

**IN THE COURT OF APPEAL OF LESOTHO**

**Held at Maseru**

**C of A (CIV) NO. 5/2018**

**CIV/APN/68/18**

**In the matter between:**

**NKEKELETSE MAMOSA JONATHAN** **APPELLANT**

And

**MAMOSIUOA NTHATI LEPHOLE** **1<sup>ST</sup> RESPONDENT**  
**(duly assisted by her husband)**

**THE EXECUTOR - THE STATE OF THE LATE** **2<sup>ND</sup> RESPONDENT**  
**‘MAKEMUELE ‘NEHENG NTSANE**

**THIKHOI LYDIA JONATHAN** **3<sup>RD</sup> RESPONDENT**

**‘MANTHOMENG MAMOSA MAJARA** **4<sup>TH</sup> RESPONDENT**

**VUYELOA KOTELO** **5<sup>TH</sup> RESPONDENT**

**SEOEHLA JONATHAN** **6<sup>TH</sup> RESPONDENT**

**MOSA JONATHAN** **7<sup>TH</sup> RESPONDENT**

**MASTER OF THE HIGH COURT** **8<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL** **9<sup>TH</sup> RESPONDENT**

**CORAM** : DR. K. E. MOSITO P.  
DR P. MUSONDA AJA  
M. CHINHENGO AJA

**HEARD** : 27 November 2018

**DELIVERED** : 07 December 2018

## **SUMMARY**

*Practice - Parties - Locus standi - Determination of - Joinder of parties - When required - Necessary parties - Other party to dispute should be joined - Appeal - Appeal Court taking point of non-joinder mero motu - Form of order.*

## **JUDGMENT**

**DR. K. E. MOSITO P**

### **BACKGROUND**

[1] This is an appeal in which the Appellant appeals against the judgment of the High Court (Nomncongo J). The prayers are as follows:

1. *That the Last Will and Testament of the late 'Mantahli Leabuo Jonathan and its codicil be declared null and void and of no force or effect in so far as it relates to the residential plots situated at Happy Villa Maseru Urban Area originally described as plot No. 567 under the old Title Deed system and plot 12283-042 under the new Lease system, in the Maseru district.*
2. *That the respondents be directed to pay costs in the event of opposition of this application.*
3. *Granting applicant such further and/or alternative as this honourable Court may deem fit.*

The application was dismissed with costs by the High Court (Nomncongo J) on 23 November.

### **THE FACTS**

[2] In her founding affidavit appellant deposes that her son Seoehla was appointed heir to estate of her late father in law

Leabua Jonathan the former Prime Minister of Lesotho. Appellant deposes that the plot identified as N0. 657 under the old Title Deed system and 12283-042 under the Deed system was not held by her mother in law “with my husband in the share ratios explained by her. She goes further to say that the site was contributed or donated to a company, **Rakolo Investment (Pty) Ltd** by his late father-in-law (*par. 23 of the founding affidavit*)”. She repeated this assertion in the next paragraph of the affidavit. In her own assertion, therefore the site belonged to a company which she has not cited in this application. She herself does not in any way lay claim to it and yet she seeks a declaratory order in respect of it.

### **ISSUES FOR DETERMINATION**

There are two main issues which must be determined in this appeal. The first is whether the appellant has *locus standi* to bring the application. The second issue is whether the appellant is not non-suited on account of the non-joinder of the company to which the plot forming the basis of the will belongs.

### **THE LAW**

At the commencement of this case, this Court enquired from counsel for the parties whether the appellant had *Locus standi* to institute the application for the nullification of the will. The court also asked Counsel whether the applicant was not non-suited on account of the non-joinder of the company. The two principles are restated below.

a) *Locus standi*

In **Rethabile Marumo and Others v National Executive Committee of Lesotho Congress for Democracy and Another**, this Court remarked that:<sup>1</sup>

[18] It is well-established that a party who has a direct and substantial interest in a matter is an interested party. Such a party has locus standi. It is upon this principle that I approach the present matter.

It was with the above principles in mind that this Court enquired from Counsel why the appellant, a party who had no direct and substantial interest in a matter was an interested party in this matter, to the extent that she brought an application for an order invalidating the will of the late Chieftainess 'Mantahli Jonathan.

*b) Non-joinder*

In **Manthabiseng Lepule v Teboho Ramodibedi P** remarked that:<sup>2</sup>

[20] There cannot be the slightest doubt in my mind in the foregoing circumstances, therefore, that the appellant's eldest son is an interested party in the matter. He has a direct and substantial interest in the disputed property. In my view, he ought to have been joined. I should stress that this Court has repeatedly deprecated non-joinder of interested parties. Thus, for example, in **Matime and Others v Moruthoane and Another 1985 – 1989 LAC 198 and 200** the Court expressed the point in the following terms:-

*This [non-joinder] is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have had no opportunity to present their case.*

See also **Masopha v Mota 1985 – 1989 LAC 58. Basutoland Congress Party and Others v Director of Elections and Others 1995 – 1999 LAC 587** at 599; **Theko and Others v Morojele and Others 2000 – 2004 LAC 302** at 313 – 314. **Lesotho District of the United Church v Rev. Moyeye**

<sup>1</sup> Rethabile Marumo and Others v National Executive Committee of Lesotho Congress for Democracy and Another (C OF A (CIV) NO.42/2011) [2011].

