

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) 43/2021**

**LC/A/14/2020**

In the matter between:

**DIVERSITY DEVELOPMENTS  
UNITY INVESTMENT (PTY) LTD**

**1<sup>ST</sup> APPELLANT**

**2<sup>ND</sup> APPELLANT**

AND

**BOIPHILELO HOLDINGS (PTY) LTD  
RESPONDENT**

**1<sup>ST</sup>**

**LAND ADMINISTRATION AUTHORITY  
RESPONDENT**

**2<sup>ND</sup>**

**CORAM:** P MUSONDA, AJA  
J VAN DER WESTHUIZEN, AJA  
N.T MTSHIYA, AJA

**HEARD:** 19 APRIL 2022

**DELIVERED:** 13 MAY 2022

### **SUMMARY:**

*Application for leave to appeal -- leave granted -- appeal upheld -- matter remitted for completion to the Leribe District Land Court for completion.*

### **JUDGMENT**

#### **MTSHIYA, AJA**

#### **Introduction**

[1] This is an application for leave to appeal against the judgment of the Land Court handed down on 9 December 2020. The judgment set aside the decision of the District Land Court reasoning that the appellants had no *locus standi* to institute proceedings in the District Land Court.

#### **Background**

[2] It is imperative at this point to look into the background of the dispute. To that end I restrict myself to the facts that are relevant to the disposal of this appeal.

[3] The dispute *in casu* is a dispute over land rights, title and interests attaching to plot 23131-2149 situated at Ha Nyenye Maputsoe in the Leribe District. The original owner of the plot, Letsatsi Mary Moholisa (Maholisa), concluded a deed of transfer with the 1<sup>st</sup> respondent on 31 March 2015. Thereafter, the 1<sup>st</sup>

respondent occupied the property and initiated developments on the plot.

[4] On 31 November 2016, Maholisa, the original owner of the plot, also concluded agreements of sale with the appellants over the same property. Moholisa had subdivided the land and sold the subdivisions to the appellants without the knowledge of either parties.

[5] As a result of alleged fraud by the owner of the plot, all parties ended up claiming ownership, rights and title over the same plot. The appellants, on the other hand, got to know of the 1<sup>st</sup> respondent's rights over the property when he initiated developments on the property. This prompted them to commence proceedings against him in the Leribe District Land Court.

### **Proceedings in the Leribe District Land Court**

[6] The appellants applied to the court on an urgent basis under CIV/DLC/LRB/40/20 seeking to interdict the 1<sup>st</sup> respondent from making any further developments on the property as well as evicting him from the property. They also sought to declare any document conferring any rights to the 1<sup>st</sup> respondent as fraudulent and therefore null and void.

[7] The 1<sup>st</sup> respondent raised preliminary objections against the appellants arguing that they lacked locus standi and that they had no clear right to the property. He also issued a counterclaim against the appellants alleging they had no right over the plot and their agreements of sale were null and void.

[8] On 18 September 2020, the Leribe District Land Court dismissed the 1<sup>st</sup> respondent's preliminary objection relating to locus standi. The court then ordered that the parties lead oral evidence to support their factual assertions.

[9] Dissatisfied with the judgment of the Leribe District Land Court, the 1<sup>st</sup> respondent appealed to the Land Court (hereinafter the court *a quo*).

### **Proceedings in the Land Court**

In appealing against the order of the Leribe District Land Court, the 1<sup>st</sup> respondent cited the following grounds:

*"1) The learned Magistrate a quo erred and misdirected himself in holding as he did by dismissing the Preliminary objection to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein had no locus standi to seek the prayers they had sought in the originating application.*

*2) The learned Magistrate a quo erred and misdirected himself in directing that oral evidence be led regard being had to the fact that the facts as pleaded in the originating application had been admitted by the Appellant and as such there was no need to invite the parties to lead oral evidence to determine and decide the issue of lack of locus standi of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.*

*3) The learned Magistrate a quo misconstrued the nature of the orders sought in the originating application and the principles applicable hence he erred*

*and misdirected himself in dismissing the special plea of lack of locus standi with costs”.*

[10] On 9 December 2020, the Land Court upheld the appeal and ordered that the counterclaim should continue before a different magistrate.

