CIV/APN/8/02

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY (LHDA) — APPLICANT

AND

MATEE PHATELA — 1ST RESPONDENT
THE PRESIDENT OF THE LABOUR COURT — 2ND RESPONDENT

JUDGEMENT

Delivered by the Honourable Mr. Justice G. N. Mofolo
on the 23rd day of August, 2002

This is a case in which the applicant has approached this court seeking an order.

1. That a RULE NISI be issued, returnable on a date to be determined by this Honourable Court, calling upon the Respondents to show cause, if any why;

   (a) The ordinary Rules of this Honourable court, pertaining to the modes and periods of service shall not be dispensed with;

(b) The judgement of the Labour Court in case no. LC/115/00 delivered on 12 December, 2001 shall not be reviewed, reversed and set aside;

(c) The execution of the judgement of the Labour Court in case no. LC/115/00 shall not be stayed, pending finalisation of this Application;

(d) The respondent shall not be ordered to file their opposing papers, if any, within seven (7) days of service upon them of this Application;

(e) The second Respondents shall not be (ordered) to transmit the Record of the proceedings in the Labour Court case no. LC/115/00 to the Registrar of this Honourable Court within fourteen (14) days of service upon them of the Application;

(f) Any further and/or alternative relief shall not be granted.

2. That prayer 1(a) and (c) operate with immediate effect as an Interim Order of Court.

3. Directing 1st Respondent to pay costs hereof only in the event of his opposition thereto;

The applicant had gone further to say TAKE NOTICE FURTHER THAT the Affidavit of E. R. Mapetla will be used in support of this Application.

The application was opposed and anticipated. An interim order had been granted by my Sister Guni J. on the 11th January, 2002.

In anticipating the application, 1st respondent had raised the following points in limine;

A. **URGENCY AND NON-COMPLIANCE WITH RULES**

(i) The Applicant had approached this Honourable Court ex-parte and without notice to the Respondents. It has also obtained orders operating with immediate effect.

(ii) Throughout his founding Affidavit, E. R. Mapetla makes no attempt whatsoever to justify this extra-ordinary remedy.

(a) Nowhere does he even make the barest allegation that the matter is so urgent so as to warrant ex-parte proceedings.

(b) He does not make even the barest allegation that Applicant would not be afforded substantial relief at a hearing in due course.

(c) He has made no attempt to set out facts on which he claims the matter is urgent.

(iii) I have been legally advised and verily believe same to be true that

the deponent was bond (bound) to set out all the facts above, in his Founding Affidavit and that this is a legal requirement and not formalistic fantasy.

(iv) The Application has in the premises been brought in stack violation of Rule 8(12) of the Rules of this Honourable Court. This is fatal and borders on contempt of court and constitutes the clearest abuse of court process. On this ground alone, the Honourable Court will be asked to dismiss this Application with costs on a scale as between Attorney and own client and de bonis propriis.

B. NON-JOINDER

The applicant has cited as a party and has thus sued together with me, the President of the Labour Court in his capacity as such. Yet, the Attorney-General in his capacity as the representative of the government of Lesotho and all its Ministries and departments including the office of the President of the Labour Court has not been joined in these proceedings.

Failure to join the Attorney-General in any proceedings against an office of the government of Lesotho is fatal. On this ground alone the

Application ought to be dismissed.

C. **NOTICE OF MOTION-DEFECTIVE**

(i) The Notice of Motion in this Application has been signed by Advocate D.T. van Tonder as Applicant's Counsel. It has not been signed by an Attorney duly admitted and practicing as such. It has also not been signed by the Applicant whose functionary is the Chief Executive or a person acting in that position.

(ii) Advocate W. T. Van Tonder is neither the Chief Executive of LHDA nor a person acting in that position. Such a person is, on the paper before court, Mr. E. R. Mapetla who appears to have instructed Mr. van Tonder to act as the LHDA lawyer in certain proceedings under case no. LC/115/00, a matter of the Labour Court (certainly not the proceedings before this Honourable Court).

