IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 77/2019**

LC/08/2016

In the matter between:

MANTEPASE LIFOLOANE **APPELLANT**

AND

MOAHLOLI NTSOOA **1ST RESPONDENT**

THABO MOFOSI **2ND RESPONDENT**

LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

O/C QUTHING POLICE STATION **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

Coram: **DR K.E .MOSITO, P**

DR P. MUSONDA, AJA

N.T. MTSHIYA, AJA

DATE HEARD: **20 May 2020**

DATE DELIVERED: **29 May 2020**

Summary

Appeal against judgment on Contempt of court - Failure to comply with court order-need to prove all elements of contempt beyond reasonable doubt- respondent failing to avail order disobeyed- appeal upheld.

JUDGMENT

MTSHIYA, AJA

INTRODUCTION

[1] This is an appeal wherein the parties have, in terms of Rule 30(5) (a) of the Court of Appeal (Amendment) Rules 2020, agreed that the appeal be heard on teleconferencing in addition to the record and written submissions.

The proceedings in this appeal started by way of civil summons in the Land Court where judgment was delivered on 18 November 2019 by Acting Chief Justice, -Madam Justice Mahase. The Court order that was made reads as follows:

"**IT IS HEREBY ORDERED THAT:**

1. 1ST Respondent should purge her contempt within four days from the date when she will have been served with this order".

[2] The record also shows that on 16 July 2019 the Land Court dismissed an application filed by the appellant for condonation of late noting of an appeal. In terms of the record, this happens to be the order that the appellant is alleged to have disobeyed or ignored. It is alleged that a copy of that order was duly served on the appellant on 18 July 2019 and appellant refused to accept service of the said order. It is further alleged that to date the respondent has not complied with the said order. There is no clear statement in the papers on how the appellant was required to obey the said order dismissing her application for condonation for late filing of appeal.

[3] Displeased by the Court's *a quo's* order of 18 November 2019 the appellant now appeals against the said order listing the following grounds of appeal:

1. The Learned Judge in the Court a quo erred/ misdirected herself by presiding over the matter for the following reasons;

1.1 The matter fell within the jurisdiction of the Quthing Land District Court. The learned Judge ought to have indicated as much and struck the matter off the roll.

1.2 The court *a quo* ought to have held that on the facts and or law 1st and 2nd Respondents had not made out a case for the relief sought.

1.3 The learned Judge ought to have held that the Court had no jurisdiction to entertain the matter as the notice of set down had not been served upon the Appellant's attorneys.

2. The Court *a quo* erred in making an incompetent order directing the Appellant to purge her contempt, in as much as the court had not convicted the Appellant of the offence of contempt of court. Consequently the court a quo had no jurisdiction to make such an order.

ALTERNATIVELY

2.2 The court *a quo* erred in holding Appellant guilty of contempt of Court in as much as *malafide* on the part of the Appellant had not been established.

2.2.1 The Learned Judge ought to have held that the 1st and 2nd Respondents had not proved their

case against the Appellant beyond reasonable doubt.

3. On the facts and law the Court *a quo* ought to have dismissed 1st and 2nd Respondents' contempt Application with costs.

In submissions the appellant, through her Advocate, said she would only pursue grounds of appeal under paragraphs 1.3 and 2.1 to 2.2.1 above.

Background

[4] This appeal arises from an application instituted by 1st and 2nd respondents in the Land Court on 20 August 2019. In the application the 1st and 2nd respondents sought relief in the following terms:

> "1. That the 1st Respondent (now appellant) be ordered and directed to purge her contempt within a day of receipt of an order to that effect.
>
> 2. That 1st Respondent (now appellant) be kept in jail for a period of sixty (60) days for contempt.
>
> 3. That 2nd Respondent be ordered to transfer rights with respect to plot number **17684-280** to 1st Applicant (now 1st respondent) and with or without 1st Respondent's (now appellant) signature thereof.

4. Costs of suit.

5. Further and/or other alternative relief."

I must point out from the outset that the papers in the record do not tell the story behind plot number **17684-280** referred to in paragraph 3 above.

