

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) NO.: 8/2020

EXECUTOR – ESTATE LATE

‘MATHABO & MOHANOE MOEPI

APPELLANT

AND

TS'EPO MONAHENG (UNLAWFUL

OCCUPIER OF PLOT NO. 13272-625

1ST RESPONDENT

LAND ADMINISTRATION AUTHORITY

2ND RESPONDENT

MASTER OF HIGH COURT

3RD RESPONDENT

MASERU CITY COUNCIL

4TH RESPONDENT

MABOTE POLICE STATION

5TH RESPONDENT

COMMISSIONER OF POLICE

6TH RESPONDENT

ATTORNEY GENERAL

7TH RESPONDENT

MATS'OOA PATRICIA MOEPI

(BORN MOHLOAI)

8TH RESPONDENT

Coram:

P T DAMASEB, AJA

DR P MUSONDA, AJA

DR J VAN DER WESTHUIZEN, AJA

HEARD:

22 OCTOBER 2020

DELIVERED:

30 OCTOBER 2020

Summary

Land Court summarily dismissed an originating application without hearing oral evidence, when on the pleadings the parties' versions with irreconcilable and mutually destructive.

Land Court's judgment and order set aside on appeal and matter referred back to Land Court to be heard by a different judge.

JUDGEMENT

PT Damaseb AJA:

[1] The appellant appeals against a judgment and order of Mahase ACJ sitting as a judge of the Land Court in which the court in essence summarily dismissed the appellant's application as executor of a deceased estate, seeking an order to eject the first respondent from Plot No. 13272-625, Khubetsoana, Maseru Urban (the disputed land).

[2] The appellant approached the Land Court (a division of the High Court)¹ in her capacity as executor appointed by the Master of the High Court in terms of the Administration of Estates Proclamation 19 of 1935 in respect of the estate of the late Mohane

¹ In terms of the Land Court Rules 2012 made under the Land Act 2010.

Kalamas Moepi (the late Mr Moepi) and the late 'Mathabo Ngwegazi Moepi (the late 'Mathabo).

[3] In her originating application,² brought on an urgent basis seeking an interim order which was then granted, the appellant (the executor) alleged that the disputed land was the property of the late Mr Moepi and 'Mathabo, and that since their death it fell to be administered by her and that the first respondent is in its unlawful occupation and hindering the performance of her responsibilities as executor over the disputed land.

[4] The executor sought the following substantive relief in the notice of motion:

- (a) That the first respondent be restrained from interfering with the disputed land and from using it for development or constructing a residential building thereon;
- (b) That the Master of the High Court (third respondent) be restrained and interdicted from permitting the Land Administration Authority (the second respondent) to authorise transfer of the disputed land to any body;
- (c) That the first respondent be interdicted from holding himself out as the owner of the disputed land;

² In terms of rule 12.

- (d) An order interdicting the first respondent from interfering in whatever manner with the disputed land;
- (e) An order declaring the agreement of sale (if any) entered into by and between the first respondent and an 'undisclosed person' relating to the disputed land 'in whatever disguised form as null and void ab initio and of no legal effect';
- (f) An order declaring the first respondent as a *mala fide* occupier of the disputed land and 'liable to forfeit any development he made' on the disputed land;
- (g) An order permanently evicting the first respondent from the disputed land;
- (h) Costs on an attorney and own client scale.

[5] As is required by the Land Court Rules,³ the executor filed a list of witnesses and a summary of what they would testify at trial. The gravamen of it is that the police will testify that the disputed land was being illegally occupied; that the executor put the first respondent on notice to cease the illegal occupation and development on the disputed land; a son of the late Mr Moepi and 'Mathabo will testify that his parents were married by civil rites in community of property and that they had not divorced prior to their demise and that they acquired the disputed land together. The executor also listed and furnished a copy of a land lease

³ Rule 13(1).

registered on 3 May 2005 and a copy of a marriage certificate of the late Mr Moepi and 'Mathabo.

[6] It is common cause that the first respondent is in occupation of the disputed land and carrying on development thereon. The first respondent opposed the application and filed an 'Answer'.⁴ In it he raised several points *in limine* (including non-joinder of 'Mantsooa⁵) and pleaded over on the merits.

[7] The first respondent asserted that the disputed land did not belong to the estate of the late Mr Moepi and late 'Mathabo (who according to him is the second wife of the late Mr Moepi). According to the first respondent, the disputed land belonged to the estate of the late Mr Moepi and his third wife, 'Mantsooa Moepi (Mantsooa) - to whom he was in terms of customary law married in community of property. That being the case, the disputed land was, in law, not part of the joint estate of the late Mr Moepi and the late 'Mathabo and therefore not subject to administration by the executor. According to first respondent, he purchased the land from

⁴ In terms of rule 28.

