IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU

C OF A (CIV) 2/2016

In the matter between:

TEXAS OIL (LESOTHO) LIMITED (in Liquidation) **1ST APPELLANT**

STANDARD LESOTHO BANK LIMITED **2ND APPELLANT**

and

JOHANNES TS'OTLEHO KOKOROPO **RESPONDENT**

CORAM: **CLEAVER, AJA**
LOUW, AJA
CHINHENGO, AJA

HEARD: **12 OCTOBER 2016**
DELIVERED: **28 OCTOBER 2016**

SUMMARY

Mortgaged immovable property sold by public auction by way of execution –judgment debtor refusing to vacate property- Execution creditor obtaining order of eviction and interdict against interference with possession and occupation- Execution creditor filing for contempt of court upon debtor's continued refusal to vacate property- Property re-mortgage by execution creditor -Debtor lodging 'counter application' to set aside sale but dismissed for lack of prosecution – 'Counter application' re-instated without formal application therefor and without notice to affected parties consisting of the execution creditor (now in liquidation), new mortgage bond holder, liquidator of execution creditor, Master of High Court and Deputy Sheriff – 'Counter application' succeeding in High Court and sale by public auction set aside 9 years after date of sale- Decision challenged on appeal- Held, re-instatement of "counter application' irregular- non-joinder of necessary parties parties fatal – Judgment setting aside auction sale reversed.

JUDGMENT

CHINHENGO, AJA

Introduction: conflicting court orders

[1] This is an appeal from the judgment of the High Court (per Makara J) delivered on 14 December 2015. The order issued by the judge reads –

> *"In the premises, the counter application is granted in these terms:*
>
> *(a) The proceedings in the main application were irregular in as much as the applicant therein was not the purchaser of plot no. 1403-034;*
>
> *(b) The judgment in CIV/APN/188/07 is rescinded due to mistake common to all parties to the extent that applicant was not the purchaser of the property allegedly sold at public auction;*
>
> *(c) The purported public sale held on 15th December 2006 is set aside as never took place nor was it published in terms of the law;*
>
> *(d) The Deputy Sheriff is directed to re-advertise the site with full description and the necessary details and developments on it;*
>
> *(e) There is no order as to costs since there was no opposition to this application as Mr. Mpaka was merely appearing as an officer of the court."*

[2] The registrar of the High Court issued the same order on 18 December 2015 but it differs in wording and substance from that made by the judge. The registrar's order reads –

> *"1. Prayer (a) is granted in that the proceedings in the main application are irregular in as much as the applicant therein was not the purchaser of Plot No. 14303-34 Matala Urban Area Maseru.*
>
> *2. Prayer (b) is not grantable since it ask this court to rescind the judgment of another judge in CIV/APN/188/07* ***Taxas oil Pty (ltd) v Kokoropo & 5 others****, due to mistake common to all parties to the extent that applicant was not the purchaser of the property allegedly sold at the public auction. In any event the prayer has been overtaken by the developments in that the respondent company has ex facie the papers been liquidated.*
>
> *3. Prayer (c) is granted in that the purported public auction held on the 15th December 2006 was not published in terms of the law and the sale is accordingly set aside.*
>
> *4. Prayer (d), which asks the court to direct that the deputy sheriff to re-advertise the site, is refused because it has been overtaken by the developments.*
>
> *5. Prayer (e) is not grantable as the respondent company has since been liquidated and ceases to exist."*

[3] The differences in substance between the two orders are disconcerting. The Court asked counsel to explain the serious discrepancies between the orders. No satisfactory explanation was forthcoming. Counsel were of the view, which the Court shared, that in the circumstances, the order as appears in the judgment signed by the judge concerned is the authentic order. A copy of the judgment signed by the judge has since been availed to us. I must recall that the order made by a judge in any proceedings is the most important part of the judgment

so far as the litigants are concerned. The terms of the judge's order should therefore be clear beyond any doubt. It is perhaps necessary that judges in this jurisdiction should adopt the salutary practice in many other jurisdictions which requires a judge to ensure that the order he or she makes is signed by him or her or at the very least that the he or she reads and approves it for reproduction by the registrar, regardless of who has drawn it up.

Background

[4] The background to this appeal is the following. In Case No. CIV/T/24/2006 the respondent was sued by Lesotho Bank (1999) Limited for a debt arising from money advanced to him by the bank, which he failed to repay. The bank obtained judgment for M351 536.39 together with interest thereon at the rate of 12.5% per annum calculated from 25 November 2005 to the date of payment and costs of suit. As security for the money advanced the respondent had registered a mortgage bond in favour of the bank over a piece of land belonging to him and known as Plot No. 14303-34 situated at Ha Matala in the Maseru Urban Area ("the plot"). Upon granting judgment against the respondent the court declared the plot to be especially executable. This meant that the plot would be sold and the proceeds from the sale paid over to the creditor bank.

