IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 14/2013**
CIV/T/329/2009

In the matter between:

BENJAMIN RADIOPELO MAPATHE **APPELLANT**

and:

EXECUTORS OF THE ESTATE OF THE LATE DR K.J. MAPATHE **1ST RESPONDENT**

MASTER OF THE HIGH COURT **2NDRESPONDENT**

REGISTRAR OF DEEDS **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

CORAM : SCOTT, J.A.
LOUW, A.J.A.
CLEAVER, A.J.A.

HEARD : 4 APRIL, 2014

DELIVERED: 17 APRIL, 2014

SUMMARY

Application for condonation – late lodging of record on appeal – seeking to enforce a pactumsuccessorium – invalid agreement – no prospects of success on appeal – condonation refused.

JUDGMENT

WJ LOUW, A.J.A.

[1] The appellant is the second son of the late Dr K.T. Mapathe (I shall refer to the late DrMapathe as the deceased or the appellant's father) who died on 22 May 2000, leaving a will which he executed on 14May,1997 with no less than 11 codicils, the last of which is dated 8 March 2000, and in which will the deceased bequeathed three leases of immovable property situate in Mafeteng (the plots) to The Memorial Trust, a trust which was set up in terms of clause 13.1 of the will in memory of his late son NkateLisole Mapathe. The appellant is not mentioned as a beneficiary in the will and clause 17 of the will records for the '*guidance of my Executors and Trustees'*that during his lifetime the deceased had generously assisted the appellant and his elder brother to establish their respective business ventures and that for the same reason he has not conferred any particular benefits on their children. The deceased also directed in clause 13.3.1.11 that in the event of a vacancy

arising, the appellant shall not at any time be nominated as a Trustee of the Memorial Trust.

[2] The three leases were registered in the name of the deceased on the following dates: commercial plot 06472-041, on 17 August 1983; residential plot 06472-222 and commercial plot 06472-223, both on 11 September 1990. (For ease of reference, I shall herein use only the last three digits when referring to the three plots).

[3] After the death of his father the appellant made two unsuccessful attempts to have the will declared invalid. In July 2005 the appellant launched the action which is the subject of this appeal.He does not now dispute the validity of the will, but claims entitlement to the leases on the basis of an alleged agreement with the deceased he claims was concluded during the lifetime of the deceased and in terms whereof the leases would be transferred to him after the death of the deceased. The appellant seeks (1) the cancellation of the three leases, (2) a declarator that the three plots do not form part of the estate of the deceased; (3) an order that the third respondent (the Registrar of Deeds) issue leases of the three plots in his name; and (4) that the costs be paid out of his father's estate.

[4] The action went to trial before Nomngcongo, J. The appellant and his brother Samuel Mapathe testified and after the appellant closed his case, the Court *a quo* found against the appellant on the facts, holding that *'there was never such an*

agreement'. The Court *a quo* then proceeded to order as follows: '*Absolution must be granted and the action be dismissed with cost'*.

[5] The appellant filed his notice of appeal timeously on 18 March 2013, but thereafter failed to lodge the record with the registrar within the three month period prescribed by Court of Appeal Rule 5(1) and, since there was no agreement between the parties to extend the period for the lodging of the record under Rule 5(2), the appeal lapsed in terms of Rule 5(3). The appellant eventually lodged the record on 10 December 2013, some nine months after he had noted the appeal and some six months after the appeal had lapsed. The appellant consequently launched an application for condonation and reinstatement of the appeal (the condonation application) supported by an affidavit in which he states that the failure to lodge the record in time was due to his legal representatives being involved in another pressing matter. The first respondent opposes the condonation application.

[6] It is incumbent upon the appellant to show sufficient cause for the granting of his application for condonation. In **National University of Lesotho and Another v Thabane LAC (2007-2008) 479,** this court held that the principles applicable to the consideration of an application for condonation enunciated as follows in **Melane v Santam**

Insurance Co Ltd1962(4) SA 531(A) at 532 C-F, may be taken to apply to Lesotho:

> "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are compatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".

