

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEBOHANG PULING

APPLICANT

and

**SELLOANE MAHAMO
COMMISSIONER OF LANDS
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

Coram : **L. Chaka-Makhooane J**
Date of hearing : **18th May, 2010**
Date of Judgment : **13th December, 2012**

Summary

Application for rescission – Requirements of bona fide defence and Prospects of success – Explanation not convincing- No bona fide defence or prospects of success shown – Application dismissed with costs.

ANNOTATIONS

CITED CASES

1. Noebejara Molahlehi v Rex LLR 1999-2001 500.
2. Numsa v Fry's Mentals (2005) 3 ALLSA 318.
3. Lesetla v Matsoso LAC (2000-2004) 444.
4. Lesotho Union of Bank Employees, In re Rangoanana v Barclays Bank International Ltd (1985-1989) 93.
5. Lesotho University Teachers' and Researchers' Union v National University of Lesotho LAC (1995-1999) 661.
6. Leuta v Tab Consult (Pty) Ltd LAC (1985-1989) 242.
7. Napo Thamae and One v Agnes Kotelo and One C of A (CIV) No. 16/2005.
8. Lebohlang Khabo v Fumane 'Malebona Khabo C of A (CIV) No. 34/2005.
9. The Liquidators, Lesotho Bank (In Liquidation) v Expertype Secretarial Services (Pty) Ltd and One C of A (CIV) No. 16/2007.
10. Thato Letuka Motebejane v Boliba Multi-Purpose Cooperative Society C of A (CIV) No. 15/07.
11. Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O).
12. Van Aswegen v Mcdonald Forman & Co. Ltd 1963 (3) SA 197 (O).
13. Rajah v Monese & Anor LAC (2000-2004) 732.
14. Leballo v Leballo & Anor CIV/APN/214/92 (92).
15. Thamae & Another v Kotelo & Another Lac (2005-06) 283.

16. *Mothobi v Sebotsa* LAC (2007-08) 439.
17. *Letsoela v Chief of Kolojane & Ano* LAC (1995-1999).
18. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD).
19. *CGM Industrial v Adelfang Computing (Pty) Ltd, C of A (CIV)* 5/2008.
20. *Deary v Dary*, 1971 (1) SA 227 (C).
21. *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd*, 1977 (2) SA 576 (W).
22. *Molapo v Molapo*, LAC (2000 – 2004), 771.

STATUTES

The Land Act, 1979

BOOKS

[1] On 14th April, 2009 the applicant called upon this Court to rescind an order granted against him by default on the 17th October, 2005 and further be granted leave to oppose the matter and file opposing affidavits. The crux of the dispute between the applicant and the 1st respondent concerns a sub-division of a site and the sale of rights on a part thereof. The applicant had only filed his Notice of Intention to Oppose when his representatives, **Messrs N. Ntlhoki & Co.**, withdrew from the matter. At the date of hearing, there was neither the litigant nor his representative to challenge the order which was consequently granted by default. A brief factual background of this case follows hereunder.

[2] On the 18th October, 2002 the applicant and the 1st respondent entered into a deed of sale agreement in terms of which the applicant sold to the 1st respondent his rights to a portion of land, comprising of a rented house¹. On the 1st December, 2002 the 1st respondent paid the full purchase price of M73, 500.00. In a surprise turn, the applicant subsequently lodged a letter with the Land Survey and Physical Planning (“land authorities”) requesting that the sub-lease in the 1st respondent’s favour be halted. Upon intercepting the letter, the 1st respondent then brought an application to this Court seeking an order allowing him to proceed with the sub-division².

[3] In the application lodged by the 1st respondent, the applicant failed or neglected to file his answering affidavit and as a result, default judgment was granted before **Lehohla CJ** on the 17th October, 2005. A copy of the order appears to have been served on the applicant on the 24th October, 2005³. With the assumption that the applicant had delayed to comply with the order, the 1st respondent’s attorneys, **Messrs Webber Newdigate**, sent letters to the applicant on the 13th October, 2006 and 4th November, 2006 respectively, and these letters requested the applicant to hand over his lease to the land authorities⁴.

[4] On the 10th April, 2008 a further application was brought by the 1st respondent in this Court in which he claimed an order that the Deputy Sheriff sign all necessary documents to transfer the sub-divided plot to

¹ The land had been registered under Plot No. 13304-048.

² This application was filed under case number CIV/APN/232/05.

³ See Return of Deputy Sheriff attached to the answering affidavit and marked annexure “I”.

⁴ Both letters are attached to the answering affidavit and marked annexures “J” “K” respectively.

the 1st respondent⁵. An order as prayed was granted on the 28th April, 2008⁶. The 1st respondent further claims that on the 10th October, 2009 the applicant placed poles across a portion of land sold to the 1st respondent, hence the 1st respondent applied to this Court for an order that the poles be removed and that the applicant be interdicted from interfering with the 1st respondent's enjoyment to the sub-divided plot⁷.

