IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.17/12**

In the matter between:

NKOPA EMMANUEL LETUKA **APPELLANT**

and

YACOOB ABUBAKER NO. **1ST RESPONDENT**
MASTER OF THE HIGH COURT **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

CORAM: HOWIE JA
HURT JA
MOSITO AJA

HEARD : 10TH OCTOBER 2012
DELIVERED: 19TH OCTOBER 2012

SUMMARY:

Review proceedings - allegations of bias on part of magistrate - evidence that magistrate in communication with one party without knowledge of other - material irregularity - perception of bias - judgment delivered pursuant to such conduct reviewable - another

case in which legal representatives resorted to undesirable practice of making affidavits on contentious issues in the litigation - such conduct improper.

JUDGMENT

HURT JA

[1] The litigation in this case commenced in 2009. It is an action for ejectment of a tenant from a property belonging to the plaintiff. It has a convoluted history. Both the plaintiff and defendant died during its course and have been represented by their respective sons in the continuation. However, for the purpose of this judgment it will be convenient to refer to the plaintiff as "the appellant" and to the defendant as the "respondent".

[2] This appeal involves two interlocutory applications which were dealt with together by Majara J in the High Court. For purposes of sketching the somewhat complicated background, it will suffice for the moment to say that the appellant had been granted summary judgment against the respondent in the magistrate's court. The respondent had delivered a notice of appeal against this judgment and the appellant had responded

by bringing an urgent application to have the appeal "declared null and void". The respondent opposed this application and launched a separate application for the review and setting aside of the judgment delivered by the magistrate.

[3] Majara J decided both applications in favour of the respondent, although the effect of her order was directed primarily at the application by the respondent to have the proceedings and judgment set aside. She gave the appellant leave to appeal to this court. It is obvious that if the appeal against the review is upheld, the issue as to whether the appeal on the merits should have been "declared null and void" would no longer be relevant. As I am satisfied that the proceedings leading up to the grant of summary judgment were, indeed, irregular in at least one material respect, it is unnecessary for me to deal with the challenge to the notice of appeal.

[4] The relevant chronological sequence of events culminating in the grant of summary judgment is as follows:-

(a) The opposed application for summary judgment had apparently been argued before a

magistrate in Leribe (for the sake of clarity I will refer to him as "the trial magistrate") during August 2010.

(b) The judgment had not been delivered by April 2011 and the trial magistrate had taken the record of proceedings with him when he went to do temporary duty at the Butha-Buthe Magistrate's Court, with the intention of there drafting his judgment.

(c) In about mid-May he was contacted by telephone by one Mukhawana, an articled clerk in the offices of the appellant's attorney, who asked him whether the judgment was ready to be delivered. He promised Mukhawana that the judgment would be ready "in the course of the month".

(d) By 23rd May the judgment had been completed but the trial magistrate was away from the Butha-Buthe court and had left the record and the draft judgment in an envelope, with the intention of having the envelope sent to the Leribe court where the judgment could be handed down.

(e) On 23rd May the trial magistrate received a call from Mukhawana who said he was at the Butha-Buthe court. The trial magistrate arranged for a colleague at Butha-Buthe to hand the envelope to Mukhawana so that it could be taken by him to the Leribe court.

(f) Later, on the same day, Mukhawana again telephoned the trial magistrate to say that he had arrived at Leribe and was at the office of his principal. He asked for instructions as to what he should do with the envelope, and the magistrate told him to contact a clerk in the Leribe court and ask that clerk to contact him (the magistrate) for instructions as to what was to be done with it. In the event, however, the trial magistrate was not contacted by the clerk.

(g) Also on 23rd May the case file was apparently presented to a magistrate in the Leribe court ("the Leribe magistrate"). The basis on which it was handed to her is not stated, but the inference is irresistible that she was requested to confirm, formally, the grant of summary judgment by the

trial magistrate. She perused the file and noted that it contained a handwritten document reflecting the grant of summary judgment with costs. She was aware that the file had been with the trial magistrate in Butha-Buthe and she presumed that he had dealt with the matter and granted summary judgment there. She could not ascertain, from the contents of the file, whether the judgment had been formally delivered and, apparently assuming as much, she signed a "Final Court Order" recording the grant of summary judgment as well as a warrant of ejectment flowing from that order.

(h) The respondent, on being served with the warrant, immediately brought an application in the High Court to have the judgment and warrant set aside on the ground that the judgment had not, in fact, been delivered before the court order and the warrant had been issued.

(i) Counsel for both parties agreed that the issue of the

judgment and the warrant had been the result of an error and, on 27th June, a consent order to this

effect was granted. In addition, the trial magistrate was ordered to deliver his judgment within seven days of service of the order upon him.

(j) On 13th July, the trial magistrate delivered a judgment in which he granted summary judgment with costs.

[5] It was against the background of the above sequence of events that the respondent brought an application to have the summary judgment set aside on review on the basis that the proceedings had been irregular and fell to be set aside. As I have indicated this application was moved after the respondent had already delivered a notice of intention to appeal against that judgment and the appellant had moved to have the appeal declared "null and void".

