That was the first irregularity. He complied with Rule 46(b) by demanding that the applicant must point out his assets but he failed to do so.

The fatal irregularity committed by the deputy sheriff was his failure to comply with the provisions of Rule 46(c) which requires that he must search for such property himself. He first accepted the fact that the applicant failed to point out his

assets. He was under an obligation to search the house and the premises of the applicant in order to satisfy the requirements of Rule 46(c).

I have come to the conclusion that the return of service (Annexure "A") on which the Registrar relied when she issued a writ of Execution against the immovable property of the applicant in terms of the proviso to Rule 46(1) was not a proper **nulla bona** return of service of a writ of execution according to our law. It was defective in the manner described above. On this ground alone the application must be granted.

Regarding the merits there seems to be a very serious dispute of fact. The applicant avers in his replying affidavit that in February, 1992 when the second respondent served him with a writ of execution against his movable assets, he showed him a television set worth around M2,500-00 and a fridge worth around M1,600-00. The second respondent has already denied this in his opposing affidavit by saying that the applicant said that he had no movable assets. It will not be necessary to resolve this disputed fact because I have already decided the matter on a point of law stated above.

In the result the rule is confirmed with costs.

J.K./ KHEOLA
CHIEF JUSTICE

6th January, 1995.

For Applicant - Mr. Nathane
For Respondent - Mr. Putsoane.