CIV/T/318/01
CIV/T/319/01

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MASUPHA EPHRAIM SOLE APPLICANT[1]

and

JAMES MOLEFI WILLIAM LEMENA 1ST RESPONDENT[2]
LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY 2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 26th September, 2001

On the 28th August 2001, **Mr Khauoe** for the applicant in CIV/APN/318/01 and **Mr Moiloa** for applicants in CIV/APN/319/01 appeared in my chambers with the Registrar and agreed that these two applications be heard simultaneously. In CIV/APN/318/01 the applicant prayed for and was granted an interim order in the following terms:-

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[1]Respondent in CIV/APN/319/01

[2]Applicant in CIV/APN/319/01

"1. That Rule Nisi be issued calling upon the Respondents to show cause if any why-

(a) The rule pertaining to notices and service shall not be dispensed with an account of urgency;

(b) The sale in execution (scheduled for the 1st September 2001) shall not be stayed pending the outcome of this applications.

2. Prayer 1 (a) and (b) be made an interim order pending the outcome of this application.

3. That the writ of execution in CIV/T/598/98 and C of A (civ) No.26 of 1999 be set aside as irregular

Alternatively that:

The sale in execution in CIV/T/598/95 and C. of A. (CIV) No.26/99 be set aside or stayed pending the removal of the irregularities.

4. That the Respondents be ordered to pay the costs only in the event of opposing this application.

5. That the applicant be granted such further or alternatives relief.

For his urgent application in CIV/APN/319/01 **Mr Moiloa** had prayed for an order couched as follows:-

"1. Dispensing with time periods stipulated in the rules of this Honourable court and admitting this matter to be dealt with as a matter of urgency.

2. Directing the Respondent (Mr Sole) to hand over to First applicant all attached assets listed in the notice of sale published in the Government Gazette and other newspapers circulating in Lesotho.

3. Directing Respondent to forthwith handover, to First applicant Land Leases in respect of

(a) Plot No. 12291-122
(b) Plot No. 12291-123

4. Directing Respondent to forthwith handover to first applicant Registration Certificates of the following vehicles.

(a) 1995 E320A Mercedes Benz Registration H1000.
(b) 1996 540A BMW Reg A8080
(c) BMW Reg A0031
(d) 1997 Toyota Twin Cab 4x4 Reg 5151

5. Costs of suit

6. Further and/or alternatives."

Both applications were supported by supporting affidavits.

CIV/APN/318/01

In this application, the applicant Mr Sole deposed as follows:-

4.

"From the list of my movable property there are some of the property which I aver are necessities and as such should not be sold in execution. To this end I hereby annex a list of some of such property and mark it "ME52".

5.

I aver that from annexure "ME51" some property is used by members of my family such as my children. These are the bicycles which are my property in the sense that I bought them for their own use as they are still minors.

6.

I aver that immovable property attached and to be sold can only be sold after the movables have been sold and the judgment debt has been realized.

7.

In sale in execution of my property which is due on the 1st day of September 2001, my property which includes both movables and immovables, is therefore irregular.

8.

In executing, I aver that such execution ought not to leave a man, not to say, his dependants (in) destitute. The sale in execution if allowed to proceed will leave me and my family (in) destitute as everything I possess is to be sold."

He avers further that a residential house is a necessity; so are means of transport, a radio and television set; beds and cutlery. **Mr Khauoe's** application is opposed and answering papers have duly been filed in which several points **in limine** have been raised e.g. regarding urgency and non-disclosure of material facts. Mr Mapetla, the acting Chief Executive of LHDA, in his answering affidavit states that-

"Applicant is not indigent .... As the trial court revealed, some of Applicant's actions involved hiding funds overseas .... Applicant keeps secret accounts and investments ... (and) is engaged in defeating proper administration of justice."