(iii) The Notice of Motion is therefore in stark violation of Rule 18(6) read with Rule 13 of the Rules of this Honourable Court. The notice of motion is therefore fatally defective and null and void.

D. BALANCE OF CONVENIENCE - HARDSHIPS

The Applicant is seeking an order of stay of Execution. No attempt whatsoever has been made to satisfy the Honourable Court that the balance of convenience favours such an order. Applicant was bound to do so and its failure to do so is fatal. Again on this ground alone the Application for stay of execution ought to fail.

Where, in an application, a party takes points in limine, the practice of this court has invariably been first to hear points in limine and in case the court would be disinclined to uphold points in limine, the court has always ordered that, to save time, merits be gone into.

In the present application for reasons that will intra become obvious, the court has restricted Counsel on either side to confining themselves to points in limine. I must also mention that points in limine having been aired, I got the impression that Mr. van Tonder was in general agreement.

With regard to (i) above, it is true that applicant has approached this court ex-parte without notice to the respondents so that it may be said applicant was heard in an urgent application without a corresponding hearing being extended to the respondents. No panic stations here for our own Rules of Court (sec. 8(4) of High Court Rules, 1980) are clear that:

> 'Every application brought ex-parte shall be filed with the Registrar before noon on two court days preceding the day on which it is to be set down to be heard-----'

Sec. 5 is even clearer for it reads;

> 'any person having an interest which may be affected by a decision on an application being brought ex parte, may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be hears (sic), whereupon the Registrar shall set down such application for hearing at the same time as the ex-parte application.

As I understand the rule, an application brought ex-parte is to be filed with the Registrar two (sic) days preceding the day on which it is to be heard.

This does not mean that it is to be heard the same day it is filed. Sub-section 5 is clear and is to the effect that a person having an interest which may be affected by a decision on an application brought ex-parte (sic) may oppose the same. The opposition in this regard cannot but mean opposition to an application brought ex-parte. It is only after all interested parties have filed their opposing papers that the application brought ex-parte and the application can be heard. I understand the rule as being to the effect that the ex parte application and the applications are to be heard simultaneously at least two clear days after the ex-parte application is filed with the Registrar. It follows that before the ex parte application is heard interested parties which are respondents should first be served with the ex-parte application and the application.

A practice has however crept in by which on the same day of filing the ex-parte application with the Registrars or soon thereafter, judges are approached in chambers to hear the applicant ex parte. Speaking for myself, there can be no doubt this is violation of Rule 8 aforesaid.

Our courts have dealt with the nature of an ex parte application and it is perhaps useful in this instance to refer to the case of **W.M.N. Investments (Pty) Ltd. v. Makhaba LLR 1979 (1) 68** where Cotran, CJ (as he then was) found it was not in the nature of an ex parte application to grant a rule nisi removing and handing the very thing sought to be granted to the applicant without first affording the other side an opportunity to be heard. Noticeably, Cotran CJ was concerned with whether in an ex parte application the applicant can be granted the very thing that is in dispute. In this regard in ex parte applications following present practice, an applicant is not granted the very-thing in dispute for this is gone into and argued on the return date. If I understood Mr. Phafane well, he is not concerned with this but whether an ex parte application can be heard in the absence of an interested party. I have already shown that if the strict letter of the relevant Rule of Court is followed, this is not possible.

I would also like to draw attention Rule 8(2) which reads;

> 'When relief is claimed against any person, or where it is proper to give any person notice of such application, the notice of motion shall be addressed to both the Registrar and such person, otherwise it shall be addressed to the Registrar only.'

It seems to me according to the Rule where notice of application is against any person, the notice of motion is to be addressed to both the Registrar and such person in which case the person is to be served with the documents relating thereto but not where relief is not claimed against any person for in such a case motion is addressed to the Registrar only. By allowing an application brought ex-parte in which relief is claimed against somebody without the somebody being served with the documents relating thereto, there can be no doubt that there has been blatant obfuscation of the Rule of Court amounting to, as Mr. Phafane has submitted, contempt for the Rules of Court and in my view it would seem its time to go back to the basics. It is also to be noted that in Peter v Union and National South British Insurance Co. Ltd. 1978 (2) SA 58(D) it was held making an application meant 'the filing and serving of the documents relating thereto'.

