IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 26/2018**

CCA: 0061/2016

In the matter between:

BEN RADIOPELO MAPHATHE **APPELLANT**

and

MAFETENG PROPERTY GROUP (PTY) LTD **RESPONDENT**

CORAM: DAMASEB (DCJ) AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: 21 JANUARY, 2019

DELIVERED: 1 FEBRUARY, 2019

Summary

Appeal based on contention that special plea of res judicata applicable to matter heard and decided by High Court and against which appeal lies - requirements for res judicata discussed

Dismissing appeal –held judgments implicated were in personam and not in rem such that the special plea not sustainable

Due to non-compliance with court direction regarding time lines for filing record and heads of argument and non-compliance with rule on inclusion or exclusion of documents from record, constraining one party to apply to strike off appeal - whether offending party liable to costs thereof – such costs awarded against offending party

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The respondent, a duly registered company, sued the appellant and ten other persons, in the High Court by way of urgent motion proceedings on 13 July 2016. It sought orders (a) stopping the appellant from interfering with the its rights as the owner of all occupational rights in Plot No. 16472-041 and Plot 16472-222 Mafeteng, both of which are also known as Patsa Shopping Centre ("the Shopping Centre"); directing the appellant "to account [to it] for all monies and rentals received from the tenants at the Patsa Shopping Centre, Mafeteng from 11 October 2008 to date hereof, and as at that time 30 April 2016 and to debate, upon demand, such account … and to pay … any amount which may be found to be due to [it] after such accounting and debate"; (c) stopping the appellant from collecting rent from tenants at the Shopping Centre and from personally or through his agents directing any demand to the tenants to enter into any sub-leases with him or threatening the

tenants with eviction should they refuse to enter into such sub-leases or from interfering with the occupation or business of any of the tenants; (d) stopping the appellant from relying on a wrong order issued by the Registrar of the Court of Appeal dated 6 November 2014 purporting that it is the order issued by the Court of Appeal; (e) stopping tenants (2nd to 9th respondents in the court *a quo)* from paying rent to the appellant and directing them to enter into sub-lease agreements with it and, in default thereof, vacating the Shopping Centre and paying rent into an independent account nominated or appointed by the court, pending the finalisation of the application. The ten other persons were eight tenants at the Shopping Centre and the Minister of Trade and Industry and the Attorney General, the 10th and 11th respondents, respectively. No relief was sought against these last two. Some interim reliefs were granted to the respondent before its application was heard.

[2] The respondent's application was heard by the High Court on 5 December 2016 and, despite opposition from the appellant, judgment in favour of the respondent was granted on 17 May 2018.

[3] The present appeal is against the whole judgment of the High Court. At the hearing of the appeal the parties agreed that the single issue for decision in the appeal was whether or not the matter before the High Court was *res judicata*. That was the substance the appellant's contention in the High Court and in the appeal before us. A brief history of the litigation between the appellant and the respondent will assist in properly

understanding the contested issue, to wit, whether or not the matter was *res judicata*.

Litigation history

[4] The appellant is the son of the late Dr KT Maphathe who, during his lifetime in 1990, entered into an agreement of sub-lease, as sub-lessee, with a company called I. Kuper (Lesotho) (Pty) Ltd ("the company" or "Kuper") in respect of the Shopping Centre. I will refer to this agreement as the Kuiper agreement. The sub-lease was to subsist for 25 years after which the sub-lessee had, at his election, two options to renew the sub-lease for periods of ten years each. In terms of clause 4(c) of the Kuper agreement the rent payable by the company was to be paid to Dr Maphathe or his nominee. The amount of the rent was fixed by clause 4(a) of the Kuper agreement at M1.20 per square metre of ground floor space actually sub-let to tenants and such amount "automatically increased or decreased, depending on the extent of the occupancy of the premises." Clause 4(b) of the Kuper agreement is a rent escalation clause providing for the increase of the rent by "7% per annum, compounded, with effect from the first anniversary of the sub-lease."

