IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 9/13
C OF A (CIV) 65/13
CIV/APN/159/2010

In the matter between:

BOKANG LELIMO	**APPELLANT**
And	
THAABE LETSIE	**1ST RESPONDENT**
LIPHAMOLA CARETAKER (PTY) LTD t/a AUTO SERVICE STATION	**2ND RESPONDENT**
MEI & MEI ATTORNEYS	**3RD RESPONDENT**
REGISTRAR OF HIGH COURT	
TAXING MASTER (MISS MOLEFI)	**4TH RESPONDENT**
DEPUTY SHERIFF (MISS LEKOATSA)	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**
S. PHAFANE CHAMBERS	**7TH RESPONDENT**

CORAM: M. CHINHENGO AJA
N.T. MTSHIYA AJA
M.A. MOKHESI AJA

HEARD: 3 NOVEMBER 2018

DELIVERED: 7 NOVEMBER 2018

SUMMARY

Civil Practice - Every application for leave to appeal must compy with S. 17 of the Court of Appeal's act N0. 10 of 1978 - Prospects of success considered - Held the appellant does not have prospects of success on appeal - leave to appeal refined with costs.

JUDGMENT

M. A. MOKHESI

INTRODUCTION:

[1] The appellant had launched this appeal on the basis of the following grounds:

1. That the Learned Judge erred and misdirected himself by dismissing the appellant's counter application for the cancellation of the first respondent's lease on the ground that it is his pendens when it is not.

2. That the Learned Judge erred and misdirected himself by not determining the issue of cancellation of the lease N0. 13283-437 dated 19 December 1986, and the deed of transfer of lease N0. 13283-437.

3. That the Learned Judge erred and misdirected himself by failing to make an order directing the director of lease service in the Land Administration Authority (LAA) to liaise with the Registrar of Deeds to expunge the same lease from the register.

4. The Learned Judge erred and misdirected himself by finding that the third respondent has the mandate to represent first respondent whilst the attorneys of record Messrs T. Matooane & Co. has not withdrawn from the case as attorney of record.

5. The Learned Judge erred and misdirected himself in awarding costs to the third respondent when he, the third respondent, is not the attorney of record in the matter and did not represent the first respondent therein.

6. The Learned Judge erred and misdirected himself in awarding costs to the third respondent when the attorneys of record Messrs T. Matooane & Co. have not withdrawn as attorneys for the first respondent.

[2] **FACTUAL BACKGROUND:**

This appeal is but one of the instalments in the legal battle between the appellant and the 1st respondent. The genesis of this battle is the issuance of summons in the Magistrate Court wherein the

appellant claimed that the 1st respondent had unlawfully occupied site number 250 Cathedral Area, that the said site had been unlawfully allotted to the 1st respondent as the appellant is the rightful allottee thereof. The appellant alleged that the 1st and 2nd respondents refused to vacate or pay monthly rental in the amount of M3800.00.

[3] On account of the fact that the summons lacked a prayer for ejectment or for payment of rental, the 1st respondent filed an exception to the summons on the basis thereof. In response the appellant filed a "notice of objection" to the exception in terms of which he sought to assail the exception on the basis that it was not served on the appellant's chosen address. At the insistence of the appellant, the Magistrate was persuaded to allow only arguments on the "objection". After hearing arguments on the objection the Magistrate reserved judgment, but when he/she dealt with the objection and exception when in actual fact no arguments were heard on the exception. The Magistrate had dismissed both the objection and exception.

[4] Aggrieved by Magistrate's dismissal of exception when no arguments were heard on it, the first respondent on 24 March 2010 launched an application to review the Magistrate's judgment dismissing the exception. On 08 April 2010 the appellant filed a counter application to the review application in terms of which he sought cancellation of the lease under which the first respondent occupied site N0. 250 at Cathedral area. He further sought

ejectment of the 1st respondent from the said site. The counter application was opposed by the 1st and 2nd respondents.

