IN THE LAND COURT OF LESOTHO

HELD AT MASERU **LC/APN/5/2019**
(CIV/DLC/BB/18/16)

In the matter between

TANKISO MARTIN NKWATE **1ST APPLICANT**

MATSEPO REGINA NKWATE **2ND APPLICANT**

AND

MOLEANE MOLAPO **1ST RESPONDENT**

LIPELANENG COMMUNITY COUNCIL **2ND RESPONDENT**

LAND REGISTRAR **3RD RESPONDENT**

LAND ADMINISTRATION AUTHORITY **4TH RESPONDENT**

CLERK OF COURT DISTRICT LAND COURT

BOTHABOTHE **5TH RESPONDENT**

CORAM: BANYANE AJ

Date of Hearing: 23/09/19

Date of Judgement: 11/10/19

JUDGEMENT

SUMMARY

Application for review of Magistrate's decision granted by default-what is the appropriate remedy for challenging such a decision, a rescission or review?- joinder of Magistrate in review proceedings-whether non- joinder of magistrate fatal-granting default judgement without hearing evidence as

envisaged by the District Land Court rules an illegality- review application succeeds

ANNOTATIONS

CASES

Lesotho

Tech & hire V Metsi a pula civil plant Hire rentals C of A (CIV) no 60 of 2015 Rantlamo Motumi v Peter shale and 2 others C of A (CIV) No.32 of 2017,

Likotsi Civic association and 14 others C of A (CIV) No.42/2012,

Rasetla Mofoka V Lesenyeho Ntsane & 3 others C of A (CIV) No 71 of 2014

Molapo V Mphuthing and others (CIV/APN/188/94)

Machaha V Mpheu C of (CIV) No.6 of 2010

Mphanyane V Lemena & another CIV/APN/344/95

Masupha V Nkoe and another C of A(CIV) No.42/2016

South Africa

Manlbaur V Papenfus (38297/2011) [2014] ZAGPPHC 945,

City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 SA (SCA) at 317(A).

Khumalo v Wilkinson 1972 (4) SA 470 at p475. *Hornby v Arthur* 1917 A.D 471

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd & Another 1972(4) SA 409 at 415H

South African Motor acceptance Corporation (Pty) Ltd v Venter 1963(1) SA 214

Introduction

[1] This is an application for review of a decision of Botha-Bothe District Land Court in **CIV/DLC/BB/18/16**(per the learned Magistrate M. Monethi). It raises questions whether a review proceedings is an appropriate route for challenging a judgement granted by default. It further raises a question whether non-joinder of the learned Magistrate in this review application renders this application defective and liable for dismissal. It raises another question whether leading of oral evidence is peremptory in terms of the Land Courts Rules (District Land Courts included) irrespective of whether or not an application is opposed.

[2] The applicants herein seek the review and setting aside of the impugned decision. They also seek the setting aside of an order directing cancellation of a lease issued in favour of the 1st and 2nd respondents(applicants herein) pursuant to the said judgement, in relation to a certain plot identified as plot **No. 31073-009,** situated at **Ha Nqabeni, Botha-Bothe**.

Background

[3] It is apposite to outline the facts that precipitated the launching of this application:

The dispute between the parties is in relation to plot Number **31073-009** described at paragraph 2 above**.** Before institution of the proceedings that gave rise to this review application, this plot was registered in the names of the applicants herein. The 1st respondent, who was the applicant in the Court a quo sued the now applicants in November 2016. He sought relief couched in the following terms;

a) That the lease number **31073-009**, which has been registered in favour of 1st and 2nd respondents cancelled by the Registrar of Lands (4th respondent in that case).
b) That the above lease be registered in favour of the applicant
c) That the 1st and 2nd respondents be evicted from plot **31073-009** situate at Ha Nqabeni, Butha-Bothe
d) 1st and 2nd respondent be directed to pay costs of the application.

[4] The respondents never filed any answer. The applicant (now 1st respondent) approached the Court and requested that judgement be granted by default. Judgement was then entered by the learned Magistrate on the 4th August 2017. The orders for cancellation of the lease and eviction of the respondents were thereby granted. A warrant of ejectment was however only issued on the 10th June 2019. Regrettably there is no explanation accounting for the lapse of time between the granting of the default judgement and issuance of the warrant of ejectment. Notably too, Pursuant to the judgement, the lease was cancelled and the disputed piece of land was then registered in the names of the 1st respondent and his wife. The respondents (applicants herein) did not take the route of rescission application in the court a quo, instead approached this Court through this review application in August 2019.

