

IN THE HIGH COURT OF LESOTHO
COMMERCIAL DIVISION

Held at Maseru

CCT/0142/2017

In the matter between:

LINEO MASALOME LEPHATSA NO
(The Curator Bonis of Estate of the
late Mabote Noosi Fanana)

APPLICANT

And

FIRST NATIONAL BANK LTD

1ST RESPONDENT

MOLAPOKATSE FANANA

2ND RESPONDENT

DEPUTY-SHERIFF: RAMOHLAHLI

‘MUSI

3RD RESPONDENT

LITEBOHO TLEBERE

4TH RESPONDENT

‘MAKATLEHO TLEBERE

5TH RESPONDENT

LAND ADMINISTRATION AUTHORITY

6TH RESPONDENT

MASTER OF THE HIGH COURT

7TH RESPONDENT

ATTORNEY GENERAL

8TH RESPONDENT

‘MAMPHO CLAUDINA FANANA

9TH RESPONDENT

Neutral Citation: Lephatsa NO v. First National Bank And Others [2021] LSHC
Comm 9 (23 February 2021)

CORAM:

S.P. SAKOANE CJ.

DATE OF HEARING:

12 DECEMBER 2020

DATE OF JUDGMENT:

23 FEBRUARY 2021

SUMMARY

Administration of estates – curator bonis seeking return of landed property to the estate – landed property transferred by surviving spouse to son more than 2 ½ years before appointment of curator – property bonded with Bank and thereafter sold and bought at a public auction – whether surviving spouse had no right to transfer property to her son or the latter had no right to pledge it as security for loan by the Bank – locus standi of curator bonis to rescind judgment and cancel the sale of property – Administration of Estates Proclamation, 1935 section 57; Land Act 2010 sections 10 and 35; Legal Capacity of Married Persons Act, 2006 sections 5 and 9.

ANNOTATIONS

CITED CASES:

LESOTHO

National Motors (Pty) Ltd v. Mohai LAC (1985-86) 283

SOUTH AFRICA

Mills v. Hoosen 2010 (2) 316 (WLD)

Simpson v. Klein 1987 (1) SA 405 (W)

Syfrets Bank Ltd v. Sheriff of the Supreme Court, Durban Central And Another; Schoerie NO v. Syfrets Bank Ltd 1997 (1) SA 764 (D)

STATUTES:

Administration of Estates Proclamation No.19 of 1935

Land Act No.8 of 2010

Legal Capacity of Married Persons Act No.9 of 2006

BOOKS:

Joubert W.A et al (eds) (2006) The Law of South Africa Volume 16 (2nd Edition) (Durban: Lexis Nexis)

JUDGMENT

I. INTRODUCTION

- [1] This is an application by a *curator bonis* whom the Master of the High Court appointed and issued her with Letters of Administration on 5 January 2020 authorising her “to administer the Estate of Late *Mabote Noosi Fanana* (for six months from date of issue)”.
- [2] The curator is before court to rescind a judgment granted on 15 June 2017 in favour of the First National Bank against the son of the late *Mabote Noosi Fanana* whose landed property had been hypothecated to secure a loan by the Bank as well as to stop the execution of sale of the property.
- [3] It is common cause that the landed property was subsequently sold by public auction following notices of sale. The first notice was by publication in a Government Gazette on 29 December 2019. The second was by notice on 20 January 2020 issued by the Deputy Sheriff. The third notice was published in the Informative Newspaper of 28 January – 3 February 2020.

Relief

[4] On 28 February 2020, the curator brought the proceedings on an urgent basis seeking the following reliefs:

- “1. Rule nisi be issued returnable on a date and time determined by the above Honourable Court calling upon Respondents to show cause, if any, why an order in the following terms shall not be made final:-

INTERIM RELIEFS:

2. That the Rules relating to forms and periods of service of the above Honourable Court be and are hereby dispensed with on account of the urgency of this matter.
3. The execution of paragraph 3 of the order of this Honourable Court dated 15th June 2017 against Plot No.14281-835 situated at **Ha Tšosane Maseru Urban Area** be suspended pending determination of these proceedings.
4. That the sale and transfer of land rights and interest in Plot No.14281-835 situated at **Ha Tšosane Maseru Urban Area** in favour of the 4th and 5th respondents be interdicted and or suspended pending finalization of this matter.
5. Prayers 1, 2, 3 and 4 be granted to operate with immediate effect as interim court orders.

