# IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 5/2012

In the matter between:

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| THABO RAMAQELE | 1ST APPELLANT |
| 'MAFOKOSE RAMAQELE MOKHOSI | 2ND APPELLANT |

and

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| 'MATSEKO RAMAQELE | RESPONDENT |

CORAM: RAMODIBEDI, P
SMALBERGER, JA
FARLAM, JA

HEARD : 12 APRIL 2012
DELIVERED : 27 APRIL 2012

## SUMMARY

Application for committal for contempt in proceedings pending in the High Court – court *a quo* advised of withdrawal of application – court none the less making finding of contempt - court failing to give the appellants an opportunity to deal with the allegations of contempt or to afford counsel a hearing on their behalf - appeal against order of court upheld.

# JUDGMENT

SMALBERGER, JA:

[1] Consequent upon an urgent application in the High Court in which the respondent (as the applicant) sought, inter alia, a declaratory order against the apppellants (as the respondents) declaring her as heir to the joint estate between herself and her deceased husband, the court (Monapathi J) granted a rule nisi operating as a temporary interdict calling upon the respondents to show cause on the return day why:

> "(b) First Respondent shall not immediately desist from collecting rental from Applicant's flats situated at Upper Thamae.
> (c) First Respondent shall not be directed to restore to Applicant her husband's passport urgently in order to access his terminal benefits from South Africa.
> (d) First Respondent shall not be restrained from throwing Applicant out of her house."

For convenience I shall refer to the parties as in the court below.

[2] In due course answering and replying affidavits were filed by the respondents and the applicant respectively. The matter was duly set down for hearing. However, before the matter could be heard, the applicant brought a further urgent application to have the respondents committed for contempt of court arising from their alleged failure to comply with the earlier court order. On 30 May 2011 Mahase J issued a further rule nisi calling upon the respondents to show cause on 6 June 2011 why, pending the outcome of the main proceedings:

> "(a) Respondent[s] shall not be jailed for contempt of court.
> (b) Respondent[s] shall not be ordered to purge their contempt.
> (c) Respondent[s] shall not pay costs of suit."

[3] The respondents filed a notice of intention to oppose on 3 June 2011. The record is silent with regard to what happened thereafter. The matter eventually came before Mahase J. On 16 December 2011 the learned judge delivered a judgment which addressed only the issue of

contempt of court. The final paragraph of the judgment reads:

> "[15] As such the said respondents are once again ordered to purge their contemptuous behavior before they and or their counsel is heard by this court. They are accordingly ordered to purge their contempt on or before the 31st January 2012; and failing compliance therewith they will be imprisoned until when they have obeyed this order of court."

[4] The present appeal is directed against the above order of Mahase J. The main grounds of appeal are:

> "(1) The learned Judge *a quo* erred and misdirected herself in dealing with the contempt application without hearing all the parties concerned, either through affidavits or oral argument.
> (2) The learned Judge *a quo* erred and misdirected herself in dealing with issues of contempt yet the contempt application had been withdrawn by consent of the parties."

[5] It is clear from her judgment that in making the order she did Mahase J proceeded from the premise that the respondents were guilty of contempt of court, and that her conclusion in that regard was based on the unanswered (and therefore *prima facie* uncontested) allegations made by the applicant in her founding affidavit concerning the respondents' conduct.

[6] What precisely took place at the hearing before the learned judge is not apparent from the appeal record. According to Adv. Shale, who appeared for the respondents, the contempt application did not feature before her as it was no longer an issue, the parties having previously, before the respondents were required to file their answering affidavits, entered into settlement negotiations which had resulted in an agreement to withdraw the contempt application. Mahase J had been informed accordingly, and consequently only the main application had been dealt with in argument before her. Adv. Manyokole for the applicant was ambivalent and entirely unhelpful with regard to the events that had occurred. He seemed to dispute that the contempt application had been settled between the parties and by agreement been withdrawn. He even went so far as to allege that it had been conceded before Mahase J that the respondents were in contempt. This could clearly not have been so, for reasons that will appear later.

[7] On appeal we are bound by the appeal record and in the absence of agreement between the parties cannot go beyond what can be gleaned from it. In paragraph 4 of her judgment Mahase J recorded, with regard to the contempt application, that "[t]his was allegedly by consent of the parties withdrawn, although there is no court minute indicating that the parties had agreed to have same withdrawn". She later again alludes (in paragraph 11 of her judgment) to the fact that there is no court minute reflecting the withdrawal of the contempt application.

