

**IN THE HIGH COURT OF LESOTHO**

**COMMERCIAL DIVISION**

**HELD AT MASERU**

**CCT/149/2013**

**In the matter between:**

**SELLO BUTI t/a CLASSIC DISTRIBUTORS**

**APPLICANT**

**AND**

**STANDARD LESOTHO BANK LIMITED**

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

**THE REGISTRAR OF THE HIGH COURT**

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

**THE DEPUTY SHERIFF (MR. MASENYETSE)**

**3<sup>RD</sup> RESPONDENT**

**Neutral Citation:** Sello Buti t/a Classic Distributors v Standard Lesotho Bank & Others [2022] LSHC 329 Comm. (14<sup>TH</sup> DECEMBER 2022)

**CORAM: MOKHESI J**

**HEARD: 27<sup>TH</sup> OCTOBER 2022**

**DELIVERED: 14<sup>TH</sup> DECEMBER 2022**

## **SUMMARY**

**CIVIL PRACTICE:** *Application for leave to appeal a final order before the High Court- Held, the order being appealed against being final in nature and effect, the applicant should appeal straight to the Court of Appeal- leave of the High Court should only be sought against the judgment of the High Court exercising its civil appellate jurisdiction – Approach to dealing with an exorbitant amount reflected on the Writ of Execution than the amount that is owed by the judgment debtor, articulated.*

## **ANNOTATIONS**

### **Cases**

*Dunlop Rubber Co. v Stander 1924 CPD 431*

*S v Munn 1973 (3) SA 734 (N)*

*Seeiso Sehloho and others v Basotho Congress Party and Others CIV/APN/267/2020 [2020] LSHC 23 (unreported, dated 15 December 2020)*

## JUDGMENT

### [1] **Introduction**

On 16 September 2020, the applicant lodged this application on an urgent basis seeking leave to appeal out of time and stay of execution pending appeal. At the time the application was lodged the Commercial Court had no judges due to the untimely passing of the incumbents. It only became operative during the last part of 2021, around November, to be precise. For obvious reasons the matter could not be heard immediately on resumption of services due to a long queue of cases waiting to be heard. It is only having its opportunity to be heard now.

[2] This application is an offshoot two judgments of this court in terms of the first one was based on summons in which the plaintiff (now applicant) had claimed for an amount of M125,728.00 as a surrender of his policy held with Momentum Life Assurance which was mistakenly cashed by the 1<sup>st</sup> respondent (plaintiff), and a second matter in which the 1<sup>st</sup> respondent claimed a refund from the applicant of an amount of M521,661.45 on the basis on the irregular writ of execution.

[3] In the initial matter the applicant had sought the following reliefs (CCT/149/13):

a) Payment by defendant of M78,338.55 as refund to plaintiff from the claims made by the defendant of plaintiff (sic) security with Momentum Life Assurance.

- b) Payment of interest at the rate of 18.5% per annum from the year 2000 to date of payment
- c) Costs of suit.

ALTERNATIVELY

- a) Payment by Defendant of M125,728.00 as the surrender value of plaintiff's policy held with Momentum Life Assurance, which was erroneously cashed by Defendant to Plaintiff.
- b) Payment of interest at the rate of 18.5% from the year 2000 to date of payment.
- c) Costs of suit

[4] The action was granted in favour of the current applicant on the 26 May 2017. The order of court reads as follows:

*“Judgment is entered in favour of Plaintiff in the main claim as prayed for in the summons,”*

The Court, unfortunately, only issued the order without rendering any written reasons to date. Consequent to the above order, a writ of execution was issued which was in the following terms (where relevant):

*“To Sheriff or His Deputy  
High Court of Lesotho  
Maseru – 100*

*You are hereby directed to attach, execute and remove movable property belonging to STANDARD BANK LESOTHO LIMITED (herein referred as Defendant) and pay the sum of (Seventy Eight Thousand Three Hundred and Thirty Eight Maloti Fifty Five Lisente) M78,338.55) to Plaintiff being the judgment debt.*

*Plus One Million Ninety Five Thousand Three Hundred and Thirty Seven Maloti (M1,095,337.00) being interest at the rate of 18.5% from 2000 to 2017.*

*..... SIGNED  
REGISTRAR ”*

- [5] The 1<sup>st</sup> respondent paid to the applicant’s former counsel, an amount of Six Hundred Seventy-Eight Thousand Three Hundred and Thirty-Eight Maloti, Fifty-Five Lisente (M678,338.55) as part-payment of the amount owed as reflected in the writ of execution. Before the full amount could be paid dispute arose regarding the irregularity of the writ of execution mentioned in the preceding paragraph and lines. The dispute could not be resolved, as a result, the 1<sup>st</sup> respondent lodged an urgent application interdicting the applicant and the Sheriff of the Court from executing the disputed writ of execution to recover the amounts M78,338.55 and M1,095,3337.00 from the 1<sup>st</sup> respondent pending the determination of the application, and a further review of the impugned writ of execution on account of its irregularity, unlawfulness and for being contrary to the Order of this Court dated 26 May

2017, and a further order that on finding that the writ was irregular, unlawful and contrary to its order, an order that the current applicant to repay an amount of M521,661.45 being the difference between what the 1<sup>st</sup> respondent paid and what it ought correctly to have paid.

