# IN THE COURT OF APPEAL OF LESOTHO

**C OF A (CIV) NO. 03/2012**

In the matter between:

**TSELISO MOKHETHI** **APPELLANT**

and

**LETLAMA MATLOLE** **1ST RESPONDENT**

**HER LADYSHIP**
**(MRS. CHAKA-MAKHOOANE)** **2ND RESPONDENT**

**THE ATTORNEY-GENERAL** **3RD RESPONDENT**

**CORAM: RAMODIBEDI P**
**MELUNSKY JA**
**HOWIE JA**

**HEARD:** 10 OCTOBER, 2012
**DELIVERED:** 19 OCTOBER, 2012

## SUMMARY

*Review – judgment in opposed application reserved after argument by appellant and respondent – judgment subsequently given in absence of appellant – appellant applied on review for the setting aside of the judgment as having been given irregularly by reason of his absence – review application correctly dismissed.*

*Counsel incurring risk of conflict of interest if, having made an affidavit regarding contentious facts, they continue to appear in the case – possible duty to withdraw as counsel.*

**HOWIE JA:**

[1] The appellant, Mr. T. Mokhethi, to whom, for convenience, I shall refer as "Mokhethi", and the first respondent, Mr. L. Matlole, to whom I shall refer as "Matlole", were the parties in an opposed spoliation application in the magistrate's court at Mafeteng. They were both legally represented. After argument by both sides the court's judgment was reserved to 7 June 2007. It was not delivered on that date but only on 9 November 2007.

[2] On the latter date Mr. Potsane appeared for Matlole. There was no appearance for Mokhethi but the record of proceedings on that day as recorded by the magistrate reads as follows:

> "MR. POTSANE: We have agreed with my friend for the respondents (sic) that we may note judgment in their absence."

[3] The reference to "my friend for the respondent (s)" was – it is common cause – an intended reference to Mr. Ntśene who had appeared throughout in the application hearing on behalf of Mokhethi.

[4] Judgment was given against Mokhethi. It resulted in the issue of a warrant for his ejectment and anyone occupying through him from the property which was the subject of the spoliation proceedings.

[5] These events prompted Mokhethi to apply in the High Court for the review and setting aside of the magistrate's judgment as having been irregularly given in his absence.

[6] In his founding affidavit in the review proceedings Mokhethi said that on 7 June 2007 he went to the Magistrate's court with Mr. Ntśene and the case was postponed to a date to be arranged. Subsequently the two of them went to court on three occasions and they were informed each time that the judgment was not ready. Service of the ejectment

process followed without his knowledge that judgment had been delivered against him. He had been advised by Mr. Ntśene that the delivery of judgment in his absence had deprived him of his right to appeal timeously.

[7] Mr. Ntśene deposed, in a supporting affidavit, that he confirmed Mokhethi's references to him. As regards delivery of the magistrate's judgment he said:

> "I also wish to emphasise the fact that I was in appearance for noting of judgment on three different occasions. Further that I only learned that it was duly passed in (sic) without my knowledge."

[8] In an affidavit opposing the review Matlole said:

> "4.2 I wish to state that my counsel of record. Adv. Potsane, has been on several occasions, calling Adv. Ntśene, Applicant's counsel, for them to fix a date for noting of the judgment.
>
> 4.3 It (sic) worth mentioning that every time Mr. Ntśene was called he will refer to his diary searching as to when he will be in Mafeteng with other matter. This showed that Mr. Ntśene always wanted to couple this matter with some other matters he has at Mafeteng Magistrate.

> 4.4 I wish to indicate that the last time Mr. Potsane called Mr. Ntśene, they agreed that whoever may go to Mafeteng will note judgment if the learned Magistrate is available."

[9] Mokhethi deposed to a replying affidavit and denied the allegations in paragraphs 4.3 and 4.4 of Matlole's affidavit.

[10] Mr. Ntśene did not depose to a replying affidavit. Neither did he nor Mokhethi seek to deny or explain away the magistrate's record that he was told by Mr. Potsane that it had been agreed that judgment could be noted in the absence of Mr. Ntśene and his client.

[11] The review failed, hence this appeal.

[12] Mr. Ntśene again appeared for Mokhethi on appeal. He conceded that delivery of judgment in his absence had not deprived him of the opportunity to advance submissions that he wanted or needed to make. However, he argued that the irregularity occasioned by such

delivery without his or his client's knowledge was, primarily, that it caused an appeal against the magistrate's judgment to be out of time. He also sought to contend that execution proceedings were set in motion without his or Mokhethi's awareness of them, to Mokhethi's prejudice.

[13] It was not alleged in the review or argued on appeal that the magistrate incorrectly understood or recorded the intimation that judgment could by agreement be delivered in the absence of Mr. Ntśene and Mokhethi. Having been informed to that effect, as we must hold he was, the magistrate acted entirely properly in proceeding to give judgment in their absence. It was in no way irregular to do so. Therefore the review application had necessarily to fail. In addition, the lateness of an appeal against the magistrate's judgment could have been cured by an appropriate condonation application.

[14] There is, of course, a conflict of fact as to whether, quite apart from what the magistrate was told, the respective legal representatives did in fact agree as alleged by Matlole. However, it was not a ground of

review that the delivery of the judgment was irregularly procured by misrepresentation.

[15] Finally, it must be emphasized – as will be done in another case in this Session as well – that 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 deposition 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.

[17] The appeal is dismissed with costs.

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**C.T. HOWIE**
**JUSTICE OF APPEAL**

I agree:

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

I agree:

_____
**L.S. MELUNSKY**
**JUSTICE OF APPEAL**

For the Appellant : Adv. P.S. Ntśene

For the First Respondent: Adv. K.K. Mohau KC
and Adv. L.L. Ramokanate