IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 13/2020**

In the matter between

MPHAPHATHI QHOBELA	**1ST APPELLANT**
KATLEHO QHOBELA	**2ND APPELLANT**
TUMISANG QHOBELA	**3RD APPELLANT**

and

PHIRI NKOE	**1ST RESPONDENT**
NTHABISENG LITABE	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
DEPUTY SHERRIF OF THE HIGH COURT	**4TH RESONDENT**
COMMISSIONER OF POLICE	**5TH RESONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

CORAM: MUSONDA AJA

CHINHENGO AJA

VAN DER WESTHUIZEN AJA

HEARD: 13 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

Summary

The appellant should have used Rule 46(11) of the Subordinate Court Rules to rescind an order for their eviction from and the demolition of structures on the property they occupied, emanating from legal proceeding in which they did not participate. Seeking a declarator to avoid eviction was inappropriate. The High Court's order of costs on a punitive scale against the appellants, based on material non-disclosure is set aside because counsel were nor given an opportunity to address the court on punitive costs.

JUDGMENT

VAN DER WESTHUIZEN AJA

Introduction

[1] At the core of this appeal against a judgment in the High Court by Banyane AJ are two main questions:

(a) Should the appellants have used Rule 46(11) of the Subordinate Court Rules 1996 (Rule 46(11)) to rescind a judgment in a matter in which they were not joined as parties, rather than to seek to stay the execution of a warrant of execution concerning property?

(b) Did the High Court misdirect itself by ordering costs on a punitive scale against the appellants because of alleged non-disclosure of facts?

Background

[2] Since 1983, when the lease was registered, the first respondent, Mr Phiri Nkoe (Nkoe) has been the registered title holder of plot 13282-043 in Mapeleng, Maseru. In 2007 he learnt that a toilet was being erected on the site and found that it was indeed so. People on the site informed him that they were contractors who had been engaged by the second respondent, Ms Nthabiseng Litabe (Litabe). Nkoe approached the area chief, who called both Nkoe and Litabe to appear and produce their documentation regarding the site. Nkoe produced his lease, but Litabe failed to show up, or present documentation.

[3] As the development was continuing, Nkoe approached the Magistrate's Court and on 31 May 2007 was granted an interdict to stop the development, pending the finalization of ejectment proceedings. On 10 March 2008 an ejectment order was granted; and on 26 March 2008 a warrant of ejectment.

[4] The development continued and Nkoe instituted contempt proceedings against Litabe. It was heard in February 2014. The court held that the improvements had been made by Litabe, contrary to the earlier court order; ordered her to vacate the site, together with all her agents and those answerable to her; and to demolish the structure for Nkoe to be able to assume possession. The magistrate ordered that failure to comply with the order would result in imprisonment or a fine.

[5] During argument in the contempt proceedings claimed to have vacated the site years earlier and that she had relinquished her rights in favour of someone else. She opposed the granting of an

ejectment order, inter alia because the ejectment of the new occupants should only be attained through the institution of proceedings against them. According to Banyane AJ, Litabe noted an appeal against the above-mentioned judgment, but the appeal lapsed. Apparently Litabe sought to reinsate the appeal, but the outcome is unclear.

[6] Banyane AJ inferred from the papers that Nkoe sought and obtained an order on 7 August 2019 authorising him to demolish the structures on the property, since Litabe failed to do so, as she was ordered. The appellants then approached the High Court on the basis of urgency.

High Court

[7] The first appellant, Ms Mphaphathi Qhobela (Qhobela) averred that her deceased sister purchased the property from Litabe in 2007 and made improvements on it, to the value of M 1.6 million. According to her, she takes care of her sister's two minor children on the property. She became aware of the existence of the ejectment and demolition order in September 2019, through a letter addressed to the occupiers of the property. They were given one month to vacate the property. In November 2019 she unsuccessfully proposed a settlement through her legal representative. Qhobela sought a rule nisi that the warrant of execution, issued earlier, be stayed; and that it must be declared that a writ of execution is not executable against a party not joined in the proceedings and not cited in the order.

[8] Nkoe relied on the history set out above. He obtained an interdict against Litabe in 2007, but the development on the property continued in spite thereof. According to him, the appeal lodged by Litabe lapsed and he was entitled to execute the judgment.

[9] On the return date the High Court discharged the rule nisi and dismissed Qhobela's application. Banyane AJ dealt with several aspects, including standing and urgency. However, at the centre of the judgment are two aspects.

[10] The first is that those who are to be evicted were not party to the proceedings resulting in the eviction order. The High Court found that it was trite that all parties with a direct and substantial interest in litigation must be joined. Only during the contempt proceedings did Nkoe find out that Litabe had allegedly vacated the premises; he could not have joined the new occupants in the ejectment proceedings. Qhobela and the other appellants were not without remedy though. They could have asked for rescission of the eviction order by using Rule 46(11) of the Subordinate Court Rules of 1996:

"Any judgment of the Court may, on application of any person affected thereby, who was not a party to the action or matter, made within a month after he has knowledge thereof, be so rescinded or varied by the Court."

[11] After referring to case law, the High Court concluded that the appellants ought to have utilized Rule 46(11). By opting not to do so but rather to approach the High Court for a declaratory order, they essentially sought to set aside the Magistrate's order "through

the back door". According to Qhobela, she became aware of the eviction order and warrant in September 2019 when they were notified to vacate the premises. They were indeed evicted with the assistance of the police early in December 2019**.** Unless the order is rescinded, it stands and has to be executed. It authorized the eviction of Litabe and all who derived their occupation from her, as well as the demolition of the structures erected on the property.

