IN THE LAND COURT OF LESOTHO

HELD AT MASERU **LC/REV/APN/26/2020**

CIV/DLC/MSU/0040/20

In the matter between

AMALGAMATED ENGINEERING SOLUTIONS (PTY) LTD	**1ST APPLICANT**
MOREMI SOJANE	**2ND APPLICANT**

And

MALISEMA FLOYD MOKHEHLE	**1ST**	**RESPONDENT**
THE LEARNED MAGISTRATE MR MOLAPO	**2ND**	**RESPONDENT**
CLERK OF COURT MASERU MAGISTRATE COURT	**3RD**	**RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**4TH**	**RESPONDENT**
MASERU CITY COUNCIL	**5TH**	**RESPONDENT**
ATTORNEY GENERAL	**6TH**	**RESPONDENT**

Neutral Citation: Amalgamated Engineering Solutions (Pty) Ltd & 1 v Malisema Floyd Mokhehle & 5 Others (LC/REV/APN/26/2020) [2021] 72

JUDGEMENT

CORAM: BANYANE J

HEARD: 30/09/2020

DELIVERED: 07/06/2021

Summary

Application for review of a judgement granted by default on grounds of procedural irregularities - whether the only remedy available to the aggrieved party is rescission - failure to adopt the rescission procedure is no bar to an application for review - application heard in spite of defective service – thereby depriving the applicant an opportunity to present his case - application succeeds.

ANNOTATIONS

Cited cases

1. Mofoka v Ntsane C of A (CIV) 71/2014
2. Tseko Machaha v Lerole Mpheu LAC (2009-2010) 519
3. Mphanyane v Lemena & Another CIV/APN/344/95
4. Lesotho Bank (in liquidation) v Teboho Mphahama CIV/T/543/2003
5. Setsomi v Lesotho Police Staff Association C of A (CIV) 55/17
6. Malefetsane Lepele v Machakela Helena Lepele C of A (CIV) 65/14
7. Masupha v Nkoe and Another C of A (CIV) 42/2016
8. Tau v Makhetha CIV/T/217/18
9. South African Motor Acceptance Corporation (Pty) Ltd v Venter 1963 (1) SA 214

Books

Herbstein & van Winsen the Civil Practice of the Supreme Court of South Africa (4th ed)

Subsidiary Legislation

1. The High Court Rules 1980
2. The District Land Court Rules 2012

BANYANE J

Introduction

[1] This is an application for review of an order / judgement granted by the Maseru District Land Court on the 22nd July 2020 in terms of which the 1st respondent herein was declared as the legitimate title holder of site No.269 situated at cathedral area, Maseru and directing the Land Administration Authority to issue a lease for this plot in her names.

Background

[2] The 1st respondent as applicant launched proceedings before the Maseru District Land Court under CIV/DLC/0040/2020 in June 2020 against the 1st applicant herein. She sought relief in the following terms;

a) That the applicant be declared to be the title holder of plot number 269
b) That the S10 document issued in the 1st respondent's favor be revoked in-and-out
c) That the respondent be directed to issue a lease in the applicant's favour over site number 269
d) Costs of suit.

[3] It is common cause that the application was served on the applicant herein on the 17th June 2020. On the 22nd July 2020, Mr. Nzuzi for respondents appeared before court, but applicant did not. Mr. Nzuzi sought and obtained default judgement. The order was served on the applicant on the 27th July 2020. Subsequent to receipt of this order, the applicant filed a review application in the High Court under CIV/APN/225/2020. This was withdrawn on the day on which the application was to be made before Court per the notice of motion.

After the withdrawal, the present application for review was filed in this Court.

The grounds for review

[4] The applicants impugn the decision of the district land court primarily on procedural irregularities that culminated in the impugned decision. The gravamen of their complaint before this Court is;

4.1 Firstly that the application was defective because it had not been signed by the applicant (in the court below), the authority to represent was not also unsigned as well as the list of documents. Lastly the attachments were not certified.

4.2 Secondly that the notice attached to the originating application served on it (1st applicant) bore no date of appearance contrary to Rule 18 of the District Land Court Rules 2012. They aver that the notice was not only defective in this regard but also contains contradictory dates. In this connection, they say the notice was apparently stamped by the clerk of court on 11th June 2020, but in the same breath the clerk appeared to have issued it on the 22nd of July 2020.

4.3 Thirdly, the procedure adopted by the court below was contrary to the rules governing procedure in that court. They aver in this regard that the learned Magistrate issued the impugned order without hearing oral evidence but simply read the originating application and heard submissions by counsel, thereby disregarding the provisions of Rules 70, 71, and 72.

