IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 21/12**

In the matter between:-

MAPUTSOE PROPERTIES (PTY) LTD **1ST APPELLANT**
TOTAL LESOTHO (PTY) LTD **2ND APPELLANT**

and

'MAMATLAKALA MAPHISA **RESPONDENT**

CORAM: HOWIE, JA
HURT, JA
THRING, JA

HEARD: 8 April, 2013
DELIVERED: 19 April, 2013

SUMMARY

1. *Discovery affidavit defective – High Court Rules 34 (9), 30 (3) and 30 (5) – proper procedure to be adopted requires two stages before defence can be struck out or claim dismissed on this ground.*

2. *Claim for an unliquidated debt or demand – judgment by default of plea – not competent unless Court hears evidence in terms of Rule 27 (5).*

3. *Application brought on motion during pendency of trial for declaratory order that action has been settled – irregularity of such procedure.*

4. *Agreement between counsel to curtail proceedings by inviting Court to decide only one issue on papers, with far-reaching consequences – how such agreement should be placed before Court – absence of proper or acceptable proof thereof, or of its exact terms.*

5. *Lack of authority to defend action – not raised in papers as ground for striking out defence – consequently cannot form basis for striking out.*

6. *Lack of authority to prosecute appeal – point raised for first time in respondent's heads of argument on appeal – not an appropriate juncture – steps ought to have been taken at an earlier stage.*

JUDGMENT

THRING, JA

[1] For the sake of clarity, I shall refer to the parties here concerned as they were in the Court a quo, that is to say, to the first appellant as the second defendant, to the

second appellant as the intervening defendant, and to the respondent as the plaintiff.

[2] Briefly, the salient points in the procedural history of this case may be summarized as follows:

(1) In March, 2006 the plaintiff issued summons in the Court a quo against the first and second defendants. The first defendant in the action was one Pule Lecheko. He is now deceased. No executor or other person has been substituted for him in terms of High Court Rule 14, and little further need be said about him in this appeal. According to the declaration accompanying the plaintiff's summons, her claim was for:

" (a) Payment of the sum of M3,500,000.00 aforesaid.

(b) Payment of the sum of M5,100.00 as payment for the valuation report.

(c) Interest on the aforesaid sums at the rate of 18.25% a tempora (sic) morae.

(d) Costs of suit.

(e) Further and/or alternative relief".

The plaintiff's principal claim (a) above for M3,500,000.00 was alleged to arise from a judgment granted to her in the Court a quo on 21 January, 1998 in which she avers that the first and second defendants were "directed" to pay her the value of certain immovable property ("the site") "minus the improvements thereon". In fact, the judgment reads that she "should be paid damages that are equal to the value of that site minus the improvements and if there is disagreements (sic) this matter be subjected to proof. If the parties do not agree proceedings must be filed for them to come to Court and contest that amount of the value (sic)". Whatever the precise terms of the judgment may have been, the amount of the indebtedness embodied in it was quite clearly not liquidated: unless it became agreed, it would have to be quantified by a competent court. Attached to the plaintiff's declaration was a valuation report reflecting that the value of the "disputed property" was "in the region of two million to five million Maloti". The alleged cost of this report was the subject-matter of prayer (b) of the declaration.

(2) The second defendant entered appearance to defend the action, and on 27 July, 2006 it delivered a plea in which, in essence, it raised two defences, viz:

(a) That upon a proper reading of the judgment of 21 January, 1998 only the first defendant, and not the second defendant, had been ordered to pay to the plaintiff the value of the site; and

(b) The plaintiff's valuation of the site was placed in issue.

(3) On or about 30 January, 2007 the second defendant delivered a discovery affidavit as required by Rule 34 (3) of the Rules of the Court a quo ("the Rules"). It was deposed to by Mr. L.A. Meyer, who is or was apparently an employee of the intervening defendant's parent company, Total South Africa (Pty) Ltd. It is common cause that this affidavit was defective, inasmuch as Meyer erroneously described himself therein as "the Corporate Credit and Risk Insurance Manager of the plaintiff herein". The affidavit is also defective in that it purports to be the discovery affidavit of the plaintiff,

whereas in fact it was clearly intended to be that of the second defendant.

(4) Some two years later, on or about 13 February, 2009 the plaintiff launched an application in the Court a quo in which she sought an order in the following terms:

"(a) The second defendant's plea/defence be strike out (sic);
(b) Cost of suit in case of opposition;
(c) Granting applicant such further and/or alternative relief as this Honourable Court may been (sic) fit".