[6] Judgment was later entered in favour of the 1<sup>st</sup> respondent, effectively rendering the current applicant liable to repay the amounts claimed for having been paid to it by the 1<sup>st</sup> respondent, erroneously. The 1<sup>st</sup> respondent, consequently, issued a writ of execution against the current applicant on the 26 November 2018 for an amount of M521,661.45 and taxed costs on the attorney and client scale. The applicant waited until 16 September 2020 to lodge current proceedings claiming the reliefs articulated in the preceding paragraphs of this judgment.

[7] The applicant raised a point in *limine* in his replying affidavit that the 1<sup>st</sup> respondent's answering affidavit is fatally defective for failure to comply with section 5 (2) (b) of the Oaths and Declaration Regulations 80 of 1964. In his papers, the applicant claims not to have been aware that there was a judgment against him. He says it was upon receipt of the answering affidavit of the 1<sup>st</sup> respondent in the present case that he knew for a fact that there was an order against him which was issued in 2018. But he admits that the matter was argued, and judgment was reserved. The applicant further argued that his property is being attached instead of Classic Distributors (Pty) Ltd. The 1<sup>st</sup> respondent on the other hand contends that the writ of execution is valid as it was issued consequent to an order of the court.

[8] **Issues for determination**

- (i) Point in *limine*.
- (ii) Whether the main case should succeed in terms of sought.

[9] **Point in *limine***

It is the applicant's contention that the 1<sup>st</sup> respondent's answering affidavit is fatally defective for being undated and not indicating the place of attestation, in violation of Regulation 5(2)(b). The said regulation provides:

*"5(1) No Commissioner of oaths is required to attest an affidavit which is in a language which is not understood by him.*

*(2) Before attesting an affidavit the Commissioner of oaths shall ask the deponent whether he knows and understands the contents of the affidavit and if his answer is in the affirmative the commissioner of oaths shall –*

*(a) Certify below the deponent's signature or mark that the deponent has acknowledged that he knows and understands the contents of the affidavit;*

*(b) Thereafter set forth, in writing, the manner, place and date of attestation*

*(c) ....."*

[10] It is common cause that the date of attestation is not set out, only the month and year have been set out clearly. The Commissioner of oaths is stated as Nthathi Pheko and attestation was made at K.E.M Chambers, Lenyora Flats,

Maseru, 100. I do not wish to waste much time on this issue as it is unmeritorious. It is perhaps necessary that I repeat the remarks I made when the same issue was raised in the case of **Seeiso Sehloho and others v Basotho Congress Party and Others CIV/APN/267/2020 [2020] LSHC 23 (unreported, dated 15 December 2020)** where the following was said at para.9

*“In all the affidavits the Commissioner of oaths did not set forth a day the affidavits were attested. He only set out the month and the year. It is without doubt that the provisions of Reg. 5(2)(b) are peremptory and that the Commissioner of Oaths did not fully set out the date of attestation. However, the proper approach to these issues is not to say that because the party did not comply with a peremptory requirement of the law his actions should be visited with nullity; the approach is rather to determine whether there has been a substantial compliance with the statutory provision. This approach is now taken as trite as was stated in **Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 ALL SA 108 (SCA) at para. 22 where Brand J.A; said:***

*“... As the appellants also correctly pointed out, it was held in **Cape Killarney Property (122 E – F)** that the requirements of S.4 (2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by the statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved.”*

[11] In **S v Munn 1973 (3) SA 734 (N)** at 737 F – H the Court said the following about the purpose of administration oath- the views with I agree-:



*“A study of the history and purpose of the administration of the oath leads to the view that the purpose of obtaining the deponent’s signature to an affidavit is twofold: to add to the dignity or impressiveness of the occasion (CF Wigmore, Vol, Sec. 1819, pp. 296 – 7) but primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to. The former aim would be frustrated were the signatory to sign an unsworn statement, and for the latter purpose the signature is valueless to prove that the deponent swore to the affidavit if admittedly signed before the oath was taken ... compliance with regulations provides a guarantee of acceptance in evidence of affidavit attested in accordance therewith .... where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above.”*

[12] In the light of the above authorities I find that there has been substantial compliance with the Regulations. The point in *limine* was therefore, not correctly taken. With all due respect, the decision of Hlajoane J in **George Charlie v Thabo Hlaare CIV/APN/224/2006 (unreported)** to the effect that because (at p.9 thereof):

*“Regulation 5(2) has been framed in mandatory terms as the word “shall” has been used. Failure to comply with it results in nullifying the document. The three affidavits are therefore defective for failure to have given date for attestation by the commissioner of oaths.”*

is unsound and in my view should not be followed as it approaches the issue of interpretation in mechanical fashion which is unsupported by the modern trends in interpretation as stated in the authorities quoted above. The presence of the word ‘shall’ in the regulation is not decisive in the

determination of the question whether the regulation has been complied with.

