IN THE COURT OF APEAL OF LESOTHO

C of A (CIV) 04/09

In the matter between:

KHAJOE MAKOALA **APPELLANT**

and

'MASECHABA MAKOALA **RESPONDENT**

Dates: Heard on 27 March 2009
Judgment delivered on 9 April 2009

CORAM: RAMODIBEDI P
MELUNSKY JA
HOWIE AJA

SUMMARY

Motion proceedings – Respondent raising points in limine –Merits not argued – Court a quo upholding points in limine without furnishing reasons and also making other orders without hearing parties – only issue on appeal whether Court of Appeal should direct matter to be remitted for oral evidence to be taken.

Practice relating to points in limine restated. Such points to be raised only if the applicant's affidavits fail to make out a prima facie case – courts of first instance not to accept that a point labelled as one in limine is necessarily an issue to be determined as a preliminary point. Oral evidence – when ordered.

Orders of High Court altered but appeal otherwise dismissed.

JUDGMENT

MELUNSKY JA

[1] The appellant was the applicant and the respondent the first respondent in the Court a quo. They are referred to as the appellant and the respondent respectively in this judgment.

[2] The respondent and the late Tsoloane Makoala ("the deceased") were married to each other by civil rites on 4 August 1984. The deceased died on 10 May 2008 and is survived by the respondent and one child, a boy, S, who is now 17 or 18 years old. In 1988, and during the subsistence of the marriage, the deceased commenced a relationship with a certain Makatiso, referred to in the papers as Makatiso Makoala. Three children – T, who, has since married, and K (now aged 17 or 18), and K (who is now 15 or 16), – were born of this relationship. 'Makatiso died in 1993. The appellant, the elder brother of the deceased, commenced motion proceedings in the High Court shortly after the latter's death.

[3] In the notice of motion the appellant claimed the following relief, inter alia:

> "2. A Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to

come and show cause if any, why the following orders shall not be made final.

a) Interdicting the 1st Respondent or her agents from interfering with and/or removing property belonging to the second house of 'MAKATISO MAKOALA.

b) Directing 1st Respondent to restore ante omnia the properties she has in person or through her agents removed from the premises that form part of the property of the second house of 'MAKATISO MAKOALA and these are inter alia;

1. Nissan Van DTR751GP
2. Toyota 2.4 van D1114
3. Truck white in colour A6327
4. Mercedes Benz brown in colour SDN617GP
5. White Compressor AK512
6. T.V. set
7. Double door fridge
8. 9mm pistol (serial number not known)

c) Declaring the Applicant the guardian of KM and KM both of whom are still minors.

d) Directing the 4th Respondent to seize a 9mm pistol issued to the late TSOLOANE MAKOALA from 1st Respondent or whoever is in possession of same and retain it until proper transfer of ownership of same has been effected.

3. Prayers 1 and 2 (a) having an immediate effect as an Interim Order.

4. Cost of suit in the event of opposition hereof.

5. Granting Applicant such further and/or alternative relief as the Honourable Court deems appropriate".

A rule nisi was granted interdicting the respondent from interfering with or removing property belonging to "the second house" of Makatiso.

[4] On the return day the respondent opposed the application on the merits and raised seven objections as points in limine. It is this procedure with which I am now concerned. The persistent practice of taking inappropriate points in limine has bedevilled the procedure in the High Court for some time and it is a usage that shows no sign of coming to an end. When a point in limine is raised, the issue for determination is whether the applicant's affidavits make out a prima facie case. Consequently the applicant's affidavits alone have to be considered and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point (see Valentino Globe BV v Phillips and Another 1998 (3) SA 775 (SCA) at 779 (F-G). Unfortunately the practice of converting defences on the merits into preliminary points has become so prevalent in motion proceedings that the process may be regarded as being akin to the Pavlovian response.

[5] It is regretted, too, that some courts of first instance appear to accept that an issue raised as a preliminary point is indeed a point in limine simply because it is given that label by the respondent. This sometimes results in procedural confusion, as happened in this matter, where the Court a quo (Mahase J) not only upheld all the points in limine but also appeared to make other orders which were not argued before her. Moreover a court, when faced with an application for only a preliminary point to be argued, should be astute not to grant that relief too readily, mindful of the need to

avoid piecemeal hearings with concomitant delays and the incurring of additional costs.

