

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 50/2021

LC/APN/42/2018

HELD AT MASERU

In the matter between:

STANDARD LESOTHO BANK LIMITED

APPELLANT

And

**MOOKHO SELOGILE BOHLOKO
RESPONDENT**

1ST

**TOM SELOGILE
RESPONDENT**

2ND

**KABELO SELOGILE
RESPONDENT**

3RD

**NTHABISENG SELOGILE
RESPONDENT**

4TH

**PITSO SELOGILE
RESPONDENT**

5TH

**SELOGILE FAMILY TRUST
RESPONDENT**

6TH

**THE LAND ADMINISTRATION
AUTHORITY (LAA)
RESPONDENT**

7TH

CORAM: K.E MOSITO, P
J VAN DER WESTHUIZEN, AJA
N.T MTSHIYA, AJA

HEARD: 11 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY:

Jurisdiction— under rule 84 of land court rules, the land court has jurisdiction to review its own decision—a litigant, with proven interest may apply to the same court for review under grounds stated in rule 85 and the court may vary or reverse its earlier decision- appellant having established acceptable grounds of review, appeal allowed.

JUDGMENT

N.T MTSHIYA AJA

Introduction

[1] This is an appeal against the dismissal of an application for review filed in the Land Court in terms of rule 84 of the Land Court Rules, 2012 (the rules). The application was dismissed by the Land Court on the grounds that the Land Court had no jurisdiction and that the appellant had no *locus standi*. The relevant background pertaining to this dispute is set out here below.

Background

[2] The 1st -5th respondents are members of the Selogile family and the appellant herein is a registered bank in terms of the laws of Lesotho.

[3] The dispute herein relates to plots 17701-001, 17684-161, 17684-287, 17684-001 and 17684-310 registered in the name of the 5th respondent.

[4] On 06 February 2019, under **LC/APN/42/2018**, a default judgment was granted in the Land Court in favour of the 1st , 2nd, 3rd and 4th respondents. The effect of the default judgment was:

- a) the granting of leave to the 1st, 2nd, 3rd and 4th respondents to proceed with action in the Land Court.
- b) a declaration that the registration of plots 17701-001 and 17684-161 referred to in paragraph 3 above in the name of the 5th respondent was fraudulent and wrongful
- c) the registration of plots 17701-001 and 17684-161 be cancelled and be registered in the name of the 6th respondent.
- d) plots 17684-287, 17684-001 and 17684-310 be registered in the name of the 6th respondent: and
- e) that the 5th respondent position as a trustee in the 6th respondent be cancelled.

[5] Armed with the above default judgment the 1st, 3rd and 6th respondents then made an application under **CIV/APN/285/2019** seeking the following relief:

- f) a declaration that the encumbrances on plot numbers 17684-287, 17684-161 and 17684-001 are now null and void.
- g) cancellation of mortgage bonds on plot numbers 17684-287, 17684-161 and 17684-001 for having been fraudulently concluded; and
- h) an order directing the cancellation of the mortgage bonds.

The mortgage bonds referred to in b) and c) above were in favour of the appellant.

[6] The said appellant only got to know about the developments affecting its interests relating to the mortgage bonds when it was served with papers relating to case **CIV/APN/285/2019**. That averment by the appellant was never disputed.

However, the respondents' position was that the appellant could have no interests in properties where it had no title and furthermore the properties of its alleged interests had been successfully auctioned. The respondents went further to say the appellant's interests, if any, were of a commercial nature and should therefore be decided in the Commercial Court.

Notwithstanding any arguments by the respondents, the appellant had, however, never been joined to the initial proceedings in case **LC/APN/42/2018** which resulted in a default judgement against it.

[7] Aggrieved by its non-joinder to the proceedings in case **LC/APN/42/2018** and the default judgment of the court a quo,

the appellant then filed an application for review in terms of rule 84 as read together with rule 85.

The said rules provide as follows:

“84. 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.

