IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 62/2019
LC/APN/19/2018

HELD AT MASERU

In the matter between

LEBOHANG THOTANYANA	**APPELLANT**
And	
NTHABELENG MOTSAMAI	**1ST RESPONDENT**
SALEM PRPPERTIES (PTY) LTD	**2ND RESPONDENT**
GEORGE THABO MONAHENG	**3RD RESPONDENT**
THE COMMISSIONER OF POLICE	**4TH RESPONDENT**
THE LAND ADMINISTRATION AUTHORITY	**5TH RESPONDENT**
THE MASTER OF THE HIGH COURT	**6TH RESPONDENT**
THE ATTORNEY GENERAL	**7TH RESPONDENT**

CORAM: MOSITO P
CHINHENGO AJA
MTSHIYA AJA

HEARD: 13 OCTOBER 2020
DELIVERED: 30 OCTOBER 2020

Summary

Locus standi of first respondent, non-joinder of first respondent's sister and misjoinder of appellant raised as preliminary points in Land Court; agreed objection of locus

standi to stand over for determination together with the merits; Court declining to join first respondent' sister as applicant for lack of sufficient interest in the matter; Appellant, shareholder and director of company, cited in personal capacity without citing company; Court mero motu holding that appellant in personal capacity and company both be cited as respondents;

On appeal against decision of Land Court- Held, confirming decision of Land Court - first respondent's sister not to be joined as had no interest in proceedings; Held further, appellant improperly joined - only company had direct interest in proceedings; as company not initially made party, first respondent given leave to join company as respondent, if so advised. Appeal partly successful - Costs order reflecting partial success accordingly made

JUDGMENT

CHINHENGO AJA:-

Introduction

1. This is an appeal against the decision of the Land Court (Banyane AJ as she then was) disposing of two of three preliminary issues raised by the appellant in that court. The appellant is aggrieved by her decision on those two issues and has appealed.

2. The three issues that the appellant raised *in limine* are the *locus standi* of the 1st respondent ("Motsamai" and applicant in the court *a quo*), the non-joinder of Motsamai's older sister to the proceedings, and the wrongful joinder (misjoinder) of

the appellant. In the court *a quo* the parties agreed that the issue of *locus standi* would be addressed together with the merits, and the learned judge agreed with them. The court was therefore called upon to decide the twin issues of non-joinder and misjoinder. Its decision on these preliminary objections is the subject of this appeal.

3. By notice of motion dated 18 June 2020, Motsamai applied for condonation of her failure to file the record of proceedings and the heads of argument within the period prescribed by the rules of this Court. The affidavit in support of the notice of motion dealt with condonation of the late filing of the heads of argument and not the late filing of the record of proceedings. There was simply no basis upon which the Motsamai would have sought condonation in respect of late filing of the record of proceedings. The filing of the record of proceedings is, in terms of Rule 5(1) of the Court of Appeal Rules, 2006, the responsibility of an appellant and not a respondent.

4. On his part, the appellant also applied for condonation of his failure to note the appeal in time and for his failure to file the record of proceedings and the heads of argument within the prescribed period. In addition, he formally applied on motion to join Motsamai as the 1st respondent on appeal. Motsamai is the real or substantive respondent in this appeal. The failure to cite her was clearly a mere omission to cite an obvious party to the appeal. That in my view did not warrant

an application to court with all the attendant costs. We granted the applications for condonation with the consent of both parties with no order as to costs. For what it was worth, we condoned the appellant's failure to cite Motsamai as 1st respondent. She now appears as the 1st respondent, as it should be.

5. The basis of the appeal in relation to non-joinder is that the learned judge erred and misdirected herself "in concluding that the non-joinder of the elder sister of the applicant in the court *a quo* is not well taken… having due regard to the fact that the heirship status of the applicant in the court *a quo* is disputed." In relation to the plea of misjoinder, the basis of the appeal is that the learned judge erred and misdirected herself in holding that the appellant can be joined as a party in his personal capacity. In this connection the appellant stated that the learned judge erred "by effectively joining both the company and the appellant when the company was not a party to the proceedings after all". She also erred "by making conclusive findings of law to the effect that both pleas of non-joinder and misjoinder are only dilatory when the latter can be fatal, if upheld."

Background facts

6. The brief factual background is this. Motsamai, as the applicant in the Land Court, instituted proceedings in that court against the appellant in his personal capacity and

against the other respondents herein. She cited the appellant as "Lebohang Thotanyana t/a Mafube Investments Holdings (Pty) Ltd". It is not in dispute that Mafube Investments Holdings (Pty) Ltd is a limited liability company and that Thotanyana is a director of, and has a controlling interest in, the company, if not that he is the sole shareholder.

