

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Court Division)**

**HELD AT MASERU**

**CCT/ 0326/2021**

**LESEGO MAKGOTHI**

**APPLICANT**

**AND**

**AUCOR LESOTHO**

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

**MINISTRY OF FINANCE**

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

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Neutral Citation: Lesego Makgothi v Aucor Lesotho and 2 others**

**CCT/0326/2021 [2021] LSHC 30 COM (12<sup>th</sup> February, 2022)**

## **RULING**

CORUM:	MATHABA J
Heard on	11 <sup>th</sup> February 2022
Delivered on	12 <sup>th</sup> February 2022

## **SUMMARY**

*Proceedings against Government – It is sufficient to cite Attorney General in his nominal capacity where Government is sued – Where Attorney General is cited, it is not necessary but convenient for purposes of ensuring compliance to cite a Minister instead of a Ministry or Department.*

### **Annotations:**

#### **Cited Cases:**

##### **Lesotho**

Attorney General vs His Majesty the King and others Cous/ case/ 021/ 2015  
LSHC 3 (03 March 2015)

Emmanuel Fleet Services (Pty) Ltd vs Procurement unit & 6 others  
(CCA/0072/2021) [2021] LSHC 137 COM

Manthabiseng Lepule vs Teboho Lepule (C of A (CIV) 5/13) [2013] LSCA 4  
(19 April 2013)

Maqacha Khoali vs His Worship Mr Selebeng and others (C of A (CIV) 23/20)  
[2020] LSCA 29 (30 October 2020)

Nkekeletse Mamosa Jonathan vs Mahosiuoa Nthati Lephole and others C of A  
(CIV) No. 5/2018

## South Africa

Henri Viljoen (Pty)Ltd vs Awerbuch Brothers 1953 (2) SA 151 (0)

The Ministry of Health and one vs Christelle Bruckner Case No. JA 11/2004

## Swaziland

Sophie Zwane vs The Attorney-General and One 2004 SZHC

## STATUTES:

Attorney General's Act No. 6 of 1994

Constitution of Lesotho, 1993

Government Proceedings and Contracts Act No. 4 of 1965

Eswatini Government Liabilities Act No. 2 of 1967

South Africa State Liability Act No. 20 of 1957

## **INTRODUCTION:**

[1] The present applicant is the plaintiff in the main matter while the 1<sup>st</sup> respondent is the defendant in the said matter. The applicant applies for joinder of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents herein as defendants in the main matter, CCT/0326/2021, as well as for an order of costs of the application in the event of opposition.

## **BACKGROUND**

[2] The applicant sued the 1<sup>st</sup> respondent for cancellation of an auction sale agreement entered between the parties and payment of M369,000.00 as the purchase price, as well as for incidental matters.

[3] In answer to the applicant 's claim, the 1<sup>st</sup> respondent filed special plea of non – joinder as a preliminary point. The 1<sup>st</sup> respondent alleges that there were three contracting parties involved in the auction, the seller, purchaser and auctioneer. It asserts that it played the role of an agent and that failure to join its principal renders the claim defective.

[4] Therefore, in a move to cure the alleged defects in its claim, the applicant instituted the instant application for joinder of the Government of Lesotho as the owner of the vehicle represented by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent.

[5] The 1<sup>st</sup> respondent has once again taken a point of law of misjoinder. It argues that the 2<sup>nd</sup> respondent has been irregularly joined in these proceedings as the correct party to join is the administrative head of the Ministry being the Minister of Finance.

[6] On the 11<sup>th</sup> February 2022 the parties appeared before me for argument with the applicant represented by Mr. *Masoeu* and the 1<sup>st</sup> respondent represented by Mr. *Rasekoai*.

### **ISSUE FOR DETERMINATION**

[7] The parties are agreeable that the only issue I am called upon to determine is whether it is permissible to cite the Ministry as a party in legal proceedings instead of a Minister who is the executive or administrative head of the Ministry. I must at the outset indicate that, in my opinion, neither party is absolutely right or absolutely wrong as to its position in this matter.

[8] During argument, Mr. *Rasekoai*, correctly so in my view, did not pursue the principal argument in the 1<sup>st</sup> respondent's heads of argument. The argument did not directly address the issue which this Court is called upon to resolve. Rather, Mr. *Rasekoai* referred this Court to the case of **Emmanuel Fleet Services (Pty) Ltd v Procurement Unit & 6 Others** (CCA/0072/2021) [2021] LSHC 137 COM. (15<sup>th</sup> December 2021) page [12] where Mokhesi J said the following regarding citation of Government Ministries in litigation instead of Ministers:

“The other issue is the citation of the 3<sup>rd</sup> respondent as the “Ministry of Public Works and Transport”. It is a notorious fact that that was the designation

before it was split up into two separate ministries. The correct citation should be “Ministry of Transport.” However, I do not consider this to be fatal, as the correct citation maybe made. It did not occasion any prejudice to the respondents that the 3<sup>rd</sup> respondent was wrongly, albeit mistakenly, cited in the manner alluded above. Another worrying feature of this case is that the Ministry as against the Minister is cited, counsel have been warned that this practice has to stop, that the public functionary not the institution is to be cited, so that when issues of enforcement arise the functionary have been singled out and cited”.

