IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) No.43/2017
CIV/APN/159/2017

In the matter between:-

LEHLOHONOLO MANGOEJANE	**1ST APPELLANT**
'MABAKUENA MANGOEJANE	**2ND APPELLANT**

And

SEABATA MANGOEJANE	**1ST RESPONDENT**
'MATLOTLISO MANGOEJANE	**2ND RESPONDENT**

CORAM: MUSONDA AJA
CHINHENGO AJA
MTSHIYA AJA

HEARD: 26 November 2018
DELIVERED: 7 December 2018

SUMMARY

Appellant contending respondent failed to establish he was entitled to claim – court a quo taking robust view of facts and finding respondent established his standing to make claim – court entitled to do so;

Misjoinder – no reason given for joining 2nd appellant – appeal on issue succeeds

Main appeal dismissed with costs

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] This case is essentially a dispute between brothers, the 1st appellant and the 1st respondent. At the hearing of this appeal only counsel for the respondents, Advocate *Sekatle*, appeared. He informed us that counsel for the appellants, Advocate *Nzuzi* had advised him that he was unable to appear because he was unwell and out of Maseru and further that he was quite comfortable for the Court to proceed in his absence and decide the appeal after considering his heads of argument, by which he stood. Indeed the heads of argument are detailed and run to some twelve type written pages. We were satisfied that no injustice could possibly be occasioned to the appellants by proceeding to hear the matter. That, in any event, was in the interests of bringing finality to a matter

that was commenced more than two year before this hearing.

[2] On 18 April 2017 the 1st respondent, in the company of his wife, the 2nd respondent, and the 1st appellant went to Standard Lesotho Bank, Tower Branch in Maseru. The three of them drove to the bank in 1st appellant's motor vehicle. Their mission was to receive payment of M70 000.00, being the balance of the purchase price of M130 000.00 arising from a sale of land by the 1st respondent to one, Refiloe Moneri, who was employed at that branch of the bank. The 1st respondent's title to the land had been confirmed in proceedings in case No. CIV/DLC/MSU/0086/15.

[3] At the bank Moneri paid the sum of M70 000.00 in cash and handed it over to the two brothers in the presence of the 2nd respondent. The 1st appellant physically received the money. Upon leaving the bank the 1st appellant walked swiftly ahead of the other two, quickly got into his car and drove away leaving the respondents outside the bank. He literally ran away with the money. Among other attempts to regain, the money the respondent immediately called the 1st appellant on his cell phone. It was not answered. He went to the police and later to the 1st appellant's pastor to report the matter. He was hoping that the 1st appellant would return the money. He hoped in vain.

[4] The respondents were constrained to take the matter to court. On 28 April 2017 they instituted urgent proceedings in the High Court seeking a rule *nisi* calling upon the appellants to show cause why they

> "... should not be ordered to submit the amount of M70 000.00 to the office of the Registrar of Court pending this application, which is an amount that the 1st respondent (now 1st appellant) unlawfully took and ran away with on 18th April 2017 without any authority from the applicants."

[5] The respondents sought two other orders, the one declaring that at the hearing of the application *viva voce* evidence may be led should any dispute of fact arise and the other that the 1st appellant's conduct was unlawful.

[6] The urgent application was heard. Interim relief was granted on 7 May 2017 and the rule *nisi* "extended to the 17th May 2017". The appellants were thus ordered to surrender the money to the Registrar. It is not clear whether they did. The respondents were directed to file their replying affidavits by 10 May 2017. Eventually the application was heard on 7 June 2017 and judgment with costs in favour of the respondents was delivered on 30 August 2017. The judgment was apparently delivered *ex tempore* on 7 June and the written version was made available on 30 August. The order in the written judgment reads-

> "I diced (sic) that the Application succeeds with costs to the Applicant."

[7] I think the point must be made that any order made by a judge is that judge's order. He must take responsibility for its formulation and accuracy. Too often in this Court we are presented with court orders from lower courts that have not been prepared by the presiding judicial officers or signed by them to indicate that they are, in fact, the orders they made. And very often those orders contain errors and sometimes they are incomprehensible. It is a salutary practice that every presiding judicial officers should peruse the orders he or she makes irrespective of who may have drafted them. Presiding judicial officers must always ensure that their orders correctly reflect their decision in the matters before them.

[8] The learned judge's order in this case contains an error in the use of the word "diced" when, no doubt, the judge intended to use the word "decided". The order is made in favour of one applicant. Throughout the judgment he makes reference to "applicant" when the application shows that there were two applicants before him. Similarly the judge refers to a respondent when there were two respondents before him. Some of the grounds of appeal are related on these errors.