The application shall be dated and signed by the party or his representative and filed at the registry of the court.” (My own underlining for emphasis)

Grounds for review

85. An application for review may be made by any interested person on one of the following grounds:

a. 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

b) 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.” (My own underlining for emphasis.)

[8] In its application under rule 84, quoted above, the appellant sought the following relief;

“16.1 Reviewing and setting aside the order granted on the 06th day of February 2019.

16.2 Granting Applicants leave to intervene in those proceedings and to oppose the main application on such terms and conditions as may be determined by this Honourable Court.

16.3 Costs of this application in the event that it is unsuccessfully opposed.

16.4 Such further and or alternative relief as this Honourable may deem proper”.

The above indicates that the main desire of the appellant has been and remains the desire to be joined to case **LC/APN/42/2018** so that it can be heard. In the main, the appellant would want the default judgment granted in that case on 6 February 2019 to be set aside so that upon being joined and granted leave to intervene, it would then have the opportunity to defend its interests based on the mortgages. As stated under paragraph 5 above the said interests were being challenged under case **CIV/APN/285/2019** .

[9] I must point out that ordinarily, since the challenge was mainly directed to a default judgment, the relief of setting aside such a judgment would fall under rule 57(1) which provides as follows:

“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,”

However, let me hasten to say that *in casu* the appellant was not a respondent as envisaged by the above quoted rule. This is so because the appellant, was never cited in case **LC/APN/42/2018** in which the default judgment was granted. Under the circumstances the relief of setting aside the default judgment in that case can only be availed through a review process under rule 84 quoted under paragraph 7 above .The rule, subject to rule 85 which spells out the grounds for review, allows “*Any person whose interests are directly 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,”*

[10] The court *a quo*, as already stated, dismissed the application on the grounds that it had no jurisdiction to entertain the review application and that the appellant had no locus standi. The appellant has now appealed to this court against that decision of the court *a quo*.

Grounds of appeal

[11] The appellant’s grounds of appeal are listed as follows;

1. “*The court a quo erred and misdirected itself by upholding the special answer of locus standi for the following reasons:*

- 1.1.1. *There is no special answer known as locus standi in the Land court rules.*
 - 1.1.2. *Even if it was, the finding is against the weight of evidence that the banks are still the registered bond holders of the properties in question, therefore qualifying as interested persons in terms of rule 85 in as much as there has been no final distribution account.*
 - 1.1.3. *Over and above that, they (sic) are persons whose interests are directly affected by the judgment, which had for all intents and purposes affected the finality of the auction in that the bonds were rendered a nullity. The reasoning that the bank's interests ceased to exist after the public auction was successful is legally flawed. Such is the case once a final distribution account is made and the bonds cancelled.*
 - 1.1.4. *Moreover, this finding is contrary to what is expected of such an applicant for review in terms of rule 85(b). The banks are in a position to adduce relevant and essential evidence to the attention of the court in relation to its earlier judgment.*
2. *The court a quo erred and misdirected itself in upholding the special answer of jurisdiction on one or more of the following reasons:*
 - 2.1.1. *The premise upon which this special answer is taken is flawed in as much as it is akin to a rescission. The review application in terms of rule 84 is not a new application aimed at asserting new land rights.*
 - 2.2. *On the contrary, it is the very argument of the bank that the Land court did not initially have jurisdiction to have granted the orders it did. The judgement herein ignores a prayer for leave to intervene in terms of paragraph 16.2 of the Originating Application.*

2.3. *It is only a court that pronounced on a judgement that can set it aside on review or as commonly known in ordinary civil proceedings, rescission.”*

ISSUES FOR DETERMINATION

[12] In my view, an analysis of the above quoted grounds of appeal (i.e two grounds of appeal in the main) speaks to the fact that the appeal lies to be determined :

- i) on whether or not the court *a quo* had jurisdiction to entertain the review application under rule 84 as read with rule 85; and
- j) whether the appellant had any interest in the matter **(LC/APN/42/2018)** justifying protection under rule 84 as read with rule 85. (**Locus Standi**)

The Law

[13] The appellant approached the court *a quo* by way of an application for review, which review, as desired by the appellant would in the main result in the setting aside of the court order of 6 February 2019 and granting the appellant leave to intervene in those proceedings **(LC/APN/42/2018)**.