[5] I have extensively referred to clause 4 of the Kuper agreement for the simple reason that the appellant has misunderstood its import resulting in him putting up a spirited but misguided fight for rights to which he is not entitled. In terms of the Kuper agreement Dr Maphathe sub-let his occupational rights to the company. The company was, in terms thereof required to pay rent to him based on the formula contained in clause 4 of the agreement. The company acquired the right to sub-lease the Shopping Centre to tenants in place at

that time and to any new tenants. The company therefore was entitled to charge rent to the tenants and receive such rent from them. Its obligation to pay rent to Dr Maphathe was not necessarily connected to its entitlement to receive rent from the tenants except to the extent that the rent it had to pay to Dr Maphathe was based on the rented floor space. Beyond that the company could meet its rent obligation by raising funds from any source, including of course, from the rent paid by the tenants, who had become its sub-tenants. The Kuiper agreement did not provide for the rent paid by the tenants to be transmitted to Dr Maphathe. There was therefore no contractual relationship between Dr Maphathe and the tenants nor did there exist any mutual rights and obligations between them.

[5] The Kuper agreement took effect in 1991. Dr Maphathe died in 2000. The appellant as son and heir stepped into the shoes of Dr Maphathe and became bound by the Kuper agreement, which provided in clause 1(b) that the agreement "shall be binding on the heirs, executors, administrators or successors in title of both contracting parties." The appellant was thus bound by the agreement.

[6] In July 2009 either the shares in the company were sold to the respondent ("Mafeteng Group) or there simply was a cession of the company's rights to the respondent. The latter seems to have been what happened as this Court found in C of A (CIV) No. 55/2013, *infra*. Mafeteng Group thus also became bound by the Kuiper agreement as successor in title of the company. From the papers on record, in 2003 the company appointed the appellant to collect rent from the tenants on its behalf. That appointment

was terminated in October 2008. The papers also show that from about the time of his appointment as agent to collect rent, the appellant has done so to his own account and did not remit the rent to the company or to Mafeteng Group.

[7] The state of affairs outlined above constrained the company to institute proceedings to reclaim its entitlement to receive rent from the tenants. They did so in August 2009. It must be recalled that by this time the company had sold ceded its rights in Patsa Shopping Centre to the Mafeteng Group. Judgment was granted in favour of the company in December 2011. The respondent appealed that decision to this Court and judgment was delivered on 24 October 2014. See C of A (CIV) No. 55/2013.

[8] The proceedings in C of A (CIV) No. 55/2013, make it quite clear that the company ceded its rights in the Kuiper agreement to the Mafeteng Group, the respondent in this appeal. Dealing with that cession, this Court in C of A (CIV) No. 55/2013 said the following at paragraphs [3] and [4] of its judgment-

> "[3] … clause 1 of the document [deed of cession] proceeds:
>
> > 'The cedent hereby cedes to the cessionary, who hereby accepts the cession of all the cedent's right, title and interest in the property, in rem suam, out and out and upon signature hereof. The cessionary shall be fully vested with the rights ceded as the lawful owner thereof upon registration of this cession.'
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> [4] The effect of the session was that when, in August 2009 the applicant [*Kuper*] launched its motion against the first respondent [appellant herein] in this matter, the cession had taken effect and the rights referred to therein had already been transferred to Mafeteng Property Group (Pty) Ltd."

[9] It is clearly articulated in C of A (CIV) No. 55/2013 that when the company claimed against the appellant for the reliefs in the matter resulting in that appeal, it did so in respect of two distinct periods –the period before the cession and the period after the cession. This Court determined that the company could not make any claim in respect of the second period. The Judge of Appeal expressed himself thus:

> "[7] To my mind, then, when the applicant commenced proceedings [*in the High Court*] it had already divested itself of any right of action which it might previously have enjoyed against the first respondent [*appellant herein*] in respect of prayers 2, 3 and 4 of its notice of motion. [*These prayers related to the second period*.]
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> [8] The same does not apply, however, to prayer 7 [*which related to the first period*], the claim for an account, debate thereof and payment of the balance found to be due. The deed of cession did not have the effect of ceding the applicant's [*Kuiper's*] right, vis-a vis the tenants, to rentals already accrued before the cession. These it can therefore recover, notwithstanding the cession. In my view prayer 7 of the notice of motion ought to have been granted in the court a quo in qualified terms. The rest of the application had to be dismissed because of the cession."