Grounds of appeal

[9] The appellants appeal on four grounds. These are that the judge erred or misdirected himself-

> "1. … in ignoring the proven allegation that the 2nd respondent in the court *a quo* has been erroneously joined in these proceedings as the 1st respondent's wife but nevertheless granted an adverse order against her.
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> 2. … by holding adversely to the proposition that the applicants' founding affidavit has not disclosed his ownership to the money (subject of dispute) aforesaid, his alleged rights were only augmented in reply (replying affidavit), which was somewhat improper and warranting the striking off of the applicants' replying papers, therefore the applicants had no *locus standi* to claim relief sought although it (relief) was granted in their favour nonetheless by the court *a quo*.
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> 3. … by holding that there was no dispute of fact pertaining to the ownership of the rights to the money in question on the face of 1st respondent's allegations that there was an arrangement by virtue of which the 1st applicant agreed to forward a certain substantial sum in favour of the arrangement aforesaid to the 1st respondent, an allegation which applicants heatedly refute. The learned judge found that the respondents had conceded that the said money was for the 1st applicant.
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> 4. … by isolating the basis for going to Standard Lesotho Bank on the 25th of April 2017 from other considerations of fact, in the inquiry of whether a material dispute of fact had surfaced or not, thus warranting the applicability of the High Court Rule 8(14), which was not the case per the judgment in the court *a quo*."

[10] These grounds are not at all elegantly drafted and they are only properly comprehended upon reading the record and the heads of argument. Simply put, the appellants are aggrieved, so they contend, by the judge's failure to address the issue of the misjoinder of the 2nd appellant; by his failure to find that the respondents did not, in the founding affidavit, establish that the money belonged to them and only did so in the replying affidavit; by his failure to recognise that the 1st respondent's ownership of the money was disputed on the basis that there existed an agreement in terms of which the 1st respondent was to pay "a substantial sum" to the 1st appellant and, to the contrary and erroneously, found that the 1st appellant had conceded that the 1st respondent was the owner of the money; and, finally, that the judge's failure to look holistically at the reasons for the parties going together to the bank, which would have shown the existence of material disputes of fact necessitating a resort to Rule 8(14) of the High Court Rules 1980, to resolve them and enable the court to appreciate the 1st appellant's conduct.

Contentions

[11]The appellants defined the issues for determination in the heads of argument filed on 17 August 2017. They are three in number. The first is whether the 2nd appellant was properly a party to these proceedings. The second is whether the respondents made a *prima facie* case and

thereby established their legal standing to make the claim. The third is whether on the papers a material dispute of fact justifying a resort by the court to Rule 8(14) of the High Court Rules existed. The respondents submitted that there are only two issues for decision by this Court, namely, whether the 1st appellant and the 1st respondent entered into any agreement that entitled the former to take the money and whether the 1st appellant was given any authority to take the money by the owner.

[12] The appellants' contention of misjoinder is that the 2nd appellant is not the 1st appellant's wife and as such there was no reason for her to be cited as a party. It was also improper that an order was made made against her, including an adverse order of costs.

[13] In addressing this issue, the 1st appellant attached to the opposing affidavit a marriage certificate showing that his wife is Mpona Florence Pheko and not Mabakuena Mangoejane. The 2nd appellant herself filed a supporting affidavit in which she stated: "… there is no existence of a valid marriage between me and the (1st appellant). I am not Mabakuena Mangoejane as supposed, my identity is Mosa Anastciah Sekoati and my passport confirming the same is hereto annexed and marked 'XZ'." This is a vague averment. It does not amount to a denial that some form of marriage exists. Impliedly the existence of some kind of marriage is acknowledged but the contention is made

that it is not a valid marriage. In the reply the 1st respondent avers that the 2nd appellant is in fact the 1st appellant's second wife and the name used on the pleadings is that given to her by the Mangoejane family. It is not possible, nor is it necessary, to decide whether or not the 1st and 2nd appellants are married as not further evidence was given on that issue.