[9] Mr. *Rasekoai* consequently argued that it is the Minister of Finance as the executive functionary who has to be cited and not the Ministry of Finance.

[10] On the other hand, Mr. *Masoeu* argued that the practice in this jurisdiction has always been to cite the Ministries whenever action is taken against the Government. He contends that whether the Minister is cited or not, is irrelevant for purposes of enforcement if the Attorney General is cited. He relies on the matter of **Maqacha Khoali v His Worship Mr Selebeleng and Others** (C of A (CIV) 23/20) [2020] LSCA 29 (30 October 2020), in particular the *obiter dictum* of Chinhengo AJA at page 6 to 7 where he said the following:

- “6. The real respondents in this matter are the 2nd and 3rd respondents. The 1st and 4th were cited for the purpose of producing the record of proceedings in the magistrate’s court. The others were cited for no apparent reason.
7. The citation of persons or entities that are not necessary parties or necessary for the determination of a matter is an ingrained habit in the practice of the law in this country and one very difficult to uproot. *When, for instance, the Attorney General is cited as a party representing the Government there is no need to also cite separately the departments of government involved in the dispute or Ministers or permanent secretaries.* The unnecessary citing of parties however is done routinely and no amount of disapproval will, it seems, persuade litigants and their lawyers from the needless inclusion of entities and individuals that should not be parties to litigation. The Police and police officials are routinely cited as respondents in civil litigation presumably to ensure enforcement of orders of court by them, yet it is trite that civil court orders are enforced by the messenger of court in the magistrate’s court or by the sheriff or his deputy in the High Court. The police are only invited to assist where the designated civil officers require their assistance in enforcing civil judgments when obstructed in carrying out their duties. The respondents took up this point in their answering affidavit where they correctly point out that the citation of the 5th and 6th respondents, the Commissioner of Police and the Officer in Charge of Mokhotlong Police Station is irregular because

they have no interest in the matter. They could well have said the same thing about the 7th respondent, the Minister of Justice. The courts should disallow costs of service of process on unnecessary parties. That way, perhaps, the habit of citing all and sundry may abate. In this appeal the real respondents are just the 2nd and 3rd respondents and reference to respondents in this judgment will be to the two of them only, unless the context otherwise requires.” (My emphasis)

[11] Mr. *Masoeu* strenuously argued that the law provides that only the Attorney General can be cited and that citation of the Ministries and Government departments is for convenience purposes only and is not what is required by the law. He relies on Section 3 of Government Proceedings and Contracts Act No. 4 of 1965 in this regard.

## **THE LAW**

[12] Courts have repeatedly deprecated the non – joinder of interested parties. See: **Manthabiseng Lepule v Teboho Lepule** (C of A (CIV) No.5/13) [2013] LSCA 4 (19 April 2013); **Nkekeletse Mamosa Jonathan v Mamosiuoa Nthati Lephole and Others** C of A (CIV) No. 5/2018.



[13] The test to determine whether there is a misjoinder is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of the Court. See: **Henri Viljoen (Pty) LTD v Awerbuch Brothers** 1953 (2) SA 151 (0) at 168 – 170.

[14] Whether the Government has a direct and substantial interest in this matter is not an issue. The issue is who should be cited between the Minister of Finance and the Ministry of Finance in addition to the Attorney General.

[15] Government and Proceedings and Contract Act No. 4 of 1965 provides that:

“2. Any claim against His Majesty in His Government of Lesotho which would, if that claim had arisen against a subject, be the ground of an action or other proceedings in any competent court, shall be cognisable by any such court, whether the claim arises out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant:

Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the

crown or of the Government of any department thereof in respect of any act or omission of its servants, or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action.

3 (1) In any action or other proceedings which are initiated by virtue of the provisions of section 2 of this Act, the plaintiff, the applicant or the petitioner (as the case may be) may make the Principal Legal Advisor the nominal defendant or respondent”.

[16] In **Attorney General v His Majesty The King and Others** (Cons/Cons/Case/02/2015) [2015] LSHC 3 (03 March 2015) at page [11] the Court of opined that “*Section 3 of the Government Proceedings and Contracts Act 1965 provides in permissive terms that the Attorney General may a nominal defendant or respondent in proceedings against the Government of Lesotho*”.