[10] The Court's reasoning above prompted it to give the order, to wit, that –

> "… the appeal is allowed, with costs. The decision of the court a quo is set aside and in its place is substituted the following:
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> > '(1) The first respondent [appellant herein] is ordered to account to the applicant [Kuiper] for all the monies received by the first respondent from tenants at the Patsa Shopping Centre, Mafeteng from 1 April 2003 to 10 October 2008, to debate such account with the applicant and to pay to the applicant any balance which may be found to be due to the applicant after such accounting and debate.
> >
> > (2) Save as aforesaid, the application is dismissed."

[11] The judgment of the Court of Appeal granted the relief to which the company was entitled and that relief related only to the first period. It denied the company relief in respect of the second period, finding, in effect, that the company had no *locus standi* to sue in respect of matters taking place in the second period. It must be remembered that the parties in the High Court proceedings and on appeal were, for present purposes, the company and the appellant herein. The respondent herein was not a party. The company and the respondent herein had been of the mistaken view that, based on some understanding between them, a misapprehension of the law in fact, the company could claim for the accounting and debate of rentals received in respect of the second period and, as a result of that mistaken view they had agreed that the company had the right to institute the proceeding to recover the rent paid to and received by the appellant in the second period.

Respondent's separate claim

[12] When the Court of Appeal dismissed the company's claims in relation to the second period, the respondent herein was left high and dry by that judgment. It had no other way of recovering the monies due to it in respect of the second period other than to sue for that money, itself. And indeed it sued the respondent in the Commercial Court in Case No. CCA/0061/2016. That court granted the relief sought by the present respondent. Accordingly the learned judge made an order that reads-

> "The application is granted as prayed in terms of prayers 2, 3, 4 , 5, 6, 7 and 12."

[13] The relief sought by the respondent in Case No. CCA/0061/2016 was similarly formulated as the relief sought by the company, not only because the deponent to the founding affidavit was the same as in the company's case (which is immaterial because the deponent deposed to the affidavits in different capacities), but more importantly because the relief was similar except that it related to a different period, the second period.

[14] The appellant was dissatisfied with the judgment in Case No. CCA/0061/2016 and appealed against the whole of that judgment. That is the matter before us in this appeal.

[15] At the hearing of this appeal some preliminary motions and issues were raised by one or other of the parties. However, none of them are of any moment any longer, except the question of costs in relation to one of them - an application by the respondent to strike off the appeal, which application was not in the event persued because both parties were keen to have the appeal determined on the merits. I will return to the issue of the costs later.

[16] The appellant's grounds of appeal appear at p 256 of the record of proceedings. At the hearing, however, the parties submitted that this Court has to decide one issue only - whether the matter before by the Commercial Court and now on appeal was *res judicata* or not. I think they were both correct. The appellant's contentions in the court below and in this Court are founded on that issue. It is therefore inevitable that a finding on that issue disposes of the appeal.

Grounds for raising *res judicata* by appellant

[17] I will first examine why the appellant contends that the matter is or was *res judicata*.

[18] The appellant's understanding is that when the company instituted action, it was seeking the relief specified in the notice of motion in the High Court and that relief related to the whole period before and after the company ceded its rights in Patsa Shopping Centre to the respondent. As such when the matter went on appeal in C of A (CIV) No. 55/2013 and the Court dismissed the company's claims related to the second period for the reason that it had no *locus standi*, the relief sought was not only denied as against the company but as against the respondent herein as well. That, quite obviously, is an erroneous understanding of the judgment.

[19] I have already stated that the respondent herein was left high and dry by the judgment of the Court of Appeal and that it had to institute proceedings in order to assert its rights and obtain relief to which it was otherwise entitled. The respondent had, by virtue of the cession, acquired the rights in Patsa Shopping Centre which the company had hitherto enjoyed. It was not a party to the litigation between the company and the appellant. It had proceeded in error believing that merely because the company had not given it vacant possession of Patsa Shopping Centre, the company retained some right to act on its behalf and claim rent for the second period. That the Court of Appeal correctly found was untenable. See the discussion of this issue at paragraph [6] of the judgment.