[5] Pursuant to a writ of execution issued by the registrar of the High Court, the Deputy Sheriff sold the plot by public auction on 15 December 2006. The buyer was one Selai Mokete (Mokete), the managing director

of, and a 50% shareholder in, the 1st appellant. The purchase of the plot by Mokete (now deceased) has given rise to some of the issues with which this judgment is concerned.

[6] At the auction sale Mokete, who was in effect and intention buying the plot for the 1st appellant signed the Conditions of Sale in his own name and not as a representative of the 1st respondent, yet clause 5 of the Conditions of Sale provided that –

> *"The purchaser shall, as soon as possible after the sale, and immediately on being requested by the auctioneer sign these conditions, and if he has bought as agent for a principal, state the name of the principal."*

[7] Mokete believed that, despite the non-disclosure of his principal, he had purchased the plot on behalf of and for the 1st appellant.

[8] The plot has certain developments thereon, residential units and a restaurant, among others. These developments were on lease to five individuals as at the time of the auction sale. Despite the sale, the respondent refused to vacate the plot. On 2 April 2007 the Deputy Sheriff by way of a return of service reported that –

> *"Mr Kokoropo (the respondent) is not complying with the court process where his property situated at Ha Matala was sold by public auction on the 15th /12/2006 and all the documents relating to this auction were served upon him personally, and he is refusing to vacate the said premises and he is even collecting the monthly rentals from the tenants, and he is*

> *obstructing the deputy sheriff from carrying out his duties, so we are asking the honourable court to intervene so that the purchaser can exercise his rights to the sold property."*

[9] The respondent's refusal to let go of the plot as reported by the Deputy Sheriff prompted the 1st appellant to approach the court on notice of motion and on an urgent basis seeking interdictory and other relief. The 1st appellant sued not only the respondent but also the five tenants for the relief specified in the notice of motion. Mokete deposed to the founding affidavit in his capacity as the 1st appellant's managing director. I will refer to this application as "the interdict application".

[10] The respondent delivered his notice of intention to oppose the interdict application on or about 22 May 2007. He did not deliver any answering affidavit. The 1st appellant then applied, in terms of rule 8(13) of the High Court Rules 1980, for a date of hearing of the application. The matter was set down for hearing on 11 June 2007. On that date the court granted the order sought by the 1st appellant. The order interdicted the respondent from interfering with or obstructing the 1st appellant in the possession, control and occupation of the plot. In particular, it prohibited him from entering the premises, collecting rent from the tenants, threatening or intimidating or interfering or obstructing the tenants from paying rental to the 1st appellant. It also prohibited the respondent from threatening the tenants with eviction and ordered him not to withhold from the 1st appellant the rental that he received after the date of the auction sale. By the same order the tenants were interdicted from paying

rent or other amounts in respect of the plot to the respondent. They were thus directed to pay the rent to the 1st appellant henceforth.

[11] The respondent did not comply with the court order and, it seems, the tenants also. The 1st appellant thereupon instituted contempt proceedings to enforce the order at least, so it appears, against the respondent only. I will refer to these proceedings as "the contempt application". It is not in dispute that the contempt application was instituted even though it is not part of the record before the court. That the contempt application was in fact made is therefore not only common cause, but it is also confirmed by the fact that on or about 9 November 2007 and in response to it, the respondent delivered a counter application in which he sought a number of orders from the court: an order declaring that "the proceedings in the main application" were irregular for the reason that the 1st appellant was not the purchaser of the plot; an order rescinding the judgment in the main application (CIV/APN/188/07) *"due to mistake common to all the parties to the extent that the (1st appellant) was not the purchaser of the property allegedly sold at public auction"*; an order setting aside the auction sale conducted on 15 December 2006 for the reason that at law it did not take place at all because it was not publicised as required, and an order directing the Deputy Sheriff to re-advertise the plot with a full description and details of the developments thereon.

[12] It is not immediately clear which proceedings are referred to as *"the proceedings in the main application"* and whether the interdict

application is what is referred to as the "main application." Clarity can be obtained from examining closely the nature of the relief sought. It should also be noted that the case in which the respondent was order to pay the money that he owned to the bank is No. CIV/T/24/2006. The reference to the main case must therefore be a reference to the interdict application commenced as Case No. (CIV/APN/188/07).

