IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C.OF A(CIV)NO.12/2012**

CIV/APPN/475/2011

In the matter between

LEHLOHONOLO MPOBOLE **APPELLANT**

and

MASHAMOLE LETOAO **1ST RESPONDENT**
LEBOHANG THOTANYANA **2ND RESPONDENT**
REGISTRAR OF DEEDS **3RD RESPONDENT**
ATTORNEY GENERAL **4TH RESPONDENT**
MAFUBE INVESTMENT HOLDINGS (PTY) LTD **5TH RESPONDENT**

CORAM: SMALBERGER JA

HURT JA

MOSITO AJA

HEARD: 9TH OCTOBER 2012

DELIVERED: 19TH OCTOBER 2012

SUMMARY

Validity of Special Power of Attorney, executed by person whose estate had been under administration by curator - onus of proving validity - party invoking power of attorney must prove principal had contractual capability at time of execution.

JUDGMENT

HURT JA

[1] This appeal concerns the efficacy of a special power of attorney allegedly executed by Mosiane Letoao ("Mosiane") in favour of the appellant, Lehlohonolo Mpobole, on 5 June 2007.

[2] The relevant history of the matter can briefly be stated as follows:-

(i) Mosiane was the holder of title to an immovable property described as "Plot No 12284-192" (referred to

as "the Property"), as registered lessee under the provisions of the Land Act, 17 of 1979 (repealed and replaced by the Land Act, 8 of 2010).

(ii) On 13 March 2006 the High Court granted an application by Mosiane's son, Mashamole Letoao ("Mashamole") in terms of which Mashamole was appointed as the administrator/curator of Mosiane's estate, the material terms of the order being couched in rather curious language, viz:

"*(a) Appointing applicant as temporary administrator of respondent's estate until his mental condition return(s) to normal.*

(b) Restraining respondent from managing and/or exercising his powers over the joint estate of himself and his wife until respondent's mental condition improves."

(iii) As already stated, Mosiane is alleged to have signed the special power of attorney on 5 June 2007.

(iv) The appellant states that he learnt, on or about 14 September 2011, that Mashamole had obtained ministerial consent, in terms of section 36 of the Land Act, to transfer title in the lease to a purchaser.

(v) According to the appellant, he was under the impression that transfer would be effected to Lebohang Thotanyana, the second respondent, but, in the event, the ministerial consent was given on 21 September 2011 to a company called Mafube Investment Holdings (Pty) Ltd ("Mafube").

(vi) Regarding this potential transfer of Mosiane's rights in the lease as an interference with his powers under the power of attorney, the appellant applied, as a matter of urgency, on notice of motion dated 21 September 2011, for an interim order interdicting the transfer.

(vii) A temporary interdict was granted on 5 October 2011 with return date 17 October.

(viii) In due course answering affidavits were delivered by both Mashamole and the second respondent.

(viii) The appellant delivered a replying affidavit on 17 October together with an application for the joinder of Mafube as fifth respondent.

(ix) An order for joinder was granted on 7 November. It included prayers for appropriate modifications to the original rule by addition of references to Mafube as the potential transferee, and the addition of the following paragraph:

"*5 The rule nisi in the main application is discharged against the second respondent only and*

the question of costs is deferred; otherwise the rule nisi is extended to 21 November 2011."

(x) The matter was argued on 14 December 2011 and, on 20 March 2012, Chaka-Makhooane J delivered judgment and granted an order in the following terms:

"*The application is dismissed with costs awarded in the following manner:*

(i) costs on an attorney and client scale awarded to the second respondent;

(ii) costs awarded to the fifth respondent awarded on the ordinary scale."

It is against this order that the appellant appeals.

[3] Chaka-Makhooane J dealt in detail with the numerous factual disputes on the papers and, as I understand her judgment, came to the conclusion that the disputes could not be properly resolved on paper. She referred to the principle that where such factual conflicts

exist and the applicant does not apply to have the matter sent for oral evidence, the application should be dismissed.

[4] I consider that the learned judge was right to dismiss the application but that she might have taken a swifter, and possibly a surer, route. The Special Power of Attorney purported to authorise the appellant to pass transfer of all Mosiane's right title and interest to the Property or otherwise

"to deal with (the Property) in furtherance and protection of [Mosiane's] rights in connection therewith including but not limited to institution or defence of legal proceedings pertaining to [it]."

[4] In his founding affidavit, the appellant contended that this conferred upon him the sole right to deal with the Property. This was the "right" upon the basis of which he sought interdictory relief. I am by no means certain

that this interpretation of the document is correct[1], but for the purposes of this judgment I can simply assume that it was.

[5] The second respondent, in an answering affidavit, annexed a copy of the order of court referred to in paragraph 2(ii) above. The fact that such an order had been granted was confirmed by Mashamole in a supporting affidavit. He also confirmed that since his appointment he had "diligently discharged [his] duties towards the estate". He suggested that (assuming the signature on the power of attorney was indeed his father's, as to which he harboured a measure of suspicion) the appellant had taken advantage of his father's diminished status.

[1] There is no evidence about the circumstances in which the power was conferred and it seems improbable that it was intended to create a perpetual agency. See ***National Board (Pretoria) (Pty) Ltd v Estate Swanepoel*** **1975 (3) SA 16(A)** at p 27.

[6] In replying to these contentions, the appellant contented himself with denials and a broad, vague submission that Mosiane was capable of conducting his own affairs and had done so with the knowledge and consent of Mashamole.

