IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.71 OF 2014

In the matter between

RASETLA B. MOFOKA **APPELLANT**

And

LESENYEHO NTSANE **1ST RESPONDENT**

REGISTRAR OF DEEDS **2ND RESPONDENT**

LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

CORAM: K. E. MOSITO P
M. HLAJOANE JA
M. CHINHENGO AJA

HEARD : 21 JULY 2015

DELIVERED: 7 AUGUST 2015

SUMMARY

Application in Land Court – Application for rescission of default judgment granted – generally inappropriate for applications for default judgment to be entered without hearing evidence.

Not advisable for legal practitioners to represent themselves in matters involving their own interests – matter remitted to that Court –appellant entitled to move the court a quo for review under Rule 84 and 85 matter to be heard by a Judge other than Judge a quo. Rule 57 – This is an appropriate rule for rescission of default judgments. Costs de bonis propriis – Not appropriate to grant it in this kind of case.

JUDGMENT

MOSITO P

BACKGROUND

[1] This is an appeal against the decision of the Land Court Division of the High Court of Lesotho. The learned counsel, advocate **R. B. Mofoka**, appeared in person (as the appellant) while advocate **C.J. Lephuthing** appeared for the respondent. Regard being had to the interests involved in this case, I did not think it was advisable for advocate **R. B. Mofoka** to have represented himself in a matter such as this as it is a dispute over a residential site which he was claiming as belonging to himself. The reasons for this view are the considerations referred

to in the Zimbabwean High Court cases of ***Bozimo Trade and Development Co P/L v First Merchant Bank of Zimbabwe and Ors, 2000 (1) ZLR 1***; ***Core Mining And Minerals Resources (Pvt) Ltd v Zimbabwe Mining Development Corporation and Others HC 8410/10.***

[2] In the former case, the court pointed out that "[a] legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client..." **Mr Mofoka** was of course, entitled to appear in person. However, he is bound to have such a deep-seated perception of unfair play on the part of the respondents that he might end up prejudicing his own case by representing himself. It is advisable for a legal practitioner to hand over his own case to another legal counsel to help him with it where his own interests are directly at stake. I say no more on this issue.

[3] A brief background to this appeal is that, on 29 July 2014, the 1st respondent herein (as applicant) filed an "originating application" against the appellant as well as the 2nd to 4th respondents herein in terms of Rule 11 of the Land Court Rules 2012 ("the Rules"). He sought an order in the following terms:

(a) "Lease N0.13271-634, Khubetsoana, Maseru held by 1st Respondent herein be cancelled and that in terms of Section 7 of the Deeds Registry Act 1967, 2nd & 3rd Respondents herein cause such cancellation.

(b) An order declaring Applicant as the owner of the property N0. 13271-634, Khubetsoana, Maseru.

(c) Alternatively to (b) above, 3rd Respondent to cause a re-survey of the Applicant's site appearing as Plot N0.13271-634.

(d) An order effectively ejecting the 1st Respondent from Plot N0.13271- 634, Khubetsoana, Maseru.

(e) Costs of suit.

(f) Further and/or alternative relief.

The matter came before **S.P. Sakoane AJ** who, on 19 August 2014, granted a default judgment against the appellant with costs. I will refer to the above application as *"the default judgment application."*

[4] Dissatisfied with that outcome, the appellant filed an application for stay of execution of the default judgment pending finalisation of the application before the Court *a quo*; for an order in the following terms:

"1. The rules of court pertaining to the ordinary modes and periods of service Should be dispensed with on account of urgency.

2. An Interim Relief and a Rule Nisi returnable on the ….day of ……..2014 pursuant to Rule 23, calling upon the Respondents to show cause if any why:

(a) Stay of execution of the default judgment shall not be ordered pending finalisation hereof.

(b) An order setting aside the Default Judgment shall not be granted.

(c) Costs de bonis propris shall not be ordered against 1st Respondent's Attorney and Counsel.

(3) Further and/or alternative relief.

(4) Prayers 1 and 2 (a) should operate with immediate effect as Interim Court Order."

This latter application was also heard by the learned Acting judge on 11 September 2014 and dismissed on 29 October 2014.

[5] The default judgment application was not opposed. The learned Judge *a quo,* without hearing evidence, granted default judgment in favour of the 1st respondent with costs. Against this order the appellant has appealed to this Court. The learned judge also dismissed the application for rescission brought by appellant and the said order of dismissal of the rescission application also forms the subject of this appeal.

THE COMPLAINT AGAINST THE GRANTING OF THE DEFAULT JUDGMENT

[6] Three issues present themselves for discussion in this appeal. These questions arise in respect of the granting of the

default judgment as well as the refusal to grant the application for rescission. There is also a complaint about the learned Acting Judge having granted costs de *bonis propriis*.

