

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.: 12/2021**

In the matter between:

**MAFETENG PROPERTY GROUP (PTY) LTD  
APPELLANT**

AND

**BENJAMIN  
RESPONDENT**

**RADIOPELO**

**MAPHATHE**

**CORAM:**

P.T. DAMASEB AJA  
M.H. CHINGENGO AJA  
N.T. MTSHIYA AJA

**HEARD:**

12 APRIL 2022

**DELIVERED:**

13 MAY 2022

## SUMMARY

*Section 16 (1) of the Court of Appeal Act 1978, application for leave to appeal against an order of the High Court in interlocutory proceedings. High Court having granted interlocutory order against objection matter was re judicata, there was non-joinder and non-compliance with rule 8(19) of the High Court rules. On appeal court sets out circumstances in which it will grant leave to appeal against an interlocutory order.*

## JUDGMENT

### DAMASEB AJA

[1] We have before us an application for leave to appeal against an order of the High Court ordering stay of execution. The matter has a chequered history.

[2] The essence of the dispute involving the applicant and the respondent was the subject of a judgment of this court in C of A (CIV) No. 26/2018<sup>1</sup>. In the latter case, Chinhengo AJA wrote:

*'The respondent, a duly registered company, sued the appellant and ten other persons, in the High Court by way of urgent motion proceedings on 13 July 2016. It sought orders (a) stopping the appellant from interfering with the its rights as the owner of all*

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<sup>1</sup>*Ben Radiopelo Maphate v Mafateng Property Group (Pty) Ltd.*

*occupational rights in Plot No. 16472-041 and Plot 16472-222 Mafeteng, both of which are also known as Patsa Shopping Centre (“the Shopping Centre”); directing the appellant “to account [to it] for all monies and rentals received from the tenants at the Patsa Shopping Centre, Mafeteng from 11 October 2008 to date hereof, and as at that time 30 April 2016 and to debate, upon demand, such account ... and to pay ... any amount which may be found to be due to (it) after such accounting and debate”; (c) stopping the appellant from collecting rent from tenants at the Shopping Centre and from personally or through his agents directing any demand to the tenants to enter into any sub-leases with him or threatening the tenants with eviction should they refuse to enter into such sub-leases or from interfering with the occupation or business of any of the tenants; (d) stopping the appellant from relying on a wrong order issued by the Registrar of the Court of Appeal dated 6 November 2014 purporting that it is the order issued by the Court of Appeal; (e) stopping tenants (2<sup>nd</sup> to 9<sup>th</sup> respondents in the court a quo) from paying rent to the appellant and directing them to enter into sub-lease agreements with it and, in default thereof, vacating the Shopping Centre and paying rent into an independent account nominated or appointed by the court, pending the finalisation of the application. The ten other persons were eight tenants at the Shopping Centre and the Minister of Trade and Industry and the Attorney General, the 10<sup>th</sup> and 11<sup>th</sup> respondents, respectively. No relief was sought against*

*these last two. Some interim reliefs were granted to the respondent before its application was heard.'*

*The respondent's application was heard by the High Court on 5 December 2016 and, despite opposition from the appellant, judgment in favour of the respondent was granted on 17 May 2018.*

*The present appeal is against the whole judgment of the High Court. At the hearing of the appeal the parties agreed that the single issue for decision in the appeal was whether or not the matter before the High Court was res judicata. That was the substance the appellant's contention in the High Court and in the appeal before this court. A brief history of the litigation between the appellant and the respondent will assist in properly understanding the contested issue, to wit, whether or not the matter was res judicata.*

*The appellant is the son of the late Dr KT Maphathe who, during his lifetime in 1990, entered into an agreement of sub-lease, as sub-lessee, with a company called I. Kuper (Lesotho) (Pty) Ltd ("the company" or "Kuper") in respect of the Shopping Centre. I will refer to this agreement as the Kuiper agreement. The sub-lease was to subsist for 25 years after which the sub-lessee had, at his election, two options to renew the sub-lease for periods of ten years each. In terms of clause 4(c) of the Kuper agreement*

*the rent payable by the company was to be paid to Dr Maphathe or his nominee. The amount of the rent was fixed by clause 4(a) of the Kuper agreement at M1.20 per square metre of ground floor space actually sub-let to tenants and such amount “automatically increased or decrease, depending on the extent of the occupancy of the premises.” Clause 4(b) of the Kuper agreement is a rent escalation clause providing for the increase of the rent by “7% per annum, compounded, with effect from the first anniversary of the bus-lease.”*

[3] The High Court (Mahase J) on 15 October 2021 granted an order in Commercial Court Application No: CCA/0034/2020 in favour of the respondent who had approached court seeking an order to stay the order of the Commercial Court in CCA/0061/2016. That order was sought by the respondent pending the finalisation of an application he brought under CCA/00034/2020 challenging the renewal of a sublease by the executors of his late father’s estate in favour of the applicant.

