CIV/APN/98/01
CIV/APN/128/01

IN THE HIGH COURT OF LESOTHO

In the matter between:

JOSEPH MOTLALEPULA MATSOETLANE	**Applicant**
and	
'MATEBELLO MATSOETLANE (born LEPONESA)	**1st Respondent**
MESSENGER OF COURT	**2nd Respondent**

And in the matter between:

JOSEPH MOTLALEPULA MATSOETLANE	**Applicant**
and	
'MATEBELLO MATSOETLANE (born LEPONESA)	**Respondent**

For the Applicant : **Mr. K. Mosito**

For the Respondent: **Mr. B. Makotoko**

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 14th day of June 2002

This Court made a ruling on the points-in-limine on the 3rd June 2002. These are the reasons therefor.

My decision dealt with the points-in-limine filed by the First Respondent in application CIV/APN/128/01. The other application concerning the same parties (CIV/APN/98/01 was recorded in a notice of motion in which the following prayers were sought, that is:

"1. Declaring the purported civil marriage entered into by and between the Applicant and Respondent null and void and of no effect.

2. Costs of suit in the event of opposition thereof.

3. Further and/or alternative relief."

It proved inconvenient to deal with the above matter as consolidated with the present application in which it was sought, in a notice of motion (in CIV/APN/128/01) the prayers that:

"1. Rule pertaining to modes and periods of service be dispensed with.

2. A rule nisi be issued "calling upon the respondents to show cause (if any) why:

(a) The purported execution in respect of CC110/97 shall not be declared null and void as being unlawful.

(b) The contemplated sale in execution as advertized in annexure "B" shall not be stayed pending finalization hereof.

(c) The purported execution process of all must be stayed pending the final determination of the Appeal noted by virtue of annexure "A".

(d) .....

3. ....."

I repeat that the agreed consolidation proved inconvenient even if the latter application was called interlocutory which it was not. There were too many complications that suggested that the prayers were not over a similar factual spectrum and would not easily be reconciled on the day of judgment except by ways that were not simple in themselves. Counsel agreed. The Court further decided that the following points-in-limine be dealt with first as Respondents' Counsel had insisted:

"(a) That this application, being a matter that could be dealt with by the magistrates Court has been brought

to this Court against the provisions of section 6 of the High Court Act 1968.

(b) The matter has been brought to Court on the basis of urgency whilst none existed, thus causing abuse of process of Court.

(c) The matter is *res judicata* or at least *lis pendens.*"

A short history of the matter will prove insightful. The Applicant who was defendant before the magistrate Court of Leribe was on the 12th February 1999 (in CC 110/97 ordered to pay to First Respondent (his wife) (then plaintiff) a sum of M1,500.00 per month as maintenance. Applicant was further to provide another room to plaintiff and furnish the same properly and in the manner befitting his wife. There was to be no order as to costs. It was common cause that an appeal was duly filed soon thereafter. (See Annexure "A")

For reasons explained in paragraph 7 of the Respondents' opposing affidavit the present Respondent applied for the said order of maintenance to be executed and be made effective because the appeal "had been allegedly noted" but a long time ago had lapsed "and the said appeal has never been prosecuted in anyway". The Respondent said that the application was not opposed. It thus resulted in the order of the 11th February 2000 annexed as "MM2". It ordered

simply that: "Defendant pay maintenance in the sum of M1,500.00 (One Thousand Five Hundred Maluti) per month from March 1999. 2. No order as to costs."

Strangely enough and much as appeal had been filed the present Applicant filed before the magistrate of Butha-Buthe (in CC2/2000) an application in which he asked that:

"(a) Further execution in CC 110/97 and CC 9/98 shall be stayed pending the finalization of Appeal already noted.

(b) Applicant's property already attached and removed pursuant to a Writ of Execution post noting of an Appeal shall not be returned to Applicant.

3. Costs of suit in the event of opposition of this application.

4. Further and/or alternative relief.

5. That prayers 1 and 2(a) operate with immediate effect as an interim order."

While I saw, in the record of proceedings, an interim order respecting above application which was issued on the 10th April 2000 I was not told when the

order was confirmed except that the Applicant did not deny that Respondents' statement that "..... However the application was dismissed with costs because of the same annexure "MM2". This will naturally beg the question whether the present application seeks to appeal the above decision or to review the magistrate's decision in annexure "MM2" or the refusal against the magistrate's decision in CC2/2000. It was said that the present application was to seek a declaration on the execution process itself but not to question the grounds, the basis or reasons for the judgment which were a different thing.

