

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

C OF A (CIV) 22/2021

In the matter between:

**NTHABELENG TAOLE
NYOLOHELO MOHALE**

**FIRST APPELLANT
SECOND APPELLANT**

And

**JIMMY MONGAULA
'MAMOLEBOHENG MONGAULA**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM: K.E. MOSITO P
P. MUSONDA
M. CHINHENGO AJA

HEARD: 13 OCTOBER 2021

DELIVERED: 12 NOVEMBER 2021

SUMMARY

Practice - Parties - Joinder of parties - When required - Necessary parties - Another party to dispute should be joined - Appeal - Appeal Court taking point of non-joinder mero motu - Form of order.

JUDGMENT

K E MOSITO P

Background

[1] At its core, this case concerns the implications of the Land Act 2010 and the Legal Capacity of Married Persons Act 2006, where parties are married in community of property regarding alienation and disposal of the property of the joint estate. It brings into sharp focus the issues of the power of a wife to alienate or dispose of immovable property of the joint estate without the consent of her husband.

[2] The first respondent instituted motion proceedings in the High Court against the appellants for interdictory reliefs regarding a purported alienation or disposal of the proprietary rights in a plot situated at Ha Mabote. The respondents opposed the application. A replying affidavit was duly filed.

[3] After the closure of pleadings, the first respondent filed a joinder application to seek the joinder of his wife (who is reflected in the papers before this Court as the second respondent). It is not apparent on record whether the wife (Mamoleboheng Mongaula) was ever served with the application for joinder. The learned counsel for the parties informed us from the bar that she had been served.

[4] However, there is no return of service; no copy of the court order joining her; no return of service evidencing the service of the process of the main proceedings on her so as to enable her to make an informed decision as to what next to do; no movement on her part and yet, she is a necessary party in these proceedings. I shall

revert to this point later on in this judgment. After hearing the matter, Monapathi J granted the main application with costs in favour of the first respondent, hence the present appeal.

Background facts

[4] The facts of this case are not complicated. They are that Mr Jimmy Mongaula and Mrs 'Mamoleboheng Mongaula are husband and wife married in community of property. On 30 October 2010, the first appellant bought a plot from Mrs 'Mamoleboheng Mongaula. There was no written agreement of sale of the plot between the first appellant and Mrs 'Mamoleboheng Mongaula. Mr Jimmy Mongaula challenges this sale agreement, *inter alia*, on the basis that there was non-compliance with the Land Act 2010 and the Legal Capacity of Married Persons Act 2006 when the purported agreement was entered into.

[5] He deposes in his founding affidavit that he never consented to the sale of the family plot, and he was not consulted when the agreement was concluded. The appellants argue that the husband knew about the transaction, and he even signed a letter while he was at the chief's place. The appellant deposes that he paid a deposit of twenty thousand maloti to the respondents. He also avers that he paid the remainder of the purchase price for the plot in December 2010 in the sum of twenty five thousand maloti.

[6] The first appellant enlisted the services of the second appellant to build a house for her on the plot. The first respondent avers that he tried all in vain to stop the second appellant from proceeding with the construction of the said house, hence the second appellant's inclusion into these proceedings. As stated above, the appellants lost the application in the High Court.

[7] Unfortunately, both the High Court and this Court were not favoured with the version of Mrs Mamoleboheng Mongaula on the issue. She was the seller of the plot. Indeed, that makes her have a direct and substantial interest in the outcome of the dispute. That made her a necessary party, and she was thus entitled to be joined of necessity.

The grounds of appeal raised in this Court

[8] The appellants raised three grounds of appeal before this Court, *viz*: that the court *a quo* erred in granting an order without giving reasons for judgment; in granting judgment in favour of the first respondent; and that the court *a quo* erred in annulling the sale agreement to the detriment of an innocent party, in total disregard of the provisions of section 8 of the Legal Capacity of Married Persons Act 2006.