[5] It was agreed during a pre-trial conference that the counter application be heard before the review application and that the latter be stood over. After hearing arguments on the counter-application **Monapathi J** delivered on unwritten ex tempore judgment dismissing the counter-application on the score that the counter-application was his pendens in the Magistrates' Court. In a nutshell **Monapathi J** reviewed and set aside the Magistrate's judgment and further ordered that the matter be tried de novo by a different magistrate.

[6] Consequent to the review order, the battle morphed into battle for costs. And this exactly what this appeal is all about. At all material times since the beginning of the legal battle between the parties, Messrs T. Matooane & Co. were the attorneys of record for the first respondent. It would seem that the appellant's unease and the resultant legal challenges stemmed from another firm of attorneys Mei & Mei Inc. claiming to have also been the 1st respondent's attorneys of record and thereby submitting a bill of costs for taxation by a Taxing Master. The appellant had lodged a notice of objection in terms of Rule 15 (4) of the High Court Rules challenging Mei & Mei Inc. attorneys' representation. His argument being that Messrs T. Matooane & Co. were the duly appointed attorneys of record. On 6 September 2012 Mei & Mei Inc. submitted a taxed bill of costs. Consequent thereto, the

appellant on 28 September 2012 launched a review application in terms of which he sought orders it the following terms"

> *"1.3 The proceedings of taxation bill of costs by the taxing master shall not be reviewed and corrected and set aside.*
>
> *1.4 The proceedings of taxation of bill of costs by the taxing master shall not commence de novo before a different presiding officer.*
>
> *1.5 The third respondent firm of law styled Mei & Mei Attorney Inc shall not be interdicted from presenting taxation of Bills of costs under the pretext that they act as attorneys of record in the case CIV/APN/159/10, the matter from which Messrs T. Matoone & Co. have not withdrawn as attorneys of record.*
>
> *1.6 The appointment of the firm of law styled Mei & Mei Attorneys Inc shall not be declared improperly made such in contravention with the Rules of this Honourable Court."*

[7] On 01 October 2012 the Assistant Registrar issued a writ of execution which led to the appellant's vehicle being attached and ultimately sold at the auction at an amount of M40,000.00.

[8] During argument Adv. Setlojoane for the 1st respondent, was asked to explain why and how Mei & Mei Attorneys Inc came to be in the picture when Messrs T. Matooane & Co. had initially represented the 1st respondent. Adv Setlojoane explained to the Court that Mr Matooane had submitted his bill of costs for taxation, and that before the costs could be taxed, Mr T. Matooane ceased to be an attorney as he had been crowned King's Counsel (K.C). Consequent to this Messrs Mei & Mei Attorneys Inc. were appointed as the 1st respondent's attorneys of record and they proceeded to file the bill of costs which was accordingly taxed in the presence of the appellant. Adv Setlojoane being an officer of

this Court, there is no reason not to disbelieve him. In fact what Adv Setlojoane told the court about is corroborated by the circumstances of this case, viz, (a) to date there is only one bill of costs filed by Mei & Mei Attorneys which has been taxed. Messrs T. Matooane's bill of costs which was lodged was never pursued or acted upon in terms of being taxed; (b) on 28 August 2012 a Notice of Appointment in terms of which Mei & Mei Attorneys Inc. were appointed the 1st respondent's attorneys of record was filed an served on the appellant on 30 August 2012 at hrs 15:30 p.m. Faced with this reality Adv Makhera was constrained to concede that indeed Mei & Mei Attorneys Inc. were properly appointed and were justified in lodging a bill of costs for taxation.