<sup>2</sup> Manthabiseng Lepule v Teboho Lepule (C of A (CIV) NO.5/13) [2013] LSCA 4 (19 April 2013).

**and Others 2007 – 2008 LAC 103; Nalane (born Molapo) and Others v Molapo and Others 2007 – 2008 LAC 457** at para [17].

[21] I should be prepared in light of these considerations to dismiss the respondent's application for non-joinder.

In ***Kethel v Kethel's Estate***,<sup>3</sup> the Appellate Division raised *mero motu* the question whether the necessary parties had been joined in the proceedings. It was with the foregoing principles in mind that this Court enquired from Counsel why the appellant, had not joined the company to which the plot had been allocated as it is clear that the company had a direct and substantial interest in the outcome of the matter, and as such, an interested party in this matter.

## **DISCUSSION AND APPLICATION OF THE LAW**

The appellant complains in her ground of appeal that:

*“1. The court erred and misdirected itself in holding that the appellant lacked the necessary interest in the proceedings.*

*2. The court erred in not finding that the applicant had made out a case not granting the application.”*

In his judgment, the learned judge states that, '[t]he applicant in **casu** has failed to establish that she has any right to the plot in question and even if I were to give the order it would be of mere academic interest as she makes no claim to the plot. The application is dismissed with costs.' The crucial question to be decided is whether or not the Court a quo was correct in dismissing the appellant's application for want of *locus standi*. I am unable to find fault with the learned judge's view. In her founding affidavit,

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<sup>3</sup> *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) p610.

the appellant deposes that the plot that she complains has been wrongly included in the will, was donated to a company, **Rakolo Investment (Pty) Ltd** by her late father-in-law, Chief Leabua Jonathan. This is indeed common cause.

This means that it belongs to another person in the name of **Rakolo Investment (Pty) Ltd**. A company is, in law, a juristic person (*persona juris*). It is in law considered to be an abstract legal entity which exists as a juristic reality in the contemplation of the law despite the fact that it lacks physical existence. It is in law through its representatives or agents (*per actores syndicosque*) capable of knowing, intending, willing, acting, acquiring rights or obligations, possessing proprietary rights and of committing delicts and even crimes. This conception of corporate personality is founded in our common law as appears from the following passages in Voet as translated by Gane:

(i) *Voet, 1.8.28:*

Who but a stranger to the law does not know that corporations are held to stand in the place of persons in contracts and wills? They make contracts through their agents and representatives. Like persons they are bequeathed inheritances, legacies, nay even usufructs, which are personal servitudes cleaving to the frames of persons. With the fictitious death of a corporation such rights perish. Assuredly than a personal obligation intervenes, whenever a debt is due by or to a corporation on contract.

A *syndicus* is defined in *Voet, 3.4.5*, as follows: "[a] syndic of the corporation was usually appointed to conduct the cases of the corporation. He is also called the complainant of the corporation, or its proctor or its defender... He so intervenes not only in civil but also in criminal cases, whenever a charge of crime is cast up against the corporation... He then is a syndic who brings or

defends the case of a corporation on a mandate from the corporation..." As Denning, L.J put it in **H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd**<sup>4</sup>:

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord HALDANE'S speech in *Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.*, 1915 A.C. 705 at pp. 713, 714. So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty.

In the present case, the appellant is not a *syndicus* of **Rakolo Investment (Pty) Ltd**. She has no right to the plot in question, as the plot, on the appellant's own averment, belongs to **Rakolo Investment (Pty) Ltd**. On this ground alone, I would dismiss this appeal.

There is however, another reason why the appeal should be dismissed. It is that of non-joinder. It is the settled practice of this Court that it can raise *mero motu* the question of non-joinder to safeguard the interest of third parties as was done in **Amalgamated Engineering Union v Minister of Labour**.<sup>5</sup> As indicated above, the issue of non-joinder of **Rakolo Investment**

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<sup>4</sup> *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd.*, (1956) 3 All E.R. 624 (C.A.) at p. 630:

<sup>5</sup> *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD).

**(Pty) Ltd** was raised by this Court with the Counsel for the appellant. His answer was that it could not be joined because it no longer exists. There was simply no evidence to support this statement. Yet, as appears in *Kethel v Kethel's Estate*,<sup>6</sup> when once the Court realises that a third party might be affected, it sets aside the lower Court's order and refer the case back to that Court to be dealt with afresh after the third party has been joined, and it orders the plaintiff to join him.

Unfortunately, this Court cannot *in casu* just set aside the lower Court's order and refer the case back to that Court to be dealt with afresh after **Rakolo Investment (Pty) Ltd** has been joined, because, appellant has no locus standi to bring this matter. This appeal must be dismissed on this ground as well.

### **COURT ORDER**

[21] The following order is made:

- (a) The appeal is dismissed with costs.
- (b) The judgment of the court a quo is confirmed.

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<sup>6</sup> Kethel v Kethel's Estate 1949 (3) SA 598 (A) p610.

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

I agree:

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**DR P. MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree:

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**M. CHINHENGO  
ACTING JUSTICE OF APPEAL**

**For the Applicant** : Advocate T.F. Motsie

**For Respondents** : Advocate T. Mosokotso