This was the first of the two applications which came before the Court a quo, and which form the subject-matter of this appeal. In her affidavit filed in support of this application the plaintiff relied on the deficiencies in the discovery affidavit referred to in (3) above. In addition she averred, in any event, that Meyer was not authorized by a resolution of the second defendant to depose to the affidavit on the latter's behalf.

(5) Meanwhile, it seems, attempts were being made by or on behalf of the intervening defendant or its parent

company to settle the matter. On 29 September, 2008 a letter was addressed by the intervening defendant's attorneys offering payment of R150,000.00 "simply to bring an end to the matter". The letter was addressed to "Adv. H. Nathane Chambers". Mr. Nathane had been representing the plaintiff as her counsel. On 6 October 2008 Mr. Nathane replied to this letter purportedly accepting the offer on behalf of the plaintiff.

(6) On or about 21 September, 2009 the intervening defendant launched an application in the Court a quo in which it sought an order:

> "*That Total Lesotho (Pty) Ltd [the intervening defendant] is joined as a third defendant in this matter" and*
>
> *"An Order is granted declaring that the action between the Plaintiff and the First and Second Defendants has been settled".*

The latter part of this application, that in which a declarator was sought, was the second application which came before the Court a quo for adjudication. This application was supported by affidavits from Meyer and

Mr. Nathane. In his affidavit, Mr. Nathane confirmed having received the written offer in settlement referred to above. He went on to say that he then obtained instructions from the plaintiff, who instructed him to accept the offer, and that on 6 October, 2008 he wrote to the attorneys who were representing the intervening defendant, accepting their offer. Subsequently, it seems, Mr. Nathane duly received a cheque for R150,000.00, which he deposited into his bank account. On 15 January, 2009, he says, he deposited into the plaintiff's bank account the balance of this sum, after deducting from it the fees due to him. In an opposing affidavit the plaintiff denies, inter alia, that she ever instructed Mr. Nathane to settle the action, or that she received any payment from him.

(7) On or about 3 August, 2010 the intervening defendant was, apparently by consent, joined as a defendant by order of the Court a quo. The precise terms of this order are not clear, as it has not been included in the record of these proceedings, but nothing seems to turn on its exact provisions. To date the intervening defendant has not delivered a plea.

[3] The matter was argued, without any evidence being led, before Mahase J. in November, 2010. On 24 May, 2012 she made an order that

> "*... the defendants [apparently meaning the first and second defendants only] are ordered to pay that said sum of money [i.e. M3,500,000.00] with interest to the plaintiff, the one paying the other(s) (sic) to be absolved. Costs are granted to plaintiff.*"

[4] It is against this order that the second defendant and the intervening defendant appeal to this Court. There are also appeals against two subsequent orders made by the Court a quo in dealing with an application for special leave to execute on the main order and an application for a stay of execution respectively (the second and third appeals), but in the view which I take on the appeal against the main order it is not necessary to say any more about them, save as regards costs. It is common cause that they have in any event been overtaken by events, and have become academic.

[5] From the above it is apparent, as I have said, that before the Court a quo in November, 2010 were two opposed applications, viz.

(1) An application brought by the plaintiff for the second defendant's "plea/defence" to be struck out on the ground of the deficiencies in its discovery affidavit; and

(2) An application brought by the intervening defendant for a declaratory order that the action had been settled as between the plaintiff on the one hand and the first and second defendants on the other.

The Court a quo held in favour of the plaintiff in both these applications. Without further ado it then proceeded to grant judgment more or less as prayed by the plaintiff in her summons in the principal action.

[6] I shall deal with each of the above-mentioned applications seriatim.

The plaintiff's application to have the second defendant's "plea/defence" struck out

[7] This application was brought, it would seem, either in terms of Rule 34(9) or, possibly, Rule 30(3) or (5). Rule 34(9) provides, in its relevant portions, as follows:

" If any party fails to give discovery as aforesaid, … the party desiring discovery … may apply to court which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence".

The corresponding rule in the Uniform Rules of the High Court of South Africa is Rule 35(7), which is in almost identical terms.

[8] The Court a quo held that Meyer had lacked the second defendant's authority to depose to a discovery affidavit on its behalf; that there was consequently no valid discovery affidavit filed by the second defendant; and the learned Judge a quo concluded from this that "the second defendant's defence has to (be?) and is strike out" (sic).She referred in this context to Rule 34(9).

