LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 16/2024

CIV/T/0533/2023

In the matter between:

MAMAISH – PROMA **APPELLANT**

AND

LIKONELO MAJARA NTSAOANA **RESPONDENT**

CORAM: MUSONDA AJA
CHINHENGO AJA
VAN DER WESTHUIZEN AJA

HEARING: 9 OCTOBER 2024

DELIVERED: 1 NOVEMBER 2024

SUMMARY

An unregistered society cannot sue in its own name unless leave is granted under section 20(2) of the societies Act of 1966- where there is no locus standi the action must be dismissed. In deserving cases where the unregistered association functioning bears the hallmark of universitas, the court may allow the association to sue in its name and be sued by that name. Absent are the characteristics of universitas in the functioning of the appellant – appeal dismissed

JUDGMENT

MUSONDA AJA

[1] **Introduction**

This is an appeal against the High Court dismissal **(Ralebese J.)** of an application for default judgement against the respondent. The respondent was a member of the appellant, which was an unregistered association.

[2] Appellant contend that the dismissal of the action by the court *a quo* was incorrect, as the appellant was a common law universitas, which can sue and be sued in its own name.

[3] **Background**

The respondent was a member of the appellant **Mamaish-Proma** also known as **Marorisang Maqakachane** indigenous

self-help profit making association, a philanthropic and humanitarian, unregistered voluntary association established on 20th January 2021. The association was formed to respond to the harsh reality of Covid-19 and its aftermath and to ensure growth and development of members exclusively.

[4] The respondent borrowed M30,000 at 20 percent penal interest monthly which amounted to another M30,000. The payable amount came to M60,000, plus 7.75 percent interest, which was the Central Bank of Lesotho prime lending rate, from the date of issuance of the summons until final payment.

[5] The certificate of indebtedness was issued on 12th September 2023 and the respondent acknowledged, the debt on 26th October 2023, which acknowledgement was conclusive according paragraph four of appellant's constitution.

[6] The respondent was served on 27th September 2023, but never opposed the action in the court a quo nor has the respondent appeared before us. It would appear on the papers the indebtedness was common cause.

[7] In absence of the defence to the claim by the respondent, the appellant applied for default judgment. The learned Judge a quo *mero motu* raised a point in *limine, locus standi in judicio* capacity to sue the defendant in its name,

considering that it was an unregistered association, which the judge was entitled to do.

The High Court Approach

[8] The singular issue in the High Court was whether the appellant association was a universitas in terms of its constitution. Can it sue and be sued in its name?. The decision of this court in ***Khoarai and Another v Mona***[1] was cited in support. An unregistered association like the plaintiff can sue its members and vice versa. The decision of this court in ***Chaba-Li-Maketse Society and Others v Sibeko and Others***[2] was relied on.

[9] Section 20(1),[3] of the Societies Act, does not apply to incapacitate the Plaintiff in the circumstances of this case, so it was argued. Appellant's counsel contended that Rule 13(2) as read with Rule 13(1) of the High Court Rules[4] gives an unregistered association the capacity to sue and be sued in its name in as much as it is unincorporated and unregistered. The judge preferred the definition of the word "unincorporated" in ***Shillings v Cronje and Others***[5] where the Court said:

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[1] C of A (CIV) No. 3 of 2005
[2] C of A (CIV) 50 of 2018
[3] Societies Act, No. 20 of 1996
[4] High Court Rules No. 9 of 1980
[5] (1998) 1 All SA 33 A (27th November 1986)

"Refer to an association which does not have a legal persona separate from its constituent members. "Corporate" would have a correspondingly opposite meaning."

[10] The High Court was of the view that universitas as defined in ***Khoarai*** *supra,* should exist quite apart from individuals who comprise it, that has perpetual succession, and is capable of owning property. However, an unregistered association may be found to be a universitas by virtue of the constitution.[6] If that constitution is not clear whether an association is a universitas, the court can determine that from the activities of the association.[7]

[11] Article 10(1), of the appellant's constitution characterized the applicant as "universitas personarum" under the common law, with the necessary capacity to own assets and property distinct from its members, and perpetual succession.

