C of A (CIV)NO.14/06
CIV/APN/259/04

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

COMMISSIONER OF POLICE **1ST APPELLANT**

ATTORNEY GENERAL **2ND APPELLANT**

and

MAOPELA MAKHETHA **1ST RESPONDENT**

MOEKETSI JANE **2ND RESPONDENT**

CORAM:

STEYN, P
SMALBERGER, JA
MAJARA, JA

HEARD : 28 MARCH, 2007
DELIVERED : 4 APRIL, 2007

JUDGMENT

SUMMARY

Appeal from an order of the High Court denying the parties the right to proceed with an opposed application because of a previous court order which it was claimed precluded them from doing so. Previous court order no longer operative because of abandonment by respondents of an earlier default judgment in their favour. Appeal allowed. Appellants ordered to pay the costs of appeal because situation which had arisen essentially due to incompetent case management on the part of appellants.

SMALBERGER, JA

1. This appeal reveals a disturbing state of affairs regarding the events preceding it. On 14 June 2004 the respondents (as applicants) brought an applicant against the appellants (as respondents) in the High Court. For the sake of convenience, and a better understanding of what follows, the parties will be referred to as they were in the court a quo.

2. In the application the applicants sought an order (1) declaring the dismissal of the applicants by the first respondent (the Commissioner of Police) as unlawful; (2) directing the first respondent to reinstate the applicants in the Lesotho Mounted Police Service with immediate effect; and (3) directing the first respondent to pay the applicants' salary arrears from the date of their dismissal together with interest thereon at 12.5% per annum. It appears from the application that the applicants had previously been dismissed from the police service; that their original dismissal was set aside following an appeal; that they

were thereafter interdicted on half pay with effect from 1 September 2000; and later again dismissed.

3. On 28 June 2004, in the absence of any appearance to defend on behalf of the respondents, Hlajoane J gave judgment by default in favour of the applicants granting them the relief sought. On 6 July 2004 the respondents filed an urgent application in which they sought, inter alia, a stay of execution and rescission of the default judgment. The accompanying founding affidavit was woefully inadequate to sustain the relief sought. The application was (quite correctly) dismissed by Majara J (then AJ) on 6 July 2004. Her order read as follows:

> "1. The application is dismissed as this court is not satisfied with the explanation for delay.
>
> 2. The applicants have simply stated that they have a bona fide defence without setting out averments which if the matter were to be taken to trial would entitle them to the relief sought."

4. On 22 July 2004 the respondents noted an appeal against the order made by Majara J. Undaunted by the noting of the appeal,

and with complete disregard of the fact that consequent upon Majara J's order the matter between the parties, pending an appeal, was *res judicata*, the respondents on 31 August 2004 launched a second application for rescission similar to the one that had been dismissed, seeking identical relief. This time the founding affidavit had been amplified in an attempt to overcome the shortcomings of the earlier one.

5. On 6 September 2004 Hlajoane J, in apparent ignorance of the previous order of Majara J, granted a rule nisi calling upon the applicants to show cause why the respondents should not be granted the relief sought. To this the applicants responded by raising various points of law in terms of High Court Rule 8(10)(c). In the meantime the respondents' appeal which had been noted on 22 July 2004 was withdrawn on 1 September 2004. There appears to have been no legal basis to justify the granting of the rule nisi.

6. What occurred thereafter does not appear from the appeal

record, but the parties are agreed that on the return day of the rule nisi on 5 December 2005 Hlajoane J noted the following in the presence of the parties' legal representatives:

> "On 5/12/05 Mr. Nteso for applicant and Mr. Motsieloa for the respondents. Parties are before court today on rescission application but on looking at the minutes in the file the rescission application was refused by my sister Majara AJ as she then was. The court is told that there was an appeal noted on that ruling which appeal was later withdrawn.
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> There was again a rescission application which was granted and the court feels that that was an error. Parties were given time in the morning to go and consider what steps to take to remedy the situation. Both the court and counsel on both sides feel that there has been so much confusion in the handling of this case and that the case was never properly dealt with particularly on the merits.
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> Parties are agreed that respondents to file their opposing papers within 14 days from today and the reply if any thereafter and thereafter rules of court to govern the rest."

