

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CIV)/50/18

CIV/APN/1158/17

In the matter between

**CHABA-LI-MAKETSE SOCIETY
APPELLANT**

1ST

**TSHABALALA MASEKO
APPELLANT**

2ND

**MATSEPO NKEJANE
APPELLANT**

3RD

And

**NOZIPHO SIBEKO & 43 OTHERS
RESPONDENTS**

CORAM : DR. K.E. MOSITO, P
M. CHINHENGO AJA
N.T. MTSHIYA AJA

HEARD : 17 May 2019

DELIVERED : 31 May 2019

Summary

*Voluntary Associations/unregistered
Society - Application of subsections (1)
and (2) of section 20 of the Societies Act*

1966 on members of a non-registered society intending to sue each other.

JUDGMENT

MTSHIYA AJA

[1] The appellants as cited in this appeal are Chaba-Li-Maketse Society (“1st appellant”), Tshabalala Maseko (“2nd appellant”) who is the chairperson and manager of the 1st appellant and Matsepo Nkejane (“3rd appellant”) who was the co-manager and a member of the management committee of the 1st appellant. The respondents are Nozipho Sibeko and 43 others. These are men and women from the administrative district of Butha-Buthe who were members of the 1st appellant.

It was agreed at the commencement of the hearing that 1st appellant cited herein was not a party in the proceedings and had never participated in the *court a quo* as confirmed in the 2nd appellant’s answering affidavit in the *court a quo*. He states in part “... I am thus duly entitled to dispose to this affidavit on behalf of both myself and third respondent herein.” The 1st appellant is therefore not before the court. The appeal is by 2nd and 3rd appellants.

[2] The appeal is centred on a dispute over the management of and remuneration of the society members. The order of the *court a quo* that is being challenged reads as follows:-

“IT IS HEREBY ORDERED THAT:

1. The applicants are hereby granted leave of court to sue the respondents.
2. The applicants whose claims are within the jurisdiction of the subordinate courts are hereby granted leave to institute their respective claims against the respondents in the High Court of Lesotho.
3. Any such contemplated action shall be instituted within 30 days of granting of this leave of Court.
4. Costs are granted to the applicants.”

It should be noted that ‘respondent’ in paragraph 1 of the above order appears to include 1st appellant who was not a party to the proceedings. However, the order shows that it was the 2nd and 3rd appellants who appeared before the Judge being represented by Advocate T.F. Motsie - with Advocate S.T. Maqaqachane representing the respondents.

[3] The grounds of appeal are listed as follows:-

“-1-

The learned Judge a quo erred and misdirected himself in granting the applicants leave for relief from the disability imposed on the first respondent society by Section 20(1) when the law is clear that same could only be sought and granted in cases where the disabled society may want to institute their claims as against the third parties and not when the individual members of the society seek the same for purposes of suing one another.

-2-

The learned Judge a quo erred and misdirected himself in granting the applicants the relief not sought by them in that the respondents had only sought leave to sue the first respondent society alone despite the fact that they had also joined the 2nd and 3rd respondents and when delivering his judgment, the learned Judge ordered that the applicants may sue the respondents

which expression includes both the 2nd and 3rd respondents against whom no relief was sought.

-3-

The learned Judge a quo erred and misdirected himself in granting the applicants relief from the disability imposed by Section 20(1) when the law is clear that it does not protect the members of an unregistered society in any manner whatsoever and even goes further to criminalise the members very acts of managing and being members of an unregistered society.

-4-

The learned Judge a quo erred and misdirected himself in delivering judgment before he could apply his mind to the facts of the case before him in that he gave judgment on the same day on which the parties addressed him and even before he could apply his mind on the relevant sections of the law applicable.

-5-

The learned Judge erred and misdirected himself in disregarding the fact that the balance of convenience favoured the granting of the applicants' for stay of execution pending appeal.

-6-

The appellants reserve the right to file further grounds of appeal on receiving a copy of the judgment."

At the hearing of this matter grounds 4 and 5 were abandoned.

BACKGROUND

[4] On 5 June 2017 the respondents made an application to the High Court in which they sought to be granted leave of the court to legally enforce their claims against the appellants arising from contracts entered into by and between themselves and the first appellant (an unregistered society alleged to have acquired *universitas*

personarum status). The respondents sought to have those applicants whose claims were within the jurisdiction of subordinate courts granted leave to bring their claims to the High Court and be joined with the claims of those respondents whose claims fell within the jurisdiction of the same court in order to have all claims proceed in a single action before the court.

- [5] Notwithstanding the non-participation of 1st appellant cited herein, the appellants opposed the application on the basis that the 1st appellant is an unregistered society that had not acquired the alleged *universitas personarum* status. They contended that the 1st appellant had no capacity to sue or be sued let alone hold and/or own property or assets in its own capacity. In essence the appellants' position was that the society was unregistered to the effect that it had no constitution.

