CCT/0021/2014

CCT/0020/2014

CCT/0036/2014

CCT/0112/2014

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

SOURCE IT (PTY) LTD	**1ST APPLICANT**
KWEKU BAFFOE	**2ND APPLICANT**
'MALERATO BAFFOE	**3RD APPLICANT**

AND

NEDBANK LESOTHO LIMITED	**1ST RESPONDENT**
KORI MAKAKOLE	**2ND RESPONDENT**
DEPUTY SHERIFF LIPHOLO	**3RD RESPONDENT**
REGISTRAR OF THE HIGH COURT	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

Coram	**:**	**L. Chaka - Makhooane J**
Date of hearing	**:**	**25th February, 2015**
Date of Judgment	**:**	**15th May, 2015**

Summary

Application for stay of execution – Applicants praying that a sale in execution of their property be cancelled – That 1st respondent be interdicted from passing transfer of property to 2nd respondent – 2nd applicant failing to abide by order of Court (deed of settlement) – 1st respondent also failing to observe Rule 47 therefore, putting applicant at a disadvantage – Court temporarily suspended execution of sale for a period of ninety (60) days within which a proper execution of sale is to be held – Both parties having failed, there is no order as to costs.

ANNOTATIONS

CITED CASES

1. Director Hospital Services v Mistry 1999 (1) SA 626 (A).
2. Duncan v Duncan 1984 (2) SA 310
3. Ladybrand Courant (Pty) Ltd v Marematlou Freedom Party and Another LLR & LB 1991 – 1996.
4. Lesotho Bank & Another v Basotho National Party LLR & LB 1991 – 1996.
5. Makoala v Makoala (C of A (CIV 04/09 (unreported).
6. Mochone Stanza Matlosa v Zakhura Brothers (Pty) Ltd and 2 others LLR& LB 1991 – 1996.
7. Ntsekhe v Ntšekhe CIV/T/136/09.
8. Open Bible Ministries & Another v Ralitsie Nkoroane & Another 1991 – 1992 LLR & LB 112
9. Setlogelo v Setlogelo 1914 AD 221.
10. Tsabane v Caba & Another CIV/APN/218/2000 (unreported).

STATUTES

1. High Court Rules, 1980
2. Evidence in Civil Proceedings Ordinance 70 of 1830.

BOOKS

1. Herbstein and Van Winsen – The Civil Practice of the High Courts of South Africa, 5th Edition, Volume 1.
2. LCT Harm – Civil Procedure in the Superior Courts.

[1] This is an application for stay of execution, of provisions of the deed of settlement (which was made an order of the Court), signed between the applicants and the 1st respondent. The applicants approached the Court on urgent basis. The prayers sought were couched in the following terms:

1. That the normal Rules pertaining to periods of notice and modes of service be dispensed with on account of urgency.

2. That the execution of the provisions of the deed of settlement/Court Order signed between the Applicants and 1st respondent on the 12/12/2014 shall not be stayed pending the finalization of this application.

3. That 1st, 3rd and 4th Respondent be interdicted from receiving any funds in relation to the sale of Plot Number 13264-002 situated at

Khubetsoana from 2nd respondent and also interdicted from passing transfer of the site to Kori Makakola and to return any funds they have received to the 2nd respondent pending finalization hereof.

4. *That a Rule Nisi be issued returnable on a time and date to be determined by this Honourable Court calling upon respondents to show cause if any why?*

   a) *That sale of Plot Number 13264-002 situated at Khubetsoana sold on the 18/02/2015 by the respondents excluding the 2nd respondent(sic) to 2nd respondent shall not be cancelled and set aside.*

   b) *Costs of suit be awarded to applicants at Attorney and Client scale against respondents except for 2nd respondent unless he opposes the application.*

   c) *Further and or alternative relief.*

5. *That prayer 1, 2 and 3 alternative relief.*

[2] It is important to note at the outset that, under consideration are four (4) matters which were consolidated by consent of the parties. These are CCT/0021/14, CCT/0020/14, CCT/0036/14 and CCT/0112/14.

[3] The application is opposed in its entirety.

[4] It is the 2nd applicant's case (as deponent) in a nut shell that, on or about the 18th February, 2015 he learnt "with shock and dismay"[1] that his property identified as Plot number 13264-002, situated at Khubetsoana, Maseru, had been sold by the 3rd respondent at the High Court. According to the 2nd applicant, the plot, which was the subject matter of a deed of settlement signed between the applicants and the 1st respondent, was sold unlawfully for the amount of one million Maluti (M1,000,000.00).

[5] The sale is said to be unlawful because it does not comply with the provisions of **Rule 47**[2]. The 2nd applicant further avers that the sale occurred despite the fact that there never was an attachment of that property nor was any writ of execution brought to his attention, in relation to the sale in execution. There also was no display of a notice on the Court premises with reference to the sale, neither was there publication in a local newspaper or Government Gazette as provided by **Rule 47** and as per clause 10 of the deed of settlement.