[12] The High Court, when dealing with the core question, as to whether the appellant was a universitas, pointedly said, "that the answer to that question goes beyond stipulations in the appellant's constitution. The Court came to the conclusion that despite the appellant's constitution designating the entity as a universitas, in fact it was not. The learned judge said that it was clear that the goals and

[6] Klerksdorp and District Muslim Merchants Association v Mahomed (1948) (4) SA 731

[7] Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta & Co at page 175

objectives in Article 4, [8] of the Constitution were not philanthropic or benevolent. Activities and programs undertaken by the appellant are for the exclusive benefit of the families, allied families and individuals who are members of the association.

[13] Article 6, Of the appellant constitution, allows only members to benefit from the funds and the resources that accrue from the activities and programs of the association which flies in the teeth of philanthropy. Upon the dissolution of the association, Article 14, provides that "the funds of the association shall be distributed to meet the obligations of the association, and the remainder shall be distributed to the members according to their respective quota of contributions. The clause does not mention the funding of benevolent or philanthropic activities. Undeniably members of the association derive some benefit from the funds and resources of the association. This was a distinguishing characteristic of the ***Khoarai case (supra)***, in which case this court held that the Church was capable of owning property apart from its members.

[14] The Court *a quo* reinforced the view that the appellant is not a universitas with South Africa decision in ***Klerksdorp and District Muslim Merchants Association V Mohomed and Another***, where it was held that:

[8] Mamaish-Proma Constitution (20/01/2021), p. 4.

> "*From the provisions in the constitution of plaintiff association, it is clear that no member has rights by reason of his membership, to the property of the association. If the constitution of the plaintiff association has not the effect of creating a universitas, it would in my opinion, be impossible to draft a constitution which would*"[9]

[15] Article 10.1, of the constitution though characterizing the appellant as a universitas, the appellant does not exist quite apart from its members. It has no capacity to own funds, resources and property apart from its members. It is therefore an incorporated and unregistered association, so reasoned the judge.

[16] The membership of the association having been restricted to families under Article 5 and Article 14, which provides for dissolution if supported by two-thirds majority of the membership mean that the association does not have perpetual succession. More so the constitution does not provide for succession as the membership is confined to the two founding families of **Maqakachane and Moalosi**. In ***Malebjoe V Bantu Methodist Church of South Africa***, the court said:

> *"The question of succession is the issue that depends on whether the body in question continues to exist even after individuals that comprise it have left"*[10]

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[9] 1948 (4) SA 731

[10] 1957 (4) SA 465 at 466

[17] **Capacity of the appellant to sue**

The Court *a quo* relied on the Rule 13(2), of the High court Rules as read with section 11(1) (a) of the society's Act, to resolve the issue. Rule 13(3) decrees that for the association to have capacity to sue, it should be registered. While section 11 (1)(a), provides that a registered society may sue and be sued under the name with which it is registered. The court *a quo* quoted section 20(1) and (2) of the society's Act, which prohibits unincorporated or unregistered societies to sue in their own names.

[18] After analyzing a triad of legislation, the court *a quo* came to the conclusion that unregistered association, has no capacity to sue save and except, where leave to do so has been granted by the Court under section 20(2), so the court *a quo* reasoned.

[19] The Court concluded that the appellant association is not a universitas, though a clause in the constitution says so. The association does not exist distinct from its members, and it is not capable of owning funds, resources, and property apart from its members. There is no proof that the association will continue to exist after the individuals who created it have left. The court dismissed the application without delving into the merits.

[20] Aggrieved by the dismissal of the application for default judgement on a point of law. The appellant filed five grounds of appeal:

(1) Assuming that the court aquo was entitled to raise issues related to *locus standi*, and the capacity to sue at that stage, it erred and misdirected itself in holding and declaring that the appellant was not a universitas, it did not exist apart from its members, was incapable of owning property and that it did not have perpetual succession, when the facts were clear that the appellant qualities as and is a universitas.

