IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 55/2013
CIV/APN/351/2009

In the matter between:

BEN RADIOPELO MAPATHE **APPLICANT**

And

I KUPER LESOTHO **FIRST RESPONDENT**

MASTER OF THE HIGH COURT **SECOND RESPONDENT**

ATTORNEY-GENERAL **THIRD RESPONDENT**

CORAM: **DAMASEB AJA**

CHINENGO AJA

MTSHIYA AJA

HEARD: **20 MAY 2019**

DELIVERED: **31 MAY 2019**

SUMMARY

In an application to have the Court of Appeal revisit its own judgment, the applicant failed to show exceptional circumstances under which an apex court would exercise such jurisdiction. In addition, the application was brought 5 years after the impugned order was made with no reasonable explanation for the delay. Court held that raising an utterly meritless application asking the Court of Appeal to hold a rehearing in the circumstances that the applicant has done, is a waste of court's valuable time and resources and merits a punitive costs order on the scale of Attorney and own client.

JUDGEMENT

DAMASEB AJA (CHINENGO AJA AND MTSHIYA AJA concurring)

[1] We have before us what is referred to as an 'application', brought on notice of motion supported by affidavit, to revisit a decision of this court (Farlam JA, Thring JA and Louw JA) handed down in October 2014[1] on the basis that the court erred in deciding only one ground of appeal when what was before it were two grounds of appeal. The application is opposed.

Background

[2] The case in which the Court of Appeal took the decision now being assailed was an appeal from a decision of late Hlojoane J in which the learned judge was seized with a matter referred back to

[1] C of A (CIV) No. 55/2013.

the court *a quo* by the Court of Appeal to hear oral evidence and to determine whether a sublease, on the strength of which the first respondent (I Kuper Lesotho) relied to enforce certain rights against the applicant, was valid in law. That is so because there was a dispute whether the sublease complied with s 24 of the Deeds Registries Act as amended by s 94 of the Land Act 1997 (the Act).

[3] The effect of these provisions is that a lessor of land can only validly sublease land to another if it is registered in the deeds registry, consented to by a 'proper authority' and 'lodged for registration in the deeds registry within three months of the granting of such consent'. The Act specifically provides that a failure to lodge such lease for registration within the stated time or such extended time as may be ordered by a court, or if executed contrary to the provisions of the section, 'shall be null and void and of no force and effect'.

[4] The applicant is the son and heir of the late Dr Mapathe who owned the lease in the disputed land and had, whilst alive, sublet it to the first respondent who exercised the rights in and over the land as sublesee purporting to have complied with the provisions of the Act. In a dispute that arose between it and the applicant as heir in title (who naturally took the land subject to the sublease agreement) the applicant disputed the validity of the sublease alleging that it did not comply with the peremptory language of s 24 of the Act. It was that dispute that the Court of Appeal directed

the High Court to resolve by oral evidence and which led Hlojoane J making an order in the following terms:

> 'The Court thus finds that there has been compliance with the provisions of section 24 of the Deeds Registries Act 1967 and that the sub-lease agreement was duly registered in terms of the land Act 1979.'

[5] Hlojoane J's judgment and order were appealed to this court by the applicant on two grounds: First, that the High Court misdirected itself in not sustaining his objection that the first respondent had no *locus standi* to bring the application against him because it had ceded its rights under the sublease to a third party and, secondly, that Hlojoane J 'erred by allowing the first respondent to introduce a new cause of action by laying a basis for its case on the sublease registered in 1991 when originally the 1st respondent had founded its case on a sublease registered in 1990 which it became apparent that it was not registered and had it not been but for this misdirection, the learned Judge a quo may not have ruled in favour of the 1st respondent'.

[6] In dealing with the grounds of appeal, Thiring JA said concerning the two grounds that:

> 'In the view which I take of this matter it is necessary to consider only [the first ground], since it is conclusive of the whole case'. (My Underlining for emphasis)

[7] It is this finding of the Court of Appeal that the applicant cavils in the 'application' with which we are now seized. He seeks the following relief:

> '1. Reinstating the … appeal for the determination of the second ground of appeal;
> 2. Directing that same record which was filed stand as the only record for the determination of such second ground of appeal;
> 3. Directing the matter to be enrolled on April 2019 Session.'

