IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 09/2016

In the matter between:

JOY TO THE WORLD Appellant

and

NEO MALEFANE Respondent

Coram: CLEAVER AJA
MUSONDA AJA
GRIESEL AJA

Heard: 18 October 2016

Delivered: 28 October 2016

Summary: *Practice – Application to set aside two warrants of ejectment – applicant relying on right of retention based on useful improvements allegedly effected by it – also that it had not been joined in the relevant proceedings giving rise to the warrants. One of the warrants set aside because it had not been authorised by the judgment on which it was based. Second warrant upheld.*
Res judicata – *applicable principles discussed.*

JUDGMENT

GRIESEL AJA:

Introduction

[1] There is a well-known Roman adage, *interest reipublicae ut finis sit litium* ('it is in the public interest that there should be an end to all litigation'). If ever there was a case where that maxim ought to find application, it is the saga between the present parties, which has occupied the courts of this Kingdom for almost three decades. As long ago as 1996, in the course of one of the early episodes of the saga, Guni J lamented:[1]

> 'This is one of those cases that have been in this court for many years. This matter in different forms has been handled by numerous hands within these walls. Some matters are brought to this court for resolutions of the problems and for the purpose of obtaining a relief from those problems. This is the main purpose of bringing cases to court. There are unfortunately mishaps, and delays which cause some disruptions in the due process of litigation. In some matters, the party or parties are determined, not only to come to court, but to come to court and stay. Matters like this one, an effort is being made to find a permanent residency for it within the walls of this court. That is very bad news.'

[2] It is indeed lamentable that the two decades that have passed since these remarks were made have not brought the dispute any closer to resolution. Moreover, it seems clear that – regardless of the outcome of

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[1] *Joy to the World v Malefane & others* (CIV/APN/340/95); [1996] LSHC 24.

the present appeal – this judgment is unlikely to be the final chapter in the saga.

Factual background

[3] The present matter dates back to 12 February 1988, when the appellant bought a certain residential site with improvements thereon, situated at Hlotse Leribe, from one Thabo Mphana ('Mphana'). Unbeknown to the appellant, the respondent had a prior (and stronger) claim to the property in question. This triggered a legal battle lasting to this day for possession of the property in question. A full synopsis of the whole history appears from two previous judgments of this court, both reported *sv Joy to the World v Neo Malefane & others*,[2] (for convenience referred to herein as the *first* and *second appeals* respectively). I shall assume that the reader hereof is familiar with the history as set out in those judgments. It is accordingly not necessary for purposes hereof to repeat those facts once again.

[4] In the application that gave rise to the present appeal the appellant sought an order in the High Court setting aside two warrants of ejectment. The application was dismissed with costs by Majara CJ, hence this appeal.

[5] The first warrant, issued on 29 September 1995, sought the ejectment of Mphana from the property. It was based on a judgment by Maqutu AJ on 31 March 1994 in Case No 266/88, of which the operative part reads as follows:

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[2] Case No C of A (Civ) 5/96, reported in LAC (1995—1999) 313; and C of A (Civ) 16/13 (unreported); neutral citation [2013] LSCA 17 (not yet reported).

‘(a) That the Registered Certificate of Title to occupy and Certificate of Registered Title to Immovable Property No 15940 registered on the 17th June 1980 in the Deeds Registry be cancelled by the Registrar of Deeds.

(b) Defendant is directed the site in respect of which the certificate of title referred to in (a) above relates. [*sic*]

(c) Defendant is directed to pay costs.’

[6] The somewhat incoherent order in para (b) formed the foundation for the first warrant, reading as follows:

> ‘Whereas in this action the plaintiff on the 31 March 1994 obtained Judgment for the Ejectment of the said Defendant from a certain RESIDENTIAL SITE AT SEBOTHOANE IN THE LERIBE DISTRICT.
>
> This is to authorise and require you to put the said plaintiffs into possession of the same by removing there from [*sic*] the Defendant for which this shall be your warrant.’

[7] The warrant was duly executed at the behest of the respondent. The appellant thereupon brought an application, under Case No CIV/APN/340/95, against the present respondent (as first respondent), calling upon her to show cause why she should not be restrained and interdicted from enforcing and executing the first warrant. Secondly, she was called upon to show cause why she should not restore to the appellant possession of the site in question. The rule *nisi* that was initially granted *ex parte* in favour of the appellant was eventually, on 12 February 1996, discharged with costs by Guni J, in the course of which judgment the learned judge uttered the sentiments quoted earlier. This judgment formed the basis for the second warrant, issued on 25 March 1996, reading as follows:

> 'Whereas in this application on the 12th day of February 1996 first respondent obtained judgment in which the applicant and fifth respondent [Mphana] were held to have no right to the residential premises at Sebothoane in the Leribe district in which the first respondent was rightly in occupation.
>
> This is to authorise and require you to put first respondent into occupation of the same by removing therefrom applicant for which this shall be your warrant.'

[8] The question raised for decision in this matter is whether the two warrants referred to should be set aside.