The Argument and the Incidence of the Onus

[7] Counsel for the appellant submitted that the onus was on the respondents to prove that Mosiane was not capable of managing his affairs when he signed the power of attorney[2]. Now it is true that there is a general presumption that when an adult person puts his signature to a document of this nature, he is presumed to have full contractual capacity. Where it is alleged that a contractual act is void because the actor was incapable of properly and validly managing his own affairs, the onus

[2] Para 2 of the Notice of Appeal reads: "The court a quo erred and misdirected itself in not addressing itself to whether the Respondents on whom the onus lay, had proved that at the time that Mosiane Letoao executed the power of attorney granting the Appellant authority to deal with lease number 12284-192, he was legally incapable of doing so by reason of his mental condition."

will be on the person so alleging to prove his contention. However, to quote Christie: "The Law of Contract in South Africa", 3rd Edition, p 273 - 274:

"*The evidentiary burden may be shifted by proof that at the time of contracting the party concerned was the subject of an order under the Mental Health Act, or by proof that he was generally insane over a period covering the time of contracting, and the normal presumption of sanity being thus rebutted, the contract will be declared void unless the other party can prove that it was made in a lucid interval.*"

[8] Apart from the appellant's unsupported assertions in the replying affidavit, there was no evidence upon which the court could come to a conclusion that, notwithstanding the order referred to in paragraph 2(ii) above, at the time of signature of the power of attorney Mosiane was sufficiently in control of his mental processes to know what he was doing. In this connection it is perhaps significant that the appellant stated in his founding affidavit that

"*Mosiane is presently indisposed on account of ill-health and is unable to depose to an affidavit.*"

A period of nearly a month elapsed between the date on which the appellant made his founding affidavit and that on which he had attested to the replying affidavit. It is difficult to accept, assuming always that Mosiane's "indisposition" was not due to diminished mental capacity, that some evidence could not be obtained from him, or at least from some person who could give direct evidence as to his mental condition.

[9] It is also significant that, both in the founding and replying affidavits, the appellant asserted that the reason why Mosiane had executed the power of attorney in his favour was that Mosiane "did not get on well" with Mashamole. If that was so, and if, indeed, Mosiane had intended to empower the appellant in relation to the administration of the Property, the probability seems to

be clear that even if he was seriously ill, Mosiane would have been prepared to confirm this intention.

[10] There is certainly no documentary evidence that the administration order, including the interdict against Mosiane managing his own or his wife's affairs, had been revoked by June, 2007. Indeed there is the direct evidence from Mashamole that it is still in force. The Consent document issued under section 36 of the Land Act 2010 by the Director of Lease Services and issued on 21 September 2011, reflects Mashamole as the person with registered title to the lease, and I assume that he was recorded as such because the Department accepted that he is the lawful administrator of Mosiane's assets.

[11] It follows that the submission of counsel for the appellant as to the incidence of the onus is, in the circumstances of this case, incorrect. The result is that the appellant had failed, before the court *a quo*, to

produce any evidence in regard to an essential element of his case, namely the proof that the power of attorney on which he relied to establish his "right" was a valid one. The onus upon him was accordingly not discharged

[12] There was mention, during argument, that this matter should possibly have been dealt with by the Land Court. Of course no objection was taken on this ground in the court *a quo*. Apart from saying that there may have been some substance in the point if it had been taken *in initio litis*, I do not think it either necessary or proper to deal with it in this judgment. It will suffice to say that even if the matter had been heard in the Land Court, this Court would have had to deal with any appeal which may have followed and there does not seem to be any purpose in now inquiring into the jurisdiction of the lower court. An enquiry of that sort would not further the interests of any of the parties.

Costs

[13] Counsel for the appellant submitted that the award of attorney and client costs in favour of the second respondent was unwarranted. But Chaka-Makhooane J pointed out in her judgment that, although he had withdrawn the application against the second respondent, the appellant had asked that the question of costs should stand over for later decision. He stated, in his affidavit supporting the application for joinder of the fifth respondent, that he bona fide accepted the information he was given by an employee at the Land Services and Physical Planning offices in Maseru to the effect that the consent had been given in favour of the second respondent. He gave no details as to the identity of the employee to whom he spoke, nor did he give any reasons either in his affidavit in the joinder application or in his replying affidavit in the main application as to why he had not taken the elementary precaution of asking to inspect the document. The joinder of a person in High

Court proceedings is a serious matter and should only be resorted to after the basis for such joinder has been carefully considered. It seems clear that the mistake the appellant made by citing the second respondent was attributable to his lack of care in this regard. The learned judge took the view that the appellant should, when he withdrew against the second respondent, have tendered to pay his costs. She concluded that his failure to do so warranted the punitive order. It is trite that, the question of the award of costs in litigation being a matter for the discretion of the presiding judge, the power of this court to interfere with such an order is a limited one. I do not think that the costs order was the result of any failure on the part of the learned judge to exercise her discretion properly. In fact, I consider that the special order was warranted. The appellant, moreover, cited the second respondent as second respondent in this appeal and argued that the attorney and client costs order should be

altered. He was unsuccessful in this endeavour and must pay the second respondent's costs in the appeal.

[14] Finally, it is desirable to deal with the costs order referred to in para 2(x) above. Although the second and fifth respondents are specifically mentioned in paras (i) and (ii) of the order there is no reference to the first respondent. There is no doubt that the learned judge intended that the first respondent should be awarded his costs, but I have seen fit to amend the order slightly so as to put the matter beyond doubt.

[15] 1. The appeal is dismissed with costs.

2. The order of the court *a quo* is amended to read:

"*(a) The application is dismissed with costs.*

(b) The applicant is ordered to pay the second respondent's costs on the attorney and client scale."

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N. V. HURT
JUSTICE OF APPEAL

I agree:

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J. W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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K. E. MOSITO
ACTING JUSTICE OF APPEAL

For Appellant : Adv L. L. Ramokanate
For Respondent : Adv. Q Letsika