4.4 Lastly that, the 2nd applicant ought to have been joined because the impugned s10 document is written in his names. I should mention that the 2nd applicant describes himself as the director of 1st applicant.

4.5 The 2nd applicant avers that as a result of the defective notice, he was in the dark as to when he was expected to appear before court because when he was served with the application on the 17th of June 2020, the messenger of court simply informed him that his company is being sued in the District Land Court. He says while awaiting communication from the 1st respondent as to when he was expected to appear before court, he shockingly received the impugned order on the 27th of July 2020.

[5] The application is opposed by the 1st respondent. She raised preliminary objections of jurisdiction, *lis pendens and locus standi*. I deal with them in turn.

Lack of jurisdiction

[6] Advocate Nzuzi argued on behalf of the 1st respondent that the application before court is a rescission application disguised as a review.

6.1 Relying on Rule 56 of the District Land Court rules, he contended that where default judgment has been granted, the relief available to the respondent against whom it has been granted in his absence is to apply for rescission before the court which passed the judgment. He submitted that an application for review on the other hand involves trial related prejudices and is available to a litigant who was present before court during the proceedings sought to be reviewed. He

contended further that Rule 84 does not in any way provide for default judgement as a ground for review.

6.2 He argued on the basis of **Mofoka v Ntsane C of A (CIV) 71/2014** and Rule 56 of the District Land Court Rules that the applicant ought to have challenged the default judgement by way of rescission and that failure to do so is fatal to this application because this court lacks jurisdiction to set aside an order granted by default. He submitted on this basis that only the District Land Court has jurisdiction to hear a rescission application in terms of Rule 56 and that this Court does not have jurisdiction to hear this application.

6.3 He submitted further that the procedural irregularities complained of should be traversed before the District Land Court, not before this Court.

[7] The applicant's counsel submitted on the other hand that this review application is brought in terms of Rule 84 of the District Land Court rules which gives any party affected by the decision of the District Land Court a right to seek relief in the Land Court. He submitted that this point lacks merit and must be dismissed.

[8] The issue that falls for determination is whether a party aggrieved by a default judgment is barred from approaching the Land Court on review, without first resorting to the rescission procedure.

[9] The starting point of the inquiry should be Rule 56 of the District Land Court rules. It reads as follows;

> 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 the judgement or order, apply to court that passed the judgement or made the order to set it aside.
>
> 56(2) if the respondent satisfies the court that the notice was not duly served or that he was disabled by a good cause from appearing when the action was called on for hearing or from filing his answer, the court shall, after the notice of the application has been served on the applicant, make an order setting aside the judgment or order as against him upon such terms as to costs, payment into court or otherwise as it thinks just, and shall appoint a day from proceeding with the application or re-hearing the appeal, as the case may be.

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

[11] The Court of Appeal in **Tseko Machaha v Lerole Mpheu LAC (2009-2010) 519** dealt with a similar argument whether a party aggrieved by a default judgement is constricted from seeking review of the proceedings without first applying for rescission.

[12] The Court held at 521 H-I that the right to apply for rescission is no bar to an application for review and that the aggrieved party is not bound to apply for rescission. See also **Mphanyane v Lemena & Another CIV/APN/344/95.**

[13] Where the complaint by the aggrieved person is an 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).*

[14] It follows in my view that the respondent's objection to the jurisdiction of this Court is unsustainable. 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 the rescission remedy available in the lower Court. See also; **South African Motor Acceptance Corporation (Pty) Ltd v Venter 1963(1) SA 214**.

[15] I now address the argument based on the grounds for review under Rule 84. The respondent's counsel's argument is that default judgement is not a ground for review.

[16] This rule must be properly read. My reading of it is that it has three sub-rules and there seems to be typographical errors in the numbering of these sub-rules. It is perhaps helpful to reproduce its provisions for a full appreciation of its contents. It reads;

> 84. (1) 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 subordination of perjury or other inappropriate and misleading conduct on the part of either party in the course of the proceedings; or
>
> (b) the person making the application 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.

(c) without prejudice to sub-rule (1), any party to a case may apply for review where the judgement sought to be annulled or varied was made based upon any irregularity on the part of the court in the conduct of the proceedings.

(2) An application for review under sub-rule (2) shall be filed at the Land Court, which shall function as a division of the High Court.

16.1 It will be observed that Sub-rules 1 (a) and (b) contains grounds for review envisaged under Rule 83. This review is made before the court that issued the judgement. They must therefore be read with rule 83, which provides;

> 83. (1) Any person whose interests are directly affected by a final judgment entered in an application may apply to the court that pronounced the judgment, on one or more of the grounds stated in Rule 83, (sic) 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.