Rules 84 and 85, in my view, provide the law to be followed in the review process. The said rules relate to the interests of a party that can seek review and the grounds upon which such review can be sought.

I have under paragraph 7 of this judgment quoted in full the provisions of rules 84 and 85. I have also in those rules underlined what I believe are the major guidelines to be taken into account in applying the provisions of those rules to this appeal.

[14] With respect to establishing interest in a matter, the law is clear. **In United Watch & Diamond (Pty) Ltd vs. Disa Hotels Ltd 1972 (4) SA 409 (C) at 415A**, the Court stated that to establish that one has *locus standi in judicio*, one must show:

“... that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial...”

[15] It is clear that for a review application to be brought under rule 84, an applicant must establish an interest in a matter and also satisfy the court on any one or more of the review grounds spelt out under rule 85.

I shall now proceed to examine the appeal on the basis of the issues that I have indicated under paragraph 12 of this judgment.

Whether the court a quo had jurisdiction to entertain a review of its own judgment under rule 84 as read with rule 85.

[16] I think it is important to start by looking at the issue of jurisdiction as determined by the lower court.

In their answer with respect to the issue of jurisdiction, the 1st-4th and 6th respondents averred:

“2.JURISDICTION

The review application herein is about re-opening the matter with the object of asserting a commercial interest and not claim of title as the matter herein is basically premised. It is submitted that on this score this Court’s jurisdiction is not available.”

The above is reinforced in the respondents' submissions where it is stated, in part, as follows:

"6.2 It is submitted that the interest of the Appellant bank is commercial in nature and has nothing to do with the title or derogation of title and as earlier submitted, the hypothecation agreement did not confer or cede the claim of the title to the Appellant.

6.3 It is submitted that the interest to secure the debt to the bank was based on a contract between the Appellant and the fifth Respondent, Pitso Selogile and that interest is adjudicable before the Commercial Court not Land Court as the Appellant intends to do with the review application at hand.

6.4The commercial interest of the Appellant is not incidental to a claim of title but substantive on its own, hence the submission that the jurisdiction of the Land Court is not available for that relief."(my own underlining).

Clearly, the above submissions do not fully address the import of rule 84 under which the application was made. There is, in my view, unnecessary emphasis on the issue of title without taking into account whether or not the appellant had an interest in case **LC/APN/42/2018** as required by the rule.

[17] The court a quo appears to have been persuaded by the respondents' submissions because in declining/ refusing jurisdiction it reasoned:

" 46) The commercial issue(s) of securing of a debt which was owed to the applicants and the claim of title of the very properties by the respondents herein, are two distinctly separate

issues; the former being commercial whilst the latter is not as it centres on title to that land.

47) In the premises, the preliminary objection of lack of jurisdiction by this Court is upheld.”

The above finding of the court a quo was wrong. The finding totally ignored the fact that the review process under rule 84 requires the applicant to approach the same court that pronounced the judgment under review.

[18] In response to the above arguments and arguing that the court a quo had jurisdiction, the appellant correctly submitted that the Special Answer relating to jurisdiction was misplaced since “it is trite that the tribunal in which to seek this kind of relief is the one in which the judgment was given”.

The appellant went further to say:

“ 7.5 The finding by the court a quo that “a claim of title to land does not have any bearing on the commercial aspect of the issues as argued by applicants” is with respect wrong. This files in the face of the relief sought and granted in the main application. What the Appellant sought in the court a quo is in my humble submission akin to a common law relief of rescission, where a court is entitled in law to revisit its decision. The judgment of the court a quo even overlooked the prayer for leave to intervene in the main proceedings.

7.6 Conversely, the issue of jurisdiction can validly be raised by the Appellant in the matter once it is re-opened to demonstrate that the dispute herein involves commercial rights, which were ignored in the order granted and that does not leave the judgment creditors herein (1st-4th and 6th respondents) without a remedy as the commercial court can

still grant it the same relief, in as much as respondents themselves are contemplating to set aside the auctions.”