Both these applications involve intricate questions of law in the execution process. Execution is a process which enables a judgment creditor, having obtained a judgment in his favour, to enforce that judgment in order to obtain satisfaction of it from the debtor. (**Herbstein and van Winsen** - Civil Practice of the Supreme Court of South Africa 4th ed -p 754 where at page 754 it is stated:-

"*Execution may be effected against the property or the person of the judgment debtor, the appropriate manner of execution in a particular case depending upon the type of judgment and the nature of the debtor's available assets. Thus, a judgment sounding in money is enforceable by the attachment and sale in execution of the debtor's property, movable, immovable and incorporeal . ...An attachment in execution creates a judicial mortgage or* ***pignus judiciale***".

A valid and extant judgment is a pre-requisite for execution. **Brendenkamp vs Comax Wholesaler** 1965 (2) SA 876. Indeed Section 10 of our 1993 Constitution states:-

> *"1. Every person shall be entitled to freedom from arbitrary search or entry, that is to say, he shall not (except with his own consent) be subjected to the search of his person or his property or the entry by others on his premises.*
>
> *2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision*
>
> *(a)* .....
> *(b)* .....
> *(c)* .....
> *(d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the entry upon any premises by order of court."*

The courts have required that during the execution process, the sheriff should adhere strictly to the procedure both under Rule 46 and Rule 47of High Court Rules 1980, otherwise the attachment which violates their peremptory provisions or the terms of the writ is invalid. In **Brummer v Gorfil Bothers Investments** 1997 (2) SA 411 it was held that until sale in execution the court had discretion to control the execution process and that

> "where steps in the process of execution have been taken but have not been completed, there is no doubt the court can interfere therewith in appropriate cases in the interests of justice.

Where the execution procedure has already been completed the position is different. The rights of other persons are then involved. The court can then only interfere if there was a reviewable irregularity in the process which prejudiced the debtor, in other words where the process was not carried out in accordance with the provisions applicable thereto. Ulterior motives, hidden agendas, hate or anger can then no longer be advanced as grounds upon which the completed execution procedure should be set aside."

Rule 46 (1980 High Court Rules) reads in part:-

"(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 therefrom that the said person has not sufficient movable property to satisfy the writ.

(2) .....

(3) *Whenever by any process of the court the sheriff or deputy sheriff is commanded to levy and raise any sum or 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.

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of sub-rule (5) hereunder, shall be taken into the custody of the deputy-sheriff; Provided-

(i) that if there is any claim made by any other person to any such property seized or about to be seized by the deputy-sheriff, then if the judgment creditor gives a deputy sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof, the deputy shall retain or shall seize, as the case may be, make a inventory of and keep the said property;
and
(ii) that if satisfaction of the writ was not demanded from the judgment debtor personally, the deputy-sheriff shall give to the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts are unknown." (My underlining)

In this application it is common cause that there exists a final judgment sounding in money in which the Court of Appeal (C. of A. (civ) No.26/99) confirmed the judgment of my Brother **Ramodibedi J** in CIV/T/598/95. The judgment debt stands at M7,751,049.25. On the 20th April 2001, the Lesotho Highlands Development Authority as judgment creditor sued out - at its own risk - a Writ of Execution which reads in part as follows:-

"TO THE SHERIFF OR HIS DEPUTY

You are hereby directed to attach and take into execution the movable goods of Mr MASUPHA EPHRAIM SOLE (the abovenamed Judgment Debtor) of 123 Lower Thetsane, Maseru Urban Area, Maseru and of the same cause to be realised by public aution the sum of M7,751,049.25....."

It is common cause that no writ was at anytime whatsoever sued out to attach the immovables of the judgment debtor.

According to the deputy sheriff's affidavit, it is clear that as early as the 7th February 2000 he had demanded the judgment debtor Mr Sole to point out to him his movable property sufficient to meet the demands of the writ in CIV/T/598/95. He says Mr Sole pointed out to him all the items which appear in the notice of sale in execution. It is not in dispute that after the Court of Appeal handed down its judgment on the 12th April 2001 another writ (final) was sued out on the 20th April 2001. This was a writ to attach "movable" goods only. He says he executed this new writ on or about 28th June 2001 and again demanded Mr Sole to point to him his movable property. He complied as before; he then pointed out to Mr Sole that the movable assets he had pointed out to him were minuscule "in value terms to the writ amount"

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".... Applicant agreed that he was well aware. I told him that I had no option but to again attach his immovable property. He understood."