The appellants vehemently denied having obtained any property in 1st appellant's capacity or abusing any of 1st appellant's funds as alleged. It was also denied that 1st appellant had attained *universitas personarum* status. It was submitted that the 1st appellant had been formed only to acquire financial gain and sharing of profits and losses between its members and not to acquire property in its own name.

- [6] Without denying receipt of money from the respondents, the appellants alleged that all members of the society had

been paid back all principal sums of money that they contributed into the society and any claim would be only in respect of 10% interest accrued from the principal sums that the respondents initially contributed.

[7] The respondents' application before the High Court, as already stated, succeeded and they were on the same day granted the relief sought. The Court's order, although without reasons furnished, now forms the subject of this appeal on the basis of grounds 1-3 listed under paragraph 3 of this judgment.

I wish to point out that in approaching the court, the respondents were not directly seeking relief under Section 20(2) of the Act. In the main they wanted the following reliefs:

- “1. **THAT** the applicants be granted leave of Court to legally enforce their respective rights/claims the respondents arising out of contracts entered into by and between the respective applicants, on the one side, and the 2nd respondent society, on the other, in relation to the business of the 2nd respondent society.
2. **THAT** the applicants whose claims are within the jurisdiction of the subordinate courts be granted leave to institute their respective claims against the respondents in the High Court of Lesotho and such claims be joined with the claims of other applicants which are within the jurisdiction of the High Court, and all the claims to proceed in a single suit/action before the High Court.
3. **THAT** the applicants institutes such claims as envisaged in Prayer 1 above, within 30 days of the granting of the leave.”

However, the interrogation of the reliefs they sought from the court could not be done without invoking the provisions of s.20 of the Act. Having stated who they are, it was necessary for the court to determine whether or not, given the provisions of s.20 of the Act, they could sue each other.

ISSUES

[8] The appeal court is now tasked with determining the following issues:-

- (a) Whether or not Section 20 (1) of the Societies Act (the Act) creates a disability on members of an unregistered society to sue each other.
- (b) Whether or not, in the face of Section 20(2) of the Act the learned Judge *a quo* erred and misdirected himself in granting the respondents relief to sue each other, particularly suing the 2nd and 3rd appellants.

SUBMISSIONS AND INTERPRETATION OF THE LAW

[9] The appellants correctly raised issue with regards the lack of reasons for the *ex-tempore* judgment. They submitted that to proceed with an appeal in the absence of reasons for the judgment would place the court in the position of the *court a quo*. However, as it turned out during the hearing, the appeal is solely anchored on the correct

interpretation of subsections (1) and (2) of Section 20 of the Act.

[10] The appellants, contend that the *court a quo* erred in granting the respondents herein the relief in the form of leave to sue against a disability imposed by section 20(1) the Act.

The appellants argued that such relief could only be sought and granted where a disabled person wants to institute claims against third parties and not when individual members of a society seek to sue each other. It is the appellants' submission that members of an unregistered society are not protected in any manner to the extent that the acts of members of such an unregistered society, are criminalised by section 19 of the Act which provides as follows:

"19. (1) Whoever manages or assists in the management of a society to which this part applies and which is not registered under this Act, shall be guilty of an offence and liable on conviction to the penalty prescribed in section *twenty-eight*.

(2) Whoever is a member or acts as a member of a society to which this Part applies and which is not registered under this Act, shall be guilty of an offence and liable on conviction to the penalty prescribed in section *twenty-eight*."

[11] The appellants' also argue that the respondents herein failed to make a case for the relief sought. They submitted that the respondents' sought to institute claims that fell within the jurisdiction of lower courts in the High Court

along with those that already fell within its jurisdiction. The appellants submit that the respondents application is made in terms of section 6 of the High Court Act No.25 of 1978 which provides as follows :-

“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 the Judge upon application made to him in Chambers and after notice has been given to the other party.”

Respondents were supposed to prove certain requirements of that provision in the law.

[12] The contention is that under the above section the respondents were required to prove that the proposed action is not frivolous or vexatious by providing sufficient evidence that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

[13] In response the respondents herein raise a single issue in the appeal. They argue that the order at the centre of this appeal does not constitute a “final judgment” of the High Court and as such cannot be appealed to this court. In reliance on section 16 (1) of the Court of Appeal Act 10 of 1978 which reads as follows:-

“An appeal shall lie to this Court-(a) from all final judgments of the High Court; (b) by leave of the Court from an interlocutory order, an order made ex parte or an order as to costs only.”

The respondents submit that the order granted by the *court a quo* merely gave leave to sue the appellants and institute claims against the appellants in the High Court and is a procedural order not appealable as opposed to an appealable final order.

