IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) NO. 2/2018**

LC/APN/16/2012

In the matter between:

ZION APOSTOLIC FAITH MISSION	**1ST APPELLANT**
PAUL RAMOTŠO	**2ND APPELLANT**
MOTSEPI MOHLABI	**3RD APPELLANT**
MALAO MOFOLO	**4TH APPELLANT**
TEFO LION	**5TH APPELLANT**
KOPANANG HLASA	**6TH APPELLANT**
MOHAU MOLUPE	**7th APPELLANT**
JERRY KHUBETSOANA	**8TH APPELLANT**
AUPA MOOROSI	**9TH APPELLANT**
NKATSA MOOROSI	**10TH APPELLANT**
'MITA MOOROSI	**11TH APPELLANT**
'MAMORERO NTHAKO	**12TH APPELLANT**
KHAHLISO NTHAKO	**13TH APPELLANT**
NTHEBE MPHATENE	**14TH APPELLANT**
NTHABELENG MOOROSI	**15TH APPELLANT**
TŠELISO KHUBETSOANA	**16TH APPELLANT**
'MAPHUTHEHO NTHAKO	**17TH APPELLANT**
MOKONE MOKONE	**18TH APPELLANT**

'MANTHABISENG MAJORO **19TH APPELLANT**

MOFOLO MORUTI **20TH APPELLANT**

And

'MAMOTLAKASE MERIAM MARAKABI **1ST RESPONDENT**

PILLAR OF FIRE MINISTRIES **2ND RESPONDENT**

LAND REGISTRAR LAA **3RD RESPONDENT**

LAND ADMINISTRATION AUTHORITY **4TH RESPONDENT**

CORAM: **P. MUSONDA, AJA**
M. H. CHINHENGO, AJA
N. T. MTSHIYA, AJA

HEARD : 22 JANUARY 2019

DELIVERED : 01 FEBRUARY 2019

SUMMARY

Appeal for stay and rescission upheld due to failure of court a quo to follow Land Court Rules of 2012.

JUDGMENT

MTSHIYA, AJA

[1] The record of appeal *in casu,* comprises of three volumes, which were prepared hurriedly after the roll call of the 14th of January 2019. Due to the extreme difficult of identifying the actual issues that the parties wanted the court to determine, at the hearing, on 22 January 2019, the court briefly adjourned in order to allow parties to agree on which papers the court was to rely in determining the issues before it. The record, I must say, had a lot of documents unrelated to the case.

The record was then reconstructed.

[2] It is important to indicate how the record was then reconstructed. Upon the resumption of proceedings, the parties asked the court to rely on the following documents contained in the three volumes:

1. The Originating application filed by the 1st respondent in the Land Court on 27 November 2012 (i.e. pages 2-11 of volume 1).

2. The Answer filed by the 1st appellant on 7 December 2012 (i.e pages 15-24).

3. The Court Order issued by the Land Court on 9 March 2015 (i.e page 59).

4. The Stay and Rescission application filed by the appellant on 24 October 2016 (i.e pages 50-61)

5. The Special Answer filed by the 1st respondent on 20 March 2017 (i.e pages 67-87)

6. The Counter Application filed by the 1st respondent on 10 July 2017 (i.e pages 225-273.

7. The Notice of Amendment filed by the 1st respondent on 16 August 2017 (i.e pages 255-275) and

8. The Court Order and Notice of Appeal (i.e pages 278-287.

The court, in dealing with the matter has therefore restricted itself to the reconstructed record, which the parties confirmed. It was therefore baffling for Advocate Sekonyela to later allege that the record had been tempered with by way of new documents being introduced clandestinely. We did not take him to be serious on that issue.

[3] The reconstructed record shows that this is an appeal against the decision of the court *a quo* wherein it dismissed the appellant's application for stay and rescission. The appeal is anchored on a matter concerning competing claims on a piece of land, under Lease No. 13284-343, Motimposo, Maseru. The said piece of land, according to the lease issued in favour of the 1st respondent on 23 June 2016, measures 89703 Square Metres.

