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IN THE HIGH COURT OF LESOTHO
COMMERCIAL DIVISION

HELD AT MASERU **CCT/0033/2019**

In the matter between

REITUMETSE MOKOKOANE **APPLICANT**

AND

DEPUTY SHERIFF – 'MIKA **1ST RESPONDENT**

'MANTILA KHAAHLOE **2ND RESPONDENT**

'MASEETŚELA LEBITSA **3RD RESPONDENT**

JUDGEMENT

Neutral Citation: Reitumetse Mokokoane v Deputy Sheriff – 'Mika & 2 Others [2022] LSHC Comm 51 (21 March 2022)

CORAM: BANYANE J

HEARD: 05/05/21

DELIVERED: 21/03/22

Summary

Civil procedure-notice to file further affidavits in terms of Rule 8(12)- notice served with the founding affidavit in terms of which rescission and other relief sought - whether this rule may be utilized by an applicant who prematurely files an application before a cause of complaint arises- as a result founding affidavit lacking facts to support the reliefs sought - whether this rule could be invoked to make good counsel's remissness in handling a matter - the purpose of the Rule restated - application insupportable on the facts of the matter - application procedurally defective and misconceived.

ANNOTATIONS

Cases cited:

Lesotho

1. National University of Lesotho and Another v Thabane LAC (2007-2008) 476
2. Joy to the world v Neo Malefane and others C of A (CIV) No. 16/13
3. O'river Textiles (Pty) Ltd v Mokoba & Others CIV/APN/156/2002
4. Thamae and Another v Kotelo and Another LAC (2000-2004)283
5. Lehana Mandoro v Libe Mohono CIV/A/26/14.

South Africa

6. Hang Trading v JR 209 Investment (Pty) Ltd 2013(1) SA 161 (SCA)
7. James Brown & Harmer (Pty)Ltd v Simmons NO 1963(4) SA 656(A)
8. ex parte Gregory 1956(1) SA 215(SR)216
9. Liquidators Union and Rhodesia Wholesale LTD v Brown & Co 1922 AD 549 at 560,
10. Nedbank v Norton 1987(3) SA 619(N) 623-624

Subsidiary legislation

1. The High Court Rules 1980

Books

1. PJ Badenhorst, JM Pieneer & H Mostert: Silberberg and Schoeman's the Law of Property, 5th ed (2006) 407-408.

BANYANE J

Introduction

[1] The applicant seeks to forestall execution of an order granted by default in an action in which she was no party. She claims to have effected developments on a portion of the immovable property attached in pursuance of this judgement after a writ of execution had been lodged by the judgement creditor following the deputy-sheriff *nulla bona* return. Her resistance of the execution birthed the filing of an interpleader notice in terms of Rule 51 of the High Court Rules 1980.

The backgrounds facts

[2] The background facts relevant for determination of the issues between the parties are straightforward and largely common cause. They may be summed up as follows.

2.1 The 3rd respondent is the registered owner of plot number 13291-2072 situated at Qoaling, in the Maseru District. In May 2017, she entered into a deed of sale with Mantila Khaahloe (2nd respondent) in terms of which she sold a portion of this plot to her. The purchase price of M45 000.00 was duly paid by the 2nd respondent as the buyer to 3rd respondent as the seller.

2.2 When they sought to facilitate transfer of rights over this plot, they met an obstacle to the intended registration. They were informed by the authorities (Maseru City Council through its land allocation committee) that the size of land to be registered does not meet the threshold requirement of 375 square metres to qualify for registration as an independent plot.

2.3 Faced with this predicament, the 2nd respondent sought reimbursement of the purchase price from the 3rd respondent. The latter failed to do so. This prompted institution of an action against 3rd respondent for recovery or return of the purchase price.

2.4 The action was unopposed, so judgement was granted by default against the 3rd respondent on 15th May 2019. No rescission was filed, and execution process ensued. When the Deputy sheriff sought to enforce the judgement pursuant to the writ of execution, the applicant (a relative of the 3rd respondent) claimed ownership to another portion of the plot. This despite the fact that no official subdivision has been made and granted. In other words, the plot remains undivided.

2.5 The sheriff on this basis filed an interpleader notice in terms of Rule 51 of the High Court Rules 1980. These proceedings remain pending.