[17] South Africa has the State Liability Act No. 20 of 1957. Its preamble and relevant Sections provide as follows:

“Act

To consolidate the law relating to the liability of the state in respect of acts of its servants.

1. **Claims against the State cognizable in any competent court.** – Any claim against the state which would, if that claim had arisen against a

person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

2. Proceedings to be taken against Minister of department concerned. – (1) in any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent. (2) For the purposes of subsection (1), ‘Minister’ shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.”

[18] In interpreting Section 2, an equivalent of Section 3 of Government and Proceedings and Contract Act, though not identical, the Labour Appeal Court of South Africa in **The Minister of Health and One v Christelle Bruckner** Case number JA11/04 said the following at para [43]:

“The intention is repeated in section 1 of the State Liability Act. The purpose of s 2 of the State Liability Act, and its predecessor, is to permit a party bringing an action against the State to cite the minister of the department concerned or a member of the executive council of a province as nominal defendant or respondent. This does not mean that an action may only be brought against the state or a province by citing the Minister of the department concerned or a member of the executive council for, as pointed out by Nugent

JA in Kate on appeal, the Government itself can be cited as defendant or respondent.”

[19] Eswatini too has a similarly worded provision in its Government Liabilities Act No. 2 of 1967. In interpreting the provision in the **Sophie Zwane v The Attorney General and One** ((2689/03)) [2004] SZHC 134 (20 October 2004) the High Court of Eswatini said the following:

“The basis of citing the Attorney-General in proceedings against the government is found in section three of the Government Liabilities Act, 1967. That section reads;

"3. In any action or other proceedings which are instituted by virtue of Section 2, the plaintiff, the applicant or the petitioner, as the case may be, may make the Attorney-General the nominal defendant or respondent and in any action or other legal proceedings by the Government or by the Minister, the Attorney General may be cited as the nominal plaintiff or applicant, as the case may."

The word "may" in the expression "may make the attorney General the nominal defendant or respondent" does not confer upon the plaintiff or applicant who wishes to institute proceedings against the government a choice between citing the Attorney General or some other person such as a head of department or a Minister responsible. The words authorise the person who has been wronged by the government or by a servant of the government who is

alleged to have been acting within the scope of his employment as a government servant to sue. In other words the Government Liabilities Act 1967 was enacted to enable any person who had a claim against government arising from contract or from any other wrong allegedly committed by any servant of the government acting in his capacity and within the scope of his authority as such servant, to bring proceedings against the government. Similar legislation exists in South Africa in the form of the State Liability Act 20 of 1957.”

[20] I respectfully agree with the interpretation which recognises that the words “*may*” in these provisions is permissive. While I accept that only necessary parties need to be cited, I find the argument advanced by Mr. *Masoeu* that Section 3 provides that only the Attorney General can be cited untenable. That is not the import of the Section. Unlike the Ghana 1992 Constitution which expressly provides in Article 88(5) that “*all civil proceedings against the State shall be instituted against the Attorney General as defendant*”, the Lesotho 1993 Constitution does not have a similar provision.

[21] Section 3 does not mean that only the Attorney General has to be cited. Consequently, citing the relevant Minister as executive functionary in the relevant Ministry does not make the plaintiff non-suited. This does not necessarily mean that the Minister must be cited as a matter of necessity. I therefore disagree with Mr. *Rasekoai* in this respect.

[22] I accept that where a Minister as the executive functionary in the Ministry has not been cited, problems may arise at the stage of enforcement of court orders. In some cases, particularly where contempt proceedings may be necessary to enforce court orders, an order to compel the functionary to ensure that his or her Ministry complies with the court order may first have to be sought against him or her, especially if the functionary was not cited in the initial proceedings.

[23] What is being sued in *casu* is the Government where both the Minister and the Attorney General can be cited in their nominal capacities. Consequently, citing the Attorney General, who at any event, must provide legal advice and representation to Government in terms of the Constitution and the Attorney General's Act No.6 of 1994, is enough. I therefore find that it was not necessary to cite either the Minister or the Ministry of Finance once the Attorney General was cited in his nominal capacity, however convenient it may have been.

## **ORDER**

24. In the circumstances, I make the following order:

24.1 Application for joinder of the Attorney General in

CCT/0326/2021, 3<sup>nd</sup> respondent herein, is granted.

24.2 Application for joinder of the Ministry of Finance in

CCT/0326/2021, 2<sup>nd</sup> respondent herein is refused.

24.3 The costs of this application be costs in the cause.

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**A.R MATHABA J**  
Judge of the High Court

For the Applicant: Mr. L. Masoeu

For 1<sup>st</sup> Respondent: Mr. M. Rasekoai