[4] On 27 November 2012, the 1st respondent filed an application in the Land Court against the 1st appellant seeking the following relief:

> *"1) a) The rules of court as to from notice and service shall not be dispensed with on account of urgency.*
>
> *2) The respondent shall not be interdicted from expelling the applicant from the site at Motimposo bearing plot number 13284-343, pending finalization of the matter.*
>
> *3) The respondent's lease number 13284-343 shall not be declared null and void and be cancelled.*
>
> *4) The applicant shall not be declared the rightful and lawful owner of the named site."*

Apparently the Plot Number is not given. The number 13284-343 is the Lease Number as stated in paragraph 3 above in the relief sought.

In support of the above relief, the 1st respondent, who was then applicant averred, in part as follows:

> *"3.1 The applicant was granted a site bearing plot number 13284-343 by one 'Matšepiso Lion sometime in 1993 at Motimposo in the Maseru District and she then occupied it in 1994 after engaging in developments thereon of building a three roomed house. The applicant cannot locate where the documents relating to the site and 'Matšepiso untimely passed away this year 2012. And the Chief of Motimposo Chief Majara Theko was involved.*

The respondent also stated that she refused to vacate "The Premises" without being compensated because she had built structures on the piece of land. An attempt by the appellant to

evict her through the Local Court failed, with the Local Court declaring her the owner of the plot.

[5] Following an interim relief granted in favour of the 1st respondent on 28 November 2012, the matter was then finalized in the Land Court on 9 March 2015 in terms of the following order:

"It is hereby ordered that:

a) The respondent's lease number 13284-343 is declared null and void and is cancelled;
b) The applicant is declared the rightful and lawful owner of the named site;
c) The Rule dated the 28th November 2012 is hereby confirmed."

The above order was granted in default.

[6] Dissatisfied with the above order, for which no reasons were given, on 24 October 2016, the appellant herein filed an application in the Land Court division of the High Court seeking the following relief:

"1. That the Rule Nisi be issued returnable on the date to be determined by this Honourable Court calling upon the Respondents to show cause if any; why the following orders shall not become absolute:

a) That the rules, periods and modes pertaining to the service of this application be dispensed with on account of urgency;

b) *That First Respondent be directed not to dispose of the site at Motimposo pending finalization of this matter;*
c) *That the judgment in* ***LC/APN/16/12*** *be rescinded, and or put aside;*
d) *That 1st Respondent be directed not to dispose of the site in issue pending finalization of this matter;*
e) *That prayers (a) and (b) operate immediately as the interim order of the court;*
f) *That 1st respondent be directed to pay costs of this application in the event of opposition;*
g) *That the applicant be granted such other and/or alternative relief."*

[7] On 20 March 2017, the 1st respondent filed a special answer to the appellant's application in the following terms:-

"There is a pending matter before this honourable court lodged by the applicant sometime in June 2016 with a case numbered LC/APN/23/16 and the cause of action is similar as in the present one. This matter is not yet finalized and/or properly withdrawn by the applicant in accordance with Rule 61 of the Land Court Rules, 2012.

It is therefore prayed that this application be dismissed on this ground alone.

Rule 13 (b) of the Rules of this honourable court specifies that documents annexed to the originating application shall be certified copies and the applicant once again failed to comply with the rules as the annexed documents to the originating application are all not certified and it is not stated in whose possession the said documents are. I therefore humbly request that this application be dismissed on this point alone."

The 1st respondent also, in part, addressed the appellant's averments in the founding affidavit as follows:

> *"3.1 Contents herein are denied on grounds that the site in question had always belonged to the deceased Solomon David Lion and his wife 'Matšepiso Lion and they were issued with a title deed to that effect in 1967."*