16.2 There seems to be a typo in this rule too. Reference is clearly made to Rule "84". What appears as 84(1) © should in my view be read as Rule 84(2). what appears as 84(2) should be read as 84(3). The last two mentioned should be read together. They deal with review by the Land Court on grounds of irregularities in the conduct of proceedings by the District Land Court.

16.3 It follows in my view that the respondent's counsel's argument misconstrues the import of this rule and therefore insupportable.

***Lis pendens* and withdrawal of proceedings**

[17] It is common cause that the present review application was preceded by another filed under CIV/APN/225/2020 in the High Court. On the 19th August 2020, a notice of withdrawal of this prior application was served on the respondents.

[18] Mr. Nzuzi contended on behalf of the 1st respondents that the initial review application **(CIV/APN/255/2020)** remains pending before the High Court because when the notice of withdrawal was filed on the 18th of August 2020, the respondent's notice objecting to the jurisdiction of the Court had already been filed and the matter had already been set down. He contended on the basis of **Lesotho Bank (in liquidation) v Teboho Mphahama CIV/T/543/2003** to submit that withdrawal of a matter post set down can only be made by concurrence of the parties or by leave of Court. He summitted therefore that this notice is in law regarded *pro non scripto* and without legal effect.

[19] The applicant's counsel counter argued that the initial review application has been withdrawn upon realization that the High Court in its ordinary jurisdiction lacks competence to review proceedings emanating from the District Land Court. He submitted that there is no pending case in the High Court.

[20] This issue whether the initial application remains pending must be resolved by reference to the rule governing withdrawal of proceedings

in the High Court. This is Rule 43(1) of the High Court Rules 1980. it reads;

> A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or by leave of court withdraw such proceedings.

[21] In **Malefetsane Lepele v Machakela Helena Lepele C of A (CIV) 65/14** the Court stated that;

> Under the common law practice, a person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrence and without leave of court at any time before the matter is set down. This is based on the trite principles of public policy that it is not the function of the court to force a person to proceed with an action against his will or wishes.

21.1 The court went on to say;

> But once the matter has been set down for hearing, it is not competent for the party who has instituted such proceedings to withdraw them without either consent of all the parties or the leave of court. Where such leave or consent has not been obtained, the purported unilateral notice of withdrawal is invalid.

[22] In **Setsomi v Lesotho Police Staff Association C of A (CIV) 55/17** para 46, the philosophy underlying the rule was stated to be that; by setting litigation in motion, the applicant / plaintiff once the matter is set down inconveniences the respondent / defendant and puts him/her at an expense, which have to be taken into account when considering leave to withdraw and when the other party is consenting.

[23] When challenging the propriety of the notice of withdrawal, the 1st respondent avers as follows at para 1.4 of the answering affidavit;

> The High Court application CIV/APN/255/2020 was set to 18th day of August 2020. 1st respondent was determined to present her defense that day, only to be served with a notice of withdrawal dated the same day…"

[24] *Ex facie* the notice, it was received by the 1st respondent on the 19th August 2020. There is no suggestion that she appeared before Court on the 18th, the date which I consider was intended for seeking dispensation and interim relief only. In my view the case had not reached the set down stage thereby necessitating concurrence of the respondent or leave of Court. For these reasons, there is no pending review application before the High Court. This point too must be dismissed.

Locus standi

[25] With regard to the issue of *locus standi*, it was argued that the applicants presented no title documents as proof of their interest over the land in question and for this reason, they have no *locus standi* to bring these proceedings. Mr Monese for the applicant contends on the other hand that the applicants have the right to bring the review proceedings by virtue of being the respondent(s) in the court *a quo.*

[26] I should point out that the issue of the applicant's documents in relation to the disputed site should not be debated before this court for the simple reason that at this stage, I do not have the benefit of the applicants defence on the matter because they are yet to file their answer. By addressing this issue, this Court would in effect

predetermine the applicants' rights to this plot. This issue may therefore be raised and properly dealt with before the lower court. I proceed now to the merits of the application.

Merits of the application

[27] As indicated earlier, the gravamen of the applicant's claim before this Court relates to defectiveness of the application and notices as well as the procedural improprieties occurring in the conduct of the impugned proceedings.

[28] A review is a process through which the proceedings of the lower courts are brought to the High Court in respect of grave/gross irregularities or illegalities occurring during the course of the proceedings. For an irregularity to be gross, it must be of such a serious nature that the case was not fully and fairly determined.