[6] It is the 2nd applicant's evidence that the sale was conducted in a private manner and as such, potential buyers were not informed. Consequently only five (5) people attended the sale, having been invited by the deputy sheriff (3rd respondent) by telephone. The net result of the 1st respondent's non – compliance with **Rule 47** is that the applicants have been prejudiced. Firstly because the property has been sold way below its market value of four million Maluti (M4,000,000.00) and secondly the sale has entitled the respondents to sell his other properties within fourteen (14) days as per clause 11[3] of the deed settlement.

[1] 2nd applicant's Founding Affidavit at para 4.
[2] High Court Rules, 1980.
[3] See Annexure "A1", the deed of settlement at clause 8 – 11 at pg 5 thereof.

[7] The applicant also allege that the matter is extremely urgent because the tenants living on the property which is the subject matter of this dispute, have already been informed to pay rental to either the High Court or to the 1st respondent.[4]

[8] The respondents had raised two (2) points *in limine,* styled cause of action and non-disclosure of material facts. Even though the applicants had responded to them in their Heads of Argument, the 1st respondent did not argue the points *in limine* they had raised in their opposing affidavit. Because the parties had also argued the merits, I decided to make a determination in this matter on the merits.

[9] It is important to note that only the 1st respondent argued this matter on the papers. Even though the 2nd respondent appeared before the Court without legal representation, this was only to inform the Court that he was anxious for the matter to be determined to finality.

[10] The 1st respondent argues that the issue of stay of execution is untenable in that, it is premised on non-observance of clause 10 of the deed of settlement. **Mr Mpaka** on behalf of the 1st respondent argues that even if the 2nd applicant was correct, it cannot mean that where a clause is found to be invalid the whole document becomes invalidated. This means the alleged breach cannot result in the stay of the whole agreement, which was made an order of Court. The Court was referred to the case of **Phoofolo v R**[5].

[4] See Founding Affidavit at para 9.
[5] 1990 – 1994 LAC 1 at pages 10E – 12 C.

[12] On the question of hearsay evidence, it is submitted by **Mr Mpaka** that even though in his affidavit the 2nd respondent avers that the facts in paragraph one (1) of his founding affidavit are within his personal knowledge, it cannot be true. It is clear from the reading of the affidavit that the information was from his counsel who failed to file a supporting affidavit nor has any allegation been made that he verily believed the information to be true and correct, especially when the allegations therein are intended to prove the truthfulness of the breach of **Rule 47**.

[13] The 2nd applicant failed to show the prejudice he alleges. **Mr Mpaka** argues that instead, the 2nd applicant fails to disclose that he also did not observe clause 6.1.3 of the deed of settlement, that is, to advertise and to hold a private public auction on or before the 16th February, 2015, nor does he furnish any explanation as to what steps he took to comply with the same. In other words according to the 1st respondent, he came to Court with dirty hands. The 2nd applicant is said to have failed to sell the property concerned at the four (4) million Maloti (M4,000,000.00) in the two (2) months allowed to him in terms of the deed of settlement. It is said to be highly improbable and speculative that the property would have fetched the amount of four million Maluti (M4,000,000.00) in a public auction.

[14] That the founding affidavit is defective is premised on the fact that where an affidavit for use in legal proceedings is taken before an attorney of record or a partner in a firm acting in the proceedings, that affidavit is objectionable and is not receivable as evidence.[6] Mr Mpaka insists that the affidavit is defective because it has been commissioned by the deponent's

[6] The court was referred to Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa 5th Ed, Vol 1, page 453 – 454 (and the cases cited therein).

own Counsel, **Adv L Ketsi**, who has also certified the certificate of urgency and had prepared the application.

[15] **Mr Mpaka** submits that the 2nd applicant is under the impression that a stay of execution ought to be granted as a matter of course simply because it is pending finalization of this application. According to **Mr Mpaka** a stay of execution can only be granted upon a well-founded application, which is not the case *in casu,* regard being had to the fact that not only are the 2nd applicant's grounds spurious , they are also hearsay and therefore, inadmissible.

[16] I now turn to deal with the application before this Court. A lot has been said by both parties in arguments in relation to this application. At the same time a lot is equally puzzling in relation to the events that eventually led to this application. Be that as it may, I must confine myself to the application before me in order to make a determination. The applicants and the 1st respondent approached the court with a deed of settlement which was made an order of this Court on the 12th December, 2014. It shall be recalled that originally there were four (4) actions and by consent they were consolidated. The deed of settlement was in relation to all four (4) matters.

