IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCT/0015/2019**

In the matter between:

MPHO LEQELA t/a MEL FINANCE **APPLICANT**

And

'MAMATHE MASUPHA **1ST RESPONDENT**

TREASURE INVESTMENT GROUP (PTY) LTD **2ND RESPONDENT**

THE LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

DEPUTY SHERIFF – MRS. PAKISI **4TH RESPONDENT**

In the counter – application for (surrender of lease and related relief) between:

'MAMATHE MASUPHA **1ST APPLICANT**

TJ GROUP OF COMPANIES (PTY) LTD **2ND APPLICANT**

And

MPHO LEQELA t/a MEL FINANCE **1ST RESPONDENT**

TREASURE INVESTMENT GROUP (PTY) LTD **2ND RESPONDENT**

MATŠANA MASIPHOLE **3RD RESPONDENT**

THE LAND ADMINISTRATION AUTHORITY **4TH RESPONDENT**

DEPUTY SHERIFF – MRS. PAKISI **5TH RESPONDENT**

Citation: MPHO LEQELE V MAMATHE MASUPHA & 4 Others [2022] LSHC 143 Com (14 May 2022)

JUDGEMENT

CORAM: MATHABA J

HEARD ON: 23rd March 2022

DELIVERED ON: 14th June 2022

Summary

Rescission and intervention – Applicant refusing to release lease for a plot sold pursuant to a writ of execution – Lease surrendered to the applicant as security for money lent to judgment debtor – Applicant seeking rescission and intervention in the main matter – Applicant failing to meet the direct and substantial interest test with respect to the main matter – Application for rescission and intervention dismissed.

Counter – application – A plot hypothecated through an agreement between judgment debtor and micro finance lender – Judgment creditor applying for the agreement to be declared illegal and unlawful and for the release of a lease in respect of the plot – The agreement of no force and effect as it offends sec 28 of the Deeds Registry Act No. 12 of 1967 – Counter – application granted.

ANNOTATIONS

LEGISLATION

Companies Act No.18 of 2011

Deeds Registry Act No.12 1967

BOOKS

Herbstein & Van Winsen – Civil Practice of the Supreme Court of South Africa 5 ed (2009)

CASES

LESOTHO

Lebabo & Another v Thibeli & Others (CIV/APN/54/2011) [2011] LSHC 40

National Executive Committee of the BCP and Another v Mbuli and Others CIV/APN/80/2021

Sole v Lemena and Another (CIV)/T/319/01) [2001] LHCS 93

SOUTH AFRICA

De Villiers v GJN Trust (756/2017 [2018] ZASCA 80

Firstrand Bank Ltd v Nkata (213/14) [2015] ZASCA 44

Ganes & Another v Telecom Namibia Ltd [2004] 2 All SA 609 (SCA)

Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (3) SA 151

Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others (Case no 1423/2018) [2020] ZASCA 83

Itzikowit v Absa Bank Ltd [2016] ZASCA 43

Masako v Masako & Another (Case No. 724/20 [2021] ZASCA

Salomon v Salomon & Co. Ltd [1897] AC 22 (HC)

Simpson v Klein No. & Others 1987 (1) SA 405

South African Riding for the Disabled Association v Reginal Land Claims Commissioner & Others [2017] ZACC 4

INTRODUCTION:

[1] On 3rd July 2020, consequent upon the Court Order of the 16th June 2020, a commercial property known as Plot No. 15263 – 136 registered in the

names of the second respondent (*"Treasure Investment Group")*, was sold in a public auction by the fourth respondent *("the deputy sheriff")* to the second applicant in the counter – application, *("TJ Group").* The applicant, *("MEL Finance")* lodged an application for rescission of the Court Order and for related relief on the 19th April 2021.

[2] The application is opposed by the first respondent *("Mrs. Masupha").* The applicants in the counter-application, Mrs. *Masupha* and TJ Group, have applied for surrender of the lease in respect of the plot and for related relief. Counter – application is opposed by MEL Finance, Treasure Investment Group and Mr. *Masiphole.* The latter is the third respondent in the counter – application. However, only MEL Finance has filed an answering affidavit in the counter-application.

THE FACTS:

[3] It is convenient to preface the setting out of facts relevant to rescission application with the history of the trial in CCT/0015/2019 that resulted into the Court Order, the subject matter of the rescission application.