[9] Irrespective of how meritorious or otherwise the aforementioned grounds of appeal may be, here there is a risk of Mrs Mongaula rights being prejudicially affected by an order issued in the main application. The High Court determined the main application without any regard to possible prejudice to Mrs Mongaula's rights.

Issues for determination

[10] In my opinion, therefore, there is only one issue which requires our attention in this matter. That issue is the non-joinder of the first respondent's wife (Mamoleboheng Mongaula). The reason is that the question of non-joinder should be considered before the adjudication of any other parts of the merits.

The legal principles applicable to the appeal

[10] The law on joinder is well settled. This Court has pronounced itself clearly on this point.¹ In **Matime and Others v Moruthoane and Another**² the Court expressed the point in the following terms:

This [non-joinder] is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested but who have had no opportunity to present their case.

[11] At common law, superior courts of record have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, *mero motu*, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. In **Jonathan v Lephole**,³ this Court remarked as follows:

“There is, however, another reason why the appeal should be dismissed. It is that of non-joinder. It is the settled practice of this Court that it can raise *mero motu* the question of non-joinder to safeguard the interest of third parties as was done in *Amalgamated Engineering Union v Minister of Labour*.⁵ As indicated above, the issue of non-joinder of Rakolo Investment 8 (Pty) Ltd was raised by this Court with the Counsel for the appellant. He answered that it could not be joined because it no longer exists. There was simply no evidence to support this statement. Yet, as appears in *Kethel v Kethel's Estate*,⁶ when once the Court realises that a third party might be affected, it sets aside the lower Court's order and refers the case back

¹ See also *Masopha v Mota* 1985 – 1989 LAC 58. *Basutoland Congress Party and Others v Director of Elections and Others* 1995 – 1999 LAC 587 at 599; *Theko and Others v Morojele and Others* 2000 – 2004 LAC 302 at 313 –314. *Lesotho District of the United Church v Rev. Moyeye*⁵ and *Others* 2007 – 2008 LAC 103; *Nalane (born Molapo) and Others v Molapo and Others* 2007 – 2008 LAC 457 at para [17].

² *Matime and Others v Moruthoane and Another* 1985 – 1989 LAC 198 and 200.

³ *Jonathan v Lephole* C of A (CIV) 5 of 2017 at para

to that Court to be dealt with afresh after the third party has been joined, and it orders the plaintiff to join him.”

[12] The purpose of this requirement, in this case, is to ensure that the said ‘Mamoleboheng Mongaula knows of the suit so that she can enlist counsel, gather evidence in support of her position, and prepare herself adequately in the knowledge that there are personal consequences for her should she decide not to contest. In *Amalgamated Engineering*, Fagan AJA states:

"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."⁴

[13] On the authorities discussed above, the High Court could not validly grant an order in the main application without the applicant’s wife having been joined or ensuring that she would not be prejudiced. It was incumbent upon that Court *mero motu* to insist on her joinder.⁵

[14] In all fairness to the learned counsel, when this issue of non-joinder was raised with them, each attempted to give their version of what actually transpired. However, each one of them could not say why there is no return of service; no copy of the court order joining her; no return of service evidencing the service of the process of the main proceedings on her so as to enable her to make an informed decision as to what next to do; no movement on her

⁴ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

⁵ *Id.*

part and yet, she is a necessary party in these proceedings. Indeed, if a party has acquiesced to granting an order without their participation, a court may not insist on a joinder, which is otherwise necessary.⁶ Is there a basis for saying that Mrs Mongaula acquiesced to the order? I do not think so.

Disposal

[15] This case raises critical legal issues about the effects of the Land Act 2010 and the Legal Capacity of Married Persons Act 2006, where parties are married in community of property regarding alienation and disposal of the property of the joint estate. It would therefore not be proper to dismiss the appeal based on non-joinder. Our view is that 'Mamoleboheng Mongaula has a direct and substantial interest in this matter, and her rights may adversely be affected by order of this Court. We are not satisfied on the record that she was duly served. Therefore, she is entitled to be notified of these proceedings and whereupon receipt of such notice elect either to participate or abstain.

