IN THE COURT OF APPEAL

HELD AT MASERU

COF A (CIV) A/62/17
CIV/APN/360/16

In the matter between-

LIAU JAASE	**1ST APPELLANT**
MAPHEELLE JAASE	**2ND APPELLANT**
TIMELO HLALELE	**3RD APPELLANT**
SEEPA JAASE	**4TH APPELLANT**
MALITSOANELO JAASE	**5TH APPELLANT**
LETHOLA JAASE	**6TH APPELLANT**

and

MPUTI JAASE	**1ST RESPONDENT**
DEPUTY SHERIFF –MR MATETE	**2ND RESPONDENT**
OFFICER COMD. QUTHING POLICE	**3RD RESPONDENT**
COMMISSIONER OF POLICE	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

CORAM : LOUW, AJA
MUSONDA, AJA
CHINHENGO, AJA

HEARD : 4 MAY 2017

DELIVERED : 12 MAY 2017

SUMMARY

Jurisdiction of High Court to entertain application for spoliation order – Issue of jurisdiction not raised or canvassed in court a quo – Whether High Court impliedly assumed jurisdiction – Meaning of "assumed" considered – Not necessary to consider value of subject-matter of spoliation where High Court has assumed jurisdiction – Sections 6 of High Court Act 1967 and sections 17(1), 18(1) and 22(1) of Subordinate Act 1988 – considered – Letsie v Maseru City Council C of A (CIV) 12/16 distinguished

JUDGMENT

CHINHENGO AJA: -

Introduction

[1] At the commencement of the hearing of this appeal we condoned two applications by one or other of the parties. The appellants sought the indulgence of the court in respect of their failure to file the record of proceedings within the time stipulated in Rule 5 of the Court of Appeal Rules, 2006 (No. 182 of 2006). The 1st respondent sought a similar indulgence for his failure to file the heads of argument in terms of Rule 9. We granted the

condonation with no order of costs in both applications with the consent of the parties.

[2] In terms of the notice of appeal, this appeal is based on essentially three grounds of appeal although the appellants listed five such grounds. Of the five, the first three grounds raised the same issue - whether the High Court had jurisdiction to hear and determine the spoliation application instituted in that court by the 1st respondent. The other two grounds of appeal were that the High Court granted the spoliation order against the weight of evidence and that it failed to recognise that when the appellants allegedly despoiled the 1st respondent, they did so as a counter-spoliation measure. The appellants did not however argue the appeal on any other ground than the single point that the court *a quo* did not have jurisdiction. Their counsel specifically submitted that their case is that the relief sought fell exclusively within the jurisdiction of the subordinate court. He abandoned the other grounds of appeal.

[3] A part of the history of this appeal is that the appellants lost in two applications in the High Court. The first was the spoliation application (CIV/APN/360/2016) referred to above, which was instituted by the 1st respondent against them seeking an order that they should restore to his possession 30 sheep and 6 goats. The High Court

(MAKARA J) made an order in that case on 21 October 2016. It reads-

> "It is hereby ordered that:
>
> (a) 1st to 5th respondents are directed to jointly and/or severally restore possession of the following livestock to the applicant-*omnia ante;*
>
> (i) thirty (30) sheep,
>
> (ii) six (6) goats.
>
> (b) That 1st to 5th respondents are restrained and interdicted from interfering with applicant's exercise of rights over the property mentioned at 1(b) above other than by due process of law.
>
> (c) 1st to 5th respondents are restrained from threatening applicant and his shepherd with violence or subjecting them to any form of physical or psychological harassment.
>
> (d) That 1st to 6th respondents are directed to pay costs of this application jointly and severally."

[4] On 2 November 2016, the appellants filed a notice and grounds of appeal against MAKARA J's judgment. On or about the same time the appellants also lodged an application in the High Court seeking a stay of execution of MAKARA J'S judgment. The 1st respondent opposed the application. At the same time he filed a counter-application seeking the committal to prison of the 1st to 5th appellants for contempt of court. He contended that the five respondents had "wilfully and maliciously

disobeyed" the court order and were thus in contempt of court. The appellants opposed the counter-application.