[4] Mrs. *Masupha* entered into agency agreement with Treasure Investment Group to subdivide her field into sites and sell the sites to interested

buyers at a commission. Treasure Investment Group sold the sites but did not remit the proceeds of sale to Mrs. *Masupha* as agreed.

[5] Aggrieved by the conduct of Treasure Investment Group, Mrs. *Masupha* instituted action in CCT/0015/19 against Treasure Investment Group and its sole shareholder and director Mr. *Masiphole*. She amongst others claimed cancellation of the agency agreement, an order directing Mr. *Masiphole* and Treasure Investment Group to pay her proceeds of sale of the sites and piercing Treasure Investment Group ‘s corporate veil in order to hold Mr. *Masiphole* liable personally and or jointly with Treasure Investment Group.

[6] The parties eventually signed a deed of settlement which was made an Order of Court on the 19th March 2019. The material terms of the deed of settlement that was made an Order of Court were cancellation of the agency agreement, payment of M1,143,000.00 to Mrs. *Masupha* by Mr. *Masiphole* and Treasure Investment Group, one paying the other to be absolved, and piercing of the corporate veil of Treasure Investment Group to make both Mr. *Masiphole* and Treasure Investment Group liable to pay the debt. The parties agreed on monthly instalment to settle the liability failing which Mrs. *Masupha* was entitled to embark on execution of the Judgement.

[7] As it happens, Mr. *Masiphole* and Treasure Investment Group defaulted. As a result, Mrs. *Masupha* caused her lawyer to issue a writ of execution to attach their property. In response, Mr. *Masiphole* brought an application for stay of execution and variation of the Court Order of the 19th March 2019 sanctioning the deed of settlement. The application was instituted on the 5th June 2019 and was eventually dismissed for want of prosecution by the late **Chaka – Makhooane J**, on the 20th November 2019. This paved way for the deputy sheriff to proceed with execution. Consequently, Plot No. 15263 – 136 was attached on the 20th March 2020. On the 26th May 2020 Mr. *Masiphole* responded with application for reinstatement of application that was dismissed.

[8] Both Counsel for the parties in the reinstatement application appeared before the late **Chaka-Makhooane J** on the 16th June 2020 where amongst others she ordered execution of the property of Treasure Investment Group to proceed. I have since considered the application for reinstatement and dismissed it with costs on the 10th June 2022.

[9] I now turn to the application for rescission. This application was lodged while the application for reinstatement was still pending. Briefly stated, these are the facts: MEL Finance lent M164,000.00 to Treasure Investment Group in July 2019. Pursuant to agreement between the parties, Treasure

Investment Group put Plot No.15263 – 136 as security for payment of the loan and surrendered its lease to MEL Finance.

[10] In September 2020 a demand was made by Mrs. *Masupha's* attorneys for Mr. *Mpho Leqela*, the managing director of MEL Finance to release the lease. Though Mr. *Leqela* has confirmed through his legal counsel that the plot in issue has been executed upon, he refuses to release the lease on the ground that Treasure Investment Group still owes MEL Finance. The refusal to release the lease is impeding the process of transfer of the plot in issue to the buyer, TJ Group.

[11] Mrs. *Masupha* believes the agreement between MEL Finance and Treasure Investment Group is absolutely simulated and calculated to stifle execution as it was signed while she had already obtained a judgment against Mr. *Masiphole* and Treasure Investment Group. MEL Finance has not reacted to this damning assertion as it has not filed a replying affidavit. In light of this serious suspicion, a natural reaction would have been for MEL Finance to file a replying affidavit and annex proof of payment of M164,000.00 to Treasure Investment Group. It has not done so.

[12] Having sketched the background, it is time to turn to the applicant's grounds of rescission. For my comments later in the Judgment, I reproduce the relevant parts of the founding affidavit below:

"-7-

7.1 I aver that I have a direct interest in this matter because as a micro – finance dealer I have lend my money to 2nd respondent who provided this plot as surety. And it was a term of the agreement that should he fail to pay his debt that this plot shall be declared executable.

7.2 As it is now I stand to suffer prejudice in that I may lose on my money advanced to the second respondent should this plot be sold in execution.

-8-

It is also my averment that due to my interest demonstrated above, that justice demands that I be allowed to intervene in the CCT/0015/19 and that the said matter be dully rescinded so that I can demonstrate that I have interest and a bona fide defence, and that I am not wasting this honourable court's time.

