IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

Held at Maseru

CCT/0420/2019

In the matter between:

MAHASE ARMSTRONG CHAKA **APPLICANT**

And

FIRST NATIONAL BANK OF LESOTHO **1ST RESPONDENT**

DEPUTY SHERIFF – MRS NTOI **2ND RESPONDENT**

Neutral Citation: Chaka v. First National Bank of Lesotho and Another [2021] LSHC Comm 14 (25 February 2021)

CORAM: **S.P. SAKOANE CJ.**

HEARD: **24 NOVEMBER 2020**

DELIVERED: **25 FEBRUARY 2021**

SUMMARY

Rescission application – summons served at chosen *docilium citandi* – applicant alleging that service unreasonably made it difficult to get service or be aware of it – applicant being aware of judgment when served with a writ of execution and notice of sale

of property – rescission sought on basis of Rule 45 (a) – whether service proper – whether Rule 45 (a) or Rule 27 (6) controlling – High Court Rules 1980, rules 4, 8, 19, 27 (6), 45 (a) and 47 (3).

ANNOTATIONS

CASES CITED:
Mokatse v. Manager of Boliba Multipurpose Co-operative And Another LAC (2009-2010) 384

National Motors (Pty) Ltd v. Mohai LAC (1985-89) 283

Nqaka v. Registrar of The High Court And Others LAC (2013-2014) 167

Principal Chief of Butha-Buthe And Others v. Chona CIV/APN/284/2001 LSHC (16 September 2019)

STATUTES:
High Court Rules, 1980

JUDGMENT

I. INTRODUCTION

[1] This is an application for rescission of a judgment granted in default of appearance by the applicant and the review and setting aside of the attachment of property. The judgment whose rescission is sought was granted by *Molete* J on 18 May 2020 and the writ of execution first served in July.

[2] On 28 October, this application was filed in court on an urgent basis in terms of Rule 8 (22) (c) of the **High Court Rules, 1980** and served on the 1st respondent's attorney the same day. A notice of intention to oppose it was instantly filed on behalf of the 1st respondent followed by his answering affidavit on the following day of 29 October. The replying affidavit was filed on 24 November.

Relief

[3] The applicant seeks the following relief:

> "1. Condoning the non-compliance by the Applicant with the rules of Court regulating service of process and time limits relating thereto and dispense (sic) with the rules on the grounds of urgency;

2. A rule *nisi* be issued and made returnable on the date to be determined by this Honourable Court calling on the Respondents to show cause why the following should not be made a final order of Court:

a. The order granted by this Honourable Court on **18th May, 2020** shall be rescinded and set aside as irregular and/or unlawful;

b. The execution of the Order granted by this Honourable Court on the **18th May, 2020** shall be stayed pending finalization of this matter;

c. The sale in execution of Applicant's immovable property attached on the basis of the order of this Honourable Court shall be stayed pending finalization of this matter;

d. Attachment of the Applicant's property pursuant to the Order granted by this Honourable Court on the **18th May, 2020** shall be reviewed, set aside and declared as irregular, illegal and/or unlawful;

3. Costs of suit on attorney and client scale;

4. Further and/or alternative relief.

5. That Prayers 1, 2(a), (b), (c) operate with immediate effect as interim Court Order pending finalization hereof."

II. MERITS

[4] The applicant and the 1st respondent entered into a loan agreement in terms of which the latter would provide finances to the former. The applicant defaulted in making the due instalment payments and this led to the 1st respondent issuing summons claiming the amount due and payable. The 2nd respondent (i.e. the Deputy Sheriff) proceeded to the applicant's residence at *Ha Lesia, Thetsane* (the *domicilium citandi executandi*) to serve the summons. The Deputy Sheriff found the gates locked and the applicant did not even answer his cell phone. The Deputy Sheriff then

"attached the copies of the summons at the gate." This was on 2 December 2019.

[5] On 22 January 2020, the 1st respondent filed a "Request For Default Judgment" on the grounds that:

> "(a) The Defendant having been served with Summons on 2nd day of December 2019;
>
> (b) The Defendant having not filed his Appearance to Defend."

[6] On 7 February, the 1st respondent filed a notice of set down for hearing of the matter on 10 February. It seems the matter did not proceed on that date because another notice of set down was filed on 9 March for hearing on 1 April by *Mokhesi* J. There is nothing on record to indicate whether or not *Mokhesi* J. heard the matter. But it seems he didn't because on 18 May, *Molete* J. granted the final order after hearing counsel of the 1st respondent in the absence of any appearance by or for the applicant. The applicant was ordered to pay the 1st respondent the claimed amount of money - being outstanding balance of the financial loan.

