**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) No. 4/2012**
**CIV/ APN/491/2007**

In the matter between: -

**NTSOTISENG 'MATSEPISO MOHLABI** **1ST APPELLANT**

**NTHABISENG 'MALINEO KOBELI** **2ND APPELLANT**

and

**'MAMOTLOMELO MOTLOMELO** **RESPONDENT**

**CORAM:** RAMODIBEDI, P
SCOTT, JA
HURT, JA

**HEARD** : 12 AUGUST 2012
**DELIVERED** : 3 SEPTEMBER 2012

## Summary

*Interlocutory application – joinder of parties after order had been made – such parties not bound to comply with order until they have had opportunity to oppose relief granted against original respondents – principle of audialterampartem applies.*

**JUDGMENT**

**HURT JA**

[1] The litigation leading up to this appeal has a tortuous, bewildering and, in many respects unfortunate history. However the issue that requires resolution by this court is a comparatively simple one and it is accordingly unnecessary to recount the entire saga.

[2] The parties to the litigation who participated in the events relevant to this appeal are the following:

(a) The original applicant, Mamotlomelo Motlomelo, who launched an urgent application (“the original application") for interim relief pending a declarator; I will refer to her as “the Applicant".

(b) Mr Koko Motlomelo ("Koko"), cited as the 1st respondent in the original application. The Applicant, in her founding papers, contended that she was the wife, in customary law, of Koko's son, Teboho Lucas Motlomelo ("Teboho") who had died in August 2007.

(c) Koko's two daughters (the sisters of Teboho), Ntsotiseng Mohlabi and Nthabiseng Kobeli, to whom it will be convenient to refer jointly as "the Appellants".

[3] In the original application, brought shortly after Teboho's death, the Applicant alleged that by virtue of her customary marriage to him she was the beneficiary in his estate. She stated that the validity of the marriage had been challenged by Teboho's family after his death and that various persons who were in possession of assets belonging to Teboho

(which, according to her, formed part of the joint estate), had refused to release those assets to her. In the meantime, she contended, Koko was in the process of taking possession of Teboho's assets. It was essential, she said, for the proper protection of her rights, for an interim interdict to be granted preventing those respondents in possession of Teboho's property from handing it over to Koko, pending the determination of her application to be declared to be Teboho's lawful customary wife. The provisions of the order prayed, relevant to this appeal, read as follows:

*" 2. Rule nisi be issued and is 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;*

*(a) That 2nd, 3rd and 4th (respondents) be interdicted and/or restrained from releasing the following properties and documents to the 1st respondent pending finalisation of this matter to wit:–*

*(i) money held under the late Teboho Lucas Motlomelo policy at MKM Burial Society, the insurance policy certificate which was given to Mrs Tabeta prior (to)*

*deceased's burial by applicant which is in 3rd respondent's possession;*

(ii) *money held under policy Scheme code 600 1376 and reference no. 4229031 at 3rd respondent's (Metropolitan Life Limited) belonging to deceased Teboho Lucas Motlomelo;*

(iii) *the gratuity and/or benefits of the deceased from the 4th respondent (the Ministry of Local Government);*

(iv) *the household goods which were joint property of applicant and deceased as detailed in annexure "A" hereto whose possession was taken by 4th respondent through self-help subsequent to the demise of the deceased Teboho Lucas Motlomelo.*

(b) *That it is declared that applicant is deceased's beneficiary to the policies and benefits held at 2nd, 3rd and 4th respondents' institutions by virtue of a stipulatioalteri.*

(c) *That it is declared a customary marriage existed between applicant and deceased Teboho Lucas Motlomelo.*

(d) *That applicant be granted leave in terms of Rule 34 (2) to request discovery of documents before close of pleadings.*

(e) *Costs of suit.*

(f) *Further and/or alternative relief.*

3. *That prayers 1, 2(a) and (d) should operate with immediate effect as interim relief."*

For purposes of clarity, I should state that the 2nd, 3rd and 4th respondents referred to in para 2(a) were, respectively, a funeral insurance company, Metropolitan Life Insurance Company and the Ministry of Local Government (the latter cited in a dual capacity as Teboho's employer and his landlord). An aspect of the order sought which is worth mentioning is that no direct relief was sought against Koko.

