IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 22/10

In the matter between:-

BOKANG LELIMO	**APPELLANT**
and	
THAABE LETSIE	**1ST RESPONDENT**
LIPHAMOLA CARETAKER (PTY) LTD T/A KINGSWAY AUTO SERVICE STATION	**2ND RESPONDENT**
THE MAGISTRATE - MASERU	**3RD RESPONDENT**
THE COMMISSIONER OF LANDS	**4TH RESPONDENT**
THE MINISTER OF LOCAL GOVERNMENT	**5TH RESPONDENT**
THE REGISTRAR OF DEEDS	**6TH RESPONDENT**
THE ATTORNEY GENERAL	**7TH RESPONDENT**

CORAM: SMALBERGER, JA
SCOTT, JA
HOWIE, JA

HEARD: 13 April 2011
DELIVERED: 20 April 2011

SUMMARY

High standard of integrity expected of advocate – Court will accept word of advocate unless compelling reasons not to do so.

JUDGMENT

SCOTT, JA

[1] The proceedings giving rise to this appeal are marked by unnecessary point-taking and technicalities calculated to obscure the real issues between the parties. Indeed, it is a great pity that the parties have allowed this matter to proceed from the Magistrates' Court to the High Court and to this Court without a decision being taken on the real dispute between them.

[2] In August 2009 the respondents were served with a summons and amended particulars of claim in the Magistrates' Court at the instance of the appellant. The appellant alleged in his particulars of claim that the first respondent was in unlawful occupation of site number 250 Cathedral Area; that the site had been unlawfully allotted to him and that the appellant was the rightful

allottee. He alleged further that the first and second respondents refused to vacate the property or pay a monthly rental of M3800. Neither the summons nor the particulars of claim included a prayer for the ejectment of either respondent or for the payment of rent.

[3] The first respondent, somewhat pedantically, filed an exception on the ground that the absence of such a prayer rendered the summons and particulars of claim excipiable. The appellant in response, filed a "notice of objection" to the exception in which the primary point taken was that the notice of exception had not been served at the appellant's chosen address. At the hearing before the magistrate on 25 February 2010 the appellant apparently insisted that the objection be argued first. Having heard argument, but not on the exception, the magistrate reserved judgment.

[4] Some while later the appellant informed the first respondent that the exception had been dismissed. The first respondent's counsel examined the court file and found that it contained a hand-written ruling dismissing both the objection and the exception.

[5] The first respondent on 24 March 2010 applied to the High Court for a rule nisi calling on the appellant, as first respondent, the second respondent in this appeal as second respondent and the magistrate as third respondent, to show cause why the proceedings in the Magistrates' Court should not be set aside on the ground that the magistrate had decided the exception without first hearing argument. The notice of motion called upon the "second respondent" to dispatch the record of the proceedings.

[6] On the same day Peete J granted the order as prayed save

that the learned judge directed the "third respondent", i.e. the magistrate, to dispatch the record as the reference to the "second respondent" in the application was an obvious error.

[7] On 26 March the appellant filed two notices of objection. The first was aimed at the obvious error in the notice of motion calling on the second respondent to dispatch the record; the second was directed at the interim order, which was stated to be "bad in law" for correcting the error. These appear, wisely, not to have been pursued.

[8] On 8 April 2010 the appellant filed a counter-application in which he sought an order for the cancellation of the lease under which he alleged the first respondent occupied the property forming the subject matter of the action then pending in the Magistrates' Court and for an order ejecting the first respondent from the property. On the same day

he filed a notice of joinder in terms of which he sought to join the Commissioner of Lands, the Minister of Local Government and the Registrar of Deeds.

[9] The counter-application and the notice of joinder were opposed by both respondents. The second respondent had not opposed the review but opposed the counter-application and joinder application, no doubt in view of the relief claimed in the counter-application which involved the second respondent's rights in relation to the property.

[10] At a pre-trial conference before Monapathi J on 26 May 2010, it was agreed that the counter-application and joinder application would be heard first and that the review application would stand over. The counter-application was heard on 6 July 2010 and following argument Monapathi J delivered an unrecorded ex

tempore judgment in which he upheld the respondents' contention that the relief claimed in the counter-application was the same as that claimed in the pending action in the Magistrates' Court.