[5] The appellants lost the application for a stay of execution on 8 December 2016. That, as I have said, was their second loss in a row. The court order is not in the record of appeal. They appeal against that decision on or about 27 December 2016 setting out six grounds of appeal but, all said and done, those grounds of appeal boil down to two grounds only, namely that the High Court did not have jurisdiction to hear and determine the spoliation application and, in respect of the stay application, that the court erred in disregarding and not considering that the balance of convenience was in favour of the appellants.

[6] Despite noting an appeal against the decision in the stay application, the appellants also applied directly to this Court on or about 27 December 2016 for an order staying execution of the spoliation order pending the finalisation of the appeals they had already lodged in that Court. The 1st respondent opposed that application. Recognizing that the appellants' case revolved around the issue of jurisdiction, their counsel not only stated that they were no longer pursuing the direct application to this Court for a stay of execution but that they were also

abandoning the appeal against the decision in the stay application.

[7] There is no indication on the record of what became of the 1st respondent's counter-application. Of the three matters that were pending in this Court i.e., the appeal against the spoliation order, the appeal against the dismissal of the stay application, and the application on motion for an order staying the spoliation judgment, only the first matter was up for consideration by this Court. The fate of the other matters depends on the result of the one. Appellants' counsel, no doubt, appreciated that all the matters depended on a determination of the appeal against the spoliation application. If the issue of jurisdiction were decided in the appellants' favour, then the other matters would fall away. Specifically, if this Court determined that the High Court had no jurisdiction to entertain the spoliation application, then the order therein would be set aside and, consequently, the stay application and the appeal thereon will fall away and so will the application on notice of motion to this Court. If this Court found that the court *a quo* did have jurisdiction to hear the spoliation application, the spoliation application would become unassailable and the other two matters would likewise fall away.

Failure of High Court judge to give reasons for judgment

[8] The High Court did not give reasons for the orders that it made in the spoliation application and the application for a stay of execution of the judgment. The failure to give reasons for judgment, or to give those reasons within a reasonable time, is a matter of concern to this Court. In another appeal in this Session of the Court, *Hippo Transport v Afrisam Lesotho (Pty) Ltd & 6 others* C of A No. 44/2016, we deprecated the failure of some judges of the High Court to give reasons for judgment. In that case FARLAM AP said-

> "[17] The judge did not give reasons for dismissing the main application or for the costs order she made on 5 August 2016, *viz* that the attorney and client scale would apply.
>
> .....
>
> [20] This Court has on a number of occasions in the past criticised the failure of some judges in the High Court to provide written reasons for their judgments. See, for example, *Masebo v Angel Diamonds Ltd* LAC (2011- 2012) 302 at 303 F-I where the following is said:
>
> > 'This Court has on numerous occasions in the past strongly deprecated the failure by some judges to give reasons for their decisions. See eg. *Qhobela and Another v Basutoland Congress Party and Another* LAC (2000-2004); *Hlalele and Another v Director of Public Prosecutions and Another* LAC (2000-2004) 233 at 237H-238A; *R v Masike* LAC (2000-2004) 557 at 559G-560B, and

Otubanjo v Director of Immigration and Another LAC (2005-2006) 336 at 343F-346C.

What was said by Friedman JA in *Qhobela*'s case applies to this case also. The passage to which I refer reads as follows –

> 'It is necessary for the proper administration of justice that courts give reasons for judgment. A litigant has every right to know why a case has been won or lost. And a lower court is also obliged to furnish reasons so that a Court of Appeal will be properly informed as to what prompted the court *a quo* to arrive at its decision. In the present case no reasons are given by the learned judge *a quo* either for his order confirming the rule or for his subsequent "ruling". His conduct in this regard is to be deplored.'"

