IN THE LAND COURT OF LESOTHO

Held at Maseru

LC/APN/130A/2014

In the matter between:

RASETLA MOFOKA **APPLICANT**

And

LESENYEHO NTSANE **1ST RESPONDENT**

REGISTRAR OF DEEDS **2ND RESPONDENT**

LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

CORAM: **S.P. SAKOANE AJ**

DATE OF HEARING: **11 SEPTEMBER 2014**

DATE OF JUDGMENT: 29 **OCTOBER 2014**

SUMMARY

Rescission application – requirements to show absence of due notice and presence of good cause for non-appearance in terms of Rules of Court – applicable principles in determining due notice and good cause. Application based on grounds of fraud

and failure by court to hear evidence before entering default judgment – held that fraud must be attributable to respondent and that hearing of evidence is not necessary where claim is for a debt or liquidated demand like specific performance.

ANNOTATIONS

CITED CASES:
G M Industrial (Pty) Ltd v. Adelfang Computing (Pty) Ltd (2007-2008) 463

K v. H LAC (1995-1999) 629

Rajah v. Monese And Another LAC (2000-2004) 736

Thamae And Another v. Kotelo And Another LAC (2005-2006) 283

STATUTES:
Land Court Rules, 2012

BOOKS:
Cilliers, Loots and Nel (eds) **Herbstein & Van Winsen, The Civil Practice Of The High Courts Of South Africa** 5th Edition Vol. 1 (Juta)

Joubert (ed) **LAWSA** 3rd Edition Vol. 4 (Lexis Nexis)

JUDGMENT

A. INTRODUCTION

[**1**] On the 5th of September 2014 the applicant filed what he termed a "Reviewing Application Per Rule 85" on an urgent basis in which he seeks the following orders:

> "(1) The rules of court pertaining to the ordinary modes and periods of service should be dispensed with on account of urgency.
>
> (2) An Interim Relief and a Rule Nisi returnable on the ….. day of ….2014 pursuant to Rule 23, calling upon the Respondents to show cause if any why:
>
> (a) Stay of execution of the default judgement shall not be ordered pending finalization hereof.
>
> (b) An order setting aside the Default Judgment shall not be granted.

(c) Costs *de bonis propis* shall not ordered against 1st Respondent's Attorney and Counsel.

(3) Further and/or alternative relief.

(4) Prayers 1 and 2 (a) should operate with immediate effect as Interim Court Order."

[**2**] On the 8th of September 2014, the applicant appeared in person before court to move this application. I declined to grant the interim relief and directed that the respondents be served.

[**3**] On the 11th of September 2014, the 1st respondent's attorneys filed a "Notice To Raise Points of Law" in which it is stated, *inter alia*, that:

"1.1 The Applicant has failed to set out entire facts which give rise to an enforceable claim.

1.2 This application is irregular, vexatious and scandalous and falls short of the requisites for review contemplated under section (sic) 85.

1.3 It also transpires that Applicant fails to discharge the burden of satisfying this Honourable Court that there is misconduct in the conduct for (sic) 1st Respondent in invoking Rule 22 for default judgment or the failure to comply or irregularity in compliance with a procedure or prescribed requirement."

B. <u>FACTS</u>

Historical Background

[**4**] This application is a sequel to a default judgment which was granted to the 1st Respondent on 19th August 2014 in respect of LC/APN/130A/2014. In that application the 1st respondent herein was the applicant and the applicant herein was the 1st respondent. The default judgment was granted in terms of Rule 22 of the **Land Court Rules**, 2012 upon the court hearing the 1st respondent's counsel and on failure to appear by the applicant.

[**5**] A court order was prepared and signed on 20th August, 2014. It is not known by the court when it was served on the applicant but knowledge of the default judgment there was because the applicant avers in para 6.17 of his affidavit that "on the evening of 19th August 2014 Applicant was even more surprised to learn from a triumphant Advocate Lephuthing that he had obtained a default judgement."

[**6**] The process that resulted in the granting of the default judgment is as follows:

(a) An originating application by the 1st respondent was filed and then served on the applicant on 31st July, 2014 (See Return of Service).

(b) The originating application was accompanied by a notice of appearance to the applicant which indicated the 19th August, 2014 as the date of set down.

(c) The notice of appearance warned the applicant that if he does not appear on the 19th August, 2014 or failed to produce an answer, or any evidence, the originating application "will be heard and determined notwithstanding your default."