[8] The applicant gives the following grounds for the relief he seeks. He says that because the second ground was not dealt with by Thring JA 'the matter was not decided to its finality' and that if decided it will have the 'effect of bringing this matter of sublease to finality'. The latter being a reference to incessant litigation in which the parties are involved in courts below this court relating to the same matter. In other words, he wants us to anticipate and deal with those disputes whatever they are even before they properly come before this court. That is a logical inference because we will have to state in our reasons for granting his relief that deciding the second ground will bring the pending disputes to an end; in other words we must consider their merits.

[9] The applicant states further that since the second ground was not 'expressly decided' the matter (meaning the appeal) remains 'unexhausted' and the Court of Appeal 'has all the powers to revisit the matter and put it to rest'. He adds that 'the importance of this matter is that the 1st respondent seemed to have made a cession and should the sublease be found to be a nullity same goes for the cession'.

[10] Crucially, he states:

> '[T]his Honourable Court has got all powers to revise its judgment specially where there is an apparent mistake committed by the Court. In conclusion I submit that this Honourable Court made a mistake by not determining the second ground of appeal…because the status quo still remains'.

[11] It is apparent from all that I have said so far that the Court of Appeal is not being asked to interpret an ambiguity in its own judgment or to rectify an apparent error. It is being asked to declare that its earlier decision was wrong and to make a decision different to what it did previously.

[12] The first respondent opposes the 'application' and denies that it is competent in law as there is no *lis* pending between the parties in respect of the appeal disposed of by the Court of Appeal in 2014 -rendering the matter *res judicata*. It states that the application is utterly without merit and that the lawyers who are encouraging it be held liable for the costs de *bonis propiis* jointly and severally, the one paying the other to be absolved.

The Law

[13] The *locus classicus* on the interpretation of judgments and orders is *Firestone South Africa (Pty) Ltd v Genticuro.*[2] In that matter, the parties made an application to the AD concerning the meaning of the cost order given by the AD. That cost order referred to counsel's fees to be taxed at a rate in the Fourth Schedule to the Patents Act, 1952. But the Fourth Schedule did not prescribe fees

[2] 1977(4) SA 298 (A) at 304.

for counsel. The court had not been alerted to this. A dispute then arose at taxation and *Firestone* then launched an application to the AD 'for an order clarifying and rectifying' the paragraph of the order in question.

[14] I propose to quote extensively from *Firestone* as it usefully sets out the applicable principles (omitting footnotes and case references):

> 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.
>
> There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:
>
> (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant.
> (ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not

thereby alter "the sense and substance" of the judgment or order.

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in the *West Rand* case, *supra* at pp. 186 - 7, when, with reference to the old authorities, he said:

> "The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

Again, this exception is inapplicable in the present proceedings since neither the T.P.D. nor this court committed any error in expressing its relevant orders; those orders reflected respectively the intention of each Court. The error related to the sense or substance of the relevant orders due to the T.P.D.'s erroneously assuming, and this Court's erroneously affirming, that the Fourth Schedule does prescribe a tariff for counsel's fees.

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order. The reason is …that in such a case the Court is always regarded as having made its original order "with the implied understanding" that it is open to the mulcted party (or perhaps any party "aggrieved" by the order… to be subsequently heard on the appropriate order as to costs.'

And concluding:[3]

'None of the aforegoing exceptions therefore applies. But the following further questions arise out of the arguments addressed to us: whether the above list of exceptions is exhaustive; whether a court, and especially this Court, being the final Court of appeal, has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, <u>especially as to costs</u>; and whether the present is a case in which that discretion ought to be exercised in Firestone's favour, according to the prayer in its application. Apparently this Court in *Ex parte Barclays Bank*, 1936 AD 481, considered that the list was not exhaustive and that a court retained a general discretionary power to alter its judgment or order, <u>at any rate in regard to costs</u>. For on p. 485 STRATFORD, J.A., said:

"That the alteration of its order is a matter for the exercise of the Court's discretion seems to have been the view of SOLOMON, J.A.: 'The matter is not one of principle or of

[3] At p 308.