7. The appellant's complaint arose from the fact that he was cited as a defendant in a matter in which he should not have been cited as a defendant at all. It also arose from the fact that Mafube Investments Holdings (Pty) Ltd ("the company"), which was not cited as such or made a party at all, was joined as a party to the proceedings by an unsolicited decision of the court.

8. The underlying cause for this litigation, as alleged in the papers before us, is that Motsamai's late mother, Esther Motsamai ("Esther") transferred her rights in a piece of land known as Plot 61B, Europa, Maseru, to the 3rd respondent, George Thabo Monaheng ("Monaheng") in 1974. The Plot was registered in Monaheng's name on 6 July 2011. He was Esther's bother-in-law. Later Monaheng sold and transferred the plot to the company. The sale price was M500 000.00. The transfer was registered under No. 30610 on 15 March 2012. The company, in turn, sold the Plot for M1 425 000.00 to the 2nd respondent, Salem Properties (Pty) Ltd ("Salem Properties") and duly transferred it.

9. The transfer of Esther's rights in Plot 61B to Monaheng, the brother-in-law, does not appear to have been a genuine sale or transfer for value because, when eventually the Plot was sold to the company, the beneficiary thereof was Esther. A part of the consideration in kind in that the appellant, who was viewed as the actual beneficiary of the transaction or the company, had to buy a site in Khubetsoana, Maseru, register it in Esther's name, and build a dwelling house for her thereat. The appellant's involvement in the transactions was in his capacity as a director of the company. The Plot was in in fact and in law acquired by the company. As agreed between the parties, a site was acquired for Esther at Khubetoana and registered in her name as lease number 13272-533. Another term of the agreement of sale was that the company would, as part of the purchase price, either make a cash payment of M300.000.00 to Esther or build two duplexes for her at the new site.

10. The company apparently failed to meet its obligations arising from the sale and Esther sued it in Case No. CCT/0277/2014 for specific performance. In pursuing specific performance Esther was supported by Motsamai, who filed a supporting affidavit. Esther did not succeed in her action for reasons that are not germane to this appeal. What, however, is significant about the transaction between Esther and the company and the legal proceedings that followed, is that Esther sold Plot 61B to the company for value. She died before the dispute over the purchase price was completely

resolved. The transfer of Plot 61B by the company to Salem Properties, which followed after Esther sold the Plot to the company, appears, on the face of it, to be entirely unimpeachable.

11. After Esther's demise, Motsamai, alleging that she is heiress to her mother's estate and in particular to Plot 61B, instituted proceedings to stop the Salem Properties from taking occupation of the Plot, developing it into an office complex or requiring her to vacate the plot. She contested the validity of the transfers of Plot 61B to each of the successive transferees and sought cancellation thereof. The merits of that contestation are what is still pending in the Land Court and therefore not before this Court on appeal.

Court decision on preliminary issues

12. The learned judge held that the appellant had not shown that Motsamai's sister had a sufficient interest in the matter and dismissed the special answer of the non-joinder of the sister.

13. In dealing with the alleged misjoinder of the appellant and the unsolicited joinder of the company, the learned judge said:

> "[30] … I uphold *Mr Rasekoai's* contention that a company exist independently of its members and as

such the citation of Mr Thotanyane t/a is not proper. This however is not the end of the matter under the circumstances of this case as will be shown later in this Ruling. The next question before striking out Mr Thotanyane, is whether in this personal capacity, he has no direct and substantial interest in the subject matter of this litigation, which may be affected prejudicially by the judgement of this court; this being the test to determine both pleas of non-joinder and misjoinder. *Henri Viljoen Pty (Ltd) Awerbunch Brothers* 1953(2) SA 151 AT 168-170. Cited in *S v S* Case No: 71/2015 High Court of South Africa, Free State Division, Bloomfontein.

"[31] To answer this question in relation to Mr. Thotanyane, the 2nd and 3rd respondents in challenging the applicants capacity to institute these proceedings, place reliance on a sale agreement concluded between Esther Motsamai (the applicant's mother) and Mr Thotanyane in his personal and not representative capacity (see in this regard para 2(a) of the 2nd respondent's answer, para 2(b) of the 3rd Respondent's answer and para 10.3,10.5 and 10.6 of the 1st respondent's answer). The averments contained therein suggest at this point that Mr Thotanyane's agreement with the applicant's mother gave birth to the litigation both in the Commercial Court and subsequently this present application. This, in my view makes him

necessary party in these proceedings. He should however be cited as a party independent of the company (Mafube Investments)."