[14] The appellants referred to cases from this jurisdiction and from South Africa on joinder of parties –*United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409(C); *Theko and Others v Morojele and Others* LAC (2000-2004) 302 and *Lesotho National Olympic Committee v Morolong* LAC (2000-2004) 447. These cases deal with the principles of law relating to joinder and misjoinder of parties and do not assist in answering the question why the 2nd appellant, and even the 2nd respondent, were cited as parties in these proceedings. Whilst no objection was raised in respect of the latter, the objection to the citation of the former needs to be addressed, however briefly that is done. The learned Judge a quo summarily dealt with this and other issues raised by the appellants in the court below at paragraph 11 of the judgment, as follows –

> "The First Respondent raised the following points (which) were ill conceived. I could not accept any. The justice of the matter had been done by my conclusion on the facts contained in the version of the parties. The points were misjoinder, cause of

> action, material dispute of fact *locus standi*, on mandatory interdicts, irreparable injury, act of interference, alternative remedy. These I dismissed. As will be observed it was all sheve(sic) imagination on the part of Respondents' Counsel. That is why I dismissed the points."

[15] This treatment of issues raised by parties in this fashion can provide a fertile ground for appeals, even unmeritorious appeals, by the parties. Parties expect to be told why the issues they raise with a court are rejected or disregarded. The ultimate decision on each of the issues may be correct but, in the absence of some explanation for the rejection of those issues, a party may legitimately be aggrieved thereby. In this case the 2nd appellant's objection to being joined, was not at all unreasonable. The respondents did not give any reason that they made her a party, even if she, indeed, is the 1st appellant's wife as alleged. That she is his wife cannot be the only reason that she was joined, as submitted by Advocate *Sekatle* in answer to a question from the Bench. A judgment was issued against her inclusive an order to pay the respondents' costs. In *Morolong* (supra) the Court pronounced itself eloquently in relation to non-joinder and said at 455D-H:

> "The question of non-joinder of interested parties is one that has perturbed this court for a long time. … in *Masopha v 'Mota* LAC (1985-89) 58 … this court took the point of non-joinder *mero motu* and set aside the High Court order which had annulled a marriage where the woman whose marriage was at

issue had not been joined as a party. In the process this court laid down the following guideline:

> 'This case illustrates the need to consider and identify those who can be affected by the result of proceedings and to ensure they are party to the proceedings.'

Three sessions later … this court again strongly deprecated the practice of non-joinder of interested parties in *Matime and Others v Moruthoane and Another* LAC (1985-89) 198 at 200 in the following words:

> 'This (non-joinder) is a matter that no court, even at the latest stage in the proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to present their case.'"

[16] The defence of misjoinder is raised, as did the 2nd appellant, where a party is joined when he or she should not have been joined. No reason was given for the 2nd appellant's joinder and no reason was given by the trial judge for not addressing that issue, as he should have done. Misjoinder is the flipside of non-joinder and the sentiments in *Morolong* apply *mutatis mutandis*. On the facts as presented, this Court is at liberty to decide the issue.

[17] That the 2nd appellant was joined as a party merely because she is married to the 1st appellant, an issue not conclusively proved, cannot be correct at law. She should

have been joined only if she had a direct and substantial interest in any order that the court might make or if any such order cannot be carried into effect without prejudicing her. The instant case in relation to the 2nd appellant was one of misjoinder. The appeal on that point succeeds. The appellant's name is expunged from the citation of the parties.

[18] The 1st appellant somewhat recast the second ground of appeal in his heads of argument by submitting that the judge "misdirected himself by not striking off the 1st respondent's (1st applicant in the court *a quo*) replying affidavit which introduced 'new matter' revealing his *locus standi* to claim the relief he sought in his founding affidavit. … that is irregular as it abrogates (derogates) from the long well entrenched maxim of practice namely, that 'an applicant must stand and fall by his papers'" . The point is however made that the complaint is that whereas in the founding affidavit the 1st respondent had failed to establish his entitlement to the relief sought in that he failed to allege that he was the owner of the money, he did so only in the replying affidavit. And that replying affidavit must be expunged for the reason that it is canvassing an issue that the 1st respondent did not canvass in the founding affidavit.

[19] I do not think it is necessary to deal with the law on the treatment to be accorded to a replying affidavit that

introduces new matter or introduces a cause of action not set out in the founding affidavit. In this case the 1st respondent's founding affidavit cannot be read otherwise than that the 1st respondent established that he was claiming money of which he sufficiently averred belonged to him. At paragraph 5 of the affidavit the 1st respondent states that the 1st appellant "was called to bear witness to the … payment." At paragraph 7 he states that it was only when he met the 1st appellant at the latter's pastor's residence that he learnt for the first time that the 1st appellant was laying claim to a part of the money, M50 000.00, as payment for testifying in his favour in a matter involving the site in respect of which the payment at the bank was made.