It should also be noted that the Deputy-Sheriff made a "Report of Execution" after his first visit to the Mr Sole in February when he asked to be shown movable assets. The last paragraph of his Report reads:-

> "We made it clear to him that the inventory of his assets was very little to satisfy the amount of the warrant of execution against his property which we served upon him. He said he was well aware but he had disclosed all his movables. I pointed to him that execution would still proceed against his immovable assets. I accordingly report and certify that the Defendant is unable to point out to me movable assets of a value sufficient to satisfy the demands of the writ amount.
>
> The inventory he confirmed and signed is attached herewith.
>
> _____
>
> W.J. LEMENA
>
> Deputy-Sheriff
>
> Date:.....
>
> Stamp of
> Registrar of
> the High Court
>
> Signed & dated 3 March 2000"

It should be noted that the final judgment of the Court of Appeal was only handed down on the 12th April 2001, and that a final writ of execution subsequently sued out on the 20th April, 2001.

In his affidavit the Deputy-Sheriff states that he re-made the same inventory on the 26th April 2001 following the judgment of the Appeal Court on the 12th April 2001, and that he held several meetings with Mr Sole on 16th April, 5th May, 25th June 2001 in an attempt to persuade Mr Sole to pay the judgment debt.

He further states that on 26th June 2001, following the meeting he had with Applicant it became clear to him that Applicant was making promises which he was unable to fulfil, he proceeded to place advertisements in the Gazette and in two (2) local newspapers for the sale in execution on 1st September 2001. He states that he also demanded Mr Sole to handover all attached vehicles except one for safekeeping, and that it was however agreed that the attached assets would remain in tact until the day before the sale. He goes further to state that on 24th July 2001 he visited Mr Sole with one Mr Pitso of Oxbow Land and Property Consultants and requested access to attach assets to enable valuation to be made. He refused.

Throughout the whole scenario it is important to bear the provisions of Rule 46 (1) in mind. It is clear from the affidavit of the Deputy Sheriff that his "Notice of Sale in Execution" published in the Lesotho Government Gazette of the 29th June 2001and in two local newspapers, that both movable and immovable assets were to be sold on the 1st September 2001. In my view it was irregular for the Deputy Sheriff to have included the immovable assets in his Notice of Sale acting on his own initiative without deference to the Registrar who under Rule 46 (1) is the person to *"perceive ... that the said person has not sufficient movable property to satisfy the writ"*. **Concise Oxford Dictionary** 9th Ed. defines the word "**perceive**" thus-

"Apprehend esp. through the sight; observe; apprehend with the mind; understand; regard mentally in a specified manner.....

Perception therefore means impression based on one's understanding of something."

The Deputy Sheriff seems to have taken upon himself to "perceive" and states " I told him I had no option but to again attach his immovable property." .... "I accordingly report and certify that the Defendant is unable to point out to me movable assets of a value sufficient to satisfy the demands of the writ amount" ... "I proceeded to place advertisements of Notice of Sale in the Gazette" which purported to sell immovable property in execution on the 1st September, 2001.

It should further be noted that neither the judgment of my Brother **Ramodibedi J.** or of the Court of Appeal specially declared the immovable property executable - **Entabeni Hospital Ltd vs Van der Linde; First National Bank vs Puckriah** - 1994 (2) SA 422. Under our Rule 46 (1) it seems the immovable property is attachable (a) where by judgment of the court immovable property has been specially declared executable or (b) where a writ to execute immovable property has issued after a return has been made by the Deputy Sheriff and the Registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ. As already pointed out the deputy sheriff should have exercised greatest care when making his return "in view of important consequences that may flow from a debtors failure to satisfy a writ". **Van Winsen** (supra); **Lotzof vs Ranbenheimer** - 1959 (1) SA 90 at 919.

In the instant case the deputy sheriff was directed by the writ of execution to attach "the movable goods of Mr MASUPHA EPHRAIM SOLE" but his notice of sale published in the Gazette and newspapers indicates sale of "immovable" goods. In the case of **Dorasamy vs Messenger of Court, Pinetown** - 1956 (4) SA 286, it was held by **Caney J** that a sale in execution of immovable property the attachment of which was not preceded by execution against the debtor's movable property was invalid and attachment of immovable property was set aside.