The respondent went further to say:-

> *"Before it could grant an order for lease cancellation, this honourable court had satisfied itself that indeed the site in question lawfully and rightfully belongs to the 1st respondent, this is because the 1st respondent was granted an portion of the site in issue by one 'Matšepiso Lion sometime in 1993 and the 1st respondent occupied the plot since then to date after developing the said site by erection of a three roomed house;*
>
> *It was only in 2010 that one Mr Paul Ramotšo and Mr Jankie Mohapi complained about the 1st respondent's occupation of the plot and they ended up causing the applicant to sue the 1st respondent in the Maseru Local Court for ejectment in CC110/11 which court ruled in 1st respondent's favour. The applicant then appealed against same which appeal was dismissed.*
>
> *The 1st respondent then instituted LC/PN/16/2012 before this honourable court after the applicant wrote to the 1st respondent a note directing her to vacate the house in issue by the 30th November 2012.*
>
> *b) The plot in issue has always been lawfully owned by the deceased 'Matšepiso Lion and her husband Solomon Lion;*
>
> *c) 1st respondent is indeed the lawful and rightful owner of the site in question.*
>
> *The court order granted by this honourable court confers unto the 1st respondent rights that are actually due to her because she is the rightful*

and lawful owner of the portion of a site in issue. The 1st respondent is therefore at liberty to use the site in a manner that is favourable to her." (own underlining)

[8] On 10 July 2017 the respondents herein filed a counter application against 1st – 20th applicants seeking the following relief:-

"a) That the rule nisi do hereby issue calling upon the Respondents herein to show cause if any on a date to be determined by this honourable court why;

b) The ordinary period of notice and modes of service shall not be dispensed with due to the urgency of this matter;
c) Eviction of the 1st to 20th Respondents in reconvention from the 1st applicant's site;
d) Interdicting the 1st to the 20th Respondents in reconvention from threatening assaulting or threatening to assault or interfering in any manner whatsoever, the peaceful enjoyment of the said property on site number 13284-343 at Maseru urban;
e) That the 21st Respondent be ordered to assist the applicants with the enforcement and the implementation of the order of this honourable court;
f) This prayers be granted as interim pending rescission application;
g) Ordering the respondent to pay costs of this application on attorney and client's scale;
h) Further and alternative relief;
i) Prayers 13 (b), (d), (e) and (f) operate with immediate effect as interim orders pending the finalization of the application."

[9] In addition to the counter application, on 16 August 2017, the 1st respondent filed an application to amend her answer filed on of 20 March 2017. The 1st respondent applied to amend her answer as following:-

"By deleting paragraph 5 (a) and 6 titled "Interim Relief" and substituting with the following paragraphs:

1. *Contents herein denied. Before it could grant an order for lease cancellation, this honourable court had satisfied itself that indeed the site in question lawfully and rightfully belongs to the 1st respondent, this is because the 1st respondent was granted the site in issue by one 'Matšepiso Lion o or about 1993 and the 1st respondent has been in lawful possession and occupation of the said site since then to date after making some developments by erection of a three roomed house.*

2. *The 1st respondent has been confirmed as the rightful and lawful owner of the site in issue by the* ***Maseru Local Court in CC/110/12*** *whereby the original owner of the site the late 'Matšepiso Lion testified on behalf of the 1st respondent while one Paul Ramotšo (who has paradoxically brought this application on behalf of the applicant) testified on behalf of the applicant. The said judgment is attached and marked MM3 and its fair translation* ***MM3A****. Applicant appealed against the decision in* ***CC/110/12*** *which was dismissed by* ***Matsieng Central Court****.*

3. *As if this was not enough, applicant through the same Paul Ramotšo filed an application at* ***Maseru Magistrate Court in AP:173/12*** *where he tried to interdict the 1st respondent from the use of the said site in issue but the court dismissed that application. Said Court Order is attached and marked* ***MM4****.*

4. *It is thus clear that this matter has been subject of many decisions of the courts in favour of the 1st respondent and the applicant is clearly* ***abusing the court's process*** *and their application has to be dismissed with costs an attorney and client's scale.*

Contents are denied. The contents of paragraph 5 above are reiterated. Further, the Court Order granted by this honourable court confers unto the 1st respondent rights that are actually due to her because she is the rightful and lawful owner of the site in issue. Consequently the 2nd and 3rd respondents have rightfully and lawfully issued the lease in the names of the 1st respondent, the said lease in attached hereto and marked MM5 since there was no order or application for stay of execution of this honourable court's order."

The papers are silent on whether or not the application for amendment was ever entertained by the court. The same papers are also silent on how the court *a quo* dealt with the special answer filed by the 1st respondent on 20 March 2017. In the absence of a judgment it is remains difficult to know whether or not the Judge ever exercised her mind on these issues.