[5] The appellant opposed the application and duly filed her answering affidavit. The 1st and 2nd respondents did not file any replying affidavits. The application was heard by the court *a quo* on the 18th of November 2019 without evidence of the notice of set down being served upon the appellant or her attorneys. The court in its ruling, as already shown under paragraph 1 of this judgment, ordered the appellant to purge her contempt within 4 days from the date of service of the said order.

Appellant's Case

[6] The Appellant denies being in contempt of court and claims to have instituted an application for the rescission of the said order, which was erroneously granted. To that end, the Appellant is asking this court to find that the order was granted without any

evidence and that a notice of set down was never served on her or her attorneys. It is her submission that in the circumstances the court ought to have refused to hear the matter. She also correctly argues that it is standard court procedure that parties to any case, be furnished with a notice of set down before the hearing in adherence to the *audi alteram partem* rule. Indeed, there is no evidence in the record advanced to rebut her story. That leaves the court with no option but to accept that the probability is that her story is true.

[7] Furthermore, as can be gleaned from the grounds of appeal, the appellant takes the position that "the court *a quo* erred in making an incompetent order directing the appellant to purge her contempt in as much as the court had not convicted the appellant of the offence of contempt of court. Consequently the court *a quo* had no jurisdiction to make such an order".

The order in question is in one sentence and there is no indication as to whether or not the issue of contempt was ever interrogated and proved. One would have expected the Court to pronounce a clear finding on the issue of contempt.

[8] During the hearing, an attempt was made to make the court believe that there was an initial order from the land court which should be read together with the court's order of 16 July 2019 which dismissed the appellant's application for condonation. Unfortunately, the order referred to does not form part of the record.

It is also appellant's case that "the court a quo erred in holding appellant guilty of contempt of court, in as much as *malafide* on the part of the Appellant had not been established".

Respondent's Case

[9] In terms of the respondent's founding affidavit in the application for contempt of court, the relevant and crucial averments pleaded are found in paragraphs 4.1 to 4.4 of the affidavit, where the first respondent states :

> "4.1 I aver that on the 16th day of July, 2019,this Honourable Court granted an order in favour of applicants; in terms of which 1st Respondent's claim for condonation for late of noting of an appeal and other relief was dismissed with costs.
>
> 4.2 The copy of the said order was duly served upon 1st Respondent on the 18th of July, 2019.I aver that despite proper service of same,1st Respondent disobeyed such an order and refused to accept same notwithstanding knowledge on her part that she was being served with the said order. I refer this Honourable Court to the return of service filed by the Court's

> messenger, which return of service forms part of the record in the matter.
>
> 4.3 It is material to disclose that up to date, 1st Respondent has not complied with the said Court order and has instead sworn before the messenger of this Court on the day in question not to accept such process ever. I aver that I was advised by counsel of record and the messenger of this Court and verify believe the advice to be true and correct, for they had no reason to lie to me.
>
> 4.4 I aver further that 1st Respondent has blatantly refused to comply with the order herein aforesaid in that despite the order, service and knowledge thereof, 1st Respondent has to date refused, ignored and/or neglected to comply with the said order. I verify aver that 1st Respondent's conduct amounts to blatant contempt of this Honourable Court. I aver she is rendering the said order meaningless and useless. I further aver that she is clearly determined to frustrate the execution of this Honourable Court's order and in my contention, her conduct clearly has the effect of bringing the administration of justice in this country into total disrepute in the eyes of the right thinking members of the society"

The above paragraphs form the bases of the respondents' case against the appellant.

The Issues

[10] A reading of these papers and a consideration of the grounds of appeal, leads one to ask: In what way can it be said the appellant disobeyed an order of Court nearly dismissing her application for condonation for late noting of appeal and was content proved.

The Law

[11] It is trite that in contempt cases the main points to be proved are generally the following:

1. That there is a valid court order in force requiring the person to whom it is directed to act on it.
2. That the person to whom the order is directed is aware of the court order in question (service of the court order on the person).
3. That there is evidence that upon being served with the court order the person to whom it is directed has deliberately refused to obey it.

Analysis

[12] I have already indicated above that the respondents' case is anchored on paragraphs 4.1 to 4.4 of the founding affidavit quoted herein under paragraph 9.Generally in motion proceedings and as correctly submitted by the appellant's Advocate:

> "it is trite that applicant must stand or fall by his/her founding affidavit".