[19] In addressing this issue, I am in general agreement with the appellant. I believe that failure to focus on the import of rule 84 is wrong. The review application is anchored on that rule, which, as seen under the part that I have underlined specifically states that the interested party “**may apply to the court that pronounced the judgment**” .That clause in the rule needs no special interpretation . To that end the law clearly imposes a duty on the court that will have pronounced a judgment on the issue or issues in dispute to review its own decision. *In casu* it was the Land Court that had granted a default judgment in **LC/APN/42/2018**. It was to that court that the appellant herein had directed its review application. The rule does not bring in the Commercial Court into the process. There is therefore no issue about jurisdiction in the circumstances of the review application. That application was properly placed before the court a quo.

[20] In view of the foregoing, I agree with the appellant that rule 84 settles the issue of jurisdiction herein. That review power, as given in the rule, cannot be derogated to another court.

My finding therefore is that the court a quo had jurisdiction to deal with the review application.

[21] It should be noted that, notwithstanding the finding that it had no jurisdiction the court, however, still proceeded to address the issue of locus standi including the merits of the

matter. To that end and for the sake of finality in this matter, it will be necessary for this court to holistically address all the issues that were raised in the dismissed application. I believe that remitting the case to that court would serve no purpose.

Whether the appellant had an interest in the matter justifying protection under rule 84 as read with rule 85 (locus standi).

[22] The appellant's argument heavily relies on rule 84 of the Land Court Rules, 2012. In the court a quo, the appellant, with respect to **LC/APN/42/2018**, contended that it had direct and substantial interests as a bond holder over the properties in question. The appellant averred that it could prove its interest through giving evidence. It therefore argued that the proceedings therein, in its absence, consequently had an effect on its legal rights. The appellant's interests were being tempered with without it being heard contrary to the fundamental principle of the *audi alteram partem* rule.

However, notwithstanding the fact that the appellant still had possession of the land leases relating to the properties, the court a quo dismissed its application on the grounds that the appellant had already relinquished its right over the bonded properties after a successful public auction. It further reasoned that the appellant's interests "are to secure the debts but not to claim title".

[23] In its application aimed at protecting its interests from the impact of the default judgment in case **LC/APN/42/2018**, the appellant averred:

“ 6. This came as a surprise because Applicants were not cited therein nor were they served in circumstances where they had a direct and substantial interest, regard being had to the fact that those properties were bonded with Applicants. This case was only meant to clear for CIV/AP/285/2019 as the 1st 2nd and 6th Respondents are in that application praying for cancellation of bonds. The irresistible conclusion is that they were aware of the hypothecations all along.

7. Apart from that, these properties were subject of judgements in execution in CCCT/0070/2017; CCT/0071/2017; CCT/0072/2017 and CCT/0253/2017, cases of the Commercial Court, on public auctions that were held in February Family Trust and PEG (Pty) LTD which has since ceded it to Chai Mel Enterprises (Pty) Ltd.

[24] Furthermore in its submissions, the appellant states;

“6.2 An applicant for an order setting aside or varying a judgment or order of court must show, in order to establish locus standi, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled intervention in the original application upon which judgment or order was granted.

6.3 In casu, it need not be overemphasized that Appellant as judgment creditor and/ or execution creditor in Commercial Court cases; CCT/0070/2017;CCT/0071/2017;CCT/0072/2017 and CCT/0253/2017; as a bond holder of the properties in question, has a direct and substantial interest in the matter, in as much the hypothecation of those properties created a limited real right in respect thereof.”

6.4 It is therefore not correct that “ the Applicants” case in the application for review does therefore not fall within the ambit of Rules 84 and 85 of the Rules of this Court.

The above submissions are very important for the establishment of the appellant’s interests in the subject matter under case **LC/APN/42/2018**.