[4] An order was made by Majara J on 8thOctober, 2007. It was in the form of a rule *nisi* granted against the 2nd, 3rd and 4th respondents (who were alleged to be in possession of the assets referred to in paragraphs 2(a)(i), (ii) and (iii) of the original application), interdicting them from releasing those assets, or the documents representing them, to Koko. The rule was returnable on 29th October 2007. The appeal record is silent as to the fate of this rule, but I

will revert to the order later. What should be noted at this stage is (a) that no direct substantive relief was granted against Koko in this order and, (b) that there was no reference whatsoever to the household goods (which I will simply call "the chattels") referred to in paragraph 2(a) (iv) of the notice of motion in the original application.

[5] By 27th October, 2007, Koko and the Applicant had respectively delivered their answering and replying affidavits and, to all intents and purposes, the matter of interim relief appeared to be ripe for hearing. However, what followed was a series of interlocutory procedures (none of them in any way relevant to this appeal) that stretched out over a period of more than two years. Eventually, on 9th

November, 2009, an order was made by Mahase J in the following terms:

> *"1. That all property which appears in Annexure "**A**" of the Notice of Motion be returned to applicant forthwith.*
>
> *2. That counsel should have the matter set down for hearing in due course and that proper papers be filed.*
>
> *3. That parties should obtain a date of hearing before this court before the end of this term or session, that is by 15th December 2009.*
>
> *4. No order as to costs."*

It is not possible, on the papers in the appeal record, to determine what preceded this order. If it was argued on the papers which had been delivered during October 2007, which reflected a diametric factual dispute as to whether the Applicant had any title to the chattels, it is difficult to believe that the learned Judge could have simply made an order without at least giving brief reasons for it. Such reasons would, of course, necessarily have reflected a careful consideration of the parties' respective

prospects of ultimate success weighed against what has been referred to as "the balance of convenience". [1] I do not think it is unfair to the learned Judge to conclude that the fact that she did not furnish such reasons rather implies that she did not consider these issues.

[6] At the beginning of September 2010, the Applicant launched a further interlocutory application. In her founding affidavit she stated that she had made several unsuccessful attempts between November 2009 and September 2010 to obtain delivery of the chattels, but that at a hearing on 6 September 2010, Koko had informed the court that it was impossible for him to comply with the order. In amplification Koko had filed an affidavit shortly after that hearing, in which he explained that after the burial of Teboho, he had instructed the

[1] ***Olympic Passenger Services (Pty) Ltd v Ramlagan*** 1957 (2) SA 382 (N)

Appellants to go to Teboho's place of residence and collect their brother's assets, which they had done. Accordingly, the Applicant contended, it was necessary to join the Appellants as respondents in the original application. By this stage, the 2nd to 6th respondents appear to have fallen out of the proceedings presumably because the temporary interdictory relief granted against them was no longer necessary (and indeed, it may have lapsed altogether for failure to extend the rule which was granted in the original application). The Appellants were cited as 2nd and 3rd respondents (with Koko remaining as the 1st) in this application. It is desirable to set out the prayers in full for reasons which will shortly become apparent. The prayers were as follow:–

*"1. That 2nd and 3rd respondents be joined in these proceedings as the 7th and 8th respondents.*

*2. Upon granting of prayer 1 above, the 2nd and 3rd respondents be ordered to comply with the order of this Honourable court dated 9 November 2000 forthwith which appears as annexure **MM 1** attached to this application, failing compliance, they should come and show cause why they cannot be committed to jail for contempt of court on the date and time to be determined by this Honourable Court.*

*3. Costs of suit at (sic) attorney and client scale."*

[7] This application was opposed by the Appellants. They delivered affidavits challenging the assertions on which the Applicant relied for her relief in the original application. They made common cause with Koko in denying that the Applicant had been the customary law wife of Teboho and that she could accordingly claim any proprietary interest in assets which he had acquired. They contended that they were the true owners of a substantial proportion of the chattels. They were both at pains to point out that they should not be bound by the provisions of orders granted before their joinder.

[8] On 10 November 2010, having heard argument on the joinder issue, Mahase J ordered only that the Appellants should be joined as 7th and 8th respondents. She did not grant any of the additional relief sought in paragraphs 2 and 3 of the notice of motion. While she did not give reasons for this order, one may reasonably have gained the impression that the learned Judge felt that the grant of prayer 2 would have the unfair result of binding the Appellants to the terms of orders which had been granted before they had had the opportunity to put their case before the court. However, when the whole matter eventually came before Mahase J some 12 or 13 months later, and she delivered a reasoned judgment (on 16th of December 2011), she effectively dispelled any such impression. Indeed, it became apparent that the proceedings from 9th of November 2009 onwards had been beset by misapprehension and misdirection on the part of Mahase J.

