

**IN THE HIGH COURT OF LESOTHO**

HELD AT MASERU

CCT/0401/2019  
CCA/0401/2021

**In the matter between:**

**ASIF MAHMOOD NAEEM**

**APPLICANT**

**AND**

**MASERU CASH AND CARRY (PTY) LTD  
DEPUTY SHERIFF (L.MIKA)**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

Neutral Citation: Asif Mahmood Naeem v Maseru Cash and Carry (Pty) Ltd  
CCT/0401/2019, CCA/0401/2021 [2021] LSHC 69

**JUDGMENT**

Coram : Hon. Mr. Justice E.F.M.Makara  
Dates of Hearing : 3<sup>rd</sup> May, 2021  
Date of Judgment : 3<sup>rd</sup> May, 2021

**SUMMARY**

Application for rescission of the judgment- The judgment having been granted by default – The ground for rescission being that default judgment was sought for and granted erroneously against the Applicant personally yet the debt was incurred while he was acting for the company – The Applicant having incurred the debt as a sole trader before the company was registered – There being no evidence that the Applicant had at any stage alluded the 1<sup>st</sup> Respondent about the change of his personal

status to that of the Company, the latter was entitled to sue him in his private capacity. Thus, application refused. No order on costs.

## **ANNOTATIONS**

### CITED CASES

1. Tumo Tlelai t/a Lesotho Mineral Exploration & Co v Sunny Hardware (PTY) Ltd t/a Sunny Buildware C of A (CIV) No 45/2012

## **MAKARA J.**

### **Introduction**

[1] The Applicant filed an urgent application on Friday the 30<sup>th</sup> April 2021. Seeking for the intervention of this Court by ordering as follows:

1. Dispensing with the forms and modes of service provided for in accordance with the Rules of Court and disposing of the matter in the manner and in accordance with such procedure as the honourable Court shall deem fit.
2. That a rule nisi be issued calling upon the Respondents to show cause, if any, on a date to be determined by the honourable Court why:
  - 2.1 The judgment granted on 25 March 2020 in CCT/0401/2019 shall not be rescinded and set aside and the applicant be granted leave to file its plea within such period as the honourable court may deem fit.
  - 2.2 The second Respondent shall not be restrained and interdicted from removing or alienating or executing the property of the Applicant/Defendant herein in pursuance of the aforementioned writ pending the determination and/or finalisation of this application.
  - 2.3 Execution of a writ dated 10 February 2021 shall not stayed pending finalisation of this application.
3. That prayers 1,2.2 and 2.3 above operate with immediate effect as an interim court order pending finalisation of this application.
4. That the Respondent pays costs of this application.
5. That the applicant be granted further and/or alternative relief.

**[2]** The Application was opposed by the 1<sup>st</sup> Respondent who in addition to the Notice of Opposition, filed an Opposing Affidavit. Thus, the matter was ready for hearing on the same date. Resultantly, it was scheduled for hearing on Monday the 3<sup>rd</sup> of May, 2021.

**[3]** It is clear from the papers that the urgency was occasioned by the fact that the 2<sup>nd</sup> Respondent was in the process of effecting a writ of execution against the Applicant. This was by virtue of a default judgment entered against him by the late Chaka-Makhooane J on the 24<sup>th</sup> February 2020. In terms of that judgment the Applicant was ordered to pay:

- a) The sum of M891,954.46 (Eight hundred and ninety one thousand, nine hundred and fifty four maloti and fourty six lisente);
- b) Interest on the above amount at the rate of (18.50%) calculated on the monthly balance of the amount of the Loan, plus any interest thereon outstanding from time to time from the 09<sup>th</sup> July 2018 up to and including date of payment, both days included;
- c) Cost of suit on attorney and client scale;
- d) Further and/or alternative relief.

**[4]** It is in consequence of that default judgment that the 2<sup>nd</sup> Respondent attached the properties of the Applicant towards its realisation. This correspondingly explains the basis of the present application for the staying of the writ of execution pending the determination of the present application.

**[5]** In a nutshell, the basis of the application for stay is that the execution is being wrongly directed at the Applicant in his personal capacity and yet he had incurred the debt which constitutes the foundation of the case, on behalf of a company named PAK wholesalers. On this basis, he repeatedly highlighted the legal

difference between a natural person and a legal person. In the same vein, he submitted that the execution should have been directed at the company for which he acted as its agent and not at himself personally. In simple terms, he acknowledges that the company incurred a debt to the 1<sup>st</sup> Respondent by obtaining a credit facility from the 1<sup>st</sup> Respondent and he is privy to that fact since he had, at all material times, acted on behalf of the PAK wholesalers which he describes as a company.

[6] The 1<sup>st</sup> Respondent counter argued that what is of determinative significance in the matter, is the status of the Applicant at the material time they concluded the contract. In this regard, the 1<sup>st</sup> Respondent maintains that he had throughout dealt with the Applicant as a sole trader and never as a company. To illustrate the point, the 1<sup>st</sup> Respondent referred the Court to the application form through which the Applicant applied for its credit facility. There was reference to the fact that the Applicant had clearly applied for the facility as the owner of PAK wholesalers. This was punctuated with a caution that there is no reference therein that PAK wholesalers was a company.

[7] It transpires to this Court that the parties have had a long contractual relationship in terms of which the 1<sup>st</sup> Respondent provided a credit facility to the Applicant. It is common cause that this was already in existence by the 29<sup>th</sup> March, 2011 and it is not in dispute that as at that time, the Applicant owed the 1<sup>st</sup> Respondent a balance of M36,323.02. This is clearly evident from a

long list of the transactions between the two which dates up to the 28<sup>th</sup> April, 2021.

[8] There is *ex facie* the papers before the court, no indication whatsoever that the Applicant had, at any stage notified the 1<sup>st</sup> Respondent about the change of his status as a sole trader to that of an agent of a company. This is indispensable in a contractual relationship since it would, *inter alia*, have legal implications and appreciation of his true identity when the contract was concluded. Understandably, this would redefine their relationship.

[9] It must be underscored that the time which is of material significant for the parties to a contract to identify their true status is at the time when they conclude such a contract. The Court had an occasion to deal with the similar factual scenario in *Tumo Tlelai t/a Lesotho Mineral Exploration Co. v Sunny Hardware (PTY) Ltd t/a Sunny Buildware C of A (CIV) No 45/2012* and it stated thus:

At no stage was it put to him that by agreeing to open a new account he had agreed the transaction was between the Plaintiff and the Company. As the Court *a quo* pointed out there was no evidence before it that such a company existed. The fact that he conceded that by the time he gave evidence he had come to know that the defendant had acted for the company does not alter the position. What was important was his knowledge at the time the contract was concluded.

[10] The absence of evidence that the Applicant had ever notified the 1<sup>st</sup> Respondent that PAK wholesalers had been registered as a company and, therefore, that he was dealing with the 1<sup>st</sup> Respondent as its agent, justifies the personal capacity in which he was sued. Consequently, this justifies the execution of the writ against him. In any event, if he was indeed acting as the agent of

the company, the latter would be obliged to settle the matter on his behalf. Otherwise, he would be legally entitled to proceed against the company to do so.

[11] In the premises, the application is refused.

**EFM MAKARA  
JUDGE**

**For Applicant : Mr. Letsika of Mei & Mei Attorneys**  
**For Defendant : Mr. Fraser instructed by Webber Newdigate & Co.**