Second warrant

[9] It will be convenient to deal first with the second warrant, which is uncontentious and may be disposed of briefly. As rightly submitted by Mr *Teele* KC on behalf of the appellant, it is settled law that a writ or warrant is to be issued in conformity with the judgment granted, failing which it is bad and is of no force or effect as a process of execution.[3] As mentioned, the second warrant was derived from the order issued by Guni J in Case No CIV/APN/340/95. The relief claimed in that case by the present appellant was for an interdict calling upon the respondent to show cause why she should not be restrained and interdicted from enforcing and executing the first warrant. Nowhere in that judgment was a warrant authorised in the terms contained in the second warrant or at all.

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[3] *Sachs v Katz* 1955 (1) SA 67 (T) at 72; referred to with approval in *Byron v Duke Inc* 2002 (5) SA 483 (SCA) at 492C—D.

[10] It follows that the second warrant falls to be set aside for that reason alone. Mr *Leputhing*, who appeared for the respondent, wisely did not seek to oppose such relief.

First warrant

[11] The first warrant was assailed by Mr *Teele* on three independent grounds: first, the fact that the respondent proceeded for ejectment against Mphana and failed to join the appellant who was in occupation; secondly, the appellant had a right of retention or lien which had been shown *prima facie* to exist based on useful improvements allegedly effected; and thirdly, the warrant was at a variance with the order of Maqutu J until corrected to reflect the true position.

[12] The attituded adopted by the respondent in her answering affidavit, and as also argued by counsel on her behalf before us, was that the grounds now being relied on by the applicant had already been considered and rejected by the courts in previous actions and applications between these self-same parties and they are therefore *res judicata*.

[13] This defence was raised somewhat obliquely in the papers and was not fully articulated in the heads of argument. (In fairness to Mr *Leputhing*, it should be pointed out that, through no fault of his own, he was only briefed a day or two prior to the hearing of this appeal and the court is indebted to him for stepping into the breach and furnishing us with heads of argument at such short notice.) Nevertheless, the defence of *res judicata* raises important points of principle, which need to be considered on the available material.

Res judicata

[14] In *Smith v Porritt & others*,[4] the SCA summarised the requirements for a successful reliance on the *exceptio rei judicatae* as follows:

> 'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bp*k 1995 (1) SA 653 (A) at 669D, 670J – 671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E – F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence

[4] 2008 (6) SA 303 (SCA) para 10; referred to with approval by this court in *Zhai Feng Fu v Lesotho Stone Enterprises (Pty) Ltd* LAC (2011—2012) 127 para 17.

of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

[15] Applying that test to the facts of this case, the following appears:

(a) In Case No CIV/APN/340/95, the appellant sought an order against the respondent, *inter alia*, restraining and interdicting her from enforcing and executing the first warrant. On 12 February 1996, the application was dismissed with costs by Guni J.

(b) On 15 February 1997, the appeal against the aforesaid order was dismissed with costs by this court in the first appeal.

(c) On 5 July 2005, under Case No CIV/APN/244/05, the respondent sought an order, *inter alia*, restraining and restricting the appellant from obstructing and/or hindering the sheriff in the execution of the first warrant; and authorising the sheriff to use the necessary force to break open the gate of the premises so as to carry into execution the first warrant. Almost 7 years later, on 15th of February 2013, the application was granted 'in its entirely [sic] with costs'.

(d) An appeal against this judgment was dismissed with costs by this court on 18 October 2013 in the second appeal.

[16] Although the legal validity of the first warrant was not, as far as I could ascertain, pertinently raised in any of these matters, none of those orders could have been given unless the first warrant was in fact accepted as valid. Furthermore, the first ground raised herein, namely that the

respondent had failed to join the appellant when proceeding for ejectment against Mphana, was specifically argued and rejected by this court in the first appeal.[5] The same point was again argued and rejected by this court (per Scott AP, Farlam JA and Thring JA concurring) in the second appeal,[6] *inter alia*, with reference to *Ntai & others v Vereeniging Town Council & another*,[7] where Van den Heever JA emphasised that the primary object of ejectment proceedings was to put the plaintiff in possession, regardless of whether the defendant or some other person holding under the defendant was in occupation.

[17] Regarding the second ground (the appellant's alleged right of retention), Scott AP said the following in the second appeal:[8]

> 'The only rights of tenure the appellant has arise by virtue of the improvements it subsequently effected. *The writ cannot be ignored on that account.* The appellant's remedy is to move to have the writ set aside. Until then the writ must be obeyed.'[9] (My emphasis)

[18] If the writ cannot be ignored by virtue of the improvements effected by the appellant, it follows logically that the improvements cannot be relied upon as a ground for invalidating the writ.

[19] Having regard to the issues between the present parties on the previous occasions, I am accordingly satisfied that the first two grounds relied upon before us have already been decided in final and binding judgments of this court in proceedings between the same parties. In the

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[5] *Supra*, at 316E—G.
[6] Case No C of A (Civ) 16/13 per Scott AP para 13.
[7] 1953 (4) SA 579 (A) at 580D—F in para 12 and 13 of the judgment.
[8] Case No C of A (Civ) 16/13 per Scott AP para 13.
[9] *Ibid.*

result, the plea of *res judicata* must be upheld with regard to those grounds.

