

CIV/T/313/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOLETSANE PHEKO

Applicant

vs

LIKOTSI MAKHANYA

1st Respondent

STERLING AGENCIES (PTY) LTD

2nd Respondent

DEPUTY SHERIFF (M. PAKISI)

3rd Respondent

LAND ADMINISTRATION AUTHORITY

4th Respondent

JUDGMENT

Coram: **Hon. Hlajoane J**

Date Hearing: **18th May, 2012.**

Date of Judgment: **13th June, 2012.**

Summary

Application for Rescission – When to be granted – Property having been sold following upon the granting of a default judgment – Applicant requesting the Court to interdict transfer of Property and Applying for

rescission – Interdicts granted following on the granting of rescission of judgment.

- [1] This is an Application for rescission and setting aside of the judgment that was granted by default on the 11th August, 2011. The Applicant is also seeking for an interdict against the 4th Respondent from processing an Application for a lease. The second Respondent is also to be interdicted and prevented from collecting rentals or evicting tenants at Applicant's premises in Masianokeng.
- [2] Respondents raised some points of law in terms of **Rule 8 (10) ©** and in the answering affidavit. The points raised are the following:
- (a) Dispute of fact
 - (b) Abuse of Court process
 - © Failing to apply for rescission within 21 days of being aware of judgment
 - (d) Urgency.
- [3] On the papers it has only been alleged that there is a dispute of fact without necessarily specifying what that dispute of fact is. So that there is no merit on this point. He only said Applicant was served with both summons and Writ of Execution.

[4] On abuse of Court Process

Respondents here have said it is wrong for the Applicant to apply for nullification of sale without applying for a rescission of judgment.

[5] On looking at the prayers sought to be granted in the Notice of Motion, Applicant has not only asked for interdict from processing lease to the immovable property subject matter of this Application and interdicting and preventing collection of rentals from the premises in question but has also prayed for rescission and setting aside of the judgment which was granted by default.

[6] The 1st Respondent in support of his argument in [4] above relied on the case of **Mthembu v Lehola**¹ where sequestration order was granted following upon the granting of a summary judgment. The Court of Appeal held that the sequestration order was dependent upon the summary judgment which had neither been rescinded nor otherwise set aside in proceedings instituted for that purpose.

[7] In *casu*, the present proceedings are about applying for rescission of judgment that was granted by default. Prayers for interdicts are meant for allowing to consider whether or not the Court is going to grant rescission. It would be different if Applicant had only applied for interdicts without having also applied for rescission of

¹ 1990 – 1994 LAC 578

judgment. So that the remedy sought in the present proceedings is distinguishable to that in **Mthembu's** case above.

[8] On failing to have applied for rescission within the time limits stipulated by the Rules of Court, Respondent argued that the Application ought to be dismissed as Applicant took no steps after learning of the granting of the default judgment against him.

[9] Applicant on the other hand argued that he took steps after knowing of the Court process which had been served on his wife in his absence. That when the Deputy Sheriff came to serve him with a writ he was never requested to point out his movable assets.

[10] Applicant may have delayed to take steps after knowing of the default judgment against him, but the Court in the interest of justice and following on the dictates of the section in the **Lesotho Constitution**², that where rights are concerned one need not be deprived of such rights without affording him a hearing, the Court feels compelled to condone the non-compliance with the Rules of Court.

[11] The above point will go hand in hand with the point on urgency. The Respondent has argued that the matter has lost urgency due to the fact that the property has already been sold.

² Section 17 of Lesotho Constitution 1993

[12] Applicant has explained in his affidavit as to why he could not have approached the Court sooner than he did. This Court has earlier on dealt with the Application in which there was a purported sale by the Applicant. The said sale has been declared null and void, which meant the property remained to be that of the Applicant.

[13] The point above also covers the issue of *locus standi*. Respondent has argued that Applicant had no *locus standi* to have brought this Application as he claimed to have sold the property. But that sale is the one which the Court has decided that it was invalid.

[14] Applicant has also given reasons as to why it was not possible for him to have defended the action and his reasons could not be considered as unreasonable. He had been advised by his Chief and Deputy Sheriff besides having wasted time in making a search for his case at the Local Court as his wife had misplaced or lost the Court papers. He has also applied for condonation of the late filing of the Application at 2.8 of his founding affidavit.

[15] Again the Applicant has also given reasons why he has asked the Court to believe that he had a bona fide defence. A decision on that can only be made after hearing from both sides.

[16] Applicant has alleged that even with the service of the Writ of Execution he was never asked to show or point at his movable

property. This was denied that the Deputy Sheriff was even paid a sum of M3,500.00 as his fees. But the Court was referred to the copy of the writ in question for movable. There is no indication on it to show that any property was attached, or that Applicant refused to point at his property. Applicant has signed on the writ and the Deputy Sheriff has signed to show the amount of M3,500.00 received by him.

[17] As shown earlier on in this judgment the sense of what is just dictates that because we are dealing with the question of interfering with the persons rights, the court is going to allow that the Applicant be heard before a final decision is made. He will only be heard by allowing him time to defend the action.

[18] The Application is thus granted in terms of Prayers 2.1, 2.2 and 2.3 of the Notice of Motion. The rescission Application is granted and Applicant allowed 14 days within which to enter appearance to defend. Costs will be costs in the course.

A. M. HLAJOANE
JUDGE

For Applicant:

Mr Letsika

For 1st and 3rd Respondent:

Mr Habasisa

For 2nd Respondent:

Mr Ntlhoki