

IN THE LAND COURT OF LESOTHO

HELDT AT MASERU

LC/APN/27/19

In the matter between

MALEKE RAKAKI

APPLICANT

AND

TAUMANE MAKOKO

RESPONDENT

JUDGEMENT

Coram: Banyane AJ

Heard: 16/12/19

Delivered: 18/05/2020

Summary

Application for review - withdrawal by an Attorney without knowledge of client resulting in non-appearance of applicant on the date appointed for hearing - Court proceeding to dismiss the rescission application without inquiring whether client is aware of the Legal representative's withdrawal - whether attorney's neglect and lack of diligence should always be visited on client.

Annotations

Cases cited

Masupha v Nkoe C of A (CIV) 42/16

Monaheng v Mapiloko C of A (CIV) 49/17

Thamae & Another v Kotelo & Another C of A (CIV) 16/2005

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

Han v Kim CIV/ APN/494/99

Take and Save Trading CC and others & 4 others v Standard Bank of SA Limited 2004(SA) 1(SCA)

Darries v Sheriff of Magistrates' Court Wynberg and Another (25/96) [1998] ZASCA 18

Statutes (and subsidiary legislation)

District Land Court Rules 2012

Introduction

[1] This is an application for review of a decision by the Maseru District Land Court dismissing an application for rescission filed by the applicant herein. It is common cause that on the date appointed for hearing of the application, a period of five (5) years after its filing, the applicant's attorneys served and filed a notice of withdrawal from the matter. The learned Magistrate dismissed the application. It is against this dismissal that the applicant seeks this Court to review and set aside the decision, primarily on the ground that he was denied the right to be heard in the said application.

Background of the dispute

[2] The dispute between the parties pertains to a certain piece of Land identified as plot No. 13291-1003 situated at Qoaling, in the Maseru Urban Area. The respondent is the registered title holder of this plot and holder of a lease. The applicant resides on this plot with his family. The respondent sued the applicant herein for ejectment from this plot under CIV/DLC/MSU/109/2013. The applicant's claim to this plot is that he

acquired possession of the plot through a sale agreement he concluded with one Thabo Lehasa.

Proceedings in the Court a quo

[3] On the 1st October 2013, the respondent (applicant in the ejectment application) filed a request for default judgement. On the date appointed for hearing of the matter, the 09th October 2013, the applicant did not appear before Court and the respondent was granted default judgement. The return of service dated 29th August 2013 reflects that service of the originating application was made on the respondent's son on 22/08/2013 who reported to the Messenger of Court that his father is works in Bophuthatswana. The service of the order after judgement was granted by default was made to the respondent's daughter on the 30th October 2013. Only on the 07th March 2014 did the applicant file a rescission application and a condonation application. These facts are common cause.

[4] For undisclosed reasons, the matter exchanged a number of judicial hands. It was finally placed before his Worship Mr Molapo. On the 30th October 2018, it was postponed to 15th November 2018. It is not immediately clear as to what transpired on that day but it appears that on the 29th January 2019, the matter was set down for hearing on the 24th April 2019. It is again not clear from the Record as to what transpired on this date, however it appears that the matter was again set down to proceed on the 17th September 2019. On this day, the applicant's attorneys, without making appearance before Court served and filed a notice of withdrawal as attorneys.

[5] The respondent's counsel appeared before Court and sought dismissal of the rescission application. Indeed the application was dismissed. Perhaps is apposite to reproduce the Learned Magistrate Minute of the

proceedings before Court on the day in question because the proceedings on that day have a bearing on the determination of this review application. The minute reads:

"On 17/09/2019 Mr Masoeu for the respondent in the rescission application. (There is no appearance by or for applicant). His counsel filed a notice of withdrawal today which was also served on the respondent. Mr Masoeu submits that this matter is over 5 years old and that there is generally a lack of will his side to prosecute this matter. He submits further that the respondent was granted ejectment on the basis of the lease in his names which evidences his title.

