C of A (CIV) NO. 36 of 2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

KABI MONNANYANE	**APPELLANT**
And	
SOS CHILDRENS' VILLAGE	**FIRST RESPONDENT**
NATIONAL COORDINATOR	**SECOND RESPONDENT**
MAKHABANE LETSIE	**THIRD RESPONDENT**
SHERIFF OF HIGH COURT	**FOURTH RESPONDENT**
ATTORNEY GENERAL	**FIFTH RESPONDENT**

Coram : Ramodibedi JA
Grosskopf JA
Mofolo J

JUDGMENT

Application for a declaratory order – brought ex parte on basis of alleged urgency – inadequate notice to respondents – factual disputes rendered motion proceedings inappropriate.

GROSSKOPF, JA;

[1] The appellant was the applicant in the Court *a quo.* He brought an *ex parte* application on 14 September 2005 in the High Court seeking relief as a matter of urgency. The application was for a declaratory order. The notice of motion and founding affidavit were both signed on 8 September 2005 and lodged with the registrar on 9 September 2005, but served on the respondents only on 13 September 2005. The first, second and third respondents ("the respondents") gave notice that same afternoon of their intention to oppose the application. Counsel who appeared for the respondents in the court *a quo* managed to persuade counsel for the appellant to change the proposed interim court order in a minor respect, viz to provide for the return of the vehicle in dispute not to the fourth respondent, the sheriff of the High Court, but to the first respondent, the SOS Childrens' Village. I do not however agree with the appellant's submission that the respondents are thereby estopped from objecting to the granting of the *interim* order or from asserting that the matter was not urgent. Counsel's suggestion that the proposed interim court order be

amended in the above minor respect did not make any real difference to the interim court order which the appellant sought. It can certainly not be inferred in my view that counsel for the respondents thereby represented to the appellant that the respondents were consenting to the interim order being made, and that it be made as a matter of urgency.

[2] The High Court granted the following interim order on 14 September 2005:

> "IT IS ORDERED THAT:
>
> The rule nisi is hereby issued returnable on the 26th day of September 2005 at 9.30 a.m. or so soon thereafter as the matter may be heard for the respondents to show cause, if any, why the following prayers should not be made final.
>
> 1(a) That the rules of court are dispensed with on account of the urgency of this matter.
>
> (b) The Toyota venture vehicle plate number AF 952 be returned to 1st respondent until the finalisation of this matter.
>
> (c) That prayer (c) is withdrawn.
>
> (d) That prayer (d) is amended to read that the auction that purportedly took place and by which 2nd responded released the Toyota Venture Vehicle to 3rd respondent be

declared null and void.

(e) That the applicant be declared the successful bidder for the said vehicle and be given its possession upon payment of M26,000-00 to 1st respondent, he originally bid the vehicle for.

(f) Costs of suit including costs for employment of counsel.

(g) Further and/or alternative relief.

(h) That respondents should file opposing affidavits on or before 21st of September 2005.

(i) That applicant should file replying affidavits on or before 23rd of September, 2005.

2. That prayers 1 (a) and (b) operate with immediate effect as interim reliefs".

[3] Answering and replying affidavits were thereafter filed and when the matter was heard on the extended return day the respondents raised an objection *in limine.* They objected to the fact that the order was sought *ex parte* and submitted that inadequate notice had been given on the ground of alleged urgency. The court *a quo* held that the appellant had failed to give the respondents adequate notice and pointed out that the use of *ex parte* applications as a matter of urgency had been criticized by the High Court and the Court of Appeal. The court *a quo* accordingly upheld the point *in limine*, discharged the rule

and dismissed the application on 3 November 2005. The appellant attacked this finding of the court *a quo* on appeal. There was no appearance for the respondents at the hearing of the appeal.

[4] In my view the matter was not urgent. The reasons advanced by the appellant for the alleged urgency of the matter are the following:

1. "The vehicle in issue may deteriorate by prolonged use and storage if the matter were to proceed" as an ordinary application.

2. The appellant "had been unlawfully deprived of the possession of the vehicle of which [he] was the lawful bidder."

3. The matter should be decided speedily "so as to avoid prejudice to either of the parties."

4. The appellant had "no other remedy".

Reason 1 was not an adequate justification for urgent relief. Reason 2 was in dispute and the respondents' version would prevail. Reason 3 would apply to most opposed applications. Reason 4 was incorrect inasmuch as the appellant had a claim for damages on his version of the alleged auction of the vehicle.

[5] Even if the matter were fairly urgent, why were the papers not served on the respondents before 13 September 2005, seeing that those papers had already been lodged with the registrar on 9 September 2005? The result was that the respondents received inadequate notice. Practitioners have been warned time and again that the abuse of *ex parte* applications on an urgent basis without proper notice may result in the dismissal of such applications and costs orders *de bonis propriis*. See Mapuseletso Mahlakeng and 55 Others v. Southern Sky (Pty) Ltd and 7 Others C of A (CIV) No. 16 of 2003 and the many other cases referred to therein which are to the same effect. I am therefore of the view that the approach of the court *a quo* in this respect cannot be faulted and that the appeal cannot succeed.

[6] The appellant's application could in any event not have succeeded in view of the serious factual disputes on the papers. It should have been obvious to the appellant that there were going to be disputes of fact which rendered a resort to motion proceedings inappropriate.

> "It is well settled that a litigant who proceeds by way of a notice of motion as opposed to action runs the risk of having his case dismissed simply on the ground that he should reasonably have foreseen that a material dispute of fact would arise in the matter."

(per Ramodibedi JA in the case of L. Tšehlana v National Executive Committee of the Lesotho Congress for Democracy and Another C of A (CIV) No. 18 of 2005 at [27]). Rule 8(14) of

the High Court Rules also provides that the court may dismiss an application if in the opinion of the court the application cannot properly be decided on affidavit.

[7] The material facts on which the appellant relied in his founding affidavit were denied by the second defendant who is the national director of the first defendant. Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. (Plascon – Evans Paints Ltd v Van Riebeeck (Pty) Ltd 1984 (3) SA 623 (A) at 634E –

635C; MNM Construction Company (Pty) Ltd v Southern Lesotho Construction Company (Pty) Ltd and Others C of A (CIV) No. 1 of 2005 at [10]; L. Tšehlana, supra, at [30]).

The facts averred by the appellant and admitted by the respondents, together with the facts alleged by the respondents cannot justify the declaratory order which the appellant seeks.

[8] I have pointed out that there was no appearance for the respondents at the hearing of the appeal. There was also no heads of argument filed on behalf of the respondents. However, in the event that the respondents did incur costs on appeal I shall make a costs order.

[9] In the result the appeal is dismissed with costs.

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FH GROSSKOPF
JUDGE OF APPEAL

I agree

_____
MM RAMODIBEDI
JUDGE OF APPEAL

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I agree

GN MOFOLO
EX OFFICIO JUDGE OF APPEAL

For the Appellant : Adv LA Molati
For the Respondents : No appearance

Delivered at Maseru this 11th day of April 2006.

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