[25] The existence, of mortgage bonds in favour of the appellant is common cause. I want to quickly state that whether or not the properties were auctioned, that alone does not extinguish the interests of the appellant until the mortgage bond is formally cancelled with the consent of the appellant. Furthermore, the appellant argued that even if the properties had been auctioned, there was no final distribution account to facilitate the cancellation of the mortgage bonds.

The relevant part of the mortgage bond reads as follows;

*“Now Therefore the Appearer q.q. declared the condition of this Bond to be such that it shall be and remain in full force, virtue and effect as a continuing security and covering Bond for each and every sum in which the Mortgagors may now be or hereafter become indebted to the Bank from whatever cause arising notwithstanding any fluctuation in the amount even temporary extinction of such indebtedness until such time as this Bond shall be cancelled by consent of the **Bank** in the Deeds Office which consent shall be granted if the Mortgagors fully and faithfully carries out all and every condition and obligation entered into by the Mortgagor with the **Bank** and discharges all the Mortgagors’ indebtedness to the **Bank**.”*

[26] Indeed, *in casu* what needs to be established is whether or not the appellant had interests in the outcome of the proceedings in **LC/APN/42/2018** where it was not cited. Generally the principle of locus standi *in judicio*, as we have seen in **United Watch & Diamond (Pty) Ltd** supra, essentially relates to “*an interest in the subject matter of the judgment or order sufficiently direct and substantial...*”

[27] Contrary to the reasoning of the court a quo, I am of the firm view that under rule 84 the appellant has *in casu* established that it has interests in the matter, which interests were directly affected by the default judgment in **LC/APN/42/2018**. Apart from saying the interests were commercial in nature, the respondents did not dispute their existence. Such interests are the ones that would fall under the protection of rule 84 and thus justifying the review application.

[28] The appellant correctly argued that it has interests in the default judgment in **LC/APN/42/2018**. It was not disputed that the appellant is a judgment creditor in commercial cases CCT/0070/2017, CCT/0071/2017, CCT 0072/2017 and CCT/O253/27. These were the same properties where the appellant is a bond holder.

[29] It must be noted, however, that the establishment of the appellant's interests alone does not in itself entitle it to success in the review application. In proceeding under rule 84, an applicant has to satisfy one or more of the review grounds stated under rule 85.

[30] In *casu*, I believe that in embarking on the review process the appellant relied on the ground under rule 85(a) which relates to **“other inappropriate and misleading conduct on the part of either party in the course of the proceedings.”**

Admittedly, the order under **LC/APN/42/2018**, was granted in default. However, in its application the appellant made the following averments;

“6.....This was only meant to clear way for CV/APN/285/2019 as the 1st, 2nd and 6th respondents are in that application praying for cancellation of bonds. The irresistible conclusion is that they were aware of the hypothecations all along.

7.....

8. Although respondents claim that plot 17684-161, has long been sold (presumably before their application) to one Mr. Lipeni Lejakane, they failed to join him in their application. This was irregular.”

9. Had this Honourable Court been aware that the bond holders and in this instance the Applicants were not cited nor served, it would not have granted the order in the manner that it did because the manner in which the proceedings were undertaken and the order itself is prejudicial to the interests of Applicant because by virtue of registration on the hypothecation, Applicants acquired a real right over the property.

11. Under the circumstances it is therefore clear that Applicants could not have known about the proceedings hence this application at this stage. Non-participation was not deliberate as the respondents are guilty of non-joinder. Moreover, the case proceeded in a rather novel way in that

instead of proceeding in terms of rule 50, the court allowed a so-called affidavit in lieu of oral evidence. This was highly irregular as it is not provided for, by the rules.”

The said rule 50(1) provides as follows;

“50(1) On the fixed hearing day, the parties shall be in attendance in the court in person or through their agents or legal representatives and the application then shall be heard”

My reading of the appellants’ averments suggests to me that contrary to this rule the parties were not attendance, but the court proceeded on the basis of affidavits filed. I have not seen a clear denial of this allegation from the respondents.