The attachment and sale of movable and immovable properties can and should never be simultaneous. In **Guy vs Colley** 1934 NPD 268 at 275 Harthorn J. noted that the deputy sheriff or judgment creditor, where there are movables insufficient to satisfy the writ, cannot, so to speak, take the matter into his own hands; he must approach the court, for the court controls execution and will deal with special cases on their merits.

In the case of **Dorasany** (supra) it was has further ruled that the fact that the debtor agreed to the attachment of his immovable goods is of no consequence because "there is a strong improbability that a man will lightly waive a right conferred upon him by law". Indeed in the case of **Sandton Finance Pty (Ltd) vs Clerk of the Magistrates Court - Johannesburg**, 1992 (1) SA 507 **Eloff JP** at 511 it was held that at common law a judgment creditor had first to exhaust the debtor's movables before seeking to execute on immovables and that Rule 45 (1) (our 46 (1)) provides that save where fixed property is specifically declared executable the Registrar may only issue a warrant of attachment of immovables where "he perceives from the Sheriff's return on a warrant of execution against movables "that the said person has not sufficient property to satisfy the writ." The learned Judge President held that the **ipsi dixit** of

the sheriff is hardly ever exact or even near the mark. "Only by proceeding with a sale in execution can real acceptable proof be forthcoming sufficient to satisfy the clerk of court."

The sale in execution of immovable property is further tarnished by the fact that it did not comply with the provisions of Rule 47 (3) requiring service of notice of attachment by registered post addressed to the owner of the fixed assets - **Joosub v JI Case** SA (Pty) Ltd - 1992 (2) SA 665

It seems to me that the proviso under Rule 46 (1) is peremptory because it states no such process (writ of execution) *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 therefrom that the said person has not sufficient movable property to satisfy the writ.

It is for these reasons that I hold that the purported notice of sale dated 26th June 2001as published in the Government Gazette and local newspapers must be set aside as being irregular and hence the attachment of the immovable property without a supportive writ of execution on immovables was highly improper and created no **pignus judiciale** - See **Seyfrets** - 1997 (1) SA 764 at 772; **Liquidators Union vs Brown** 1922 A.D. at 558/9; **Morrison** - 1967 (2) SA 208.

I should not be misunderstood to say that the Writ of Execution dated 20th April 2001 was a bad writ. It still stands extant. What was irregular was the notice of sale

purportedly made thereunder. It must be set aside - **Du Preez vs Du Preez** - 1977 (2) SA 400.

Unattachability of certain items

As shown above, the writ of execution of the 20th April 2001 directed the deputy sheriff to attach and take into execution the movable goods of Mr Masupha Ephraim Sole. **Mr Khauoe** for Mr Sole contends that the list of items in the Notice of sale is indiscriminate and has improperly included items of property which under common law ought not to have been attached e.g. bedding, means of transport, etc.

As I pointed out to both counsel, our law in Lesotho on this aspect is not at all clear - at least in the High Court practice. Under our Subordinate Court Order No.9 of 1988 section 40 reads:-

> *"40. In respect of any process of execution issued out of any court, the following property shall protected from seizure and shall not be attached or sold,*
>
> *(a) the necessary beds, bedding and wearing apparel of the person against whose property execution is levied and of his family;*
>
> *(b) the necessary furniture and households utensils in so far as the same do not exceed in value the sum of M700;*
>
> *(c) the supply of food and drink in the house sufficient for the needs of such person and of his family during one month;*

(d) tools and implements of trade, and tools necessarily used in the cultivation of land, in so far as any such tools or implements do not exceed in value the sum of M700;

(e) professional books, documents, or instruments, necessarily used by such person in his profession, in so far as the same do not exceed in value the sum of M700;

(f) a dwelling house erected on a site allocated for the purpose of residence:

Provided that this paragraph shall not apply where the dwelling house has been bonded as security for a loan and the judgment is in respect of such bond."

