IN THE HIGH COURT OF LESOTHO

COMMERCIAL DIVISION

HELD AT MASERU **CCA/APN/0077/2024**

CIV/APPEAL/0006/2024

In the matter between:-

NYEFOLO JOHANNES ALOTSI **1ST APPLICANT**

BRIGHT LIGHT COMPANY (PTY) LTD **2ND APPLICANT**

AND

LESOTHO NATIONAL DEVELOPMENT CORPORATION **1ST RESPONDENT**

SSM PROFESSIONAL SECURITY COMPANY (PTY) LTD **2ND RESPONDENT**

Neutral Citation: Nyefolo Johannes Alotsi & Another v Lesotho National Development Corporation & Another [2024] LSHC 76 Comm. (A) (08 MAY 2024)

CORAM: **MOKHESI J**

HEARD: **11 APRIL 2024**

DELIVERED: **08 MAY 2024**

SUMMARY

CIVIL PRACTICE: *Appeal against the decision of the magistrate court to uphold the legal point of jurisdiction in a matter of a spoliatory relief where the subject matter of the dispute exceeds the monetary ceiling of that court- On appeal, the appellants contended that the learned magistrate erred because they were not claiming the return of the immovable property in issue but were merely asking for the aid of the court to have access to it, a relief which that court had power to grant- Held, jurisdiction of the magistrate courts in matters of spoliation is conditioned by the monetary ceiling of that court- Further, the court dealt with the propriety of dealing with a legal point on appeal which was not the basis of the judgment of the court a quo.*

ANNOTATIONS

Cases

Lesotho

Jaase and Others v Jaase C of A (CIV) A 62/2017 dated 12 May 2017 (unreported)

Letsie v Ntšekhe LAC (2009 – 2010) 423

Malebo v Attorney General LAC (2000-2004) 874

South Africa

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)

South African Football Association v Mangope (JA13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC)

England

Foss v Harbottle (1843) 2 Hare 461, 67 ER 189

Legislation

Companies Act 2011

Companies Regulations, 2012

Subordinate Courts Act 1988

JUDGMENT

[1] **Introduction**

This is an appeal against the decision of the Magistrates' Court dismissing an application for a spoliatory relief, on account of lack of jurisdiction. I dismissed the appeal with costs. I only provided *ex tempore* reasons for the decision and promised to deliver written reasons in due course. In this judgment, therefore, I provide written reasons for the decision. It should be stated be stated that this court is in a difficult position because there is no written judgement of the court below. This is highly regrettable because judicial officers account for their work through written reasons. In the absence of written reasons this court sitting in its appellate jurisdiction has its hands extremely tied as it does not know the thinking behind the decision of the court below.

[2] **Factual Background**

For ease of reference, I will refer to the parties as they are on appeal. The 1st appellant is the director and a shareholder of the second respondent private company, which was duly registered and incorporated in terms of the laws of the Kingdom until it was struck off the register of companies by the Registrar of Companies for non-compliance with Companies Act 2011 prescripts. The 1st respondent is a corporate body established in terms of an act of Parliament, charged with the facilitation and development of industries and commerce in the Kingdom of Lesotho. The 2nd respondent is a security company engaged by the 1st respondent to provide security services at the premises in issue. The dispute relates to the denial access to the property which was subleased by the 1st respondent to the 2nd appellant. It is common ground that the sublease has since has since expired. The denial

of access was done by placing armed security guards at the entry point to the property.

[3] Consequent to being denied access, on 24 November 2023, the appellants sought and got a rule *nisi* operating as an interim relief on an *ex parte* and urgent basis calling upon the 1st respondent to show cause why the following reliefs should not be made absolute:

> *"1. A rule nisi be issued returnable on a date and time determinable by this Honourable Court calling upon the respondent to show cause, if any, why the following prayers shall not be made absolute: -*
>
> *a) The rules of court on modes and periods of service of process shall not be dispensed with on account of urgency hereon.*
>
> *b) Pending finalization of the present proceedings the respondent be ordered to restore possession and access to plot number 12273 – 022*
> *Industrial Area Maseru*
>
> *c) That the respondent be interdicted from interfering with the applicant's possession and access to plot number 12273-002 save by due process of the law.*
>
> *d) Applicant be grant such further and/or alternative relief.*
>
> *e) Costs in the event that the application is opposed.*
>
> *2. That prayers 1, 1(a) and (b) shall operate with immediate effect as an interim relief."*

[4] The rule *nisi* was extended for a number of times until 24 January 2024 when the matter was finally argued. The matter was decided on the preliminary legal point of lack of jurisdiction. Although there is no written judgment the parties are on agreement that the point was upheld. It is against this decision that the applicants appealed to this court.

