

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.19/2015

In the matter between

AFZAL ABUBAKER

1ST APPELLANT

MESSENGER OF COURT - QUTHING

2ND APPELLANT

and

MAGISTRATE QUTHING

1ST RESPONDENT

OFFICER COMMANDING

POLICE – QUTHING

2ND RESPONDENT

COMMISSIONER OF POLICE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

THABANG LECHELA

5TH RESPONDENT

‘MAKHAFO MOHLEKOA

6TH RESPONDENT

MANTSOE MATLE MAKHETHA

7TH RESPONDENT

CORAM : MOKGORO, AJA
 LOUW, AJA
 MOLETE, AJA

HEARD : 18 APRIL 2016

DELIVERED : 29 APRIL 2016

SUMMARY

Practice - execution of order subject to appeal suspended pending outcome of appeal - Rescission application does not automatically suspend order sought to be rescinded - Subordinate Courts Act, 1988 section 51

JUDGMENT

LOUW, AJA

[1] This is an appeal against the judgment delivered and orders made by Moiloa, J on 8 June 2015:

1. Dismissing the appellants' application (the main application) for an order directing that the order made by the Magistrate Quthing under case

CC40/2010, be executed by the second appellant with the assistance of the police and

2. Granting the relief sought by the sixth respondent and others in the counter application brought by them.

[2] In 2010 the appellant (Abubaker) brought an action in the Quthing Magistrate Court under case CC40/10 for the ejectment of the fifth respondent (Thabang Lechela) and one Khursheed Ahmed (who did not take any further part in the proceedings) from certain premises, being plot 17684-182 situated at Lower Moyeni, Quthing (the property). Abubaker alleged that he was the 'lawful and registered owner' of the property and that since the two defendants were in occupation of the property without his knowledge and/or consent, such occupation was unlawful. Thabang Lechela did not plead to the merits, but filed a plea of non-joinder, stating that one 'Makhafo Mohlekoa, (the sixth respondent in this appeal) was a necessary party to the proceedings, since she was the lessor from whom he leased the property.

[3] Despite the plea of non-joinder, the matter proceeded to a hearing and on 18 April 2011, default judgment was granted ordering the ejectment of the defendants being Lechela and Khurseed Ahmed, from the property. Abubaker alleges that pursuant to the order for ejectment, on 20 April 2011 he and Thabang Lechela entered into a written sublease in terms whereof Lechela would remain in occupation of plot 17684-182 as Abubaker's tenant. Lechela denied the conclusion of the sublease.

[4] Lechela then brought an application for rescission of the judgement taken by default. On 19 May 2011, Lechela was granted an interim stay of execution, pending the outcome of the application. On 13 July 2011 the rescission application was dismissed. On 14 July 2011, Lechela noted an appeal to the High Court against the dismissal of the application for rescission and on 25 July 2011, Lechela made due application for the allocation of date for the hearing of the appeal. These steps were taken within the time periods laid down in Rule 52.

[5] Despite the pending appeal against the dismissal of the application for rescission of the order for ejectment

granted under case 40/2010, Abubaker, contending that the appeal had lapsed, sought to execute the order of ejectment against Lechela. The sixth respondent, Makhafo Mohlekoa, who was not a party to the proceedings in case 40/2010 and who was not referred to in the order for ejectment, but who was in occupation of the property, resisted execution of the order. Abubaker thereupon obtained an order from the Magistrate, Quthing on 7 November 2011, ordering and directing the police to assist the second appellant (the messenger of the court) in the execution of the ejectment order. Acting upon this order, the police on 9 November 2011 detained 'Makhafo Mohlekoa when she again resisted the execution of the ejectment order. The next day, 10 November 2011, 'Makhafo Mohlekoa appeared before the magistrate who ordered her release and issued an order suspending the previous day's execution order and granted the sixth respondent 'Makhafo Mohlekoa and seventh respondent leave to intervene in case CC40/10.

