

**THE COURT OF APPEAL OF LESOTHO**

**JUDGMENT**

HELD AT MASERU

C of A (CIV) NO.13/07

CIV/APN/144/06

In the Matter Between

**MOSEBATHO MALAKANE**

**Appellant**

And

**BESELE MALAKANE**

**First Respondent**

**MOKETE DUNCAN MALAKANE**

**Second Respondent**

**MONTOELI MALAKANE**

**Third Respondent**

**SERAME MALAKANE**

**Fourth Respondent**

**MOHAU MALAKANE**

**Fifth Respondent**

**THE MASTER OF THE HIGH COURT**

**Sixth Respondent**

**ATTORNEY GENERAL**

**Seventh Respondent**

**Neutral citation:-**

**CORAM:** N MAJARA CJ, Y MOKGORO AJA, M CHINHENGO  
AJA

**HEARD:** 20 OCTOBER, 2015

**DELIVERED:** 06 NOVEMBER, 2015

### **Summary**

**Appeal against the ruling of Hlajoane J in the High Court, declaring First Respondent heir to the deceased estate - Appeal pending for 8 (eight) years due to repeated withdrawal of counsel of record at relevant times and concomitant appointment of new counsel - non-compliance with rules of Court requiring repeated interlocutory applications for condonation - Exacerbating effect of failure to make an appearance and or provide counsel with instructions regarding how to proceed with the matter - Court concluding that condonation which is in its discretion is not lightly granted and must be justified - Court taking into account well-established factors - Using its discretion, the Court finding that postponement of application for condonation or striking from the roll, is not in the interest of justice - absence of the appellant and or no appearance on her behalf - Appeal therefore dismissed with costs.**

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### **ORDER**

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**On appeal from:** High Court (Judgment of Mofolo J)

The appeal is dismissed with no order as to costs.

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### **JUDGMENT**

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Mokgoro AJA (Majara CJ and Chinhengo AJA concurring)

## **INTRODUCTION**

[1] This matter originated as an appeal against the decision of Mofolo J in the High Court, handed down on 7 May, 2007. The judge *a quo* had ruled that the first respondent, Besele Malakane, who had approached the Court *ex parte*, was heir to the deceased estate of Thabo Oswin Tennyson Malakane (Thabo Malakane).

[2] The appellant is Mosebatho Malakane, the daughter of Thabo Malakane, whose deceased estate is the subject of the appeal relating to this application for condonation. The first respondent is Besele Malakane who is the son of Thabo Malakane's brother who had pre-deceased him. It is Besele Malakane who had been declared heir by the High Court to the estate of his father's brother. Second to fifth respondents are all members of the Malakane family who have a direct interest in the deceased estate and like the sixth and seventh respondents who are the Master of the High Court and the Attorney General respectively, did not file and presumably, will abide the decision of the Court.

## **THE ISSUES**

[3] The appellant noted an appeal against the ruling of the Court on 2 July, 2007 but failed to prosecute her appeal timeously. She filed an application for condonation of the late filing of the record, the late prosecution of the appeal and the reinstatement of the appeal on the Appeal Court roll of 8 September, 2014. In the context of the political circumstances of the country at the time, it is common cause that the

earlier sessions of the Appeal Court, between September 2014 and July 2015 did not materialize. The application for condonation was therefore set down to be heard on 30 July, 2015.

[4] However, the appellant, on 16 July, 2015 served notice of motion, applying for postponement of the application for condonation, which was vehemently opposed by the first respondent.

[5] For the record, the appellant, justifying her failure to proceed timeously with the appeal, had cited in her written heads of arguments for the appeal, her ill- health and hospitalisation for a period of 18 months from June 2007, causing her immense financial strain, thus precluding her from affording to pay her legal fees; taking care of her disabled nephew and losing almost all her belongings in a family-home fire. In his argument, the first responded disputed her claims, based on the fact that she had not produced medical evidence. To that effect and in particular, that he does not account for her failure to proceed with the appeal for 18 months (between December 2007 and September 2014), viewed this failure as an abandonment of the appeal.

[6] In the end, however, based on an agreement between counsel on both sides at the hearing, the Court, per Hlajoane J ordered a postponement to the next session of the Appeal Court, due in October 2015 with costs on the ordinary scale for first respondent. The appeal was again set down for 20 October, 2015.

[7] At the hearing, counsel for the appellant, from the bar, informed the Court that appellant's instructions were that he must make an appearance at the roll call for the current session of the Court. Appellant herself was absent at the roll call and had given no instructions for any further appearance on her behalf, nor was there any indication whether she would be ready to proceed with the application before the court.

[8] In the circumstances, the first respondent, based on the above chequered history of this appeal, applied for the dismissal of the application for the postponement of the condonation application without more.

[9] It is incumbent upon this Court to place on record the displeasure and unacceptability of the incessant delays in bringing this matter, to finality.

[10] In her founding affidavit for the appeal, the appellant had argued that she had good prospects to succeed in the appeal. Thus, although the first respondent initially opposed her application for postponement of the condonation application, but in the end was agreeable, the Court, in its discretion, granted the postponement so that appellant could have her day in court and be heard.<sup>1</sup> Besides, like the appellant, the first respondent also has a right to be heard. But due to her impudence to this Court and other litigants, justice will not be seen to be done.

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<sup>1</sup> See *Matshehlana Khalapa v Compol and Another* 1999 - 2000 LLR - LB 350 at 352- 353 at para. 17.

[11] It is not unusual that in situations that appellant now finds herself in, counsel would be the sage. However, in this case, appellant's conduct towards her counsel was at all relevant times, not particularly helpful. At the hearing on 20 October, 2015, counsel who appeared on appellant's behalf at this session's roll call, responding to an inquiry from the bench to clarify the status of the matter before the Court, gave information that from the inception of this appeal, appellant had changed counsel constantly.

[12] When the application for postponement was moved on 30 July, 2015, Mr Nathane KC, having replaced Mr Ntlhoki KC, had appeared for appellant. At the time, he however indicated his view that this was, no matter, he could pursue any further. He had also pointed out that he would no longer continue with the matter, having appeared solely to move the application for postponement. Current counsel, Mr Nts'ene KC had been instructed only to appear at the roll-call for this session of the Appeal Court, as the matter would be heard this session. The appellant, however, was not only absent at the hearing on 20 October, 2015, but more crucially, counsel had not been given any further instructions as to how to proceed with the matter. Resultantly, there was no appearance for appellant before this Court. She has therefore shown no sensitivity towards the need for finality, little respect for counsel who had shown willingness to assist her and no regard for the integrity of this Court. The appellant has been unacceptably remiss in the manner in which she has conducted this matter and undermined the processes of Court.

[13] For the above reasons, in particular that this appeal had been pending for eight years, it is not in the interest of justice to grant a further postponement of the application for condonation. There being no appearance for the appellant to proceed with the appeal, it must therefore be dismissed with costs. Clearly, there must be no order as to costs regarding the appeal.

## **CONCLUSION**

[1] The application for condonation for the late filing of the record, the prosecution of the appeal, and the reinstatement of the appeal on the roll is dismissed with costs.

[ 2] The appeal is dismissed with no order as to costs.

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**Y MOKGORO**  
**Acting Justice of Appeal**

I concur

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**N MAJARA**  
**Chief Justice**

I concur

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**M CHINHENGO**  
**Acting Justice of Appeal**

**Counsel for the Appellant:** Adv M. Ntlhoki KC  
**Counsel for the First Respondent:** Adv P.S Nts'ene KC