[8] It is appearent from Mahase J's judgment that she was informed that the contempt application had, by agreement between the parties, been withdrawn. There is nothing to suggest that this was ever disputed on behalf of the applicant. Once the parties were in agreement in that regard, and Mahase J was so advised, there was no need for a formal notice of withdrawal to be

filed for it to be effective *inter partes*. The agreement reached would explain why no answering affidavits were filed and the applicant's allegations left unchallenged. In the circumstances it is highly unlikely that the respondents would have conceded, as suggested by Adv. Manyokole, that they had remained in contempt.

[9] Mahase J went on to state in her judgment:

> "[12] It is the considered view of this Court that the conduct of the respondents about which the applicant complains is far too serious to be ignored and or disregarded. Such conduct greatly undermines the authority of this Court, much to the prejudice of the applicant. It also brings into disrepute the administration of justice in this country. This should not be allowed to persist whether or not the contempt of court application is withdrawn even by consent of the attorneys.
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> [13] This Court will have failed in the execution of its duties if it were to allow such conduct to persist and continue unchecked. It is the duty of this Court to jealously guard against its integrity and to ensure that its orders or judgments are obeyed."

[10] I endorse the views of the learned judge in regard to the duty of a court to ensure that its authority is not undermined by non-compliance with its orders.

However, in the present instance they are premised on a finding that despite the agreement between the parties regarding the withdrawal of the contempt application, the respondents remained in contempt of the court's order, which in turn was based on the applicant's unanswered allegations. What Mahase J overlooked was the fact that the agreement had rendered it unnecessary for the respondents to file answering affidavits and that their failure to do so did not amount, in the circumstances, to an admission of those allegations. Accordingly she was not entitled simply to proceed on the basis that the applicant's allegations were true without affording the respondents a proper opportunity of replying thereto or, at the very least, to have afforded the respondents' counsel the opportunity to address her in that regard. It is clear from her judgment that she did neither, and therefore denied the respondents an opportunity, to which they were entitled, of defending themselves against the applicant's allegations. In that she erred. Her

conduct was materially unfair and the order she made cannot be allowed to stand.

[11] In this respect it is apposite to draw attention to what was said by Gauntlett JA in *Vice-Chancellor of the National University of Lesotho and Another vs Putsoa LAC (2000 - 2004) 458 at 460 I – 461 F:*

> "[8] In the first place, it is apparent – and counsel before us confirmed – that the hearing which preceded her judgment was confined in its ambit to the appellants' *in limine* defences. In effect, there was a separation of issues: full argument was heard on the preliminary issues, and none on the merits. Yet the learned acting judge purported not merely to dismiss the *in limine* defences, but to deal with the merits too. She made a finding on these without hearing full argument, and issued an order dismissing the entire application, with costs.
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> [9] In the circumstances she had no entitlement to do so. If the learned acting judge did not wish to be confined in her ruling to the *in limine* points, she should have said so in terms to counsel, and given them a proper opportunity to address the merits. In similar circumstances, *Corbett* CJ, said this:
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> > 'It was undoubtedly procedurally incorrect for the trial judge to have thus telescoped the proceedings and this irregularity held potential prejudice [for the parties]'.

> *Marsay v Dilley* 1992 (3) SA 944 (A) at 963 C-D). As a consequence, the appeal in that matter was allowed and the matter remitted for hearing before another judge.
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> [10] What the court *a quo* did in this matter was not only in breach of basic procedural principles. It was also materially unfair. Not only at commom law but as an entrenched right under the Constitution (s.12 (8)), litigants are entitled to a fair hearing. In this case they were not given one in relation to the merits of the matter.
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> [11] On this basis alone the judgment and orders must be set aside".

It follows that the appeal must succeed and an appropriate order made to allow the respondents to defend themselves against the allegations that they were in contempt of court.

[12] As the appeal was necessitated by the irregular conduct of the judge *a quo* rather than circumstances justifying a costs order against the applicant it would seem appropriate to make no order as to costs in respect of the appeal.

[13] The following order is made:-

1. The appeal is allowed and the order of the court *a quo* is set aside.
2. The respondents are to file answering affidavits in respect of the contempt application (CIV/ APN/ 464/ 10) within 14 days of the date of this judgment.
3. The matter is thereafter to proceed in the normal course, and must eventually be dealt with before another judge.
4. The Registrar is requested, insofar as it may be possible to do so, to afford priority with regard to the hearing of the matter in due course.
5. There will be no order in respect of the costs of appeal.

J.W. SMALBERGER
JUSTICE OF APPEAL

I concur:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT
OF APPEAL

I concur:

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I.G. FARLAM
JUSTICE OF APPEAL

For the Appellant : Adv. S. Shale
For the Respondents : Adv. M.M. Manyokole