What was important was that the above application was made in the circumstances where Respondent had already moved for execution because the appeal was not being prosecuted. If an answer was sought as to why the Applicant sought for stay of execution (CC2/2000) it was because he knew that the Respondents already moved for execution. (See MM2) It is because Respondent on the other side as I believed, knew that an appeal had the effect of staying execution. This should surely be a perfect answer to the submission that the appeal had stayed execution. The stay has been removed. An application for stay, in the light of the noted appeal, would be surplusage and a wrong advice as Mr. Mosito for Applicant conceded.

What was important furthermore was that as after MM2 "despite the said

Annexure "A" a Writ of Execution was issued and it was executed on the 22nd day of March 2000 and consequently Respondent's property would be put up for execution. As said before I believed that the Applicant's application for stay of execution was dismissed by the magistrate.

Later the Applicant approached this Court in March 2001. That was after about twelve (12) months after that application for stay of execution, judging from the date of the Interim Court Order (10th April, 2000). It was not denied that execution was being proceeded with hence the application. Applicant applied on urgent basis for the prayers shown on page 2-3 of this judgment.

The grounds upon which the Applicant sought the main prayers (a) and (c) are as follows: Firstly, that the majority of the goods attached and to be sold in execution are specially declared to be exempt from execution in terms of section 40(a) and (b) of Subordinate Courts Act/Rules.

Secondly, since Applicant has noted an appeal before this Court which appeal has not yet been processed (which awaiting the completion of the record of proceedings before the magistrates Court) he has been "legally advised and verily believes same to be true and correct that the noting of Appeal at Roman Dutch Common Law, has the effect of staying executions automatically."

Applicant then concluded that he was legally advised that the continuing process of execution was unlawful. I did not have to decide whether the said appeal may have already lapsed. (See Rule 52(1)(e) A *rule nisi* had been granted in terms of prayers 2(b) of the notice of motion by this Court on the 23 March 2001.

A further ground was advanced which really belonged to the merits by the Applicant during argument. It was as follows: It was that no leave of Court had been applied for at the time of granting of judgment before the day on which that judgment was given. Indeed the Subordinate Court Rule 36(7) is couched in the following manner:

> "(i) Except where judgment has been entered by consent or default process in execution of judgment shall not be issued, without leave or court, applied for at the time of granting the judgment before the day following that or which the judgment is given."

Applicant's Counsel conceded that the rule was an un-attractively unfamiliar provision but a creature of statute all the same.

I would deal with the Respondent's first point-in-limine. Matters that are beyond the jurisdiction of the Subordinate Courts are spelt out in section 29 of the Subordinate Court Order No.9 of 1988. It is not apparent that a declarator is beyond the jurisdiction of a Subordinate Court. Neither is it excluded in the six matters that are specified in the section. It may even be that a declarator is not one of the matters in respect of the jurisdiction in respect of provision in section 19 of the said Subordinate Court Order No. 9 in section 17 (Jurisdiction in respect of causes of action). Nor in section 18 (Arrests and Interdicts). Nor, still, in section 22 (incidental jurisdiction).

In any event I would have a problem in accepting that the declarator sought by the Applicant, about a matter being dealt with in another Court, is a declaration of rights and can be extended to ".....an existing, future or contingent right or obligation ....." such as is meant by section 2(b) of the High Court Act 1978. I would say without deciding that such remedy will normally be limited to a question of rights and not review of irregular procedure or conduct. See **Government of the Self Governing Territory of Kwazul v Mahlangu and Another** 1994(1) SA 626. The remedy that the Applicant seeks may perhaps be that of review. That I do not decide now except to say that clearly the Applicant is seeking an order of review under the guise of a declarator whose pedigree I have already described.

Together with the above comment I would accept the distinction that Mr. Mosito made namely, that the process of judgment itself is not being attacked but the process of execution is being availed as being irregular. Indeed the two stages in litigation are distinct.

My initial observation was that with regard to the application (CC 21/2000) by the Applicant which was refused by the magistrate the same ground for stay of execution was put forward as in the instant application. It was as stated in paragraph 5 therein and it was as follows:

> " I wish to humbly aver that this my present application is *bona fide* in that prior to the execution I had already appealed against the judgment subject of the said execution. A copy of the said noted Appeal filed of record on the 12th day of March 1999 is being attached together with grounds of Appeal and marked Annexure "A" and the same is self explanatory."