14. It is important to recognise that the first respondent did not cite the company as a party in the Land court or apply for it to be joined as a party to the proceedings before Banyane AJ, nor did the company itself apply to be joined as a defendant. All that the appellant sought to do was for him to be removed as a respondent in the Land court proceedings. If he succeeded that obviously would have meant that neither he nor the company would be a party to the litigation before the learned judge. Perhaps the learned judge recognised this untenable outcome for Motsamai and then, not only refused to remove of the appellant as a respondent but also made the company a party, thus joining both the appellant and the company as respondents without their consent and without any application therefor having been made. In fact, the appellant was joined as a party against his express position, and in the case of the company, without anybody applying that it be joined as a party.

15. It seems to me that the learned judge misconstrued the meaning of the paragraphs in the affidavits of Salem Properties, Monaheng and the appellant/company (cited as Lebohang Thotanyana t/a Mafube Investment Holdings (Pty) Ltd). For instance, at paragraphs 10.5 and 10.6 referred to, Salem Properties merely states Esther declared that she

concluded a sale agreement with appellant/company in 2011 and was seeking specific performance against it or him or them in another court action. Monaheng's paragraph 2(a) talks about Motsamai's lack of locus standi arising from her endorsement of Esther's claim for specific performance. The paragraphs to which the learned judge referred to, do not, even in the remotest sense, establish that the appellant assumed any obligations in his personal capacity to the exclusion of the company.

Grounds of appeal

16. The appellant relies on his grounds of appeal, which read:

> "(1) The learned judge in the court *a quo* erred and misdirected herself in concluding that the non-joinder of the elder sister of the applicant in the court *a quo* is not well taken, especially when having due regard to the fact that the heirship status of the applicant in the court a quo is disputed.
>
> (2) The learned judge in the court *a quo* erred and misdirected herself by concluding that appellant herewith can be joined in his personal capacity.
>
> Still incidental to the point in paragraph 2 above:

(3) (a) The learned judge in the court *a quo* erred and misdirected herself by effectively joining both the appellant and the company when the company was not party to the proceedings after all.

(b) The learned judge in the court *a quo* erred and misdirected herself by making conclusive findings of law to the effect that both the pleas of non-joinder and misjoinder are only dilatory when the latter can be fatal if upheld."

17. I turn now to an examination of the grounds of appeal as outlined above.

Contentions on misjoinder: separate legal personality of a company

18. The appellant contended that all the documentary evidence in the matter shows very clearly that Monaheng transferred his rights and interest in Plot 61B to the company and that the company transferred its rights and interest in the same Plot to Salem Properties. For this reason, he was therefore improperly joined as a party to the proceedings.

19. It seems true that the appellant was involved in the negotiations leading to the purchase by the company of Esther's rights in the Plot. He did so, as he averred, in a

representative capacity as director of the company, a capacity which he readily admits. This self-evident truth is supported by the fact that it is the company in whose name the lease, granting unto it the rights to the Plot, was registered. It is the company that assumed rights and obligation vis-à-vis Esther. It was the company that gave the undertaking to build a dwelling house for Esther at Khubetsoana and to pay part of the purchase price of Plot 61B in kind and part in cash. All this is contained in the court action in which Esther, with the support of Motsamai, sought specific performance against the company.

20. A company is a juristic person and a different entity from its shareholder and directors. This has been the law since the seminal case of *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) in which Lord Halsbury LC said-

> "It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.…
>
> Either the limited company was a legal entity, or it was not. If it was the business belonged to it.… If it was not there was no person and no thing to be an agent at all;

and it is impossible to say at the same time, there is a company and there is not."

21. Lord Macnaghten, in that case, endorsed the above view in very expressive terms. Appellant's counsel, without giving complete citation, referred us to *Nkekeletse Mamosa Jonathan v Mamasiuoa Nthati Lephole* and quoted this Court as having said:

> "A company is, in law, a juristic person (*persona juris*). It is in law considered to be an abstract legal entity which exists as a juristic reality in the contemplation of the law despite the fact that it lacks physical existence.
>
> It is in law, through its representatives or agents (*per actores syndicosque*), capable of knowing, intending, willing, acting, acquiring rights and obligations, possessing proprietary rights and committing delicts and even crimes. This conception of corporate personality is founded in our common law as appears from the following passages in *Voet* as translated by *Gane*: Voet,1.8.28:
>
> > 'Who but a stranger to the law does not know that corporations are held to stand in the place of persons in contracts and wills. They make contracts through their agents and representatives. Like persons they are bequeathed

inheritances, legacies, nay even usufructs, which are personal servitudes cleaving to the frames of persons. With the fictitious death of a corporation such rights perish. Assuredly that a personal obligation intervenes, whenever a debt is due by or to a corporation on contract.'"

22. The learned judge was correct to accept submissions by appellant's counsel on the separate personality of a company and its ability to enter into business transactions. She also correctly referred to s 9 of the Companies Act 2011, which recognises that a company, upon its incorporation, becomes a person in its own right, separate from its shareholders and with capacity, rights, powers and privileges of a natural person and capable of doing anything that it is permitted or required to do by its articles of incorporation or under the Act.