[7] On 24 June, the 1st respondent sued out a writ of execution of the movable property of the applicant. The Deputy Sheriff served the writ on the applicant on unmentioned date in July. The return reads:

> "The service of the writ of execution was effected upon the above-mentioned defendant personally, although he couldn't sign claiming that he was beaten by the police as he was fired by LAA and accused of fraud I couldn't find any movable goods claiming he was reaped off (sic) everything even his accounts were frozen. Therefore, I declare this writ of movable writ (sic) as *nulla bona*."

[8] On 15 October, the Deputy Sheriff issued a public notice of sale of immovable property on 30 October by public auction. The listed property is described as "**Plot No.11294** situated at *Ha Lesia, Thetsane, Maseru Urban Area*".

[9] On 16 October, the 1st respondent sued out a writ of execution of the applicant's immovable property as described above.

Rival contentions

[10] The applicant contends that:

10.1 He was never served with the summons. He first became aware of the claim when he was served personally with a writ of execution. The order was granted erroneously.

10.2 The summons were not properly served in terms of Rule 4 of the **High Court Rules, 1980** which states that summons can be served either personally or by leaving them at the residence.

10.3 He would expect that notice of proceedings be given to him so that he can defend himself.

10.4 He has a *bona fide* defence to the claim in that:

10.4.1 the 1st respondent froze the account he used to service the loan without prior warning and contrary to the agreed monthly instalments;

10.4.2 despite his objections that the act was unlawful and in breach of the agreement, the 1st respondent did nothing except to take his entire salary deposited in the said account;

10.4.3 he then entered into an agreement with another bank where he would receive the payment of salary and would thereafter deposit money in order to pay his instalments.

[11] The 1st respondent counters by contending that:

11.1 The applicant was properly served with the summons at his chosen *domicilium citandi et executandi* at *Ha Lesia,*

Thetsane. This was in accordance with Rule 4 (1) (b) of the **High Court Rules, 1980**.

11.2 The summons were issued after the applicant fell in arrears to pay. He had been contacted many times to rectify this breach of agreement but had failed. It is not true that his account was frozen.

11.3 Nothing prevented the applicant from continuing to service the loan after moving his account to another bank. He does not demonstrate how 1st respondent made it impossible for him to transfer or pay the loan amount into the account. He has no defence, let alone a *bona fide* one.

II. ANALYSIS

[12] The applicant wants the order granted to be rescinded and set aside as irregular and/or unlawful. Similarly, the writ for attachment of his property be reviewed and set aside. But a reading of his founding affidavit is that he wants a straightforward rescission of the order on two grounds: one, it was granted without notice and two, that he has a *bona fide* defence on the merits. He also seeks a review of the attachment of the property on the basis that it was made irregularly, illegally and/or unlawfully.

[13] A review of the order is not competent because this Court cannot review its proceedings or set aside its final orders. These are matters for the Court of Appeal as the apex court. I will then only confine myself to the aspect of the relief of rescission of the order on the basis that it was erroneously granted in the applicant's absence and the review of the attachment of the property.

[14] The applicant invokes Rule 45 for rescinding the order. The 1st respondent says that is not the right Rule. The correct one is Rule 27 (6)(a)-(c).

[15] Rule 45 reads as follows:

> "(1) The court may, in addition to any other powers 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) an order or judgment in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as a result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.
>
> (4) Nothing in this Rule shall affect the rights of the court to rescind any judgment on any ground on which a judgment may be rescinded at common law."

[16] Rule 27 (3) and (6) (a)-(c) provides that:

> "(3) Whenever the defendant is in default of entry of appearance or is debarred from delivery of a plea, the plaintiff may set the action down for application for judgment. When the defendant is in default of entry of appearance no notice of application for judgment shall be necessary….
>
> (6) (a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgment apply to court, on notice to the other party, to set aside such judgment.
>
> (b) The party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for rescission of such judgment.
>
> (c) At the hearing of the application the court may refuse to set aside the judgment or may on good cause shown set it aside on such terms including any order as to costs as it thinks fit."

