IN THE COURT OF APPEAL OF LESOTHO

JUDGMENT

C OF A (CIV) 38/2015

In the Matter Between:

LESOTHO NATIONAL DEVELOPMENT CORPORATION **APPELLANT**

And

MASERU BUSINESS MACHINES (PTY) LTD **1ST RESPONDENT**

SMAS AUDITORS **2ND RESPONDENT**

SUNDAY ADACHE **3RD RESPONDENT**

BRAYKTHRU MEDIA (PTY) LTD **4TH RESPONDENT**

THE MESSENGER OF COURT (MR. LETSIE) **5TH RESPONDENT**

Neutral citation:

Coram: Majara CJ, Chinengho AJA, Mahase J

Heard: 21 October 2015

Delivered: 6 November 2015

Summary

Appeal against decision dismissing application of landlord-s tacit hypothec – parties not in dispute that hypothec terminated upon removal of the subject matter from landlord's premises – no relief sought- appeal moot and accordingly dismissed.

ORDER

On appeal from: High Court per MoleteJ

The appeal is dismissed with costs

JUDGMENT

Majara CJ (Chinengho AJA and Mahase JA concurring)

[1] This is an appeal against the judgment of the High Court handed down on the 12th August 2015. A brief summary of the facts is that the 1st respondent herein is the owner of a photocopier machine which it had rented out to the 4th respondent. The 4th respondent is a sub-lessee on the premises of the appellant herein, a statutory corporation that sub-lets property for industrial, residential, office and commercial purposes and it took the machine to the said premises.

[2] When the 4th respondent fell behind with payment of rentals the appellant attached the machine belonging to the 1st respondent pursuant to a tacit hypothec right against its tenant. Upon learning about the said attachment, the 1st respondent approached the court a quo for an order to inter alia, restrain and interdict the appellant from disposing of the machine; set aside the purported attachment; release the machine to the 1st respondent.

[3] The court a quo found in favour of the 1st respondent and ordered the appellant to release the machine to it. Consequently, the appellant applied to the court a quo for stay of execution of its judgment but was only granted the prayer for dispensation. It then was left with choice but to comply with the court order and released the machine.

[4] This was followed by the appellant filing the present appeal. However, it also appealed the lower court's refusal for stay. Meanwhile, the 1st respondent filed what it styled am interlocutory application to strike out the appeal. The appellant filed another application before this court for condonation for the late filing of its heads of argument in terms of the rules. All these proceedings were opposed at every stage. At the time of the appeal, the appellant had filed yet another application for consolidation of the appeals and applications.

[5] On the date of hearing and after much debate, the application to strike out the main appeal was abandoned as Counsel for the 1st respondent conceded that it did not meet the requisites of an interlocutory matter as it is defined by the Rules.[1] The grounds for the application to strike out were basically the same as those of the main appeal. The relevant rule reads as follows:-

> *"In this Rule, "an interlocutory matter" means any matter relevant to a pending appeal* ***the decision of which will not involve the decision of the appeal****."* Emphasis added

[1] Rule 18 (1) of the Court of Appeal Rules, 2006

[6] Similarly, Counsel for the appellant eventually conceded that the appeal against the order of the court a quo refusing stay of execution was dependant on the outcome of the main appeal and that notwithstanding the said outcome, the appeal against the refusal of stay would fall off either way so that there was no real benefit to pursue it. At the end of the day matters were narrowed down to arguments on the main appeal only.

[7] In this connection the appellant's case is premised on the following grounds and further grounds of appeal, that;

a) the court a quo erred in finding that the appellant was not entitled to exercise a hypothec over the first respondent's property when all the requirements for a legal exercise for such a right by the appellant were met;

b) the court a quo erred in finding that the landlord was 'not unaware' that the goods did not belong to the tenant when such awareness had only been brought to the attention of the applicant after a lawful exercise of the hypothec had been effected;

c) the court erred in finding that the landlord as required to investigate the ownership of the property on service upon the landlord when the law places the obligation to inform the landlord upon the tenant, before the exercise of the tacit hypothec;

d) the court erred in awarding costs to the 1st respondent when the later was equally at fault for failing to inform the appellant of the ownership of the property;

e) the court erred in finding that it was entitled to interfere with the unfinished proceedings of the subordinate court when neither

leave was sought from that court, nor an order made by the subordinate court relative to the disposal of the item in dispute. Consequently the court a quo erred in finding that it had jurisdiction to determine a pending subordinate court matter in which neither leave to intervene nor to join the Clerk of court to the proceedings was sought;

f) the court erred in holding that the question of urgency of the matter was no longer relevant by reason of the fact that the parties had agreed on the interdict and dispensation;

g) the court erred in finding that 1st respondent's property was unlawfully confiscated/impounded, when the only prohibition against the machine being moved out was an automatic rent interdict.