Applicant has not challenged that lease but only challenged the ejectment order. Even if that order is rescinded, respondent would still be the one having title in respect of this plot; we therefore on the basis of the above grounds ask that this application be dismissed".

Court: application for rescission is dismissed with costs on the basis of two grounds advanced above".

[6] A warrant of ejectment was issued subsequent to the dismissal of the rescission application.

The review application

[7] The gravamen of the applicant's case before this Court is that the learned Magistrate erred and adopted an irregular procedure in one or all of the following;

- a) Despite the notice of withdrawal being brought to his attention, the learned Magistrate non-the-less dismissed the rescission application;
- b) By ignoring the withdrawal, the learned Magistrate denied the applicant of the right to personal or legal representation, by having him served personally to appear before Court;

- c) By so denying him the right to appear before Court personally or with another legal representative, he denied him the Right to be heard and present his case.
- d) By denying him the right to be heard, he denied him an opportunity to prove his case before Court that he actually brought the rights and interest in the subject matter, an issue that would arise from viva voce evidence.

[8] On the basis of these grounds, he seeks an order; a) declaring the warrant of ejectment issued by the 4th respondent on the 17th September 2019 a nullity and that it should be cancelled, b) reviewing and setting aside the proceedings in CIV/DLC/MSU/109/13, c) that the land dispute between the parties in CIV/DLC/109/13 should start *de novo* before a different Magistrate.

[9] The application is opposed by the 1st respondent only. It is his case that the applicant's attorney had a professional duty to make appearance before Court for a formal withdrawal and that the learned Magistrate was therefore entitled to dismiss the application for non-appearance in terms of Rule 53 of the District Land Court Rules.

[10] The respondent argues further that because the parties' heads of arguments had been filed, the presumption is that the learned Magistrate had applied his mind to the same before deciding to dismiss the application; and therefore that the dismissal of the application under these circumstances did not amount to gross irregularity.

[11] It was contended further that the applicant was not denied an opportunity to address the Court because the applicant nor his legal representative were not before Court.

[12] The Respondent also addressed the requirements of rescission, contending that the applicant's explanation for non-appearance is not only unreasonable but also false; Further that he has no bona fide defence to the main case because the person from whom he claims to have acquired the disputed land lost a case of inheritance in 2017.

Issues for determination

[13] The issues that arise for determination are as follows;

- a) Whether the Magistrate was obliged to order postponement of the matter and personal service to the applicant in view his attorney's withdrawal.
- b) If the answer to (a) above is in the affirmative, whether he committed a gross irregularity in proceeding to dismiss the application in view of the withdrawal. I deal with them below.

Grounds for dismissal of the application

[14] Before I proceed to deal with these issues, it is apposite to first address the question whether the application was dismissed on the basis of Rule 53 or other grounds.

[15] Rule 53 of the District Land Court Rules sanctions dismissal of an application where the applicant fails to appear when the application is called on for hearing. *It reads;*

"53(1) where the respondent appears and the applicant does not appear when the application is called on for hearing, the Court shall make an order that the application be dismissed".

[16] A fair reading of the learned Magistrate's minute shows that the grounds for dismissal of the application were; firstly, the matter is an old one and there seems to be unwillingness on the part of the applicant to

prosecute; secondly, whatever the applicant's defence(in the main), the lease-hold by the respondent is unassailable. There is no suggestion that he invoked this Rule to simply dismiss the matter on the basis of non-appearance of the applicant. He went further than that to deal with whether the applicant's defence in the main case is sustainable. It is not correct to therefore argue, as respondent counsel does, that the application was simply dismissed for non-appearance of the applicant.