> substantive law, but purely one of procedure, and we are entitled to regulate the procedure of our own Courts'.

In fact, in the *Barclays Bank* case this Court refused to exercise the above-mentioned discretion in favour of the applicant by altering the orders as to costs made by the T.P.D. and itself. But in *Pogrund v Yutar*, 1968 (1) SA 395 (AD) at pp. 397D - F and 398B - C, this Court, relying on the *Barclays Bank* and *West Rand* cases, purported to exercise that discretion by subsequently altering its order of costs by directing that the tariff of maximum fees for counsel prescribed in the Rule of Court 69 (3) should not apply. However, on my reading of the judgments in the *West Rand* case, I think that a clear distinction was drawn between a Court's jurisdiction to correct, alter or supplement its judgment or order and the time limit within which the application for such relief has to be brought; that this Court held that the former is a question of substantive law and the latter one of procedural law; and that a court has a discretion, not in regard to the former, but only in regard to the latter. The dicta of SOLOMON, J.A., referred to above relate to the procedural and not the substantive aspect of the problem. It is indeed difficult to reconcile the idea of a court's retaining a general discretionary power to correct, alter or supplement its own judgment or order with the fundamental concept of its being *functus officio* when it pronounces it. True, this Court in the *Estate Garlick* case, supra, 1934 AD 499, did add para. (iv) to the above-mentioned list of exceptions to the general principle of the finality and immutability of a court's judgment or order (pp. 503 - 4). But in doing so it did not purport (in my respectful view) to exercise any general discretion; it seems merely to have adapted the general Roman-Dutch substantive law ex necessitate rei to meet the modern exigency caused by the practice of our courts of making orders as to costs without having heard any argument thereon. However, I need not pursue and express any final view on this inquiry; the correctness or otherwise of the approach in the *Barclays Bank* and *Pogrund* cases was not debated before us; that

> aspect can be left for future consideration, since, for the immediate purpose in hand, it suffices merely for me to assume without deciding in Firestone's favour that a court does retain a general discretion to correct, alter or supplement its judgment or order in appropriate cases other than those listed above. But, I should add, the assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest *reipublicae ut sit finis litium*.' (my underlining)

[15] The *Firestone* Court however declined the application because of an inordinate delay (7 years), stating:[4]

> 'In a case such as the present once a court ought to be loath to exercise its discretion in favour of a party who has not been vigilant, but indeed supine or dormant, about protecting its alleged rights or redressing alleged wrongs.'

[16] Except for the exceptions set out in *Firestone*, the following are the circumstances in which the apex would revisit an earlier judgment. First, where it was obtained by fraud.[5] It was recognised by the Constitutional Court of South Africa in *Thembekile Molaudzi v The State*[6] that a final order may be revisited if it had resulted in substantial hardship or injustice'. A similar approach was adopted by the Supreme Court of Namibia in *S v Likanyi.*[7] That remedy is possible only if, in the words of Lord Woolf CJ in *Taylor v Lawrence*[8], it is clearly established*:*

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[4] At p 309.
[5] Schierhout v Union Government 1927 AND 94 at 98.
[6] (2015) ZACC 20 at para 37, Quoted with approval by this court in Lepule v Lepule and Others C of A (CIV) NO. 5/2013 at para [13].
[7] *S v Likanyi* 2017 (3) NR 771(SC).
[8] (2003) QB 528(CA) at para 55.

> '. . . a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on other and the extent to which the complaining party is the author of his own misfortune will also be important consideration'.

[17] Speaking of the Court of Appeal of Lesotho, Mosito P made clear in *Hippo Transport (Pty) Ltd v The Commissioner of Customs & Excise and Another*[9] that:

> '[O]nce it has made a decision on an issue, that decision is final in that the issue is settled, based on the notion among others of the need for the finality and certainty in the context of the rule of law.'

[18] The learned President recognised though that the Court of Appeal as 'the final court . . . has the inherent jurisdiction or powers to review its own previous decision. . . in order to correct obvious mistake and to do justice.' He made clear that the power should be exercised sparingly and only in exceptional circumstances such as where 'gross injustice and or a patent error has occurred in the prior judgment' and that it is 'not done for purposes other than to correct a patent error and or grave injustice. . . '

[19] To succeed, the applicant had to bring himself within one or more of the exceptions delineated in the authorities that I have cited.