[7] Rule 22 of the ***Land Court Rules 2012,*** makes provision for judgments by default. Rule 64 provides for an "examination of parties" at the "first hearing." As pointed out by this Court in ***Likotsi Civic Association and 14 Others v The Minister of Local Government and 4 Others C of A (CIV) NO.42/2012***, it would seem that the framers of the Rules had in mind in this connection, *inter alia,* the identification or definition of disputes of fact which might arise on the papers, for Rule 64 (2) reads:

> *"The court may orally examine either party in relation to any material fact of the legal action."*
>
> Rule 64 (4) goes on to provide that:
>
> *"After examining the parties the court shall give directions as to the further conduct of the proceedings."*

[8] Rule 71(1) provides that the party entitled to begin shall state his case by relating it to the documentary evidence or list of witnesses that he may have attached to his application. As regards the manner of producing evidence, Rule 72(1) enjoins the party entitled to begin to call his witnesses who, after taking an oath or affirmation, shall be examined by that party, cross-examined by the other party and re-examined by the party beginning where necessary. Witnesses are to give evidence orally in open Court. In my view, the effect of Rules 71 and 72 is to require the leading of sworn evidence in respect of facts

contained in the originating application, the answer as well as the annexure or list of witnesses that may have been attached to originating application as well as the answer.

[9] In the present case, the procedure laid down in Rules 64, 71 and 72 was unfortunately not followed in the Court *a quo*. Instead, the Court *a quo,* without hearing evidence or examining the parties or any of them, and without first giving any directions as contemplated in the rules, dealt summarily on the papers with the default judgment in favour of the 1st respondent and disposed of the application by granting it, with costs. In my view, the learned Acting Judge erred in doing so (See: ***Likotsi Civic Association and 14 Others v The Minister of Local Government and 4 Others*** *(supra*).

[10] In the grounds of appeal before us, the appellant advances complaints relating to the failure of the Court a quo to receive evidence in order for it to grant default judgment against the first respondent. It is to these grounds that I must now turn. A default judgment is a judgment entered or given in the absence of the party against whom it is made. Rule 22 reads as follows:

> *"(1) Without prejudice to the provisions on service of notice and non-appearance on court date, where the respondent fails to appear, without good cause, at the first date of appearance or thereafter as the court may direct, the court may enter judgment for the applicant.*
>
> *(2)Notwithstanding subrule (1), the court may make such other order as it considers appropriate".*

[11] Thus, in the Land Court, default judgment arises for consideration in consequence of a failure to appear, without good cause, at the first date of appearance. A closer reading of the above Rule reveals that, service of notice and non-appearance on court date, where the respondent fails to appear, are not in themselves dispositive of the issue whether the Court should enter default judgment for the applicant. At the stage of considering whether or not to grant default judgment to an applicant, the Land Court has to go further to determine whether the failure to appear is without good cause.

[12] Whether or not the failure to appear is without good cause is a matter for evidence. It follows therefore that, the default judgment ought not to have been granted in such circumstances. The judgment was therefore irregular. If a judgment is irregular, the appellant was entitled *ex debito justiciae* to have it set aside (See: ***Maqalika Leballo v Thabiso Leballo & Anor 1993 -1994 LLR –LB 275*** *at para 11*) as well as ***Anlaby v Praetorius (1888) 20 Ch. 764*** and ***Sterkl v Kustner (1959) 2 S.A. 495***.

[13] The appellant further complains that the learned judge erred by granting a judgment by default in a claim for cancellation of a lease without hearing any evidence. He complains that no documentary evidence had been annexed to the originating application justifying cancellation. It is indeed

common cause that there is no record of any evidence at all before us. This was contrary to the Rules mentioned above.

[14] I am of the view that the default judgment granted in this matter was void *ab origine* by reason of the Court's failure to hear evidence from the office of the Chief Surveyor in relation to the lease number in question. I say so because, in terms of the ***Land Survey (Amendment) Act No. 15 of 2012***, it is the function of the office of the Chief Surveyor to administer the land cadastre system, which includes retaining accurate information and maps on the land cadastre system; registering land on the cadastre on request from the title holder; updating the cadastre with details of any consolidations, sub-divisions or other changes in legal boundaries; providing maps and other information regarding the cadastre upon request; and to resolve administratively registration and cadastre complaints and disputes with regard to land parcel boundaries.

[15] There was therefore, no admissible evidence that a site inspection by qualified surveyors had been made and there was no report to that effect attached to the originating application. There is merit in the appellant's complaint that, the acceptance of an allegation that a site inspection had verified that one of appellant's properties 'on the cadastral map actually belongs to applicant' (1st respondent herein) without hearing evidence constituted inadmissible hearsay evidence. In my opinion, such allegations could not be testimonially relied on.

[16] I am therefore of the view that it was irregular for the Court *a quo* to have accepted the inadmissible hearsay evidence that a lease bearing No. 13271-634 had '…erroneously been registered with the Registrar of Deeds as belonging to Mr Rasetla Mofoka'. As appellant correctly complains, no evidence was led to prove an error in the issuance of the said lease. No evidence was led in a form of a letter of demand or oral evidence to prove a demand by 3rd respondent that the appellant should surrender his lease. Again no evidence was led to prove that appellant has been unable to surrender his lease.