[17] Worthy of comment too is the assumption that the respondent's counsel asks this Court to make; that the learned Magistrate applied his mind to the heads or arguments filed. To decide the tenability of this proposition, it should be noted that the grounds for seeking rescission include certain procedural defects; viz; that the Default judgement was erroneously sought and granted, firstly because, the request for default judgement was irregular by reason that it was made in terms of Rule 27(1) of High Court Rules. Secondly, the originating application was irregular because it was lacking the mandatory Rule 12 requirements (there were no documents attached to support the applicant's claim); significantly, it was not served with the accompanying "notice to the respondent", which, in terms of Rule 18 contains a date of hearing of the matter, the effect of which is that the applicant was not aware of the date of hearing. Thirdly, the default judgement was granted without hearing of viva voce evidence for the applicant in the main to prove his title.

[18] Rule 56 of the district Land Court Rules enables a party against whom judgment is entered in his/her absence to make an application to have it set aside. All that is required under this rule is for the applicant for rescission to satisfy the Court that, the notice was not duly served, or that he/she was disabled by a good cause from appearing or from filing his answer. ***Rasetla Mofoka V Lesenyeho Ntsane & others C of A (CIV) No.71. of 2014 para 20.***

[19] There is no suggestion from the Minute, that the learned Magistrate took into account the principles highlighted above. To put it another way, there is no suggestion that the Court did consider whether there is a reasonable and acceptable explanation for non-appearance of the applicant on the hearing date in the main application and whether the procedural defects complained of are valid e.t.c.

[20] I however refrain from deciding the application before Court, on this basis. My reason is simple; this Court is not called upon to make such a determination. The only issue pleaded by the applicant before this Court is denial of a fair hearing caused by the failure of the learned Magistrate to issue an order directing that the applicant be notified of the attorney's withdrawal so he can make an election to either personally argue the rescission or engage another counsel. In other words, the heart of the dispute before this Court is that the applicant was denied the right to be heard and no other reason. It cannot therefore be approached in the light of the question whether the learned Magistrate committed an irregularity in failing to consider the application or requirements of rescission before him.

[21] It is trite that an application can only be decided by the Court on the pleadings and evidence before it. It is not for the court to make out a case for the litigants, nor can the court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded. A plaintiff is thus restricted to the cause of action which he relied upon in his declaration, that is to say, the Court cannot determine an issue on the basis of a cause of action preferred by it and not on the basis of the cause of

action pleaded by the parties (***Monaheng v Mapiloko C of A (CIV) 49/17 (para 24 and 25)***).

I proceed now to deal with the issue before Court.

Was the Magistrate obliged to order personal service where Counsel failed to appear at the hearing?

[22] While it is trite that mere withdrawal by a practitioner does not entitle a party to a postponement as of right ***Take and Save Trading CC and others & 4 Others v Standard Bank of SA Limited 2004(SA) 1(SCA) para 3***, prejudice is an important consideration in assessing an application for postponement because of the withdrawal of a legal representative.

[23] Peete J in ***Han V Kim*** in dealing with rescission of a judgement obtained by default upon withdrawal of counsel, remarked that, upon immediate withdrawal of counsel, the Court has to be assured that such a withdrawal had been communicated to client. He instructively identified the following, as important factors when considering whether or not a matter has to be postponed on account of withdrawal of counsel; **a)** a legal practitioner who has been engaged by a client to represent him in a trial before Court owes that client a supreme professional duty and that duty involves protecting the interests of such client to the best of his or her professional ability. **b)** Regardless of the reasons for the withdrawal, lawyers have to see to it that client's interests are safeguarded by seeking a postponement or adjournment to facilitate engagement of another lawyer. **c)** In order to be effective the withdrawal must of necessity be communicated to all parties including the client in terms of rule 15(4) of the High court Rules. **d)** The rationale for the rule is to guarantee the right to legal representation in cases where a defended party is faced with a problem of an attorney abandoning and resigning from the case.

[24] He held further that a fair hearing envisaged by section 12(8) of the constitution means that regardless of the merits of his claim or plea, a party in a civil litigation must be afforded opportunity to motivate such claim or defence.; that where an attorney withdraws without informing client, the person has to be afforded an opportunity to elect another representative or prosecute his own defence regardless of its merits or demerits, and that the Courts commits a procedural irregularity in proceeding with the case and granting judgement in such circumstances.

