**IN THE COURT OF APPEAL OF LESOTHO**

**HELD IN MASERU**

**C OF A (CIV) NO. 55/2017**
**CIV/APN/216/2017**
**CIV/APN/216B/2017**

In the matter between:

**LEBOHANG SETSOMI & 22 OTHER** **APPELLANTS**

**AND**

**LESOTHO POLICE STAFF ASSOCIATION** **1ST RESPONDENT**

**COMMISSIONER OF POLICE** **2ND RESPONDENT**

**ATTORNEY GENERAL** **3RD RESPONDENT**

**CORAM:** DR. K.E. MOSITO P
DR. P. MUSONDA AJA
MTSHIYA AJA

**HEARD** **:** 27TH November 2018

**DELIVERED** : 7th December 2018

**SUMMARY**

*First Respondent challenging the promotions alleging violation of provisions of Lesotho Mounted Police Service Act No. 7 of 1998 and Lesotho Mounted Police Service (Administration) Regulations 2003 as amended – propriety of the Attorney General withdrawing opposition – having filed intention to oppose on behalf of a the Respondents – duties of the Attorney General in litigation – Whether Attorney General's withdrawal offends against the provisions of Rule 43(1) of the High Court Rules, where both parties who are dominis litis have consented to the withdrawal.*

## JUDGEMENT

**DR. MUSONDA AJA**

**BACKGROUND**

[1] The parties shall be referred to as they are in this Court as in the *Court a quo* both were Respondents. In this Court the co-respondents are now appellants. This is an appeal against the learned Judge's judgment in the Court a quo dismissing an application in terms of Rule 30(1), as read with **Rule 43(1)(a)**, of the High Court **Rules 1980** by the appellants in the **Court a quo**. The 1st Respondent, Lesotho Police Staff Association (LEPOSA), sought the setting aside of the 1st Respondent's promotion of the appellants on ground of

illegality. There were no opposing papers after the Attorney General's withdrawal of opposition, which was consented to by the then 1st, 2nd and 3rd Respondents. The Attorney General was the 47th Respondent.

[2] The learned Judge consequently granted the 1st Respondent's prayers (b) and (c) which were couched in these terms:

(b) The forty four (44) promotions announced on the 4th day of June 2017 shall not be declared null, void and of no effect in law for violating provisions of section 8(1) of the Lesotho Mounted Police Service Act No. 7 of 1998.

(c) The promotions announced on the 4th June 2017 shall not be declared null, void and of no legal force and effect for violating provisions of Regulation 7 (1) (2) and (3) of the Lesotho Mounted Police Service (Administration) Regulations 2003 as amended.

[3] The notice of motion and certificate of urgency were served on the Respondents and the then 47th

Respondent who is Attorney General, received all the papers on behalf of other Respondents. The Attorney General filed the notice of intention to oppose in the *Court a quo*. For the purposes of service of process, the address of the Attorney General was to be used.

[4] The matter was filed on urgent basis and the grounds of urgency stipulated therein. The application was first served on the Respondents, before it was moved and the parties were present when it was being moved. The urgency of the matter was agreed to by the parties and the Court granted the prayer for dispensation with the modes of service as provided for in the **Rules of Court** due to the urgency hereof.

[5] After all the necessary affidavits were filed counsel for the Commissioner of Police 1st Respondent, Staff Officer to Commissioner of Police 2nd Respondent, LMPS Human Resource Officer 3rd Respondent and Attorney General 47th Respondent filed notice of withdrawal opposition on 4th August 2017, which notice was served on the other Respondents now appellants. On the 7th

August 2017, a notice of appointment of counsel for 4th and 11th Respondents was filed. You now, had two sets of Respondents 1st, 2nd, 3rd and 47th were characterized as the main Respondents while 4th to 11th became the co-respondents in the *Court a quo*.

[6] The appellants' appointed counsel filed an application in terms of Rule 30(1), of the High Court **Rules** to have the withdrawal of opposition by the then 1st, 2nd 3rd and 47th Respondents set aside for irregularity for violating Rule 43 (1) (a) of the High Court **Rules 1980**.

