

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0119/18

In the matter between:

TŠELISO ‘MEKO

APPLICANT

AND

‘MAMOHAPI MOETSANE POKA

1ST RESPONDENT

DEPUTY SHERIFF – MR MASENYETSE

2ND RESPONDENT

Neutral Citation: Tšeliso ‘Meko v Mamohapi Moetsane Poka & another [2022]
LSHC 160 Comm. (18th AUGUST 2022)

CORAM: MOKHESI J

DATE OF HEARING: 02ND JUNE 2022

DATE OF JUDGMENT: 18TH AUGUST 2022

SUMMARY

CIVIL PRACTICE: *Application for rescission of judgement in terms of Rule 27-Applicable principles considered and applied.*

ANNOTATIONS

BOOKS:

Van Loggerenberg **Erasmus Superior Court Practice 2nd Ed. Vol.2 [service 6, 2018]**

STATUTES:

High Court Rules 1980

CASES:

Cordiant Trading CC v Daimler Chrysler Financial Services 2005 (4) SA 389 (D & CLD)

Doti Store v Herschel Foods (Pty) Ltd 1982 – 84 LLR 338 at 339

Deputy Sheriff of Witwatersrand v Goldberg T.S 680

Fraind v Nothmann 1991(3) SA 837 (W)

Lammers v Giovannoni 1995 (3) SA 385 (A).

Kleyhans Bros v Wessel's Trustee 1927 AD 271

National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA

Plascon-Evans Paints v Van Riebeck Paints [1984] ZASCA 51; 1984 (3) SA 623 (A)

Ramphalla v Barclays Bank PLC and Another (CIV/T/565/92 CIV/APN/257/95) [1997] LSHC 15 (05 Feb. 1997)

JUDGMENT

[1] Introduction

This is an application for rescission of this Court's judgment that was granted by default applicant's appearance on the 30 May 2018. .

[2] The respondent had caused summons to be issued against the applicant in CCT/0119/2018 wherein it sought and was granted prayers that the agreement of sale of land between the parties be cancelled and that the applicant pays to the respondent an amount of M80,000.00 that had been paid as consideration for the land and in respect of legal costs incurred in respect of the same land in LC/APN/32/2017.

[3] Factual background

Around August 2017, the 1st respondent instituted an action in the Land Court against one Joshua Setipa and his wife. This was following the purchase and sale of land between the applicant and the 1st respondent, and in respect of which an amount of M80,000.00 was paid as consideration by the 1st respondent. A Form C was caused to be issued by the applicant, in the 1st respondent's names, as proof of allocation. Before the site could be registered in the names of the 1st respondent, the latter saw the said Joshua Setipa developing the site by erecting structures on it. This prompted the 1st respondent to institute the proceedings in the Land Court in LC/APN/32/17 seeking certain reliefs.

[4] It is during the hearing of LC/APN/32/17 that counsel representing Kanana Community Council which purportedly issued the Form C, disclosed that the said Form C was issued fraudulently, and further that the site in question belonged to Mokhoele family not the applicant, and that in their records Mr. Setipa was allocated the site that was allocated to the said Mokhoele. Mr. Setipa even had a lease to the site. Faced with the scenario, the 1st respondent withdrew the case in order to avoid incurring further costs. It is following the withdrawal of the case against the Setipas that the 1st respondent issued summons claiming cancellation of agreement between herself and the applicant and claimed the amount she paid as consideration for the site.

[5] **Parties' Respective Cases**

The applicant's case is that he was not served with the summons as alleged. He further argues that the 1st respondent, by withdrawing her case against Mr. Setipa, she "abandoned her registered title in favour of Hon. Setipa." He avers, in what I consider to be the essence of his defence, in para. 14 of his founding affidavit that:

4.6 I verily aver that the background circumstances and the conduct of the parties immediately after allocation of the land to the 1st Respondent is consistent with the extinction of my interest to the land in issue by consent of the parties. This explains why it was 1st Respondent who went to court to vindicate her rights, not me. So her failure to asset her title and to evict Hon. Setipa cannot be visited at my door because the agreement I had with her was subsumed by the subsequent lawful allocation of the land made in terms of the Land Act 2010.