[4] The respondent also sought an order that all shops situated at the Patsa Building in Mafateng on plot numbers 06472-041 and 06472-222 be opened for letting and hiring pending the finalisation of an application he brought under CCA/0034/2020.

[5] It is common cause that the judgment and order in CCA CCA/0061/2016 was appealed by the respondent to this court and confirmed on appeal in the judgment written by Chinhengo AJA which I quoted in para [2] above. In that case, we dismissed an appeal by the respondent challenging the applicant's right to occupy under a sublease from the executors of his late father's estate, being Plot No. 16472-041 and Plot 16472-222. The effect of the dismissal of that appeal is that the High Court's order evicting Mr Ben Maphathe from those plots remained in force.

[6] It is apparent, therefore, that Mahase J's order of stay in effect stayed the High Court's order upheld by this court in CA 26/2019. In other words, the learned judge made the Court of Appeal's order *brutum fulmen*.

[7] When the respondent (since deceased) sought the order of stay, the present applicant opposed it and raised several points *in limine*, including pleading over on the merits. It objected that there was non-joinder, that the stay order was not competent because it offended *stare decisis* in that it would subvert a decision of this court; and that there was non-compliance with Rule 8(19) of the Rules of the High Court.

[8] All of these objections did not find favour with Mahase J. Aggrieved by the High Court's rejection of those objections, the

applicant sought leave to appeal to this court in terms of s 16 of the Court of Appeal Act 10 of 1978, which states:

*'(1) An appeal shall lie to the Court-*

*(a) From all final judgments of the High Court;*

*(b) by leave of the Court from an interlocutory order, an order made ex parte or an order as to costs only.*

[9] Leave is required because the applicant accepts that the impugned order is interlocutory in nature.

[10] Leave to appeal was resisted on the basis that (a) it would amount to promoting piecemeal appeals and (b) it would frustrate proceedings in the High Court challenging the extension of the sublease.

[11] I will demonstrate four circumstances (not necessarily exhaustive) in which an interlocutory order may be appealed to this court in terms of s 16 of the Court of Appeal Act.

[12] First, this court held in *First National Bank of Lesotho v Lugy's Manufacturing (Pty) Ltd*<sup>2</sup> that where the High Court has erroneously interpreted a rule of court in a manner determinative of the rights of litigants, such an order will be appealable, even if interlocutory.

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<sup>2</sup> C of A (CIV) 51/2019 [2019] LSCA 33 (11 November 2019) para [20].

[13] A wrong application in interlocutory proceedings of a rule of court whose purport and effect has been authoritatively settled by the apex court would therefore be appealable with leave because the contrary would create legal uncertainty and offend our cherished principle of *stare decisis*.

[14] Secondly, where the High Court makes an order without jurisdiction, such an order will be appealable because a court lacks jurisdiction where an issue has been decided in a live controversy between the same parties on the same subject matter.

[15] Thirdly, where a court makes an order without a necessary party being joined, such an order would, even if interlocutory, be appealable. A court cannot make an order which binds a party that has not been joined when it ought to have been.

[16] Fourthly, this court has now laid down beyond a peradventure that in the absence of condonation being sought and being granted, non-compliance with rule 8(19) is fatal.<sup>3</sup>

[17] It is common cause in the present case that the application for stay related to an estate of a deceased person and that the applicant for stay did not comply with Rule 8(19). The court a

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<sup>3</sup> *Qocha v Nthongoa* C of A (Civ) 49/16 [2018] LSCA 19 (07 December 2018); *Matete v Matete* C of A (CIV) 57/2018 [2019] LSCA 31 (31 May 2019), para 11; *Mohlouoa v Motsami* C of A (CIV) 49/2018 [2019] LSCA 49 (01 November 2019).



*quo's* attention was drawn to that fact but it chose not to follow established precedent.

### **Important Backdrop**

[18] Leave to appeal was lodged during the last session of the Court of Appeal. In the intervening period, the respondent, Mr Ben Maphathe died. The consequence is that there was no longer a living respondent. On behalf of the appellant, Mr Mpaka directed an inquiry to the Master of the High Court who informed him that the estate had not yet been reported. In other words, no executor had been appointed for late Ben Maphathe's estate.

[19] Mr Potsoane who appeared at the hearing placed on record that he had acted for Ben Maphathe when he was still alive but that since the latter's passing, he is not aware of the appointment of an executor and that he has no instructions to act on behalf of the deceased Ben Maphathe's estate.

[20] The practical difficulty which presented itself at the hearing of the application for leave to appeal therefore was that there was no representation at the hearing of late Ben Maphathe's estate.