FINAL RELIEF:

6. That paragraph 3 of the order of this Honourable Court dated 15th June 2017 be and is hereby rescinded and set aside as it was granted by error.
7. That the sale and transfer of land rights and interest in Plot No.14281-835 situated at **Ha Tšosane Maseru Urban Area** in favour of the 4th and 5th Respondents be and is hereby cancelled.
8. The Applicant be and is hereby granted leave to oppose the relief sought under paragraph 3 of the order granted on the 15th June 2017 and to file a counter claim against the 1st, 2nd, 6th and 9th respondents.
9. Costs of suit on attorney and client scale.
10. Further and alternative relief.”

Urgency

- [5] The application was not heard on urgent basis as had been envisaged. The answering affidavit was only filed on 7 May and the replying affidavit on 11 June. From there the hearing of the matter laid in limbo because of COVID 19 which had rendered the Commercial Court inoperative.
- [6] In any event, urgency was contested by the Bank and I endorse its reasons for contestation. The curator filed the matter on an urgent basis on the reasoning that the sale in execution was legally flawed and because of that, the beneficiaries of the estate were in jeopardy of suffering tremendous harm. The other reason was that the buyers of the property had told the occupants of the property to vacate by 1 March.
- [7] These reasons are spurious and hardly warrant urgent attention of the application. The property was transferred to the 2nd respondent by his mother, the 9th respondent. Judgment was obtained by the Bank in 2017. This is common cause. The three sisters who are disgruntled because of the transfer, do not stay in the property. The only person who had the right of occupancy would be the 2nd respondent. The so-called beneficiaries whose interests the curator seeks to protect had no occupancy to the property. After all, they were aware of the court order and notices of sale in execution long before 28 February when the application was filed and

did nothing to stop same. The argument on urgency is without merit and is dismissed.

Locus standi

[8] The Bank challenges the *locus standi* of the curator to nullify the execution process and to rescind the judgment that gave birth to it. It is contended that it does not fall within the remit of the curator to rescind an order that was granted before her appointment nor to enforce rights of daughters who claim, without proof, to be beneficiaries to property that their mother transferred to their brother. The curator's reply is that she has a legal interest in the property because it "was originally that of the late *Mabote Noosi Fanana* and has been irregularly or illegally transferred to the son to the adverse prejudice of the other beneficiaries and or the estate."

[9] The points of fact and law are that the curator says that she is suing pursuant to Letters of Administration granted on 5 January. But according to her affidavit she was also appointed as an executrix of the estate on 15 February, whereafter she learnt that the sisters' residential home had been transferred by their mother to their brother behind their back. She now wants to recover and reduce the property as an asset of the estate of the late *Mabote Noosi Fanana*. What is evidently clear is that there are no Letters of Administration to vouch for her appointment as executrix nor is there a

will to found any claim that the sisters are residual legatees. Neither is there any legal basis to contend that their mother, as a widow, has no sole control or title over it. As a surviving spouse, she can dispose of her interest in it: S.35 of **Land Act No.8 2010; Lepule v. Lepule** LAC (2013-2014) 21.

[10] It is, therefore, a misconception to contend, as the curator does, that the transfer of the property to the son prejudiced the estate and rights of the daughters. The daughters and their brother, as children of 9th respondent and the late *Noosi Mabote*, have no colour of right to the property. Any title thereof would only be conferred by way of a joint will or transfer by the title-holder who is the mother. Once she exercised her right of disposal of interest/title in favour of the 2nd respondent, the property moved out of the estate. The curator cannot lay her hands on it as the son lawfully held the property and was entitled to hypothecate it.

[11] The curator was appointed in terms of section 30 of the **Proclamation**. Her duties are to take charge of and custody of the estate of the late *Noosi Mabote Fanana* and to collect debts. Section 85 obliges the curator to “make, sign and transmit to the Master” an inventory of all the property owned by the person subject to her administration. In none of these provisions is the curator *bonis* clothed with powers to institute legal

proceedings to recover the property or debts. That is the duty of the executor as the representative of the estate and the one in whom dominium of the assets passes: **Mills v. Hoosen** 2010 (2) SA 316 WLD.

[12] Therefore, the question whether in the performance of these duties, a *curator bonis* has authority, whether express or implied, to engage in litigation in respect of the estate assets must be answered in the negative. She is answerable to the Master as her appointing authority and supervisor. She is clothed with no powers to represent the estate or the Master in legal proceedings or to institute proceedings without the Master's consent and approval.

