C. of A. (Civ) No.4 of 1986

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:

LAWRENCE MATIME and two others	First Appellant
v	
ARTHUR VINCENT MORUTHOANE and another	First Respondent

HELD AT MASERU

Coram:

Schutz P.
Aaes J.A.
Miller J.A.

J U D G M E N T

Schutz P.

This is an appeal against an order made in the High Court in an application which was brought by one Moruthoane and another Machefo against eight respondents. The application succeeded against three of them and various orders were made in favour of the applicants. I will not detail these orders, but the general effect of them is that they would pass control of the first Appellant, one Matime, and those others with whom he may be associated. A large number of points has been raised on behalf of the Appellants in this case who were Respondents below.

The first difficulty that I have with the original application by Moruthoane and Machefo is that it appears that the real potential applicant in this case was the said Church. That Church is not cited as a party in the proceedings at all and there is no evidence that the two Applicants acted with

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the authority of that Church. Nor does it appear from the papers that the two Applicants themselves had the right to bring these proceedings, which, among other things, would have had the effect of thrusting the school in question upon the Church, that Church not having been a party. It therefore seems to me that at the very commencement the application was defective in this respect, whether it be called technical or fundamental. It is clear that the form of the order that was made is such that it is largely conceived in favour of the Church.

The next difficulty that I have with the application in the High Court is that the deponents who purported to give evidence did not say that they had personal knowledge of the facts deposed to. It it true that in respect of some of the facts it appears from the affidavits themselves that knowledge is established. But when one has regard to the basic facts that had to be established there is a lack of admissible evidence to make the simple case that was sought to be made.

Mr. Maqutu for the Respondents on appeal has sought to avoid this difficulty by saying that these matters were not challenged below and that in some manner or another it was generally accepted that the basic facts to be proved had been proved. I am afraid I cannot agree with that view at all. It is for the applicant to establish the essential facts on which his cause of action is based and that he has

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failed to do . I do not propose going through the various documents that have been referred to in evidence. It is true that there are distinct indications that the Church may well have a good cause of action against someone. But there is a lack of admissible evidence in the founding affidavits to establish the essential facts. Among these are proof that it was the Church that applied for the registration of the school, and proof that the government, which controls these matters, granted authorisation to the Church to open a school.

Moreover, it appears very clearly from these papers that there are fundamental disputes of fact. It may well be that the disputes that were raised by the Appellants were spurious, but there is no avoiding the conclusion that there are fundamental disputes. For that reason, in my opinion, the Court below should not have allowed this matter to be decided on affidavit.

I do not propose saying more about the merits, because I think that the less said the better, as, in the light of the order that I shall propose, these matters will have to be properly thrashed out in a proper manner in due course.

I would add that there is another point that is raised on appeal and that is that the original application as it was persited in was defective, in that the Appellants made at least a prima facie case to the effect that the school is owned, insofar as there can be ownership,

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and is controlled by a body which is a corporate body according to its alleged constitution. It may be that the Applicants below were not to be faulted for not having joined this body in the first instance, but once it became apparent that this corporate body might well be the one most deeply interested in the results of this litigation, it became, in my opinion, incumbent on the original Applicants to join that body as a Respondent.

Accordingly, I consider that at the time that the orders below were sought and obtained, there was a non-joinder. This is a matter that no Court, even at the latest stage in proceedings, cannot overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have had no opportunity to present their case.

The question then arises what we should do in these circumstances. Mr. Maqutu has contended that the matter should be referred either to evidence or to trial. Mr. Edeling proposes that the appeal should be upheld and that the Church should, if it so advised, issue a summons and prove its case properly. In my opinion, we should not exercise our discretion in this case so as to refer the matter to trial or to evidence. In the first place, there are the problems about joinder and locus standi to which I have already referred, and I consider that if the present proceedings are allowed to continue, the Court would simply be bringing further bedevilment upon the interested parties. Also, and this is a relatively minor consideration, I think Mr. Edeling is correct in saying that the existing papers are so confused that it might be better to start with a clean slate and allow the parties to address themselves to the essential issues in the case.

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The Court has not lost sight of the fact that apart from the interests of the warring parties, there are the interests of many children and parents involved, and we have given consideration to what would, in our opinion, be the most sensible way of dealing with the matter. I would like to stress that nothing that I say is to be taken as a determination, much less a final determination, of the disputes between the parties. In my view this is essentially a case in which an order should be made having the effect of dismissing the original application without deciding on the merits of the disputes raised. Accordingly, I am of the opinion that the appeal should be allowed with costs and that the order that should be substituted for that of the High Court should be the following:
The application is dismissed with costs.

Signed: ....
W.P. SCHUTZ
President

Signed: ....
M. Odes
Judge of Appeal

Signed: ....
S. Miller
Judge of Appeal

Delivered ex tempore at Maseru on this 25th day of July, 1986.

For the Appellant : Mr. Edeling

For the Respondent : Mr. Maqutu