[6] The appellants then launched review proceedings in the High Court (the main application). This application sought orders reviewing and setting aside the magistrate's suspension on 10 November 2011 of the orders of 7

November 2011 and authorising the execution of the original order for ejectment granted under case NO 40/2010 against Lechela, with the assistance of the police. The application was brought as a matter of urgency and without notice to the respondents, but although the relief granted by Peete J on 11 November 2016 was interim in nature, pending the final determination of the review application, the suspension on 10 November 2011 of the order directing the police to assist in the execution of the ejectment order, was lifted with immediate effect. This resulted in the order being executed on 14 November 2014 and despite the fact that the sixth respondent 'Makhafo Mohlekoa was not a party to the ejectment proceedings and was not named in the order for ejectment, she was evicted from the property.

[7] Lechela and 'Makhafo Mohlekoa opposed the main application, raising an objection to the urgent ex parte procedure adopted as well as two defences on the merits. The first of these relates to the powers of the second appellant, Fihlo Sefako, who described himself in the papers as the messenger of the Leribe Magistrate Court. They averred that he had no authority to execute orders issued by the Quthing magistrate's court. The

respondents contend that he therefor lacked authority to execute orders issued out of another court, the Quthing Magistrate Court. The second defence raised relates to Abubaker's standing. They denied his claim that he is the lawful and registered owner of the property and consequently disputed his standing to apply for the ejectment of the respondents. In addition they raised factual disputes regarding the events when the appellants sought to execute the ejectment order. In particular, they aver the sixth respondent had been in occupation of the property with her husband since 2001, when they acquired possession thereof from one Mabiss Makhetha. They thereafter developed the property and after her husband's death, the sixth respondent continued to possess and occupy the property on her own. During 2006 she leased part of the property to Lechela. This lease was terminated on 2 May 2011 and thereafter she was in sole occupation of the property, until she was evicted on 14 November 2011. To the extent that there is a dispute of fact in regard to those matters, the rule in ***Plascon – Evans Paints v Van Riebeck, Paints (Pty) Ltd 1984 (3) SA 623 (A) 643-635***, which rule has consistently been applied by this court in motion applications, applies and Lechela's and the sixth respondent's version must prevail.

[8] In addition to their opposition to the main application, Lechela and 'Makhafo Mohlekoa also filed a counter application (the counter application), seeking orders in respect of case 40/2010, reviewing and setting aside: (a) the default judgment granted by the magistrate on 18 April 2011, (b) the order granted by the magistrate on 7 November 2011 authorising the police to assist in the execution of the order for ejectment, (c) declaring the execution of the order on 9 and 14 November 2011 to be null and void and of no effect, (d) restoring sixth respondent's possession and occupation of the property, and (e) interdicting interference with the sixth respondent's exercise of right in relation to the property.

[10] The applications came before Moilola, J on 11 March 2013. In a judgement delivered on 8 June 2015 which is the subject of this appeal, Moilola, J dismissed the main application and granted all the relief sought in the counter application.

[11] I turn to consider the appeal against the dismissal of the main application. Moilola J dismissed the

main application on the basis that it was improperly brought without notice on an *ex parte* basis.

[12] It is in my view not necessary to consider whether the procedure adopted by the appellants in bringing the main application justified the dismissal of the application. The relief sought in the main application, namely, an order setting aside the magistrate's suspension of the order for ejectment and an order that the order for ejectment be executed, with the assistance of the police, is in essence based on two assumptions, namely, that the order for ejectment made by the magistrate on 18 April 2011, was at the time the magistrate suspended the order on 7 November 2011, an enforceable order for ejectment and secondly, that such order could be executed against the sixth respondent.

[13] As indicated earlier, although the fifth respondent's application for the rescission of the magistrate's order was dismissed, the fifth respondent duly noted an appeal to the High Court under the provisions of Rule 52. The first appellant thereupon proceeded with the execution of the order for ejectment on

the basis that the appeal that had been noted, had lapsed and that consequently, the order for ejectment was enforceable.

[14] Where an appeal to the High Court is noted against a judgment and order of a subordinate court, the judgment and order appealed against is automatically suspended pending the outcome of the appeal. This is the common law rule of practice (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, 1977(3) SA 534 (A) at 545 A).