(d) On 19th August 2014 (the date of hearing) the 1st respondent herein and his Counsel appeared before the court. There was no appearance by the applicant who, in any event, had not filed any answer despite being warned to do so.

(e) Counsel for 1st respondent moved the application and after hearing Counsel and reading the papers, the Court entered judgment in terms of Rule 22 granting prayers 11 (a) (b) (c) and (e) in the originating application.

The Attack On Granting Of Default Judgment

[7] The challenge mounted against the default judgment is articulated by the applicant in his affidavit thus:

> "
> -7-
> The default judgment has been obtained fraudulently and wrongfully.
>
> -8-
> The reasons supporting fraud are the following:
>
> 8.1 Applicant was served with an originating application which did not inform him of a date by which to deliver an answer or when an application would be made.
>
> 8.2 Applicant's expectation was that the court would later on issue Notice to Respondent to appear to answer on a specific date pursuant to Rule 36 of the Land Court Rules. Notice was not issued instead a default judgement was granted on the 19th day of August which date was not communicated to Applicant.

8.2 (sic) Subsequent to the default judgement, Applicant observed that on the papers filed in the Judge's and Registrar's file, the date of hearing had been appointed as the 19th August 2014 which date was not communicated to Applicant pursuant to Rule 36.

8.3 Applicant also observed that there are some alterations made on the date on which the Registrar signed the Notice of Appearance. On the face of it, it appears as if the original date when the Registrar signed the notice was the 19th August 2014. But it was altered and now looks like the 39th (sic) of July 2014; the word August having been cancelled and replaced by 'July'.

8.4 The alterations on the dates made on the papers found in the Court's and Registrar's file (sic) do not appear on the papers served on Applicant.

8.5 Respondent's legal representative is Advocate Lephuthing who has been recently accused of a malpractice involving the disappearance of a court's file.

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The default judgment is wrongful for the following reasons:

9.1 Applicant was not given an opportunity to be heard. This is different from a case where a party elects not to be heard by failing to deliver an answer or failing to appear despite notice.

9.2 No evidence was led at all to support entering of judgement in default. No witnesses' statement (sic) had been filed of record. The Judge's notations on the cover of the Judge's file do not show any assessment or consideration of the appropriateness of the allegations and prayers made in the originating application at all

and whether they were justified. In short there is no evidence of the court exercising its discretion judiciously contrary to Rule 22 (1) and (2) and contrary to the common practice of awarding default judgements."

C. SUBMISSIONS

[**8**] Mr. Mofoka, who represents himself in this application, contends as follows:

(1) This application is a review in terms of Rule 85 to set aside the default judgment.

(2) The Rules provide for variation/setting aside by this Court of its own judgments in terms of Rules 57 and 85.

(3) Review in terms of these Rules should not be confused with common law review on procedural improprieties.

(4) The default judgment was granted by fraud in the form of failure to inform him of the date to file an answer and appear in court including alterations of the dates in the court's file.

(5) The judgment is wrong as it was entered without any evidence.

[**9**] Mr. Lephuthing, for the 1st respondent, submits that:

(1) The applicant has failed to set out facts for rescinding the default judgment as he says he is surrendering the lease for cancellation anyway.

(2) It is the law that a lease-holder must pay ground rent. According to applicant's own prayers, he is unable to pay ground rent and is thus hamstrung to surrender the lease for cancellation.

(3) The applicant's cause of action is that he was not served with a notice of a date for set-down. This is irreconcilable with his argument that he thought the matter would be heard on 29th July 2014. As a lawyer, he ought to have taken steps to verify so that he could file his answer in terms of the Rules.

(4) The applicant has no direct and substantial interest capable of legal enforcement in respect of the plot of the 1st respondent.

He has no business opposing the declaratory order that the 1st respondent owns the plot or the re-survey of same.

D. ANALYSIS

The Law

[**10**] The Rules relied upon are Rules 57 and 85 of the **Land Court Rules, 2012**.

Rule 57 provides in relevant parts:

> "(1) 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.
>
> (2) If the respondent satisfies the court that notice was not duly served, or that he was disabled by a good cause from appearing when the suit was called on for hearing or from filing his answer, the court shall … make an order setting aside the judgment or order as against him …" [Emphasis supplied]

[**11**] Rules 84 and 85 provide:

> "84.1 (1) Any person whose interests are directly affected by a final judgment entered in on application may apply to the court that pronounced the judgment, on one or more 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.
>
> (2) ……..
>
> 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."

[**12**] The final order sought in this application is "setting aside the Default Judgment". The grounds thereof are two:

(a) fraud; and

(b) absence of evidence in support of entering of judgment.

