

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.18/2014

In the matter between

HLABATHE MAKIBI

1ST APPELLANT

SEASHELL LOGISTICS (PTY) LTD

2ND APPELLANT

and

‘MAMOOROSI MAKIBI

RESPONDENT

CORAM : SCOTT, AP
HOWIE, JA
CLEAVER, AJA

HEARD : 16 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

No written judgment or order reflecting High Court's decision – responsibility of Judge to ensure order reduced to writing and to write a judgment – donation – no notarial execution – validity.

JUDGMENT

HOWIE JA

[1] This is an appeal against a decision of Moiloa J in a motion case. The notice of appeal does not state *“whether the whole or part of the judgment or order is appealed against”* (Court of Appeal Rule 4 (4) (a)). That is not surprising. No written judgment has been given. Regrettably, that is something not uncommon in the High Court of this Kingdom. In this case, however, there is not even a written transcript of any order.

[2] It is unfortunately the general position that if the result of a case in the High Court is announced in open court, whether with or without accompanying reasons,

no transcription services are available. When that is the position it is the responsibility of the Judge to ensure that the order is reduced by the Registrar to writing so that, first, it is incorporated in the Court's records for future reference and as an item of public record and, second, so that copies can be issued to the litigants for their information and in case either wishes to consider an appeal.

[3] It is also the responsibility of the Judge to write a judgment. Parties expend anxious time and hard-earned money in taking a matter to the High Court. They are entitled to know the reasons for reaching the conclusion to which the Judge has come. In addition, where there is an appeal against the judgment or order the parties cannot fully prepare their cases in the absence of the reasons and this Court requires to know the reasons in order properly to bring a fully informed mind to bear on the question whether the Judge was right.

[4] The state of affairs in this case is one of which we strongly disapprove. It reflects adversely on the presiding Judge's concern for the standards of care,

responsibility and efficiency which the public, and particularly the litigants, are entitled to expect from the highest trial court in the land. The parties' advocates – both Senior Counsel – have drawn attention in their heads to the difficulties which this situation has imposed upon them in regard to the proper preparation of their cases. We have been required to endure similar difficulties. We trust it will be unnecessary to echo our disapproval of this situation in any subsequent appeal.

[5] Turning to the appeal, the respondent, Mrs 'Mamoorosi Makibi, is the daughter of the late Lekena Albert Makibi ("the deceased") who owned and operated a transport business at Pitseng, Leribe, originally called Everite Transport Hire and subsequently conducted by way of a company named Seashell Logistics (Pty) Ltd. ("Seashell"), of which he was majority shareholder.

[6] The first appellant is Mr Hlabathe Alphonse Makibi, a nephew of the deceased and the other shareholder in Seashell. The second appellant is Seashell.

[7] The appeal arises out of a counter application brought by Mrs Makibi in the High Court. (The application is presently irrelevant.) In her capacity as executrix dative in the estate of the deceased, she sought an order directing Mr Makibi to put her in possession of trucks and trailers which she claimed were assets in the estate. She listed 15 trucks and 14 trailers. Ancillary relief was also claimed which need not be referred to. No relief was sought against Seashell.

[8] Mr Makibi contested her claim. He said, first, that the deceased had made a Will appointing a trust company as his executor and that she accordingly had no *locus standi* to bring the application. His counsel on appeal supported this ground of opposition.

[9] Mrs Makibi's answer on the record was that the institution concerned refused to release the Will without certain personal documentation of the deceased and she was unable to obtain it from his surviving widow who declined to provide it. She accordingly approached the Master to appoint her as executor. It is not in dispute that the Will has not been filed with the Master and that

she has been appointed executor dative. Mr. Makibi's first point of opposition therefore cannot succeed.

[10] His next ground of opposition was that 8 trucks and the trailers did initially belong to the deceased. However, in August 2009 (the deceased having died in July 2011) the deceased donated those vehicles to him with the result that registrations were effected into his name in terms of the Road Traffic Act, 8 of 1981. The reason, he alleged, was that he was sickly and the deceased wanted to set him up in business in return for his having helped the deceased in his own business. The remaining vehicles – 7 trucks – he himself bought in July 2008.

[11] As to the alleged donation, Mrs Makibi relied on the absence of any registered or notarial deed of donation. Indeed there is none. She therefore contended for the invalidity of the alleged donation.

[12] In this Kingdom Roman Dutch law as expounded in Southern African case law applies to the validity of donations. In **Coronel's Curator v Estate**

Coronel 1941 AD 323 it was held that an unregistered donation to the value of more than £500 is void as regards the value in excess of that sum (at 342). See also **Estate Phillips v Commissioner for Inland Revenue 1942 AD 35** at 56 and **The Master v Thompson's Estate 1961 (2) SA 20 (FC)** at 23 E-G.

[13] The invalidity point was only raised in Mrs Makibi's replying affidavit, understandably, but Mr Makibi did not seek to answer it in any respect in a further set of affidavits.

[14] There is thus no need to embark upon an attempt precisely to assess the current value of £500 nor to consider Mr. Makibi's possible entitlement to subtraction of the value concerned from the value of the vehicles claimed by Mrs Makibi. The value of 8 trucks and 14 trailers – to judge by the prices reflected in the invoices annexed by Mrs Makibi which pertain to the other 7 trucks – would probably be far and away in excess of £500 whether as at August 2009 or even now. It is unnecessary to put a finer point on it. The invalidity contention must succeed. The fact that any registrations

appear in Mr. Makibi's name is therefore irrelevant for present purposes.

[15] As to the 7 trucks which Mr. Makibi claims to have bought in July 2008, the invoices just referred to reflect the purchases as having been made by Everite Transport, all on 7 April 2008. In addition Mrs Makibi has annexed a copy of an agreement of loan dated 25 April 2008 between the deceased, of Everite Transport Hire, and Standard Lesotho Bank. It shows that the loan was for financing the purchase of trucks for hiring and that repayments were to be effected by deductions from the deceased's current account.

[16] Mr. Makibi produced no evidence to support his allegation that it was he who purchased the 7 trucks. Even just on the record that allegation must be rejected as unacceptable.

[17] Counsel for Mr. Makibi before us did not seek to advance any other ground of opposition raised in his client's opposing affidavit.

[18] The appeal cannot succeed and it is dismissed with costs.

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
ACTING PRESIDENT

I agree:

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For Appellants : Mr M. Ntlhoki KC

For Respondent : Mr M.E. Teele KC