[11] The appellant filed a notice of appeal in which he did not appeal against the dismissal of his counter-application but against the ruling of the Court a quo on two points which he said he had raised at the hearing. The points, as clarified in argument before us, were first, that the Court a quo misdirected itself in dismissing his objection that counsel for the first respondent had failed to establish his authority to represent the first respondent in the counter-application and, second, that the Court a quo misdirected itself in allowing Mr. Mabulu, second respondent's attorney, to argue the counter-application when the second respondent had not filed an opposing affidavit and had not opposed the review application in which the

second respondent had been cited as a respondent.

[12] Neither ruling amounted to a final judgment within the meaning of section 16 (1) (a) of the Court of Appeal Act 1978 and was quite clearly no more than an interlocutory order within the meaning of section 16 (1) (b) of the Act. The leave of the Court a quo was accordingly a prerequisite for an appeal to this Court.

[13] The appellant, who appeared in person, explained that although the judge a quo had delivered an ex tempore judgment on 6 July 2010, his written judgment had come to light only a few days before the hearing of the appeal and it was only then that he was able to study the judgment and by this time it was too late to seek the leave of the Court a quo in respect of the grounds raised in his notice of appeal and to which no reference was made in the judgment. He said, too, that in the course of his

argument the Court a quo had summarily dismissed his submissions with regard to these grounds and that when he protested the judge had told him that it was his constitutional right to appeal.

[14] This appeal is one of several this term in which an order was made at the conclusion of the hearing in the court below and a written judgment produced a matter of days before the hearing of the appeal. The practice is to be deprecated. It results in counsel having to prepare heads of argument without sight of the judgment, to the prejudice of their clients, and causes considerable inconvenience for the judges of this Court who only become aware of the reasoning of the court below shortly before the hearing and long after reading the record of the proceedings.

[15] In view of what the appellant told us and the fact that the

judgment had only just come to hand, we permitted the appellant to argue the points raised in his notice of appeal. As to the first, the appellant submitted that once having challenged the authority of counsel, Adv. Shale, to represent the first respondent, the latter was obliged to produce proof of his authority and that he had failed to do so. In support of his argument he relied inter alia on **Griffiths and Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C)** and **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)**. But these cases deal with authority to represent a company. The position with regard to counsel is very different. An advocate is an officer of the Court and as such a high standard of integrity is expected of him or her. A Court is entitled to, and will accept the word of counsel unless there are compelling reasons not to do so. In the present case Adv. Shale gave this Court and the Court a quo the assurance that he has at all times been duly instructed by

attorneys, T. Matooane & Co, to represent the first respondent. There is no reason to doubt counsel's word. On the contrary, it is apparent from the record that Adv. Shale has represented the first respondent from the very inception of these proceedings which began in the Magistrates' Court. The appellant's first ground of appeal must therefore fail.

[16] The second ground is similarly without merit. Mr. Mabulu did not oppose the review as his client, the second respondent, had no direct interest in the outcome. But he did oppose the counter-application as it affected the second respondent's rights to the property referred to in the action in the Magistrates' Court. Admittedly, the second respondent did not file an opposing affidavit but a notice of opposition was filed on its behalf in which the grounds of its opposition were set out. There was nothing wrong with this.

[17] Finally, it is necessary to mention that the appellant also sought to criticize the Court a quo "for not exercising its discretion" in relation "to the delaying tactics played by first and second respondents by lodging a review of the magistrate's ruling on the exception". But as I have indicated, the Court a quo was not seized with the review. In any event, had the appellant confined himself to the review it would long since have been disposed of.

[18] The appeal is dismissed with costs.

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D.G. SCOTT
JUSTICE OF APPEAL

I agree: _____

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree: _____

C.T. HOWIE
JUSTICE OF APPEAL

For Appellant: In person

For First Respondents: Adv S. Shale

For Second Respondent: Mr. M.A Mabulu