[9] The next issue to be determined is the question of leave to appeal. The appellant had applied for leave to appeal in the court but that application was refused. Faced with the refusal of application for leave to appeal, appellant was duty-bound to invoke the previous of s.17 of the Court of Appeal's Act, N0. 10 of 1978, and apply directly to this Court for leave to appeal s. 17 provides that:

> *"Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the court with leave of the court or upon the certificate of the judge who heard the appeal on any ground of appeal which involves a question of law not a question of fact."*

[10] In Mohale v Mahao LAC (2000-2001) 101, at 104, para [6] the plain meaning of section 17 (above) was articulated. **Ramodibedi J.A** (as he then was) stated the meaning as follows:

> *"The plain meaning of this section is that any person who intends to appeal against the judgment of the High Court in its civil appellate jurisdiction as here, must first seek and obtain the leave of the High Court or of this Court. Furthermore, leave may be sought only on a question of law."*

[11] As already highlighted the appellant first sought leave of the judge *a quo* but was refused leave. He is therefore seeking leave of this Court to appeal the judgment of **Monapathi J**. The principles applicable to an application for leave to appeal are trite, and in the **Ngobeni v S (741/13) [2014] ZASCA** 59 at para. 15 the court said:

> *"The test is whether there are reasonable prospects of success on appeal (see R v Ngubane 1945 AD 185). What the test of reasonable prospects of success postulates is dispassionate decision, based on the facts and the law. The question is whether a reasonable person, adopting a different line of reasoning - usually by attaching more weight to factors ignored or downplayed in the judgment, or by attaching less weight to factors accentuated in the judgment, could have come to a different conclusion. That there is a possibility of success, the fact that the case is arguable, or that it is not hopeless case, do not constitute grounds for granting leave to appeal."*

[12] I turn now to deal with the appellant's prospects of success.

> *"1. Grounds 1 and 2 and 3 of the Appellant's ground of appeal speaks to the same issue, and that is that the learned judge a quo failed to determine the issue of cancellation on the basis that it was his pendens. Even though I agree with the appellant that the issue of cancellation of lease was not his pendens I however do not fault the learned judge for having declined to determine the issue of cancellation of the lease. Perhaps it is better to capture the prayer which the appellant sought in this regard. In that counter application the appellant sought a prayer "(a) Directing the Registrar of High Court to cancel a lease N0. 13283-437 issued through SDA gazette N0. 156 of 1986 as predated by a Registered Certificate to Title N0.*

> *13772 dated 7th November, 1978 in respect of the same site 250 Cathedral Area in Maseru Urban Area."*

[13] Quite plainly, the appellant was seeking the court to order the impossible, the court does not have power to order the Registrar of the High Court to cancel leases. That is not one of the duties of the Registrar of the High Court. Such an order would be *brutum fulmen* (**Coetzee v Coetzee (18681/2015) [2016] ZAWCHC 115** at para. 11-14. In **Mansell v Mansell 1953 (3) SA 716** at 721E the court said:

> *"If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears ….to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."*

As regards the test of the grounds of appeal the concession by Adv Makhera that the appointment of Mei & Mei Inc. Attorneys was above board speaks for itself. What seems to have provided a source of irritation for the appellant is the presence of Mei & Mei Inc Attorneys at the Taxing Master's. I do not find anything wrong with T. Matooane & Co. Attorneys ceding their costs to Mei & Mei Attorneys, as this is allowed in law. (see: **Rochelle Francis - Subbiah "Taxation of Legal Costs in South Africa 1st Ed. Juta** at p. 303).

[14] Upon the conspectus of all the issues discussed above my considered view is that the appeal does not have the prospects of success, and therefore leave to appeal is accordingly refused.

[15] **COSTS:**

There is no reason why costs should not follow the events.

[16] **ORDER:**

In the result the following order is made:

(a) Leave to appeal is refused.

(b) The appellant to pay costs on party and party basis.

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M. A. MOKHESI
ACTING JUSTICE OF APPEAL

I agree:

M. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

N.T. MTSHIYA
ACTING JUSTICE OF COURT OF APPEAL

For Appellant : Adv. P. Makhera

For 1st and 2nd Respondents : Adv. R. Setlojoane