[13] In the affidavit supporting the counter application the respondent admitted that he did not oppose the interdict application because he was under the impression that attachment and sale in execution related to or affected only a portion of the plot on which he had built residential units with funds advanced to him by Lesotho Bank (1999) Ltd, being the judgment creditor in Case No. CIV/T/24/2006, mentioned in paragraph 4 above. He averred that he laboured under the impression that "the developed complexes like the clearly separate Restaurant complex" was not included. The respondent averred that on further investigation he found out that –

> *"… the whole process of attachment, publication of sale, and representation in buying were irregular, example:*
>
> > *(a) No necessary publication has been shown relating to public auction sale;*
> >
> > *(b) The purchaser not the company but one individual did the purchase nor does the individual claim to be agent of the sale is contrary to conditions of sale;*
> >
> > *(c) The person now suing was never a party to the auction sale;*

> *(d) The auction sale was never public and there was no competition to buy at a properly held public auction."*

[14] Having made the above averments the respondent accordingly sought an order that the whole process of attachment and sale be conducted afresh. The 1st appellant delivered its notice of opposition and opposing affidavit on or about 13 and 27 November 2007, respectively. Again Mokete deposed to the opposing affidavit, this time describing himself merely as a representative of the 1st appellant.

[15] I must pause here and observe that, to my mind, the respondent employed a strategy that the 1st appellant unwittingly fell victim to. He described what in essence was an opposition to the 1st appellant's interdict application as a counter application, but at the same time creating the impression that it was a counter application to the 1st appellant's contempt application. He thus ingeniously took the opportunity by such description of his papers to oppose the interdict application which he had not done, as he said, because he laboured under the mistaken belief that only a portion of the plot was sold at the auction. Not only did the 1st appellant fall for this trick, but also the judge who eventually decided the counter application.

[16] Having thus fallen victim of the respondent's trick, the 1st appellant gave notice in its opposing affidavit to the so called counter application that at the hearing of the counter application it would raise certain points *in limine,* namely the non-joinder of the judgment and execution creditor

(Lesotho Bank (1999) Limited) and the Deputy Sheriff as the person who conducted the auction sale sought to be impugned. The deponent to the 1st appellant's opposing affidavit, Mokete, inadvertently seized the opportunity to explain why he signed the Conditions of Sale in his personal capacity and what he did thereafter to regularise the purchase by his principal. At paragraph 6 of the affidavit, he averred:

> *"I need to explain the involvement of the respondent herein (a reference to the 1st appellant). I am the general Manager and major shareholder of the respondent. I caused a representative of the respondent to attend the auction and to bid on behalf of the respondent. I was presented with the Conditions of Sale by the Deputy Sheriff, who instructed me to sign. I was not aware at the time that I should sign as a representative of the respondent. This, as I am advised, is not of any consequence whatsoever, as I ceded my rights in the agreement to the respondent, which I was entitled to do. The respondent got full rights acquired in terms of the sale and consequently is entitled to enforce its rights as the owner of such rights. Attached hereto please find Annexure 'B', being a true copy of the Cession."*

[17] Annexure 'B' is indeed a cession by Mokete as purchaser of the plot. In terms thereof he ceded "all my right, title and interest in and to the conditions of Sale in Execution of immovable property under CIV/T/24/2006, dated the 15th of December 2006 to Texas Oil (Proprietary) Limited". The cession was executed on 16 December 2006, the day after the auction sale.

[18] The 1st appellant goes on to show why the respondent could not have been mistaken as to the subject matter of the auction sale. It states

that the respondent was served with the warrant of execution and the notice of sale and took no action in regard thereto; he had registered a mortgage bond over the plot in favour of the creditor bank and the bond documents showed that the plot as a whole, and not just a portion of it, was the subject matter of the mortgage bond. He therefore must have known and in fact knew that the plot as a whole was advertised for the sale. The 1st appellant also averred that it was not aware of the alleged irregularities in the sale of the plot: the court record shows that the sale was published in the Government *Gazette*; the actual purchaser ceded his rights to the 1st appellant and the auction was a public auction duly conducted by the Deputy Sheriff. The 1st appellant accordingly prayed for the dismissal of the counter application "with a special order of costs on the attorney and client scale, to be paid *de bonis propriis"*.