On the other hand our High Court Act No.5 of 1978 and the High Court Rules 1980 are silent on this issue. It seems in South Africa, the Supreme Court Act (section 39 of Act 59 of 1959) provides that the deputy sheriff shall not seize in execution of any process i.e.(a)the necessary beds and bedding and wearing apparel of the person against whom execution is levied or any member of his family; (b) the necessary furniture, other than beds, and households utensils in so far as they do not exceed M2,000; (c) tools and agricultural implements; (d) food and drink; (e) tools of trade; (f) professional books in so far as they do not exceed M2000 - which amount the court may in its discretion increase.

The position at common law is far from clear. It seems in England the **Small Debts Act 1845** protected certain items like wearing apparel, bedding (Halsbury's Statutes Vol.22). In South Africa, **Mr Moiloa** cited the Cape Ordinance No.37 of 1828 which

he says introduced protection of certain items from attachment by court sheriffs. The text of this Ordinance has unfortunately not been provided to the court for perusal. Anyway in First and Third Schedules of the Law Revision Proclamation No.12 of 1960 no law dealing with execution or attachment of debtors properties is listed. It seems to me therefore that when the Proclamation 2 B of 1884 was passed on the 29th May 1884 this Ordinance did not become part of the law of Basutoland.

It seems rather illogical that in Lesotho a judgment debtor liable to satisfy a writ sued out of the Subordinate Court enjoys better protection under law as regards exemption of necessary goods than a judgment debtor would under a High Court writ. The latter stands to lose every movable property if the judgment debt is not satisfied. Courts of law should on the other hand not be seen to enforce injustice moreso because 1993 under our Constitution equality before the law must be guaranteed at all times. As **Schreiner ACJ** in **C.I.T. vs Louis Zinn Organization**, 1958 (4) SA 477 at 485 stated, where an anomaly can only lead to the conclusion that Parliament had been guilty of a **casus omissus**, "no doubt such oversights, just like tautology, occur in the Acts of Parliament, but a construction which avoids them is to be preferred to one that does not."

I am inclined to conclude that common law of Lesotho provides that certain necessary items of the nature listed under section 40 of the Subordinate Court Order 1988 cannot be attached and the same principles should apply in this case.

The applicant Mr Sole has also made an application that he should be ordered to pay the amount owing in instalments. Granting such an application would have the

practical effect of setting aside the writ of execution of his movable and immovable properties. Perhaps this issue ought to have been addressed before everything else.

Under our law having obtained a judgment in his favour a judgment creditor has a clear right (a) to demand payment forthwith of the judgment debt, and (b) failing prompt payment, he can sue out "*at his own risk*" a writ of execution against the movable assets of the judgment debtor and (c) if upon receiving the return of the deputy sheriff, the Registrar perceives that movable assets are not sufficient to satisfy the judgment, the judgment creditor can proceed and sue out a writ against immovable property of the judgment debtor. It seems to me that once he has obtained a judgment the judgment creditor "*calls the shots*" and the court cannot, without prejudicing his right to full and prompt payment, order the debt to be paid by way of instalments. Our Rule 46 (12) reads in part:

> *(h)* *"whenever the court is of the opinion that a debtor is able to satisfy a debt by instalments out of his earnings, it may make an order for payment of such debt by instalments.*
>
> *Whenever an order has been made for payment by instalments and the debtor makes default in such payment, any salary, earnings, or emoluments due or accruing to such debtor to the extent of the arrears may, without further notice to the debtor, but subject to the rights of the garnishee, be attached under the provisions of paragraph (a) of the rule."*

It should be noted that a similar sub-rule in South Africa had existed since 1966 but was deleted by Government Notice R608 of 31 March 1989. It seems to me that under common law a special application to court for leave is necessary to enable the

judgment creditor to execute upon money due to the judgment debtor at the hands of a third party e.g. earnings - **Van der Heever vs Bester** 1960 (3) SA 154; **African Distillers vs Honiball** - 1972 (3) SA 135 per **Goldin J.** It is not good practice for the judgment debtor to make an application for the attachment of his own earnings.

Our Rule 46 (12) reads:-

> (a) Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment debtor, attach the same an thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment to him by the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may upon any such payment, give a receipt to the garnishee which shall be a discharge, **pro-tanto**, of the debt attached."