2.6 On the date appointed for hearing of the interpleader proceedings, namely, the 17th December 2019, the 1st claimant (applicant) failed to appear before Court. The Court directed that its order (default judgement) granted on 15/05/2019 stands and the sheriff must proceed with its execution in January 2020. The present application for rescission and other relief was filed in February 2020. The Court (Makhooane J may her soul rest in peace) heard the application and reserved judgement. Regrettably she met an untimely death a few months later before delivery or rendition of judgement.

2.7 This matter was placed before me in May 2021 for rehearing of the rescission application.

The present application

[3] It is the applicant's case that she acquired rights to a portion of plot No.13091-2072 measuring 18.1 x 18.5 x18.5 x15.3 metres through a sale agreement concluded with the 3rd respondent and her express intention to transfer such rights to her. She avers that after relinquishing her rights to this portion, the 3rd respondent sold another portion of plot No.132091-2072 to the 2nd respondent.

[4] It is her primary contention that despite non-subdivision of the plot and non-registration in her name, she is entitled to the portion in question, having developed the property and enhanced its market value. She avers that the non-registrability of the plot size does not disentitle her to the fruits of her labour as a bona fide possessor and / or occupier. Secondly that her claim to the portion must be given preference because her sale agreement preceded that of the 2nd respondent.

4.1 It is on the basis of the above that she seeks the following reliefs;

1) That a rule nisi issue calling upon the respondents to show cause if any why;
    a) The rules of this court as to modes and periods of service may not be dispensed with an amount of the urgency hereof.
    b) The intended sale in a public auction of the 3rd respondent's site identified on lease No.13291-2072 may not be held in abeyance pending finalization hereof.
    c) That for the convenience of the Court this application be consolidated with CCT/0033/19.
    d) The applicant may not be ordered to provide to the Court an authentic validation report of his portion of the site within three weeks.
2) The order of this Court authorizing the said public auction of the site in issue may not be rescinded in so far as it relates to the applicant's portion of the site.
3) The proceeds from the auction may not be applied to compensate her for the useful improvements effected on this portion of site.

[5] In opposing the application, the 2nd respondent contends that the application is defective and misconceived for the following reasons (which were raised in *limine*);

a) The procedure followed by the applicant titled "notice of set down", "notice in terms of Rule 8 (12)" is grossly irregular because the Rules do not sanction such procedure.
b) Following the delivery of Interpleader notice by the Deputy Sheriff dated 25th October 2019, the applicant and herself both delivered their respective particulars of claim in pursuance of Rules 51(3) (b).

For this reason, what remains for adjudication is the Interpleader proceedings on a date to be arranged.

c) That the application was and is not urgent because the Court authorized the Deputy Sheriff to execute against plot No.13291-2072 on the 17th December 2019 and the order was only served on the 06th January 2020. The order cannot therefore form the basis for the alleged urgency.

d) Further that the application was prepared on 13th December 2019. It follows, so she alleges, that it was prematurely filed because the Court was yet to decide whether the sale should go ahead or not, which it did only on 17th December 2019. That the date of preparation of the application cannot also be the basis for urgency since the order authorizing execution had not been made at this time.

e) In respect of prayer (d), she contends that if the applicant were to be given rescission (which she has not claimed in so far as the order of this Court dated 17th December 2019 is concerned), there would be no need for the Court to order the applicant to produce whatever evidence he would consider as relevant to this case in the Interpleader. That an order of Court sought by a litigant to produce evidence that supports his case is superfluous and unnecessary, if not without precedent.

f) In relation to prayer 2, her contention is that on the 13th December 2019, there was no order of Court in so far as interpleader proceedings were concerned. The application for rescission, on the facts was premature.

g) For prayer 3, she contends that the proceeds from the sale cannot be used to compensate the applicant instead of satisfying the judgement. She contends therefore that the claim in this regard is without legal merit.

[6] On the merits, she contends that the size of the plot claimed by the applicant measures 306 square metres and is not liable for registration.

For the reason that it does not meet the minimum land registrability ceiling of 375 square metres, the applicant cannot therefore legally hold title to it. In other words, the size does not entitle her to hold title to it. She denies that effecting developing on the plot entitles the applicant to ownership rights.