[7] We observed that the Arguments that were proffered in the *Court a quo* are substantially similar to the arguments canvassed in this Court.

[8] It was valiantly argued in the *Court a quo* on behalf of 4th to 11th Respondents, that evidence cannot be withdrawn in the manner the Attorney General did. Given that the 1st Respondent, had deposed to the effect that the promotions were in order. That if there was need to withdraw, the leave of the Court could have

been sought. The case of ***Standard Bank of South Africa Limited v. Daven Port NO and Others***,[1] which among others issues dealt with withdrawal of admissions was cited in the Court a quo. In that the Court said the following:

> *"It is not only the withdrawal of an admission that requires a proper explanation, every application for leave to amend requires this as part of the applicant's obligation to establish that the application is bona fide".*

[9] **Adv. Molati** further cited the Canadian case of ***Gill v. Gill***[2], where the following considerations had to be interrogated before allowing the withdraw of an affidavit. These are:

a) Was the affidavit filed by mistake;
b) Has the affidavit been used, in the sense of having been before the Court, during the cause of the application;
c) Is there a pending application before Court for which a party has indicated it intends to rely upon the affidavit;

[1] Case No. 847/2010 Safli.org
[2] 2004 BCSC 518

d) Is the application to withdraw the affidavit made a strategic or tactical decision to deny the other party access to relevant information or the ability to cross-examine the deponent;
e) Would the other party be prejudiced in any way by the withdrawal of the affidavit;
f) Are there policy considerations which would militate against a withdrawal of the affidavit?; and
g) Would the administration of Justice be adversely affected by the withdrawal of the affidavit?

[10] It was the 4th to 11th Respondent's case in the Court a quo that evidence can never be withdrawn in the manner the Attorney General did. That constituted an irregularity within the context of Rule 30(11) as read with Rule 43 (1) (a).

[11] The learned Judge declined to address the consideration's stipulated in ***Gill v. Gill*** (**supra**) as they were not relevant in this jurisdiction, as they were not interpreting similarly worded legislation like ours. Counsel conceded this fact.

[12] **Adv. Sekati** for the 2nd and 3rd Respondents cited the Attorney General Act 1994[3], the Lesotho Constitution[4], Section 3 of the Government Proceedings and Contract Act[5]. Section 3 of the Attorney General Act, is couched in these terms:

> *"The duties vested in the Attorney General by the Constitution of Lesotho, the Attorney General shall represent Government of Lesotho in all legal proceedings in which the Government is a party".*

Section 3 of the Government Proceedings and Contract-Act, provides the following:

> *"The Attorney General may be a nominal defendant or respondent in proceedings against Government of Lesotho".*

[13] In ***Motanyane and Others v. Ramainoane***[6], where the plaintiffs in a defamation case, were all Ministers, the Court in ordering them to obtain their own legal representatives said:

> *"Although these individual's happen to be Ministers of the Crown consequently the Attorney General ought to have nothing to do with these legal proceedings".*

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[3] Act No. 6 of 1994
[4] Lesotho Constitution 1993
[5] Act No. 4 of 1965
[6] CIV/T/419/1996

[14] Adv. Sekati further, referred to the case of ***Selikane and Others v. Lesotho Telecommunications Corporation and Other***[7]**.** This was a case where one appellant purported to act for other appellants and his authority was in issue. The Court finding that the 1st appellant had no authority to act for and to depose to an affidavit on behalf of other appellants, held that such appellants were not properly before the Court and their application was dismissed on that ground alone.

[15] The learned Judge held that the co-Respondents had not individually filed their own intention to oppose and affidavits, as they could not in their individual capacities be represented by the Attorney General. They were time-barred to file any papers, so that they are therefore not *dominis litis*.

[16] Rule 43(1) (a) applies to a party instituting any proceedings and such a person can only be a plaintiff or applicant. Both the applicant and the main Respondents have consented to the withdrawal in compliance with the provisions of Rule 43(1) (a).