23. In the present case, it is quite clear that the appellant acted as agent of the company in his capacity as director. It was to the company that Plot 61B was transferred from Monaheng and it was from the company that the Plot was transferred to Salem Properties. The appellant as an individual did not acquire any rights and obligations in these transactions. He has no direct interest in the litigation. The fact that he facilitated the company's transactions is immaterial and his person and that of the company must be kept separate. No application or submissions were made by

Motsamai nor were sufficient circumstances established for the lifting of the corporate veil. No relief of any significance was sought against the appellant in his personal capacity. He is not a necessary party. The appellant should therefore not have been joined as a party, more so in the absence of an application by any party for such joinder. The learned judge therefore erred in making an order that the appellant be joined as a party to the proceedings before her.

24. The appellant, in his notice of appeal, challenged the learned judge's finding that the company should be joined as a party when the company was not a party to the proceedings in the first place. The correct citation of parties is a matter for an applicant in motion proceedings or for a plaintiff in action proceedings. A failure to cite the correct party is normally rectified by an application to the court to amend the originating process accordingly. It does not appear from the record that Motsamai made such an application. It was therefore not for the court, *mero motu* so to speak, to foist a respondent upon her. The furthest the Court should have gone was, upon application therefor, either in writing or orally, to grant leave to Motsamai to amend her originating process within a specified time period and join the company as a respondent. The order made by the learned judge was, to this extent, wrong and will have to be amended to provide that the inclusion of the company as a party is entirely at the instance of Motsamai.

25. The last issue on appeal is the refusal of the learned judge to join Motsamai's sister in the proceedings. The learned judge was correct in deciding the way she did. I find no legal basis upon which she could have done otherwise. The matter before the learned judge was not an inheritance issue. The substantive relief that Motsamai was seeking in the Land Court, as clearly set out at paragraph 4 of the originating application, was "a declaratory order and writ of mandamus sought for enforcement of [her] rights to occupy and utilise the residential Plot … and resources thereat" on the grounds that she inherited the Plot from Esther. The fact that she may be heir to her mother's estate, whether true or not, was not the foundation of her case. Her case was founded upon the allegation that the successive transfers of the Plot were improperly procured from the beginning, hence she sought the reversal of the transfers. Her *locus standi* in the matter is still to be decided by the court *a quo*. If she should succeed in that action and embark upon a registration of herself as rightful heir, her sister may, if she so wishes, challenge her in separate proceedings that do not involve all the other parties to the present proceedings. If she does not succeed and the court finds that the Plot was legally transferred to Salem Properties, its order would be binding against the world. In other words, it would be a judgment *in rem* and not *in personam*. There is therefore no reason to join Motsamai's sister in the proceedings in the Land Court. The judge's well-reasoned decision not to join her cannot be faulted.

26. In conclusion I wish to emphasise that this appeal is not concerned with the merits of the matter before the Land Court but only with the issues raised on appeal – whether the appellant and the company were improperly joined in the proceedings and whether Motsamai's sister should have been joined. Counsel for Motsamai appears to me to have focussed on the merits of the case before the Land court and not on the issues on appeal before us. This explains why his written submissions deal at length with the power of attorney given by Monaheng to Esther and the purported involvement of the appellant in the transfer of the Plot. If Esther's claim was for damages to be paid by the appellant for his alleged fraudulent conduct in the transaction, perhaps the matter would have been viewed differently. I did not find the submissions made on behalf of Motsamai's to be of much assistance.

27. The first two issues are resolved in favour of the appellant and the third issue against him. This result is significant in regard to costs of appeal. The appellant has largely succeeded and must be awarded a substantial portion of his costs. In my assessment he is entitled to recover 85% of his costs and Motsamai only 15%.

28. In light of the foregoing, we make the following order:

1. The appeal against the Land Court decision refusing to join the 1st respondent's sister, Nthabiseng Motsamai, as a party to the proceedings before that Court, is dismissed.

2. The appeal against the joinder of the Appellant is upheld.

3. The order of the Land Court directing the 1st respondent to amend her originating papers so as to include Mafube Investment Holdings (Pty) Ltd as a party to the proceedings before that Court is amended to read:

> "The applicant may, if she so wishes, amend her originating application and include Mafube Investment Holdings (Pty) Ltd as a respondent, provided such application is lodged within 7 days of this order."

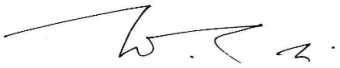
4. The 1st respondent shall pay 85% of the appellant's costs of appeal and in the court *a quo*.

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



N T MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANT:	ADV MAKARA (Assisted by MR M RASEKOAI)
FOR RESPONDENTS:	ADV C J LEPHUTHING (Assisted BY MR S E PULE)