Mr. Phafane has said some lawyers ignore judgements of this court and the Court of Appeal in that these courts have time and again made it clear that ex-parte relief in an extraordinary remedy making it to jump the queue and that,

if such an application must jump the queue, it goes without saying that it must not only be treated as urgent, but must be expeditiously determined.

From the record of proceedings it would appear the application was launched on 11 January, 2001 as an urgent application and rather regrettably was opposed on 17th January, 2002 more than a year after it was launched. A week after the application was opposed, the 1st respondent anticipated the application. For my part, I am not concerned with whether there was belated service on the 1st respondent for as I have said above, at the time of launching an urgent application the applicant must at the same time serve the respondent with the papers.

I am of the view that applicant proceeded by way of an urgent application merely to frustrate the 1st respondent and to avoid the materialization of the evil day and find that on this ground alone this application deserves to be dismissed.

B. NON-JOINDER

Undoubtedly when government or government department or office is sued, the government does and would have an interest in the result of such litigation and as an interested party government has to be cited and the Attorney-General as an officer representing government in suits against government has to be cited. Unless the Attorney-General is cited one cannot see how the judgement can be sustained or carried out. (see **Fisheries Development Corporation of South Africa Ltd v. Jorgensen and Another; Fisheries Development Corporation of SA Ltd v. AWJ Investment (Pty) Ltd and others, 1979(3) SA 1331(W) at 1337G and also Amalgamated Engineering Union v. Minister of Labour, 1949(3) SA 637 (A)).**

As to C to the effect that the Notice of Motion is defective the Notice of Motion has been signed by Adv. W. T. van Tonder as Applicant's Counsel and yet, according to Mr. Phafane Mr. van Tonder is not an attorney. He has said since Mr. van Tonder is an advocate he cannot be an attorney through the back

done and if he wishes to practice as an attorney he must go through known and accepted channels. He has also said that Mr. Van Tonder is neither Chief Executive of LHDA nor a person acting in that capacity such a person being, on papers before court, Mr. E. R. Mapetla who appears to have instructed Mr. van Tonder to act as LHDA lawyer in certain proceedings under case no. 115/00, a Labour Court matter having nothing to do with proceedings before this court.

It seems to me at this stage this court is called upon to decide whether (a) Mr. van Tonder is entitled to sign application papers as LHDA counsel; (b) whether the instruction by Mr. Mapetla is in order. With regard to (a) above, it would appear Mr. van Tonder acts for LHDA at their legal advisor there being nothing unusual in the practice as private firms and corporations do this by employing a qualified advocate solely for the purpose of advising his employees on certain legal problems which might crop up from time to time in the course of their undertakings. (see **Ex Parte Masterson, 1974 (4) SA 321 (R, AD) at p. 324).**

In the above case same page it was also observed that it is a well known fact that certain large newspapers employ qualified barristers or advocates as full-time employees to advise them on whether anything published in their papers is likely to expose the paper to any claim for damages or criminal prosecution.

In my view, the fact alone that an advocate is employed to advise an entity does not confer on him the right to practice as an attorney by signing an application as Mr. van Tonder has done. In this regard the practice of our court stands namely, that an advocate cannot sign originating court papers nor can he appear in court unless duly instructed in civil matters. Concerning (b) above, the substantive part of the application is review of judgement of the Labour Court in case no. LC/115/00 and it would seem to me if it was required to have Mr. van Tonder appear in the present application, it is in this application that he required and instruction. I am now concerned with whether Mr. van Tonder was properly instructed or not for in this application he was not instructed having been instructed by Special Power of Attorney dated 22nd September, 2000 to defend legal proceedings brought against LHDA by Matee

M. Phatela. The case quoted in the Special Power of Attorney is L.C. 115/00 being a case heard in the Labour Court. In my view, an instruction in the Labour Court is not to an instruction in this court.

