CIV/APN/51/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

THE LIQUIDATOR (THEKO J. MORUTHANE)	Applicant
and	
PALESA 'MAMPHO KHOAPHA (born Sebilo)	1st Respondent
LESENYEHO KHOAPHA	2nd Respondent
THE DEPUTY SHERIFF	3rd Respondent
REGISTRAR OF THE HIGH COURT	4th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 9th day of November 2000

It was common cause that on the 27th July 1999 a writ of execution was issued by the Applicant. He says this was in pursuance of a ruling of this Court given on the 14th December 1998 and later amplified by judgment which was

delivered on the 1st March 2000. It cannot be correct that the ruling sanctioned the issuing of a writ of execution. What is correct is that this Court made a ruling on the 14th December 1998 in which it was decided, that a certain site or plot No. 14303-669 Ha Matala was part of the estate of the First Respondent and the Second Respondent, in a declaration.

The said estate was being liquidated following a divorce between the parties. As Liquidator was appointed the Liquidator made a report and a plan of distribution in which distribution the disputed plot was deemed to be part of the estate. I later confirmed that the report did go further. It spelt that the distribution and allocation of this site was in favour of First Respondent who was the wife of the Second Respondent.

What my ruling of the 14th December 1998 did was to confirm that the disputed site was part the common estate. This was against the challenge which had been brought by the First Respondent in an application in which she sought a declaration that the site could not have formed part of the estate. This ruling of the 14th December 1998 was followed by my full reasons of the 1st March 2000. It is correct that the ruling and the judgment confirmed the liquidator's findings on the division of the joint estate of the parties and one could safely say to that extent the liquidator's recommendations were made an order of Court.

As a sequel to that there followed the ruling that I have spoken about. The First Respondent herein filed the notice of appeal of the 12th January 1999 and hastily followed it up with an urgent application to stay execution which

was granted *ex parte* on the 11th February 2000 under CIV/APN/51/00.

The application for stay of execution was opposed. The present controversy was precipitated by this circumstances particularly in that the First Respondent failed to prosecute her appeal and did not prepare the appeal record in time. I did not hide my feelings on the first day that the parties appeared. It was that in no way would the Appellant have been held to have been dilatory in any respect. What was important was that he was led to prepare the record late by the fact that she was awaiting the full reasons of the Court. At the hearing Mr. Ntlhoki said he had already persuaded his client not to pursue the appeal.

What quite precipitated the present aspect of the matter and the argument of this matter was the situation that the rule to stay execution ultimately lapsed. And in the absence of an application to revive the rule the Liquidator filed as he conceded the somewhat unconventional application. And as he said it was "in the interest of professional courtesy." He moved this Court to formerly discharge the rule on an amended notice of motion which was filed of record on the 17th August 2000.

In his attack against the motion to discharge the rule Mr. Ntlhoki complained that the Liquidator had to use what he says was an unconventional way of seeking for discharge of the rule and he says there was absolutely no need for the attempt to discharge the rule. What the Liquidator should have done was to seek to implement the plan as he had finalised it inasmuch as he had not formally sought to vary it. I believed that made good sense.

Mr. Moruthane conceded that there was no necessity to issue the notice of motion (to discharge the rule) in terms of rules of Court. He submitted that any harm which may have been perceived in that regard was minimal and could not alter the complexion of this matter from one of essentially seeking to re-emphasize the liquidator's opposition to the application for stay of execution, by the First Respondent, on the ground that the application was frivolous and unduly dilatory. I did not see any reason for this what I perceived to be an unnecessary complication that resulted in this argument before me.

Mr. Moruthane appealed that any further delay in prosecution of this matter would adversely and severely bring unnecessary costs to the beneficiaries of the joint division of the joint estate. This Court was respectfully urged to finalize this matter in the interest of justice rather than be lured into an argument on technicalities which First Respondent, as alleged, seemed to be bent on. He further said that it would be a sad day in the administration of justice if adversaries in litigation were to be allowed a carte blanche to exercise their wits on protracted technical arguments to no meaningful avail. This would constitute a serious travesty of justice. But my feeling and belief was simply that the complication and the costliness of these proceedings was caused by the Liquidator himself.

The Liquidator had brought about the dragging out of the proceedings in a simple way. It was that he now wanted to bring about a sale of that site which was allocated to the First Respondent in the said Liquidator's plan and the inventory. It is that later intention now to sell the disputed site which

brought about the stay of execution by Mr. Ntlhoki's client. It was that stay of execution which resulted in that rule which had lapsed. I agreed that essentially, barring for the intention to appeal, the First Respondent had not objected to the liquidator's recommendations which after all had been made an order of Court. That was definitely so when one also noted that the disputed site was allocated to the First Respondent in terms of the plan. She complained later when the attitude of the Liquidator was changed to that of wanting to sell the site.