[12] Secondly, the High Court found that Qhobela had failed to disclose material facts in the application to the Court. In approaching the Court ex parte and on the basis of urgency, the founding affidavit stated that the appellants *"were informed that the 4th respondent intends to eject us from the premises … and intends to demolish the structures …"*; and *"the respondents have already commenced attempts to eject the applicants … all the people including the tenants will be standing in the rain if the Court does not grant the temporary relief".* According to the High Court, counsel for the appellants stated: *"The 4th respondent (the sheriff) is in the process of ejecting the applicants …."*

[13] Yet, the messenger's return filed on 5 December 2019 stated: *"On the 05th December 2019 we went to Ha Mabote plot number 13282-043 to eject the defendant. We found miss Mphaphathi Qhobela who told us that her parents buy(sic) that plot … and adv.Molati … said … if the names of her(sic) are absent on the papers she must refuse … to allow us to take her out of her property …."* Another return (on 12 December 2019) stated: *"We ejected defendant and one Miss … Qhobela …."*

[14] The High Court found that the application was moved before it on an ex parte and urgent basis at 20h00 on the day after the ejectment. The appelants indirectly sought reinstatement into the premises from which they had already been evicted. They concealed facts that would have influenced the Court to direct service on Nkoe before the interim relief was granted.

[15] Based on this conduct, Banyane AJ ordered costs against Qhobela and the other appellants on the punitive scale of attorney and client.

Consideration

[16] On appeal in this Court the first respondent supports the judgment of the High Court. Counsel for Nkoe pointed out that he had joined the appellants on the point of execution, because he had previously not been aware of their occupation of the property. The order to evict and demolish in any event provided for those who occupied because of Litabe.

[17] On behalf of Qhobela it was explained why Rule 46(11) had not been used. Counsel argued that she had not concealed material facts from the High Court and quoted from the same founding affidavit referred to in paragraph [12] above: *"(T)his matter is extremely urgent as the 4th respondent has informed the applicants that the demolition … is to commence sometime in December 2019. The 4th respondent has already commenced attempts to eject the applicants …people … will be standing in the rain if the court does not grant … relief."*

[18] There is a significant difference between stating that the deputy sheriff had already commenced attempts to eject and disclosing that eviction had happened as stated by the messenger. In an ex parte urgent application, this is a material non-disclosure. Mentioning that people will be standing in the rain seems like an attempt to evoke sympathy on the side of the court. If indeed it rained at the time, those people would already have stood in the rain, assuming that they had nowhere else to take shelter from the rain.

[19] It is arguable that the non-disclosure was not material. As its relevance relates mainly to the punitive costs order of the High Court, a difference of opinion matters little in view of what is stated below in this judgment.

[20] In the finding of the High Court that Rule 46(11) should have been used, within one month after the appelllants became aware of the eviction and demolition order, I am respectfully unable to detect any misdirection.

[21] This judgment is based on the fact that Qhobela attempted to obtain a declarator instead of us seeking rescission through Rule 46(11). It does not deal with other factors such as the possible right of Qhobela .or the children as a result of the alleged contact between her sister and Litabe, the missing link, whose participation in these proceedings could have been helpful

Costs

[22] Based on her finding of material non-disclosure, Banyane AJ ordered costs against the appellants on a punitive scale. Her displeasure in concluding that the court had virtually been misled is understandable.

[23] By agreement between the parties, this appeal was decided on the papers. There was no oral hearing of argument during which questions for clarification could be put to counsel. The first respondent did not ask for punitive costs. According to the heads of argument of the appellants, the learned judge did not put her inclination to order punitive costs to counsel to afford them an opportunity to address the court on the issue.

[24] This constitutes an irregularity. One might be cynical in one's expectation as to what counsel for the appellants would have submitted, if the possibility of punitive costs were put to counsel. As seen above, the explanation as to why there was no material non-disclosure is not overwhelmingly impressive. However, factors other than the denial that facts were concealed could have been presented to the court. Very long delays and alleged inaction over years by the first respondent could have been raised. The presence of minor children on the property might have been mentioned. The relevance of these and other factors, should they have been raised, could only have been debated if counsel were given an opportunity to do so. As stated in several decisions, the scale of attorney and client is an extraordinary one. Whereas a court may consider punitive costs meru motu, it is inappropriate to make an order to that effect without a proper audi alteram partem opportunity.

[25] As to the appeal in this Court, costs must follow the result. The first respondent succeeded on the dismissal of the application in the High Court. The appellants succeeded on the High Court's punitive cost order. To order no costs has been considered. However, the appellants did conceal a relevant fact; the first respondent did not ask for that order; and the High Court neglected to afford both parties an opportunity to address the court on it. Thus it seems fair that the costs of this appeal be paid by the appellants.

Order

(a) The appeal against the discharge of the rule nisi and the dismissal of the application is dismissed.

(b) The appeal against the punitive cost order of the High Court against the appellants is upheld and the order is replaced by the following:

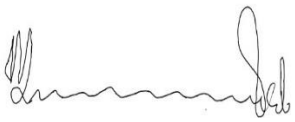
- The applicants must pay the costs of the first respondent.

(c) The appellants must pay the first respondent's costs in this Court.

J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree



P MUSONDA

ACTING JUSTICE OF APPEAL

I agree

M CHINHENGO

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV MA MOLISE

FOR 1ST RESPONDENT: ADV N B MASEKO