[**13**] The relevant, applicable principles in the adjudication of a rescission application are stated by the Court of Appeal in **Thamae And Another v. Kotelo And Another** LAC (2005-2006) 283. They are these:

(a) The applicant has to show a good cause in order to succeed.

(b) In order to do so, the applicant must comply with these requirements:

(i) he must give a reasonable explanation of his default;

(ii) the application must be bona fide; and

(iii) he must show that he has a bona fide defence to the applicant's/plaintiff's claim.

(c) In deciding whether good cause has been shown, the court has a discretion, to be exercised judicially and upon consideration of all the facts. And among the considerations usually relevant are:

(i) the degree of lateness;

(ii) the explanation therefore;

(iii) prospects of success; and

(iv) the importance of the case.

(d) Ordinarily these considerations are interrelated: they are not individually decisive but collectively important. The court is obliged to look at the total picture presented by all the facts and no one factor should be considered in isolation of all the others.

(e) Thus a slight delay and good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success

may tend to compensate for a long delay. But the respondent's interest in finality must not be overlooked.

(f) If the applicant is to blame or sets out the merits of a defence which it is obvious that it could never pass muster, the court is likely not to order rescission (See **Cilliers, Loots and Nel (eds) Herbstein & Van Winsen, The Civil Practice Of The High Courts Of South Africa** 5th Edition Vol. 1 (Juta) pp. 930 and 933.)

[**14**] Regarding the requirement that good cause must be shown it means that the defendant must not be in wilful default. And "'wilful' connotes knowledge of the action and its legal consequences and a conscious decision, freely taken, to refrain from entering appearance, irrespective of the motivation." (Joubert (ed) **LAWSA** Third Edition Vol.4 para 289)

[**15**] Whether the court ought or ought not to have heard evidence before granting default judgment, is a matter that turns on whether the plaintiff's claim was for a debt or liquidated demand. If and when the claim is for a debt or liquidated demand like specific performance the court can grant default judgment without hearing any evidence (**LAWSA** op.cit. paras 286 and 291)

[**16**] In **GM Industrial (Pty) Ltd v. Adelfang Computing (Pty) Ltd** LAC (2007-2008) 463, the Court remarked in an *obiter dictum*:

> "It may well be that a judgment can be said to have been erroneously granted where it appears from the record of proceedings before the court granting the default judgment that the judgment was not sustainable in law and thus obviously wrong." (See para [18])

And in **Rajah v. Monese And Another** LAC (2000-2004) 736 the Court made these pertinent remarks:

> "[9] In this case the summons bore an incorrect (and misleading) case number while appellant was clearly not in wilful default and also asserted that he has a good defence, a judgment on a misleading document is in any event clearly a judgment 'erroneously granted'. This being common cause the judgment had to be rescinded."

[**17**] According to **Herbstein and Van Winsen,** where rescission is sought on the ground of fraud:

> "It must, however be shown that the successful litigant was a party to the fraud or perjury on the ground of which it is sought to set aside the judgment. Furthermore, there must be proof that the party seeking rescission was unaware of the fraud until after judgment was delivered: it is not sufficient for the applicant for rescission to prove merely that a fraud was practiced on the court, which resulted in a wrong judgment. The person seeking relief must be able to show that because of the fraud of the other party, the court was misled into pronouncing a judgment which, but for the fraud, it would not have done… Fraud can consist not only in the wilful making of incorrect statements but also in the withholding of

material information with fraudulent intent. The mere circumstance that certain material facts were not disclosed does not in itself establish that there has been wilful concealment. A fraudulent intent must be affirmatively proved." (See **Herbsein & Van Winsen** (supra) pp. 939-940)

The Facts

[**18**] The applicant avers in his papers that the Land Administration Authority (3rd respondent) herein wrote a letter dated 15th July 2014 informing him that his lease bore 1st respondent's plot number. The respondent's plot number in the lease is 14271-634. What was needed was for the applicant

to surrender his lease for the purpose of cancelling it and re-issuing him one with his plot number 14271-635. Applicant agreed to surrender his lease on conditions:

> "6.8.1 that LAA should write a letter recording that an error had been made by the leasing authority;
>
> 6.8.2 that there would be no change to the extent of the site and/or its boundaries;
>
> 6.8.3 that there should be no costs incurred by applicant toward issuance of a new lease."