[6] In a nutshell, the applicant's contention is that the agreement of sale cannot be cancelled, and compensation paid because the 1st respondent failed to defend her title to the site against Setipa, for reasons better known to her. He contends that he was the owner of the site he sold to the 1st respondent, and that her rights were not defended skillfully by her legal representative.

[7] **1st Respondent's case**

The 1st respondent's case is that she bought the site in question from the applicant for an amount of M80,000.00 and that the latter caused a certificate of allocation to be issued in the names (Form "C"). She contends that the applicant sold her a site which did not belong to him as Mr Setipa started making improvements to the site armed with the Lease to the site. She maintains that the applicant was duly served with the summons as evidenced by the return of service. In support of this, the Deputy Sheriff (2nd respondent) deposed to a supporting affidavit in which he states that on the 11 April 2018 he telephonically called the applicant and informed him that he was in possession of the summons from the 1st respondent. He avers that the applicant volunteered to come and collect same at his office at the High Court. He says he explained the contents of the summons to the applicant as well as the particulars of claim and request him to sign the copies. The applicant refused to sign the copies. A return of service was filed showing that the applicant was served but he refused to sign. The significance of the Deputy Sheriff's averments will become clear in due course.

[8] **Issues for determination**

(1) Whether the applicant has made out a case for granting of rescission.

[9] This application was lodged in terms of Rule 27(6) which provides that:

(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 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)

(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.

[10] The requirements in terms of this rule are trite. In order to succeed, an applicant must give a reasonable explanation for his default (that his default was not willful: (ii) his application must be made bona fide, and (iii) he must show that on the merits, he has a *bona fide* defence to the plaintiff's claim.

[11] **The return of service and willfulness of default**

The return of service is a *prima facie* proof that the defendant/respondent was served (**Ramphalla v Barclays Bank PLC and Another (CIV/T/565/92 CIV/APN/257/95) [1997] LSHC 15 (05 Feb. 1997)**). See also **Doti Store v Herschel Foods (Pty) Ltd 1982 – 84 LLR 338 at 339**. In these cases, **Deputy Sheriff of Witwatersrand v Goldberg T.S 680** was followed. Where summons have not been properly served or served at all, the applicant will not be held to be in willful default of appearance (**Fraind v Nothmann 1991(3) SA 837 (W)**).

[12] In the present matter, the Deputy Sheriff records that he served the Copy of Civil summons on the applicant, explained its nature and exigency, but the applicant refused to sign on it. In his supporting affidavit, the Deputy Sheriff avers that he telephonically called the applicant and informed him about the civil summons in his possession. He avers that the applicant volunteered to come to his office. After the contents of the summons had been read to him, he refused to sign the summons.

[13] As the return of service constitutes a *prima facie* proof of service, where the defendant seeks to impeach it “the clearest and most satisfactory evidence” must be proffered (**Deputy Sheriff Witwatersrand v Goldberg T. S 680 at 684**). This places an evidentiary burden on the applicant to adduce evidence, and in **Sussman & Co. (Pty) Ltd v Schwarzer 1960 (3) SA 94 (OPD) at 96C – F** the court said:

...If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8(b) have been complied with they were in fact not complied with and that the return is not a proper return. Where, however, the return itself does not show that the requirements of the subsection have been complied with, then the onus is not shifted and it rests on applicant to show that in fact the requirements have been complied with and that the return is in fact a nulla bona return.

[14] In trying to impeach the return of service the applicant simply contends himself with saying he was not served and that he does not know the 1st respondent. However, as it is apparent, the applicant has only dealt with the

averments in the 1st respondent's answering affidavit, leaving unanswered the averments in the Deputy Sheriff's supporting affidavits unscathed. As already stated, in his supporting affidavit, the Deputy Sheriff's states that he personally contacted the applicant telephonically, and that the latter volunteered to come to his office where after being read the contents of the summons and its exigency explained, the applicant refused to sign on the copies.

[15] We are concerned here with Motion proceedings whose purpose is to resolve legal issues based on common cause facts. Where disputes of fact arise, the final order can only be granted if the facts averred by the applicant in his affidavits, which have been admitted by the respondent justify the order. This will be the case if the respondent's version consists of bald or untrustworthy denials, is palpably implausible, far-fetched or so clearly untenable that the court is justified to reject them merely on papers without the need for viva voce evidence (**National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para. 26 relying on Plascon-Evans Paints v Van Riebeck Paints [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 E – 635 D**).

