

THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CIV) 59/2014

In the matter between:

AFZAL ABUBAKER

1ST APPELLANT

AFWA INVESTMENTS

2ND APPELLANT

And

DEPUTY SHERIFF MS. SEFORA

1ST RESPONDENT

ESTATE OF LATE SAMUEL

MOKHOELE MONKI

2ND RESPONDENT

REGISTRAR OF THE HIGH COURT

3RD RESPONDENT

COMMISSIONER OF LANDS

4TH RESPONDENT

REGISTRAR OF DEEDS

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

MASTER OF THE HIGH COURT

7TH RESPONDENT

CORAM: MOKGORO AJA,

LOUW AJA

MOLETE AJA

HEARD : 18 April 2016

DELIVERED : 29 April 2016

SUMMARY

Warrant of ejectment – When to be issued – Whether order of cancellation of Deed of Sale of plot is competent order to issue warrant – order only conferring rights of ownership to Respondent – Not an appropriate order for ejectment – warrant of ejectment set aside.

JUDGMENT

MOLETE AJA

- [1] This is an appeal against the order of the High Court dismissing appellants' application to set aside a warrant of ejectment.
- [2] The appellants had approached the High Court on an urgent basis seeking an order that:
- a. Execution of a warrant of ejectment issued by the Registrar on 14th November 2011 be stayed pending the outcome of that application.
 - b. That the same warrant of ejectment be declared unlawful, illegal, irregular and/or invalid.

- [3] An interim order was granted to stay the execution and the High Court proceeded to hear argument on the irregularity or invalidity of the warrant of ejectment.
- [4] The Court refused to set aside the warrant and dismissed the application with costs.
- [5] The factual background to the dispute between the parties in this matter pertaining to the plot in question had a long history before the court a quo. It was common cause that the 2nd Respondent had earlier in CIV/APN/35/03 obtained an order against appellants.
- [6] Effectively that order granted the relief of cancellation of the Deed of Sale and transfer purportedly passed by the late Samuel Monki in favour of first appellant. This was in respect of plot held under lease number 17684-181 Lower Moyeni, Quthing. The Court also granted an order of cancellation of the endorsement by the Registrar of Deeds to authorize the transfer.

- [7] An application to rescind that judgment was refused and therefore effectively the cancellation of the sale and transfer was final. It was not appealed.
- [8] For some reason after the dismissal of the rescission, and despite the final order of cancellation of the Deed of Sale and transfer, the appellants remained in occupation of the premises for a long time of about decade thereafter.
- [9] In the time that elapsed, the owner who had obtained the order passed on, and his estate became a party to the proceedings. The Estate then issued a warrant of ejectment relying on the order of cancellation of Deed of Sale and transfer. This gave rise to the application in the High Court.
- [10] A number of issues were canvassed in the High Court including the fact that the order granted was in favour of the deceased and not his estate. However this Court will concern itself with only whether it was competent

for the warrant of ejectment to be issued on the basis of that order of the High Court.

[11] It is not in dispute that the warrant of ejectment was issued on the basis that a Deed of Sale and transfer had been cancelled by the Court, and the application to rescind that cancellation had failed. The 2nd Respondent was of the view that the warrant of ejectment was an automatic result of the order of cancellation.

[12] Second Respondent's argument before this Court followed the same approach. Reliance was placed on Rule 46(1) of the High Court Rules 1980 which says

“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”.

[13] In addition, 2nd Respondent relied on the High Court pronouncement that the claim or lease between the

parties had been judicially resolved and the rights of the successful party had to be enforced. The Court was of the view that ownership ipso facto reverted to the original owner and could not be left in limbo.

[14] That may be correct, but the question still remains, and it is whether on the basis of the cancellation order the respondent was authorized to issue a warrant of ejection. In my view it cannot be so.

[15] It is true that the Court had resolved the rights of the parties to the dispute and the right of the successful party had to be enforced. However, the Respondent had not in the same papers asked for an order evicting the appellants from the plot.

[16] It is also correct that the ownership of the plot reverted to the owner. Therefore it was not left in limbo. The court had determined and conclusively decided the question of ownership. Second Respondent could

therefore on the basis of that judgment proceed to seek eviction or ejection of the appellants.

[17] The Respondent relied on some authorities and case law including **Herbstein and van Winsen, The Civil Practice of the superior Courts in South Africa, 3rd edition, Chapter 38**, and also the case of **De Crespigny v. De Crespigny 1959** (1) SA 149 (N).

[18] These authorities do not support the Second Respondent's case and do not lay any basis for the contention that a writ or warrant of ejection may be issued on the basis of the order such as the one in this case.

[19] Indeed the case relied upon by the appellants, **Lurlev v Unifreight General Services and Others 1978** (1) SA 74 (D) is more persuasive when it says:

“..... the writ must follow strictly the form of the Court's order that warrants its issue, otherwise it is liable to be set aside”.

Where therefore, the writ had not been issued in conformity with the judgment, the court held that the writ was bad and of no force and effect as a process of execution.

[20] It is also interesting to note that the legal representative of the respondent, had in his demand addressed to the appellants; required that unless appellants vacate the plot by the 30th September 2011, ejectment proceedings would be issued against them.

[21] No ejectment proceedings were instituted, but the respondents counsel now submits before this Court that it was not necessary to obtain an order of ejectment before a writ or warrant of ejectment could be issued.

[22] The writ was not issued in conformity with the judgment and was liable to be set aside. The High Court should have granted the application.

[23] The following order is made:

1. The appeal is allowed.
2. The order in the court a quo is altered to read
“The application is granted with costs”
3. The Second Respondent is ordered to pay the appellant’s costs on appeal.

L.A. MOLETE
ACTING JUSTICE OF APPEAL

I agree:

Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

W.J. LOUW
ACTING JUSTICE OF APPEAL

Counsel for Appellants: S. Ratau

Counsel for 2nd Respondent: M. Ntlhoki