[10] On 5 December 2017, the court *a quo* dismissed the appellant's application for stay and rescission. The order of the court *a quo*, which was again issued in default, reads as follows:

"It is hereby ordered that:

1. *All applications by the Applicant be and are hereby dismissed with costs on attorney and client's scale.*
2. *Applicant's application for stay of execution be dismissed with costs on attorneys and client's scale.*

3. *All other prayers prayed and set out in paragraph 19 (c) and (d) of the 1st respondent's heads of arguments, namely that:*

3.1 The 1st to the 20th Respondents be and are hereby ejected from the Applicant's site no 13284-343 at Motimposo.

3.2 The 1st to the 20th respondents be and are hereby interdicted from threatening, assaulting and/or threatening to assault or interfere in any manner whatsoever with the 1st respondent's peaceful enjoyment of the said property being site no 13284-343.

3.3 The 21st respondent, being ***Officer Commanding Mabote Police, be and is hereby ordered to assist 1st respondent in the enforcement of this order*** *of this honourable court by ejectment of the 1st to the 20th respondents from the said site.*

Be and are hereby granted with costs against the applicant's church*."*

[11] As can be seen, the first paragraph of the Court Order granted on 5 December 2017 refers to the dismissal of <u>all</u> applications. The applications covered under the word "ALL" are not specified.

However, what appears from the record is that there were three applications before the court namely: the appellant's application for stay and rescission filed on 24 October 2016, the 1st respondent's application to amend her answer, filed on 16 August 2017 and the respondent's counter application, filed on 10 July 2017.

This appeal seeks to have the above court order set aside.

[12] In seeking to have the Court Order granted on 5 December 2017 set aside, the 1st appellant relies on the following grounds of appeal:-

GROUNDS OF APPEAL

"1.The honourable Judge of the land court erred and misdirected herself in dismissing the applicants' rescission application on the basis of the 1st respondent preliminary objection namely res judicata.

2. *The honourable Judge of the land court erred and misdirected herself in ordering that 1st and 20th appellants be ejected from site No. 13284-343 at Motimposo when there is an abundantly clear evidence gleaned from the 1st respondent's originating application that 1st respondent was only disputing a certain portion of the site forming part of site No. 13284-343 not the whole site.*

3. *The learned Judge a quo erred by permitting and/or allowing the first respondent to argue the so called res judicata point when it was incompetent for her to raise such a point in view of the fact that she was the dominis litis having initiated the main originating application*

4. *The Judge a quo in allowing first respondent to argue the said point misconceived the law and failed to appreciate that res judicata is raised as defence and not a cause of action.*

5. *The court a quo erred in dismissing the rescission application when on 1st respondent's own papers, it was abundantly clear that she had no title at all on the plot in dispute.*

6. *The learned Judge in the court a quo erred by dismissing the rescission application when the undisputed evidence clearly indicated that title in the plot in dispute vested in the first appellant.*

7. *The Judge a quo erred in not finding that first respondent's contention that she was granted title in the plot in dispute by 'Matšepiso Lion was not proved on the papers.*

8. *Even assuming that first respondent had proved on the papers that she was granted title in the plot by the said 'Matšepiso Lion, without conceding, the court erred by not finding that the said 'Matšepiso Lion had no title in the plot which could be granted to first respondent.*

9. *Even assuming without conceding that the said 'Matšepiso Lion had title in the plot, the court erred in not finding that the formalities of the Land Act had not been complied with that consequently any purported granting of title by her to first respondent would have been an invalid, unlawful, and null and void disposal of title in land*

Appellant reserve an opportunity to file additional grounds of appeal when and/or if reasons for judgment become available."

The above grounds of appeal, in my view revolve oround two issues, namely, the defence of *res judicata* and lack of evidence establishing title to the land.

[13] As already stated, the dispute is based on competing claims to a site of land under Lease Number 13284-343. The 1st respondent contends that the site was given to her by one 'Matšepiso Lion in 1993. She then occupied the land from 1994 and her ownership was confirmed by the Central

Magistrate Court in March 2012. That confirmation, it is alleged, led to the cancellation of the lease granted to the appellant in 1994.