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[9] C of A (CIV) NO. 06/2017, para 19.

[20] He has not come to this court because the judgment he impugns seeks supplementation under the first exception in *Firestone*. Under the second exception, he does not rely on any ambiguity in the judgment and he also does not rely on a clerical error in the judgment. The other exception relating to costs also finds no application.

[21] In fact, what he seeks to do is that which the *Firestone* Court said is impermissible, that is to change the 'sense and substance' of the judgment given by Thring JA. To change the substance or essence of an earlier judgment, it is now clear from the modern authorities, he had to establish fraud or, a gross injustice.

Disposal

[22] The Court in the previous case had regard to both grounds advanced on appeal. As it was entitled to do, it looked at the merits of both and took the view that the second ground did not require consideration because the first was dispositive of 'the whole case' and dismissed the part of the relief sought by the applicant based on the second ground.

[23] What the applicant now seeks is a rehearing of the appeal which was determined by the Court of Appeal because he takes the view that the issue remains unexhausted. That stance is not supported by the finding made by Thring JA who stated clearly that the court, by its finding, intended to dispose of the entire case which included the second ground relied on by the applicant. No gross injustice or patent error arises from such an approach which

is common practice in our courts. By granting the relief that the applicant seeks, we will create a charter for every dissatisfied litigant to return to court claiming that points not decided by the court occasioned him a grave injustice and that the Court of Appeal must reopen an appeal.

[24] At all events, the judgment being impugned was handed down in 2014, some five years ago. There is no credible reason provided why it was not impugned soon after it was handed down. It was for such inordinate delay that the court in *Firestone* was prepared to disallow the relief sought even if a case was made out for it. Thus, even assuming that the applicant had made out a case of grave injustice, the relief he seeks would have failed.

[25] The application brought by the applicant must therefore be dismissed.

Costs

[26] Costs must follow the result and the first respondent is entitled to its costs. The first respondent asked that we make a punitive costs order de *bonis propriis* against the applicant's legal practitioners in view of the utterly hopeless prospects of the application and based on the fact that the applicant stated in the supporting affidavit that he did so on the advice of the legal practitioners.

[27] As I have shown, the authorities show that in an exceptional case the apex court will revisit its previous decision. The applicant has failed to bring himself within any of the exceptions set out in the cases and this judgment. The legal fraternity is thus on notice as to the view of this Court in regard to the applicants' ceaseless pursuit of the matter. Those who in future assist him to pursue this meritless cause will be doing so at their own peril. I do not think it will be appropriate to hold the legal practitioner of record personally liable at this stage.

[28] What remains to be considered is whether the applicant must be made to pay the first respondent's attorney-client costs.

[29] The Namibian Supreme Court stated the applicable approach in *Katjaimo v Katjaimo and Others* 2015 (2) NR 340 (SC) at 350I-351A-H. Attorney and own client costs are awarded sparingly and only if party and party costs will not adequately indemnify the innocent party in respect of the costs incurred as a result of the opponent's nonfeasance or malfeasance. The court was satisfied that in that case, party and party costs would not be an adequate recompense to the respondents for the costs they incurred in opposing the ill-fated appeal and the related interlocutory applications.

[30] In my view, raising an utterly meritless application asking the Court of Appeal to hold a rehearing in the circumstances that the applicant has done, is a waste of court's valuable time and resources and is deserving of a punitive costs order on the scale of attorney and own client. Party and party costs would not be an

adequate recompense to the first respondent for the unnecessary costs incurred to ward off the meritless application.

[31] I therefore order as follows:

1. The application is dismissed.
2. The applicant shall pay the 1st respondent's costs on the scale of attorney-and-own client.

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P.T DAMASEB
ACTING JUSTICE OF APPEAL

I agree:

_____

M CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

_____

M MTSHIYA AJA
ACTING JUSTICE OF APPEAL

For the Appellant: Adv. Metsing

For the 1ST Respondent: Adv. T . Mphaka