The liquidator says it was only on the modalities of the division that the First Respondent seem to take issue but that aspect had been disposed of by the judgment as aforesaid. I would note that it could not have been simple in the context that the First Respondent had intended to challenge the finding of the Court that the site formed part of the estate. The intention to sell the site had not yet arisen. In the circumstances that the attitude to proceed with the appeal had been abandoned I would agree that the matter had become simple and straightforward and it required that the liquidator had to bring into fruition the plan that he had chiselled out in his report.

I came back to the matter of the application for the discharge of the interim order granted on the 11th February 2000. The application was as aforesaid opposed. To the application the First Respondent raised certain points-in-limine: Firstly, she said the application was an academic exercise which only served to increased the costs in this matter. Once a rule had lapsed it was not necessary to launch an application to discharge it. She said effectively

it was no longer in existence. In view of the fact that as she contended the Court had *meru motu* revived and extended the rule, the Applicant could not persist in this averment that it has lapsed. The correct procedure available for him was to resort to rule 39(2) that is to obtain date of hearing of the application which gave rise to the interim order and seek to have that application dismissed if the Applicant therein was not pursuing the matter.

This allegation that the Court *meru motu* revived and extended the rule was interesting but not too accurate. The correct version could perhaps be that the rule was revived and extended by agreement between the parties. This is because when the issue was raised none of the parties rejected the suggestion by the Court that to enable that there be argument and for the time being the rule be regarded as being in existence. This may have been technically inelegant. It may be that there arose a perception that the Court virtually gave advantage to the party who wanted to get a declaration that the rule did not have any life. That should not have been so. Despite that the rule was, conveniently as it were, revived I would still make my declaration either way when the moment came. So do I.

The Liquidator's application to discharge the rule that had lapsed had a second prayer. It was this second prayer which the First Respondent submitted was incapable of being granted. The Court was virtually being asked to direct that a particular asset of the joint estate be sold in execution allegedly "as contemplated in the ruling of this Honourable Court issued on the 14th December 1998 and subsequent judgment entered on 17th March, 2000". This

Mr. Ntlhoki contended was the duty of some other persons namely: the Deputy Sheriff acting pursuant to a writ or, the Liquidator in the exercise of the powers vested in him. Such sale if it was to be would not only depend on discharge of the interim order which stayed such sale in the first place or the lapse of that rule if it had not been revived. I would also depend on whether it was the original intention of the Liquidator in his plan of distribution. The First Respondent also resisted the award of costs as prayed or under any scale.

To repeat it was submitted that the procedure adopted by the Applicant was unwarranted. If Applicant felt that the issues surrounding the devolution of the joint estate between the First and the Second Respondent ought to be pursued differently he ought to have resorted to procedural steps already available and at his disposal as Liquidator instead of launching this application. He should have applied for variation of his plan because the original plan did not encompass sale of the disputed plot. In the interest of justice and in following the judgment of the Court a sale could not be countenanced . And that the application ought to be dismissed with costs because it would serve no purpose whether the rule therein lapsed or was revived. I agreed.

Two questions remained to be answered. None being a re-visit of the technical aspect of the application for discharge of the rule. The understanding being that discharge or confirmation of a rule remains a discretionary remedy. The first question was this: what now happens to the plan of the liquidator now that the attitude of the First Respondent was to abandon the appeal, her intention being no longer to proceed with the appeal? That is the first question.

The second question was this: Was the liquidator entitled for any reason to resolve that there be a writ of execution seeking to place the site that was allocated to the First Respondent on auction? And was he not only entitled to proceed with the allocation as contained in the plan and the allocation on the basis of which the Court in its ruling in December 1999 virtually confirmed the plan and further confirmed that the site was part of the estate by declaration of that Court's Order?

Could the liquidator thereafter change his own plan that is the plan to allocate the site to the First Respondent? If the answer to the last question was that he was incompetent to actually vary his plan after the Court had confirmed the plan, it meant that that application for stay of execution was well founded. In the circumstances the application to discharge the rule no longer mattered, it became nugatory indeed became academic as I concluded it was.

It becomes academic because once the rule was discharged if his application was granted still it was incompetent as I conclude in law for him (the Liquidator) to change the plan that was virtually confirmed by the Court. Even if the rule ended being confirmed it could only be on the basis that there was no reason for the Liquidator to change the plan that included the allocation of that site to the First Respondent.

I have to say something by way of a background to the reasons for the liquidator's decision to sell the site. It will be apparent that the reasons were not

good reasons and the reasons were actually bad in that they discriminated over the allocation that was made to the First Respondent and could not demonstrably lead to her advantage. This discrimination consisted in that instead of taking up and bundling all the assets for sale the Liquidator picked out and singled out this allocation made to the First Respondent thus separating it from others and committing it for sale. It will be apparent that the reasons for this sale which was sought to be interdicted could not have been good reasons. If the reasons were bad it meant the intention to discharge the rule could not have brought any justice and the attempt was (even if not impeached) futile in its effect. I say even if the discharge was in fact brought about.