[9] I do not think that this point can be made with any greater force. Reasons for judgment must always be given for the reasons outlined above and also for the very important reason that the giving of reasons for judgment is the way, if not the only way, by which judges are held accountable for their decisions and conduct on the bench. In this case I consider that the absence of reasons for judgment in the two matters does not impede the determination of the appeal: the issues are fairly straightforward. Both parties are not averse to the appeal proceeding. However, during the course of the appeal hearing counsel for the appellants submitted that either the matter should be remitted to the High Court in order for that court should hear evidence to determine the

value of the sheep and goats and the question whether that value falls within the monetary jurisdiction of the subordinate court or that it be postponed to give the judge an opportunity to give his reasons for judgment so as to determine whether or not he acted in terms of s 6(a) of the High Court Act and and assumed jurisdiction.

Appellants' case

[10] It is quite appropriate I think, that I should at this stage quote the appellants' grounds of appeal *in extenso* in both the appeal against the spoliation and the stay of execution as well as a part of their counsel's submissions. The grounds of appeal in the first matter read as follows –

> "1. The learned judge a quo erred and misdirected himself in proceeding with the granting of the spoliation application in as much as:-
>
> (a) The application fell exclusively within the jurisdiction of the Subordinate Court.
>
> (b) The fact that the market value of the property subject matter of dispute exceeded the monetary ceiling of the Subordinate Court does not itself oust the jurisdiction of the said court to entertain the matter.
>
> 2. The learned judge a quo erred and misdirected himself in proceeding with the application for spoliation in the absence of an order granting the first respondent leave to institute the same before the High Court and the first respondent has not been granted such leave by the court acting on its own motion.

3. The learned judge a quo erred and misdirected himself in proceeding with the application for spoliation in the absence of a suggestion on the part of the first respondent that the monetary value of the property the subject matter of dispute exceeded the monetary ceiling of the subordinate court.

4. The learned judge a quo erred and misdirected himself in granting the application for spoliation despite the fact that there was overwhelming evidence that the first respondent has never been in possession of the property subject matter of dispute therein at any time or at all.

5. The learned judge a quo erred and misdirected himself in not finding that when the appellant took possession of the animals subject matter of dispute herein, he did so as a counter-spoliation to the first respondent which is justified in law."

[11] The grounds of appeal against the decision in the application for a stay of execution are the following –

"1. The learned judge a quo erred and misdirected himself in dismissing the appellants' application for stay of execution on the grounds that they were raising the issue of jurisdiction on the part of the court for the first time on appeal.

(a) The application fell exclusively within the jurisdiction of the Subordinate Court.

(b) The fact that the market value of the property subject matter of dispute exceeded the monetary ceiling of the Subordinate Court does not itself oust the jurisdiction of the said court to entertain the matter.

2. The learned judge a quo erred and misdirected himself in disregarding the fat that a point of law can be raised at any stage before judgment and even for the first time on appeal.

> The learned judge a quo erred and misdirected himself in disregarding that a point of law relating to jurisdiction is so material that even the courts can raise the same *mero motu* on appeal.
>
> 3. The learned judge a quo erred and misdirected himself in disregarding that a point of law pertaining to jurisdiction is a procedural issue/or aspect that operates retrospectively unless there is a clear provision in the statute to the contrary.
>
> 4. The learned judge a quo erred and misdirected himself in dismissing the appellants' application for stay of execution despite the fact that the appellants' grounds of appeal raise arguable points of law which are fit for argument on appeal.
>
> 5. The learned judge a quo erred and misdirected himself in dismissing the appellants' application for stay of execution pending appeal without having regard to the fact that the appellants have very high prospects of success on appeal.
>
> 6. The learned judge a quo erred and misdirected himself in disregarding the fact that the balance of convenience favoured the granting of the applicants' application for stay of execution."

[12] All the above grounds of appeal except grounds number 4 and 5 in paragraph 10 and ground 6 in paragraph 11 are concerned with jurisdiction and some of them are in fact not grounds of appeal but arguments in support of the contention that the High Court did not have jurisdiction in the matter.

[13] In the heads of argument at paragraph 2.1 thereof the appellants unmistakably state that –

> "The [appellants'] main ground of appeal is that the High Court did not have the necessary jurisdiction to have entertained an application for spoliation in as much as it falls within the jurisdiction of the subordinate court."