[7] (1997) LSHC 67

[17] The opposition of the respondents having been formally withdrawn that left the Court with the discretion to grant the application.

[18] The application, in absence of any opposition was granted in terms of prayers 2(b) and (c) of the notice of motion and costs were awarded to the applicants.

[19] Dissatisfied with the judgment in the *Court a quo* the 23 appellants noted an appeal to this Court. The appellants filed 16 grounds of appeal, which for convenience will be summarized as there is duplicity.

[20] Ground one was that, the *Court a quo* granted a default judgment to the applicant, which is contrary to the decision of this Court in ***National Independence Party and Others v. Manyeli and Others***[8]. The second to seventh grounds can be summarized as follows, that the court below erred in law in allowing the withdrawal of evidence already received from the Police Commissioner Mr. Molahlehi Letsoepa and which ought to have been

[8] 2007-2008 LAC 10

considered, which was also corroborated by sworn evidence of the Members of the Police Promotions Board. The Respondents were not given an opportunity to file opposing papers. The withdrawal was without leave of the Court or the consent of the substantive commissioner.

[21] Ground 8 and 9, both are dealing with the *Court a quo* erring in holding that the Attorney General could not represent the promoted officers together with the Commissioner. Ground 10 appears unintelligible. In ground 11, the appellants were attacking the allowing of withdrawing the answering affidavit, while allowing the founding affidavit and the replying affidavit to remain on record. Ground 12, attacked the failure by the *Court a quo* to observe the *audi alterum partem* principle, while ground 13, dealt with the failure by the *Court a quo* to consolidate the two applications. Ground 14, is a duplication of ground 7. The complaint was that the holding that only the applicants before the Court were those who had filed affidavits was a misdirection, so it was submitted. The last ground was ground 16, which faulted the learned Judge to have

committed a grave error of both law and procedure by leaving CIV/APN/216B/2017 undecided and hanging in the balance, when the Court pronounced a final Court Order in CIV/APN/216/2017. It was argued that the Court was not addressed in respect of issues of fact and law which arose in CIV/APN/216/2017. To that extent and on that ground alone, the judgment of the Court below ought to be set aside.

[22] Further it was argued that, it was wrong for the Court a quo to hold that only applicants before court were those who had filed affidavits, when it is settled law per the decision of this Court in ***Lesotho Telecommunications Corporation and Another v. Nkuebe and 299 Others***[9]**.** The Court said:

> *"To determine whether the application was authorized by those named as parties thereto, one is however not confined solely to the affidavits since as suggested in the answering affidavit, the notice of motion is also relevant".*

[23] The appellants argued that the 1st Respondent was granted a default judgment, which is contrary to this Court's decision in ***National Independence Party and***

[9] (1995-199) LAC 597

***Others v. Manyeli*** *(*supra). Default judgment is governed by **Rule 27** of the High Court **Rules**, while applications on the other hand are governed by **Rule 8 sub-rule (13)** thereof, which latter **Rule** provides that, where no answering affidavit nor any notice to raise any question of law without answering affidavit has been delivered within the stipulated time, the applicant may apply to the Registrar to allocate a date for hearing of the application. This procedure was not followed in the Court below. No notice was given and no application was made to the Registrar for a date for hearing. It was argued that where parties are sued jointly, as here, it is impermissible for the Court to make a decision which prejudicially affects the interests of the other parties thereto, without giving such party or parties an opportunity to be heard on the merits.