Upon addressing the preliminary objection, the court a quo concluded that the appellants had no *locus standi*. The court also held that the appellants’ title to the property was null and void.

Following the decision of the Land Court, the appellants applied for leave to appeal. Their application was rejected on the basis that the application did not raise points of law but instead contained factual arguments.

The appellants have now approached this court directly seeking leave to appeal the decision of the Land Court delivered on 9 December 2020..

### **Grounds of appeal to this Court**

[11] If leave to appeal is granted, the appellants intend to place before this court the following grounds of appeal:

- i. “The court a quo erred in upholding the appeal despite the ruling appealed against not being appealable. The court a quo should have dismissed the 1<sup>st</sup> respondent’s appeal on that ground alone.*

- ii. *The court a quo erred in ruling that the appellants lack locus standi despite the existence of appellants' title (leases).*
- iii. *The court erred in determining the issue of validity and or authenticity of the appellants' leases which was not an issue on appeal.*
- iv. *The court a quo erred in awarding costs at attorney and client scale in the absence of sufficient cause to award costs on that scale”.*

### **Application for leave to appeal**

[12] Section 17 of the Court of Appeal Act provides as follows:

*“Any person aggrieved by any judgement of the High Court in its appellate jurisdiction may appeal to the court with the leave of the court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not a question of fact”.*

Mindful of the above provision in the law, the appellants applied in the court a quo for leave to appeal. As already said under paragraph 10 of this judgment, their application was dismissed.

In their dismissed application the appellants had, in part, averred as follows:

*“5. The applicants herein lodged an application for eviction, interdict and cancellation of any document that purports to confer title over Plots 2313-2244 and 23131-2245. The 1<sup>st</sup> respondent opposed the*

*application and raised preliminary objection that the applicants have no locus standi to have instituted the application on the grounds that the 1<sup>st</sup> Respondent was the first purchaser and the sites in issue were transferred to it before those of the Applicants.*

*6. The preliminary objections were dismissed. The 1<sup>st</sup> Respondent noted an appeal to this Honourable Court LC/A14/20. The appeal was upheld. The facts and details of that appeal appear in the judgment of this court together with the decisions of law made by her Ladyship in that regard. The judgment of the court is annexed herewith and marked Annexure DU1, the findings of this court.*

*7. The applicants are desirous of noting an appeal in this matter. Since this is a second appeal, the applicants need a leave certificate of her Ladyship to enable them to do so only on the questions of law. The grounds of appeal annexed hereto constitute questions of law arising in the intended appeal and that they have good prospects of success in the court of appeal”.*

In response the 1<sup>st</sup> respondent averred:

*“4.1 Contents therein are denied in as the Applicants have dismally failed to make out a case for leave to appeal as envisaged by the law. Since this is a point of law, the 1<sup>st</sup> Respondent’s counsel will develop this argument at the hearing of the matter.*

*4.2 All the grounds of appeal attached to the applicants' **schedule of documents** do not constitute any question of law as required by the law. The aforesaid grounds are factual in nature; they were not even the issues in the main appeal in terms of the pleadings."*

[13] The court a quo considered the appellants' application for leave to appeal, and in dismissing the application the court a quo reasoned:

*"21) In the instant application, the respondents have not specified the points of law as required by the Act in question; namely section 17 of the Court of Appeal act No. of 1978 (sic). The respondents have specified the grounds on which leave is sought but in doing so they have not raised questions of law as envisaged by the law. They have raised factual issues as has correctly been argued on behalf of the first respondent".*

[14] It is the dismissal by the court a quo of their application for leave to appeal that necessitated the direct approach to this court seeking the same relief.

In the founding affidavit in support of their application, the appellants repeated the averments they had made in their application to the court a quo. They then conclude by saying:



*“7. ....The applicants are still pursuing to appeal the Annexure DU1 have decided to seek leave to appeal directly before this Honourable court (sic)”.*

Annexure DU1 refers to the judgment of the court a quo delivered on 9 December 2020.