[14] And at paragraph 2.7:

> "It is our submission that the legislative scheme gives the subordinate court jurisdiction over spoliation application and that is reinforced by section 22(2). In this background, we maintained that the subordinate court had jurisdiction to entertain the main application and that the High Court lacked original jurisdiction competency to do so except where it grants a dispensation under section 6(1) of the High Court Act."

[15] Apart from the three or so grounds of appeal, which they abandoned, the appellants clearly raised jurisdiction as the sole issue for determination by this Court.

[16] The appellants admit that when the spoliation application was heard in the High Court, they did not raise the objection that that court had no jurisdiction. They also admit that they raised the issue for the first time in this appeal. They contend that a party may raise a point of law for the first time on appeal provided that that does not result in unfairness to the other party and that the point may also be raised if it had been covered in the pleadings.

[17] The appellants' main contention is that in terms of s 18(1) of the Subordinate Courts Act, 1988 (No 43 of 1988) a subordinate court has the power to "grant against persons and things, orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*" and that, as this was an application for a *mandamenten van spolie*, that court had exclusive jurisdiction to hear and determine the matter and the High Court did not have such jurisdiction. They submitted that the subordinate court's power and competence to deal with a spoliation application is not affected by s 17 of the Subordinate Courts Act, which prescribes the monetary jurisdiction of that court even if the value of the subject matter of the application exceeds that court's monetary jurisdiction. For this contention they rely on s 22(2) of the same Act, which they construe to mean that the court's jurisdiction is not ousted merely by the fact that the amount claimed or other relief sought is above the court's monetary jurisdiction. In this regard the appellants submitted that the decision of this Court in *Letsie v Maseru City Council*[1] is not in rhythm with section 22(2) of the Subordinate Court Act. Although they do not say so it is clear that they hold the view that that case was wrongly decided.

[1] C of A (CIV) 12/16

[18] The appellant further contended that having regard to s 6 of the High Court Act, 1967 (No. 4 of 1967), it should abundantly clear that the High Court had no jurisdiction in the matter. Section 6 provides that-

> "6. No civil cause or action within the jurisdiction of a Subordinate Court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save -
>
> (a) by a judge of the High Court acting of his own motion; or
>
> (b) with the leave of a judge upon application made to him in Chambers, and after notice to the other party."

[19] The appellants submitted that no application was made to a judge in terms of s 6, nor did the judge on his own motion permit the matter to be heard in that court. They accordingly prayed that this Court should find that the High Court had no jurisdiction to hear and determine the spoliation application and, for that reason, uphold the appeal with costs.

1st Respondent's case

[20] Proceeding on the assumption that the two appeals would be heard together the 1st respondent filed two sets of heads of argument, one set in relation to the appeal against the judgment in the spoliation application and the other in relation to the judgment on the application

for a stay of execution. In his heads he confirmed the fact that the issue of the jurisdiction of the High Court was not raised in that court. He contended that that issue may not now be argued on appeal because that would be unfair and prejudicial to him. Further that the appellants' request that the matter be remitted to the High Court for further evidence to be led on the issue of jurisdiction was an attempt by them to supplement the record of proceedings. In any event, he submitted, the referral to the High Court was not a part of the appellants' grounds of appeal. What the appellants were required to do now was to put before the appeal court facts showing that the High Court had no jurisdiction. That onus was on them.

[21] In general it can be said that the 1st respondent contested all the submissions of the appellants. I will not consider all his submissions because some of them relate to issues or submissions that the appellants have abandoned. In particular I will not deal with the appeal against the judgment on the application for a stay of execution, as the applicants also did not pursue it.

Discussion

[22] The statutory provisions relevant to the issues and submissions in this appeal, apart from s 6 of the High

Court Act referred to above, are sections 17(1)(b), 18(1) and 22(2) of the Subordinate Court Act:

> Section 17(1)(b):
>
> > "Subject to this Act the court with regard to causes of action, shall have jurisdiction … (b) in any action in which is claimed delivery of any property, movable or immovable, where the value does not exceed… in the case of the Chief Magistrate M25 000."
>
> Section 18(1):
>
> > "Subject to the limits prescribed by this Act, the court may grant against persons and things, orders for … interdicts and *mandamenten van spolie*."
>
> Section 22(2):
>
> > "Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction."