[25] Whilst there is no explicit Rule in the District Land Court Rules dealing with withdrawal of a Legal representative, I find the guidelines above equally applicable in the Land Courts where Counsel withdraws from the matter without informing client. This conclusion is based on the Right to a fair hearing entrenched in our constitution. By dismissing the rescission application, which was ripe for hearing and written submissions filed when the Court was not in the position to know whether the applicant was aware of such a withdrawal, constitutes a procedural irregularity because it cannot be said, in the circumstances, that the applicant had a fair hearing.

[26] The respondent's counsel contends that the applicant has to accept responsibility for the neglect or fault of his attorney, whom it is correctly submitted, had a duty to appear before Court and formally inform the Court of the withdrawal.

[27] Indeed there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence and efficiency ***Darries v Sheriff of Magistrates'' Court Wynberg and Another (25/96) [1998] ZASCA 18***. It is also not a general Rule that neglect of an attorney, even if serious, should always be visited upon the client. ***Thamae & Another v Kotelo & Another C of A (CIV) 16/2005(para 16)***.

[28] It is undeniable that the applicant suffered prejudice because of the negligence of his attorney. The question is whether in the present case, the applicant has to bear the brunt of his attorney's neglect. In my view the answer has to be in the negative for the simple reason that it is not suggested by the respondent that the applicant was made aware of the withdrawal so that he may have elected to engage another counsel for oral argument since the heads of arguments had been filed as far back as 2014.

[29] in addition, the application could not simply be dismissed on the ground of the delay to prosecute when the Court was not even told of the reasons for the delay or that the delay was solely attributable to the applicant. Similarly, the fact of the unchallenged lease could not solely be a decisive factor in concluding that the matter should be dismissed without affording the applicant an opportunity to address both the condonation and the rescission applications.

[30] The Right to a fair hearing regardless of the merits and demits was also echoed in ***Masupha v Nkoe C of A (CIV) 42/16*** where the Court of Appeal stated at paragraph 17 of the Judgement that summary dismissal of a case without trial deprives an applicant an opportunity to present his claim regardless of its prospects. It held:

"Indeed even a frivolous claim deserves a hearing".

Conclusion

[31] In the premises, I have come to the conclusion that the Resident Magistrate did not consider the principles enunciated in *Han v Kim (supra)* before dismissing the application. He had no reason to believe that the applicant was aware of his attorney's withdrawal. In particular, he did not consider the prejudice to be suffered by the applicant when he proceeded to agree with respondent's counsel to dismiss the matter under such circumstances.

[32] In my view, the failure by the Magistrate to afford an opportunity to the applicant to argue his rescission application is not in consonance with the right to a fair hearing. This failure constituted a gross irregularity warranting the setting aside of the decision.

[33] Lastly, on the orders to be made, the applicant has asked the Court to also issue an order that "the dispute between the parties should start de novo". It is not immediately clear whether 'dispute' means the rescission application or the main case. However, I have considered that; a) the only ground of review ventilated before this Court is denial of hearing in the rescission application, b) The Court has not been supplied with the complete record relating to both condonation application and the rescission application. This Court is therefore in no position to address the question whether the rescission application was well grounded. These applications should best be dealt with by the District Land Court after hearing both parties and considering all papers filed.

Order

[34] In the result, I make the following order;

- a) The proceedings of the 17th September 2019 in CIV/DLC/MSU/109/13 are reviewed and set aside

- b) The warrant of ejection issued pursuant to the said order is also set aside.
- c) The condonation and rescission applications should be heard afresh before a different Magistrate; so should the trial in the event of setting aside the default judgement.
- d) Applicant is awarded costs of this application.

P.BANYANE
ACTING JUDGE

For Applicant: Advocate Ramakhula

For Respondent: Mr Makhetha KC