6.1 She is of the view that the applicant is in essence seeking enforcement of a legally unenforceable contract for failure to meet statutory requirements. It is for this reason that it is contended that her prospects of success in the interpleader are naught. In addition, the applicant proffered no explanation for her default on the 17th December 2019. The 2nd respondent concludes on this basis that the applicant failed to make out a case for rescission.

Issues for determination

[7] Two main issues arise for determination. The first is whether this application is procedurally flawed. Allied to this is whether the applicant has furnished a satisfactory explanation for her failure to initially include her grounds for rescission in the founding affidavit, and whether therefore the court should excise its discretion in favour of the applicant and allow her to file a further affidavit.

7.1 The second issue is whether the other reliefs sought by the applicant are sustainable on the facts of this matter.

Is the application procedurally defective?

[8] I must point out from the onset that this application demonstrates lack of appreciation of the purpose behind certain rules of procedure, in particular, Rule le 8(21) dealing with interlocutory applications Rule, 27(6) dealing with rescission of judgements granted by default and Rule 8(12) permitting the filing of further affidavits. The significant remarks of **Smalberger JA** in **National University of Lesotho and Another v Thabane LAC (2007-2008) 476 at 480 F-G** on practitioners' duty to understand and comply with the Rules of Court are apposite. He said;

> "Before proceeding I propose to make some comments concerning the rules. They are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals. Consequently, the Rules must be interpreted and applied in a spirit which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the Rules... most of which are cast in mandatory terms. A failure to abide by the Rules could have serious consequences for the parties and practitioners alike, and practitioners ignore them at their peril..."

8.1 See also **O'river Textiles (Pty) Ltd v Mokoba & Others CIV/APN/156/2002** Where Monapathi J also emphasized that counsel must consider more seriously the meaning and interpretation of the Rules.

8.2 Having said this, I proceed now to interrogate the documents filed with the notice of motion and thereafter the applicant's request to be permitted to file further affidavits in terms of Rule 8(12).

[9] The applicant initiated this application by filing a certificate of urgency, a notice of motion, a notice of set down and a notice in terms of rule 8(12). These were all filed on the 06th January 2020 while the notice of motion as well as the accompanying affidavit were apparently prepared on the 13th December 2019.

9.1 My reading of the Rules of this court reveal that it is only in interlocutory application where an affidavit in support of a notice of motion may be accompanied by a notice of set down. This is in terms of rule 8(21) which provides;

> Notwithstanding anything to the contrary contained in this Rule, interlocutory and other applications incidental to pending proceedings may be brought on notice accompanied by such affidavits as may be required and set down at a time assigned by the registrar or as directed by a judge.

9.2 Gleaning from the applicant's founding affidavit and reliefs sought, some orders sought, for example, an order directing payment of the proceeds of the sale to the applicant, are not interlocutory but final because they do not depend on or await any decision later in these proceedings.

9.3 Proceeding in the manner in which she did is therefore procedurally flawed. I turn to consider the request for filing of further affidavits.

Filing of further affidavit

[10] The purpose of filing further affidavits must properly be understood. In terms of our Rules, three sets of Affidavits are allowed in motion proceedings, namely, the founding affidavit, answering affidavit and replying affidavit as correctly pointed out by the applicant's counsel. These are filed in this sequence. The court may however, in its discretion, upon good cause shown, permit the filing of further affidavits. In such event, leave to file further affidavits out of the sequence may only be allowed in instances where perhaps certain information was not available to the applicant when the founding affidavit was filed, where there was something unexpected or the applicant's replying affidavit raised a new matter and the respondent was obliged to respond. See for example **Hang Trading v JR 209 Investment (Pty) Ltd 2013(1) SA 161 (SCA).**

[11] Thomson JA in **James Brown & Harmer (Pty)Ltd v Simmons NO 1963(4) SA 656(A) at 660 D-F** expressed the above by *saying it is in the best interests of justice that these well-known and well established rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed although rigidity in application must be avoided and flexibility controlled by the presiding judge exercising its discretion must be permitted.*

[12] The applicant's request must be rejected for reasons that follow. The first is that the application was prepared on the 13th December 2019.