[7] The first respondent opposes the condonation application on two principal grounds. First, the explanation for the delay given in the launching papers is in material conflict with the version given on his behalf in the correspondence between the parties' legal representatives. The reasons given for the delay are therefore neither sufficient nor acceptable. In the reply, the appellant avers that the version given in the launching papers is based on what he was told by his erstwhile counsel (whose mandate has since been terminated). He contends that the delay was not caused by any remissnes on his part. The second basis upon which the condonation application is opposed is that the appellant in any event does not have any prospects of success in the appeal.

[8] Given the manifest importance of the case for the appellant and first respondent (who must now complete the administration of the estate some fourteen years after the death of the testator), the overall explanation for the delay in lodging the record may be such that condonation could be granted. For the reasons that will appear hereunder, I am of the view that the question whether appellant has prospects of success on the merits of the appeal, is of decisive importance in this case. If there are no prospects of succeeding with the appeal, there will be no sense in granting condonation. It follows that it is necessary to proceed to consider the merits of the appeal.

[9] I firstset out and consider in broad outline the relevant facts that are common cause and those that appear from the evidence on behalf of the appellant. As stated earlier, no evidence was tendered on behalf of the respondents.

[10] The appellant was informed in 1983 by a Mr Scott that a Mrs Stewart wished to sell immovable property situated in Mafeteng. It is common cause that at the time the property consisted of one piece of land which was later subdivided into the three plots that are the subject of the dispute in this case. The appellant approached his late father and told him about the availability of the land and that he was keen to buy the land. According to the appellant he asked his father with whom he had *'a lot of businessrelations'* to assist him to *'carry the process forward'* and to assist him with the registration and other formalities that needed to take place at that stage. His father was based in Maseru where the survey office is situated and it would be easier for his father, so he testified, to see to the formalities on his behalf. The appellant could also, so he testified, take advantage of the fact that his late father was a cabinet minister and a senior man of influence and he thought that he needed his father's influence since the Motloung family who owned the hotel in Mafeteng, was also showing an interest in the land. The appellant testified that he 'acquired' the land with the assistance of his father but that the registration of the leases in his father's name occurred pursuant to an agreement between them and that it was further agreed that

'*in due course or… may be after his passing they (the plots) will be (sic) pass on to me …'* I interpose here to point out that throughout the appellant's narrative of the events, he never said that he had purchased and paid for the land on his own or that he had made any financial contribution with his father towards the acquisition of the land. No contract of sale was produced or referred to in the pleadings or the evidence. *Mr Nathane KC* who appeared for the appellant on appeal, suggested that one must assume that *'acquire'* meant that he bought and paid for the land. That is not in my view the more likely or plausible inference to be drawn from the facts as a whole.

[11] The appellant testified that his father verbally informed the entire family of the agreement and wrote out a document to the same effect, which was signed by both of them and which was kept with the rest of the family treasures in the safe custody of the Standard Bank in Ladybrand.

[12] The appellant stated in his evidence that the agreement was concluded in 1986 (as opposed to 1990 and 1998, the years mentioned in the pleadings). This year is associated by the appellant with the registration of the company Mafeteng Block and Brick (Pty) Ltd on 3 December 1986, with the appellant, his father and two others as the founding shareholders.

[13] In 1990 the original piece of land was subdivided and cut into three separate plots. The appellant explained in evidence

that the two newly subdivided plots were again registered in his father's name because at that stage he had, because of a disability arising from injuries sustained in a motor vehicle accident in 1988, taken a back seat in their joint business affairs and that his father, who was in the driving seat, continued with the business on the appellant's behalf. His father took the initiative to bring in an investor and concluded a sublease for the two plots during September 1990. Pursuant to the terms of the sublease the investor constructed a shopping centre on the premises.

[14] According to the appellant, the written agreement and other documents, including the original leases of the three plots, were removed from the bank by his stepmother soon after his father's death.

[15] I turn to the merits of the appeal which require two issues regarding the alleged agreement to be considered. The first is whether the Court *a quo* was correct in granting absolution after deciding on the facts that *'there was no such agreement'*. A decision on this issue would require an evaluation of the evidence of the appellant and his brother Samuel against the background of the allegations in the appellant's pleadings. I do not consider it necessary to embark on this exercise in the light of the second ground of opposition raised on the merits, namely that the agreement relied upon by the appellant is invalid, being a *pactum successorium*. This defence was not expressly raised in the

first respondent's plea, but it was put to the appellant that even if there were an agreement as alleged by him, his late father was not bound thereby and was free to stipulate otherwise in his will.