I am aware of the broadly phrased resolution of the applicant by the Board Secretary dated 25th November, 1999 which Mr. Phafane has attacked as too widely stated. While I am inclined to agree, sight cannot be lost of the authority vested in the Chief Executive Officer of the applicant and the wide range of activities by the applicant. (see also **Shell Company of SA v. Vivier Motors (Pty) Ltd, 1959 (3) SA 971 (WLD).**

It would seem, following applicants' resolution of 25th November, 1999 above, a Mr. E. R. Mapetla in his capacity as Acting Chief Executive Officer of the applicant gave Mr. van Tonder authority/power of Attorney to act for the applicant in legal proceedings brought by Matee M. Phatela against the LHDA in Labour Court case no. L.C. 115/00. A civil application is quoted but it has no number. I am satisfied that when Mr. van Tonder appeared before Guni J.

and asked for an interim order by virtue of the papers which he presented being irregular in that they were signed by him an advocate, the order was irregularly obtained. I am also satisfied that when the said Mr. Van Tonder so appeared as aforesaid, he was not duly instructed so to appear.

D. BALANCE OF CONVENIENCE

Mr. Phafane has submitted that it was incumbent on the applicant to have satisfied this court that balance of convenience favoured the applicant for an order sought. In this respect I entirely agree with Mr. Phafane in that where an applicant seeks to vary or set aside a judgement of court as the applicant in the instant case is purportedly seeking, he must satisfy the court before the order he seeks is granted that balance of convenience or as it were hardship favours him. No such an attempt having been made, it stands to reason that such an application cannot succeed for the application to succeed the applicant is to satisfy the court that balance of convenience is in his/her favour and that the respondents will not be prejudiced by such an order.

Indeed such was the case in **Matiso v. Commanding Officer, Port Elizabeth Prison and Another, 1994 (3) SA 899 (SECLD)** where the applicant sought to be released from prison pending the decision of the Constitutional Court with regard to the constitutionality or otherwise of certain sections of the Magistrate's Court Act no. 32 of 1944. Apparently the applicant had been imprisoned for failure to satisfy a judgement debt and it was a section relating to this and by which the applicant had been imprisoned.

After considering a number of factors, the court had come to the conclusion that balance of convenience clearly favoured the applicant for if she was not then released it would be cold comfort for her should the Constitutional Court decide in her favour. On the other hand, the second respondent namely, Port Elizabeth Prison would not be prejudiced if the Constitutional Court eventually decided the case against her in that in the event and in all probability the applicant would have to serve the remainder of the sentence imposed on her by the magistrate. Because balance of convenience favoured the applicant and the 2nd responded would not be prejudiced by the applicant's release, the court

had granted the applicant for the release of the applicant pending her case in the constitutional court.

In the instant case the 1st respondent has judgement in his favour, no security for costs was filed, the application has taken an ordinately long time to be determined and there can be no doubt that 1st respondent was gravely prejudiced.

Among other things, this court should have been addressed on this aspect by the applicant if the application of succeed.

In these matters the court has a wide measure of dis action to allow or disallow an application. The discretion is more often than not exercised to alleviate hardship and to ensure that form does not triumph over substance.

In this application though, there have been too many irregularities as points in limine taken have demonstrated and I find that these, taken together, have grievously prejudiced the 1st respondent. There are cases where, despite

irregularities, an applicant has been allowed leave to bring a fresh application on the same papers supplemented by necessary proof of authority but my view is that though this court prefers cases to be decided on their true issues than on technical points, regrettably this court in the instant case has no choice but to dismiss this application at this stage.

Consequently, the rule is discharged and the application is dismissed. The court not being inclined to order costs on a higher scale, the application is dismissed with ordinary costs to the 1st respondent.

G. N. MOFOLO
JUDGE

For the Applicant : Mr. Van Tonder

For the Respondent : Mr. Phafane