[23] Another relevant statutory provision is s 2 of the High Court Act 1978 (No 5 of 1978) which provides that the High Court has "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in Lesotho." This general jurisdiction is, of course, qualified by s 6 of the Act with the result that a civil cause within the jurisdiction of a subordinate court may be instituted in or removed into the High Court by "a judge acting on his own motion" or with his leave upon application to him by a party on notice to the other party.

[24] It is common cause that in this case the issue as to how the court came to deal with the spoliation application was not at all canvassed in the High Court nor did the 1st respondent, applicant therein, aver in the founding affidavit that the court had jurisdiction on any basis. The appellants did not challenge the jurisdiction of the court.

[25] It is necessary to set out in simple terms what the statutory provisions I have referred to above mean. In terms of s 2 of the High Court Act, the High Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings. That jurisdiction is circumscribed by s 6 of the same Act. Thus the High Court has no jurisdiction in a civil cause falling squarely within the jurisdiction of a subordinate court but may exercise jurisdiction in respect of such cause if a judge *mero motu* allows that cause to be instituted in or removed into the High Court, or a party thereto obtains leave from the judge upon making application to the judge on notice to the other party. Otherwise the High Court has jurisdiction in every civil cause, which does not fall within the jurisdiction of a subordinate court.

[26] Sections 16, 17 and 18 of the Subordinate Court Act set out instances when a civil cause falls within the jurisdiction of a subordinate court in relation to persons

and causes of action and in relation to orders of arrest or attachment of things and persons, interdicts and *mandamenten van spolie*. Section 17 specifies the monetary jurisdiction of subordinate courts. The Chief Magistrate's court, being the highest subordinate court, has a limit of M25000.00. See s 3(a) of the Subordinate Courts (Amendment) Act 1998 (No. 6 of 1998).

[27] The question that falls for decision in this case is: What is the effect of the failure by the parties to raise the issue of jurisdiction when the spoliation application came before the judge, and of the judge hearing and determining the application in the circumstances? There are no reasons for judgment and as such there is no way of knowing how the judge went about the jurisdiction issue and whether or not he adverted his mind to s 6 of the High Court Act.

[28] *Letsie*'s case (*supra*) is similar to the present case. In that case a judge of the High Court declined to exercise jurisdiction because, as MUSONDA AJA said,

> "[13] The learned Judge in the court a quo held that his jurisdiction was limited by Section 6 of the High Court Act No. 6 of 1978, which is couched in these terms: (*the section is quoted in full*) …
>
> [14] The learned Judge appeared to have fortified his decline of jurisdiction by the wording of Section 18 (1)

> of the Subordinate Courts Act No. 9 of 1988. The Section reads:(*and it is quoted in full*)
>
> [15] The learned Judge went on to say that, the court did not for a moment understand the decision of the Court of Appeal case of *Jobo v Lenono*[2] as meaning that "willy nilly" the High Court is bound to take up "spoliation" cases even in the circumstances which place the spoliation cases squarely at the steps of the subordinate court. In my honest view to do so would indeed be to usurp the judicial power of the subordinate court. It would be totally illegal and ultra vires".

[29] The judgment by my brother, MUSONDA AJA, does not show the full reasoning of the judge *a quo,* if at all the judge went further than is quoted. It seems to me however that the judge in the court *a quo* did not consider s 17 (1) (b) which provides that the jurisdiction of a subordinate court is circumscribed by its monetary jurisdiction. And that is precisely what *Jobo*'s case (*supra*) said. So also *Letsie v Ntsekhe* where SCOTT JA said:

> "While it was true that the subordinate court had jurisdiction to adjudicate spoliation disputes in terms of Section 18 (1) of Act No. 9 of 1988, such jurisdiction was limited to the value of the despoiled property as provided in Section 17 (1) (b) of that Act, that value of the despoiled if in excess of the values prescribed for the subordinate courts' jurisdiction, entitles the High Court to assume jurisdiction. In terms of the High Court Act 1978, the High Court had unlimited discretion to assume jurisdiction in any matter."