7. A further entry was made by Hlajoane J on 6 March 2006. She noted that "the parties are negotiating a settlement", and postponed the matter to 20 March 2006 on the contested roll. The respondents duly filed answering affidavits to the first application on 17 March 2006 to which the applicants responded with replying affidavits on 23 March 2006.

8. The matter eventually came before Maqutu J on 14 August 2006. He made an order in the following terms:

> "In view of Majara J's order dated 6th July 2004 dismissing the application for rescission, this matter remains final until the said order can be reversed on appeal."

The present appeal is directed against this order.

9. Before us counsel were agreed that the proceedings before Hlajoane J on 5 December 2005, as recorded by her, amounted to an abandonment by the applicants of the default judgment granted in their favour so that the true issue between the parties, the legality of the applicants' dismissal, could be determined without recourse to further unproductive legal proceedings and resultant unnecessary delays. It is common cause that such abandonment was legally competent. It should have been done formally in terms of High Court Rule 44(1) by delivering a notice of abandonment of the judgment to the Registrar and all affected parties. Had this been done it may well have prevented

later confusion, and Maqutu J may not have made the order which is being appealed against. Presumably the requisite notice was not given because abandonment was agreed upon between the legal representatives of the parties before the presiding judge.

10. The events before Hlajoane J reflect a commendable and mature approach by all concerned to overcome the legal obstacles in the way of a proper ventilation of the true issues between the parties. In so doing they acted in the interests of the proper administration of justice. That the parties had wisely elected to follow such a course is further evident from their conduct in filing affidavits consequent upon Hlajoane J's order.

11. By the time the matter came before Maqutu J, Majara J's order had been overtaken by subsequent events and had fallen away following on the abandonment of the default judgment. It is not clear whether these events, particularly the agreement noted by Hlajoane J, were brought to the attention of Maqutu J or, if he

was aware of them, he simply chose to ignore them. Whatever the situation, Maqutu J's order cannot stand having regard to the events that preceded it. It follows that the appeal must succeed.

12. With regard to costs, we are of the view that the costs of the appeal should be borne by the respondents (appellants in the appeal). Having regard to the unfortunate history of the matter, the appeal is the end manifestation of what essentially amounted to incompetent case management on behalf of the respondents in their conduct of the matter. Mr Motsieloa for the respondents fairly conceded that in the circumstances it would be appropriate to mulct the respondents with the costs of the appeal.

13. The parties were further agreed that it would be proper for them to be given an opportunity to supplement their affidavits, if so advised, in order to ensure that the issues between the parties are properly before the High Court so that the matter may be brought to finality as soon as possible. Each party will be afforded time within which to do so; if the applicants do not

avail themselves of the opportunity to file further affidavits, that will not preclude the respondents from doing so. Counsel were *prima facie* of the view that the dispute can be disposed of on application. Should the judge hearing the matter consider that there is a need, because of factual disputes, to refer the matter to evidence, it would be open to such judge, in the exercise of his or her discretion, to do so.

14. At the end of the appeal we presented counsel with a draft of the order that we proposed making, for their consideration. They raised no objection to the order proposed.

15. The correctness of the order made by Majara J on 6 July 2004 was never an issue in this appeal, and her minimal participation in the preceding events did not preclude her from sitting in the appeal. The matter was specifically raised with counsel and they had no objection to her being a member of the Court hearing the appeal.

16. In the result to following order is made:

1. The appeal is allowed and the order of Maqutu J dated 14 August 2006 is set aside.
2. The appellants (respondents in the High Court) are ordered to pay the costs of appeal.
3. The matter is referred back to the High Court for the hearing of the application of the respondents (applicants in the High Court).
4. The respondents (applicants in the High Court) are given leave to supplement their papers, if so advised, within 21 days of 4 April 2007.
5. The appellants (respondents in the High Court) are in turn given leave to supplement their papers, if so advised, within 21 days thereafter whether supplementary papers are filed by respondents (applicants in the High Court) or not.
6. The Registrar of the High Court is requested to give the matter the highest priority on the roll of opposed civil

matters.

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J.W. SMALBERGER
JUDGE OF APPEAL

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I agree **J.H. STEYN**
PRESIDENT OF THE COURT
OF APPEAL

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I agree **N. MAJARA**
JUDGE OF APPEAL

For the Appellants : Mr R. Motsieloa
For the Respondents : Mr P.T. Nteso