[8] I find it convenient to deal with the issue of jurisdiction first. In this connection, Counsel for the 1st respondent made the concession that although Section 6 of the High Court Act[2] requires a litigant whose claim falls under the concurrent jurisdiction of the both the High Court and the Magistrate Court to obtain leave of the High Court before instituting such a claim in the High Court or the Judge of the High Court may assume the jurisdiction mero motu, this Court has laid down the position that where there is concurrent jurisdiction between the said courts the subordinates courts have priority jurisdiction.[3]

[9] However, it was his submission that since the 1st respondent sought an order of specific performance for the release of his

[2] High Court Act No. 7 of 1978
[3] Nko v Nko LAC (1990-1994) 32

property the provisions of section 29 (d) of the Subordinate Courts Act came into play.[4] The section provides:-

"The court shall have no jurisdiction in matters,

(a) ....;
(b) ....;
(c) ....;
(d) in which is sought the specific performance of an act without an alternative payment of damages, ..."

[10] In my view, the relief sought does fall under this provision so that the general rule and the decision in the **Nko case** would be of no application in this appeal. This is moreso because it is not in dispute that the value of the machine is far in excess of the rental owing and as the court a quo correctly found, this founded jurisdiction of the court.

[11] Insofar as the issue of the purported attachment goes, Counsel for the appellant made the contention that the 1st respondent was labouring under the misconception that the appellant and 5th respondent had attached the property whereas the summons had an automatic rent interdict. Further that a court order is not required to exercise a tacit hypothec in this manner, so that the submission that the appellant had resorted to self-help is flawed.

[12] In my view, the problem with this submission is that it was not supported by any authority to could have persuaded the Court that it does indeed form part of our law. Counsel restricted his

[4] Subordinates Court Act of 1988

argument to the form as it appears in the schedule without giving the Court anything more. Whereas Counsel for the 1st respondent correctly argued in my view that there was an obligation to obtain a court order to perfect the rent. I accordingly find it difficult to accept that **Mr. Mothibeli's** argument has merit that what the appellant did was indeed done in terms of the correct position of our law.

[13] In this regard, the written submission by **Mr. Mothibeli** which he furnished to the Court at a later stage i.e. that **Mr. Setlojoane** raised the point that there is no statutory provision in Lesotho relating to attachment by way of automatic rent interdict for the first time during oral submissions does have merit. Indeed it has since been laid down that a party cannot be allowed to direct the other to one issue and seek to argue a new one in reply. However, it is my view that this submission does not advance this issue any further because I have already found that the appellant had failed to provide authority supporting that type of attachment in Lesotho anyway which is novel to this Court.

[14] In connection with the ground that the court a quo erred in finding that there was no urgency in this matter, I am of the opinion that the point is misconceived for the reason that, that factor notwithstanding, the matter was enrolled and heard in the court a quo and this brought the issue of urgency to rest and thus, renders it not appealable. This is because the ruling on urgency per se was not definitive of the rights of the parties as it did not grant definite and distinct relief.[5] As a matter of fact this ground

[5] Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296

merely served to complicated and unnecessarily burden this appeal. It accordingly falls to be dismissed.

[15] The rest of the grounds of appeal are in connection with the actual merits of the matter namely, consideration by the Court of the legal requirements with respect to the landlord's exercise of a tacit hypothec. In this regard, the 1st respondent raised the point that this appeal has since become moot for the reason that the property/goods in question was removed from the appellant's premises pursuant to the order of the court a quo and this effectively terminated the tacit hypothec. That this is so especially because ownership of the property is not in dispute as the appellant admits that the machine belongs to the 1st respondent who is not a party to the sub-lease agreement between the appellant and the 2nd to 4th respondent. **Mr. Setlojoane** made the submission that for this reason, this court's judgment would simply serve no purpose except to be rendered academic.

[16] I however hasten to add that these submissions were dealt with in greater detail in the application to strike out the appeal rather than in the main appeal itself. However, since both parties are in agreement that the tacit hypothec terminated upon removal of the machine, the Court invited them to make their submissions on this point as its finding on it might be dispositive of the matter.

[17] In this connection, **Mr. Setlojoane** made the contention that the appeal is of no consequence regard being had to the fact that even if the appellant is successful, the order of this Court will be

of no assistance to the appellant. He added that there is no life line or existing controversy between the parties and it is not in the interest of justice for the merits and demerits to be heard. To this end he referred the Court to the remarks of Ackerman J in the case of **National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others**[6] quoted with approval in **Independent Electoral Commission v Langeberg Municipality**[7] to wit:-

> *"A case is moot and therefore not justifiable if it no longer presents an existing or life controversy which should exist if the Court is to avoid giving an advisory opinion on abstract propositions of law."*

[18] He added that the appellant's case as pleaded in the answering affidavit deposed to by its Chief Executive Officer is simply that *"contents are denied, the appeal is not moot as there are serious legal issues that require this Honourable Court's attention, as well as the costs orders that have been challenged and appealed against."*

[19] He accordingly submitted that the present appeal involves ordinary and individual litigants and if the appeal is upheld, the order will have no practical effect on the parties. Further that future cases will and/or might present different factual matrixes and it would therefore serve no purpose to resolve and entertain the present appeal more so when there is no public interest affected by the decision.