[19] The 1st appellant attached to its opposing affidavit a supporting affidavit of the Deputy Sheriff in which he denies that the auction sale was held improperly or against the Rules and emphatically states that –

> *"I was charged with the execution of immovable property known as Plot No. 14303-034, Ha Matala, Maseru. I confirm that I have complied with all the provisions of the Rules of the High Court and conducted the sale in execution on the 15th of December 2006. A copy of the Conditions of Sale which applied to the auction is attached to the affidavit of the respondent (1st appellant)."*

[20] The respondent delivered his reply in the counter application on or about 30 December 2007. Therein he disputed the non-joinder issue in rather unclear terms:

> *"4.2 Non-joinder: The counter application is mainly about rescission of the original application and the contempt of court application. So dismissal of the application of rescission of contempt application which did not join Lesotho Bank (1999) Limited cannot be irregular so as to prejudice respondent.*
>
> *4.3 The Deputy Sheriff has joined himself by making affidavits to both proceedings."*

[21] The averment that the Deputy Sheriff had joined himself was made on the basis that he had filed an affidavit supporting the 1st appellant's opposing affidavit to the counter claim. The respondent went on to state that the law requires a purchaser to disclose his status as either a principal or an agent, which Mokete failed to do, hence the contention that the sale was irregular. The cession, he said, was an after thought and did not cure the irregularity. He also disputed the 1st appellant's prayer for costs as having no sound legal foundation.

[22] On or about 16 January 2008, the 1st appellant delivered a notice of objection to the replying affidavit on the grounds that it was filed out of time and without leave of the court as provided in Rule 8 of the High Court Rules. In response the respondent filed a notice of opposition to the objection and an application on notice seeking condonation for the late filing of the replying affidavit and for leave to join Lesotho Bank (1999) Limited and the Deputy Sheriff as parties to the counter application. This

was on 23 January 2008. The 1st appellant opposed the condonation application and the application to join Lesotho Bank (1999) Limited and the Deputy Sheriff. In the main the 1st appellant contended that Lesotho Bank (1999) Limited had merged with Standard Bank Lesotho Limited and as such it no longer existed as a separate *persona*. It also contended that there was no longer any legal basis for joining the Bank and the Deputy Sheriff. In its reply the respondent pointed out that the 1st appellant could not now object to the joinder of the Bank and the deputy Sheriff when it had raised the issue itself.

[23] The respondent sought the reversal of the sale in execution about a year after the sale for basically three reasons. He alleged that when the sale was held and he did not oppose it as he was under the impression that only a portion of the plot, on which the residential units built with loan funds stood, was to be sold and not the whole plot. This is a completely untenable contention. The judgment debtor registered a mortgage bond in favour of the Bank as security for the loan over the plot as a whole. There was no basis whatsoever for him to believe that only a portion of the undivided plot would be put up for public sale. The second reason was that the sale was not advertised as required by law so as to attract buyers. The Deputy Sheriff filed an affidavit attesting to the fact the sale had been conducted according to the law. The respondent did not place enough evidence before the court of the irregularities he was alleging. The third reason was that the execution creditor was not the purchaser of the plot at the public sale but another individual who did not disclose, as required by the Conditions of Sale, that he was acting as agent.

The actual purchaser ceded his rights in the plot immediately after the sale and the respondent did not mount a direct challenge to the cession. The transfer through the cession therefore stands.

[24] The stream of applications appears to have abated in January 2008. At this point in time no date had been fixed for the hearing of any of the applications then before the court. The next document that appears at page 67 of the record before this Court is one citing Texas Oil Lesotho (Pty) as "Appellant/Applicant" and Johannes Tsotleho Kokoropo and the four tenants at the plot as respondents. That document is a handwritten note and/or order by the then Chief Justice. It is dated 14 March 2011 and reads –

> *"Record reveals matter ground to a dead stop upon delivery of an order made as long ago as 23-11-2009 by Hon Guni J postponing to 4-12-2009. Court infers loss of interest from this long period of inertia. Order: Dismissed for want of prosecution."*

[25] Rather confusingly the same document bears at the foot thereof an inscription "Dates 24 /04/13, Hearing." Counsel on both sides explained to the Court the meaning of this document. *Adv. Mpaka* for the 1st appellant said that the Chief Justice dismissed the contempt application and the respondent's counter application for want of prosecution. *Adv. Tsenoli* for the respondent said that the matter dismissed by the Chief Justice was the contempt application and not the counter application. He

also said that the notation "Dates 24/04/13 Hearing" was the date fixed by Makara J for a hearing of the counter application.