[24] It was argued that the Court a quo did not give the appellants an opportunity to adduce their defence as they were jointly sued with the 1st Respondent and whatever determination was to be made by the Court, stood to prejudicially affect their interests. For the appellants the decision in ***President of***

***Bophuthatswana and Another v. Sefulaso***[10], was cited in support of the concept of *Audi Alteram Partem*, when the Court said:

> *"The audi alteram partem rule is a principle of natural justice which promotes fairness by requiring persons exercising statutory powers which affect the rights or property of others to afford a hearing before the exercise of such powers. It has existed from antiquity and is today the cornerstone of the administrative laws of all civilized countries".*

[25] It was argued that in determining of a notice of withdrawal the *Court a quo* should have followed the case of ***Malefetsane Lepele v Machakela Helena Lepela***[11], where the Court stated as follows:

> *"Under our common law practice, a person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrence and without leave of the court at any time before the matter is set down. This is based on the trite principles of public policy that it is not the function of the court to force a person to proceed with an action against his will or wishes".*

The Court went on and said:

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[10] (1994) (4) SA 96 BA

[11] C of A (CIV) No. 65/2014

> "*But once the matter has been set down for hearing, it is not competent for the party who has instituted such proceedings to withdraw them without either consent of all the parties or the leave of court. Where such leave or consent has not been obtained, the purported unilateral notice of withdrawal is invalid.*

[26] The appellants having not consented to the withdrawal, the withdrawal was invalid, so they argued.

[27] It was further argued that the Court below had failed to consolidate the two applications contrary to **Rule 11**, which left the second application undetermined, which does not serve the ends of justice.

[28] It is critical to point out that during the hearing of the appeal **Adv. Molati** graciously conceded that the tenor of **Rule 43(1)** is that it is the one instituting the proceeding i.e. the applicant or plaintiff who requires leave of the Court and consent of the other party to withdraw and not the Respondent/Defendant.

[29] It was argued by **Adv. Lephuthing** on behalf of the 1st Respondent (LEPOSA) that it was misleading for the

appellants, who had filed an application in terms of Rule 30(1), stating that there was a contravention of Rule 43(1) to claim that they were precluded from filing opposing papers. They were allowed by the *Court a quo* to file papers and a date for hearing was set. The application having been dismissed, consequently the main application was left without any opposition and the *Court a quo* granted the application. The circumstances obtaining in this case should be distinguished from ***National Independence Party and Others v. Manyeli and Others (supra)***. In that case the parties had signified their opposition thereto. Therefore the two matters must not be confused as in *casu* the appellants (co-Respondents in the *Court a quo*) were not *dominis litis*. It was for that reason that the Court held in **National Independence Party** (Supra)

> *"... [14] It cannot be seriously contended that the granting of a default judgment is a "determination" of the right and obligations of the parties to the litigation".*

[30] It was argued that, if the appellants wished to be *dominis litis*, they would have filed a notice of intention to oppose, but they did not. They sat on their laurels

and they were time-barred and now wish to raise the point that the decision by the *Court a quo* prejudicially affected their interests.

[31] The *audi Alteram Partem* rule as a principle of natural justice was afforded to the appellants. They were dully served with the application, they did not file opposing papers and now seek to raise the right to be heard.

[32] Rule 43(1), is very clear in that it relates to "*a person instituting any proceedings".* The other party to the proceedings is not precluded from withdrawing its opposition. It is only the person who instituted the proceedings that needs leave of the court and consent of the other party.

[33] **Adv. Lephuthing** argued that the appellants ought to have complied with **Rule 8(10)** of the High Court **Rules**, which stipulated times when a party can oppose an application. According to the **Rules** the appellants were time barred. The bar may have been lifted by filing a condonation application instead of travelling the wrong path of making a **Rule 30(1)** application.

[34] On whether one party can file papers on behalf of others the seminal case of ***Selikane and Others v. Lesotho Telecommunications Corporation and Others (supra)***, was alluded to by **Adv. Lephuthing**. We were further referred to the duties of the Attorney General under various statutes, which we have already referred to. We were further referred to the case of ***Johnny Wa Ka Maseko v. Attorney General***[12], where Ackerman JA, deplored the use of state machinery to protect reputations of the Crown. In that case, the state had detained an editor of a newspapers under the **Internal Security Act of 1984**, for defaming a Minister by publishing secret information concerning him and the Government. This Court felt that the government was using the machinery of government to silence critics. Whatever the merits of the case may be, the Attorney General has to maintain the outward impartiality of his office.