The judgment debtor does not seem to have complied with this subrule if at all, he wished to reduce his debt.

In South Africa a sub-rule similar to our sub-rule 46 (12) (L) was discussed in the case of **Standard Bank of SA Ltd vs Clemans** - 1982 (4) SA 408 and **Mullins AJ** noted that the procedure provided for in their Rule 46 (12) is a further form of execution and the subrule does not suggest that the court can make an order against potential assets or income, where no such assets exit or where the debtor is not actually in receipt of an income. "It can of course make an order against future assets or income e.g. by garnishee proceedings in terms of Rule 45 (12) (a) but in such event there must be debt (liquid) owing or accruing from a third party to the judgment

debtor". Where, as **Kumleben AJ.** stated in **Haarhoff vs Fourie** 1974 (2) SA 594 the judgment debtor is not in receipt of any salary or emoluments, or his earnings were speculative and prospective it was impossible for the court to conclude that he was able to satisfy his debt out of his earnings. The court has no power in effect to order a judgment debtor to order payment by instalment from a hypothetical source of income.

> "The language of the subrule in no way suggests such far reaching powers."

I agree. Where a debtor does not wish to endure a lifetime of penury, he voluntarily makes arrangements with his creditor to avoid the ever-present threat of a writ against his assets or income. For example he can place selected movable and immovable assets for sale on open market and secure highest price rather than putting all those assets under the hammer of the deputy sheriff at a public auction!

In his "Notice to Amend" it is stated:-

"Alternatively

The sale of execution be (set) aside and the Applicant be ordered to pay debt by instalment."

This Prayer is somewhat equivocal - because sale in execution has not yet come about. It seems to me that Mr Khauoe wishes to have the "writ of execution" set aside

upon the ground that the judgment debtor ought to be granted leave to pay the judgment debt "not immediately but by instalments." Mr Sole in his supplementary affidavit in support of his application to amend his original notice of motion (to include an alternative as suggested) states that the LHDA is presently repaying a loan (part of which is the judgment debt) to the Development Bank of Southern Africa (DBSA) in thirty-four (34) equal instalments.

He submits that he should similarly be ordered to pay the debt by instalments because "this will be to the prejudice of nobody because the second Respondent (LHDA) will be losing nothing more" and that this will be a just and equitable treatment "especially when one takes that a person should not be left destitute."

Payment by instalments - **per se** - necessitates the setting aside of the writ which has been proved to have been wrongly sued out. In the case of **Mears vs Pretoria Estate and Market Co. Ltd** 1906 TS 661 **Innes CJ** expressed the opinion that "as general rule it is advisable and convenient that application to set aside order and to rectify its consequences, should be by action" - especially where facts are in dispute - and this is apparent from Mr Mapetla's answering affidavit to Mr Sole's supplementary affidavit.

Upon the affidavits as they stand on the instalments prayer, it is not easy to determine the issue and thus prayer cannot be granted and is therefore refused; granting it would necessitate sitting aside the writ of execution properly sued out by the judgment creditor.

In any event the "notice to amend" (inelegantly) seeks to set aside the "sale in execution" and not the writ in execution.

Under these circumstances, the following order is made:-

RE: CIV/APN/318/01:

1. Prayer 3 of the Notice of motion is discharged, that is to say the Writ of Execution in CIV/T/598/95 (C. of A. (civ) No.26/99 still stands extant.

2. Notice of Sale in execution published on the 29th June 2001 is set aside as being irregular.

RE: CIV/APN/319/01:

1. The Respondent is directed to make available all his movable assets to the Deputy Sheriff who shall take inventory of the same in the presence of Mr Pitso of Oxbow Land and Property Consultants and of the attorneys of the applicants and respondents.

2. The Deputy Sheriff to comply strictly with the provisions of Rule 46 and Rule 47 before the immovable assets of Mr Sole are attached and sold in execution.

Each party to bear its own costs.

S.P. PEETE

JUDGE

For Applicant : Mr Khauoe (also for respondents in CIV/APN/319/01)

For Respondent : Mr Moiloa (also for applicant in CIV/APN/319/01)