-9-

It is my averment that, I am not in wilful default in as much as I was not a party to CCT/0015/19. I also aver that I have bona – fide defence in that matter as I have demonstrated in the above paragraphs that the plot in question has been surrendered to me as surety it is my further averment that all the prospects of success are favouring me, in that I am justified to intervene in this proceedings in order to secure my rights as I have demonstrated my substantive interest, in this matter.

-10-

I must indicate to this Honourable Court. I have moved this court on urgent basis because the first respondent is now equipped with a warrant of execution, and they have indicated that they are going to compel me to surrender the lease document in regard to this plot. I must say that this will be to my detriment as I will have no surety that the 2nd respondent will pay back my money duly advanced to him. Furthermore, it may take a considerable time for this matter to be finalized so it is prudent to move it on urgent basis so that it can be dealt with expeditiously.

WHEREFORE I am making this affidavit in support of all my prayers in the notice of motion."

[13] Mrs. *Masupha* has taken points of law as well as pleading to the merits. First, she takes the point of non – joinder of TJ Group. She contends that TJ Group bought interests to title in the plot in issue through legally sanctioned court process as a result of which it has direct and substantial interest in the application and should have been joined. Non – joinder of TJ Group is fatal, Mrs. *Masupha* contends. Mr. *Masiphole* has a direct and substantial interest in the matter as co – judgment debtor with Treasure Investment Group as a result of which he should have been joined in this matter, so asserts Mrs. *Masupha*.

[14] Mrs. *Masupha* states in her answering affidavit that prayer 2 (a), (b) and (c) in the notice of motion are legally untenable. The main contention of

Mrs. *Masupha* is this: execution of the Court Order dated the 16th June 2020 was completed and the plot in issue sold to TJ Group in a public auction. As a consequence, so the argument proceeds, the prayer for stay of execution is untenable.

[15] Again, the prayers for rescission of the Court Order of the 16th June 2020 and for consequent intervention by MEL Finance in the main matter in CCT/0015/19 are legally untenable and incompetent in that MEL Finance does not have interest in the matter, argues Mrs. *Masupha*. She contends that MEL Finance features nowhere in her claims against Treasure Investment Group and Mr. *Masiphole*.

[16] On the merits Mrs. *Masupha* reiterates that MEL Finance has no interest in the main matter to apply for rescission or to seek to intervene inasmuch as there was no claim against it and the Orders granted therein are against Treasure Investment Group and Mr. *Masiphole*.

SOME LEGAL PRINCIPLES:

[17] During argument and with reference to paragraph 9 of the founding affidavit, Mrs. *Kao – Theoha* for MEL Finance explained that the application for rescission was brought under common law. The principles applicable to the adjudication of rescission application based on the common law have by now

become settled and trite and require no comprehensive explanation for present purposes.

[18] In view of the conclusion to which I have come in regard to the results of this application, it is unnecessary to consider in detail all the preliminary points raised by Mrs. *Masupha*. Suffice to say that I agree that TJ Group was a necessary party to have been joined in these proceedings.

[19] In line with the argument that the prayers in the notice of motion are legally untenable on the ground that MEL Finance does not have interest in the main matter, the enquiry must first be whether MEL Finance has a legal standing to seek rescission of the Order of the 16th June 2020 and to be allowed to intervene in the main proceedings in CCT/0015/2019.

[20] In **De Villiers v GJN Trust** (756/2017) [2018] ZASCA 80 where the appellants somewhat also relied on common law in the application for rescission the Court said the following:

> "*[27] The appellants obliquely also relied in the rescission application on the common law. However, as explained in Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa 5 ed (2009) at 929, rule 42 is for the most part a reinstatement of the common law and must be interpreted in*

> *the context of the common law principles of finality of judgments in the interests of certainty.* ***This leaves no room for rescission of a judgment at the instance of a person who was not a necessary party to the litigation concerned****. In the result I hold that the appellants had no locus standi to challenge the section 420 order".* (Emphasis mine)

[21] A party has legal standing (locus standi) if it has a direct and substantial interest in the subject matter of the judgment or order sought to be rescinded. See: **Masako v Masako & Another** (Case No 724/20) [2021] ZACSA 168 (3 December 2021) at para 9.