The application before this Court

Grounds for review

[5] The applicants essentially seek reversal of the order in the court quo as well as its resultant consequences. The basis on which the judgement of the Court a quo is allegedly defective as contended by the applicants' counsel is that;

a) The court process initiating the application in the Court a quo was never served on the applicants herein and the Court proceeded to hear the application without ordering substituted service when it was clear per the return of service that they were at the time, in South Africa.
b) The court a quo granted judgement without hearing oral evidence
c) The judgment was granted on the basis on false documents on which the applicant (respondent herein relied) which were in any case not title documents.

Arguments and analysis

[6] In his answer, the respondents raised two special answers;

a) Lack of authority
b) Non joinder of the Magistrate who presided over the application in the Court a quo and non-joinder of the 1st respondent's wife.

[7] Over and above this, the 1st respondent impliedly challenged the competence of this Court to hear a review application of a default judgement where an applicant did not first apply for rescission in the District Land Court. It was argued that a party against whom judgement has been obtained in default is barred from challenging such a decision on review and should approach the District Land Court for rescission.

[8] I propose to first deal with the last point raised since it is dispositive of this review application.

Procedure for challenging judgement granted by default

[9] In the determination of the question whether or not this application is properly before this Court, it is imperative to reproduce the Rule that deals with 'setting aside an order granted in the absence of the other party'. It is **Rule 56** of the **District Land Court Rules 2012**. It reads;

56(1) *"any respondent against whom a judgement is entered or order made in his absence or in default may, within one month of the day when he became aware of such judgement or order, apply to the Court that passed the judgement or made the order to set it aside*". (My underline)

[10] The contention by the 1st respondent's counsel therefore raises the question whether this rule is peremptory and non-compliance therewith renders the review application dismissible.

[11] Ramodibeli P (as he then was) in the case of **Tseko Machaha V Lerole Mphou C of A (CIV) No.6 of 2010**, dealt with a similar Rule under the subordinate Court Rules. He gave the following instructive remarks;

"*The fact that the respondent may have been entitled to apply for rescission is no bar to an application for review. He was not bound to apply for rescission. Section 21 of the Subordinate Courts Act 1988. This section reads as follows:-*

"*21. (1) the court may, on the application of the party in whose favour a judgment has been given, rescind or vary such judgment in the absence of the party against whom the judgment was granted, provided such last-mentioned party has received notice of the application and has been given an opportunity to appear at the hearing of the same."* (My underlining.)

I have underlined the word "may" to indicate my view that the section is not peremptory. There was, therefore, nothing to prevent the respondent from approaching the High Court by way of a review".

See also **Mphanyane V Lemena & Another CIV/APN/344 /95**

[12] I conclude, on the strength of this authority that the applicants were not precluded from approaching this Court in the manner in which they did, by the mere fact that they did not first exhaust remedies available to them in the lower Court. See also; **South African Motor acceptance Corporation (Pty) Ltd v Venter 1963(1) SA 214**. It has been further stated that where the complaint by the aggrieved person is the illegality or fundamental irregularity of the decision sought to be reviewed, such a party is not obliged to first approach the Court which is responsible for the illegality or irregularity complained of. **Mphanyane V Lemena & Another (supra)**. Of significance in this case is whether there exists valid grounds for review. This aspect will be dealt with later in the judgement.

[13] Having asserted the jurisdiction of this Court, I proceed to deal with the preliminary objections raised in this application. It is worthy to mention that the 1st point (lack of authority) was abandoned by consent at the hearing of this application and an authority to represent was accordingly filed. The only point left for determination is non-joinder.

Non joinder

[14] Advocate Nteso argued on behalf of the 1st respondent that the Magistrate has a direct and substantial interest in this application because

the complaint is directed at the use of his discretion in granting the default judgement and as such he ought to have been joined so that he can defend himself. As regards the joinder of the 1st respondent's wife, it was argued that her rights as co-owner of the disputed land are likely to be affected should this application succeed.

[15] Applicants' Counsel on the other hand contended that the question whether joinder or otherwise of a person is fatal should be guided by the purpose for which they are to be joined in the proceedings. Relying on the case of **Kalema Tech & Hire V Metsi a Pula Civil Plant Hire Rentals C of A (CIV) No 60 of 2015**, he contended that a distinction between joinder of necessity and joinder of Convenience should be drawn; further that it is only necessary to join a party where there is an order sought against them or where they would be affected by an order of Court or where the order cannot be sustained or carried into effect without prejudicing that party. He submitted that the orders sought before this court can be carried into effect without prejudicing the Magistrate so his joinder would only be for convenience and therefore not necessary.

[16] As regards the joinder of the 1st respondent's wife, the applicants' counsel argued that by reason that she was not a party in the Court a quo, she needs not be joined in this case since she only came into picture per the lease Document issued pursuant to the impugned decision.