The respondents cannot be correct because the relief they sought was granted in its final form. The order gave them the right to join and consolidate their claims and sue the appellants for their money in the High Court. That is what they approached the court for. The respondents were not asking the court to determine their claims. That is a process that ensues once leave has been granted.

I am in agreement with the appellants' submissions that:

“In determining whether an order is final, it is important to bear in mind that ‘not merely the form of the order must be considered but also, and predominantly, its effect’ per the principle set out in **SOUTH AFRICAN MOTOR INDUSTRY EMPLOYERS’ ASSOCIATION V SOUTH AFRICAN BANK OF ATHENS LTD 1980(3) SA 91 (A)** at **96H AND ZWENI** at **5321**.

2.4 In that case, it was held that the order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court a quo and for these reasons, they are in effect final orders.”

[14] As I have already indicated in paragraph 9 above, notwithstanding other issues raised, the dispute herein lies in the correct interpretation of subsections (1) and (2) of Section 20 of the Act which provide as follows:

“20. (1) If a society formed after the commencement of this Act, and to which this Part applies, is not registered under this Act, the rights of that society and any member thereof, under or arising out of a contract made or entered into by or on behalf of that society or member in relation to the business of that society shall, subject to the provisions of subsections (2) to (6) inclusive, not be enforceable by civil action or other civil legal proceeding, whether in the society’s name or otherwise for so long as the society is not registered under this Act, but any other party to such contract may so enforce his rights under or arising out of such contract against that society or that member thereof.

(2) A society to which this Part applies and which is not registered under this Act or a member of such a society, may apply to a court of competent jurisdiction for relief from the disability imposed in subsection (1). If that court is satisfied that the failure to register was accidental, or due to inadvertence, or due to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, the court may, subject to the provisions of subsections (3) and (4), grant such relief either generally or in relation to a particular contract, on condition that the cost of the application be paid by the applicant unless the court otherwise orders, and subject to such other conditions as the court may see fit to impose.” (My own underlining).

A correct reading of s.20(1) above clearly shows that the intention of the legislature was to protect third parties from being sued by an unregistered society or by members of an unregistered society. The provision does not say members cannot sue each other. They can. It is the society and its members that is disabled from suing third parties.

I have underlined the above in subsection (2) to show that the society or its members, may, upon application being made to court, proceed against third parties. However, that was not necessary the application before the *court a quo*.

[15] It is my view that the failure to interpret the above provisions of the law has necessitated this appeal. The above provisions of the law are, in my view, clear and unambiguous. In general the process of interpreting a statute is aimed at giving words in the statute their ordinary meaning through having regard to the language used. In **Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA13, Wall; JA** said

“.....interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibly must be weighed in the light of these factors. The process is objective not subjective.”

The legislature deemed it necessary to bring in the Act in order:

“To provide for registering societies, for the consequences of failure to register societies and for dissolving unlawful societies to the extent that is necessary in a practical sense in a democratic society in the interest of public safety, public order, public morality and for protecting fundamental human rights and freedoms: and to make provision for related matters.”

[16] Having, under s.20(1), disabled the respondents to sue the third parties the legislature, honouring the civil rights of individuals belonging to the society, deemed it necessary to remove the disability through s.20(2). The enabling part of the provision as I have already indicated, clearly states that “a member of such society may apply to a court of competent jurisdiction for relief from the disability imposed in subsection (1).” The court, upon being satisfied by reasons given may grant the relief. This was not necessary *in casu* because the disability did not apply to the society and its members. The respondents had a right to proceed against the appellants who actually admit receiving the money from the respondents. All the court did was to allow the respondent to claim their money from the appellants. The law did not bar them from proceeding against each other.

[17] Given the correctness of the procedure that the respondents followed, namely taking advantage of Section 6 of the High Court Act No 25 of 1978, quoted herein at paragraph 11 of this judgment, I am unable to fault the granting of the order by the *court a quo*. The court, I want to believe, found that the application was not frivolous and

vexatious. The order was clearly directed against the appellants who had opposed the relief sought.

[18] On the issue of costs, the Act clearly states that the costs of an application under s.20(2) ought to be borne by the applicant unless the court thinks otherwise. However, the application in the *court a quo* was not made under the s.20(2) of the Act since it was not necessary. To that end I think that the respondents are entitled to their costs in respect of this appeal.

I therefore order as follows:

1. The appeal is dismissed.
2. The 2nd and 3rd appellants shall pay the respondents costs for this appeal, the one paying the other to be absolved.

N.T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree:

DR. K.E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

**M. CHINHENGO AJA
ACTING JUSTICE OF APPEAL**

For Appellant : ADV. T.F. MOTSIE
For Respondent: ADV. K. NYABELA