[22] The nature and extent of the "direct and substantial interest" requirement was pertinently dealt with in **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953(2) SA 151 (O) at 169 H in which it was defined as:

> *"… an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation."*

[23] The same threshold of direct and substantial interest applies with equal force even in application for intervention. **National Executive Committee of the BCP and Another v Mbuli and Others** CIV/APN/80/2021; **Lebabo and Another v Thibeli and Others** (CIV/APN/54/2011) [2011]

LSHC. **Peete J**, as he then was, said the following in **National Executive Committee of the BCP and Another v Mbuli and Others**, *supra*:

> *"In this enquiry the court must be satisfied upon the papers that there exists a prima facie case* ***that the applicants seeking to intervene have a direct and substantial interest in the subject matter of these proceedings*** *which may be prejudiced by an order or judgement of the court."* (Emphasis mine)

[24] In **South African Riding for the Disabled Association v Regional Land Claims Commissioner & Others [2017]** ZACC Jafta J said the following:

> *"[9] It is now settled that* ***an applicant for intervention must meet the direct and substantial interest test in order to succeed****. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegation which, if proven, would entitle it to relief."* (Emphasis mine)

APPLICATION OF LEGAL PRINCIPLES:

[25] In applying the above legal principle to the facts of the instant application, it is plain that MEL Finance has not met the requirement to participate in the main matter. MEL Finance has dismally failed to demonstrate direct and substantial interest in the subject matter of the proceedings in the main matter. The action in the main matter was between Mrs. *Masupha* and Mr. *Masiphole* and Treasure Investment Group.

[26] The nub of the claim was cancellation of agency agreements, piercing of Treasure Investment Group's corporate veil to ensure that Mr. *Masiphole* and Treasure Investment Group were both liable to pay Mrs. *Masupha* proceeds of the sale of her sites. The action and the relief that was sought in the main matter had absolutely nothing to do with MEL Finance or with the plot in issue.

[27] Surely, MEL Finance cannot agitate for recourse by way of rescission and intervention in the main matter as it seeks to do. Whatever interest MEL Finance has in the plot in issue, it does not arise in the granting of the Order of 16th June 2020. The claim in the main matter or the Court Order were not directed at the plot in issue. MEL Finance's attack is surely misdirected, it could only aim its attack at the process of execution if it had valid grounds to do so.

[28] Under the circumstances, it will serve no purpose to examine MEL Finance 's case against the requirements of rescission application under common law. I will not be putting this Court's limited resources into good use if I were to start enquiring if MEL Finance has provided a reasonable explanation for the default and if it has prospects of success in the main matter. It bears repeating that the main matter had nothing to do with MEL Finance nor does the Order of the 16th June 2020. MEL Finance is irrelevant for purposes of the main matter.

[29] Based on the circumstances of this matter, as well as the applicable legal principles, I therefore conclude that MEL Finance has not made out a good case for the rescission of the Court Order granted on the 16th June 2020 and to intervene in the main action. It was not a necessary party in the main matter, and it remains as such. The interim relief, including a prayer for stay of execution pending this application were not granted when the parties first appeared in Court. With the application disposed of, these prayers fall by the wayside.

[30] Mr. *Rampai* argued that execution has been completed. I disagree with his argument. It is not because of this argument that I decline the prayer for stay of execution. Though sale in execution denotes a point of no return, execution is a process-oriented concept and not just a single event. Full

purchase price has not yet been paid and ownership in the plot did not immediately pass to TJ Group upon payment of the deposit during the auction, it will pass subsequently upon formal transfer of the property.

[31] Though in a context different from the one I am dealing with now, **Kriegler J** said the following in **Simpson v Klein NO & Others** 1987 (1) SA 405 (W) at 411I to 412A:

> *"It is, however, clear from the passage quoted that execution is a process for the enforcement of a judgment and entails a number of successive steps. Such execution is perfected eventually by a number of different procedures to be performed by the officer of the court. They include delivery to the purchaser of the goods attached and sold in execution, receipt of the price obtained at the sale in execution for such goods, the accounting for such receipts (including the calculation of the costs of execution), the payment to the judgment creditor or creditors of what is his or their due and the payment over to the judgment debtor of any balance which may then still remain. The whole of that process is embraced under the concept of execution".*

[32] I respectfully agree. These comments apply with equal force in this jurisdiction considering the scheme of the High Court Rules of 1980, *("the rules")* relevant to execution.