(2) The court *a quo* erred and misdirected itself in holding that the appellant had to be registered in order to sue under the dictates of Rule 13 of the High Court Rules, when the Rule does not so provide.

(3) The court *a quo* erred and misdirected itself in holding that the appellant is precluded from suing by the disability imposed by section 20(1) of the Societies Act, 1966.

(4) The appellant, being a philanthropic or charity association, was not subject to the disability clause, pursuant to section 3(i) of the societies Act, 1966.

(5) The appellant under the Societies (Amendment) Act 2001, properly construed, is not subject to the disability imposed by section 20(1) of the Act.

[21] When the Heads of Arguments were five only three grounds of appeal were argued as opposed to the file grounds in the Notice of Appeal. These were

(a) The court *a quo* erred in holding that the appellant was not a universitas and therefore has no *locus standi*, and capacity to sue, when it was clear that on the facts that the appellant was a universitas.

(b) That the court *a quo* erred in holding that the appellant had to be registered in order to sue in terms of Rule 13 of the High Court Rules 1980; and

(c) That the court *a quo* erred in holding that section 20(1) of the societies Act 1966, precluded the appellant from suing

[22] **The issues**

The following are the issues in this appeal:

(1) Whether appellant has given a reasonable explanation for the late noting of the appeal; and

(2) Whether the appellant was a universitas, which can sue and be sued in its own name.

[23] **Condonation Application**

Appellant filed a motion before us to condone the late filing of the appeal. The appeal was lodged on the 8th day of March 2024, which was seven (7) weeks late. The founding affidavit was sworn by **Marorisang Maqakachane** on behalf of the appellant, who is the treasurer of the association. The reform for the delay was that appellant's counsel belatedly accessed the reasons of the order.

The Law

[24] The appellant has to have a good explanation and the prospects of success should exist. The application must be brought timeously. In **Makhelelise Khatala v Commissioner of Correctional Services and 3 others**[11] this court said:

> *"The real question is whether this is a proper case to condone non-compliance with the Rules of court. Rule 4(1) provides that the appeal should be noted within six weeks after judgment."*

[25] In **Zaineb Moosa and others v Lesotho Revenue Authority**[12] we said:

> *"The standard for considering an application for condonation is the interest of justice. However, the*

[11] C of A (CIV) 45/2021 (13th April 2021)

[12] C of A (CIV) 2/2014 para. 15

concept 'interests of justice' is so elastic that it is not capable of a precise definition. Fairness includes, the nature of the relief sought, the extent and course of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay the importance of the issue to be raised in the intended appeal and the prospects of success."

[26] Accordingly where there has been non-compliance the applicant should, timeously apply for condonation and should give cogent reasons for non-observation with the Rules initially, **Estate Woolf v Johns [13].** Where non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted whatever the prospects of success might be. The prospect of success is important but not decisive **Darries v Sheriff Magistrate Court Wynberg and Another[14].**

[28] In **De Klerk v Penderis and others[15]** the Namibian Supreme Court had this to say on condonation:

"The first dictate is that an application for condonation must be brought as soon as the non-compliance has been detected. Second, the appellant must provide a reasonable and acceptable explanation for his or her non-compliance and show that the main matter has prospects of success. Third, and application for condonation may be

[13] 1968 (4) SA at 497

[14] 1998 (3) SCA 34 at 41

[15] SA 76 of 2020 [2023] NASC 1 (1 March 2023)

refused because the non-compliance with the rules has been glaring flagrant or inexplicable and fourth, the bona fide of the application has also been held as a factor to be taken into account by the court exercising its discretion on whether to grant condonation or refuse condonation where there has been delay in noting an appeal."

[29] This court said in **Noko Mota N.O (curator bonis) Estate of Rapotlaki 'Mota & Another v Abdul Aziz Noor Mohamed**[16]:

"The appeal is against an order and not the reasons."