[17] Commenting on the applicability of the two Rules in legal proceedings, *Melunsky* JA said the following in Manager of **Boliba Multipurpose Co-Operative And Another** LAC (2009-2010) 384:

> "[13] I have no doubt that Rule 45 and not Rule 27 (6) is applicable to the present application for rescission. On the face of it Rule 27 applies only to actions and not to proceedings by way of application but this is a point that I do not have to decide. If it is assumed that the aforesaid rule applies to motion proceedings, judgment may be granted against a defendant without notice to him only if he is in default of entry of appearance to defend. In this matter the respondents had given notice of their intention to defend and, even if it was technically flawed, the appellant was not entitled to regard it as non-existent. His remedy was to apply for it to be set aside as an irregular step in the litigation (see **Theron v. Coetzee** 1970 (4) SA 37 (T) at 38H). This the appellant did not do.

> [14] The respondents brought their application for rescission in terms of r 45. They were correct in doing so on two grounds. The first is that the order or judgment was erroneously sought for the reasons already given. The second is that it was erroneously granted by *Mofolo* AJ in the absence of the respondents. The learned judge obviously disregarded the respondents' clear intention to oppose the main application. Furthermore, while under r 27 6) an applicant for rescission must satisfy the court that his default was not willful and that he has a *bona fide* defence, this is not a requirement under r 45. See *Rajah v Monese and Another* LAC (2000-2004) 736 at 741 B-C. It follows that if the court holds that an order or judgment was erroneously sought or granted in the absence of the respondent the order should, without further enquiry, be rescinded. See *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30D-E and *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D-J. In the circumstances the court *a quo* should have granted the rescission application and it erred in not doing so."

[18] If we work by Rule 45 as the applicant wants, it suffices for him to show that the order was granted in his absence for failure to serve him with the summons or notice of set down. He need not go further to show a *bona fide* defence with some prospects of success on the merits.

[19] Rescission is sought against the order granted on the ground that it was erroneously granted without proper notice of the service of summons. The jurisdictional fact for a Rule 45 (a) rescission is absence of notice of the proceedings. This talks to the **audi a alteram partem principle**. The jurisdictional fact for a Rule 27 rescission speaks to the right of the defaulting party to be heard but subject to good cause (i.e. that the default was not willful and a *bona fide* defence) being shown.

[20] Under Rule 45 (a), rescission is available just on proof of failure to serve the applicant with a notice of the legal proceedings. Such failure constitutes a breach of the Rule 8 (1) and (2) which provides, in peremptory terms, that proper notice of proceedings be on notice of motion and proper notice be given.

[21] Under Rule 27, a default of entry of appearance after proper service of summons constitutes a breach of Rule 19 (1) which requires a defendant to enter appearance to defend (if he so wishes), by giving a notice of intention to defend. The defaulter will get a rescission only upon proof of absence of wilful default and showing a *bona fide* defence with some prospects of success on the merits: **Nqaka v. Registrar of the High Court And Others** LAC (2013-2014) 167.

[22] The two Rules, therefore, serve two different purposes. Rule 45 (a) makes it easier to re-open the doors of justice for a litigant whom the judgment creditor failed to notify about the legal proceedings. Rule 27 makes it more burdensome for a prodigal defendant who, having been given notice of legal proceedings, wilfully defaults but later turns around to ask the court to all the case back into court. To achieve each purpose, the law allocates

different burdens of proof – absence of notice under Rule 45 (a) and, under Rule 27, good cause for defaulting.

[23] The applicant's contention is that he was not served with the summons in breach of Rule 4 which states that service be either personal or at the residence. He expected notice of proceedings to be given to him. Leaving the summons at his chosen *domicilium citandi* was done in manner that such service would not come to his attention. The problem with this line of argument is that the applicant does not specify any defect in the mode of service at the chosen *domicilium citandi*. This was the agreed mode of service. I do not think of or discern anything wrong when the summons are left at the gate because the Deputy-Sheriff cannot enter the yard because of the locked gate.

[24] A perusal of the loan agreement reveals the following:

24.1 The cellphone number, home telephone and work telephone of the applicant at which the applicant could be contacted;

24.2 The street address where legal notices and summons must be sent (*domicilium citandi*).

24.3 Obligation to give notice of any changes in any of the addresses and proof of changes if any.

[25] Given these express terms in the loan agreement, the applicant's contention that service at the chosen *domicilium citandi* was not reasonable rings hollow. He does not even challenge the Deputy-Sheriff's return of service which states that he was not reachable on his phones. He merely contends himself with saying that if the Deputy-Sheriff could serve him personally with the writ of execution, he was obliged to do the same with the summons.