[33] **Willis JA** in **Firstrand Bank Ltd v Nkata** (213/14) [2015] ZASCA 44 (26 March 2015) at para 31 quoted with approval Lord Denning MR in *In re: Overseas Aviation Engineering (G.B) Ltd* [1963] Ch. 24 (C.A.);[1962] 3 All ER 12 (C.A.) where he said the following with reference to section 325 of the English Companies Act, 1948:

> *"The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process: for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment…"*

[34] Therefore it bears repeating that the prayer for stay of execution is not refused because execution has been completed, but with the application having been dealt with, the prayer is no more relevant.

[35] Finally, the counter-application. The counter-application was lodged on the 20th May 2021 in terms of Rule 8(16) of the rules. The substantive prayers which Mrs. *Masupha* and TJ Group seek are as follows:

> *"2 (a) That the **1st RESPONDENT** be ordered and or directed*
>
> *to surrender Lease document in his possession in respect of **Plot No. 15263-136** to **4th RESPONDENT** within seven days*

(7) of the grant of this Order to enable ***4th RESPONDENT*** *to effect transfer of land rights in respect of Plot No.* ***15263-136*** *to* ***2nd APPLICANT*** *in compliance with execution of the Honourable Court's order and sale in execution in respect of the said property completed on* ***3rd July 2020****.*

(b) It be declared that the agreement between ***1st RESPONDENT*** *and* ***2nd*** *and* ***3rd RESPONDENTS*** *signed on* ***7th July 2019*** *in respect of property registered under Lease numbers* ***15263-136*** *is illegal and or unlawful.*

(c) Pursuant to the grant of ***PRAYER 2(b)*** *above,* ***1st RESPONDENT*** *and* ***2nd*** *and* ***3rd RESPONDENTS*** *are directed to surrender Lease document in respect of* ***Plot No. 15263-136*** *to* ***4th RESPONDENT*** *within* ***7 (seven)*** *day after the grant of this order.*

(d) ***4th RESPONDENT*** *be ordered and or directed to register title in favour of* ***2nd APPLICANT*** *within* ***fourteen (14)*** *days of the grant of this order.*

3*. Costs be awarded to the* ***APPLICANTS*** *in the event of opposition hereof.*

4. *That the **APPLICANTS** be granted further and or alternative relief as this Honourable Court may deem fit under the circumstances."*

[36] Borrowing liberally from Mr. *Rampai*'s heads of argument, which speak to the founding papers, Mrs. *Masupha* and TJ Group's case may be summarised as follows:

36.1 Plot No. 15263 – 136 was sold to TJ Group at a public auction and the process of execution is completed. The fourth respondent, *("LAA")* cannot register the transfer of the plot into the names of TJ Group in the absence of original lease document;

36.2 The lease document is in possession of MEF Finance which, despite demand, is refusing to release it on the ground that it was surrendered to it as security for money lent to Treasure Investment which remains outstanding;

36.3 Mrs. *Masupha* and TJ Group are being prejudiced in that Mrs. *Masupha* cannot receive full payment of purchase price while transfer of the plot to TJ Group is pending and TJ

Group is prejudiced in that it has already paid M80,000.00 for the plot.

[37] On the other hand, MEL Finance argues that the process of execution is not completed inasmuch as the TJ Group has not paid the remaining balance. Since all the parties are unsecured creditors owed by Mr. *Masiphole* and Treasure Investment Group, so contends MEL Finance, it must also have its share from the proceeds accrued from the sale of the plot. MEL Finance relies on the deed of lending it entered into with Treasure Investment Group, annexure "MM4" to the founding affidavit.

[38] It is common cause that the plot in issue is registered in the names of Treasure Investment Group. In my view, there is a completely acceptable and unshaken evidence that this plot was sold to TJ Group at a public auction that was held on the 3rd July 2020. It is beyond disputation that on the 16th June 2020, in CCT/0015/2019, the late **Chaka – Makhooane J** had ordered "Execution of the property of the 2nd Respondent [Treasure Investment Group] to proceed." Mrs. *Masupha* is judgment creditor while Treasure Investment Group and Mr. *Masiphole* are judgment debtors.