[26] At page 68 of the record appears an order by Makara J dated 13 June 2013 to the effect that the "counter application is reinstated" with no order as to costs. It shows that the judge made the order after hearing only the respondent's attorney. There follows two applications for a date of hearing of the counter application filed on behalf of the respondent on 14 June and 3 July 2013 respectively. The 1st appellant's attorneys received these notices and on or about 10 July 2013 they delivered a notice in terms of Rule 30 of the High Court Rules. I reproduce the notice *in extenso* because the 1st appellant relies on it for argument on the issues before court. The Notice reads-

> *"Kindly take notice that Du Preez, Liebetrau & Co having been served with notices in terms of the Rules of court and a court order hereby notes an objection against the service of the notice in terms of Rule 8 (13) and the order of the court;*
>
> > *(i) Du Preez, Liebetrau & Co Attorneys or acting on behalf of any of the respondents never gave notice to be attorneys of record on behalf of any party hereto or on the address where process on behalf of any party shall be received, as provided for under Rule 4 (10), 10 or 12 of the rules of the court.*
> >
> > *(ii) 1st Respondent (Standard Lesotho Bank) was never joined as a party to the proceedings in terms of Rule 12 and applicant (Kokoropo) has no rights in law or otherwise to serve any attorneys of his choice who does not act for the mentioned respondents;*

(iii) The applicant's attorneys are fully aware that the 2nd respondent (Lesotho Bank Limited) is in liquidation and is represented in law by the liquidator and/or Master of the High Court, and these Attorneys cannot, in terms of the provisions of the rules of court serve on any Attorney they choose;

(iv) The liquidators of Lesotho Bank Limited, 2nd respondent, are not joined as a party to the proceedings and were never served with the originating applications;

(v) The applicant's attorneys are fully aware that the 3rd respondent (Texas Oil (Lesotho) Limited) is in liquidation and is represented by the liquidator and/ or Master of the High Court, and these Attorneys cannot, in terms of the rules of court serve any Attorney they choose;

(vi) The liquidators of the 3rd respondent, Texas Oil (Lesotho) are not joined as a party to these proceedings and were never served with the originating applications;

(vii) No entity by the name Texas Oil (Lesotho) exist and cannot legally be represented nor be sued or cited in court processes;

(viii) Not one of the respondents have filed affidavits in terms of Rule 8 (10) nor gave notice to be a party to the proceedings;

(ix) the notice is defective and does not comply with Rules of court on the names of the 1st, 2nd and 3rd respondents;

(x) the Master of the High court, 4th respondent was never joined as a party to these proceedings;

> *(xi) no date of hearing can be allocated by the Registrar in terms of Rule 8 (13) where the entities are not parties to the proceedings;*
>
> *Kindly take notice that the 1st, 2nd and 3rd respondents shall apply at the hearing for the notices to be set aside and that applicants' attorney pays costs de bonis propriis on Attorney and own client scale."*

[27] The respondent filed an unintelligible notice on behalf of Standard Lesotho Bank, Lesotho Bank Limited and Texas Oil (Lesotho) Limited (in Liquidation) opposing the notice in terms of Rule 30. This last notice was filed on or about 10 July 2013.

[28] The above outline of some of the many applications made to the court and notices filed by the parties do not give a very clear picture of how this litigation progressed. Less still do they give a good impression that the litigation was conducted with the professionalism and diligence, which this Court expects from parties and their attorneys. The record of proceedings has a number of gaps, such as the absence therein of the 1st appellant's contempt application. The gaps are perhaps explainable on the basis that some of the relevant events took place a long time ago and the finalisation of this matter has taken far too long. The order condemning the respondent to pay the debt was made on 2006. The auction sale was conducted on 15 December 2006. The interdict application was lodged on 27 April 2007 and the relief sought therein granted on 11 June 2007. The counter application was filed on or about 9 November 2007. The then Chief Justice's order dismissing the application or applications was made on 14 March 2011. Two years later, on 13 June

2013, Makara J re-instated the counter application without hearing both parties and without a formal application for the re-instatement of the application. The counter application was only finalised on 14 December 2015. To be noted is that Texas Oil (Lesotho)(Pty) Ltd was finally liquidated at the instance of Standard Lesotho Bank Limited by order of the High Court (Hlajoane J) on 5 July 2010. The order reads-

> *"1. The respondent be and is hereby placed under liquidation in the hands of the Master of the High Court.*
>
> *2. The Order herein be and is to be published once in the Lesotho Today.*
>
> *3. Stefan Carl Buys and Salemane Phafane be and are hereby appointed as joint liquidators of the estate of the respondent (Texas Oil (Lesotho) Limited) specifically granting onto them such powers as are set out and provided for in Section 188 of the Companies Act No. 25 of 1967."*

First High Court judgment

[29] Makara J, so the record shows, heard the counter application on 13 June, 11 December 2014 and 18 February 2015 and he handed down the first instalment of his judgment on 15 July 2015. The second and last portion of the judgment was delivered on 14 December 2015. These judgments provide other insights into the case that do not appear in the record of proceedings.