Applicable principles in Joinder

[17] The Rule on joinder of parties is that *a party is necessary and should be joined in the proceedings if such party has a direct and substantial interest in any order the court might make in the proceedings or if such*

order cannot be sustained or carried into effect without prejudicing that party. ***Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637(A).***

[18] It has also been held that; where a person's right might adversely be affected by an outcome of court proceedings, they need to be joined so as to be afforded hearing before such an order may be made. ***Khumalo v Wilkinson 1972 (4) SA 470 at*** **p475.** If the Court can adjudicate in an effective manner upon rights and liabilities of the cited parties without the non-cited party being affected thereby, he or she is not a necessary party**.** ***Hornby v Arthur*** **1917 A.D 471.**

[19] Corbett J in ***United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd & Another*** **1972(4) SA 409 - at 415H** described the position as follows:

> *"What is required is a legal interest in the subject - matter of the action which could be prejudicially affected by the judgment of the court".*

[20] Another approach for determination of the question whether a person is a necessary party was discussed in the case of ***Gordon v Department of Health, Kwazulu-Natal 2008 (6) SA 522 (SCA)*** where it was stated that the test should be whether a person that is alleged to be necessary would have *locus standi* to claim a relief concerning the same subject matter. See also ***Lebabo and Another v Thibeli and Others (CIV/APN/54/2011).***

[21] In *casu,* the 1st respondent failed to discharge the onus of proving that the Magistrate is a necessary party in these proceedings. Differently put, the burden was on him to prove the alleged right of the Learned Magistrate which might be affected by the Judgement of this Court. In my view, the mere fact that the Magistrate might have interest in the outcome of this review application, does not mean there is any right of his that can be prejudiced by the review order in the event that it sets aside the order in the Court a quo. See ***Manlbaur V Papenfus (38297/2011)[2014] ZAGPPHC 945, City of Johannesburg v Changing Tides 74 (Pty) Ltd*** **2012 SA (SCA) at 317(A).**

[22] To further buttress the point that; there is no right of the learned Magistrate that will be affected by any order that may be given in this application, reference should be made to the review grounds. The complaint is based on factors that can be found on the record itself. He is not accused of conduct that would require a response from him because the record supplied speaks for itself. The leaned Magistrate is thus not a necessary party in the dispute between the parties because he is not being sued. **Maqutu J** (as he then was) succinctly stated in the case of ***Molapo V Mphuthing and Others (CIV/APN/188/94)*** **"***That Magistrates are cited in review proceedings merely to compel them to send the record for review"*.

[23] As regards joinder of the 1st respondent's wife, who was no party in the Court a quo, it is my considered view that the nature of these proceedings is to restore the *status quo* before the impugned Judgement was granted. This application is in no way intended to determine the rights of the parties on the disputed plot but focuses only on the conduct of

proceedings before the learned Magistrate. I conclude that her non-joinder in these proceedings is therefore not fatal.

I now turn to the merits of the application

The merits of the application

[24] As stated earlier, the grounds for review are directed at non-service of the Court process to the applicants (respondents in the Court a quo) and failure by Magistrate hear oral evidence before granting the impugned orders. The first ground, treated independently can validly be dealt with in a rescission application. It is however related to the second and pivotal ground as I will demonstrate below. They will therefore be discussed together.

Entering judgement without leading evidence

[25] I will begin the analysis on the premise that on the 04th August 2017, the minute of the learned Magistrate confirms the applicants' contention that no evidence was led before the granting of the default judgement. It is apposite to reproduce it. It reads;

"On the 04th Aug/17 Adv. Thaatho is before Court. There is a return of service that the respondents were served, to the exception of 1st and 2nd respondents who are alleged to be residing in SA. And it has been impossible to locate them, but service was effected where they were last staying or their last known address…the applicant prays for a default judgement in terms of prayer, 1, 2 and 3.

Court: D/J is hereby granted in terms of prayers 1, 2 & 3.

No order as to costs"

[26] It was contended on behalf of the applicants that the Court a quo committed an irregularity in giving judgement without hearing viva voce evidence**.** Reliance was placed in this regard on the cases of ***Rantlamo Motumi v Peter Shale and 2 Others C of A (CIv) No.32 of 2017, Likotsi Civic Association and 14 Others C of A (CIV) No.42/2012, and Rasetla Mofoka V Lesenyeho Ntsane & 3 Others C of A (CIV) No 71 of 2014*** to illustrate the point that it is mandatory in land litigation that oral evidence be led before granting any judgement.

[27] The 1st respondent's counsel argued on the other hand that; leading of formal evidence is not a prerequisite for granting of default judgement in terms of Rule 21 of the District Land Court Rules.