[16] The disputes of fact in this case must be resolved based on these principles. Given that the Deputy Sheriff's averments have not been denied, it follows that they stand unchallenged. And therefore, in the light of this, the version of the respondents that the applicant was served is the preferred one. The applicant is merely making bald denials without adducing evidence. In my considered view, the applicant was in willful default.

[17] **Bona fide defence**

It is common ground that the parties entered into an agreement for sale of site and that the 1st respondent paid the applicant an amount of M80,000.00 as purchase price. It is also not in dispute that following this sale and subsequent to the applicant securing the certificate of allocation (Form C) for the 1st respondent, the latter saw developments being made on the site by one Setipa. She sued Mr Setipa only to withdraw the matter after having had sight of the latter's lease to the site. It is common cause that the applicant was alerted the litigation concerning the said site.

[18] In showing good cause, the applicant must:

“... Show [] a prima facie case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not merely for the purpose of harassing the respondent.” **(Van Loggerenberg Erasmus Superior Court Practice 2nd Ed. Vol.2 [service 6, 2018] D 1 – 369)**

[19] The applicant's defence is that he is not indebted to the 1st respondent as the latter's legal representatives were unskillful in protecting her rights. She avers that Mr Setipa's lease is questionable as it was secured post 1st respondent's allocation. At paragraph 4.5 of his founding affidavit he avers that:

“...I am not in anyway indebted to the 1st Respondent. The tardiness of the 1st Respondent’s lawyer in their lack of effort to reinstate the matter before District Land Court is so patently without justification because they failed to apply for the cancellation of the lawful lease registered in favour of Hon. Joshua Setipa when it is clear that the allocation made to her is set in sufficient factual context to convey her legal title in acceptable details in the records of Kanana Community Council.”

[20] I think the above excerpt shows a fundamental lack of appreciation of the principles applicable consequent to an agreement of sale of a thing. It is trite that under common law the seller is under a residual and continuing obligation to ensure that the buyer of the property remains in undisturbed possession (*vacua possessio*) of that property. The principle was stated as follows in **Kleyhans Bros v Wessel’s Trustee 1927 AD 271 at 282:**

*“All I [as the seller of property] undertake to do is to give you possession of the thing, and my contract implies in law a guarantee that I will see that you are not deprived of the thing by one who has a better title to it than I. A contract of sale with us does not have the effect of a *translatio domini*; it is simply an obligation to give *vacua possessio* coupled with the further legal consequence of a guarantee against eviction.”*

[21] The protection offered by this guarantee of undisturbed possession is limited to compensating the buyer for loss of possession. If the seller does not protect the buyer’s possession after being notified of the threatened disturbance the buyer may defend the claim by lodging a reasonable defence. Where the seller does not protect the buyer after being notified of the threatened disturbance the seller cannot afterwards resist a claim for

breach of warranty against eviction on the basis that the buyer should have been more skillful in resisting third party's claim (**Lammers v Giovannoni 1995 (3) SA 385 (A)**).

[22] In the present matter, the applicant seems to be labouring under a misconception that because he secured the certificate of allocation for the 1st respondent, he is out of the picture. He is clearly mistaken, as already seen, upon selling the site to the 1st respondent, he guaranteed that the buyer would be in undisturbed possession and to compensate her if the possession is lost. In the present matter the 1st respondent lost possession of the site when Mr Setipa started making development on it. She sought to resist but was convinced that Mr Setipa has an unassailable right to the site. This entitled her to claim compensation (**Cordiant Trading CC v Daimler Chrysler Financial Services 2005 (4) SA 389 (D & CLD) at 399 E – F**). The applicant should have intervened to protect the 1st respondent's possession, but he did not do so. As we have seen he cannot even blame the unskillfulness of the 1st respondent's counsel in handling the matter. It follows, that the applicant did not show that he has a *bona fide* triable defence.

[23] In the result;
The application is dismissed with costs.

MOKHESI J

**For the Applicant: Adv. Monate instructed by T. Maicane & Co.
Attorneys**

**For the 1st Respondent: Adv. Mosoeu instructed by T. Matooane & Co.
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