IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 40/2010

In the matter between:

I. KUPER (LESOTHO) (PTY) LTD	**APPELLANT**
AND	
BENJAMIN MAPHATHE	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
THE ATTORNEY GENERAL	**THIRD RESPONDENT**

CORAM : RAMODIBEDI, P
MELUNSKY, JA
FARLAM, JA

HEARD: 13 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Practice – non joinder – need for direct and substantial interest on part of party not joined before defence can succeed – *locus standi* of applicant company – change of share holder irrelevant –bare denial of authority to sue not sufficient to defeat claim.

JUDGMENT

FARLAM, JA

[1] This is an appeal from a judgment of Hlajoane J, who dismissed with costs an application brought by the appellant for interdictory relief against the first respondent. The other respondents cited in the application were the Master and the Attorney General.

[2] The interdictory relief sought against the first respondent related to his right to collect rentals, rent out shops and manage or control a shopping centre constructed on two plots situated at the Mafeteng Urban Area, which was the subject of a sub-lease concluded in 1990 between the appellant and Dr. K.T. Maphathe, who was the lessee of the two plots under leases granted to him in terms of the Land Act 17 of 1979. The sub-lease contains a clause which reads as follows:

> "This contract shall be binding on the heirs, executors, administrators or successors in title of both contracting parties".

[3] According to the founding affidavit Dr. Maphathe died in 2000. It appears from the papers that the shares in the appellant held by Investec Property Ltd and Kupool Nominees (Pty) Ltd were sold to Mafeteng Property Group (Pty) Ltd in July 2008 and Mr. Ashraf Abubaker, the deponent to the founding affidavit, was appointed managing director of the company.

[4] Attached to the founding affidavit is a resolution of the appellant passed at a meeting held in Maseru on 1 August 2009, which authorizes Mr. Abubaker to act on behalf of the appellant and to sign any court papers to enforce the appellant's rights to what is described as 'the property', which in the context is clearly the shopping centre.

[5] Also attached to the founding affidavit were:

a) a letter written in 2003 on the letterhead of Investec Property Group Ltd appointing the first respondent to render various services in respect of certain premises including one of the plots on which the shopping centre is constructed; and

b) another letter written in 2008 on the letterhead of the same company appointing Du Preez, Liebetrau and Company, attorneys of Maseru, as agent and attorney, *inter alia*, to terminate the appointment of the first respondent 'as agent and supervisor in all respects'.

[6] In the opposing affidavit deposed to by the first respondent, two points in limine were raised:

a) that parties who had a 'legal interest' in the matter, namely the estate of the late Dr. Maphathe, Investec Property Group Limited and Du Preez Liebetrau and Co., were not joined; and

b) that the appellant did not have *locus standi* in the proceedings.

The contention that the appellant lacked *locus standi* was particularized as follows in paragraph 2 of the first respondent's affidavit:

'2.1 The applicant herein does not have any *locus standi* in [these] proceedings in as much as there is no proof that [the] Managing Director has been duly appointed and registered as required by the law.

2.2 There is also no proof [of] change of management or directorship of the applicant.

2.3 There is no proof of allocation or transfer of shares in the application.

2.4 Also there is no proof to the effect that the Managing Director has been given any mandate by this company to sue the first respondent, nor is there any resolution to that effect.'

The judge in the court a quo upheld the points in limine and, as I have said, dismissed the application with costs.

[7] In my view the learned judge erred in upholding the point of non-joinder. None of the parties mentioned by the first respondent had a direct and substantial interest in the application, which is what is required before a plea of non-joinder can be successfully raised: **see** **Amalgamated Engineering Union** v **Minister of Labour** 1949 (3) SA 637 (A), which has been cited with approval by this Court on several occasions: see, e.g. **Masopha** v **'Mota** LAC (1985-1989) 58 and **Educational Secretary ACL Church Schools** v **'Maliteboho Ramokone**

and Others C of A (CIV) 05/2010, a decision delivered on 22 October 2010.

[8] The estate and the executors of Dr. Maphathe are bound by the sub-lease and clearly have no direct and substantial interest in the question as to whether the appellant is entitled to the interdict sought against the first respondent. Equally there is no basis on which it can be said that Investec Property Group Ltd or Du Preez Liebetrau and Company have a direct and substantial interest in the order the court was called upon to make in the case.

[9] The point raised in regard to the appellant's alleged lack of *locus standi* is also clearly without any merit whatever.

[10] In her judgment on this part of the case the judge referred to the sale of the shares in the appellant to Mafeteng Property Group (Pty) Ltd and said:

> 'it would not be unreasonable to conclude that it was all the shares which were sold. That being the case Mafeteng Property Group (Pty) Ltd must have taken over from I. Kuper Lesotho (Pty) Ltd [the appellant]. The mandate therefore must have been given by the new Company which took over from the present applicant. There could not have been two companies operating at the same time in relation to the same subject matter.
> ……
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> In casu the Court considers that Abubaker who deposed to the founding affidavit has not established the authority to have made the affidavit as on the papers. There are two companies involved and the last company which had bought shares from the former seems not to have given any mandate to sue.'

[11] Though she upheld the point in limine of lack of locus standi, in reality she held, or meant to hold, that the appellant was not properly before the court as Mr. Abubaker had not established authority to bring the proceedings on the company's behalf. Despite that, she gave an order that the appellant had to pay the first respondent's costs. But apart from that her decision on this point was clearly wrong. The fact that the shares in the appellant had been sold by their previous owners to Mafeteng Property Group (Pty) Ltd is irrelevant. The appellant continued to exist as a company and was still the sub-lessee of the

shopping centre. It, and not Mafeteng Property Group (Pty) Ltd, had to give the mandate to sue and it is clear from the resolution of the board of the appellant that it did so. All that the first respondent says in his affidavit about the paragraph in the founding affidavit in which Mr. Abubaker says he was authorized to act on behalf of the appellant in these proceedings and refers to the resolution which he annexes is:

> 'The contents herein [i.e., in this paragraph] are denied and Applicant is put to the proof thereof.'

Such a bare denial is not enough in a case such as this to establish the defence that the requisite authority has not been proven: see **Wing on Garment (Pty) Ltd** v **LNDC and Another** LAC (1995–1999) 752 at 755C-D.

[12] Dr. Mosito KC, who appeared at the appeal on behalf of the first respondent, was unable to support the judgment of the court a quo and conceded that the appeal should be allowed, the judgment of the

court set aside and the matter remitted to the High Court for argument on the merits, with a request to the registrar to give the matter preference on the roll.

[13] As far as the costs are concerned Adv Mpaka for the appellant consented to an order that the costs in the court below and in this Court should be costs in the cause.

[14] The following order is made:

1. The appeal succeeds: by agreement costs of the appeal to be costs in the cause.

2. The order made in the court below is set aside and replaced by an order in the following terms:

   '(a) The points in limine are dismissed.

   (b) By agreement the costs occasioned by the taking of the points in limine are to be costs in the cause.'

3. The Registrar of the High Court is requested to give the matter preference on the roll.

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I.G. FARLAM
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

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L.S. MELUNSKY
JUSTICE OF APPEAL

For the Appellant : Adv T. Mpaka

For the Respondents : Dr. K.E. Mosito KC