[6] There is also a further matter of importance, namely that a court should not adopt a supine attitude when it is faced with a point in limine. It is the duty of a court to regulate procedural matters in a reasonable way in order to ensure the smooth progress of the litigation. This might perhaps be illustrated with reference to one of the points in limine taken by the respondent – the appellant's failure to join Sechaba as a party to the proceedings. The non-joinder of a party who has a direct and substantial interest in the outcome of the proceedings, might not inevitably entail the dismissal of the application. Depending on the circumstances of the case the court could decide to take other steps, including permitting the matter to stand down to enable notice to be given to an interested party and for his response to be obtained. Such a step can even be taken by a court on appeal in order to avoid unnecessary expense or delay (see the discussion in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 653 and 662-663). In the present case the interested party, Sechaba, was the respondent's son. He was aware of the proceedings and had gone so far as to depose to an affidavit in support of the respondent. He could have intervened in the proceedings, duly assisted, had he wished to do so. In the event the Court a quo might have considered that his attitude to being joined be ascertained instead of simply upholding the point of non-joinder.

[7] Mahase J upheld the points in limine and dismissed the application but made no order as to costs. In the course of her judgment, the learned judge added the following:

> *"It has already been indicated above that in the circumstances of this case and due regard being had to the fact that this court is the upper guardian of minor children, it is not in their best interests that the status quo which obtained before their father's death should be disturbed or changed.*
>
> *In the premises the 1st respondent is ordered to continue and should be allowed to reside with, raise, guide and maintain these minor children, Kotola and Katiso.*
>
> *The property registered, used for their upkeep and welfare during their father's lifetime should be so reserved, and utilized for that purpose by the 1st respondent without interference by applicant or any of the Makoala family.*
>
> *This is so ordered, and this should remain so, not unless and until there arises some other factors warranting or calling for the change for worse in the life styles and welfare of these said minor children who are entitled to benefit from their biological father's property as well".*

The property referred to by the learned judge are two sites which, according to the appellant, were allocated by the deceased to Kotola some time ago. The legal validity of the allocation is disputed by the respondent but this is a matter that does not require a decision on appeal.

[8] On appeal to this Court, counsel on both sides agreed that Mahase J was wrong in considering any matter other than the points in limine. On the respondent's behalf it was submitted, however, that this error should not affect the outcome of the appeal as the learned judge also upheld all the points in limine, and it was argued that this Court should arrive at the same conclusion. Counsel for the appellant emphasized that the issue for determination at this stage was only whether, on the death of the deceased,

the minors, K and K were left destitute. He submitted that this Court should remit the matter to the High Court with the direction that viva voce evidence be led to determine what is now in the best interests of the said minors. The issues before us have therefore narrowed considerably. In particular it should be noted that, notwithstanding counsel's heads of argument, the appellant no longer claims guardianship of the minors, nor does he persist in any proprietary claims. As to the question of guardianship, the Court a quo held that the common law marriage between the deceased and Makatiso was null and void, having regard to the pre-existing civil marriage. It went on to hold, however, that the union between the deceased and Makatiso was a putative marriage and that therefore the minors were legitimate. These, too, were not points that it was called upon to decide, nor do we have to do so. It suffices to say that the appellant's counsel, rightly or wrongly, accepted for the purposes of this appeal that the respondent was the guardian of the children.

[10] At the risk of being repetitious, this seems to be an appropriate stage to summarize the history of the litigation with a view to deciding upon the issues now before this Court. The essential facts are the following:

1. The Respondent raised seven points in limine. At least two of these, namely, that there was a foreseeable dispute of fact and that the appellant was guilty of non-disclosure, were not proper points in limine at all, should not have been raised as such by the respondent and should not have been dealt with as such by the Court a quo.

2. All of the so-called points in limine were upheld. In most instances, however, and contrary to the accepted and recognized practice, no reasons were given for the decisions. When an opposed matter is argued it is unacceptable for a court to make an order without giving any reasons for it, since litigants are entitled to be informed of the reasons for the decision (see Botes and Another v Nedbank Ltd 1983(3) SA 27 (A) at 27H-28A; Qhobela and Another v Basutoland Congress Party and Another [2000-2004] LAC 28 at 38 C-E).