[2] C of A (CIV) 28/2010

[30] The submission by counsel for the appellants that in terms of s 18(1) of the Subordinate Court Act that court has jurisdiction to the complete exclusion of the High Court in relation to a cause or an action arising from spoliation regardless of the monetary value of the subject matter, is therefore incorrect.

[31] The conclusion I have reached finds support in *Botha v Andrade and Others*[3]. In that case the court was called upon to interpret provisions of the South African Magistrates Court Act 32 of 1944 in *pari materia* with, if not word for word the same as, our sections 17(1)(b) and 18(1). It had to consider the extent to which the jurisdiction of the magistrate's court to grant an interdict under their s 30(1) (same as our s 18(1)) is limited by s 29(1)(g) (same as our s 17(1)(b)) which sets a monetary limit on the value of the subject in dispute. The court had this to say at 263A-264B –

> "[13] The wording of the two sections is clear and unambiguous and the ordinary meaning of the words ought to be given effect to. On a proper reading of [s 18(1)] it is clear, I think, that the magistrate's power to grant interdicts is circumscribed. The section provides that a magistrate may grant certain orders, including (*mandamenten van spolie*), subject to the limits of jurisdiction prescribed by the Act. The search for the limits referred to in [s 18(1)] leads one inevitably to [s 17(1)] of the Act and the conclusion is, to my mind, unavoidable that the qualification

[3] 2009 (1) SA 259

"subject to the limits of jurisdiction prescribed' by the Act is a reference to [s 17(1)(b)]….

[14] … It seems to me that the two sections [17 and 18] complement each other and where the limits of the magistrate's jurisdiction are required to be determined in [spoliation proceedings], in so far as the value of the matter in dispute is concerned, the two sections ought to be read together. [Section17] speaks to the value of the matter in dispute and [s 18] limits the jurisdiction of the magistrate's court to the limit set out in [s 17], which at the present moment by regulation is fixed at [M25000]. In my view, this accords with the limitation placed on the magistrates courts' jurisdiction as a creature of statute. To follow the approach adopted by the magistrate, which in effect places no jurisdictional limit at all on [*mandamenten van spolie*] orders in that court, cannot be correct, and would resultin the magistrates court exercising parallel jurisdiction with the High Court, a consequence which could never have been contemplated by the legislature.

[15]… It follows that s 17(1)(b) is applicable to [*mandamenten van spolie*] granted by the magistrate under [s 18], and the section operates to set the jurisdictional limit of the value of the subject-matter in dispute….".

[32] In *Letsie v Maseru City Council,* this Court remitted the matter to the High Court because the value of the despoiled property was not known. The High Court was to hear evidence and establish the value of the property. The court reasoned thus-

"[20]… The appellant magnanimously conceded that the value of the tent should have been provided. In any event the basis of the jurisdiction in the Subordinate Court is the value. If the value is M10,000 and below the subordinate courts have

> jurisdiction. If the value is more than M10,000, the High Court have jurisdiction up to any value….
>
> Where the legislature intends to monetarily limit jurisdiction, the legislature will say so i.e. in Section 17 (1) (b) and where they did not intend to do so they will say so as Section 17 (1) (c).
>
> [22] It was for the Appellant to provide the value of the tent. The Respondent would have borne that onus if they were challenging the jurisdiction of the subordinate court. As rightly conceded it was for the appellant to demonstrate that the value of the tent exceeded the jurisdiction provided by Section 17 (1) (b). It is a time honoured procedural concept that "he who asserts must prove". Jurisdictional facts must be established at the time of filing not after.
>
> [24] It is undoubted that where cases are brought in the wrong forum, it is not only litigants who incur avoidable costs, the judiciary deploys the meagre resources, both material and human on litigation in the wrong forum. The judiciary, "backlog mountain", is enhanced, as time and resources are spent on 'litigating on where to litigate', which can be avoided if advocates were not indifferent to rules of procedure.
>
> [25]… The value of the tent not having been available to the Judge in the court a quo and having not been available in this court, the court is unable to determine the issue of jurisdiction. Is the tent below the value prescribed in section 17 (1) (b)?, in which case the subordinate court has jurisdiction or if more than that value, then the High Court has jurisdiction.

