CIV/APN/ /12
CIV/APN/160/12
CIV/T/58/12
CIV/APN/516/07

IN THE HIGH COURT OF LESOTHO

In the Matter between:-

KALINYANE MOHANOE **APPLICANT**

AND

'MAMOEKETSI MOHANOE **1st RESPONDENT**
DEPUTY SHERIFF (MR. L. LIPHOLO) **2nd RESPONDENT**

JUDGMENT

Coram : Hon N. Majara J
Date of hearing : 11th November 2013
Date of judgment : 12th August 2014

Summary

Application for declarator that earlier orders of this Court be declared irregular and be set aside – that writ of execution of this Court be declared null and void – stay of execution of the writ – restraint order against respondents from interfering with applicant in the administration of the parties' estate pending finalization of these proceedings – improper for a judge to review and set aside its own orders as it is functus officio – applicant to have appealed to the Court Appeal – application dismissed on this ground alone.

ANNOTATIONS

BOOKS

1. Isaacs; Beck's Theory and principles of Pleading in Civil Actions; 5th Edition

STATUTES

1. High Court Rules No. 9 of 1980

CASES

1. Grant v Plumbers 1949 (2) SA 470
2. Mahase v Kh'ubeka & Others LAC (2005 – 2006) 426

[1] The present applicant instituted an urgent application in this Court praying for relief inter alia,

1. A Rule Nisi be issued returnable on a date and time to be determined by this Honourable Court calling upon the respondents to show cause if any, why an order in the following terms shall not be made final:-

a) The rules relating to forms and periods of service of the above Honourable Court be dispensed with on account of the urgency of the matter
b) It be declared that an order granted on the 7th June 2012 by Her Ladyship Majara J be declared irregular and be set aside.
c) The order granted on the 15th November 2012 by Her Ladyship Majara J be declared irregular and be set aside.
d) The Writ of Execution of Immovable Property duly stamped on differing dates of the 18th March 2013 and 20th March 2013 to be declared null and void to the extent of its inconsistency and irregularity.

e) The execution of the above mentioned Writ of Execution of Immovable Property to be stayed pending finalization of the present matter.
f) The respondents to be restrained from interfering with the applicant in the administration of the entire estate alluded to in the pleadings pending the determination of these proceedings.
g) Costs in the Attorney and Client scale in the event of opposition to this application
h) Granting further and/or alternative relief.

[2] Facts that are common cause are that the applicant and the 1st respondent herein were married by civil rights and in community of property in 1982. Sometime in October 2007, the applicant approached this Court seeking for an order to sue the 1st respondent by edictal citation in terms of the Rules of Court.[1] The order was granted and pursuant thereto summons were issued against the 1st respondent through a publication in the Public Eye Newspaper.

[3] On November 29th 2007, a decree of divorce was granted against the 1st respondent on the grounds of her adultery. The applicant was also granted custody of the minor children and it was also ordered that each party should keep property in his/her respective possession.

[4] On the 8th February 2012, about five (5) years later, the 1st respondent instituted divorce proceedings under case number CIV/T/58/12 and the applicant filed his notice of appearance to defend the matter. However, she withdrew the case upon realization that a decree of divorce had already been granted against her in 2007.

[1] Rule 5(2) of the High Court Rules of 1980

[5] On the 29th March 2012, four days after the withdrawal, the 1st respondent filed an urgent application for rescission of the judgment in terms of High Court Rule 45 but never pursued it to finality. She then launched another application termed "*application pendete lite*" in August 2012. On the 15th November 2012, the 1st respondent was granted a final order granting her certain property pursuant to which a writ of execution was then served upon the applicant.

[6] It is the case of the applicant that the writ of execution was served two days after the court order which is final in nature was granted against him and was served on one 'Maetsollang Lebajoa, a 78 year old woman who promised to give it to the applicant. In terms of the Court Order, the property was divided equally between the parties and no inventory thereof was made.

[7] Upon receipt of the writ of execution, the applicant lodged an urgent application and was granted an interim order staying execution of the writ. The 1st respondent opposed the application and consequently filed an application for contempt notwithstanding the stay of execution. The applicant opposed this application in terms of Rule 8(1) and Rule 48 mandating the 1st respondent to file security for costs. The 1st respondent opposed the application for filing of security for costs and then filed an application setting aside the applicant's replying affidavit.

[8] In her answering affidavit, the 1st respondent made the following assertions; in 2007 she was hospitalised in Bloemfontein and that is when the applicant filed divorce proceedings against her knowing perfectly well that the 1st respondent was seriously ill. Despite this knowledge the applicant continued to divorce her by way of edictal citation. In February 2012, the respondent instituted divorce proceedings against the applicant as she genuinely believed

they were still married. It is however upon realization that the applicant had already divorced her that she withdrew her action for divorce.