[20] The whole tenor of the 1st respondent's affidavit was that the 1st appellant had absconded with his money. The fact that the money belonged to him is, in my opinion, clearly made in the founding affidavit. The replying affidavit did not therefore introduce any new matter to warrant striking it out. In any case there is not indication on the papers that the 1st appellant raised any such issue in the papers or before the judge and sought an opportunity to deal with it as new matter. The passage from *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) on which the 1st appellant relies in his heads of argument therefore has no application in this case. In that case the court said:

> "The practice of the courts, as Mr. Feetham correctly pointed out, is that an applicant must, generally speaking,
>
> > 'stand or fall by his petition (founding affidavit) and the facts alleged therein'
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> and that he cannot introduce for the first time in his replying affidavits facts or circumstances upon which he seeks to found a new cause of action. … In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet. If the founding affidavit is allowed to be supplemented by adding further facts in a replying affidavit, the consequence would often (but not necessarily always) be that a fourth or possibly also a fifth set of affidavits would be required – a situation the development of which the Court would not lightly be disposed to facilitate or encourage."

[21] At home here, in *Mohaleroe v Lesotho Public Motor Transport Co. (Pty) Ltd and Another* (C of A (CIV/16/10), the court had this to say:

> "28. The objection that the new facts had been wrongly permitted in the replying affidavit is also without substance. … the rule that new matter in replying affidavits must be struck out is 'not a law of the Medes and Persians'. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent an opportunity to deal with it in a second set of affidavits.

> 29. Apart from the fact that the matter objected to could reasonably be categorized as not 'new matter' because it constituted a permissible reply to the appellant's answering affidavit, it is clear that Lyons AJ's decision to allow it to remain after enquiring whether the appellant wished to reply, cannot be faulted."

[22] The second ground of appeal therefor cannot succeed.

[23] The appellants' last ground of appeal is that the learned judge a quo should have referred the matter to trial or called witnesses to deal with what he says are disputes of fact. It is trite that it is undesirable to attempt to settle real disputes of fact on affidavit evidence without taking advantage of *viva voce* evidence. A dispute of fact arises when material allegations of fact made by the applicant are denied, on the strength of positive evidence to the contrary, by the respondent. See generally *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155(T). The question whether a dispute of fact exists is itself a question of fact for the court to decide - *Ismail & Anor v Durban City Council* 1973 (2) SA 362 (N) at 374. Thus a respondent's allegation of the existence of a dispute of fact alone is not sufficient and a court should determine it - *Peterson v Cuthbert & Co. Ltd,* 1945 AD 420 at 428. If it were to be otherwise a respondent may raise fanciful or fictitious issues of fact to delay proceedings. A party that contends that a dispute of facts

exists is required to place enough evidence to persuade the court that such dispute in fact exists.

[24] In their exposition of the existence of disputes of fact, the appellants contend in the heads of argument that the judge *a quo* "observed that what was material under the circumstances of the present case was whom the owner of the site in question was." A fair perusal of the judgment does not reveal that the judge made any such observation. The 1st appellant refers to paragraph 10 of the opposing affidavit to make the point that the ownership of the site was in dispute. That is not so. In that paragraph the 1st appellant makes no more than the point that the site was "known to us as our home" without stating, even if that were so, who owned that site. He also makes the point that the 1st respondent promised to pay him M50 000.00 if he helped him to "attain proper documents towards the sale of the site" and ensure that "he is not cheated." He avers therein that the 1st respondent "proposed to sell the site and that I aid him to do so, whereas he will tender fifty thousand maloti (M50 000.00) from the sale price, with which I was to find alternative residence for our deceased sister's orphans and see after their well-being." Paragraph 10 does not raise the issue of ownership as a matter in dispute between the parties.

[25] The respondents produced evidence in the form of the court order in Case No.CIV/DLC/MSU/0086/15 and annexure "SM1" being an acknowledgement by the buyer of the site that he had paid off the balance "as settlement of his site" in reference to the 1st respondent. On the facts of this case it cannot be consistent with those facts to allege any dispute of fact arising from ownership of the site. The dispute, if any could only be whether or not the 1st appellant was entitled to the money.

[26] This brings me to the second allegation of the existence of a dispute of fact. The 1st appellant stated that there was an arrangement or agreement between him and his brother that he was entitled to M50 000.00, which is disputed by the respondents. He submitted that the judge should have called *viva voce* evidence on this issue.