Interpretation

[20] The only 'new' ground advanced by the appellant in these proceedings for setting aside the first warrant – although this 'defence' was potentially available to the appellant from the day when the first warrant was issued – was that it is at variance with the order of Maqutu AJ. For the reasons that follow, I am of the view that this ground is likewise without merit.

[21] It was common cause before us that para (b) of the order in its present form contains a typographical or clerical error. Counsel for the appellant sought to persuade us that it was necessary for the respondent in these circumstances to have applied for the correction of the error. This was so, according to counsel, because it is not permissible to look at the body of the judgment in interpreting the order, and that 'the directions of the court are to be found in the order and not elsewhere'. In support of this argument, counsel relied on *Administrator, Cape & another v Ntshwaqela & others*.[10] However, read in its proper context, the judgment is actually authority *against* counsel's argument. At 716B—C of the report, Nicholas AJA said the following:

> 'It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but *the Court's directions must be found in the order and not elsewhere.* If the meaning of an order is clear and unambiguous, it is decisive, and cannot be

[10] 1990 (1) SA 705 (A) at 716A.

> restricted or extended by anything else stated in the judgment.'[11] (My emphasis)

[22] The passage italicised in the above quote was the one relied on by counsel. However, it is immediately qualified by the sentence that follows. Applying this approach, it is apparent, first of all, that para (b) of the order as it stands is far from 'clear and unambiguous'; on the contrary, it is unintelligible without reference to the rest of the judgment. From the papers, it appears that the claim advanced by the plaintiff in the case before Maqutu AJ (the present respondent) was for ejectment of the present appellant from the property in question. The *ipsissima verba* of the plaintiff's prayers as contained in the summons (as later amended) were quoted twice in the course of the court's judgment. Prayer (b) of the amended claim reads: *'(b) Ejectment and/or eviction of the defendant from the said site.'* When the learned judge reached his conclusion,[12] he preceded his order by stating: 'Consequently I enter judgment for Plaintiff in terms of his [*sic*] amended claim,' followed by the order quoted earlier. It is accordingly abundantly clear that the learned judge intended to issue an order in accordance with the prayers contained in the amended summons. Unfortunately, inattentive proofreading probably resulted in para (b) in its present form, which contains a patent error.[13] It should be interpreted to read (with the italicised words inserted):

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[11] See also *Herbstein & Van Winsen – The Civil Practice of the High Courts and Supreme Court of Appeal of SA*, 5ed at p 936.
[12] At p 23 of the typed judgment.
[13] The same underlying cause probably resulted in the transposal of the names of the 'plaintiff' and the 'defendant' in the heading of the judgment. (Record p 19)

> 'Defendant is *evicted from* the site in respect of which the Certificate of title referred to in (a) above relates.'

[23] In passing, it can be pointed out that none of the courts that had on previous occasions needed to enforce or consider the first warrant experienced the slightest difficulty in applying and interpreting it in the sense as outlined above. In the circumstances, it follows that the appellant's attack against the first warrant cannot succeed.

Conclusion

[24] On an overall conspectus of the matter, this court should not, in my view, be astute to come to the aid of the appellant by allowing it to rehash old arguments that have been rejected by the courts in the past or to raise new ones that it could have raised at various stages in the course of the protracted litigation between the parties but failed to do.

[25] Finally, the words of Lord Hoffman in *Arthur JS Hall & Co v Simons*[14] are apposite in this context:

> 'The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and interest *rei publicae ut finis sit litium*. They are usually mentioned in *tandem* but it is important to notice that the policies they state are not quite the same. The first is concerned with the interest of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: *autrefois acquit res judicata* and issue estoppel. The second policy is wider: it is concerned with the

[14] [2000] UKHL 38; [2000] 3 All ER 673; [2000] 3 WLR 543 para 20.

> interests of the state. There is a general public interest in the same issue not being litigated over again.'

Costs

[26] It follows that the appeal falls to be dismissed, save to the limited extent as far as the second warrant is concerned. The respondent has accordingly been substantially successful in defending the judgment of the court below and is entitled to her costs. Counsel for the respondent applied for a punitive costs order against counsel for the appellant *de bonis propriis* because of the history of the matter and the fact that the application constitutes an abuse of this court's process. However, in the exercise of this court's discretion, I am not persuaded that a sufficient case has been made out for such a drastic order. Ordinary party and party costs will accordingly be awarded.

Order

[27] For the reasons set out above, I would issue the following order:

(a) The order of the court below is varied to read as follows:

> **'(i) The warrant of ejectment, Annexure "AA2" issued in CIV/APN/340/95 is set aside.**
>
> **(ii) Save as aforesaid, the application is dismissed with costs.'**

(b) Save as set out in para (a) above, the appeal is DISMISSED with costs.

B M GRIESEL

Acting Justice of Appeal

I agree.

R B CLEAVER

Acting Justice of Appeal

I agree.

P MUSONDA

Acting Justice of Appeal

Appellant : **Adv ME Teele KC**

Respondent : **Adv CJ Leputhing**