CIV/T/313/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:

LIKOTSI MAKHANYA Applicant

And

MALEFETSANE PHEKO 1st Respondent

STERLING AGENCIES (PTY) LTD 2nd Respondent

DEPUTY SHERIFF 3rd Respondent

LAND ADMINISTRATION AUTHORITY 4th Respondent

JUDGMENT

CORAM: HON HLAJOANE J.

DATE OF HEARING: 29TH OCTOBER, 2012.

DATE OF JUDGMENT: 9TH NOVEMBER, 2012.

SUMMARY

Application for leave to appeal – Rule 8 of the High Court Rules having not been followed – The Court being asked to review its own decision – Application dismissed with costs.

[1] This is an application for leave to appeal. Default judgment was granted in this case which was later challenged by applying for rescission of judgment.

[2] The rescission application was argued and the Court granted the rescission allowing the applicant fourteen days within which to enter his appearance.

[3] It is that order granting the rescission which is being sought to be appealed against. The Court in dealing with the rescission and making a ruling was in no doubt dealing with an interlocutory matter as no final judgment has yet not been given.

[4] The present application for leave to appeal has been challenged by raising some points *in limine*. The applicant had noted an appeal against the order that granted default judgment but the appeal has since been withdrawn before the Court of Appeal.

[5] When the matter was so withdrawn it was already before the Court of Appeal.

[6] In *casu,* the first respondent has argued that in terms of the law once the Court has granted the rescission application, one intending to appeal against it would not appeal as of right to the Court of Appeal since the order of the High Court rescinding its previous order of default judgment would be interlocutory in nature.

[7] The argument above by the first respondent finds support in the case of **Makape v Metropolitan Homes Trust Life (Pty) Ltd**[1]**.** He also supported his argument that lodging an appeal without seeking leave of the Court of Appeal can be described as an exercise in futility, and the case of **Sealake (Pty) Ltd v Chung Hwa Trading Enterprise Co (Pty) and Another**[2]**,** where it was said

"Under the circumstances an appeal against the dismissal can only be described as reckless."

[8] First respondent's counsel also referred to **section (16) (1) (b) of the Court of Appeal Act**[3] to say that appeal lies to the Court of Appeal by leave of the Court from an interlocutory order of the High Court.

[9] **Section 16 (2)** of the same Act goes further to say that the rights of appeal given under **sub-section (1)** apply only to judgments given in the exercise of the original jurisdiction of the High Court.

[10] Again the first respondent argued that there has been an abuse of Court proceedings as he considers that there has been no application for leave to appeal. He said this because he considered

[1] Makape v Metropolitan (1990 – 94) LAC 137
[2] Sealake v Chung Hwa Trading (2000 – 2004) LAC 190
[3] Court of Appeal Act No.10 of 1978 at 194

that the Applicant has not followed the provisions of **Rule 8 of the High Court Rules[4].**

[11] **Rule 8** requires that an application has to be on Notice of Motion supported by affidavits, see **Makepe v Metropolitan**, *supra*. Counsel has sought to move an application from the bar for leave to appeal in terms of **Rule 16 (1) of the Court of Appeal**. But the Court showed that such an application could not be entertained as there was no formal notice of motion before the Court supported by affidavits.

[12] Even in this case no application has been filed on notice of motion and no affidavits filed. What the applicant has done was to file a document styled Notice of Application for leave to appeal. This did not confirm with the provisions of **Rule (8)** on applications thus reading the application defective.

[13] First respondent also argued that the application was defective in that it was asking the Court to review itself. He was saying this on the basis of the prayers sought to be granted in the application.

[14] Such prayers are the following;

1. The learned Judge erred and/or misdirected itself in failing to dismiss this application on the basis that it was not made in good faith.

[4] High Court Rules Act of 1980

2. The learned Judge erred and for misdirected itself in failing to find that the applicant failed to establish a *bona fide* defence.

3. The learned Judge erred and for misdirected herself in failing to dismiss this application on the basis that the applicant failed to advance a reasonable explanation for the default.

4. The learned Judge erred in granting a rescission of the judgment which has been duly executed.

5. The learned Judge erred and / or misdirected himself in granting of this application without the applicant having applied for condonation as his relief on the notice of motion.

[15] First respondent further argued that the notice was bad in law as the Court could not be asked to review itself as the Court is *functus officio.*

[16] Looking at the notice as shown above it is without doubt that as argued by the first respondent, **Rule (8) of the High Court Rules** has not been followed rendering the application defective.

[17] Again the prayers sought to be granted have been framed in a way that the Court is being asked to review its own decision. But as rightly pointed by the 1st respondent the Court has become *functus officio.*

[19] Because Rule 8 of the High Court Rule has not been followed and also because the Court would not in law be in a position to review itself as it has become *functus officio* the application stands to be dismissed and it so dismissed with costs.

A. M. HLAJOANE
JUDGE

For Applicant: Mr Habasisa

For 1st Respondent: Mr Letsika