[27] The evidence in the affidavit filed by the 1st appellant on this issue is not enough to convince a court that there is a real dispute regarding the alleged agreement. The 1st respondent denies the existence of any agreement. In answer to paragraph 5 of the 1st respondent's founding affidavit where he makes the averment that he invited the 1st appellant to witness the making of the payment by the buyer of the site, the latter states at paragraph 8 of the opposing affidavit:

> " The contents here are noted safe (sic) to the extent that I was called to bear witness to the said payment. I have been aiding

the 1st applicant to procure proper documentation relevant to the sale of the site in question. I even collected some prior payments pertinent to the sale aforesaid on behalf of 1st applicant bearing in mind doubtless, that the seventy thousand maloti (M70 000.00) which is herein claimed was the final payment of a total of one hundred and thirty thousand maloti (M130 000.00). In essence therefore, it is apposite to state that I was legitimately thereat not to bear witness but rather in completion of a mandate which I had commenced."

[28] It must be apparent from a reading of the answering affidavit that nowhere did the 1st appellant make a positive statement that an agreement existed in terms of which he was to be paid for a service rendered, except in paragraph 10 where, in one breath he says the payment to him was for assisting the 1st respondent in preparing certain documents, and, in the next, he says it was intended to enable him to find alternative accommodation for the deceased sister's children.

[29]Rule 8(14) of the High Court Rules provides that if the court is of the opinion that an application cannot properly be decided on affidavit, it may, in the interests of a just and expeditious decision, direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact. The court can be moved in this direction only if a real dispute of fact, and not a fictitious one, exists. In any event a court may take a robust view of the facts and decide the matter on probabilities disclosed by

the affidavits. See *Bur Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B and *Sewmungal & Anor NNO v Regent Cinema* 1977 (1) SA 814(N).

[30] The learned judge in the court below was aware of the imperatives where a dispute of facts arises, for, at paragraph 3 of the judgment, he said:

> "While ideally in application proceedings the court proceeds on the basis that there would be no material disputes of fact, this was a classical situation where the facts were so simple and straightforward for this court to make a decision. The court would accordingly not incline to call viva voce evidence where major concessions were to be found as in the present case. And the applicant's case [should be respondent's case] was simply a cock and bull story."

[31] The judge narrated what happened at the bank, why the 1st appellant went along to the bank with the 1st respondent and how he ran away with the money, all the money, when he was laying claim to M50 000.00 only. The judge came to the conclusion that the 1st appellant was, on a fair analysis of the affidavits, dishonesty. I am of a similar view. The 1st appellant was called upon to answer paragraph 6 of the founding affidavit, at which the 1st respondent stated:

> "… as we moved out of the bank premises, the 1st respondent without any provocation from anybody rushed to his vehicle

> with the money and took off at high speed which prompted the parking marshal shouting at him whereby he threw some coins out of the window of a moving vehicle. I immediately called him on his mobile phone demanding an explanation to his unwarranted act and his response was he was leaving for the place of my senior wife; therefore we should thereat meet. However, on arrival we were told he has never been there."

[32] The 1st appellant's reply to this paragraph was a curt response at paragraph 9:

> "Contents herein are unknown to me, Applicants are put to the proof thereof."

[33]This response is at best bad pleading. It, in fact, is a dishonest reply. It had been squarely put to him that he was not provoked to act as he did; he rushed to his vehicle with the money; he drove off at high speed; the parking marshal called out to him for the parking fees; he threw some coins to the ground for the marshal to pick up; and the 1st respondent called him on the cellular phone and he gave some response. To all these allegations of fact in respect to which a direct answer was called for, he retorted that all that was unknown to him. An honesty answer was a straight denial if what was alleged did not happen. This dishonest response shows that he was trying not to ensnare himself because he would have had to explain why he left the bank premises in that fashion. There is also the unexplained and undisputed fact that the 1st appellant made away with all

the money received from Moneri, when, as he said, he was owed M50 000.00. No explanation was forthcoming from the 1st appellant.

[34] The conclusion of the learned judge *a quo* cannot be faulted. He took a robust view of the facts, which he was entitled to do. The appeal by the 1st appellant has no merit and should be dismissed with costs.

[35] Accordingly it is ordered that-

1. The appeal be and is hereby dismissed with costs to be paid by the 1st appellant.

2. The objection raised by the appellants that the 2nd appellant was wrongly joined is upheld. The respondents shall pay her costs in the court *a quo* and in the appeal, jointly and severally the one paying the other to be absolved.

CHINHENGO AJA
ACTING JUSTICE OF APPEAL

I agree:

MUSONDA AJA
ACTING JUSTICE OF APPEAL

I agree:

MTSHIYA AJA
ACTING JUSTICE OF APPEAL

For Appellants: Adv. Nzuzi

For Respondents: Adv. Sekatle