[39] **Peete J**, as he then was, said the following in **Sole v Lemena and Another** (CIV/T/319/01) [2001] LHCS 93 (26 September 2001) at 6:

"*Execution is a process which enables a judgment creditor, having obtained a judgment in his favour, to enforce that judgment in order to obtain satisfaction of it from the debtor. (Herbstein and van Winsen - Civil Practice of the Supreme Court of South Africa 4th ed -p 754 where at page 754 it is stated:*

> *"Execution may be effected against the property or the person of the judgment debtor, the appropriate manner of execution in a particular case depending upon the type of judgment and the nature of the debtor's available assets. Thus, a judgment sounding in money is enforceable by the attachment and sale in execution of the debtor's property, movable, immovable and incorporeal. ...An attachment in execution creates a judicial mortgage or pignus judicia."*

[40] It is clear therefore that once the plot was attached, Mrs. *Masupha* enjoyed *pignus judiciale* (judicial lien) over it. The question is, can this be thwarted by or be equated with the arrangement between MEL Finance and Treasure Investment Group? There is no doubt in my mind that the arrangement was intended to hypothecate the plot in issue. Though inelegantly drafted, the relevant parts of the deed of lending are reproduced below:

"*3*

> ***Treasure investment (Pty) ltd T/A treasure catering services*** *hereby states that it has acquired rights over plot No 15263-136.* ***Treasure investment (Pty)***

ltd T/A treasure catering services *hereby puts the foresaid as bond towards the advanced loan.*

4

The parties agree that after bonding the aforesaid lease and still no payment is made on due date, the parties agree that the lender will at any time may (sic) approach the court of law to have the aforesaid bonded lease sold in execution of this debt and the borrowers will have no objection to the court proceedings. Further that out of the aforesaid property in execution the legal fees of litigation and court process and mortgage bond will be deducted."

[41] The deed of lending flies in the face of section 28 (1) of Deeds Registry Act No. 12 of 1967 which provides that –

"No mortgage bond or ***agreement*** *hypothecating immovable property* ***shall be of force and effect unless the proper authority has consented thereto,*** *which consent shall however not be unreasonably withheld.*" (Emphasis mine)

[42] There is not even a slightest trace of evidence that the proper authority had consented to the agreement between MEL Finance and Treasure Investment Group. Again, the agreement did not confer real rights to MEL Finance because it was not registered in terms of the Act. The law does not recognise the arrangement between MEL Finance and Treasure Investment Group. The irresistible conclusion to arrive at is that the deed of lending is of no

force and effect against the execution creditor, Mrs. *Masupha* as well as the purchaser of the plot, TJ Group.

[43] In the result, I have no doubt that the counter – application must succeed. However, there are prayers that I will not grant in the proposed form. First, prayer 2 (c) in the notice of motion is already part of prayer 2 (a) except that the former does not include the 2nd and the 3rd respondents for the surrender of the lease document.

[44] Moreover, in prayer 2(d) the Court is asked to order or direct the LAA to register title in favour of the TJ Group within fourteen (14) days of the grant of the Order. In terms of Rule 47(13) of the rules the deputy sheriff is instrumental in the execution process including the transfer of the property to the purchaser upon performance of the conditions of sale by the purchaser.

[45] One of the conditions of sale in *casu* is that the purchaser must provide a bank guarantee for payment of the balance and that the "Judgment Creditor's Attorneys shall attend to the transfer of the property upon full payment of the purchase price to the Judgment Creditor's Trust Account." This Court has not been told that TJ Group has fulfilled all the conditions of sale such that transfer into its names can be effected. I am cautions not to issue an

Order that undermines the rule without any justification and thereby create chaos.

[46] Besides, I have not been told that the transfer takes fourteen (14) days to be effected in terms of the processes of the LAA. Neither am I prepared to assume that this is possible simply because the LAA is not opposing this prayer. It could be there are other customers already on the queue waiting to be assisted by the LAA, so I am not going to facilitate that this transfer jumps the queue at the expense of other deserving customers.

[47] Even as I am grappling with the Orders that I need to make, I am not certain about the correctness of the description of the applicant, *Mpho Leqela* t/a MEL Finance. Mr. *Mpho Leqela's* affidavits are the source of this uncertainty and confusion as I will demonstrate below. For convenience, I have referred to the applicant only as MEL Finance in this Judgment. For a Court Order to be effective, it must not only be intelligible, but it must be clear against whom it is made and if that person exists, as a natural or a legal person.