[13] **The merits of Application**

It is the applicant's that when the 1<sup>st</sup> respondent approached this court to set aside the writ of execution, it left the order of this court of the 26 May 2017 extent and still executable. The proper course to have taken, would have been to appeal against it, the argument goes.

[14] Regrettably, the 1<sup>st</sup> respondent's heads of argument did not deal with this aspect. The argument of the applicant is that when Chaka-Makhooane J granted the reliefs sought by the 1<sup>st</sup> respondent, that is, setting aside the writ as irregular, she was effectively reviewing her order of the 26 May 2017.

[15] As I see it, the 1<sup>st</sup> respondent has queries about what it considered to be the inflated amount reflected on the writ of execution, and in terms of which it had already paid a substantial amount towards satisfaction of the judgment debt. At first blush, it may appear that the 1<sup>st</sup> respondent sought and was granted the setting aside of the writ, he instead of amending it. The order of the court was couched as follows (in relevant parts):

*"It is hereby ordered as follows: -*

- 1. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents are interdicted and restrained from executing a warrant of execution issued by 2<sup>nd</sup> Respondent on the 10<sup>th</sup> November 2017, or any re-issue thereof, to recover the amounts of M78,338.55 and M1,095,337.00 from the Applicant.*

2. *The above warrant of execution issued by the legal representatives of the 1<sup>st</sup> Respondent be set aside as irregular, unlawful, and contrary to the order of this Honourable Court dated the 26<sup>th</sup> day May 2017 on the grounds set out in the founding affidavit.*
3. *The 1<sup>st</sup> Respondent is directed to repay the amount of M521,661.45 to the Applicant.”*

[16] I do not agree with the applicant’s submission that the court effectively reviewed its order. I must confess that I am operating in the dark trying to understand the thinking behind the order of my Late Sister Chaka-Makhooane J because there are no written reasons for the order. In my judgment, the court did not review itself, it was merely adjusting the sum reflected on the writ to reflect the correct amount. This was an amendment though not sought and granted in clearest of terms. The inelegance in drafting and the terms of the order of court create confusion.

[17] It is trite that a judgment debtor is not entitled to have a warrant issued against it to have it set aside merely because it reflects a large amount than what is owed(**Dunlop Rubber Co. v Stander 1924 CPD 431** at 459). The 1<sup>st</sup> respondent ought to have shown prejudice suffered by it, and I guess in the circumstances, the prejudice was that it paid more than the entitlement of the applicant. In **Dunlop Rubber Co. v Stander** it was held that in situations where the writ reflects an exorbitant amount than due, the proper cause of action is to seek amendment of the warrant by adjusting the sum reflected to the correct one.

[18] **Leave to appeal a final order**

One of the reliefs sought by the applicant is that this court grants it leave to appeal out of time. I found this to be a rather strange and novel approach by the applicant. In our law at least in terms of section 16(1) of the Court of Appeal Act, 1978 an appeal shall lie to the Court of Appeal –

(a) From all final judgments of the High Court and

(b) By leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only.

And in terms of s.17 of the same Act, leave of this court should only be sought when appeal is against the judgement of the High Court exercising its civil appellate jurisdiction.

[19] It is without doubt that the order which is the subject matter of these proceedings is final in effects and nature. The applicant did not appeal against the order within the six weeks stipulated in the Court of Appeal Rules 2006 (i.e. Rule 4 thereof). This being a final order which the applicant is desirous of appealing against, he should go straight to the Court of Appeal. Whether the appeal is within or without the stipulated timeframes, is a matter for the Court of Appeal to deal with. Leave to appeal can only be sought in the High Court in the circumstances outlined in s.17 of the Court of Appeal Act. It follows that the relief is untenable.

[20] In the circumstances of this case, the applicant has not appealed against the judgment of this court. In the absence of an appeal against the judgment of this court, the application for stay of execution cannot succeed.

[21] In the result:

The application is dismissed with costs.

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**MOKHESI J**

**For the Applicant:** Adv. Ntsiki instructed by V. M. Mokaloba & Co.

**For the 1<sup>st</sup> Respondent:** Adv. T. Mpaka instructed by Du Preez, Liebetrau & Co.

**For 2<sup>nd</sup> and 3<sup>rd</sup> Respondent:** No Appearance