[28] The authorities cited by the applicants' counsel indeed support the applicants' proposition. The net effect of these judgements is that; the procedure in the Land Courts require the leading of evidence before any adverse order can be made against a party, be it granting of a default judgement or an order dismissing an application on the basis of preliminary objections in which disputes of fact might arise. Land litigation is said to be inquisitorial and *sui generis* (see ***Masupha V Nkoe & Another C of A (CIV) 42/16***) as I will further demonstrate below.

[29] The relevant Rule that deals with granting of judgement where respondent fails to appear before Court on the scheduled date is Rule 21(Rule 22 in the Land Court Rules). It provides;

"*Without prejudice to the provisions on service of notice and non-appearance on court date, where the respondent fails to appear, without good cause, at the first date of appearance or thereafter as the Court may direct, the Court may enter judgement for the plaintiff.*

(2) Notwithstanding sub-rule (1), the Court may make such order as it considers appropriate.

[30] This rule, albeit, it does not specifically provide for leading of evidence, it should, in my view, be interpreted and read together with other Rules governing procedure in the Land Courts because it is interrelated with Rules such as 11, 62, 63, 69, 70, 73 and other Rules that deal with trial procedure.

[31] It lucid from these Rules that the procedure in the Land Courts, I opine, is akin to action proceedings although the proceedings are initiated by first filing an "originating application". The party initiating an application is required to "*concisely state material facts, circumstances and other relevant matters on which the application is based" (rule 11(e)*). Notably, one of the mandatory annexures to this application is the "list of witnesses", with their full names and addresses and the purpose for which they are to be called.

[32] After an answer will have been filed (to which similar annexures of an originating application also apply), the Rules require that parties be examined and that a pre-trial conference be held. As interpreted in the cases referred to by applicants' counsel, the rules clearly envisage a trial where viva voce evidence will be led.

[33] In other words, the Rules (both Land Court Rules and District Land Court Rules) illuminate the fact that in Land Litigation, viva voce evidence is inevitable. It follows therefore that; the fact that a default judgment is being asked for does not mean rules of evidence and procedure must not be followed.

[34] Moving on to the question whether failure by the Court a quo to hear evidence constitutes an irregularity, it has been held that where the defendant has not been personally notified of the proceedings instituted against him, as is the case here, it cannot be inferred that he had no objection to the action instituted against him, and that the court must not dispense with the hearing of evidence under such circumstances. Further that the Magistrate is obliged to scrutinise evidence in order to determine whether the plaintiff's claim had been proved because asking for a default judgment does not entitle a plaintiff to judgment even where he has not led evidence to prove his claim. **Molapo V Mphuthing** (supra).

[35] In the Court a quo, the applicant made brief allegations in his originating application that the lease was fraudulently applied for and obtained by the respondents (applicants in this Court). Nothing more is said as the basis for such a serious allegation. What is evident from the record is; there was no evidence suggesting that applicants herein did not have title to the land in question, no evidence of the alleged fraud in the issuance of the lease was adduced and similarly there was no evidence on whether or not the applicants did follow proper procedures to obtain the lease in question. In my view the leading of evidence was indispensable in this case, regard being had to brief statement in the originating application. It becomes clear in the absence of evidence on these material aspects that

there was no basis upon which the court granted an order directing cancellation of the applicant's leases.

[36] In the case of **Motumi V Shale** (cited by the applicants' counsel, the Court of Appeal held that *the presiding Judge erred in granting the originating application as prayed without hearing evidence and that; cancelling the appellant's lease without affording him an opportunity to be heard amounted to a misdirection*. It has also been held, albeit not in land litigation, that, granting judgement without the requisite evidence against a person goes to the method of trial and as such amounts to a reviewable illegality. (**Molapo V Mphuthing**)(Supra).

[37] I conclude in the light of the above analysis that the proceedings under review were irregular and that the irregularity clearly prejudiced the applicants because their lease was cancelled when they have not been given an opportunity to be heard and there being no evidence to support such cancellation.

Disposition

[38] In the result, the following order is made;

1. The review application succeeds
2. The decision of the district Land Court in CIV/DLC/BB/18/16 granted on 04th August 2017 is reviewed, corrected and set aside.
3. The order directing cancellation of registration of lease number 31073-009 in the names of the 1st applicant and directing the registration of the said lease in the names of the 1st respondent is set aside.

4. The registration of the plot in favour of the 1st respondent made pursuant to the said judgement is of no legal force and effect
5. The hearing of the application should start De novo at Botha Bothe District Land court and it should proceed in accordance with the District land Court Rules.
6. Each party should bear their own costs.

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P. BANYANE
ACTING JUDGE

For Applicants: Advocate Letuka

For 1st Respondent: Advocate Nteso