[17] It is the 2nd applicant's prayer that the execution of the provisions of the Court Order (per the deed of settlement) between the applicants and the 2nd respondent, be stayed pending this application. It will also be recalled that the other prayer is an interdict which comes after the sale of that property, wherein the 2nd applicant is saying that the 1st, 2nd and 4th respondents be interdicted from receiving any funds from the 2nd respondent in relation to

the said property. This is premised on the fact that the respondents did not comply with the tenets of **Rule 47** in its entirety.

[18] The 1st respondent argues in response that the applicants did not come to Court with clean hands themselves. That, even if the stay of execution was granted, this would only postpone the inevitable since the Court Order still stands. In this I agree, only to the extent that the applicants are not praying that the order be reversed. Theirs is that if the tenets of **Rule 47** are not observed, the applicants stand to suffer prejudice, that, not only will their debt not be extinguished, their other property stands to be executed as well.

[19] I must mention that I am in a bit of a fix, in that nowhere in his papers does the 2nd applicant inform the Court why, in terms of the Court Order (deed of settlement) he was unable to utilize the time allotted to him profitably by securing a sale to the amount desired by himself or the market value as he so wishes. It is still a puzzle why he rushed to Court at the first sign of trouble yet he fails to mention why it was not possible for him to proceed with the sale himself. Yet when a sale has actually gone through, he cries foul because it did not meet his expectations. It should have occurred to him that given the time frames agreed upon, a sale by public auction was imminent.

[20] I have also observed with dismay that indeed, the same applicants Counsel who filed a certificate of urgency, is the one who commissioned the 2nd applicant (deponent's) founding affidavit. I agree with **Mr Mpaka** on this that, that affidavit is not only objectionable, it must not be receivable as evidence. On its own that point ought to dispose of this application. However, I will not be too hasty to do so.

[21] I must not overlook the real issue here. In truth in order to give effect to the order I gave in December 2014, I must also take into consideration how real and substantial justice will be met. Guni j in **Ladybrand Courant (Pty) Ltd v Marematlou Freedom Party and Another**[7], had this to say;

> "*…once on executable judgment has been obtained against the party who nonetheless feels aggrieved by it, the party against whom such judgment has been obtained, is obliged to take immediate steps to prevent its enforcement once it has come to his knowledge… the application for stay of execution is itself the element of convenience on the part of the Applicant."*

I agree.

[22] By so agreeing, I am still alive to the fact that the balance of hardship favours the 1st and 2nd respondents respectively by reason of the 1st respondent being the successful party in terms of the order and the 2nd respondent having bought the property that is the subject matter of this application. I am not convinced anyhow that inspite of what has been alleged by the respondents in relation to the applicants` conduct, that the tenets of **Rule 47** were indeed followed to the letter, maybe somewhat but obviously not to the satisfaction of the applicants. I fully agree with Maqutu J in **Lesotho Bank and Another v Basotho National Party**[8] when he observed that;

> *"Another disturbing feature of this case is the notice of sale. It did not describe the property to be sold in execution fully. It also did not put all its good points so that it could attract buyers. It seems to me this has to be*

[7] LLR & LB 1991 – 1996 at 286.
[8] LLR & LB 1991 – 1996 412 at 414.

done. If this has not been done, the sale in execution will not attract enough prospective buyers. The property will realize very little money. This is to the detriment of both the judgment creditor and the judgment debtor. The reasons being that the debt will not be discharged, both the judgment debtor and the judgment creditor might thereby be ruined or prejudiced unnecessarily."

[23] The copy of the Notice of Sale in Execution annexed as "A3" to the 1st respondent`s opposing affidavit, leaves much to be desired. It does not describe the property to be sold in execution in order to attract prospective buyers and possibly also attract good money. The idea is neither to sacrifice the property at a sale[9] nor to despoil the respondents of their property without a corresponding reduction of his liabilities and satisfaction of the 1st respondent.[10]

[24] It is for the foregoing reasons that I make the following order:

a) In terms of prayer 2 the execution is temporarily suspended for a period of ninety (90) days of this order, within which a proper execution of sale is to be held;

b) Prayer 3 is granted as prayed for in the Notice of Motion.

c) I am of the opinion that none of the parties actually succeeded in this application. Both sides have failed in some respects, consequently there will be no order as to costs.

[9] See Mokotso v Mojaki & Others 1977 LLR 119 where at 126 – 127 Cotran CJ quoted from Messenger of the Magistrate Court Durban v Pillay 1952 (3) SA 678 at 680.
[10] Lesotho Bank v Basotho National Party (Supra) at 412.

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L. CHAKA-MAKHOOANE
JUDGE

For Applicants	:	Mr. Molapo
For 1st Respondent	:	Mr Mpaka
For 2nd Respondent	:	In person
For 3rd, 4th and 5th Respondent	:	No representation