[5] In their ground of appeal the appellants complain that:

> *"The learned Magistrate erred in holding that the court did not have jurisdiction on the case because it concerns a subject matter with monetary value beyond jurisdiction of the court when in reality the remedy brought per the prayers in the notice of application were within the competence of the court to determine."*

[6] **Before the court *a quo***

In their founding papers the 1st appellant avers that the 2nd appellant occupied a small piece of land in 2001 with the permission of the 1st respondent. The land was small and full of dongas. He states that he rehabilitated the site to the value of M30,000,000.00. He states that the 2nd appellant was allowed to occupy the property in exchange for a verbal undertaking, made to the 1st respondent's Chief Executive, then, Ms Sophie Mohapi, that the piece of land be used only for business purposes and further that he would not in future lay a claim over it. The piece of land, he says forms part of the big cadastral number 12273 – 002.

[7] In response the 1st respondent through its Interim Chief Executive raised three points *in limine*, namely: lack of jurisdiction of the magistrates' court on account of the monetary value of the property involved which far exceeds the monetary ceiling of that court; misjoinder of the first appellant as the director of the second appellant company; lack of standing on the part of the company to sue in view of the fact that it was struck off the register of companies by the Registrar of Companies for non-compliance with statutory requirements. On the merits, the 1st respondent denies that there was an agreement between the parties in the manner and form suggested by the appellants. Instead he annexed a ten-year sublease agreement which was concluded by the parties on 23 June 2003 which came to an end in 2013. The 1st appellant signed as surety and co-principal debtor for the 2nd appellant. The sublease agreement was not renewed. It appears the 2nd applicant had accumulated rental arrears and has since the lapse of the sublease agreement never vacated the property.

[8] Confronted with a contrary view that the 2nd appellant occupied the property on the strength of a sublease agreement which came to an end in 2013, the 2nd appellant provides an evasive response, in reply, to the effect that (at para. 13) "contents herein are denied. I submit that the verbal agreement with the LNDC concerns the land fill in respect of the surrounding dongas to the site occupied by the second applicant." However, nothing turns on whether the 2nd appellant had lawfully occupied the property as it is not disputed that the appellants were denied access to the property in question by placement of armed guards.

[9] **Before this court**

Apart from the value of enhancement to the property which the 1st appellant claims to have effected which is in excess of the monetary ceiling of the Magistrates' Court, the appellant's counsel conceded that the property, though it may not be valued in millions of Maloti, its value exceeds the monetary ceiling of the court *a quo*. All she could submit was that the value of enhancements to the property was not meant to be value of the property. On the one hand the 1st respondent persisted with the argument that the court *a quo* was correct to rule that it lacked jurisdiction. The 1st respondent did not, however, restrict itself to this point as it persisted with the point of law of lack of standing of the appellants to institute the proceedings. Whether this court, on appeal, can deal with the issue of lack of standing which is not the basis of the court *a quo*'s decision, is the matter to which I will revert in due course.

[10] **Discussion**

Although as I stated earlier that the court *a quo* did not render written reasons for its judgment, which is to be regretted, I however, consider that not to be enough to stand in the way of this court determining the appeal because the issue(s) on appeal are uncomplicated. Sections 16, 17 and 18 of the Subordinate Courts Act 1988 details out the civil jurisdiction of the Magistrates Court in relation to persons and causes of action, arrests and interdicts- *mandament van spolie,* among others-. However, Section 17 caps the monetary ceiling of the Magistrate's Court at M25,000.00. Monetary ceiling conditions the exercise of that court's power to deal with spoliatory

reliefs. It makes the exercise of its civil jurisdiction in respect of *mandament van spolie* subject to the statutory monetary ceiling mentioned in the preceding sentences. There is no need to spend much time on this issue as it has been decided in several cases by the Court of Appeal. In **Letsie v Ntšekhe LAC (2009 – 2010) 423** Scott JA said:

> *"While it was true that the subordinate court had jurisdiction to adjudicate spoliation disputes in terms of Section 18(1) Act No.9 of 1988, much jurisdiction was limited to the valued of the despoiled property as provided in Section 17 (1)(b) of that Act…"* **See also Jaase and Others v Jaase C of A (CIV) A 62/2017 dated 12 May 2017 (unreported and the authorities cited therein.**