[30] The first judgment ordered *"service of all the litigation papers involved in this case upon Standard Lesotho Bank for it to consider filing written counter papers to the counter application and thereafter submit Heads of Argument on same."* This it had to do within 21 days of the order. The Deputy Sheriff was granted leave *"to react in writing to whichever papers the bank could file with the court"* within 7 days of the bank filing its papers. It is to be noted that at paragraph 27 of this judgment the learned judge dealt with the question whether or not the counter application was extant. After considering the order made by the Chief Justice dismissing whatever application or applications he was considering for want of prosecution, the learned judge said-

> *" At this stage the Court finds that it must preliminarily determine whether or not the counter application has since its inception, continued to exist and pending a hearing on the scheduled dates and times. The question is resolvable through reference to the Court's minute and/or its order on the subject… a revelation from the papers filed is that the company had brought the interdict and contempt applications some time around April 2007. The interdict application was as it has been indicated, granted in rule nisi terms while the latter was never heard until on the 14th March 2011 when it was removed from the roll for want of prosecution. In the verbatim words of Lehohla CJ, 'Court infers loss of interest by period of inertia'. On that basis he ordered for the dismissal of the case for want of prosecution. There is from there, no iota of a recording that the counter application was ever treated as such. Ultimately the court remains seized with it for hearing until it directs otherwise. Here it has to be recognised that a counter application is an independent litigation in its own right though interlinked with the main one –Danielz N.O. v De Wet and Another; De Wet and Another v Danielz N.O. ([2008] 4 All SA 549 C). This brings a point home that the argument that the*

> *applicant should apply for the re-instatement of the counter application is irrelevant and misdirected. It is accordingly dismissed and it is logically ruled that a hearing of this application should proceed as scheduled."*

[31] It is not clear why the judge dealt with this issue at all. He had already made an order re-instating the counter application on 13 June 2013. That order appears at page 66 of the record. It is to be observed that despite making a positive finding in paragraph 27 of the judgment that the counter application remained on the table and a further finding dismissing the 1st appellant's contention that the counter application could only have been re-instated upon a successful application therefor, he did not make any order in that regard. At paragraphs 28 – 34 the judge dealt with the non-joinder of Standard Lesotho Bank and the Deputy Sheriff and then made the order to which I have referred above. In making that order the judge recognised and accepted that the respondent had not joined the Bank and the Deputy Sheriff in the counter application and further that he had made no application for their joinder. Nonetheless he took up the cudgels for him at paragraphs 32 and 36 in particular, where he stated-

> *"32. The basic insufficiency in the counter application could rightfully, depending on the perception of justice by the court seized with a similar matter, be fatal to the application. There is however, a mitigating consideration that the non-joinder of the Bank and the Deputy Sheriff was occasioned by the simple adoption of the citations followed by the applicant in the original application, which triggered the present one. This was oblivious of a change in the content, the prayers and*

> *consequently a legal imperative for the additional respondents.*
>
> *36. The Court in exercising the pronounced discretionary latitude finds that though the applicant has committed rudimentary mistakes of law, he has nevertheless; ex facie his papers established that he has a prima facie case against the company, the Bank and the Deputy Sheriff. It would as a result rhyme with a sense of justice for the Bank to be provided with the opportunity to tell its counter story if it would so elect. It could perhaps, address the controversies on the company's credentials to have bonded the Plot to it, the lawfulness of the conduct of the sale by the Deputy Sheriff, its alleged connivance with the Company against the applicant, the absence of evidence that the purchase price was deposited into the court contrary to law."*

[32] On appeal the 1st appellant complained that the judge dealt with issues that had not been placed or argued before him. It seems to me that there is some merit in this complaint but one cannot be conclusive about it since the parties filed no affidavits to deal with these issues. The record is not helpful in this connection.

[33] I will pause here to deal with certain issues arising from the first judgment that on their own may dispose of this appeal. First as I have already stated, the judge had re-instated the respondent's counter application on 13 June 2013 without the participation of any of the other parties but perhaps that on the respondent only. He had done so without any application for the re-instatement of the counter application. Second, there was an indication on file that the counter application had been dismissed along with other applications pertaining to this matter that

had been dormant for about 2 years. Third, the judge ignored fundamental issues raised in the Rule 30 Notice, namely the non-joinder of necessary parties, disregard of the fact that certain of the companies were in liquidation, irregular service of notices and other court process by the respondent upon Du Preez, Liebetrau & Co, and the fact that the party that would have suffered immeasurable prejudice by the granting of the reliefs sought in the counter application, Texas Oil (Lesotho), had long been placed under liquidation as of 5 May 2010. Fourth the failure to take into account that the property in issue had been registered in the names of Texas Oil (Lesotho) which had been placed under liquidation and which had registered a mortgage bond over the plot in favour of another party. The counter application was dealt with against this host of irregularities. It was not supposed to see the light of day at all. The appeal may succeed on this basis alone.