[5] I pause here to observe some guiding principles in rescission matters, and though they are now trite, they are worth mentioning. In these applications, the applicant must satisfy the Court that, firstly, he was not deliberately or intentionally in default, and secondly, he has a *bona fide* defence against the claim which resulted in the default judgment⁸. In addition, the applicant must show good cause and prove that he at no time renounced his defence, and further convince the Court that he has a serious intention to proceed with the matter. Furthermore, in order to establish a *bona fide* defence, the Applicant must set out averments which, if established at the trial, would entitle him to the relief he asks for, but he need not deal with the merits (prospects of success)⁹.

⁵ This application was filed under case number CIV/APN/122/08.

⁶ See answering affidavit, p. 19, para 11.2.12.

⁷ This application was lodged under case no. CIV/APN/48/09

⁸ See *Napo Thamae and One v Agnes Kotelo and One* C of A (CIV) No. 16/2005, *Lebohang Khabo v Fumane 'Malebona Khabo* C of A (CIV) No. 34/2005, *The Liquidators, Lesotho Bank (In Liquidation) v Expertype Secretarial Services (Pty) Ltd and One* C of A (CIV) No. 16/2007, *Thato Letuka Motebejane v Boliba Multi-Purpose Cooperative Society* C of A (CIV) No. 15/07.

⁹ See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O), *Van Aswegen v Mcdonald Forman & Co. Ltd* 1963 (3) SA 197 (O).

- [6] It is now clear that an examination of the applicant's explanation is mandatory. He begins by stating that his attorneys withdrew from his case because, since he is unemployed, he could not meet the attorney's fees¹⁰. He further indicates that he is not familiar with procedures in this Court and had hoped that he would appear before Court and testify without filing opposing papers. At the end of this submission, he readily concedes that, "*I verily believe this, but wish to state that I was all along ignorant of this fact*"¹¹. It is also common cause that the Notice of Set-down was served upon **Messrs T. Mpopo & Co.** and **Advocate N. K. Lesuthu**, but the applicant claims that he never instructed them to represent him in this matter¹².
- [7] Surprisingly, a Notice of Intention to Oppose had been filed on the applicant's behalf on the 8th June, 2008 by **Messrs T. Mpopo & Co.** and **Advocate N. K. Lesuthu**¹³. It is quite bizarre to suggest that officers of this Court would, as Good Samaritans, file a Court document on behalf of an unrepresented stranger, without even informing that stranger that they are his legal representatives. I find this to be utterly unconvincing. As his previous attorneys would probably have done, the applicant's present attorneys have almost certainly advised him that an Opposing Affidavit must be filed.
- [8] The applicant avers that had he been properly advised, he would have timeously filed opposing affidavits since he has a *bona fide* defence in

¹⁰ See Para 6 of the applicant's Founding Affidavit.

¹¹ See Paras 7 and 8 of the applicant's Founding Affidavit.

¹² See Paras 9 and 10 of the applicant's Founding Affidavit.

¹³ See annexure "E" of the 1st respondent's Answering Affidavit.

the main application¹⁴. However, it would seem that the issue in dispute in the main application is the measurements of the portion of land which the applicant had intended to transfer to the 1st respondent. The prospect of success or otherwise of the applicant's case on further litigation can thus be gleaned from perusing his defence in the primary case. His defence in this regard is rather nothing but a mere denial that he ever instructed **Messrs T. Mpopo & Co.** and **Advocate N. K. Lesuthu** to be his legal representatives.

[9] The applicant further contends that his deed of sale agreement is a nullity in as much as it was concluded without ministerial consent, and therefore, the Court should not have granted an order to enforce an illegal sale¹⁵. He supports this submission with the case of **Rajah v Monese**¹⁶ where it was held that where an application is based on an error on the part of the court, there is no need to show *bona fide* defence and absence of willful default. Nonetheless, the applicant fails to comprehend that, had he been of positive assistance to the 1st respondent, as per their agreement, the ministerial consent would not have been an issue.

[10] It is clear that the explanation given by the applicant in motivation of his prayers for rescission of an order against him is not convincing. In turn, he does not have a *bona fide* claim which carries any prospect of success. He has only relied on the fact that his attorney withdrew from his case due to non-payment of fees, which averment has not been

¹⁴ See para 11 of the applicant's Founding Affidavit.

¹⁵ See para 16 of the applicant's Founding Affidavit.

¹⁶ LAC (2000-2004) 732

persuasive. In passing, I should also express my displeasure regard being to the delay in finalizing this matter. This delay of approximately ten (10) years has mostly been caused by the applicant himself, to the prejudice of the 1st respondent.

[12] The application for rescission is therefore, dismissed with costs.

L. CHAKA-MAKHOOANE
JUDGE

For applicant : Mr. Mohau KC

For respondents : Ms. Ramphalile