[9] In a subsequent judgment dated 11 July, 2012 in which she dismissed the second and intervening defendants' application for a stay of execution, the learned Judge a quo referred to an agreement between counsel for the plaintiff and for the second and intervening defendants to the effect that, should the Court dismiss the defence of settlement, the Court could proceed forthwith to strike out

"the defendants' " defence (presumably only the second defendant's, since it was only the second defendant's discovery which was defective, that of the intervening defendant not yet being due) in terms of the provisions of Rule 34(9) and "award damages as prayed in the summons in the sum of three and a half million Maloti …" I shall presently have more to say about this agreement between counsel: suffice it for the moment for me to say that, as I shall endeavour to show, I have concluded that there is insufficient evidentiary material concerning this agreement before this Court for the alleged agreement to be of assistance to the plaintiff. Consequently this aspect of the matter must, in my view, be approached on the basis that the agreement has not been satisfactorily proved and is not properly before this Court.

[10] Now, Rule 34(9) quite clearly envisages relief being granted to a successful applicant in two separate stages: the Court is empowered by the Rule, first, to "order compliance with this rule"; it is only afterwards, and "failing such compliance" that the Court "may dismiss the claim or strike out the defence".

[11] Similarly, Rules 30(3) and 30(5) provide for relief to be given in two stages. The Rule is about improper or

irregular proceedings or steps and the setting aside thereof. Because of its defects, the second defendant's discovery affidavit could no doubt be regarded as an irregular or improper step or proceeding. Rule 30(3) reads, in its relevant parts:

" If at the hearing of such application [i.e. to have such a proceeding or step set aside] the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part and grant leave to amend or make any such order as it deems fit…"

Then Rule 30(5) goes on to provide as follows:

"Where a party fails to comply timeously with a request made or notice given pursuant to these Rules, the party making the request or giving the notice may notify the defaulting party that he intends after the lapse of seven days, to apply for an order that such request or notice be complied with, or that the claim or defence be struck out. Failing compliance within the seven days, application may be made to court and the court may make such order thereon as it deems fit".

[12] The corresponding rule in the Uniform Rules of the High Court of South Africa is Rule 30(3) and (5) which, again, is in almost identical terms.

[13] Rule 30, then, provides, first, for an application to set aside a particular proceeding or step as irregular or improper. The Court, in granting such an application, may and usually, in practice, does, grant leave to amend the offending document or to deliver a fresh document or to rectify the step concerned with or without a sanction attached to the effect that, failing rectification of the offending proceeding or step, the aggrieved party may apply for the claim or defence to be struck out. Alternatively, if there has been non-compliance with a legitimate request made or notice given pursuant to the Rules, the aggrieved party may apply on notice to the Court for an order that such request or notice be complied with. Failing compliance with the order, the aggrieved party may then apply to have the claim or defence struck out by a separate order of the Court. In either event relief is granted in two stages: first, in the form of an order directing the defaulting party to comply with the Rules, with, if apposite, a concomitant order setting aside the irregular or improper step or proceeding; and secondly,

and in the event of non-compliance with the first order, a separate order striking out the relevant claim or defence. That is the practice which is followed in the South African Courts in applying the almost identical equivalents of Rules 34(9) and 30(3) and (5), and I consider that the same practice applies in Lesotho. The contrary was not argued before us.

[14] Leaving aside the agreement between counsel, then, as, in my view, one must, the correct procedure for the Court a quo to have followed in this case would have been:

(1) To grant an order setting aside the second defendant's discovery affidavit as an irregular step or proceeding under Rule 30(3), with directions as to when the second defendant should deliver a fresh discovery affidavit;

(2) Only in the event of the second defendant failing to comply with the aforesaid directions, to entertain an application by the plaintiff under Rule 30(5) or 34(9) for the second defendant's defence to be struck out, if such an application were to be brought.

[15] Unfortunately, the Court a quo failed to follow this procedure. As I have said, having found that no valid

discovery affidavit had been delivered by the second defendant, the Court a quo proceeded without further ado simply to strike out the second defendant's defence. For the reasons which I have mentioned above, I consider that the Court a quo erred and misdirected itself in so doing without affording the second defendant the opportunity of delivering a fresh discovery affidavit, to which opportunity it was entitled under the Rules. It is, after all, a serious and final act to close the doors of the Court in the face of a defendant which has duly entered appearance to defend an action and delivered a plea. Such a sanction should not lightly be imposed on a bona fide litigant.