[31] Given the forgoing averments by the appellant I find myself persuaded to accept the appellant’s assertion that in filing the application, **LC/APN/42/2018**, the respondents were fully aware of the appellant’s interests in the properties. However, as already stated, the respondents deliberately took the view that such interests were of a commercial nature and as such they saw no need to cite the appellant. That, in my view, was inappropriate conduct on their part. The said conduct denied the appellant involvement in a matter in which it had clear interests.

[32] Furthermore, the appellant averred that failure to join a party such as the alleged purchaser of one of the properties, Mr Lipeni Lejakane (Lejakane) and failure to order viva voce evidence was irregular. In my view, the respondents do not pay serious attention to or adequately address the procedural issues raised by the appellant. For instance, in response to the

joining of Lejakane and the failure to comply with rule 50 the respondents' merely say :

"4..... The same Lejakane could resist when being confronted with the misrepresentation committed by the said Pitso Selogile, he wouldn't deny save to appear as an innocent purchaser of rights, this would be dealt with in the case of the said Lejakane should there be one not by the Applicants herein.

7. Contents herein are highly denied to a certain extent, it is specifically stated that there is no irregularity that could, even if (though not admitting) committed, warrant review of the order herein at the behest of the now Applicants; who do not have any interest in the title but on the debt between themselves and Pitso Selogile. The Applicants are non-suited herein, maybe else where they can still pursue their debt against the said Pitso Selogile.

[33] With respect to compliance with rule 50 the respondents do not at all explain what they mean by "*contents are highly denied to a certain extent*". That response is incomplete and does not assist the court in anyway.

I also find it absurd to note that whilst the respondents find it fit to deal with Pitso Selogile, the 5th respondent, whom they accuse of fraudulently obtaining title to one of the properties, they do not deem it necessary to cite those he dealt with such as Lejakane who is said to have obtained title to one of the properties.

I want to believe that it is on the basis of the respondents' failure to adequately address the irregularities raised that led

the appellant to proceed in terms of rule 84 as read with rule 85 (a) as indicated under paragraph 29 above.

In conclusion therefore, I am satisfied that grounds existed to justify the appellant's application for review under rule 84.

Disposition

[34] *In casu*, given the import of rule 84, the Commercial Court had no jurisdiction to deal with the application brought under that rule. Not only that, but the decision being also sought to be rescinded was made by the Land Court and not the Commercial Court. Accordingly, remitting the matter to the commercial court would not be in sync with Rule 84.

[35] In addressing the appellant's *locus standi* to institute review proceedings in the court *a quo*, I am of the view that the appellant had substantial interests in the outcome in case **LC/APN/42/2018** where it was not cited. The appellant is a mortgage bond holder and thus any judgment that impacts on the properties in question has an effect on its interests and legal rights. The appellant as already argued, as a legal right to be heard. It is clear from rule 84 that the review envisaged is a remedial procedure in the Land Court rules availed to any person not cited in any earlier proceedings which result in a final order affecting his or her interests. That being the case, it is in the interests of the appellant that the order in **LC/APN/42/2018** be set aside and that the appellant be granted leave, to intervene in those proceedings so that it can defend its interests.

It is worth noting that, notwithstanding the fact that the court a quo dealt with the merits of the matter, for unexplained reasons, the issue of leave to intervene was never addressed. To me that issue was an important relief sought by the appellant and should have been addressed.

All in all, this appeal should succeed.

Order

[36] I therefore order as follows;

1. The appeal is upheld with costs.
2. The judgement of the court a quo is set aside and substituted with the following;
 - k) The order of this court granted on 6 February 2019 is set aside.
 - l) The appellant is granted leave to intervene in case **LC/APN/42/2018** to defend its interests.
 - m) The respondents shall pay costs of this application.

N.T MTSHIYA
ACTING JUSTICE OF APPEAL

I agree:

**K.E MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree:

**J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

FOR THE APPELLANT:

ADV T. MPAKA

FOR THE 1ST- 4TH & 6TH RESPONDENT:ADV T. POTSANE