[9] The 1st respondent then proceeded to apply for an order varying the one granted in the earlier (2007) divorce proceedings to the effect that each party keep property in its possession. The Court papers were received by the applicant's son on his behalf. Upon receipt thereof, through his lawyer Advocate Lesuthu, the applicant filed his Notice of intention to oppose the matter on the 27th March 2012 but did not file his answering affidavit. The variation order was granted on the 7th June 2012 about two months after the applicant filed his Intention to Oppose and after several postponements of the matter. It is the case of the respondent that such service was proper under the law and the applicant has not denied that he received such an Order.

[10] The 1st respondent, now in possession of the variation order, filed an application in which she sought to be granted the items listed in "MM1". On the 27th August, the applicant, through Advovate Lesuthu, filed an Intention to Oppose the application but yet again did not file an answering affidavit. As a result, the Court on the 15th November 2012 granted that the respondent the property outlined in **"MM1".**

[11] A writ of execution was issued and served upon the applicant hence his application for a stay of execution. Since the applicant refused to release the property to the Deputy Sheriff, contempt proceedings were then filed against him.

[12] Against this background, the issues for consideration are whether the orders granted by this Court that precipitated this application are irregular or otherwise and if so whether the applicant herein has made out a case for the

relief sought and secondly whether the procedure that was adopted in granting those orders was correct.

[13] It is a trite principle of law that for a litigant to be granted a rescission order he has to establish basically three essential requirements namely;

(i) Whether the applicant has presented a reasonable and acceptable explanation for his default;
(ii) Whether the application is made bona fide and not merely to delay execution of judgment;
(iii) Whether on the merits the applicant has a *bona fide* defence which *prima facie* carries prospects of success.[2]

[14] However, a problem herein lies in the fact that in terms of the prayers sought *in casu*, the applicant has approached this Court for a declarator that its own orders are irregular and to set them aside. On the other hand the 1st respondent contended that the orders alleged to have been granted irregularly are not irregular and should therefore not be set aside.

[15] It is my view that in light of the payers sought for as well as in his assertions and submissions, the applicant has not relied on the ordinary grounds for rescission as outlined above. This is because as can be read from his prayers he seeks for me to declare my own order as irregular and to therefore set it aside.

[16] In terms of the law, by seeking this Court to grant a declarator that its own order is irregular in what was essentially supposed to be an application for rescission, the applicant has not only failed to meet the basic requirements

[2] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470

thereof as stated above, but has also sought for an order that is untenable because it would be highly irregular for this Court to review its own orders and to set them aside for that reason. Such a procedure is not known in our law.

[17] It is trite that where a litigant relies on an alleged irregularity by a Court whether procedural or otherwise, the proper relief to seek for is a review order and not rescission. However, even if the applicant were to seek review, it is my view that the proper forum would be for him to lodge an appeal to the Court of Appeal. This is because powers of review are vested in the superior courts to review proceedings of **inferior courts** as well as decisions of public bodies and administrative tribunals and not for them to review their own decisions.[3]

[18] Thus, being a Superior Court, the final decisions of the High Court are subject to appeal before the Court of Appeal as the former effectively becomes *functus officio* and the matter in question *res judicata*. It is also my opinion that the remarks of the learned Gauntlet JA in the case of **Mahase v Kh'ubeka & Others**[4] similarly apply *in casu*, albeit in that matter the order negating an earlier one was made by one Judge against another which was effectively a review order over a colleague. However, the principle must apply similarly. In its own words, the Court had this to say at paragraph 7 of its judgment:-

> *"In the second place, and as a consequence, Molai J had no jurisdiction to make an order the effect of which was to negate the earlier order of Mofolo J. A High Court judge has no review power over a colleague (High Court Rule 50)."*

[19] Therefore, while I am aware that there has been a duplication of proceedings herein that ultimately resulted in the 1st respondent being granted the order that the applicant seeks to have set aside, it is my opinion that the applicant approached the wrong forum for a declarator as opposed for seeking

[3] High Court Rule 50; Isaacs; Beck's Theory and Principles of Pleading in Civil Actions; 5th Edition p 325
[4] LAC (2005 – 2006) p 426 at 428

for rescission and for that reason, it is my view that his application ought to fail on that ground alone. In the result, I order as follows;

(1) The application is dismissed with costs.

N. MAJARA
JUDGE

For the applicant : Mr. M. Rasekoai
For the respondent : Mrs. VM Kotelo