The appellant's advocate went further to submit:-

> "Time after time, it has been authoritatively cautioned that issues upon which parties seek to rely should be raised in

the affidavits, by defining relevant issues and setting out evidence relied upon, as it was observed in **Swissbough Diamond Mines (Pty) and Others v Government of Republic of South Africa and Others**

1999 (2) SA 279 at 323J:

" Relevant issues should be dealt with in affidavits and not left to be raised only in argument by Counsel"

(See also Lesotho National Olympic Committee v Morolong LAC (2000-2004) 449 at 457 and **Frasers Lesotho LTD V Hata Butle (Pty) Ltd LAC** (1995-1999) 700 AT 702C.

l have elsewhere in this judgment already indicated that an attempt was made during argument to indicate that there was yet another relevant court order which should be read together with the court order referred to in paragraph 4.1 of the founding affidavit. That order, as already stated, does not form part of this record. It is clear from the quoted paragraphs of the respondents' founding affidavit that the order of 16 July 2019 is the one that was served on the appellant. That is the order the appellant is alleged to have disobeyed. Unfortunately, that order does not require the appellant to do anything. The order, as was correctly argued, is not executable. There is a plethora of authorities which support that position.

In **Lesotho Girl Guides Association v Unity English Medium School CIV/APN/5/1994 (UNREPORTED) at pp. 3-4,**the court, faced with a similar problem, had this to say:-

> "Orders of court are, generally speaking divided into orders *ad pecuniam solvendam* (i.e orders to pay a sum of money) and orders *ad factum praestandum*(i.e. orders to do, or abstain from doing a particular thing).
>
> Where an order is for payment of money, it is enforced by issuing a writ of execution against the judgment debtor in terms of which, if the judgment debtor does not pay the amount specified in the writ, the judgment debtor's property can be attached and sold in execution. Where, however, the respondent or defendant has been ordered to do or abstain from doing any particular act and he intentionally fails or neglects to comply with the court order, the order of court is enforced by committing respondent or defendant to prison until he complies with the order.
>
> The problem that Applicant could not overcome was whether or not the dismissal of the applicant's application by the court was *ad* order as *factum praestandum*. What was the applicant ordered to do save to pay costs? What was applicant ordered to do or not do which respondent could enforce through contempt of court proceedings?"

The above, in my view, is applicable to this case. The order dismissing the application for condonation for not filing an appeal on time did not require the appellant to do anything.

[11] Furthermore, the Court order of 18 November 2019, apart from directing the appellant to purge her contempt, does not declare the appellant to be in contempt of any specific court order.

Given the factors to be proved in cases of contempt, it is difficult in *casu* to ascertain how the finding of contempt was arrived at.

In **PS Minisitry of Foreign Affairs and international Relations v Maope (C of A) 52/18 [2019] LCSA 12 (31 May 20190);** this court, in dealing with the issue of contempt, had this to say:

> " [12] In the circumstances, bearing in mind that the application in the court *a quo* was a contempt application, it is difficult to see how it could be said that the appellant discharged the onus placed on his shoulders, of showing that indeed the 1st respondent was guilty of contempt beyond a reasonable doubt.
>
> [13] The contemporary approach to applications for contempt of court was stated in the oft-quoted decision of Fakie No v CCII Systems (Pty0 Ltd (653/04) {2006} ZASCA 52;2006 (4) SA 326 (SCA) AT PARA .42 wherein Cameron JA said:
>
> 1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> 4. But once the applicant has proved the order, service or notice, and non-compliance the respondent bears an evidential burden in relation to willfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond reasonable doubt".

Guided by the above principles of law, l am unable to accept that the respondents gave notice to the appellant or her attorneys, that the respondents have placed before the court the actual order that was not complied with and that contempt

was indeed established beyond reasonable doubt. In the circumstances it is only proper that the appeal be allowed with costs.

[12] I therefore order as follows,

The appeal succeeds with costs.

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N.T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree .....

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

I agree .....

DR P. MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV. Z MDA KC

FOR RESPONDENTS: ADV. R.R TS'EPHE