[14] The appellant on its part, lays claim to the site mainly in the following terms:-

> *"The Applicant bought the rights in the site in issue from one Solomon David Lion and prior to that Mr Solomon held the said site as a trustee of the Applicant church. He was also granted certificate of Allocation stating clearly that the site is for the church. He is the founder of Applicant church."*

The appellant asserts that a lease was later granted to it in 1994. i,e the lease cancelled by the Land Court on 9 March 2015.

[15] The appellant must satisfy this court that there are indeed grounds for the setting aside of the court *a quo*'s decision rejecting its application for stay and rescission. The order appealed against was granted in default where, in the absence of a judgment or reasons, I can only assume that the court *a quo* was guided by the papers before it. I have listed under paragraph 2 of this judgment, the documents that are relevant for the determination of this appeal. The said documents were agreed to by Counsel for both sides.

It should therefore be assumed that the court *a quo*'s decision to dismiss all applications filed by the appellant was based on the papers appearing in the reconstructed record.

[16] 1) With respect to the granting of default judgment Rule 22 of the Land Court Rules 2012 provides as follows:-

"22 1) Without prejudice to the provisions on service of notice and non-appearance on the 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"*

Rule 51 of the same Rules also provides, in part as follows:-

"Where the applicant appears and the respondent does not appear on the date fixed for hearing:

a) If it is proved that the notice was duly served, the application shall be heard in the absence of the respondent;
b) .....
c) .....
d) *....."* (own underlining)

Clearly in terms of the above rule the court may proceed to hear the matter as long as it is satisfied that the respondent was served with notice.

In the case of a judgment obtained in default, Rule 57 of the Rules provides as follows:-

> *"57. (1) Any respondent against whom a judgment is entered or order made in his absence or in default may, within one month of the day when he became aware of such judgment or order, apply to the court that passed the judgment or made the order to set it aside.*
>
> *(2) 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.*
>
> *(3) 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."*

I want to believe that it is under the above rule that the appellant's application of 24 October 2016 was filed.

It is in that application where the appellant says the application for the cancellation of the lease was never served on it. He states:-

> *"c) The elders made directive that he should meet the then Counsel to consult about the situation. I am advised by my Counsel of record and believe same to be true that the Application for the cancellation of a lease should have been served to the Applicant or at least any member or church secretary or the committee of the Applicant. To my*

surprise none of them is aware of such application. I am further advised that the court order discovered at LAA should have been served as has been shown above. It was never served. The 1st Respondent took Applicant by surprise. This has denied the Applicant opportunity to be heard. It is crucial to inform this Honourable Court that application for the rescission was instituted, however it was withdrawn with costs as the then Counsel had noticed some defects in it. Applicant understood that such withdrawal shall not be a bar from instituting it again.

a) It is not clear how the court made a court order cancelling Applicant's lease though 1st Respondent has no title deed to this site upon the discovery of court order at LAA, the then Counsel for the applicant went to the High Court to find out what exactly happened, However, she was met with sad position that file LC/APN/16/12 is missing even today;

b) The Applicant bought the rights in the site in issue from one Solomon David Lion and prior to that Mr Solomon held the said site as a trustee of the Applicant church. He was also granted certificate of Allocation stating clearly that the site is for the church. He is the founder of Applicant church."

[17] I have already pointed out that a careful examination of the grounds of appeal shows that they can in fact be reduced to two main ones, namely that:-

i) The court *a quo* erred in accepting the defence of *res judicata*; and

ii) The court *a quo* did not, through merely reading the papers filed, have adequate evidence on the issue of Title

i.e identifying the rightful owner of the site in dispute and hence failure to consider the prospects of success.

If this court finds that the court *a quo* misdirected itself in its examination of the above grounds, which examination I shall assume, in the absence of written reasons, was based on papers filed, the court order shall be set aside.

[18] In response to the appeal, the respondents identified the issue for determination as:-

> "5.*1 The issue for this appeal seems to be whether the court a quo erred in dismissing the rescission application on the basis that the case was res judicata.*
>
> *5.2. Secondly whether the 1st appellant made the case for the rescission application."*

The respondents alleged that the 1st appellant was served with notice of hearing on 29 January 2015 for the hearing on 9 March 2015 when the default judgment was granted. As already seen, the appellant denies that.