[35] Finally it was argued on behalf of the 1st Respondent that the 1st application stood or fell with the outcome of

[12] C of A (CIV) No. 22 of 1988

the 2nd application. After failure of the 1st application, the 2nd application was academic.

[36] **Adv. Sekati**, for the 2nd and 3rd Respondents argued that **Rule 43(1)** only applies to Plaintiff/Applicant whose is by that virtue a *dominis litis*. The **Rule** applies to withdrawal of proceedings not a pleading. In the present case the 2nd Respondent, did not withdraw proceedings, but their affidavit, so the **Rule** does not apply.

[37] **Adv. Sekati** buttressed his assertion with the decision in the case of ***Minister of Safety and Security v. Mzukisi Tyali and Another***[13], where it was said:

> *"I am not aware of any provision which precludes a party from withdrawing an affidavit, or a requirement that such withdrawal should be accompanied by a prior application for the leave of the Court.*

[38] **Adv. Lephuthing**, sharply focused on the illegality of the promotions and briefly alluded to the dismissal of the application under **Rule 30(1)** and **Rule 43(1)**. He

[13] Case No. 230/2009

additionally submitted that the affidavit of the 1st Respondent in *Court a quo,* the then Commissioner of Police contained opinions and conclusions. This affidavit however had been withdrawn in the *Court a quo* and cannot be subject of comment in this Court. Nor can we comment on the affidavit of Mrs. Oliphant, denying that the promotions of applicants were ever budgeted for by the Ministry of Police, because this issue was not determined by the *Court a quo*.

**ISSUES FOR DETERMINATION**

[39] The issues that are for determination in this appeal are:

i. Was it or is it competent for the learned Attorney General in particular to withdraw opposition to the application by the 1st Respondent?

ii. Could the Court a quo have estopped or restrained 1st, 2nd and 3rd Respondents against their will to withdraw their opposition to the application;

iii. What is the tenor and philosophy underlying Rule 43(1)?

iv. Whether 1st appellant could give evidence on other appellants' behalf; and

v. Was there a violation of the *audi alterum partem* **Rule** by the learned Judge in the *Court a quo*.

**CONSIDERATION OF THE APPEAL**

[40] The Attorney General in the Kingdom of Lesotho occupies a unique position. He may for a triad of reasons which may be ethical, legal and public policy withdraw if in his deliberate judgment, his participation may offend the above values. Government is his client and cannot prosecute any litigation which conflicts with the interests of his client. In the *Court a quo* the respondents sought to validate appointments of the appellants which could result in a budget over-run, which was inimical to the Treasury, his client.

[41] In ***Motanyane and Others v. Ramainoane (supra)***, the Court deprecated the defence by the Attorney General of Ministers who were plaintiffs in the defamation case and ordered them to engage their own counsel. In this appeal the appellants were individuals alleged to have been appointed illegally and were pursuing their personal interests against government.

It would be extremely inappropriate for the Attorney General to file opposing papers.

[42] ***In Johnny Wa Ka Maseko v. Attorney General (supra)***, Ackerman JA deplored the deployment of state machinery to protect reputations of the Crown.

[43] We are not saying that in sufficiently exceptional circumstances, the Attorney General may not defend or prosecute individual interests for example when such litigation is in furtherance of liberty and justice.

[44] The Court a quo could not have restrained the 1st, 2nd and 3rd Respondents against their will not to withdraw their opposition to the application. The tenor of **Rule 43(1) (a)**, which we quote in extension in order to paint a picture with broad strokes, though as we said earlier **Adv. Molati**, conceded is that it is the initiator of proceedings, who has an obligation under the **Rule 43(1) (a)**. It says that:

> *"A person instituting any proceedings may at any time before the matter has been set down and thereafter by*

*consent of the parties or by leave of the Court, withdraw such proceedings*".