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[6] [1999] ZACC 17: 2000 (2) SA 1 (cc)
[7] 2001 (3) SA 925 at 931

[20] For the appellant, **Mr. Mothibeli** made the submission that while they accept that in terms of the law the tacit hypothec terminated upon removal of the property from the appellant's premises, the importance of the court's consideration of this appeal is to define the position of the law especially because the appellant is in the business of leasing out property for different purposes and the same issue might arise again in the future.

[21] He added that the general rule that courts of law should not determine moot cases and that a case is moot when no controversy exits and the court cannot grant actual relief, has exceptions and the doctrine of mootness is not exempt. It was his submission that one of the exceptions is questions that are capable of repetition.[8]

[22] Indeed, this position was stated by the Supreme Court of New Mexico in a case where the petitioner, one Garcia had filed for a writ of habeas corpus during his incarceration and transfer on detainer to Nevada. At the time of the petition Garcia was still serving the balance of his original revoked probation period. His argument therein was that his claim was not moot as he was being held illegally. I will come back to this case later.

[23] **Mr. Mothibeli** made the further submission that in the present matter the subsequent conduct application before the Judge a quo, *"in particular the constructive refusal of the order staying the execution without a definite/express refusal, which turned out to be real"* warrants the determination of the merits of this appeal.

[8] Garcia v Dorsey, No. 29,689 November 2006

[24] I now turn to deal with the question of mootness of the appeal. It is trite that as a general rule the Courts will not decide moot cases. It is however also a fact that there are exceptions to the mootness doctrine which allow for review as already shown in the cases quoted above. Therefore the question that we have to consider *in casu* is whether the present appeal passes muster for the exception to be applied to it.

[25] Basing myself on the remarks of the Supreme Court in the case of Garcia, it appears to me that the first consideration, i.e. that a case is moot when no actual controversy exists and the court cannot grant relief, is not met in this appeal. This is because there is no controversy and/or dispute that the landlord's tacit hypothec terminated upon removal of the machine from the appellant's premises and that in the result this Court cannot grant the appellant relief.

[26] The second consideration that allows for review of moot cases is where they present issues which are capable of repetition yet evade review. In my view, it cannot be correctly argued that issues concerning the exercise of the landlord's tacit hypothec even if capable of occurring in the future would as a matter of fact evade review. It is my finding that should this issue arise in the future either between the appellant and any other parties, it will be premised on different facts and circumstances which will be properly brought before the Court for its consideration so that it can grant actual relief.

[27] I also find that the facts in **Garcia (supra)** upon which the appellant relies in support of his submission, are distinguishable

from what obtains in the present appeal because at the time he filed his petition, Garcia was still in incarceration and the Court was able to grant him actual relief. Indeed this is borne out by the finding of the court as it is stated in relevant parts at paragraph {18} of its judgment as follows:-

> *"Our review of the relevant statutory and case law leads us to the conclusion that Garcia's claim remains a live controversy because the procedural due process violation he alleges impacts his current incarceration."*

[28] Going back to the remarks of the Court in the case of **Independent Electoral Commission v Langeberg Municipality (supra),** my understanding of the situation per the judgment of Yacoob J and Madlanga AJ as they analysed the position stated in the **National Coalition for Gay and Lesbian Equality & Others Case (supra)** is that in considering 'mootness' they drew a clear distinction between the powers of the Constitutional Court vis-a-vis those of the other courts in the following words at page 931 F:-

> *"Even though a matter may be moot as between the parties in the sense defined by Ackerman J, that does not necessarily constitute an absolute bar to its justiciability.* ***This Court*** *has a discretion whether or not to consider it."* Emphasis added

[29] They continue as follows in relevant parts of the succeeding paragraphs:-

> *"In High Courts, sitting as Courts of appeal, and in the Supreme Court of Appeal (SCA) the situation is governed by s 21A of the Supreme Court Act 59 of 1959. This is to be contrasted with*

the position in this Court where there is no equivalent statutory provision....

***This Court** has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising out in an appeal it is obliged to determine all other moot issues.*

There if no live controversy between the parties. The elections are over and there is no suggestion that any order we make could have any impact on them."

[30] *In casu*, not only is this Court not exercising its constitutional jurisdiction, it is also my finding that the appellant has not successfully met the requirements of the exception, i.e. the importance of the case, as well as complexity and/or fullness of the argument it advanced. This is because the basis of his submission in terms of its assertions is briefly that "*the appeal is not moot as there are serious legal issues that require this Honourable Court's attention, as well as the costs orders that have been challenged and appealed against."*

CONCLUSION

[31] Based on the foregoing considerations and analysis, we find that this appeal is moot and does not pass muster in order for the exception to the general rule to be applied. I therefore order as follows:-

The appeal is dismissed with costs on the ordinary scale. There is no adverse order of costs consequent to the institution of the incidental applications and appeals as the parties were equally guilty of unnecessarily burdening this appeal with those proceedings.

N. J. MAJARA CJ

I agree: **P. CHINENGO AJA**

I agree: **M. MAHASE JA**

For the Appellant : Mr. T. Mothibeli

For the 1st Respondent : Mr. Setlojoane