The respondents, however, maintain that the appellants did not show good cause for failure to attend court on 9 March 2015 and that, given the judgments of the Local and Central Courts, there were no prospect of success. The respondents then proceed to raise the defence of res judicata. In so doing the respondents rely on Rule 66 (2) which provides as follows:-

> *"(2) Any party may make an objection on the following grounds:-*

a) *That the court has no jurisdiction;*
b) *That there is a final and binding decision by a competent court over the same claim."*

The respondents submitted that on the basis of *res judicata* and the special answer filed on 20 March 2017, the court *a quo* was correct in dismissing the rescission application. It was on the basis of *res judicata* that the court had granted the order of 28 November 2012 which cancelled the appellant's lease.

In ***Joy To The World v Neo Malefane C of A (CIV) 09/2016***, this court defined the defence of *res judicata* by way of quoting from ***Smith v Porritt and Others 2008 (6) SA 303 (SCA)*** where the court summarized the requirements for successful reliance on the exception *rei judicatae* as follows:-

> *"Following the decision in* ***Boshoff v Union Government 1932 TPD 345*** *the ambit of the exception rei judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by* ***Botha JA in kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 670J-671B****, this is not to be construed as implying an*

*abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by case basis. (**Kommissaris van Binnelandse Inkomste v Absa Bank** (supra) **at 670E-F**). Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by **De Villeirs CJ** as long ago as 1893 in **Bertram v Wood (1893) 10 SC 177 at 180**, 'unless carefully circumscribed, (the defence of res judicata is capable of producing great hardship and even positive injustice to individuals'."*

I shall now proceed to examine whether or not on 28 November 2012 the papers before the court *a quo* revealed the presence of the defence of *res judicata*, which defence, it is claimed, was again used when the application for stay and rescission was rejected on 5 December 2017.

[19] In dealing with that issue, the appellant argued that the defence, as argued by the 1st respondent, was never specifically raised when the 1st respondent filed its application of 27 November 2012, wherein she sought the following relief:-

"1) a) The rules of court as to from notice and service shall not be dispensed with on account of urgency.

2) The respondent shall not be interdicted from expelling the applicant from the site at Motimposo bearing plot number 13284-343, pending finalization of the matter.

3) *The respondent's lease number 13284-343 shall not be declared null and void and be cancelled.*

4) *The applicant shall not be declared the rightful and lawful owner of the named site."*

[20] The defence of *res judicata*, explained and defined in case law above, can indeed be available to a party in litigation.

The application that was before the court *a quo* on 28 November 2012 was brought in terms of the Land Court Rules 2012 (the Rules) and it is under those rules that the proceedings ought to have been managed.

[21] (i) The defence of res judicata raised by the respondent is based on Rule 66 (2) (b) which provides that:-

"2 Any party may make an objection on the following grounds;

(a) - - -

(b) That there is a final and binding decision by a competent court over the same claim;

(c) - - -

(d) - - -

(e)- - -

(f) - - -"

Rule 64 also states:-

> *"(1) At the first hearing the court shall read the pleadings and ascertain from each party or his legal representative whether he admits or denies such allegations of fact as are made in the application or answer and as are not expressly or by necessary implication admitted or denied by the party against who they are made.*
>
> *(2) The court may orally examine either party in relation to any material fact of the legal action.*
>
> *(3) Where the legal representative of any party who appears by a legal representative is unable to answer any material question relating to the application which the court considers that the party whom he represents has to answer and is likely to be able to answer if examined in person, the court may adjourn the hearing to a future day and direct that such party shall appear in person on that day.*
>
> *(4) After examining the parties the court shall give directions as to the further conduct of the proceeding.*
>
> *(5) The substance of the examination held under this rule and any admission or denial made in the course thereof shall be recorded by the court."*

(iii) Rules 67, 71 and 72 also provide for how objections and hearings shall be managed by the court.

[22] The major problem *in casu,* as already stated, is that there is no judgment to support the order that was granted on 28 November 2012.

