IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) NO.42/2012

In the matter between

LIKOTSI CIVIC ASSOCIATION AND 14 OTHERS **Appellants**

V

THE MINISTER OF LOCAL GOVERNMENT AND 4 OTHERS **Respondents**

CORAM: HOWIE JA
HURT JA
THRING JA

Heard 8 April 2013

Delivered 19 April 2013

Summary

Application in Land Court – points in limine – generally inappropriate

in such applications – matter remitted to that Court – no order made that matter to be heard by a Judge other than Judge a quo.

Judgment

THRING JA

[1] In the Land Court Division of the High Court of Lesotho the 15 appellants filed an "originating application" against the five respondents in terms of Rule 11 of the Land Court Rules ("the Rules"). In it they sought the setting aside of a certain Legal Notice No.17 of 1999 which was allegedly issued on 10 March, 1999 by the first respondent, declaring certain land at or near Maseru to be a selected development area, or SDA, under the provisions of sec. 44 of the Land Act, No.17 of 1979; the setting aside of two "plot leases" granted in favour of the fourth respondent; an interdict prohibiting the fifth respondent from holding further pitsos intended to aid or abet the fourth respondent; and ancillary relief. The application was opposed only by the fourth respondent. It took two points *in limine*, viz, first, that the appellants lacked *locus standi* to bring the application, some or all of them having been misjoined; and, secondly, that the application was barred by the effluxion of time in terms of sec. 6 of the Government Proceedings and Contracts Act, 1965. The learned

Judge *a quo,* Mahase J, without hearing evidence, upheld both these points and dismissed the application, with costs. Against her order the appellants appeal to this Court.

[2] The Rules lay down the procedure to be followed in bringing a claim relating to land before the Court. Rule 11 reads:

> *"Any proceeding for the determination of any land related matter by the court shall be started by filing an originating application as set out in form 1 of the schedule with the Deputy Registrar."*

Such an application does not require to be supported by an affidavit. Rule 28 provides for an "answer" to an application. This, too, does not require a supporting affidavit. Both the originating application and the answer are required under the Rules applicable to each, respectively, to contain, *inter alia*, a concise statement of the material facts on which the application or answer is based (Rules 12 (c) and 28 (1) (d)). Rule 64 goes on to provide for an "examination of parties" at the "first hearing." It would seem that the framers of the Rules had in mind in this connection, *inter alia,* the identification or definition of disputes of fact which might arise on the papers, for Rule 64 (2) reads:

> *"The court may orally examine either party in relation to any material fact of the legal action."*

Rule 64 (4) goes on to provide that:

> *"After examining the parties the court shall give directions as to the further conduct of the proceedings."*

[3] In the present case the procedure laid down in Rule 64 was unfortunately not followed in the Court *a quo*. Instead, the Court *a quo,* without hearing evidence or examining the parties or any of them, and without first giving any directions as contemplated in the rule, dealt summarily on the papers with the two points *in limine* raised by the fourth respondent, upheld them both and disposed of the application by dismissing it, with costs. In my view, she erred in doing so.

[4] The taking of such preliminary points in motion proceedings is generally speaking not appropriate. One of the reasons for this is that often, as is indeed the case here, disputes of fact arise in regard thereto (such as whether each individual appellant had title) which cannot be properly decided on the papers and require *viva voce* evidence. Dr Mosito, who appears for the appellants with Mr Rafoneke, submitted that this appeal should therefore be allowed, with costs, that the order of the Court *a quo* should be set aside, and that the matter ought to be remitted to the Court *a quo* so that it may proceed there according to the Rules. I agree. So does Mr

Phafane, who appears for the fourth respondent.

[5] Two questions remain for discussion in this Court. The first relates to a complaint by the appellants that the precise identity, description and nature of the fourth respondent are unclear: they therefore seek a costs order against its representative and deponent, Ms Litlhakanyane, who, they contend, is the true respondent. Mr Phafane, for the fourth respondent, resists this and points out, in the first place, that this deponent is not a party to these proceedings; and, secondly, that it would appear from the papers that there is a certain registered company in existence called List Consortium (Pty) Ltd which trades as the Likotsi Technical Institute (the fourth respondent): he indicated that an application would be brought in due course to change the name of the fourth respondent to the name of this company. He indicated that the costs of this appeal would be paid by the fourth respondent on the basis that it is the aforesaid company, and he moreover gave an undertaking on behalf of his client that the company would satisfy any costs order which this Court might see fit to make against the fourth respondent. That, I think, disposes of this point satisfactorily.

[6] Secondly, Dr Mosito contended that we should order that the matter be remitted to a Judge other than Mahase, J for further

hearing. Such an order could be justified only if the learned Judge *a quo* had made credibility findings or findings on the merits of the application or had expressed herself in such a way as to indicate that she might reasonably be thought to be in some way prejudiced against one or other or more of the parties. I have considered her judgment and I do not think that it can be said that she did any of these things. Consequently, I am unable to accede to the appellants' request in this regard.

[7] For the above reasons the appeal is upheld, with costs, such costs to include the costs occasioned by the employment of two counsel, and to be borne by the fourth respondent, and the order of the Court *a quo* is set aside. The matter is remitted to that Court so that it may proceed in accordance with the Rules of that Court. It is further ordered that the costs to date in the Court *a quo* will be costs in the cause.

W. G. THRING
Justice of Appeal

I agree

C. T. HOWIE
Justice of Appeal

I agree

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N.V. HURT
Justice of Appeal

For the Appellants : Adv. Dr K. E. Mosito, KC
Adv. M. Rafoneke

For the Respondent: Adv. S. Phafane, K.C.