[33] In *Letsie v Maseru City Council,* as appears in the order; the High Court had upheld a special plea of lack of jurisdiction. That finding was set aside and the matter was remitted for the court to receive evidence on the value of the property involved. *Letsie v Maseru City*

Council is distinguishable from the present case in that a special plea of lack of jurisdiction was raised and upheld by the court. In the case before me no such plea was raised; the court proceeded to hear and determine the matter without demur from the appellants. Section 6(a) of the High Court Act empowers a judge, in the words of SCOTT JA in *Letsie v Ntsekhe*, to "assume jurisdiction" because it has "unlimited discretion to assume jurisdiction in any matter."

[34] In *Jobo* (supra) SMALBERGER JA discussed the manner in which s 6 of the High Court Act curtailed that court's jurisdiction. At paragraphs [5], [6] and [9] of the judgment he said-

> "[5]… It is important to note that the jurisdiction of the High Court is not ousted in respect of claims for ejectment. Such jurisdiction may be acquired where the necessary leave is given in terms of section 6(b) of the Act, or ***assumed*** where a judge in terms of section 6(a) of the Act***, acting of his own motion, expressly or impliedly permits*** the institution in or removal into the High Court of a claim for ejectment (cf *Metlomelo Selema v Lirahalibonoe Letsie* C of A No. 12/2009 (unreported) at para [14].
>
> [6] The proper administration of justice requires that the High Court exercises its powers in a manner which will resolve disputes between parties as expeditiously as circumstances permit. Where it is legitimately within his or her power to do so, a trial judge should act in a way which will prevent unnecessary delay in the resolution of such disputes."
>
> [9] … given the ancillary nature of the claim for ejectment [and it was indeed ancillary]and the need to

> avoid unnecessary delay and costs in litigation, the trial judge, in the proper and responsible exercise of her powers under section 6(a) of the Act, have assumed jurisdiction under that section in respect of the claim for ejectment. Where a judge may ***legitimately assume jurisdiction***, and can do so without prejudice to the parties, he or she should not hesitate to do so in the interests of the administration of justice."
> *Emphasis added*]

[35] The dictionary meaning of "assume" for present purposes is "to take responsibility or control." See *Concise Oxford English Dictionary*. The meaning of this word was considered in at least three cases in South Africa, Roper and *Bryce v Connock*[4], *Kloka v Rondalia Assurance Co. Ltd* [5] and *Masinga v Minister of Justice, Kwazulu Government*[6] but the context in which the word was used does not assist me in interpreting it. The ordinary meaning of "assume" suggest to me that a judge who on his or her own motion assumes jurisdiction in terms of s 6 (a) of the High Court takes control of the case and hears and determines it with or without expressly stating to the parties that he or she was in fact assuming jurisdiction. Jurisdiction may be assumed impliedly, as no doubt happened in this case. See *Jobo*'s case where the judge said that when a judge, acting on his or her own motion assumes jurisdiction under s 6 (a) of the

[4] 1954 (1) SA 65 (W)
[5] 1966 (2) SA 382 (T)
[6] 1995 (3) SA 214

High Court Act, he or she may do so expressly or impliedly. I am satisfied that the learned judge impliedly assumed jurisdiction to hear and determine the spoliation application. The matter was brought to him on urgency. It was concerned with the unlawfully deprivation of possession livestock of the 1st respondent by the appellants. The cause of action and the nature of the relief sought called upon the judge to exercise his powers and resolve the dispute between the parties without delay and unnecessary additional costs. That, to my mind, was a "proper and responsible" exercise of his powers under s 6(a) of the Act.

[36] The conclusion I have come to in the preceding paragraph renders it unnecessary for me to consider the submissions of counsel on the instance of the onus of proof in respect of the issue of jurisdiction and what the appellants had to establish in order for this court to accede to their contention, not only that the High Court had no jurisdiction but also that the matter should be remitted for evidence on the value of the sheep and goats to be led.