[30] The delay in noting the appeal was avoidable, the delay by the court in providing reasons notwithstanding.

[31] **Prospects of success**

In Lesotho: An association becomes a legal entity once registered, allowing it to operate with formal status. This provides legal protection, enabling it to enter into contracts, own property, and sue and be sued.

[32] *Locus standi* is described in **LAWSA (The law of South Africa) LexisNexis JA Faris et al Durban 2022** as follows:

"*He who has a right to sue in an action is said to have a locus standi in such an action, and vice versa." Everyone has a right*

[16] C of a (CIV) No. 19 of 2021

to be heard in his own cause, and no one, save a qualified practitioner, has a right to be heard in the cause of another"[17]

[33] In **Amlers precedent of pleadings LexisNexis LTC Harms et al 2018** at page 248 the following is said:

> *"The question of Locus standi is in a sense procedural but it is also a matter of substance. It concerns the sufficiency and directions of a performs interest in the Litigation to be accepted a litigating party. Sufficiency of interest depends on the facts of each case and there are no fixed rules.*[18]

> *"A universitas personarum in our law is a legal fiction or incorporeal abstractions consisting indeed in a collection aggregation of real or natural persons, but having in itself no existence in nature, and existing merely in contemplation of law ---. It is only those associations which have been endowed by legislature authority with the capacity and power of acquiring rights and undertaking obligations, and those associations which, at common law, have the characteristics of a universitas, which are considered in law to be juristic persons whether an association which has not been given corporate person by statute, is a common law universitas depends on the nature of the association, its constitutions, its objects and its activities."*

[34] As far as the common law is concerned Innes CJ in **Webb & Co Ltd v Northern Rifles**[19] put the Roman-Dutch

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[17] Back Arthur Charles, The Theory and Principles of Pleading in Court Actions, for all courts of the Unions of South Africa, Juta & Company Limited 1923

[18] Ibid.

[19] 1904 (March 4 June 5)

law position concerning the universitas and its capacity to sue beyond any doubt, stating:

> *"An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of enquiring rights and incurring obligations to a great extent as a human being. A universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole and not for the individual members."*

[35] When the language of a statute is clear and unambiguous, courts are bound to apply it. They will not resort to common law to override or contradict a statute unless the statute expressly or implicitly allows for it. The principle is; "legislation overrides common law to the extent of any inconsistency.

[36] **National Director of Public Prosecutions V Mohamed NO[20] 2003 (4) SA (CC)**, the court held that where a statute is clear, it must be given effect. Judges cannot disregard clear statutory provisions in favour of a common-law rule.

[37] Section 11(1) states:

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[20] 2003 (4) SA (CC)

Nothing in this Act contained shall confer up on any society the status of a body corporate:

Provided that unless the rules of the society may, under the name under which the society is registered

(a) Sue and be sued

(b) Hold property or assets, wheels, if not vested in trustees, shall be deemed to be vested in the governing body for time being of the society, and in all proceedings civil and criminal may be described as the property of the society.

[38] Section 20(1)

"If a society formed after the commencement of this Act, and to which this part applies, it is not registered under this Act, the rights of that society and any member thereof under or rising out of a contract made or entered into in relation to the business of that society shall subject to the provisions of subsections (2) to (6) inclusive, not be enforceable by civil or others legal proceeding; whether in the society's name or otherwise for so long as the society is not registered under this Act, but any other party to such contract may so enforce his rights under or arising out of such contract against that society or the member thereof.

(2) A society to which this part applies and which is not registered under this Act or a member of such a society may apply to a court of competent jurisdictions for relief from the disability imposed in subsection (1), if that court is satisfied that the failure to register was accidental, or due to inadvertence, or due to some other sufficient cause, or that another sufficient cause, or that on other grounds it is just

and equitable to grant relief, the court may, subject to the provisions of subsections (3) and (4) grant such relief either generally or in relation to a particular contract, on condition that the costs of the application be paid by the applicant unless the court otherwise orders, and subject to such other conditions as the court may see fit to impose."