[16] It is just that this matter should be remitted to the High Court to ensure that justice is done in this matter. The first respondent's wife (Mamoleboheng Mongaula) must be served with the application for joinder. A return of service; a copy of the court order joining her; a return of service evidencing the service of the founding papers, and all subsequent court papers in the proceedings must be served on her to enable her to make an informed decision as to what next to do. She is a necessary party in these proceedings.

⁶ Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank [2011] ZACC 2; 2011 (3) SA 1 (CC); 2011 (5) BCLR 505 (CC) at para 57 (Twee Jonge Gezellen).

[17] The irregularity committed by the High Court is such that the only appropriate decision is a remittal for the reason that the 1st respondent's wife be joined to these proceedings. It follows that the appeal should succeed.

Order

[18] As a result, the following order is made:

- (a) The judgment of the High Court is set aside.
- (b) The joinder application and all other processes must be served on Mamoleboheng Mongaula, and the matter be proceeded with according to law.
- (c) Costs of this appeal shall be costs in the cause.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



P. MUSONDA
ACTING JUSTICE OF APPEAL

Chinhengo AJA:-

[19] I have read the judgment prepared by the President. He sets out the law on joinder of necessity and I agree entirely with his exposition of it. However, having regard to the facts of this case, I,

respectfully, do not agree with the conclusion that the matter must be remitted to the High Court for the purpose of ensuring that the 2nd respondent is joined as a party.

[20] At paragraph [3] of the judgment, the President records that “(t)he learned counsel for the parties informed us from the bar that she [2nd respondent] had been served” with the papers and the court order joining her as a party. In my opinion, there is no reason why this Court should not accept as fact that the 2nd respondent was indeed served and chose not to participate in the proceedings. The fact that a return of service is not in the record cannot, in my view, stand in the way of the finalisation of this matter on the merits in this appeal when two counsel, officers of the court, on both sides have informed the court that there is no issue between the parties on the question of service and that the 1st respondent’s wife was in fact served with the papers and the court order relating to her joinder as a party.

[21] It seems to me that there are at least two reasons why 1st respondent’s wife is unwilling to be a party to the proceedings. The first is that her husband, the 1st respondent did not seek any relief against her. The second is that the proceeds from the sale of the jointly owned property came into their joint estate as persons married in community of property and the cancellation of the sale and repossession of the immovable property, now massively developed, inures to their joint benefit. The third, though speculative at worst but not unreasonably so, is that she is in collusion with her husband in the endeavour to repossess the

developed stand. The two are married and live together. They were called to the chief's court for the possible resolution of the dispute before the matter went to court. She refused to attend the chief's court on the flimsy excuse that she did not have "the right shoes to wear and she had not done her hair at the salon" to be presentable enough before the chief.⁷ Her husband was leaving her at home when he went to court to fight this case. His legal representative informed the court that she was served with the papers and order for her joinder as a party to the proceedings. When the husband obtained the order joining her, it would not have been necessary, in my view, to incur the costs of service by the deputy sheriff when the husband could easily, and at no expense, serve her with all the papers and order. It smacks of collusion that she is unwilling or refuses to get involved in the litigation.

[22] On the other side an innocent purchaser bought the couple's immovable and undeveloped property for upward of M40 000.00 and developed it to the tune of over M300 000.00 since more than 10 year ago. I would have applied the provisions of the Legal Capacity of Married Persons Act, 2006, s 8 thereof, and the decision of this Court in *Teboho Mohapi v Motselisi Lucy Mabathoana & Another*⁸ and finalised the matter in favour of the appellant. I would consequently have upheld the appeal and set aside the order of the court *a quo* with costs granted to the appellants against the 1st appellant.

⁷ See para 15 of appellant's heads and para 5.1 of Answering affidavit p 13 of record

⁸ C of A (CIV) No. 16/2018



M CHIHENGO
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: Adv L Molati
FOR THE RESPONDENT: Adv T. Mohanoe and
Adv V.P.'Mone