[21] Absent appointment of an executor for late Ben Maphathe's estate no other person could in law fill the void left by his death because an estate is not a legal person<sup>4</sup>. The *persona* in

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<sup>4</sup> *Hughes' Estate v Fouche* 1930 TPD 41; *Haarhoff's Executor v De Wet's Executor* 1939 CPD 273.

connection with a deceased's estate is the executor in his or her representative capacity as the assets of the estate vest in the executor and not in an heir.<sup>5</sup>

[22] It follows that only an executor can sue and be sued in respect of estate matters. An heir only has a vested claim against the executor which is only enforceable after confirmation of the liquidation and distribution account.<sup>6</sup>

[23] The question arose, could the application for leave to appeal be heard in the absence of the executor of late Ben Maphathe? As I have already shown, the applicant made an effort to establish if an executor had since been appointed for late Ben Maphathe's estate. During the hearing, we ascertained from Mr Mpaka that there was no other step that the applicant could reasonably have taken, but failed to, to ensure representation of late Ben Maphathe's estate at the hearing of the application for leave to appeal.

[24] We do not know whether late Ben Maphathe died testate or intestate. That is important in Lesotho because it will determine whether the estate is to be administered under customary law or under the Administration of Estates Proclamation 19 of 1935.

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<sup>5</sup> *Krige v Scoble* 1912 TPD 820; *Smith's Estate v Follet's Estate* 1942 AD 385.

<sup>6</sup> *Ohlsson's Cape Breweries v Humburg* 1909 TS 140; *Snyman v Basson N.O.* 1915 TPD 374.

[25] Against that must be weighed the fact that all pleadings in the application for leave to appeal had been filed at the time Ben Maphathe died and the matter had become ripe for hearing and remained on the court's roll. The applicant remained saddled with an order of stay which, unless set aside, remains binding on it.

[26] We therefore considered it to be in the interest of the administration of justice for the application for leave to appeal to be heard.

### **The application for leave to appeal**

[27] The application for leave to appeal complained that the order granted should be appealed against because (a) it subverted an earlier order of this court between the same parties on the same subject matter, thus breaching the principle of *res judicata*; (b) a necessary party was not joined and (c) it could not be heard because the application for stay had not complied with rule 8 (19) of the High Court Rules. All of these grounds are covered by the situations warranting leave that I pointed out in paras [12] - [16] of this judgement.

[28] Late Ben Maphathe's basis for opposition to the application for leave to appeal was that it would be encouraging piecemeal appeals if the matter were heard and that it would pre-empt the

outcome of the application still to be determined by the High Court.

[29] All the proposed grounds of appeal that I have set out above would be a sufficient basis for this court to interfere with the order made by the High Court which the applicant wishes to appeal to this court. That is so because those grounds all go to whether or not the High Court could competently adjudicate the dispute before it. If it could not, the issue of piecemeal appeals does not carry any weight because the proceedings would have been incompetent *ab initio*.

[30] I am satisfied that the applicant has made out the case that there are reasonable prospects that this court will interfere with the High Court's order. Leave to appeal must therefore be granted against the order of stay.

[31] It is important to impose the safeguard that to the extent that in the interim there have been new developments in regard to late Ben Maphathe's estate, the applicant gives appropriate notice of the appeal to any interested person, being an executor or executrix or successor-(s)-in title to the estate of late Ben Maphathe. Such notice must be published in the official gazette and be served on the Master of the High Court and, in addition, be published at least twice in both English and Sesotho in two newspapers having a wide circulation in Lesotho.

## **Intervention**

[32] Before the hearing of the application for leave, an intervention application was filed of record on behalf of Nkhathi Lesoli Maphathe Memorial Trust and the executors of the estate of the respondent's late father. The intervention application was lodged by V Mokaloba & Co.

[33] The intervention was sought in the event that leave to appeal is granted so that the said executors can join in the appeal and support the orders sought by the applicant setting aside Mahase J's order of stay. A proper basis was laid for the application and it should be granted.

## **Order**

[24] I make the following order:

### **Leave to appeal**

- (i) The applicant is granted leave to appeal against the judgment and order granted by Mahase J in CCA/0034/2020.
- (ii) The applicant must comply with rule 3(13) of the Rules of the Court of Appeal; and in addition, the applicant must give appropriate notice of the appeal to any interested person, being an executor or executrix or successor-(s)-in

title to the estate of the late Ben Maphathe. Such notice must be published in the official gazette and be served on the Master of the High Court and, in addition, be published at least twice in both English and Sesotho in two newspapers having a wide circulation in Lesotho.

Intervention

- (iii) Nkhati Lesoli Maphathe Memorial Trust and the Executors of the Estate of the late Kenneth Thulo Maphathe must be joined by the applicant in the appeal to be lodged against the order of stay granted by Mahase J in CCA/0034/2020; and even if the applicant does not pursue the appeal, the intervening parties are entitled to pursue the appeal in their own right.



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**P T DAMASEB AJA**  
**ACTING JUSTICE OF APPEAL**

I agree



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**M H CHIHENGO**

**ACTING JUSTICE OF APPEAL**

I agree



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

**FOR THE APPELLANT:**

ADV. T MPAKA

**FOR THE RESPONDENT:**

ADV T POTSANE