⁵ The rest being lack of jurisdiction by the land Court; 'privity of contract' and the executor's lack of 'locus standi' as the disputed land belonged to an estate other than the one in respect of which she holds a mandate.

‘Mantsooa who, in law, was the lawful heir thereto. The first respondent therefore raised a ‘special answer’ of non-joinder of ‘Mantsooa.

[8] It bears mention that the first respondent in his plea on the merits alleged:

‘Late Mohanoe Kalamas Moepi had three wives and the marriage of [Mathabo as second wife] being null and void to the extent that it was entered during the subsistence of the existing marriage between ‘Masekhobe Moepi [the first wife] [who] is still alive [and] with whom she was married by customary rites and in community of property with the late Mr Moepi. And the third [marriage was] with ...‘Mantsoaa Moepi [who] was also married to the late Mr Moepi by customary rites and in community of property and she is still surviving the property in issue [and it] does not form part of the estate of the said deceased [with ‘Mathoba].’

....

The position of the law is that the civil marriage does not co-exist with any other marriage to the exclusion of all other marriages. Therefore there cannot be any talk of the joint estate between the late couple to the extent that their marriage was a nullity.’

[9] The first respondent listed the witnesses that will testify and the documents to be produced at the trial. The gist of which is that he bought the disputed land from 'Mantsooa; that 'Masekhoe will testify that she is the first wife of the late husband; and that 'Mantsooa is the third wife of the late Mr Moepi. The allegation relating to the customary marriages is to be supported by oral testimony.

[10] It is common cause that the executor had not joined 'Mantsooa in his originating application. 'Mantsooa therefore brought an interlocutory application to intervene⁶ which was not opposed. The court granted it and she became a party to the proceedings, becoming the eighth respondent. 'Mantsooa then also filed an Answer with a list of her intended witnesses and documents. She intends to prove her marriage and that of the alleged first wife to the late Mr Moepi by the testimony of witnesses and contemporaneous documents evidencing the existence of those marriages.

[11] 'Mantsooa also attached documents purporting to prove that she and the late Mr Moepi had a joint will and power of attorney in

⁶ In terms of rule 35.

terms whereof she became heir to the disputed land upon the death of the late Mr Moepi. She also asserted that, as lawful heir, she sold the disputed land to the first respondent.

[12] Clear issues of law and fact arose at the close of pleadings: was the marriage of 'Mathabo valid? Was the alleged first wife validly married to the late Mr Moepi? If she was not, and in light of 'Mathabo's civil marriage to the late Mr Moepi, what is the consequence of that for the marriage of 'Mat'sooa's purported customary marriage to the late Mr Moepi?

[13] Those factual and legal issues are accentuated by the fact that the alleged first and third marriages depend for their existence on oral evidence which, in the best of circumstances, can be unreliable. It will be recalled that the late 'Mathabo's is the only marriage that is evidenced by a marriage certificate. Whichever result is arrived at as regards the validity of the various marriages, the question still looms large: which joint estate does the disputed land belong to?

[14] It is what happened after the pleadings closed which is the subject of the present appeal. Mahase ACJ proceeded to determine the matter without hearing oral evidence regardless of the disputed

facts and mutually destructive versions of the main protagonists as appear on the pleadings.

[15] I hasten to add that the averments made in the pleadings and the summary of the evidence do not constitute evidence under oath and the various documents disclosed by the parties - although they may on their face support the version of the party producing them – have not been subjected to scrutiny under cross-examination because no oral hearing took place.

[16] Without hearing oral evidence, Mahase ACJ in her judgment made critical findings of fact favourable to the first respondent and destructive of the version of the executor. She found that ‘Mantsooa was the third wife of the late Mr Moepi and that ‘Mantsooa became owner of the disputed land by virtue of the joint will and power of attorney with the late Mr Moepi. The learned judge found that the joint will and power of attorney had not been ‘challenged nor annulled’ and ‘remains extant’. The court also found that the late Mr Moepi was married to three wives. The problem with the latter finding is that if the alleged first marriage is in existence, the marriage to ‘Mathabo is void. In that case, there could not have been three wives in law. The judge *a quo* also found

that the disputed land belonged to the joint estate of the late Mr Moepi and 'Mantsooa. But if the alleged first marriage does not exist then that of 'Mathobe is valid and the purported marriage to 'Mantsooa must be void.