As correctly observed by the 2nd respondent's counsel, the order authorizing sale of the plot had not been issued at this time but was only issued on the 17th of the same month. Counsel for applicant sought to manfully contend that the applicant seeks rescission of the 17th December order but was not able to explain why the application was filed even before the impugned order was granted. This fact that the application was prematurely filed explains why the application does not in any matter set out grounds for rescission. I expound below.

[13] The applicant seeks rescission as one of her reliefs. Whether it is under Rule 27 or 45 remains unclear because the grounds on which rescission is permissible under these two rules are not distillable from the founding affidavit.

[14] Assuming then in his favour that that the application is made under Rule 27, it is trite that for a successful application for rescission, the applicant must show good cause. In order to show good cause, he/she must establish the following requirements.

a) He / she must give a reasonable explanation to show that he was not in willful default.
b) The application is brought bona fide and not merely with the intention to delay the plaintiff's claim.
c) He must show that he has a bona fide defence to the plaintiff's claim, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief sought. He need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.

14.1 See **Thamae and Another v Kotelo and Another LAC (2000-2004)283 at 290-91** where the Court of Appeal held that in determining whether good cause in shown, the Court exercises a discretion upon objective consideration of all facts and circumstances of a case. These include the degree of lateness, the explanation therefore, the prospects of

success and the importance of the case. See also **Lehana Mandoro v Libe Mohono CIV/A/26/14.**

[15] As stated earlier, the application was prepared on the 13th December 2019. The applicant has not therefore stated reasons for her failure to appear, or prospects of success (presumably in the interpleader). This is clearly due to the fact that the impugned order had not been issued at the time of preparation of the application. Instead she later (when he filed and served the application) also filed the affidavit with a "*notice of set down*" together with a Rule 8(12) notice. In the later notice, she states;

> Kindly take notice that the applicant will on the hearing date hereof apply for leave of court to depose to an affidavit explaining her failure to appear before court on the 17th December 2019.

[16] It is clear in this notice that the purpose of a further affidavit is to amplify the affidavit already filed in order to set out grounds for rescission sought. If indeed the application is intended to rescind the order granted on the 17th December 2021 although it baffles me why it was prepared prior to this date, I also fail to comprehend why counsel proceeded to serve the application as is it (deficient in material respects). I say deficient because the applicant has not rendered any explanation for her default nor stated whether she has a bona fide defence that carries with it good prospects of success. A simple explanation for this failure to incorporate essentials of a rescission application, is that the application was prepared even before the impugned order was made.

16.1 I am therefore of the view that the premature filing the rescission an application undoubtedly amounts to remissness on the part of the legal practitioner. The rule cannot therefore be resorted to in order to rectify a legal practitioner's negligence in the preparation of his client's case at the initiation stage. To put it differently, permission to file further affidavits

out of sequence set out above cannot be granted in circumstances such as these.

[17] Am therefore in agreement with the 2nd respondent's counsel that to this extent, the application is procedurally and substantively flawed and the rescission relief must fail.

[18] The rescission also fails for another reason. It is this. The applicant couched the prayer as follows;

> The order of this court authorizing the said public auction of the site may not be rescinded in so far as it relates to the applicant's portion of the property.

18.1 The prayer is untenable for the simple reason that no legally sanctioned subdivision has been made. The lease encompasses the whole area. How the partial sale of the site and subsequent transfer to the buyer would be achieved? I am not told.

Whether the applicant has a preferential claim over the judgement creditor?

[19] I turn now to consider whether on the facts pleaded by the applicant, the other reliefs sought are supportable.

[20] The applicant has also asked for an order permitting her to file a valuation report of the portion which she claims to have developed. She also seeks another order directing that the proceeds of the sale be used to compensate her for improvements made on the plot in question (I think on the basis of the valuation report).

20.1 To address the tenability of this relief on payments of the proceeds to her, I must highlight the nature of security rights that a judgement creditor holds over the attached property.