[6] All of the events which I have set out in para 4 above are common cause between the parties. However there is one aspect of the matter on which they do not agree and that is in regard to the question whether Mukhawana, or anyone else in the appellant's attorney's offices, had looked at the draft

judgment at any time between the handing of the file to Mukhawana and its delivery to the Leribe court.

[7] The respondent contended that it must be inferred that this had happened, and Majara J upheld this contention. The appellant has challenged her finding in this regard on the basis that there was no evidence to show that the envelope had been opened and its contents inspected before it was handed in at the court. There had, indeed, been no direct evidence to this effect and there was no affidavit by Mukhawana as to what he did while the envelope was in his custody. But that did not preclude the learned Judge from drawing an inference by considering the probabilities. As Selke J said in ***Govan v Skidmore*** **1952 (1) SA 732 (N)** at p 734[1]:-

> " . . . *in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd Ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."*

[1] Approved in ***Ocean Accident and Guarantee Corporation Ltd v Koch,*** **1963 (4) SA 147 (A)** at p 159, and numerous subsequent decisions.

[8] Applying this approach to the established facts set out above, one is immediately struck by the curious sequence of the events which occurred on 23rd May, 2011, and which are recounted in paras 4(e), (f) and (g) above. Clearly the most reasonable inference to be drawn from them is that the Leribe magistrate was asked to formalize the judgment adumbrated by the trial magistrate's handwritten draft. Nor can it be at all likely that the clerk in the Leribe court would have taken it upon herself, without having contacted the trial magistrate, to ask the Leribe magistrate to perform this function. Further, I think one is justified in assuming that the warrant, signed and issued by the Leribe magistrate on the same day, was drafted in the appellant's attorney's office. In this connection the Leribe magistrate said in her affidavit in the application to set the first "judgment" aside: -

> *"I perused the court file before signing the documents and noted there was a ruling upholding an application for summary judgment . . ."*

In my view, the probabilities are strongly in favour of the conclusion that the "documents" to which she

refers were already prepared for presentation to her when she was asked to formalize the judgment.

[9] It was in this light that Majara J inferred that the appellant's attorney had acquired prior knowledge of the result of the summary judgment application and used this knowledge to procure a warrant of execution before the fact of the judgment had been brought to the respondent's attention.

[10] As I understand the submissions by the appellant's counsel in this regard, such irregularities had been cured by the setting aside of that judgment and warrant and could not be invoked again by the respondent with regard to the subsequent judgment handed down by the trial magistrate on 13th July. Majara J rejected this contention and I think she was correct in doing so. It was only on 24th June 2011 that the trial magistrate and the magistrate at Leribe deposed to their affidavits, disclosing what had taken place on 23rd May. Until then the respondent could not have been aware of precisely how the judgment had come to be delivered in his absence. When that judgment was set aside, the trial magistrate was directed to deliver his own

judgment within seven days. I do not consider that it was incumbent on the respondent, in those circumstances, to launch an application for review of the whole proceedings on pain of being precluded altogether from complaining about the irregularities at a later date. The appellant's submission that, in setting aside the erroneous judgment of 23rd May, the High Court became *functus officio* in respect of any prior procedural irregularities is entirely without substance.

[11] It was obviously irregular for the trial magistrate to communicate, without the knowledge of the respondent's attorney, with a representative of the appellant's attorney. It was equally irregular for him to use that representative as an emissary to carry an envelope containing what was, at that stage, a highly confidential document, viz. a draft final judgment, to the court at which it was intended that that document would be published in the presence of the representatives of both parties. The irregular conduct of Mukhawana and/or some other person in his principal's office in previewing the draft judgment was the culmination of the irregularities thus perpetrated by the trial magistrate. Even if

these unfortunate events did not, of themselves, cause prejudice to the respondent, there can be no question but that they justifiably generated a perception, on the part of the respondent, that the trial magistrate might have been biased against him. Such a perception would, of course, justify the setting aside of the summary judgment proceedings and it follows that I consider that Majara J was right in making that order.

[12] I should mention that there were other grounds upon which the respondent contended for a review of the judgment of 13th July and which were upheld by Majara J. Save to say that I also consider her findings on these aspects to have been correct and, on their own, to have justified the order which she made, it is not necessary for me to advert to them in this judgment.