[17] Mahase ACJ justified her approach on the basis that the executor failed to (a) file an Answer to 'Mantsooa's application for joinder and (b) to contest the preliminary objections raised by the first respondent. The learned ACJ wrote:

'[31] The fact that...no answer has been filed on behalf of the applicant in respect of the application for intervention by the eighth respondent, means that the applicant has waived whatever rights it had in law to have raised same. Refer to Rule 66(3) of the land Court Rules.

[18] At paragraph [32] of her judgement, the learned ACJ states that the executor failed to file an answer to the intervention despite 'Mantsooa having disclosed documents which show that the disputed land belongs to her joint estate with the late Mr Moepi.

[19] The judge goes on to hold that:

‘[33] Put differently, there is nothing put forward to interrogate allegations that the properties therein shown in those annexures form part of the estate of [the late Mr] Moepi and [‘Matsooa.].’

[34] The applicant has decided not to invoke the provisions of Rule 66 as she has not raised any preliminary objections by way of a special answer. There is therefore nothing raised by the applicant by way of a preliminary objection; as such it can safely be concluded that she admits contents of those annexures. In that way, it makes no logical sense to invoke Rule 67(1) of the Rules of this Court.’

[20] The court went on to state that the executor failed to challenge the authenticity of the documents relied upon by ‘Mantsooa as proof of her title to the disputed land.

[21] Mahase ACJ was satisfied that the disputed land belonged to ‘Mantsooa’s joint estate with the late Mr Moepi and dismissed the executor’s application, holding that ‘the first respondent has acquired rights and interests over [the disputed land] lawfully’.

Grounds of appeal

[22] In short, the executor impugns the judgment and order on the ground that the court *a quo* misdirected itself in making the critical findings already referred to in this judgment, without hearing oral evidence as contemplated by Part IX (rules 70-81 of the Land Court rules).

[23] Counsel for the executor maintained on appeal that the Land Court should have heard oral evidence as, on the pleadings, disputes of fact arose as to the ownership of the disputed land and the existence of the customary marriages pleaded by the first respondent and 'Mantsooa'.

[24] It was also contended that the court *a quo* misdirected itself by summarily determining the matter without first giving directions as contemplated by Rule 67(1). It is said that once the pleadings closed, the court should have held a pre-trial conference in terms of rule 63 and then only determine the preliminary objections under rule 66(2).

[25] As counsel for the executor put it: '*some of the material facts that are in dispute as disclosed in the pleadings are so serious that*

the summary dismissal of the application without a trial deprived the Appellant the opportunity to present his claim.'

[26] In my view, the real issue which arises in the appeal is whether it was a misdirection for Mahase ACJ to not entertain oral evidence but to determine the disputes of fact and law summarily on the pleadings.

Analysis

[27] It is apparent from the passages quoted from the judgment that the court a quo placed great store by the fact that the executor did not file an answer in opposition to 'Mantsooa's application for intervention or to challenge the authenticity of the documents she disclosed in support of her claim to ownership of the disputed land.

[28] I find that approach problematic. On the bare allegations that 'Mantsooa made in her application for intervention, I cannot conceive of any plausible basis on which a court could deny her the right to participate in the proceedings, let alone the executor successfully resisting the intervention. This clearly is a case where

the ‘interests of justice’ required that ‘Mantsoao be a party. According to rule 35(1):

‘The court may, upon application by a person having interest therein, and if it finds it necessary in the interests of justice and for the proper hearing of any proceedings, allow such a person to intervene as a party thereto at any time before judgment.’

[29] In the light of the first respondent’s allegation that he bought the land from ‘Mantsooa, there could not have been a ‘proper hearing’ of the application without her participation in the proceedings.

[30] The allegations made in the intervention application however did not translate into proof on balance of probabilities that ‘Mantsooa was the owner of the disputed land.

[31] The executor came to court placing reliance on the marriage between the late Mr Moepi and ‘Mathabo by civil rights and the former’s ownership of the disputed land, for the inference that it belonged to the estate of the deceased couple. He had the onus to prove those allegations. The first respondent and ‘Mantsooa

alleged that (a) the latter was married as the third wife (b) that there was a first wife and that the disputed land belonged to the joint estate of the late Mr Moepi and 'Mantsooa. They bore the onus on that score on the principle that he or she who alleges must prove.

[32] I fail to understand how the failure to object to preliminary issues raised by the first respondent should have the effect of waiver such as the court a quo found. In the first place, the court rejected the preliminary objection that it did not have jurisdiction as contemplated by rule 66(2)(a). That is the only preliminary objection relied on by the first respondent which, on our facts, falls within the purview of rule 66. The rest of the preliminary objections ('privity of contract' and non-joinder) are not contemplated by rule 66. The remaining objection of lack of locus standi by the executor, although it may be said to fall under rule 66(2)(d), is so inextricably linked to the resolution of disputed facts and could in my view not have been the basis for the inference that the executor waived the right to contest it at trial.