[21] Judicial attachment of property in execution of a judgement debt affords a judgement creditor a security right, namely a judicial pledge or mortgage depending on the nature of property. This judicial pledge or mortgage serves as security for the satisfaction of the judgement debt, meaning that the proceeds of the property should go towards paying the debt of the judgement creditor. **PJ Badenhorst, JM Pieneer & H Mostert: Silberberg and Schoeman's the Law of Property, 5th ed (2006) 407-408.**

[22] to put it another way, Judicial attachment creates a *pignus judiciale* (a judicial lien) upon the goods so attached which has preference over all prior mortgages which have not been completed by delivery so as to create a real right. In other words, the judgment creditor, becomes a secured creditor after attachment and the judicial pledge or mortgage is enforceable against the debtor as well as all other creditors who hold no prior or limited rights to the property. **Deputy sheriff v Messenger of Court Jo'burg 1905 TS 68, ex parte Gregory 1956(1) SA 215(SR)216.** The judicial pledge is preferred over incomplete prior security rights such as unperfected personal rights. **Liquidators Union and Rhodesia Wholesale LTD v Brown & Co 1922 AD 549 at 560, Nedbank v Norton 1987(3) SA 619(N) 623-624.**

[23] It is concludable from these authorities that the applicant herein cannot enjoy preference over the 2nd respondent as the judgement creditor. The applicant is not even a concurrent creditor at this stage in my view. She would not therefore enjoy preference over the security right of the judgement creditor. When the property is sold, the 2nd respondent will enjoy preference to the proceeds before other creditors (if any) are paid.

[24] In **Joy to the world v Neo Malefane and others C of A (CIV) No. 16/13**, a buyer in occupation of the land sought an order restraining and

interdicting the judgment creditor from executing the writ against it. Its reasons being that it had effected improvements thereon.

Scott AP (as he then was) concluded as follows;

> In the present case Mphana purported to transfer his "rights" to the property to the appellant and the latter proceeded to occupy the property by virtue of those rights. But the rights proved to be non-existent. The only rights of tenure the appellant has, arise by virtue of the improvements it subsequently effected. The writ (for ejectment in this case) cannot be ignored on that account. The appellant's remedy is to move to have the writ set aside. Until then the writ must be obeyed.

[25] I was not addressed in this matter on whether the claimed personal right by the applicant when the property was attached would defeat the judgement creditor's claim. It seems to me on the basis of the authority cited above(Joy to the world) that the applicant cannot resist the writ on the basis that she has effected developments thereon when she has not even filed a claim for recovery of her expenses, obtained judgement and lodged a writ against this plot so that perhaps she becomes a concurrent creditor.

[26] If the present application is intended to recover the value of the alleged improvements, the procedure followed to recover same is flawed; firstly because it is doubtable whether she could do so by motion proceedings, regard being had to the nature of the claim and the type of evidence required to prove such a claim. Secondly, why should she ask for leave of court to give evidence in support of her relief?

[27] There is another problem inherent in the reliefs sought. she is asking for payment of compensation and simultaneously asks for consolidation of the interpleader proceedings with this application. The question that the arises is this. By filing this application, is she is abandoning her claim of ownership of the portion of the land in the interpleader proceedings?

Because clearly if she seeks to be compensated for her expenses on the land in question in this matter, this directly contrasts her claim in the interpleader.

Conclusion

[28] For reasons set out in this judgement, I conclude that the application is seriously misconceived and misplaced. It is not only an indication of a misunderstanding or misinterpretation of the rules of this Court, but the reliefs sought are contradictory and irreconcilable and must be dismissed in totality.

[29] I am alive to the fact that in terms of Rule 51(5) *if a claimant to whom an interpleader notice has been served, fails to appear before court in support of his claim, the court may make an order declaring him barred, as against the applicant, from making any claim on the subject matter of the dispute*.

29.1 Following the delivery of Interpleader notice by the Deputy Sheriff, dated 25th October 2019, the applicant and 2nd respondent both delivered their respective particulars of claim in pursuance of Rules 51(3) (b) and the order of the 17th December 2019 has not barred the applicant from pursuing her claim. I am therefore in agreement that what remains is adjudication of the Interpleader proceedings on a date to be arranged.

[30] The parties must therefore ensure that a date is appointed for hearing of the interpleader proceedings.

Order

[31] In the circumstances the application is dismissed (in its totality) with costs

P. BANYANE
JUDGE

For Applicant: Advocate Mphakoanyane

For 2nd Respondent: Advocate Makhethe KC

For 3rd Respondent: No appearance