See paragraph 7 in the present Applicant's founding affidavit. Again as in CC 2/2000, one prayer is for stay of execution pending finalization of the appeal (see prayer 2(b)). See (also prayer 2 (c) in the instant application) If this is so it can only mean that a Court of competent jurisdiction has already decided the issue

and held that the Respondent was entitled to execute. A declarator was dismissed in a similar situation. (See **Garment Workers Union Western Province and Another v Industrial Registrar and Another** 1967(4) SA 316 (TPD).

This leads me to the third point-in-limine. The order given by the learned magistrate in allowing for execution (see MM"2") and the order in CC 2/2000 were final order made under a competent procedure whose effect was final. It had the effect of final decision affecting the rights of the parties as to whether to execute or not. The question then remains as to how a declaration would be sought on a matter which has been finally resolved. It was between the same parties, in respect of the same substance. The only difference herein is that in addition there is a prayer for a declaration.

The orders made by the magistrate were in fact appealable in themselves or reviewable on the grounds of an irregularity. See **Van Streepen and Germs v Transvaal Administration** 1987(4) SA 569 on the nature of "judgments" with regard to interlocutory orders.

So that we have here a classical situation where an additional prayer has been added on the same grounds stated in the founding affidavits except that

here an additional attack has been made in connection with the non-compliance by the Respondent/Plaintiff in the Court *a quo* through Rule 36(7) of Subordinate Court Rules.

The above analysis mean that if it is found that it is the same thing that was being claimed or disputed between the same parties and same cause of action which resulted in a final judgment then the plea of *res judicata* will succeed.

As I said before the only difference between the claim in the magistrates' Court and the present one is that there is an additional prayer for a declarator. I found it difficult to distinguish the causes of action in both cases merelecause in the other there was no prayer for a declaration while the form might be different but the substance similar. The same question seem to have been raised. See **The South African Law of Evidence,** LH Foffman. DT Zeffert, 4th edition at page 342 "(c) The Same Cause."

In matters like the present consideration of public policy come into play. It is a weighty consideration in that regard that parties will split claims or cause of action on the basis of altered prayers as if there was a difference. If this is countenanced litigation will therefore be on going and endless. There can be no

obedience to the principle of finality if that were allowed. I would accordingly conclude in favour of the Respondent that the matter was *Res Judicata.*

It was correct that the ground about urgency may have been couched in a manner in which the two notional issues namely urgency and violation of the *audi alteram* rule. While the Respondent may have had an idea that although the matter was thought to be urgent by the Applicant Applicant should have proceeded on notice, the other side of the coin would have been that the matter was not urgent and should not be dealt with on urgent basis. Still the other aspect would have been that no grounds were stated for the matter being thought to be urgent.

The latter attempt was made nowhere except the suggestion which Court made namely that Applicant only realized on the 21st May 2001 that his property had been put up for auction in an advertisement (Annexure B). And that was not disputed. Even if this was admitted by Respondent, it came out in argument that there were other weighter factors, going against any conclusion based on the aspect, in the total circumstances of the situation. But the salient question would be as to when did the Applicant became aware that execution was instituted and not when the final sale in auction of his property was afoot. Incidentally it must have been quite some time before and prior to the advertised auctions that

attachment was done. That is what the Applicant himself speaks about in paragraph 6 of CC 2/2000 that:

> "Despite the said Annexure "A" a writ of Execution was issued and it was executed on the 22nd March 2000 and presently my property stands to be put up for auction."

All this means that as early as April 2000 when CC 2/2000 was filed the Applicant must have been aware of the impending sale in auction.

It stands to reason when regard is had to above account that the Applicant had ceased to treat the matter as an urgent one even if it may have originally been urgent. That is "where applicant delays in bringing the application as one of urgency, or, having brought it on an urgent basis incurs delay thereafter." See **The Law and Practice of Interdicts,** CB Prest, (1996) page 260 "Delay".

It did not stand the Applicant in good stead that the Court may have granted an interim interdict when first approached. It must have been that a judge of this Court when granting the Interim Court Order was not aware of the facts from the other side. That an interim order was previously granted cannot surely be support for matter that ought not to be treated as one of urgency and

that ceased to cry out for urgency. There was therefore no substance in the opposition to the second point-in-limine.

There will be no need on my part to deal any further with the question of the applicability of section 6 of the High Court Act considering the comments earlier made in the judgment. It might perhaps even be that once a matter was a declarator in the strict sense, the Subordinate Court would have no jurisdiction.

Having allowed the two other points-in-limine, I need not decide the aspect on jurisdiction. The two other points-in-limine therefore succeeded with costs to the First Respondent

T. Monapathi
Judge