Second High Court judgment

[34] The second judgment is really a continuation of the first. The judge added new and additional paragraphs 39 to 55 to the first judgment and delivered on 14 December 2015. It is against this second judgment that the appeal was noted. At paragraph 39 the learned judge state as follows-

> *"After the court had given the Bank the indulgence of being served with all litigation papers between the parties for it to consider joining the proceedings, it transpired that despite its knowledge of service of same, it decided otherwise. The same applies to the Deputy Sheriff and their time for doing so has expired."*

[35] The judge then went ahead and decided the matter on the papers before him and on the basis of earlier submissions made to him by counsel who he said, *"decided not to re-address the Court and adhered to their earlier arguments and submissions on law".*

[36] Now, there is nothing on record to support the judge's finding that the Bank and the Deputy Sheriff had knowledge of service of the litigation papers purportedly served upon them, let alone any proof that they had in fact been served. Counsel does not appear to have made any submissions on service of the papers or advised the court what the attitude of those two parties who should have been served was. What we have on record is a protest in the Rule 30 Notice by Du Preez, Liebetrau & Co Attorneys, which it is commonly accepted the court did not deal with, that they were not authorised to receive service on behalf of Standard Lesotho Bank, Lesotho Bank Limited, Texas Oil (Lesotho)(in liquidation), the the Master of the High Court or the liquidators of any of the companies, as the case may be, and as such service upon them was invalid. Texas Oil Lesotho (Pty) Ltd it should be recalled had long been placed under final liquidation.

[37] The second judgment contains the order that I have reproduced in paragraph 1 of this judgment.

[38] In order to finalise the matter before him the judge dealt with four issues – the sufficiency of the publication of the plot for purposes of the sale; the fact that Texas Oil (Lesotho) Ltd was not a party to the sale and

Mokete was the individual who bought the plot; the argument that the respondent did not appreciate or understand that the plot as a whole was up for sale at the auction and that the counter application was never dismissed on 14 March 2011. It is against this judgment that the appeal lies.

Grounds of appeal and submissions thereon

[39] The Notice of appeal sets out six grounds of appeal. These are that the learned judge in the court a quo erred and misdirected himself –

> *"1. … in re-instating and entertaining the counter application without a substantive application filed of record; alternatively for holding that it was only the main application that was dismissed for want of prosecution and not the counter application way back in 2009 by the then Chief justice Mr. M Lehohla. This finding is contrary to the clear minute of the record in as much reference was made to CIV/APN/188/2007 the same number of the counter application.*
>
> *2. … in failing to adjudicate upon the Rule 30 Notice.*
>
> *3 … in the first judgment of 15th July 2015 by making orders on matters that were not argued before him or raised in the papers before him, as he had already made a decision to re-instate the counter application, albeit unlawfully.*
>
> *4. … by holding that Texas Oil (Lesotho) (Pty) Ltd as it was then, was not the purchaser of the property in question, therefore misconstruing or totally ignoring the legal effect of the cession.*
> *5. … in granting prayer (a) of the counter application, because according to him the proceedings in the main application were*

> *dismissed for want of prosecution, whereas at the same time he refuses prayer (b) which is based on the same reasoning.*
>
> *6.1 … in granting prayer (c) in as much as there is no evidence that the sale was not published in terms of the law, regard being had to the fact that the respondent claimed that the public auction never took place. The learned judge ignored the evidence of the Deputy Sheriff in this regard.*
>
> *6.2 Having granted the above order the learned judge created a legal quagmire because the proceeds of the sale have been distributed a long time ago in 2006 and title has since passed hands in circumstances where the buyer was an innocent party."*

[40] The 1st appellant submitted that the judge erred in re-instating the counter application without any application therefor having been made to the court. *Adv. Mpaka* for the 1st appellant did not; either in his heads of argument filed on 11 August 2016 or in oral submissions draw the court's attention to any rule of court or case law that supports the proposition that the re-instatement of a case must be preceded by a formal application. His reasoning is not easy to follow. In my opinion the main pointer in the direction that an application for reinstatement was necessary is that the order of 13 June 2013 re-instating the counter application must have been based on the clear understanding that the counter application had been dismissed; and such dismissal could only have that made by the Chief Justice on 14 March 2011. That being so I find no difficulty, even in reliance on first principles, in reaching the conclusion a formal application for re-instatement should have been made in order to give all parties the opportunity to argue the matter.