3. In the notice of appeal, the appellant raised the following grounds, inter alia: that the Court erred in going beyond the points in limine and in traversing the merits; in failing to furnish reasons in respect of the individual points in limine; and in upholding the points in limine. However, in the heads of argument and in oral argument before this Court, the appellant's counsel submitted in essence that, there being a dispute of fact, the matter should have been referred for oral evidence in relation to one aspect – the welfare of the children.

[11] The synopsis contained in par [10] above reflects the confusion that can arise when unwarranted points in limine are taken and decided by the Court of first instance without giving reasons therefor. It also shows that the Court of first instance had taken it upon itself to express opinions and make orders beyond the scope of its functions. This adds to the confusion and makes this Court's task more difficult.

[12] Firstly, it is clear that the appellant has a legitimate grievance concerning the apparent orders made by Mahase J mentioned in par [7]

above. Those orders, if they were made at all, were made without the Court hearing argument and they cannot stand.

[13] The next question is whether, on the assumption that there is a dispute of fact relating to the welfare of the minor children (as the High Court apparently held), this question should be remitted to that Court for decision after hearing oral evidence. In the notice of motion the appellant's claim was for guardianship and this has now been abandoned: he now seeks to involve himself in the welfare of the children, presumably because of his relationship to them. Whether he is legally entitled to do so is a matter that was not argued before us but I will assume, without deciding, that a close relative of children – even where they are of relatively mature ages – might be entitled, for altruistic reasons, to seek the aid of the Court in order to enquire into their welfare.

[14] The referral of a matter for oral evidence is a matter for the discretion of the Court of first instance. The matter was apparently not raised in the Court a quo, and the learned judge did not consider it. The question is whether we should now do so. Although this question falls outside the scope of the points in limine, it was argued on appeal and, in fact, was essentially the main issue for this Court's decision. Clearly, therefore, counsel were satisfied that we should go beyond the matters dealt with in the High Court and that it was proper for this Court to decide the appeal on the real issue raised before us. I proceed to do so.

[15] There are two main reasons why, in my view, this Court should not accede to the appellant's request. The first is that the appellant's averments

concerning the need for an investigation into the welfare of the minors is not spelled out convincingly in his affidavit. His allegations relating to the condition of the children and their requirements are couched in terse terms. What was required was detailed evidence of the children's day-to-day living conditions, their emotional and physical needs and why the appellant was alleged to be the person best suited to provide them. What was provided by the appellant were a few isolated examples of apparent neglect on the part of the respondent. This information is insufficient to persuade me to order that the Court should hear oral evidence. It is not the purpose of Rule 6 (14) of the High Court Rules to enable an applicant to amplify an affidavit by additional evidence where the affidavits themselves do not make out a sufficiently clear case (see Carr v Uzent 1948 (4) SA 383 (W) at 390).

[16] The second reason is that the oral evidence which the appellant seeks to lead is not germane to the relief claimed. Such evidence would be purely peripheral and a ruling by the High Court would not have a direct bearing on the outcome of the litigation.

[17] Finally, I draw attention to the fact that an order of court should be contained in a separate document signed by the registrar. There is no such document in the High Court file relating to this matter and the only entry on the file in this regard reads: "Apn dismissed. No order as to costs" above a signature, possibly that of the registrar. There is therefore some uncertainty as to whether the words quoted in par [7] above do indeed form part of the order of the High Court. In so far as they might form part of that order they should in any event be deleted therefrom.

For the rest the appeal should be dismissed.

[18] It is therefore ordered:

1. In so far as the words quoted in par [7] of this judgment may form part of the order of the High Court, they are deleted therefrom;
2. Save for the aforegoing, the appeal is dismissed with costs.

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree

_____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT
OF APPEAL

I agree

_____
C.T. HOWIE
ACTING JUSTICE OF APPEAL

For Appellant : Adv. L.P. Nthabi
For Respondent : Adv. T. Mothibeli