[20] The requirements of *res judicata* are trite. The one that looms large here is whether the *lis* was between the same parties. In *Dubach v Fairways Hotel* 1949 (3) SA 1081 (SR) 1082 the importance and function of pleadings was emphasised. Pleadings not only enable each party to know what case it has to meet, clarify the issues, and assist a court in defining the limits of the action -(*Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 @ 178) - but they also place the issue raised in the action on record so that when judgment is given such judgment may be a bar to the parties litigating again on the same issue. Pleadings thus constitute proof where *res judicata* is raised. So, where the special plea of *res judicata* is raised as a defence to a claim, it is necessary to determine whether the issue raised was disposed of by a judgment *in rem* or by a judgment *in personam* delivered prior to an action between the same parties, concerning the same subject matter and founded on the same cause of action. The application of the principle of *res judicata* was discussed in *Joy to the World v Neo Malefane* C of A (CIV) 09/2016, in which the court upheld that special plea in respect of some only of the issues therein raised. In reaching its conclusion the court relied on the below quoted passage:

> "[14] In *Smith v Porritt & others*, the SCA summarized the requirements for a successful reliance on the *exceptio rei judicatae* as follows:
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> > 'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exception 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 defense remains one of *res judicata*. The recognition of the defense in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defense 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 defense of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

[21] I have heeded the cautionary remark in the above quotation and carefully considered the facts of the present case. In *casu* the parties were not the same in the company's case and in Case No. CCA/0061/2016. In the former, it was the company and the present appellant and, in the latter, it was the present respondent and the appellant. In both cases the judgments were *in personam* and not *in rem*. Whilst the cause of action and the relief sought were similar, the parties were not the same. The company was entitled to sue in respect of the first period. So was the respondent herein, in respect of the second period. A litigant in the position of the appellant can legitimately be sued by two plaintiffs or applicants for the same relief and on the same cause of action, provided the causes of action, though similar, the plaintiffs are not the same. That was the case here.

[22] The learned judge *a quo* was entirely correct to dismiss the special plea of *res judicata*. It did not apply. This appeal, grounded as it is on the issue of *res judicata*, must be therefore be dismissed.

[23] Returning now to the issue of the costs of the application to strike off the appeal, the respondent's contention was that the appellant failed to comply with this Court's directions that were issued, at the instance of the appellant, on 5 December 2018, when he applied for the appeal to be head urgently during this Special Sitting of this Court from 14 January to 1 February 2019. In difference to the application, the President of the Court gave directions regarding the filing of the record, and the heads of argument. The respondent said that the appellant failed, without any explanation therefor, to meet the deadline, much to the prejudice of the respondent, and proceeded further to have the matter heard without seeking condonation for his non-compliance with the directions. Linked to this complaint of the respondent is the state of the record. Two volumes in the record, Volumes 2 and 3 and all document, except those listed as items 25, 28, 20 and 31, were not necessary for the purposes of this appeal and should not have been included in the record. That those documents should have been excluded, is now common cause. At the hearing, both parties were in agreement that this was so. A further complaint was that the record was incomplete in that certain pages were missing, for example the first page of the appellant's grounds of appeal. The respondent prayed for the costs of the application to strike off the appeal, albeit it was not pursued for the reason I have already given, as well as the costs of perusing the unnecessary documents included in the record of appeal. In terms of Rule 5 of the Court of Appeal Rules, portions of the record which will not affect the result of the appeal *may not* be included in the record. The efficient preparation of the record is essential for the proper functioning of the Court of Appeal. Accordingly, if Rule 5 aforesaid, is needless breached, an appropriate order of costs against the offending party will be warranted. Taking a cue from Rule 5(16)

of this Court's rules, if documents mentioned in the sub-rule are included when they are not essential, the Registrar is required *mero motu* to disallow the costs as between attorney and client, of all documents mentioned in that sub-rule. In the circumstances of this matter I am satisfied that costs should be awarded against the appellant in relation to the preparation of the record and the filing of the application to strike off the appeal.

[24] In the result –

1. The appeal is dismissed with costs.

2. The appellant shall pay the costs of appeal as well as costs associated with the application to strike off the appeal and the preparation of the record.

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MH CHINHENGO

Acting Justice of Appeal

I agree

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P DAMASEB (DCJ)

Acting Justice of Appeal

I agree

_____

P MUSONDA

Acting Justice of Appeal

For Appellant: Adv C. J. Lephuthing

For Respondent: Adv T. Mpaka