28.1 Irregularity in itself is not a ground for setting aside a decision on review. The reviewing court will only interfere with the impugned proceedings if the irregularity is prejudicial or caused an injustice. See **Tau v Makhetha CIV/T/217/18**. **Herbstein & van Winsen the Civil Practice of the Supreme Court of South Africa (4th ed)** P 936-937.

[29] It is trite that failure to give proper notice of the hearing or conducting a material part of the proceedings in the absence of a party amounts to grave procedural irregularity and it has been held that where the magistrate commits a procedural irregularity, the judgement / decision made in those proceedings will be set aside on review if it results in the aggrieved party not having his case fully and fairly determined.

See **Tau v Makhetha** *(supra).* **Herbstein & van winsen the Civil Practice of the Supreme Court of South Africa (4th ed)** P 936-937

[30] I proceed now to address the validity of the applicant's complaints. I start with the filing and service of the originating application in terms of the procedural Rules of the District Land Court.

30.1 Rule 10 deals with initiation of proceedings in the district land court. It reads;

> (1) A proceeding for the determination of any land related matter by the court shall be started by filing an originating application with the clerk of court.
>
> ……..

30.2 Rule 11(e) reads;

> An originating application shall be made in writing and in conformity with Form 1 contained in the schedule to these rules and shall be signed and dated by the applicant or his legal representative.

30.3 Where the originating application is compliant with the rule, the clerk of court is then required under rule 18 to fix the date of first hearing and issue a notice to the respondent in that regard. This notice should require the respondent to submit his answer to the court on the fixed date. It reads;

> 18 (1) Where there are no reasons for rejecting an application by the Clerk of Court, the court shall immediately cause the application and annexes to be served on the respondent together with the notice requiring him to submit his answer to the court before the date of the first hearing to be fixed in the notice and informing him that the case

will be proceeded with notwithstanding that he does not appear or that he appears without his answer submitted in terms of sub-rule (2).

[31] On the date fixed under this rule, rule 50 permits the magistrate to proceed to hear the matter in the absence of the respondent where the latter fails to appear on the said date. It reads;

"50 where the applicant appears, and the respondent does not appear on the date fixed for hearing;

a) if it is proved that notice was duly served, the application shall be heard in the absence of the respondent.

31.1 This should be read with Rule 21 (1) which provides;

21. (1) 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 judgment for the applicant.

[32] The questions that must be answered here are; firstly whether the impugned notice reflects a date fixed for hearing; secondly whether the 1st applicant failed, without good cause, to appear before court.

[33] The notice required under rule 18 is issued in accordance with Form 3 of the schedule to the rules. Form 3 is a notice of appearance of respondent. In terms of this form, the notice must firstly contain the date on which the respondent is required to appear before Court to answer all material questions pertaining to the application. Secondly; the date on which the clerk of court issued the notice. The latter must be filled at the bottom of the page.

[34] While the impugned notice takes the form 3 format, it is inaccurate, confusing and manifests material omissions. I explain below.

34.1 The date on which the respondent was to appear before Court is omitted, that is, the slot intended for this date has been left blank.

34.2 The notice was stamped by the clerk of court on the 11th June 2020 thus suggesting it was issued on this date. However, on the slot designated to reflect the date of issuance of the notice (at the bottom of the page) appears a date which would presumably be the date for first hearing.

34.3 Regard being had to these omissions and inaccuracies, the service was in my view defective. It means a date fixed for hearing was not communicated to the 1st applicant nor the date by which it was expected to file its answer. It could not have appeared before court on the date it was not notified of.

[35] In view of the findings above, it is clear in my view that the applicant was denied an opportunity to argue his case. By proceeding on the basis that the applicant was served and without interrogating the defective notice and service, the magistrate committed an irregularity thereby depriving the applicant the opportunity to present its defense regardless of its prospects. Indeed, even a frivolous claim deserves a hearing**. Masupha v Nkoe and Another C of A(CIV) 42/2016**.

[36] Although I have also observed that the application itself was defective in that it is unsigned as well as the authority to represent, no prejudice to the1st applicant would arise from these omissions.

Conclusion

[37] The failure by the court *a quo* to ensure that there was proper service and by conducting the proceedings and granting an order against the 1st applicant was clearly calculated to cause prejudice to the 1st applicant in that the order was made against it without giving it an opportunity to be heard. This renders the decision reviewable. The decision must therefore be set aside on this ground alone.

Order

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

a) The application succeeds with costs
b) The default judgement granted by the Maseru District Land Court under CIV/DLC/0040/20 is reviewed and set aside
c) The applicant is granted leave to defend the matter in the court below.

P. BANYANE
JUDGE

For Applicant: Advocate Nzuzi

For Respondent: Advocate Monesa