Appellants Submissions

[39] It was canvassed that the appellant was a common law universitas and therefore, it can sue and be sued. The decision of this court in **Khoarai v Mona Supra** was heavily relied.

[40] The appellant's argument is that if the Catholic Church was allowed in **Khoarai,** to sue as a universitas at common law, the appellant association could also sue and be sued. Section 20 is therefore rendered irrelevant. In any event the Societies (Amendment Act) of 2001, recognized the indigenous self-help profit making associations allowed membership into the indigenous self-help association beyond the statutory ceiling and to allow such associations to generate and share profit.

[41] It follows that the policy considerations underlying section 20(1) and (2) that the section does not bar the association from suing its members as long as it does not use the assumed name.

[42] The appellant stunningly denies the relevance of the statutory provision under Section 20(1) and its disabling of unregistered association to sue and be sued in its own name

and the proviso in Section 20(2). It was argued that the Amendment to the Societies Act, 1966 was to accommodate self-help profit-making association like these, so the appellant argues.

[43] The appellant drew equivalence between the appellant and the Roman Catholic Church. This was the upshot of the appeal that the appellant was a common law universitas, more so that their constitution says so.

[44] **Consideration of the Appeal**

The grounds of the appeal are so interconnected that it is convenient to deal with them holistically. The appellants labored under the mistake that they can only note the appeal upon receipt of the reasons from the Judge's Chambers, despite the order having been available on 7th December 2023, they noted the appeal the 8th March 2024. We deprecated the notion in **Mota v Mohamed supra** that the appeal can only be noted when the appellant was in receipt of reasons, as the appeal is against the Order not reasons.

[45] The explanation of delay in noting an appeal is *ex facie* unreasonable. It is trite that an appeal is against an Order and not against the reasons. The Order was rendered on 7th December 2023, in terms of Rule 4(1), the appeal should have been noted within six weeks.

[46] Under Section 19, being a member or managing unregistered association has been criminalized Section 28, which prescribes a sentence of two hundred Maloti or in default up to six months' imprisonment.

[47] The fundamental element of common law universitas is that they must have a board, which runs the organization through deliberations and binding resolutions. They ran like a "conciliar" like fashion of Governance, the rule is by majority. The Board is absent in the appellant's structure, so appellant's comparison with the Catholic Church is plainly wrong.

[48] *The authorities of* **EX-TRIC United Workers Front; Eastern Cape Province**[21], **Foundation Impactors Church v Here by Life Ministries**,[22] **United Apostolic Faith Church v Boksburg Christian Academy**[23], are decisions that speak to the same characteristics of a universitas, that one need not delve into each case, as there is unanimity on what the characteristics are.

[49] Absent registration perpetuity and the board there is no legal fiction created and consequently the members are not distinct from the association. The legislation itself is in simple and plain language. The courts have to pronounce it

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[21] 2010 (2) SA 114 ECB

[22] 2022 ZAK2PHC 62 (24th October 2022 para 16.

[23] 2011 (6) SA 156 (GST), para 43

as it is and no further. It was imperative for the appellant to carefully and guardedly consider the provisions of Section 11, 19 and 20(1)(2), which are couched in simple language.

[56] **Conclusion**

The condonation application ought to be dismissed as no plausible reasons have been advanced for late noting of the appeal. The prospects of success of the appeal are dim, as the dictates of statute were ignored.

[57] **Costs**

This litigation was unopposed in the court *a quo* and is unopposed in this court. There will be no order as to costs.

Order

(1) The application for condonation is refused and the appeal is stuck from the Roll, and

(2) There will be no order as to costs

P MUSONDA
ACTING JUSTICE OF APPEAL

I agree

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: ADV KATLEHO NYABELA

FOR THE RESPONDENT: NON-APPEARANCE