[33] Waiver is not readily presumed and clear proof of it is necessary. In fact, there is a strong presumption against waiver.⁷

[34] The Land Court appears to have found that the executor waived the right to a trial at which oral evidence would be led. I cannot agree. At trial, each party would have the right to challenge the version of the other under cross-examination. The Land Court rules do not oust the rules of evidence and therefore the parties would be required to comply with the rules of evidence. For example, each party will have to produce the best evidence such as the original documents and to explain why it produced a copy if the original is not available. The opponent would be entitled to examine documents discovered by the other side and, through cross-examination, challenge its authenticity.

[35] As the pleadings stand, the executor can, through cross-examination, challenge the oral evidence, if led, of the existence of the two customary marriage. It is quite unsafe to suggest that the executor waived all those procedural rights in the absence of a clear intention on her part to do so.

⁷ Christie, RH. 2006. *The Law of Contract in South Africa*. LexisNexis Butterworths: Durban from p 441 and the authorities there collected.

[36] What is most troubling is that the court *a quo* concluded that the executor waived the right to challenge the material allegations in ‘Mantsooa’s Answer that she was validly married to the late Mr Moepi and that she was the heir to their joint estate under the joint will. The Land Court Rules provide for no specific procedure which the executor could have used to replicate to the averments made in ‘Mantsoao’s Answer.

[37] On my reading of the Land Court rules, once the pleadings have closed, the possibilities open on the way forward are the following: Either there is no dispute ‘on any question of fact or law’; or there is a factual dispute or a dispute on the law.⁸ It is only where there is no dispute ‘on any question of fact or law’ that the court is competent under rule 69(2) to without hearing oral evidence ‘at once pronounce a judgment’.

[38] At the close of the pleadings in the present matter, it was clear that, on the one hand, the executor claimed that the disputed

⁸ See rule 69 which states: ‘ (1) After preliminary objections, if any, have been decide the court shall ensure upon what point of law or fact the parties are in controversy, and thereupon proceed to frame and record the real issues in dispute. (2) Where the pleadings have been submitted and after any preliminary objections have been decided, it appears to that the parties are not at issue on any question of fact or law the court may at once pronounce judgement’. (My underlining for emphasis).

land was part of the joint estate of the late Mr Moepi and 'Mathabo and therefore fell for administration by her as the executor. On the other hand, the first respondent, supported by 'Mantsooa, maintained that the property belonged to the latter. That is the dispute that fell for adjudication at the close of pleadings. Allied thereto is the status of the various marriages.

[39] To conclude, as the court a quo did, in the absence of (a) a provision under the rules which entitled the executor to replicate to the case made in the Answer of the first respondent and 'Mantsooa, (b) a clear intent on the part of the executor to waive the right to the hearing of evidence, amounts to a reversible misdirection.

[40] As I previously demonstrated, the pleadings as they stand raise irreconcilable disputes on the existence of the two customary marriages and, if the first is found to exist, the validity of late 'Mathabo's civil marriage. The success of the executor's claim or that of the first respondent is inextricably bound up with those factual and legal issues. Those are matters which, in no small measure, will depend on oral evidence dependent as it is on the credibility and reliability of witnesses.

[41] I come to the conclusion that the Land Court misdirected itself by summarily disposing of the matter without hearing oral evidence. The appeal must succeed and the matter must be remitted to the Land Court to be dealt with according to law. Since Mahase ACJ prejudged the issues it will be improper for her to hear the matter upon it being remitted.

[42] Mr Lephuthing for the executor insisted that the first respondent should have abandoned the judgement and order granted by the Land Court. Counsel submitted that the failure to do so must attract an adverse costs order. I will make no such order because the order given by the Land Court is not one that was actively sought or promoted by the first respondent.

Order

[43] I propose the following order:

- (a) The appeal succeeds.
- (b) The judgement and order of the Land Court are set aside and the matter is remitted to that court for the parties to be allowed to lead oral evidence on the disputed issues and for the matter to be otherwise dealt with according to the Land Court Rules.

- (c) The matter must upon remittal be dealt with by a judge other than the one whose judgment and order led to the success of the appeal.
- (d) There is no order as to costs.



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



DR P MUSONDA, AJA
ACTING JUSTICE OF APPEAL

I agree:



DR J VAN DER WESTHUIZEN, AJA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: MR CJ LEPHUTHING

FOR FIRST RESPONDENT: MS M V KHESUOE

