IN THE HIGH COURT OF LESOTHO

COMMERCIAL DIVISION

HELD AT MASERU **CCA/0034/2022**

In the matter between:

HATA BUTLE SUPERMARKET (PTY) LTD **APPLICANT**

AND

MOIKETSI MONETHI (AKA MAX) **1ST RESPONDENT**
WEN HUI ENTERPRISES (PTY) LTD **2ND RESPONDENT**
DIENGOANE HLALELE **3RD RESPONDENT**

Neutral Citation: Hata Butle Supermarket (Pty) Ltd v Moiketsi Monethi & 2 Others [LSHC] 2024 93 Comm. (13 JUNE 2024)

CORAM: **MOKHESI J**
HEARD: **15 May 2024**
DELIVERED: **13 June 2024**

Summary

CIVIL PRACTICE AND PROCEDURE: *Application for variation of court order in terms of Rule 45(1)(c) of the High Court Rules – Principles applicable thereto considered and applied-Held, application should succeed with costs.*

ANNOTATION

Legislation

High Court Rules 1980

Cases

Firestone SA (Pty) Ltd v Gentiruco A. G 1977 (4) SA 298 (A)

Tshivhase Royal Council v Tshivhase 1992 (4) SA 852 (AD)

JUDGMENT

[1] **Introduction**

This matter concerns the application of Rule 45(1)(c) of the High Court Rules 1980. The applicant is seeking variation of clause 1.4 of Mathaba J's Order issued on the 08 April 2022.

[2] **Background**

The applicant has quite a chequered history of litigation before the Courts of this country spanning decades. The dispute around the applicant is centred on who are its shareholders, and this is what is at the heart of all the peripheral issues which periodically keep cropping up around this entity. I do not wish to burden this judgment with all those unnecessary facts, suffice, for present purpose to state that on 05 April 2022 the applicant lodged an urgent application seeking a number of reliefs.

[3] Relevant for the determination of this matter are the reliefs which were sought before my Brother Mathaba J, which were to the following effect:

> *"2. PART B – ORDINARY RELIEF*
>
> *2.1 Directing 1st and 2nd Respondents, jointly and severally, and within 7 days of service of this order upon them, to account and debate any such accounting for all amounts received by them from or in respect of the Applicant's complex, Hatla-Butle.*
>
> *2.2 Directing the 1st Respondent to repay the amount of M99,000.00, to the Applicant being the amounts received by the 1st Respondent from the 2nd Respondent in respect of monthly rentals*

for the periods December 2021, January 2022, and February 2022.

2.3 Declaring letter issued by or on behalf of 1st Respondent dated 08th March 2022 unlawful

2.4 Interdiction and restraining the 2nd and 3rd Respondents to make any monthly payment or any payment of any nature or cause to any third party except to the Applicant or to withhold such payments due for rental or occupation of any area within the said complex while in occupation thereof from Applicant.

2.5 Granting applicant further and/or alternative relief as this Honourable Court may deem necessary in the circumstances."

[4] The 1st respondent was charged with collecting rentals from the tenants of the applicant, while the rest of the respondents are tenants. It would appear that when the parties appeared before Mathaba J on 08 April 2022, the 2nd respondent's counsel conceded to the order being made for payment of rentals, couched as follows – only relevant part of the order will be reproduced under clause 1.4:

> *"2nd Respondent is directed to pay rentals to the Applicant's account, together with all and any arrear rentals due and payable to the Applicant and to do so upon written demand by Applicant's attorneys (Du Preez Liebetrau & C0.) in respect of the 2nd Respondent's three (3 shops in the Hata-Butle Complex."*

[5] It is common cause that unbeknown to the parties the applicant's account into which the rentals were supposed to be paid was closed for inactivity

during the lockdowns induced by covid-19 pandemic. It should be stated that the applicant's averment that there was a mistake between the parties that the applicant's bank account is still active, is not disputed, hence I state that it is common cause. Attempts to re-open the account were fraught with hurdles due to the fact of the pending shareholding dispute cases regarding the applicant which I alluded to earlier in the judgment. The applicant is now seeking variation of the Mathaba J's order alluded to so that the rentals be paid into the applicant attorney's trust account.