[15] Section 51 of the Subordinate Courts Act, 9 of 1988, which is identical to section 78 of the South African Magistrates' Court Act 32 of 1944, provides:

Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision on appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.

[16] Since an order which is subject to appeal is automatically suspended in terms of the common law, there is no need to apply for its suspension in terms of section 51. The judgement creditor may, however, apply for execution of the order and either one of the parties may seek a direction regarding security pending the appeal.

[17] There is no substantive rule of law that the filing of an application to rescind a judgment automatically suspends execution of the judgment. (***Nel v Le Roux NO, 2006 (3) SA 56 (SE) 59 –J***). The judgment debtor may apply for suspension of the order in terms of section 51. This is what the fifth respondent did and he was granted an order suspending the execution of the order pending the outcome of the application for rescission. When the rescission application was dismissed, the fifth respondent duly noted an appeal in terms of Rule 52 (1) (a) to the High Court on 14 July 2011 and thereafter, within the four week period prescribed by Rule 52 (1) (a), the fifth respondent applied in writing to the Registrar of the High Court for a date of hearing. The appeal had consequently not lapsed in terms of Rule 52 (1) (d) by the time the purported executions took place during November 2011.

[18] It is not merely the process of execution which is suspended but the operation of the order is also suspended. The general effect of the noting of an appeal is that that no results can flow from the judgment appealed against which would place the parties a position different from that which they enjoyed immediately before judgment was given. (Herbstein and van Winsen: The Civil Practice of the Supreme Court of South Africa, 4th Ed by Dendy, p889.) Any purported execution of an order which has been suspended by the noting of an appeal is a nullity (***Barret v Potgieter 1908 TS 13; Malan v Tollekin 1931 CPD 214***).

[19] The noting of the pending appeal to the High Court had automatically suspended the effect of the dismissal of the rescission application and the issue of rescission of the order remained a live issue pending before the High Court. There is no indication on the papers that the fifth Respondent had obtained a further order suspending the order of ejectment pending the outcome of the appeal. In my view, however, the existing order of suspension remained in place pending the final determination of the application for rescission.

[20] It follows that when the appellants sought to execute the order for ejectment during November 2011, the order had been suspended and such purported execution is a nullity and had no effect.

[21] The appeal in respect of the main application must therefore fail.

[22] I turn to consider the appeal against the granting of the counter application.

[23] The purported execution under case CC40/2010 during November 2011 of the order against the sixth respondent who is not mentioned in the order, was a nullity.

[24] The sixth respondent sought the review and setting aside of the order for ejectment under case CC40/2010 on the basis that she had not been joined in the matter. In fact, however, she had no direct interest in the matter since the plaintiff in the action (Abubaker) had sought and was granted only the ejectment of the fifth respondent (the

second defendant, Khurseed Armed took no further part in the proceedings). No relief was sought against the sixth respondent and none was granted and the relief sought against the fifth respondent did not affect the sixth respondent. There was therefore no non-joinder that would justify the setting aside of the judgment and order of the magistrate of 18 April 2011 under case NO C40/2011.

[25] It follows that the relief sought in paragraph (a) namely, the setting aside on review of the judgment in case CC40/2011, should not have been granted. To this limited extent, the appeal against the orders made in terms of the counter application, must succeed.

[28] Although the appellants achieved some success in respect of the counter application, the respondents have enjoyed complete success in the appeal in respect of the main application and in my view the respondents are entitled to half of their costs on appeal.

[27] The following orders are made:

1. The appeal against the dismissal of the main application is dismissed.

2. The appeal against the orders granted in respect of the counter application succeeds in part and the order made in the court a quo in respect of the counter application is altered to read:

“The counter application of first and second applicants is, save for paragraph (a) thereof, granted with costs.”

3. The appellants are ordered to pay half of the respondents’ costs on appeal.

W.J LOUW
ACTING JUSTICE OF APPEAL

I agree:

Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

L MOLETE
ACTING JUSTICE OF APPEAL

For Appellants : Adv Ratau

For Respondent : Adv Z Mda KC