[16] The events which then ensued in the Court a quo regretfully went from bad to worse, procedurally.

[17] Having improperly struck out the second defendant's defence, Mahase J proceeded to dispose summarily of the main action by immediately granting the plaintiff judgment for the principal amount claimed in the action, M3,500.000.00, with costs. In doing so, she erred and misdirected herself, in my view, in several material respects, as follows:

(a) Even if the second defendant's defence had been correctly struck out (which I find that it was not), so that the plaintiff's action against the second defendant had become, technically, unopposed, there was no application before the Court a quo for judgment by default in terms of Rule 27(3): such an application would in any event probably have required to be preceeded by not less than three days' notice to the second defendant under the sub-rule. Of such notice or application there is no sign in the record. Inasmuch as the Court a quo relied in this regard on the agreement between counsel to which I have referred, as I have said, that agreement does not assist the plaintiff, in my view.

(b) It would seem, on the face of the record, that Mahase J. gave judgment against the first and second defendants, "one paying the other(s) (sic) to be absolved". As regards the first defendant, he was no longer before the Court, having died and no executor or other person having been substituted for him as a party in terms of Rule 14(2). So that the judgment given against him was incompetent on that ground, also.

(c) The plaintiff's claim for M3,500,000.00 is clearly unliquidated: in para. 10 of her declaration the plaintiff herself describes it as " a fair and reasonable value of the property based on the aforesaid valuation"; in the valuation the value of the property is indicated to be somewhere between two million and five million Maloti. In the 1998 order of Court which forms the basis of the plaintiff's present claim, she is awarded "damages that are equal to the value of the site minus the improvements…." (my emphasis). In terms of Rule 27(5), where a defendant "is in default of entry of appearance or is barred from delivery of a plea", a Court may grant judgment without hearing evidence only "where the claim is for a liquidated debt or a liquidated demand. In the case of any other claim the court shall hear evidence before granting judgment…". However, the Court a quo granted judgment in the aforesaid sum without hearing evidence. It erred and misdirected itself in doing so. See **CGM Industrial (Pty) Ltd. v. Adelfang Computing (Pty) Ltd,** C of A (CIV) No. 5/2008, 17 October 2008 at para's [20] to [24]. For the reason which I have mentioned, the agreement between counsel does not, in my view, assist the plaintiff this regard, either.

The intervening defendant's application for an order declaring that the action had been settled.

[18] At the outset, it must be said that this was a most extraordinary application to bring in the course of a pending action, and one for which the Rules make no provision. Nevertheless, the Court a quo allowed the intervening defendant to proceed with it, and considered it on its merits instead of declining to hear it as an irregular procedure, and making no order on it, as, in my opinion, it ought to have done. It was an ill-conceived application for which there is no basis in the Rules or practice of the High Court, and it ought not to have been brought. In my view the Court a quo ought not to have entertained it or made an order on it, save as to its costs, which must, I consider, be borne by the intervening defendant.

[19] On behalf of the plaintiff reliance is placed in this regard, as have said, on the agreement between counsel to which I have referred. I revert now to this agreement. It is not mentioned anywhere in the record until the judgment of the Court a quo on the application for a stay of execution of 11 July, 2012. That was nearly two months after Mahase J. had delivered judgment in the main

applications on 24 May, 2012, and some 19 months after she had heard argument in those applications in November, 2010. That in her main judgment there is no mention of the agreement between counsel I find quite astonishing. It had formed the very foundation of the truncated and irregular procedure which she had seen fit to adopt in this matter. Without it, that procedure could not possibly be justified. Moreover, the terms of the agreement, as she appears to have recalled and understood them 19 months later, are so far-reaching that they can only be described as highly improbable. They entail the abandonment by the second defendant of both the defences raised by it in its plea, viz. the interpretation of the 1998 judgment and the disputed quantum of the plaintiff's claim; they entail the abandonment or waiver, also, of the second defendant's procedural right to rectify its discovery affidavit in terms of the Rules. The least that could be expected was that such far-reaching abandonments would be placed formally on record, even if they were conditional on some anticipated future finding of the Court. Mr. Louw, who appeared for the second and intervening defendants in this Court, did not appear in the Court a quo, and he was unable to throw any light on the agreement. Mr. Maqakachane, who appeared for the