[17] There was indeed, no admissible evidence that the appellant had '…surveyed and registered lease number 13271-634 over the only residential home of applicant'. I am unable to understand why the Chief Surveyor, who has authority to undertake surveys and to give evidence as to whether a survey had been properly or improperly made, was not called to give evidence on the foregoing facts as a basis for determining whether the lease warranted cancellation. On the above basis, I am of the view that the granting of the said default judgment was erroneous.

RESCISSION APPLICATION

[18] It is common cause that after the default judgment mentioned above was granted, the present appellant brought an application for review in terms of Rules 84 and 85 of the Rules.

Under those Rules, he sought to rescind the default judgment mentioned above. The relevant rules read as follows:

> *"84. (1) Any person whose interests are directly affected by a final judgment entered in an application may apply to the court that pronounced the judgment, on one or more of the grounds stated in Rule 85, to order that the application shall be reviewed, in whole or in part, upon such terms or conditions as to costs, or otherwise, as the court considers just.*
>
> *(2)The application shall be dated and signed by the party or his representative and filed at the registry of the court.*
>
> *85. An application for review may be made by any interested person on one of the following grounds:*
>
> *Where the judgment sought to be annulled or varied was made based upon or substantially influenced by fraudulent or fabricated documents or subornation of perjury or other inappropriate and misleading conduct on the part of either party in the course of the proceedings; or*
>
> *The party moving is prepared to adduce relevant and essential evidence which was unknown to, and could not reasonably have been discovered by him before the judgment was pronounced."*

[19] It seems to me that the appellant invoked wrong Rules for the rescission that he desired to secure from the court. He relied on Rules 84 and 85 that deal with reviews as opposed to Rule 57 which deals with the setting aside of orders granted *in* his absence or default. In my view, the correct Rule under which the appellant ought to have proceeded is Rule 57. That Rule reads as follows:

> *"Any Respondent against whom a judgment is entered or order made, in his absence or default may, within one month of the day that he became aware of such judgment or order, apply to the court that passed the judgment or made the order to set it aside.*

> *If the Respondent satisfies the court, that the notice was not duly served, or that he was disabled by a good cause from appearing when the suit was called on for hearing or from filing his answer, the court shall, after notice of the application has been served on the opposite party, make an order setting aside the judgment or order as against him upon such terms as to costs, payment into court, or otherwise as it thinks just, and shall appoint a day for proceeding with the application or re-hearing the appeal, as the case may be.*
>
> *Where the judgment or order is such that it cannot be set aside as against such Respondent only, it may be set aside as against all or any of the other Respondents also."*

[20] The Court *a quo* considered this Rule but declined to grant relief thereunder. The primary purpose of Rule 57 is to enable and regulate applications for rescission. It is on the face thereof designed to aid an applicant against whom a judgment is entered or order made in his absence or default. All that is required is for the applicant for rescission under this Rule, to satisfy the Court that, the notice was not duly served, or that he was disabled by a good cause from appearing when the suit was called on for hearing or from filing his answer. Had the Court applied its mind to the consideration for the need to receive evidence as discussed above, it would have rescinded the default judgment given. This Court should therefore rescind that judgment.

COSTS DE BONIS PROPRIIS.

[21] As I pointed out above, there was also a complaint by the appellant that the learned Acting Judge had improperly awarded costs *de bonis propriis against* appellant. The appellant complained that he was not invited to address the court on the

issue why he should not be ordered to pay costs *de bonis propriis* without having been afforded an opportunity of being heard. Both parties were agreed that no notice of the intention to punish appellant with costs was ever given by the Court *a quo*. I must mention that the attitude of the respondent's counsel was that he did not support that order.

[22] I am of the opinion that, the order for costs *de bonis propriis* was inappropriate in this case. There are two reasons for this view. First, as a general rule, notice must be given by the court to a person intended to be punished with costs *de bonis propriis*. Secondly, in his judgment, the learned Judge *a quo* made two equivocal and contradictory statements on costs. The one statement is that he was making a costs order *de bonis propriis* against appellant. The second statement, which is contained in the order itself, is that he was granting the judgment with costs (apparently no longer *de bonis propriis).* This last statement is contained in what appears to be the final order of the court. Bearing in mind the above two scenarios, coupled with the fact that the respondent does not support this order, I would uphold the appeal on this point as well.

CONCLUSION

[23] In the result, I am of the view that the default judgment granted on the 19th day of August 2014 was irregular and therefore, the appellant was entitled to have it set aside. Consequently, the following order is made:

- The appeal succeeds with costs.
- The default judgment granted by the Court *a quo* on the 19th day of August 2014 is hereby rescinded with costs.
- The matter is remitted to the Court *a quo* to be proceeded with in terms of the Land Court Rules 2012.

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DR K.E.MOSITO

President of the Court of Appeal

I agree _____

M. HLAJOANE

Justice of Appeal

I agree _____

M. CHINHENGO

Acting Justice of Appeal

For Appellant : **Advocate R. B. Mofoka**

For Respondent: **Advocate C.J. Lephuthing**