

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/308/16

In the Matter Between:-

'MARETHABILE TLALAJOE

PLAINTIFF

AND

TEBOHO TLALAJOE

DEFENDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 11th AUGUST 2020

DATE OF JUDGMENT : 15TH OCTOBER 2020

Summary:

CIVIL PRACTICE-Applicant instituting an application for rescission on the basis of Rule 45 (1) (a), that the order of division

*of joint estate was erroneously sought and granted in his absence-
Applicable principles restated and application dismissed with costs.*

Annotations :

CASES : *Leen v First National Bank (PTY) C of A (CIV)
16A of 2016 [2016] LSCA 27 (28th Oct. 2016)*

MOKHESI J

[1] The applicant and respondent were once married in community of property until their bonds of marriage were terminated by means of a decree of divorce on the 13th February 2008 on account of the applicant's malicious desertion. Prayers relating to the division of the joint estate were deferred to be dealt with at the later stage, and perhaps to give the parties a chance of working out a settlement thereon. Among the properties forming part of the joint estate and which were subject of division was an undeveloped and registered as plot NO. 12293 – 652, situated at Ha- Thetsane. It would seem the negotiations which were aimed at resolving lingering issue division of estate dragged on for more than ten years without a headway being made. During this period the applicant had engaged valuers to place a value on the above-mentioned plot. It was valued at M72,000.00. During negotiations the respondent made a proposal that the parties share the above value equally. This value represents the value of the property excluding its current value, as the applicant continued to develop the site while negotiations on settlement had all but ground to an unproductive standstill.

[2] Seeing that the negotiations had reached a point of stalemate the respondent, on the 07th August 2019 launched an application in terms of which she sought the following relief:

“a) Respondent shall not be ordered to pay to the applicant an amount of M36,000 being Applicant’s half share of the value of the property that formed the parties’ joint estate.

b) Respondent may not be ordered to pay the said M36,000 within 30 calendar days from the date of the order.

c) Respondent may not be ordered to pay interest on the amount M36,000 from the date that 30 days shall have lapsed, and the amount has not been paid to the date of payment at the rate of 10% per annum simple interest.

d) Costs of suit in the event of opposition hereof”

This application was served upon the applicant’s erstwhile counsel Mr. T’senoli, and that matter was scheduled to be heard on the 12 August 2019. There was no intention to oppose filed of record, and the application was granted as prayed on that date, in his absence.

[3] On the 23rd January 2020, the applicant lodged the current application to rescind the order which was granted by default. The basis of his application was that that application was granted erroneously. He says the order was erroneous because during the negotiations the applicant had proposed that the immovable property be given to the respondent. As I said earlier in the narration of the factual background, the negotiations which were aimed at settling the issue of division of the joint estate failed to yield results, and the movable property which was always in the

hands of the applicant had been rendered of no value and worthy of division, and because the respondent had developed the plot in issue, the respondent sought her equal share of the value of that site prior to its development, assisted of course, by the valuation report which was compiled by the property valuers she had engaged.

[4] This application is in terms of the provisions of rule 45 (1) (a) of the rules of this court, which provides that:

“45(1) The court may, in addition to any other power it may have *mero motu* or upon the application of any party affected, rescind or vary –

a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby:

b)

c)”

[5] An order or judgment is erroneously sought or granted if at the time the order was issued there existed a fact which had the judge been aware of would not have granted the judgment or issued the order (***Leen v First National Bank (PTY) C of A (CIV) 16A of 2016 [2016] LSCA 27 (28th Oct. 2016) at para. 28***

[6] The applicant’s contention is that the order of this court was erroneous because the valuation report upon which this court

based its order was made many years after the decree of divorce was granted, to be precise, ten years later and does not appear to cater for the movables. The applicant had averred that she was not concerned about the movables because they have depreciated to the extent that they are worthless and had no interest in them, the only property of value remaining being the site mentioned above. To my mind the respondent cannot be faulted for wanting to share only in the value of the immovable property, as it formed part of the joint estate, and therefore, subject to be divided between them.

[7] The question to be answered is whether it was erroneous for this court to have ordered that the respondent be given the half share of that property value prior to its development. At the certain point during their negotiations when the respondent proposed to the applicant's erstwhile counsel that the parties should share on the basis of the value of the immovable property prior to its development, the applicant did not seek to secure a counter valuation, he simply remained passive and indifferent only to cry foul when an order is made on the basis of the applicant's valuation. It will further be recalled that when the applicant approached this court for an order of division, that application was unopposed. In the circumstances my considered view is that the order of division on terms outlined above is justified and above board. The fact that during negotiations the applicant may have

made certain proposals is of no moment as the negotiations were fruitless.

[8] In the result:

- a) The application is dismissed with costs.

MOKHESI J

**FOR THE APPLICANT/RESPONDENT: ADV. THAFENG S.
INSTRUCTED BY K.D. MABULU ATTORNEYS**

FOR THE RESPONDENTS/APPLICANT IN THE MAIN:

ADV. K. THABANE INSTRUCTED MAKHOAKHOA ATTORNEYS