[9] It is the judgment of 16 December 2011 which is challenged on appeal. It is necessary, therefore, to allude briefly to its contents (against the factual background set out above) in order to highlight the significant respects in which the erroneous impressions and conclusions to which I have referred in the previous paragraph led the learned Judge into error.

[10] After mentioning the order which she had granted in November 2009, and the circumstance that it had not yet been complied with, the learned Judge referred to the fact that the Appellants had been joined in the proceedings and subsequently served with "all the necessary and appropriate court papers and the said order of court".[2] As one of these

[2] *sc.* that of 9th November 2009 – see para 5 above

documents, she specifically mentioned annexure "**A**" to the original notice of motion. Her judgment then proceeds as follows:

> *"[6] . . . the seventh and eighth respondents have argued that they have been highly prejudiced by their having been joined in the application in question for purposes of complying with a court order which was granted before they could be heard.*
>
> *[7] They say they should therefore be heard by this Court on the merits of the facts leading to the granting of that order. With the greatest respect, the said respondents are misconstruing the contents of that interim order of this Court. This is an interim order of court granted pending the finalization of the main application.*
>
> *[8] If indeed they feel so prejudiced, which fact is correctly denied by the applicant, the said respondents should have first applied for the rescission of that order of court and ask (sic) that they be then allowed an opportunity to defend the case. They have not done that. In other words, instead of being defiant, they should have invoked the provisions of Rule 45 of the Rules of this Court.*
>
> *[9] . . .*
>
> *[10] Whether or not this order of court has been granted erroneously against them they cannot ignore it and refuse to abide by it while at the same time they want to be heard on the merits."*

[11] There are several aspects of these passages from her judgment which demonstrate that Mahase J had a defective grasp of the nature of the proceedings before her and of the effect of the orders previously made in the matter. I have already indicated that I have misgivings about the propriety of the order which she made on 9th November, 2009. But, in my view, the most disquieting feature about her approach to the matter, as clearly reflected in the passages quoted, is an apparent unawareness of the hallowed principle of *audialterampartem.* She plainly took the view that the Appellants were bound to comply with orders served on them even though those orders had not been granted against them as parties in the application. Even if the order of 9th November, by some contortion of interpretation, is to be construed as having been an interim order, the Appellants nevertheless had a fundamental right to oppose the grant of similar relief against them as

newly-joined 7th and 8th respondents. The Judge's view that the Appellants had been "defiant" of an order and that they should have taken steps to have the orders rescinded under the Rules was, in the circumstances, without any justification whatsoever. The short answer is that the orders were never made against the Appellants. There are several other unsatisfactory features in the judgment, but it is unnecessary to detail them all here. It will suffice to say that the judgment cannot be supported.

[12] That brings me to the nature of the relief which this court should grant. In the final paragraph of her judgment, Mahase J said the following:

> *"In the premises, the seventh and eighth respondents are once more ordered to purge their contempt before the 31st January 2012; failing which they risk being jailed for contempt. Costs herein will be costs in the (cause)."*

I think that this must be construed as a final order to deliver the chattels to the Applicant. It then follows from what I have stated above, that the judgment falls to be set aside. Having reached that conclusion, I think it may be apposite for me to urge the parties to step back from the lists and put this deplorable rash of litigation in perspective. The primary issue between them (at least between the Applicant and Koko) is whether the Applicant was married to Teboho by customary union. The question whether the Applicant has title to any of the assets referred to in the original notice of motion depends directly on the resolution of that issue. Yet, after nearly five years of litigious skirmishing which must have involved the parties in enormous expenditure, they have not even started to canvas that primary issue. Moreover, the value of the chattels, which form the subject of the dispute between the Applicant and the Appellants and most of which were apparently not

new even in 2007, can hardly be significant when measured against the outlay which this litigation must have necessitated. There would now seem to be no useful purpose to be achieved by pursuing the original application, and although this court does not have the power to dismiss it, the parties would do well to consider abandoning it and, if they are still so inclined, proceeding directly with an action to have their dispute resolved.

[13] I make the following order:

> "The appeal is upheld and the judgment and order of Mahase J, delivered on 16th December, 2011, are set aside and the following order substituted therefore:
>
> "The application is dismissed with costs."

The respondent is ordered to pay the Appellants' costs of appeal."

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**N.V. HURT**
**JUSTICE OF APPEAL**

I agree _____

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

I agree:

_____

**D.G. SCOTT**
**JUSTICE OF APPEAL**

**Appellants' Counsel**: Ms. M Tau-Thabane
**with her**: Adv L. M. Lephatsa

**Respondent's Counsel:** Adv M. A. Molise