Rescission

[13] The curator seeks to rescind the judgment and to set aside the sale of the property. This is on the assumption that she has *locus standi*. The grounds for rescission and nullification of the property are error in granting of judgment and illegality in the sale of the property.

[14] The curator contends that the transferred property formed part of the estate which has not been properly reported and wound up. Its hypothecation rendered the bond registered in favour of the son *pro non scripto*.

[15] The curator's contentions are premised on dubious legal foundations. Disposal of interest in landed property or its inheritance are governed in accordance with the provisions of the **Land Act, 2010**. Section 10 provides that married persons have joint title to immovable property. Section 35 (1) (a)(v) and (b) (i) give a lessee the right to donate or dispose of her interest subject to consent by the Commissioner of Lands. None of these provisions fetters the freedom of the surviving spouse to transfer her/his title to any of the children. Neither is any of the children entitled to demur if the disposal is not for its benefit.

[16] It follows that the daughters whose rights or interests the curator purports to protect, have no right to protest about their mother's conduct in relation to their home. Their home is not an inheritance left for their benefit by their late father.

[17] In this Kingdom, married persons have joint title and equal power and capacity to control property in the joint estate and to bequeath it by a joint will: Sections 5 and 9 of **Legal Capacity of Married Persons Act No.9** of 2006; section 10 of the **Land Act No.8 of 2010**.

[18] Upon death of one of the spouses, sole control of landed property by the surviving spouse arises *ex lege*. Title in the landed property remains in

the names of the surviving spouse and is not divisible. There is no question of inheritance by her by will, contract or *pactum successorium*. The surviving spouse is not precluded from alienating or bequeathing the landed property.

[19] As a titleholder, the surviving spouse is entitled to encumber the property, donate it and, subject to consent by the Commissioner of Lands, to dispose of his/her title which has become hers solely. Therefore, questions of whether *dominium* vests and when do not arise precisely because she is not an heir or legatee who has to await claim of inheritance or title after confirmation and distribution account.

[20] The surviving spouse transferred the property to her son in accordance with the behests of the **Land Act, 2010**. The son was free to bond it to secure a loan from the Bank. The Bank instituted proceedings against the son in CCT/0142/2017 and got judgment by default in its favour on 15 June 2017. Thereafter, a writ of execution was issued and notices of sale published and the property sold by public auction. This is unlike a case where a creditor obtains judgment against a deceased and then sues out an execution writ before the estate is wound up.

[21] The judgment was not rescinded by the son as judgment debtor or the daughters despite their being aware of the notice of sale by publication of auction on 18 August 2018. Neither were any interpleaders entered. No reason is given for this inaction. On the contrary, the daughters offered to buy back the property, but their efforts never came to fruition as they failed to raise sufficient funds.

Purchase of property by 4th and 5th respondents

[22] By not seeking rescission of judgment coupled with the attempt to buy back the property after it was put up for sale by public auction, the daughters evinced an attitude to accept the validity of the hypothecation of the property and its subsequent sale by public auction. Subject to questions of delivery, a valid judicial sale passes ownership: **National Motors (Pty) Ltd v. Mohai** LAC (1986-89) 283 at 286C.

[23] The property was sold by public auction to the 4th and 5th respondents. There is no suggestion that they bought in bad faith or knowledge of defect of title. In other words, it is not the applicant's case that these respondents are not innocent purchasers. In the circumstances, the Deputy-Sheriff is obliged by law to do all that is necessary to effect registration of transfer into their names and anything thus done is valid and effectual as if the

buyers were the owners of the property: vide Rule 47 (13); **Syfrets Bank Ltd And Others v. Sheriff of the Supreme Court, Durban Central And Another; Schoerie NO V. Syfrets Bank Ltd And Others** 1997 (1) SA 764 (D) 773C-774A.

[24] Pending formal transfer by the Deputy-Sheriff, ownership of the property remains vested in the son as the judgment debtor. He is the one having *locus standi* to stop the transfer into the names of the 4th and 5th respondents: **Simpon v. Klein** 1987 (1) SA 405 (W); **Syfrets** (supra).

III. DISPOSITION

[25] There is no factual or legal basis to grant the reliefs sought by the *curator bonis*. The application falls to be dismissed as I hereby do.

Order

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

1. The application is dismissed with costs.
2. Costs to be paid from the estate of the late *Mabote Noosi Fanana*.

**S.P. SAKOANE
CHIEF JUSTICE**

For the Applicant: M.S. Rasekoai

For the Respondent: S. Shale