I will now look into the reasons. In looking into the reasons I have to remark at the way in which the Liquidator went about the ventilation of his case in the replying affidavit. This he did in an unusual way. Mr. Ntlhoki correctly complained that it disclosed the privileged communications between attorney and attorney . It disclosed the correspondence between them. It was to speak about what transpired between the offices of the two Counsel and I believed and agreed with Mr. Ntlhoki that that was not the proper way to go about it as such communications are privileged and their disclosure in the manner that Mr. Moruthane went about was unethical conduct. But having said so I further noted that this in fact facilitated this Court in knowing about what was in the mind of the Applicant.

The real reasons for bringing about the site on sale became apparent.

Incidentally Mr. Moruthane was put in a cleft stick, so to speak, and was unable to resist the conclusions as to what appears to have been his intention to bring the site for sale on auction. In the letter dated 29th July 2000 Mr. Ntlhoki wrote to the Applicant - Liquidator, said he has perused the Liquidator's report he found that he was unable to find the "driving reason" for the Liquidator's intention to put up for sale the single immovable property that was awarded to his client by virtue of the same plan of the Liquidator.

Mr. Ntlhoki commented further that if the idea was to strike some form of parity all the assets of the estate of the parties would have to be sold up and the proceeds would have to be divided equally between them. This he said because he intended to advise his client to accept the Liquidator's award. But if the only property that will be sold was the one awarded to the First Respondent then he foresaw problems. This meaning that he had advised his client that the Order of Court confirming that the property belonging to the common estate was acceptable. And if the Liquidator was intent on selling this site that was allocated to the First Respondent as the Counsel contended there would be problems.

The letter of the 15th August 2000 from the Liquidator then followed. This letter was in three paragraphs. The first one was rather longish and the last two were a mere two lines. I intend to quote letter in full because it really shows the reasons for the Liquidator's intention to put up the site for sale. The second paragraph seems to say so much about the real reason. There was another reason to be found in the first paragraph:

" With to your letter of 29th July 2000 on the above matter, as well as related discussions (previous and subsequent) with Mr Ntlhoki I wish to invite your kind attention to paragraph 3.1.4 of the first Liquidators Report (styled Liquidator's award Recommendations - Report). This is the driving reason for the solution - rather than intention - to put up for sale the immovable property at Ha Matala, in an attempt to strike an equitable balance in the distribution between the parties. However, although the Liquidator's recommendations have now become an Court Order there is still some room, hopefully, for the parties to arrive at a negotiated settlement so long as the stark imbalance which it is attempted to remove is indeed effectually removed. Nothing is case in stone and no vindictive intentions should be allowed to prevail on either side.

If your client is willing and able to pay the costs, so let it be, and she can keep the contentious property to herself without any acrimony howsoever.

Finally, please allow me to congratulate your enlightened and magnanimous approach in advising your client to accept the Liquidator's award." (My underlining)

The reasons now became clear and obvious.

Together with contents of the letter I needed to note a very significant statement that was made by Mr. Moruthane. It was that the feeling of the

Liquidator and indeed the feeling of the Second Respondent had been that in terms of the plan the First Respondent seemed to have benefited more. That was why there was that reference to "equitable balance." Related to this was that reference to the payment of costs that we find in the second paragraph of this letter. It was further because in the mind of the Liquidator and indeed he expresses this to say that if his costs are paid the matter of the property can be left as directed in the plan. This matter of the costs of the Liquidator is even borne by the attitude of the First Respondent's Counsel as contained in the letter of the 26th August 200. I quote from the letter:

> "The net effect of the solution is to leave our client without any immovable property - a house to live in. At the same time the prize for retaining that house is for her to shoulder the entire costs of the liquidator. All these issues are difficult to live with.
>
> Perhaps you might consider selling all the assets belonging to the parties and divide the proceeds equally between them. They should then bear the liquidator's costs in equal proportions. We are merely thinking loud and are yet to take up this matter with client."
> (My underlining)

The statement is loud and clear that the changing of the attitude of the Liquidator, that is his intention lately to have the site sold, was based on the reasons of his own costs furthermore about an attempt which he said he was making, to even out things.

It should be clear that the application for discharge of the rule was not

proper in the circumstances. Even if one were to rule that technically on application for discharge of a lapsed rule could be done on a notice of motion and therefore not unconventional there were still serious hurdles. The first hurdle was that the application for stay of execution was based on an eminently good ground that the appeal had been pending. Secondly the additional ground was that it was incompetent for the Liquidator to want to place the disputed site on sale by auction when his plan has not been varied. It was incorrect to say that the sale was contemplated in any judgment of the 1st March 2000. Once the First Respondent elected to accept the allocation as proposed in the plan of distribution that became the end of the matter because it bound the Liquidator. The application ought to fail with costs against the estate.

The Liquidator's costs still have to be borne by the estate failing which by the First Respondent and the Second Respondent. I do not see how the Liquidator should be driven to desperation namely because the issue of his costs remained unsettled. If a bill of costs had been prepared he stood a good chance of confronting the parties and asking for endorsement of the Court. The bill would become a claim in his favour. Why should the Liquidator confuse his good work with his claim for costs? He deserved the costs.

The application fails with costs.

T. MONAPATHI
JUDGE