

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 27/2016**

In the matter between

**MAHLOMOLA NKHABU**

**APPELLANT**

**And**

**MOJELA LEROTHOLI**

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

**‘MAMAAMA LEROTHOLI**

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

**COMMISSIONER OF LANDS**

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

**CORAM:**

DR K.E. MOSITO P

M.A. MOKHESI AJA

M. CHINHENGO AJA

**HEARD:**

27 NOVEMBER 2018

**DELIVERED:**

07 DECEMBER 2018

**SUMMARY**

*Civil practice---Appeal against a judgment of The Land Court dismissing appellant's application on attorney and client scale on the basis that the matter was res judicata and therefore an abuse of court process – The basis of the cost order found to be factually incorrect – Power of the Court of Appeal to interfere with the Lower Court's exercise of discretion in awarding costs – Applicable principles.*

## **JUDGMENT**

**MOKHESI AJA**

[1] **INTRODUCTION**

This is an appeal against the judgment of Mahase J (as she then was) dismissing the appellant's application and awarding costs on attorney and client scale. The appeal is narrowly directed at the costs order of the court a quo.

[2] **FACTUAL BACKGROUND**

The dispute between the parties herein is a result of an agreement to sell interest in a piece of land. It was a term of the said agreement that the 1<sup>st</sup> respondent would pay consideration in the amount of M45,000.00 once the appellant would have obtained a lease for the site. It would appear that the appellant succeeded in securing a lease as

agreed, but the problem started when the 1st respondent could not pay the purchase price as agreed.

- [3] Aggrieved by 1<sup>st</sup> respondent's apparent unwillingness to fulfil his side of the bargain, the appellant served the 1<sup>st</sup> respondent with a notice of termination of the agreement. In reaction thereto, the 1<sup>st</sup> respondent approached the Magistrate Court on notice seeking relief interdicting the appellant from ejecting the respondents from the said site.
- [4] The appellant launched a counter application in terms of which he sought cancellation of the agreement of sale, and ejectment of the respondents from site No.14 333-031. The appellant further sought an order that the respondents pay arrear rental in the amount of M6 500.00. The counter application was dismissed on the ground that the Magistrate Court did not have jurisdiction to grant the relief sought.
- [5] Consequent to the counter application being dismissed for want of jurisdiction by the Magistrate's Court, the appellant initiated proceedings before the Land Court seeking cancellation of the sale agreement, ejectment and an order for payment of arrear rental. The respondents raised a special answer of *res judicata* to the application.
- [6] The Learned Judge dismissed the application and awarded costs to the respondents on attorney and client scale, the

basis of the award of costs on this scale being that the matter was res judicata, and therefore an abuse of court process . It is against this order that the appellant appealed to this Court.

[7] **ISSUE FOR DETERMINATION**

The issue for determination before this Court was whether the Learned Judge erred and misdirected herself by awarding costs on attorney scale and client scale.

[8] **DISCUSSION**

The basis for the Learned Judge’s award of costs on this high scale can be gleaned from paragraphs 9 and 10 of the judgment wherein the learned Judge said:

*“[9] The information so withheld being that prior to his approaching the Land Court, he had initially sued the respondents in the Maseru Magistrates’ Court for substantially identical or the same prayers as in this Court. This is clearly an abuse of court processes. This behaviour also costs (sic) a negative picture on the applicant’s bona fides.*

*[10] The respondents have and correctly so, raised a special answer against this originating application that special answer being in the circumstances, this Court (Land Court) has no jurisdiction to entertain this matter as some has already been dealt with to finality in Maseru Magistrate’s Court in*

*AP/306/2010, in which the applicant's counter claim asking for substantially the same prayers as in the instant application has been dismissed with costs."*

[9] it was common cause that the Magistrate Court dismissed the counter application on the basis of want of jurisdiction. When the judgment of Mahase J(as she then was) is seen in the light of the fact that the Magistrate Court dismissed the application on the basis of lack of jurisdiction, the conclusion is ineluctable that the basis for awarding costs on the highest scale was not grounded on facts. Faced with this reality, counsel for the respondent was constrained to concede that indeed the Learned Judge *a quo's* award of costs on the scale as between attorney and client was unjustified as the merits of the counter application were never canvassed, and therefore, the matter as between the parties was not *res judicata*.

[10] THE LAW

The issue for determination is whether this Court can temper with the lower court's award of costs in view of the facts discussed in the preceding paragraph. The award of costs falls within the discretion of the Court awarding them, and this Court can only interfere with such an award of costs within certain defined boundaries. Thus, in **Trencon Construction (Pty) Limited v Industrial Development**

**Corporation of South Africa Limited and Another [2015]**

**2 ACC 22** at para.88, Khampepe J said:

*[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised-*

*‘Judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’.*

*An appellate court ought to be slow to substitute its decision solely because it does not agree with the permissible option chosen by the court.”*

[11] In *Casu*, therefore, as alluded to, counsel was constrained to concede that the Learned Judge a quo misdirected herself on the facts, *viz*, that the Magistrate Court dismissed the application on the merits. The Magistrate’s Court did not entertain the merits of the application for lack of jurisdiction. Clearly, the learned Judge a quo’s award of costs on attorney and client scale was as result of factual misdirection of the court a quo. Because of this factual misdirection, this Court’s interference with the Court a *quo*’s award of costs on attorney and client scale is called for.

[12] **COSTS**

There is no reason why costs should not follow the event in this appeal.

[13] **ORDER**

The appeal is upheld with costs, and the order of the Court is varied to read:

*‘The application is dismissed with costs on party and party scale.’*

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**M. A. MOKHESI  
ACTING JUSTICE OF APPEAL**

I agree:

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**K. E. MOSITO  
PRESIDENT OF THE COURT OF APPEAL**

I agree:

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**M. CHINHENGO  
ACTING JUSTICE OF APPEAL**

**For the Appellant:** Adv. P. N. Thabane

**For the Respondent:** Adv. P. S. Ntsene