[48] While the existence of Mr. *Mpho Leqela* as a natural person and his instrumentality in these proceedings is manifestly clear, the following issues are worthy of note:

48.1 In terms of the deed of lending, the M164,000.00 was lent by M.E.L Finance LTD to Treasure Investment (Pty) Ltd. In paragraph 1 of his founding affidavit Mr. *Mpho Leqela* introduces himself as the Managing Director of M.E.L Finance (Pty) Ltd. It is not clear if the latter company is one and the same thing with M.E.L Finance LTD. The same applies to Treasure Investment (Pty) Ltd and Treasure Investment Group (Pty) Ltd.

48.2 At paragraph 4.1 of his founding affidavit Mr. *Leqela* says that "Sometime in July 2019, the second respondent borrowed monies from the applicant, at the amount of One Hundred and Sixty-Four Thousand (M164 000.00)". While I may not conclude that the noun applicant refers to M.E.L Finance LTD or M.E.L Finance (Pty) Ltd, it clearly refers to a third party.

48.3 However, the proceedings have been brought by *Mpho Leqela* t/a MEL Finance. The description creates the impression that Mr. Leqela is bringing these proceedings as a sole proprietor trading as MEL Finance and that the money lent is his. This is confirmed by his averments at paragraph

7.1 of the founding affidavit where he says that "I lend (sic) money to 2nd respondent …" and at paragraph 7.2 where he further says "I stand to suffer prejudice in that I may lose on my money advanced to the second respondent…".

48.4 In his answering affidavit in the counter-application Mr. *Leqela* introduces himself as "the 1st respondent herein trading as MEL Finance (Pty) Ltd a company duly registered in terms of the laws of Lesotho. It is a company that operates a business of micro financing and lending…" But the 1st respondent in the counter – applicant is cited as *Mpho Leqela* t/a MEL Finance.

48.5 However, when he addresses paragraph 5 of the founding affidavit in the counter-application, Mr. *Leqela* says that "… I stand to suffer prejudice and financial loss should I release the lease document which is the only security I now have for my moneys owed by the 2nd respondent." This again gives the impression that it is Mr. *Leqela* who lent the money, the subject of the deed of lending.

[49] I am not sure if the apparent confusion in Mr. *Leqela's* affidavits regarding the identity of the applicant or the first respondent in the counter – application is as a result of the attorneys who drafted the papers failing to make a distinction between Mr. *Mpho Leqela* as a managing director and M.E.L Finance (Pty) Ltd as a company. A company is a separate legal person from its shareholders or directors. *See*: **Salomon v Salomon & Co Ltd** [1897] AC 22 (HC); **Itzikowitz v Absa Bank Ltd** [2016] ZASCA 43 para 9; Section 9 of the Companies Act No. 18 of 2011.

[50] **Itzikowitz,** *supra***,** was quoted with approval in **Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others** (Case no 1423/2018) [2020] ZASCA 83 at para 27, where it was concluded that a shareholder does not suffer any personal loss merely because the company in which he is a shareholder has suffered damages. A company's property belongs to the company and not to shareholders. Shareholder's general right of participation in the assets of the company is deferred until winding – up, and then only subject to the claims of creditors.

[51] The net effect of the above authorities is that if it is M.E.L Finance (Pty) Ltd that had lent money to Treasure Investment Group, Mr. *Leqela* had no business bringing these proceedings or opposing the counter-application in his personal capacity as money that was lent is not his personal property. Legally,

Mr. Leqela stands to suffer no prejudice if he were to surrender the lease even if he is a managing director or a shareholder of M.E.L Finance (Pty) Ltd.

[52] Mr. *Leqela* could only institute the proceedings or oppose the counter – application on behalf of M.E.L Finance (Pty) Ltd if it had duly resolved to institute the proceedings or to oppose the counter – application. *See*: **Ganes and Another v Telecom Namibia Ltd**. [2004] 2 ALL SA 609 (SCA) para 19.

[53] In fact, nowhere does Mr. *Leqela* aver that M.E.L Finance (Pty) Ltd duly resolved to institute the proceedings or that the proceedings are instituted on its behalf. There is absolutely no evidence in this regard. The inevitable conclusion therefore is that the institution of the application or opposition to the counter – application has not been authorised by M.E.L Finance (Pty) Ltd.