[13] What does require some further attention and clarification in regard to the learned Judge's judgment is the form of the order which she granted. As I have indicated, she dealt on appeal with two separate applications, the one by the appellant to have the appeal by the respondent

declared "null and void" and the other by the respondent for review of the proceedings in the magistrate's court. It is plain, from the contents of her judgment, that Majara J was not prepared to uphold the former. However she did not make a specific order dismissing the appellant's application. Instead she confined herself to granting the respondent "prayers 2(a), (c) and (d) as they are stated in the notice of motion". The order subsequently issued out of the Registrar's office was in the following terms:-

"1. The execution of judgment in ***CC: 27/09*** *Leribe Magistrate's Court be stayed pending the outcome of this application and (the) business premises on Plot No.* ***23131-001/89 and 90*** *Maputsoe Urban Area closed on 23rd August 2011 pursuant to the warrant of ejectment in* ***CC: 27/09*** *be opened forwith.*

2. The fourth Respondent is directed to dispatch to the Registrar of this Honourable Court within fourteen days the record of proceedings in ***CC: 27/09*** *Leribe Magistrate's Court.*

3. The proceedings in ***CC: 27/09*** *are reviewed and set aside."*

Paragraphs 1 and 2 of this order applied to the proceedings at the time when the rule *nisi* was granted and were no longer relevant after paragraph

3 was granted. As already indicated, there is no mention of the application to have the appeal declared null and void, nor is there any order as to costs. It is clear from the contents of her judgment that she intended to dismiss the appellant's appeal. Her failure to include an order to that effect was plainly an error and this court has the power to correct that. But as to the absence of an order for costs, different considerations apply. There was no cross-appeal by the respondent on the question of costs in the High Court. In the absence of such a cross appeal, this court does not have the power to alter the order in the court *a quo.*

[14] It is necessary for me to comment on two features of the litigation in this matter. First, both counsel made affidavits on behalf of their clients in regard to what transpired before the trial magistrate on 13th July 2011. It was clear, at the time when these affidavits were made, that there was likely to be a dispute of fact in this regard. Where counsel becomes a witness to events which are pertinent to his client's case and which give rise to credibility issues, it is highly undesirable, if not improper for such counsel to continue to represent the client in

the litigation. This is the second case in this session alone, in which legal representatives have made contentious affidavits. This growing tendency should be deprecated and discouraged. In the case of ***Mokhethi v Matlole and Others, C OF A (CIV) NO. 03/2012***, para 15, **Howie JA** said:

> *"[15] . . . when advocates or attorneys make affidavits for use in judicial proceedings in which they are instructed to act they may run the risk of a conflict of interest between their duty to the client and their duty as officers of the court if they thereafter appear, or continue appearing, as counsel in the case. An affidavit affording formal proof of an uncontentious fact will probably occasion no such risk. Affidavits containing contentious allegations are quite another matter. Their position may be unavoidable because the facts are exclusively within the knowledge of the deponents. But then such deponents will face the unenviable, and undesirable, predicament of having to argue defensively of their own credibility and, very often, critically of the credibility of a colleague.*
>
> *[16] Counsel in a case, whether advocate or attorney, owes a duty to the court to present facts, and to argue the issues, with objective independence from the interests of the client. Accordingly, if counsel has to make an affidavit regarding disputed facts, subsequent withdrawal from the case may well be required so as to avoid acting in conflict with that duty."*

[15] Second, there is also a growing tendency, apparent in a number of cases which have recently come before this court for deponents to affidavits to use

unrestrained, insulting and often defamatory language. As an example in this case the appellant delivered himself of the comment that "the Respondent is a crook". It is clear that the affidavit in which this scurrilous statement is contained was drafted for the appellant by his legal representative, and that representative had a duty to temper the language used by his client. As **Howie JA** said in the passage quoted above, the object of an affidavit is to place facts, and occasionally submissions, before the court. The affidavits should not be used as a vehicle to insult or to express adverse opinions about the opponent. If such a practice continues, it may become necessary for the court, *mero motu* to strike out the offensive language and make a punitive order as to costs, including, if necessary, an order for costs *de bonis propriis.*

[16] It is unfortunate that the litigation has been conducted in a manner which must have resulted in the parties incurring enormous and largely unnecessary expense without the proceedings having advanced past the Declaration. The summary judgment application seems to have been drawn with total disregard to the provisions of Rule

14 of the Magistrate's Court Rules. Documents (other than the liquid document prescribed by Rule 14(2) (b)) were annexed to the founding affidavit. The plaintiff then delivered a lengthy and detailed replying affidavit which he was plainly not permitted to do. The application should perhaps have been dismissed simply on the basis that the strict provisions of the Rule had not been adhered to by the plaintiff. I think it would be desirable for the legal representatives to consider whether any future interlocutory applications should not be avoided in the interests of the parties and whether it would not be the simplest and surest path to finality if they simply proceed to trial with a minimum of delay. That is, of course, if it is not possible for the parties to come to an agreement which disposes of the litigation.

[17] The following order is made:

(1) For purposes of clarity, the order of the High Court is amended to read:

"1. The grant of summary judgment by the magistrate on 13th July 2011 is set aside on review.

2. The application to have the appeal against the grant of summary judgment declared null and void is dismissed."

(2) The appeals are dismissed and the appellant is ordered to pay the respondent's costs in both matters.

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N. V. HURT

JUSTICE OF APPEAL

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I agree **C. T. HOWIE**

JUSTICE OF APPEAL

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I agree **K. E. MOSITO**

ACTING JUSTICE OF APPEAL

For the Appellant: Mr. P. T. Nteso

For the Respondents: Adv. S. Ratau