[26] Rule 4, on which the applicant relies heavily for his contention, indeed permits service at the chosen *domicilium citandi*. It is then not understandable on what basis the applicant contends that the service was contrary to this Rule. Service at the *domicilium citandi* is good even if it apparently could not have come to the applicant's notice. The only manner of escape for the applicant is proof that he did not choose the address as the *domicilium citandi* – proof which is lacking: **LAWSA** Replacement Volume 4, (3rd Edition) para 133.

[27] A Rule 45 (a) rescission is, therefore, not available to the applicant. He was properly served and, thereby, given notice of the proceedings in a manner and place of his choosing.

Absence of wilful default and existence of bona fide defence

[28] Having failed to give a legally acceptable reason for non-appearance, the applicant advances the proposition that he has a *bona fide* defence on the merits in that he never failed in his obligations to pay the loan instalments. His discharge of the obligation was frustrated by the 1st respondent's action of freezing his account and seizing his entire salary as soon as it was deposited.

[29] The version of the 1st respondent is a denial of the allegations. It asserts that the applicant made sporadic payments after he had moved his account to another bank and, thereafter, stopped making payments and then fell into arrears. He was contacted several times to pay but failed. His account was never frozen. In 2019 he was charged with fraud at the Magistrate's Court and that was the only time that there was an issue with his account.

[30] By opening an account with another bank with the aim of denying the 1st applicant direct access to it, the applicant acted in breach of the agreement. The 1st respondent was within its rights to call for the full payment or sue

to recover the outstanding amount. It is no answer for the applicant to argue that he was forced to breach the agreement by the action of the 1st respondent. It is incomprehensible how a creditor whose interest is to recover a debt could make it impossible for a debtor to make good the debt.

[31] The *bona fides* of the asserted defence are questionable in the light of the applicant's concession that he is indeed indebted to the 1st respondent and has not been paying as he is required by the loan agreement. The defence does not have prospects of success on the merits.

Validity of writs of execution

[32] The applicant admits that he was served with the writ of execution against immovables sued out on 16 October, which writ yielded a return against the property listed thereunder. It is the writ in respect of which property was "set to be sold in execution on or about 30th October 2020" and on whose basis the application to stop it was brought on an urgent basis.

[33] It is common cause that the applicant became aware of the order when he was first served with a writ of execution in July. That writ was for attachment and execution of movables. It yielded a *nulla bona* return. Because of this, another writ was sued out on 16 October for attachment and execution of immovable property. It is this writ which applicant seeks

to review and have it set aside. However, there is no explanation for applicant's inaction between July (when he got the first writ for attachment of movables) and 27 October when he launched these proceedings. Absent an explanation for inaction in this period of about three months, the application for rescission falls at the first hurdle because the court is disabled from determining the reasonableness of an explanation which does not exist: **Principal Chief of Butha-Buthe And Others v. Chona** CIV/APN/284/2001 (16 September 2019).

[34] I searched in vain for any notice of attachment of the immovable property to be given to the applicant as required by Rule 47 (3). Yes, a notice of sale was issued by the Deputy Sheriff on 15 October followed by a notice of attachment on 21 October. But it does not appear that service of such notice of attachment as a peremptory requirement under this Rule, was given. The attachment is void: **National Motors Pty Ltd v. Mohai** LAC (1985-89) 283.

[35] The applicant was entitled to be given proper notice of the attachment of the property. The Deputy-Sheriff was obliged to serve him with the notice. Because this was not done, the applicant is entitled to bring this application to challenge the attachment of the immovable property in question. The attachment is, thus, reviewed and set aside.

III. DISPOSITION

[36] The summons were properly served at the applicant's chosen *domicilium citandi*. The relief for rescission cannot be granted.

[37] The applicant was not given notice of the attachment of the immovable property. The writ for execution and sale must be suspended pending proper service of a notice to attach.

Costs

[38] The applicant has minimal success in this application. He has succeeded in having the attachment reviewed and set aside and the notice of sale suspended. He is, therefore, entitled to some costs but which are proportionate to the minimal success. He must pay three quarters of the costs of the 1st respondent.

Order

[39] In the result, the following order is made:

1. The prayer to rescind the Order granted on 18 May 2020 is dismissed.

2. The attachment of the applicant's property is reviewed and set aside.

3. The notice of sale of the attached property is set aside.

4. The 1st respondent is free to issue a fresh notice of attachment and sale in execution.

5. The applicant must pay 75% of the 1st respondent's costs.

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S.P. SAKOANE
CHIEF JUSTICE

For the Applicant/Defendant: D. Makhakhe

For the 1st Respondent/Applicant: S. Shale