plaintiff before us, also appeared for her in the Court below, but he, too, was unable to take the matter any further. The result is that there is no evidence of the agreement or of its precise terms before us, apart from the belated description thereof contained in the subsequent judgment of Mahase J. I would like to emphasize that I do not wish to be understood as in any way impugning the credibility, integrity or bona fides either of the Court a quo or of Mr. Maqakachane: but the risk of a bona fide misunderstanding or misstatement of the terms of the agreement ex post facto after such a long delay is too great to be ignored, in my opinion. Where an agreement of this type is concluded which goes to the very root of the dispute between litigants, and which may have extremely far-reaching consequences for them, including, as this one allegedly does, the abandonment or waiver by a party of his, her or its procedural and substantive rights and, in effect, a concession of liability in full in the event of only one of several of its potential defences being dismissed, a proper record of its content should be placed before the Court. Such record ought preferably to be in writing. Unfortunately, that was not done in this instance. I consequently conclude that the agreement between counsel has not been properly or acceptably proved, nor

have its contents, and it must accordingly be left out of account in the adjudication of this appeal.

The second defendant's authority to defend the action

[20] It was contended on behalf of the plaintiff, and found by the Court a quo, that the second defendant had failed to give proper authority to its legal representatives to defend the action.

[21] In my view, this question did not arise on the papers: there was no basis laid in the plaintiff's application before the Court a quo for such a contention or finding. That application was for the striking out of the second defendant's "plea/defence" on a single ground only, viz. the defects in the latter's discovery affidavit. There was no application before the Court for any relief based on the second defendant's attorneys' alleged lack of authority.

[22] I conclude that insofar as the learned Judge a quo allowed her finding in this regard to influence the order which she made in this matter, she erred and misdirected herself.

The second defendant's authority to prosecute this appeal

[23] On behalf of the plaintiff it was contended before us that the second defendant had failed properly to authorize its legal representatives to prosecute this appeal.

[24] This point was raised for the first time in the heads of argument of the plaintiff's counsel, which are dated 19 December, 2012. That was not, in my opinion, an appropriate juncture at which to do so. The appeal was noted on 3 July, 2012. If the plaintiff was dissatisfied with the second defendant's authorization of its attorneys in regard to the appeal, she ought, in my view, to have taken appropriate steps without delay by bringing an application, either in this Court or in the Court a quo, for appropriate relief. Instead she did nothing until the appeal was ripe for hearing and costs had no doubt been incurred in this regard by the second defendant. In these circumstances I do not think that this Court should entertain this question at this late stage.

The costs of the second and third appeals

[25] As I have said, and as is common cause, the second and third appeals in this matter have become academic, having been overtaken by events. However, the question remains as to who is to bear the costs of these appeals.

[26] In my view, they must be borne by the plaintiff in both cases. She ought not to have moved for judgment in the action as she did. Had she not done so, the subsequent appeals would not have been necessary. In the case of the third appeal, the defendants' application for a stay of execution ought in any event not to have been refused in the face of the then pending appeal in the main matter.

[27] For the above reasons the appeal is upheld, with costs. The order of the Court a quo is set aside, and the following order is substituted therefor:

"(1) The second defendant's discovery affidavit jurat 30 January, 2007 is set aside as an irregular step or proceeding.

(2) The second defendant is given leave to deliver a fresh discovery affidavit by no later than 19 June, 2013.

(3) Save for paragraph (5) below, no order is made on the third (intervening) defendant's application for an order declaring that the action between the plaintiff and the second defendant has been settled, this question to be decided at the trial if it is properly raised on the pleadings in due course.

(4) The second defendant is ordered to bear the costs of the plaintiff's application to strike out the second defendant's plea/defence as if it had been an unopposed application in terms of Rule 30(3) for the striking out of the second defendant's discovery affidavit; the balance of the costs of that application shall be borne by the plaintiff.

(5) The third (intervening) defendant is ordered to bear the costs of its application for an order declaring that the action between the plaintiff and the first and second defendant has been settled".

No order is made on the second and third appeals, save that the costs thereof must be borne by the plaintiff.

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W.G. THRING
JUSTICE OF APPEAL

I concur.

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C.T. HOWIE
JUSTICE OF APPEAL

I concur.

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N.V. HURT
JUSTICE OF APPEAL

For Appellants: Adv. H. Louw

For Respondent: Adv. S.T. Maqakachane