Furthermore, the order dismissing the stay and rescission application merely reads:-

> *"All applications by the applicant be and are hereby dismissed with costs on attorney and client's scale."*

There is no reference to *res judicata* or special answer in the order. It is the respondents who informed the court that the appellant's application for stay and rescission was dismissed on the basis of the defence of *res judicata*. There is no evidence of that in the record. Such evidence would have informed us how the court *a quo* responded to the special defences raised

[23] Admittedly this was a default judgment and one can safely assume that the court relied on the papers before it. However, in granting the relief sought, the court must satisfy itself that the evidence before it justifies the granting of the relief. The court must have satisfied itself indeed that if the cancellation of the applicant's lease was based on the order of the Local Magistrate's Court, then the existing lease was granted in terms of the country's Land Laws. That would also have entailed an interrogation of the orders of magistrate's Court since there ought to be clear evidence to support the defence of *res judicata*. We do not seem to be told whether or not any inquiry was, in terms of the Land Rules, made before the court's decision on 28 November 2012.

[24] This was a motion process where disputes of fact arose. There were a number of disputes of fact particularly in relation to areas spelt out under paragraph 25 in this judgment.

The facts of this case clearly dictate that the court should have followed the procedures laid down in the Rules particularly rules 64 and 66. The court, for reasons not stated, merely proceeded to grant default judgment without regard to the procedures laid down in the Land Court Rules.

[25] This, as already stated, was an opposed matter wherein the originating and answering affidavits of both parties (the main parties) reveal disputes of fact which, in my view, required *viva voce* evidence. There was, due to disputes of fact, need to:-

a) find out what had actually transpired relating to the local court decisions which were not appealed against and indeed where the appellant says the relief sought was an interdict, and that the court had no competence to deal with the matter;

b) ascertain how the issue of title to the piece of land was handled, leading to cancellation of lease; whether laid down procedures in obtaining title were followed;

c) find out why the 1st respondent's answering affidavit referred to a portion of the land in dispute;

d) establish if the appellant had a reasonable excuse for failure to attend court when the default order was granted *moreso* where it maintains that there was never any service of notice;

e) attend to the issue of whether or not the appellant, under the given situation had any reasonable prospects of success i.e addressing the major requirements for an application for rescission.

[26] All the above issues, in my view, required evidence because the parties viewed them differently.

In agreeing with the position taken in ***Likotsi Civic Association and 14 Others, C of A (CIV) No. 42/12,*** Mosito P in ***Rasetla B. Mofoka v Lesenyeho and 3 Others C of A (CIV) 71/14*** said in part:-

"[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."

> *"(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."

"*[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 or have been granted in such circumstances. The judgment was therefore irregular. If a judgment is irregular, the appellant was entitled ex debito jud ticiae 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 complained 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."

[27] In my view, the above cited cases advance the correct position in dealing with this appeal. The irregularities in this case call for the setting aside of the court *a quo*'s order of 28 November 2012. The Rules of the Land Court were ignored. Had the court *a quo* taken the trouble to look at the Land Court Rules, it would have certainly granted the application for stay and rescission to allow for the matter to be properly decided.

[28] The setting aside of the court order granted on 28 November 2012, also impacts on the counter application which was

based on the understanding that the 1st respondent's title could not be questioned. The issue of title still needs to be looked at in terms of the country's land laws. In the result the appeal should succeed.

I therefore order as follows:

1. The appeal succeeds and the order of the court *a quo* granted on 5 December 2017, is set aside and substituted with the following:-

   "(i) The court order granted by the court a quo on 28 November 2012 be and is hereby rescinded with costs.

   (ii) The counter application filed by the respondents on 10 July 2017 be and is hereby dismissed.

   (iii) The 1st respondent be and is hereby directed not to dispose her rights in the site in issue pending the finalisation of this matter.

   (iv) The matter is remitted to the Court a quo for the determination in of the application filed by the respondents on 27 November 2012 in terms of the Land Court Rules."

2. The respondents shall jointly and severally, the one paying the others to be absolved, pay costs of this appeal.

N. T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree:

P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

M. H. CHINHENGO
ACTING JUSTICE OF APPEAL

For Appellants : Adv. E. M. Sello
For Respondents : Adv. B. Sekonyela