There is nothing on the record or in the judgments to show that such application was made or that the other parties concerned were given the opportunity to argue whether or not the counter application should be re-instated. This conclusion answers the question whether or not the counter application was dismissed on 14 March 2011. By merely asking the question why the order of 13 June 2013 rein-stating the counter application was made, the answer becomes apparent that it was because at some point the counter application had been dismissed. And that point can only be when the Chief Justice dismissed, on 14 March 2011, matters that had been outstanding for a long time, for lack of prosecution. That includes the contempt application. The judged therefore erred in this regard. This conclusion renders it unnecessary for me to deal with ground of the appeal number 5.

[41] Ground of appeal number 2 is a complaint that the judge *a quo* did not deal with the 1st appellant's notice in terms of Rule 30. In the heads of argument filed for the respondent (at paragraph 3), it is admitted that, "throughout the entire record, nowhere does it appear that this notice was ever argued before the court *a quo*." Yet the respondent immediately thereafter adopts a dismissive attitude where, in the heads of argument, it is submitted that the notice was "simply confusing the whole case" and that the issue of non-joinder was peripheral to the substantive issue to be decided. And then:

> *"It is without question that the lengthy and/or protracted proceedings before the court a quo, parties (companies) changed their status, they undergone liquidation thus*

rendering the whole proceedings uncertain about the parties' description."

[42] This simplistic approach cannot surely be the answer to the complaint that the court did not deal with issues raised in the notice. Those issues were important to the fair determination of the matter as earlier alluded to. In my view, a number of the points raised in the notice, which were not dealt with by the judge *a quo*, are dispositive of the issue. These are –

(a) the first respondent was never joined as a party to the proceedings in terms of rule 12 and the applicant was not entitled to serve papers on a firm of attorneys who had not given notice that they were acting for the 1st respondent;

(b) the applicant's attorneys were aware that the 2nd respondent was in liquidation and the papers were not served on the liquidators of the 2nd respondent or on the master;

(c) the liquidators of the 2nd respondent were not joined as parties to the proceedings;

(d) the 3rd respondent was in liquidation. Its liquidators were not joined as parties to the proceedings.

[43] Turning now to the orders made by the judge a quo-

1. The expression "the proceedings in the main application are irregular" is meaningless and incapable of being giving effect to. It is also by no means clear what the main application was. Although the order records that the applicant was not the purchaser of the plot it, ignores the evidence that the rights of the purchaser had been ceded to the applicant.

2. The judgment referred to in (b) of the order can only be the judgment, which Lesotho Bank had obtained against the respondent. Apart from the fact that the liquidators of Lesotho Bank were not before the court, there was no proper application for rescission of this judgment. As it happens, the respondent had acknowledged his indebtedness by making payments in reduction of the debt after judgment had been entered against him.

[44] Quite apart from the reasons for upholding the appeal as set out in this judgment, there is another and dispositive reason why the appeal must succeed. Section 128(1) of the Companies Act 2011 provides –

> *"As from the commencement of the liquidation of the company… (c) a person may not commence or continue legal proceedings against the company or in relation to its property, or exercise or enforce a right or remedy over or against property of the company unless the liquidator otherwise agrees or the court otherwise orders."*

[45] A somewhat similar provision appeared in the previous Companies Act No. 25 of 1967. In terms of s 180(a) of that Act –

> *"in a winding up by the court- (a) no action or proceeding shall be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the court may impose*."

In relation to Act 25 of 1967 this Court held in *'Mampe Khaebana v Ifts (Pty) Ltd Liquidation* C of A (CIV) No. 26/2005 (CIV/APN/299/99) that the failure to obtain the leave of the court to sue a company in liquidation resulted in the dismissal of the action. Whichever of the two Companies Acts applies it is clear that neither the approval of the liquidator or of the court was obtained before the institution or continuation of the proceedings against the appellants. The fact that this point was not argued before the court a quo cannot give the court jurisdiction which it did not have.

[46] In view of the findings set out above it is not necessary to consider the other grounds of appeal.

[47] I agree with the view of counsel for the appellants that it was the failure of the lower court to ensure that the rules of court were properly complied with before making orders that created a 'procedural and legal quagmire'.

[48] For the above reasons the following order is made.

1. **The appeal is upheld with costs; and**

2. **The orders made by the court a quo are set aside.**

_____

M. H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

_____

R. B. CLEAVER

ACTING JUSTICE OF APPEAL

I agree

_____

W. J. LOUW

ACTING JUSTICE OF APPEAL

For the Appellants: Adv T. Mpaka

For the Respondent: Adv P.V. Tsenoli