[45] The word "Institute" as defined by the ***Paper Back Thesaurus Dictionary third Edition at P445*** means:

*"Initiate, set in motion, get under way, get off the ground, start, commence, begin, launch, set up, inaugurate etc.".*

It is clear, that the learned Attorney General, the 1st, 2nd and 3rd Respondents did not initiate or set in motion these proceedings in the *Court a quo* for them to be under legal compulsion to apply for leave or consent from the Court and parties respectively.

[46] The philosophy underlying **Rule 43(1)** is that by setting litigation in motion the Applicant/Plaintiff once the matter is set down inconveniences the Respondent/ Defendant and puts him/her to expense, which have to be taken into account, when considering leave to withdraw and when the other party is consenting.

[47] The **Rule** is not of mutual application to Applicant/Plaintiff and Respondent/Defendant. It only applies to the former, as a defendant against whom a meritorious suit is brought will withdraw his opposition at his own peril as default judgment may be entered.

[48] We agree with **Adv. Sekati**, that a distinction must be drawn between withdrawing "proceedings" and "pleadings". Withdrawing an affidavit, which is a pleading cannot be equated to withdrawing a motion, which originates the process. There is no provision, which obligates a party from withdrawing an affidavit or requirement that such withdrawal should be accompanied by a prior application for leave of the Court or consent of the other party.

[49] The issue of the 1st appellant purporting to file papers on behalf of other appellants was dealt with by this Court in ***Selikane and Others (supra)***, where we said: Per **Ramodibeli JA**:

> *"Accordingly I am inclined to the view that these applicants were not properly before the Court and their applications stand to be dismissed on this ground alone. Even if the persons in question authorized the first appellant to include them as co-litigants, that could not mean he could give evidence on their behalf of facts of which he had no personal knowledge".*

[50] We now come to the issue of *audi alteram partem*. It was strenuously argued by **Adv. Molati** that the learned Judge violated the right of the appellants to be heard.

The appellants had notice of the withdrawal of the opposition. They never filed opposing papers pursuant to **Rule 8 sub-rule 10**. While we acknowledge that, law is not a subject of mathematical precision, but surely where the Rules of procedure are contained in a primary instrument as in this case, the **High Court Rules 1980**, they can only be ignored by a litigant at his/her own peril. It is tremendously beneficial to abide by Court **Rules**, as they are there for orderly administration of justice.

[51] The allegation by the appellants, that the *Court a quo* denied them the right to be heard bears no intellectual justification. The appellants would have given the Attorney General notice of intention to oppose the application and within 14 days file an answering affidavit. If out of time they would have applied for condonation. The appellants failed to invoke the procedure laid down in the **Rules,** this was self-denial of the right to be heard.

[52] The appellants were supremely confident that their application under **Rule 30(1)** as read with **Rule 43(1)**

**(a)** was going to succeed. Even after the dismissal of the application, the appellants felt they could succeed in this Court. This was a serious misunderstanding or misinterpretation of **Rule 43(1) (a)**, which point was belatedly conceded to, in this Court by **Adv. Molati**.

[53] We think the significance of **Rule 8** to a fair hearing was underappreciated by the appellants in the *Court a quo* and in this Court, otherwise they would have not been alleging the denial of the right to a fair hearing. The Court cannot force a litigant to litigate an issue, if the litigant does not want to litigate it. The appellants were more desirous in setting the withdrawal by the Attorney General aside for irregularity than opposing the withdrawal.

[54] **Conclusion**

(i) The appeal is dismissed with costs and it is so ordered.

(ii) The appellants to pay costs on Attorney Client scale to each of the three Respondents.

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DR. JUSTICE PHILLIP MUSONDA

ACTING JUSTICE OF APPEAL

I agree: _____

DR. K.E. MOSITO

PRESIDENT

I agree: _____

MTSHIYA AJA

ACTING JUSTICE OF APPEAL

**For the Appellants**: Adv. L. Molati

**For the 1st Respondent**: Adv. Mohanoe

**For the 2nd and 3rd Respondents**: Adv. Sekati

Adv. Lephuthing