[15] In order to place the appellants’ appeal before this court, it is necessary to start by determining the application for leave to appeal. Initially this was strongly opposed by the 1<sup>st</sup> respondent but as arguments proceeded in court, it became obvious that the issue of leading evidence in this case was crucial. The papers presented to the court a quo, confirmed that the dispute between the parties could not be resolved on papers. That included the dispute relating to the issue of locus standi. In order to resolve the disputes, there was need for viva voce evidence to be led as had been directed by the Leribe District Land Court. The issue of locus standi that the land court dealt with was anchored on whether or not the appellants had any interests in the disputed property. The issue required evidence.

[16] In my view, if the issue of leading evidence is accepted, as indeed it should, that position would mean that leave to appeal should be granted. Such a decision would enable the disputes between the parties to be properly ventilated. Furthermore, a decision in that direction would also support the ruling by the magistrate in the Leribe District Land Court, where he ruled:

*“....while it is common cause that each party in the case holds title to the plots, it is quite clear that the*

*circumstances leading to the granting of title are very much in dispute. Allegations of fraud are already flying around. It is therefore the consideration of this court that the processes leading to the granting of titles in question need to be thoroughly ventilated. On papers the court cannot properly determine whose title is legitimate without evidence being led and thoroughly scrutinized. Ex facie applicants have documents or leases which make them parties with an actual interest in the determination of the issues at hand and their outcome”.*

[17] I am in full agreement with the above position taken by the Magistrate. It is through the leading of evidence that the rights and interests of the parties in this case can be properly determined. Accordingly it is my considered view that, leave to appeal should be granted.

### **The Appeal**

[18] The facts of this case lead to one conclusion, namely the need to set aside the judgment of the court a quo.

The grounds of appeal listed under paragraph 11 relate to the assertion that the ruling of the District land Court was interlocutory and therefore not appealable; argument that appellants had no *locus standi*; validity of leases and issue of costs.

[19] The decision to grant leave to appeal is mainly centered on the fact that, the decision of the District Land Court relating

to the need to lead evidence in order to establish the rights and interests of the parties in the dispute, was correct. That finding alone, in my view, dictates that the judgment of the court a quo should be set aside as prayed for by the appellants. This is mainly so because it is only through the leading of evidence that the issues raised in the appeal could properly be dealt with.

[20] Furthermore, the decision to set aside the court a quo's judgment is also anchored on the clear position that the court a quo should not have completed the proceedings that the District Land Court was already seized with. In any case, the court a quo, apart from improperly addressing an interlocutory issue, went on to deal with other issues that were not before it, namely issues relating to title and leases. Given the facts of this case, my view is that the court a quo should have declined dealing with the first respondent's appeal pending finalisation of the case in the Leribe District Land Court.

[21] All parties *in casu* are claiming some ownership of the land in dispute. I therefore reiterate that, the issues of title and interests can only be decided through the leading of evidence. To that end I am compelled to fully accept the ruling of the Leribe District Land Court which I referred to under paragraph 16 herein.

[22] Endorsement of the ruling of the magistrate means that the prayer to set aside the ruling of the court a quo should be accepted. In coming to that decision, I am satisfied that the

leading of evidence will settle the disputes attaching to Plot 23131-2149.

[23] Having accepted the setting aside of the judgment of the court a quo in its totality, what remains is for this court to refer the matter to the Leribe District Land Court for completion. Allowing the decision of the court a quo to stand would lead to a miscarriage of justice.

[24] I accordingly make the following order:

1. Application for leave to appeal is granted.
2. The order of the court a quo, dated 13 September 2021 dismissing the appellant's application for leave to appeal, is set aside.
3. The appeal succeeds with costs.
4. The judgment of the court a quo, delivered on 9 December 2020, is set aside.
5. The matter is remitted to the Leribe District Land Court for completion.



---

**N T MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

I agree:



---

**P MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree:



---

**J VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANTS:**           ADV.L. MOLAPO

**FOR THE RESPONDENT:**           ADV.R.D. SETLOJOANE