[54] Despite the confusion alluded to above, absent evidence that the proceedings were authorised by M.E.L Finance (Pty) Ltd or M.E.L Finance LTD, the only reasonable conclusion to make is that these proceedings were brought by Mr. *Leqela*. Again, on the evidence before me, the unquestioned fact is that Mr. *Leqela* is the one in possession of the lease to the plot in issue which he is refusing to release. He is either holding onto the lease as a sole trader

under the name MEL Finance or as a managing director of M.E.L Finance (Pty) Ltd. The Order that I make must take into account both scenarios.

COSTS AT ATTORNEY AND CLIENT SCALE:

[55] Mrs. *Masupha* asked for costs at attorney and client scale in the application. She and TJ Group also asked for costs in the event of opposition of the counter – application. In the absence of evidence that the deed of lending is bogus, the application was clearly not meritless or sterile. Mrs. *Masupha* suspects that the deed is bogus, but she has not provided evidence to support her suspicion.

[56] There is nothing to demonstrate mendacious, vexatious or unscrupulous conduct on the side of the applicant. I accept that the applicant was dilatory in bringing the application which offends every rule governing urgent applications. Though the application was purportedly brought on an urgent basis, it was surely not treated as such. The respondents had ample time to indicate their intention to oppose and file answering papers. There is no basis to impose punitive costs.

[57] However, I must say something about the certificate of urgency filed of record by Advocate E.M *Kao*. I have already commented about the

sorry state of her client's affidavits. Adv. *Kao* says the following in the certificate:

> *"1. The matter is urgent because the 1st respondent is now armed with the writ of execution and deputy – sheriff* ***may execute at any time****.*
>
> *2. The applicant to suffer financial loss* ***should this plot is (sic) executed*** *because he landed (sic) the 1st respondent his monies and he offered this plot in question as surety.*" (Emphasis mine)

[58] Conversely, it is clear from the papers filed of record and even from Adv. *Kao's* own client that, though there was outstanding payment, the plot had already been sold when she signed the certificate of urgency. It is regrettable that Counsel signed the certificate creating the impression that execution was imminent when she knew that the plot had already been sold.

[59] Clearly Counsel did not exercise high sense of responsibility expected of her towards this Court. I did not engage with Counsel on this issue during arguments as I only realise this at the stage of preparing this Judgment. There was no need for me to closely interrogate the certificate before arguments as the matter was not treated as urgent. But in the search of who really is the applicant in these proceedings, I had to consult even the certificate of urgency.

CONCLUSION:

[60] Having due regard to the particular facts of this matter, in my view, this is not a case where the application for rescission and intervention should succeed. Clearly the applicant was not a necessary party in the main case in CCT/0015/2019. Looking at the claim and the relief that was sought, the applicant did not have a direct and substantial interest. On the other hand, the counter – application must succeed. The deed of lending which purported to hypothecate the plot in issue is of no force and effect and cannot stand in the way of judiciously sanctioned execution.

THE ORDER:

[61] The following order is accordingly issued:

61.1 the application for rescission and intervention in CCT/0015/19 instituted by *Mpho Leqela* t/a MEL Finance on the 19th April 2021 is dismissed with costs.

61.2 the counter – application instituted by '*Mamathe Masupha* and TJ Group of Companies (Pty) Ltd is granted as follows:

61.2.1 that *Mpho Leqela* trading as MEL Finance and/or as the Managing Director of M.E.L Finance (Pty) Ltd, Treasure Investment Group (Pty) Ltd and *Matšana Masiphole* are ordered and or directed to surrender lease document in respect of Plot No.15263-136 to the Land Administration Authority within seven days (7) of the grant of this Order.

61..2.2 that in line with its processes, the Land Administration Authority is ordered and directed to register title in Plot No.15263-136 in favour of TJ Group of Companies (Pty) Ltd upon request by the Deputy Sheriff, *Mapalesa Pakisi*, or *Rasekoai, Rampai* and *Lebakeng* Attorneys.

61.2.3 That the deed of lending signed on the 7th July 2019 by *Mpho Leqela*, Treasure Investment Group and *Matšana Masiphole* in respect of property registered under Lease No. 15263-136 is declared illegal and unlawful.

61.2.4 That *Mpho Leqela*, *Matšana Masiphole* and Treasure Investment Group (Pty) Ltd are ordered and directed to pay the costs of counter – application.

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A.R. MATHABA J
Judge of the High Court

For Applicant: Adv. *Kao – Theoha*

For First Respondent: Mr. *M. Rampai*