[37] Counsel on both sides made submissions on the instance of the onus in relation to jurisdiction of the High Court in this matter. Counsel for the appellants contended that

the onus to establish the jurisdiction of the court lay with the applicant. Counsel for the 1st respondent contended that the onus was on the appellants. The answer is to be found in *Botha*'s case (*supra*). In that case, per the headnote, the appellant applied in the magistrates' court for a prohibitory interdict restraining the respondents from conducting a sawmill business and a brick making business on their farm on the grounds that the business caused a nuisance and entailed usage of the farm contrary to the municipal zoning of the farm under the town planning scheme. The respondents contended *in limine* that the court lacked jurisdiction to grant the order since the value of the matter in dispute exceeded the court's monetary jurisdiction. The High Court set aside the magistrate's decision but on appeal to the Supreme Court of Appeal the magistrate's order was reinstated. At 264I – 265 B the SCA addressed the issue of the onus and stated at paragraph [18] as follows –

> "The onus was on the respondents to prove that the matter fell beyond the jurisdiction of the magistrates court. The substantive plea challenging the jurisdiction (*exceptio fori declinatoria*) was raised by the respondents and they accordingly bore the onus of proving facts upon which their plea was based *Munsamy v Govender*[7]".

[7] 1950 (2) SA 622 (N) at 624

[38] In this case the 1st respondent, as the applicant in the court a quo did not aver, as practice would require him to do, that the court had jurisdiction. The appellant, as respondents therein also did not challenge the jurisdiction of the court. In general, as stated in Hoffman & Zeffert *The South African Law of Evidence*, 4th ed. at p 510, the onus rests on the party who avers that a court has no jurisdiction, and in this regard the learned authors refer to *Durban City Council v Kadir*[8]. In that case the appellant sued the respondent for ejectment and the respondent raised the question of the court's jurisdiction under section in the Magistrates' Court 32 of 1944, which is in *pari materia* to our s 17. At 366D the court held that "the onus was upon the defendant (respondent on appeal) to establish the facts upon which the *exceptio fori declinatoria* pleaded is based." It went on to say- "Thus if in his plea the defendant avers the existence of certain facts which, if proved, will defeat the jurisdiction the onus of proving such facts rests upon the defendant on peril of having the plea decided against him if he fails in discharging such onus."

[39] The appellants in this case raised the issue of jurisdiction for the first time on appeal and it being a point of law, they were entitled to do so. Nonetheless, as would have

[8] 1971 (1) SA 364 (N)

been the case had they raised the same issue in the High Court, the onus of proving that the High Court had no jurisdiction was upon them. They had therefore to set out facts which would show that the High Court had no jurisdiction. In my opinion, they failed to do so and thus failed to discharge the onus upon them in that regard. The appellants merely surmised that the value of the sheep and the goats may be lower than M25000 because the market value depended on the place that the sheep may be sold and bought. They were thus unable to prove facts upon which this court could find that the value of the subject matter of the spoliation application was within the jurisdiction of the subordinate court and that the High Court did not have jurisdiction to entertain the application. The appellants' contention that the High Court had no jurisdiction or that the matter should be referred back to that court should fail.

[40] To sum up, I hold that the judge in the court a quo assumed jurisdiction and heard and determined the application for a spoliation order in accordance with the law. The mere fact that he did not expressly state that he had assumed jurisdiction in terms of s 6(a) of the High Court Act does not mean that he did not; to the contrary he impliedly permitted application to be instituted in the High Court. This appeal was based squarely on the issue of jurisdiction, the other grounds of appeal having been

abandoned. In the result the appeal against the decision of the court quo in relation to the spoliation order must be dismissed. The appeal against the decision in relation to the application for a stay of execution of judgment though not pursued in this Court but literally abandoned, must also be dismissed.

[41] Counsel for the respondent prayed for costs of appeal in relation to the two appeals. There is no reason to deny him those costs. Accordingly the appeal is dismissed with costs.

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MH CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

_____

WJ LOUW
ACTING JUSTICE OF APPEAL

I agree:

_____

P MUSONDA
ACTING JUSTICE OF APPEAL

For Appellants	:	Adv. T Motsie
For 1st Respondent	:	Adv. F Sehapi