[11] I now turn to deal with the next question whether this court, on appeal, can deal with the legal point of lack of standing on the part of the appellants when it was not the basis of the court *a quo's* decision. As already stated, the 1st respondent raised the issue in its answering affidavit in the court below and before this court, and even in its heads of argument it was fully canvassed. The appellants were fully aware of it. In my considered view nothing precludes this court from determining this issue even though it was not the premise of the judgement of the court below. It is trite that a point of law can even be raised for the first time on appeal provided certain requirements are met (see **Malebo v Attorney General LAC (2000-2004)** 874 at 875**).** In this case a South African case of **Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)** was followed which at p.23D states:

> *"It is clear that the 'duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it'*

(per Innes J Cole v Government of the Union of SA 1910 AD 263 at p.272). For this reason, the raising of a new point of law on appeal is not precluded, provided certain requirements are met:

> *If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point raised at the outset. In presence of those conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.' (per Innes, J in Cole's case, supra at pp. 272-3)."*

[12] In the light of the above principles, my view is that the point of lack of standing is tenable in the circumstances of this case: The 1st respondent raised an issue in its answering affidavit that the 2nd appellant had been struck off the register of companies and has even annexed to the pleadings a company extract from companies' registry. When the appellants reply they to this averment they plead as follows:

> *"8. I deny that the deponent has deposed to true facts.*
> *AD paragraphs 4,4.1,4.2,4.3,5.1,5.2,6 & 7 thereof*
>
> *9.Contents herein are denied.*
> *Ad paragraph 5, 6, 7 &7.1"*

[13] As can be seen, the way the appellants have dealt with this factual averment leaves a lot to be desired. It is a bare denial of fact. This is not countenanced in motion proceedings. It should be kept in mind that in motion proceedings, affidavits perform a dual role of being pleadings and evidence. It is not enough to make a bare denial of a fact. The pleader must set out a version of the facts on which his/her denial is based. Short of this, a contrary version will be taken as uncontested. In the light of this, I find that it is undisputed that the 2nd appellant has been struck off the register of companies. In **South African Football Association v Mangope (JA13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC)** (7 September 2012) the following apposite remarks were made:

> *"[9] It is trite that an application encompasses pleadings and evidence, all rolled into one. The affidavits take the place of the pleadings and the evidence, and formulate the issues of fact between the parties and contain the evidence upon which each wishes to rely. The applicant must set out in the founding affidavit the facts necessary to establish a prima facie case in as complete a way as the circumstances demand. The respondent is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts.* ***In dealing with the applicant's allegations of fact, the respondent should bear in mind that the affidavit is not solely a pleading and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant. Likewise, failure to deal with an allegation by the applicant amounts to an admission. It is normally not sufficient to rely on a bare or unsubstantiated denial.*** *Unless an admission, including a failure to deny, is properly withdrawn (usually by way of an affidavit*

explaining why the admission was made and providing appropriate reasons for seeking to withdraw it) it will be binding on the party and prohibits any further dispute of the admitted fact by the party making it as well as any evidence to disprove or contradict it." (Emphasis provided)

[14] As it has been found that the company has been struck off the companies' register, the question to be answered is what is the legal effect of this striking off? Section 9(1) of the Companies Act 2011 provides that:

> *"A company shall, upon its incorporation, be a person in its own right, separate from its shareholders, and shall continue in existence until it is removed from the register of companies in accordance with this Act."*

Implicit in this subsection is that a separate legal personality of a company is dependent on its continued registration. Once it ceases to be registered, as in this case, through striking off the register of companies by the Registrar of Companies in terms of section 87(5) read with Regulation 27 of Companies Regulations, 2012, it can no longer do all the things that come with separate legal personality, for example, it cannot sue or be sued nor hold any assets. This point was driven home in the decision of **Miller and Others v Nafcoc Investment Holding Company Ltd and Others (324/09) [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA) (25 March 2010)** when the court at para. [11], stated:

"Deregistration, on the other hand, puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death."

[15] **Propriety of a shareholder/director joining in suit by a company.**

The 1st appellant is a director and a shareholder of the 2nd appellant. The question is whether he can rightfully join in the proceedings in which a company is party? The right of possession on which the 2nd appellant is suing emanates from the sublease agreement it concluded with the 1st respondent. It is the company which is being despoiled of the property in question not its directors or shareholders. The proper plaintiff in the circumstances is only the company. Its directors and shareholders do not have *locus standi* to sue to vindicate its rights. This principle has been part of our common law since time immemorial (**Foss v Harbottle** (**1843) 2 Hare 461, 67 ER** 189). It follows, therefore, that the 1st appellant does not have *locus standi* to sue and has been misjoined in these proceedings.

[16] In the result, therefore:

(i) The appeal is dismissed with costs

MOKHESI J

For the Appellants:	**Adv. P. M Mokobocho instructed by M. Shakhane Attorneys**
For the 1st Respondent:	**Adv. Mothibeli**