[**19**] Before the applicant could surrender the lease, he was served with the originating application. Meanwhile he was busy "going through the

process of surrendering his lease". Significantly, the applicant says that when the originating application was instituted in court on 29th July, 2014 the 1st respondent had not bothered to check if he would comply with the instructions of LAA in the letter of 15th July 2014. He goes further to state that there is no dispute over the plot except the problem of swapped plot numbers. He does not explain why the 1st respondent should have awaited his compliance with the Land Administration Authority's instructions which, in any event, had nothing to do with 1st respondent.

[**20**] From the aforegoing synopsis of facts, it is clear that the applicant does not have a problem with the cancellation of his lease bearing 1st respondent's plot number 13271-634. There is then no basis to rescind the order in respect of prayer (a) in the originating application. Similarly there would be no basis to rescind the orders in respect of prayers (b), (c) and (e).

[**21**] The only issue is whether the 1st respondent procured the default judgment through any fraud. The alleged alterations be on the dates inserted by the Registrar in the Notice of Appearance to the applicant. The date stamp therein is 31st July, 2014. This date corresponds with the hand-written date which was allegedly altered. It is clear that the alleged alterations are attributable to the Registrar and not the 1st respondent who has no business

in drafting and filling in dates in such a notice. This much was conceded by Mr. Mofoka during oral argument.

[**22**] The suggestion made is that the alterations are attributable to Counsel for the 1st respondent. When asked on what basis this suggestion is made, Mr. Mofoka was unable to give any reason. The Court asked him to withdraw such a statement and it be expunged from the record. He was at best indifferent.

[**23**] I have not found any evidence that fraud was committed, let alone by the 1st respondent. I, therefore, hold that the applicant has failed to discharge the necessary onus as articulated above in para [16].

[**24**] I have already given the historical background regarding the procedure followed when granting the default judgment. It is not fathomable on what basis the applicant argues that evidence should have been led before judgment was entered. No answer was filed despite service of notice by the Registrar. There was not even a notice of appearance to defend. As a practitioner of this Court, the applicant is familiar with this Court's procedures. He chose not to do anything about the matter. His expectation was that another notice would be issued in terms of Rule 36 and not the granting of a default judgment. But the very notice he says he expected

accompanied the originating application with which he was served on the 31st of July 2014. Why should there have been a repetition of the same exercise? The answer is that there was no need to do so. The applicant was duty-bound to do what the law called him to do, that is indicate his attitude in the matter by filing an answer within 14 days in terms of Rule 19. The 14 days he had expired on 15th August 2014. He was in wilful default (LAWSA op.cit. para 289)

[**25**] As regards the complaint that default judgment ought not to have been entered without hearing any evidence, the single answer is that it was not necessary in view of the liquidated demands in the 1st respondent's prayers in the originating application. The demands were for the surrender of the lease and its cancellation so as to enable issuance of new leases for both parties bearing their respective correct plot numbers. This is common cause.

[**26**] The last issue that I turn to is the reliance on Rule 85 as a basis for bringing this application. Mr. Mofoka was unable to answer the question posed during oral argument as to why reliance was reposed thereon. It is clear from this Rule read with Rule 84 that a review under these Rules is a procedure for the benefit of any person whose interests are affected by a final judgment other than the litigants in the application to be reviewed. In

other words, a party to the proceedings cannot seek a review. It is only a person who has a right or protectable interest and was not joined or cited in an application in respect of which a final judgment has been granted who can institute review proceedings. Presumably, the parties to the application that is sought to be reviewed would be respondents and not applicants in the review application. Reliance on these Rules *in casu* is misconceived and must be rejected.

E. DISPOSITION

[**27**] I find that the applicant has no *locus standi* to review a default judgment under Rule 84 of the **Land Court Rules, 2012**. Further, that even on the basis of grounds for rescission, under Rule 57 he has not shown any good cause or lack of service of due notice for rescinding the default judgment.

[**28**] I have seriously considered awarding costs *de bonis propriis* against the applicant for the unfounded and unjustified attack on the integrity of Mr. Lephuthing. He has alleged in para 85 of his affidavit that Mr. Lephuthing "has been recently accused of malpractice involving the disappearance of a court's file" without disclosing the accuser, the concerned file and the veracity of the accusation. This is totally unacceptable. As a mark of the court's displeasure, I award costs *de bonis propriis* against the applicant. (See **K v. H** LAC (1995-1999) 629)

[**29**] The application is accordingly dismissed.

S.P. SAKOANE
ACTING JUDGE

For the Applicant: Mr. R.B. Mofoka
For the Respondents: Mr. C.J. Lephuthing