[16] A *pactumsuccessorium* is an agreement which purports to regulate matters of succession andsave for two exceptions, is invalid. (**Borman en de Vos v Potgietersrusse Tabakkorporasie,1976(3) SA 488(A) at 501 AD**). The two exceptions are a contract which constitutes a *donatio mortis causa*(where the parties intend vesting to take place during the life of the donor) and where in an antenuptial contract it is stipulated that one spouse is to succeed to property on the death of the other spouse. (**The Law of Succession in SouthAfrica, 2nd Ed** Corbett, Hofmeyr Kahn, 36-7). The reason for the invalidity of a *pactumsuccessorium* is that such an agreement conflicts with the general rule that the property of a deceased estate must devolve by will or, where there is no will, in accordance with the rules of intestate succession (**Borman** 501 CD).

[17] In the appellant's declaration the relevant term of the agreement is formulated as follows:

'It was a further term of the said agreement… That after the death of his father all three sites would be transferred to the Plaintiff as his own for his own benefit'

To the extent that this formulation may be open to the construction that a personal right to the transfer of the leases vested in the appellant during his father's lifetime and that it was only the enforcement of the right to transfer which was postponed until the death of his father, the circumstances and the appellant's direct evidence of the terms of the agreement provide the answer to what the true nature of the agreement is.

[18] I have already pointed out that the agreement was at best for the appellant concluded in 1986, three years after the first lease was registered in his father's name in 1983. This was also four years before the other two leases were registered in his father's name in 1990. There is no evidence that the appellant purchased the land or paid the whole or part of the purchase price. There isno satisfactory explanation, apart from vague considerations of convenience and the influence his father might exert, why the leases were not registered in the appellant's name from the start. The evidence also does not suggest that the appellant's father was in way restricted (apart from the alleged agreement as to what should happen after his death) in dealing with the land as his own.

[19] The appellant testified that the terms *'were quite straightforward in that he (his father) acquired (the) sites in the manner that I had outlined already which the family knew very well (and) just to make sure that in the event of his*

passing there is no dispute about it. It should remain known that ***I have to bethe successor of his estate'***. This makes it clear that the agreement was that the appellant would be his father's heir in regard to the three leases. The appellant was asked by his counsel near the end of his evidence in chief to return to the terms of the agreement. He agreed with the leading statement put to him by his counsel that the import of the agreement was that *'Even if he (the appellant's father) were to make the will and include them (the three plots) in the will,* ***in terms of the agreement he will bequeath them to you because of the agreement'.*** The formulation of the terms and import of the agreement given in evidence by the appellant makes it clear that the appellant's case is that the agreement regulates and restricts the deceased's right to free testation. It attempts to do by contract what can only be done by way of a duly executed will. The statements are a textbook example of a *pactumsuccessorium.* It follows that the agreement relied upon by the appellant is invalid. The appellant has no prospects of success on appeal even if it were to be found that he did conclude the agreement relied upon. In the light of this finding, there is no point in granting condonation and the application for condonation must fail.

[20] Mr Loubser conceded in his heads of argument and again in argument before this court that the Court *a quo*erred in ordering absolution from the instance **and** the dismissal of

the appellant's claim at the end of the appellant's case. He correctly conceded that the dismissal of the claim cannot stand.

[21] I turn to the costs of the condonation application. Mr Nathane, KC suggested, with little enthusiasm I might add, that in the light of this concession by the respondent, the appellant enjoyed a measure of success, a fact which should have a bearing on the cost order. In my view the concession should not affect the issue of costs. The appellant has in effect had no success whatsoever and no time or effort was taken up by the issue conceded by the respondent. It follows that the costs must follow the result.

[22] The following order must be made:

1. The application for condonation is dismissed; and
2. The appellant is ordered to pay the costs of this application.

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W.J. LOUW
Justice of Appeal

I agree:

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D.G. SCOTT
Acting President

I agree:

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R.B. CLEAVER

Acting Justice of Appeal

For appellant :PJ Loubser

For first respondents:H. Nathane K.C.