[6] Only the 2nd respondent is opposing this application, and in it, raised a point in *limine* that this court lacks jurisdiction as it is *functus officio* with regard to the order.

[7] **Issue for determination**

Whether the court has power to vary an order which was brought about by mistake common to both parties.

[8] **The Law**

Variation of orders is sought under the provisions of rule 45(1)(c). This rule provides that:

> *"(1) The Court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary –*
>
> *(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

(b) an order or judgment in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to parties.

(2) ….
(3) ….
(4).…"

[9] There is a fundamental principle in our law to the effect that litigation must reach finality. It is not difficult to decipher the wisdom behind this principle: It is so that there be certainty in the law, as those judgments provide guidance to individuals on how to conduct their affairs. If judgments could be altered at the whim of the judges who delivered them certainty and guidance will only exist in the realm of dreams. It is for this reason that once a judge has pronounced himself/herself on the matter he/ she cannot vary or rescind it. He is *functus officio.* Only the higher court can perform that function (**Firestone SA (Pty) Ltd v Gentiruco A. G 1977 (4) SA 298 (A) 306 F – G).** It is against this background that Rule 45 (1) (C) should be understood. It provides an exception to the general rule stated in the preceding sentences.

[10] What then are the requirements of Rule 45(1) (C). I can do no better than reproduce what was stated in **Tshivhase Royal Council v Tshivhase 1992 (4) SA 852 (AD)** when the court was dealing with a similar Rule of the Uniform Rules of Court 1965, where at p.p. 862 H – 863C it stated that:

"On this factual basis, the question is whether the first judgement was granted 'as the result of a mistake common to the parties' within the meaning of this expression as used in Rule 42(1)(1) …. The Rule sets out exceptions to the general principle that a final order, correctly expressing the true decision of the Court, cannot be altered by that Court. The judge is functus officio ***(Firestone South Africa (Pty) Ltd v Geneticuro AG 1977 (4) SA 298 (A) at 306 F – G).*** *I agree with the statement of* ***Vivier J in Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) Sa 532 (C) at 536G*** *that the Court has a discretion whether or not to grant an application for rescission under Rule 42(1). In relation to subrule (C) therefore, two broad requirements must be satisfied. One is that there must have been a 'mistake common to the parties.' I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (See Christie Law of Contract in South Africa 2nd ed at 382 and 397 – 8). A mistake of fact would be the usual type relied on. Whether a mistake of law and motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of the matter, arise. Secondly there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been 'as the result of' mistake. This requires, in the words of Eloff J in* ***Seedat v Arai and Another 1984 (2) SA 198 (T)*** *at 201D**,** that the mistake relate to and be based on something relevant to the question to be decided by the court at the time …." (sic).*

[11] I now turn to apply these principles to the facts of the present matter. When the order in question was issued both parties were labouring under a mistake that the applicant's bank account was still operative. This much is common

cause. The 2nd respondent is a tenant of the applicant. It has to pay rentals for the space it occupies. In view of the above principles and circumstances of this case the following order is made:

(i) The 2nd respondent is directed to pay rentals to the Applicant, in terms of the written sublease agreement while occupying the supermarket and furniture shop in terms of the sublease agreements, dated June 2020, between Applicant and 2nd Respondent, together with all and any arrear rentals due and payable to the Applicant and to do so upon written demand by the Applicant's attorneys, (Du Preez Liebetrau & Co.) and into their bank account at Standard Lesotho Bank, Account No. 9080003122855 in respect of the 2nd Respondent's three (3) shops in the Hata-Butle Complex.

(ii) The applicant is awarded the costs of this application.

MOKHESI J

For the Applicant: **Adv. T. Mpaka from Du Preez Liebetrau & Co.**

For the 1st Respondent: **No Appearance**

For the 2nd Respondent: **Adv. Maile instructed by MM Chambers**