

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.49/18  
CA/0011/18**

**In the matter between**

**NGAKA MOHLOUOA  
THE ESTATE OF MOKIBE MAHLOUOA**

**1<sup>st</sup> APPELLANT  
2<sup>nd</sup> APPELLANT**

**AND**

**MOSITO MOTSAMAI  
MOJALEFA PELESA  
ROSALIA MOLIKO  
THE BIG FOUR (PTY) LTD  
THE PRINCIPAL SECRETARY MINISTRY OF  
FINANCE AND DEVELOPMENT PLANNING  
THE MINISTRY OF FINANCE AND  
DEVELOPMENT PLANNING  
MANAGING DIRECTOR – LESOTHO  
POST BANK MASERU  
LESOTHO POST BANK QUTHING  
SUB-ACCOUNTANT QACHA’S NEK  
SUB-ACCOUNTANT QUTHING  
LESOTHO MOUNTED POLICE SERVICE  
INTERPOL  
THE MASTER OF THE HIGH COURT  
ATTORNEY-GENERAL**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT  
4<sup>th</sup> RESPONDENT  
5<sup>th</sup> RESPONDENT  
6<sup>th</sup> RESPONDENT  
7<sup>th</sup> RESPONDENT  
8<sup>th</sup> RESPONDENT  
9<sup>th</sup> RESPONDENT  
10<sup>th</sup> RESPONDENT  
11<sup>th</sup> RESPONDENT  
12<sup>th</sup> RESPONDENT  
13<sup>th</sup> RESPONDENT**

**CORAM:**

**K.E. MOSITO, P**

**P. MUSONDA, AJA**

**N.T. MTSHIYA, AJA**

**DATE OF HEARING: 22 OCTOBER 2019**  
**DATE OF JUDGMENT: 1 NOVEMBER 2019**

### **Summary**

*Claim of title to a vehicle jointly owned with an estate. Effect of failure to serve Master of the High Court with the application before it is issued in terms of Rule 8 (19) of the High Court Rules.*

### **Judgment**

#### **MTSHIYA AJA**

- [1] This is an appeal against the entire judgment of the High Court ( Commercial Division) dated 12 August, 2018 heard and handed down by Justice Molete .

#### **Background**

- [2] The facts of this case are that the Appellant's father who is deceased, along with the 1<sup>st</sup> to 3<sup>rd</sup> Respondents formed a company called the Big Four (PTY) Ltd, 4<sup>th</sup> Respondent, with the intention of purchasing vehicles for the sole purpose of hiring them out to the Lesotho Government.
- [3] They obtained a suitable vehicle and purchased it from Heinz Motors in South Africa. It was submitted that each partner contributed an amount of M50, 000-00 to raise the initial deposit of M200, 000-00. The purchase price was M534, 384-00 and a credit instalment sale agreement was concluded with the balance to be paid over an agreed period of time.

4. The vehicle was registered in the names of Mokibe Mohlouoa, the deceased. The deceased was the 1<sup>st</sup> Appellant's father. The registration of the vehicle in the deceased's name was due to the fact that he was the only one in the group who possessed a cross border permit and was familiar with Heinz Motors. Mokibe Mohlouoa died on 30 November 2017. The 1<sup>st</sup> and 3<sup>rd</sup>s Respondents were then informed that the 1<sup>st</sup> appellant would take over from the deceased and continue with the arrangement.

[5] The death of the 1<sup>st</sup> appellant's father resulted in disputes between him and the 1<sup>st</sup> – 3<sup>rd</sup> Respondents. The vehicle was registered in the name of the deceased and so were the contract of sale, the rental contract and the account into which rental payments were made.

[6] Due to the disputes that had arisen the 1<sup>st</sup> to 4<sup>th</sup> respondents herein brought an urgent application seeking the following reliefs:-

“1.

a) The Rules as to form and notice shall not be dispensed with on account of urgency;

b) The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not be restrained and interdicted from alienating and/or disposing of in any many whatsoever certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 pending the finalization hereof;

c) the 3<sup>rd</sup> and 4<sup>th</sup> respondents shall not be restrained and interdicted from releasing in any manner whatsoever

certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the rental contract in respect of the aforesaid vehicle pending the finalization hereof;

d) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall not be restrained and interdicted from releasing in any manner whatsoever all funds or monies emanating from the rental contract of a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pending the finalization hereof;

e) the 5<sup>th</sup> and 6<sup>th</sup> respondents shall not be ordered and directed to freeze certain account Number 1021627100019 held by Ngaka Mohlouoa and all funds therein pending the finalization thereof;

f) The 5<sup>th</sup> respondent shall not be ordered, directed and compelled to freeze certain account Number 1021627100019 held by Ngaka Mohlouoa in all the branches of Lesotho Post bank and all the funds therein pending the finalization hereof;

g) The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents shall not be restrained and interdicted from registering or causing to be registered a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 in the names of the 1<sup>st</sup> Respondent pending finalization thereof;

h) The registration of a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 in the names of the 1<sup>st</sup> Respondent herein shall not be declared null and void and of no effect ad legal force;

i) The 4<sup>th</sup> Applicant shall not be declared as the lawful and rightful owner of a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818;

j) The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents shall not be directed and ordered to deregister a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No:

AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818 in the names of the 1<sup>st</sup> Respondent and register the aforementioned vehicle in the names of the 4<sup>th</sup> Applicant;

k) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall not be directed and ordered to transfer and/or release all the funds or monies emanating from the rental contract of a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818

l) The 1<sup>st</sup> Respondent shall not be directed and ordered to facilitate the registration and transfer of the shares of the later Mohlouoa Mokibe in the 4<sup>th</sup> Respondent's Company into his names in terms of the written agreement;

m) The 5<sup>th</sup> and 6<sup>th</sup> Respondents shall not be ordered and directed to transfer all the funds or monies from a certain Account number 1021267100019 held by Ngaka Mohlouoa to the 4<sup>th</sup> Applicant's account;

n) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall not be ordered to pay costs hereof on Attorney and Client Scale and the 3<sup>rd</sup> to 11<sup>th</sup> Respondents shall not be ordered to pay costs hereof only in the event of their opposition hereto;

o) The Applicants shall not be granted further and/or alternatively relief;

Alternatively;

p) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Applicants and the 1<sup>st</sup> Respondent shall not be declared as the Co-Owners of a certain motor vehicle to wit, Toyota Hilux Double Cab, 2.8 GD6 4x4, RAIDER 2016 Model, Vin No: AHTHA3CD803414855, Engine No: 1GD0187912, Registration Number H2818."

In the application, the Master of the High Court was cited as the 12 Respondent.

[7] An interim order was granted on 5 March 2018 as prayed for in the notice of motion. That order was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant herein. They raised *points in limine* to the effect that the applicants lacked authority and had no *locus standi*

to bring the application and that the application was an abuse of the court process. The points *in limine* were heard together with the merits and dismissed in a judgment dated 12 august 2018.

- [8] In response the appellants herein brought an urgent application for stay of execution on 13 September 2019. That application was opposed and dismissed on 14 November 2018. Dissatisfied with the judgment of the court *a quo* delivered on 12 August 2018, the appellants noted an appeal on the following grounds:-

“-1-

“The learned Judge erred and misdirected himself in hearing an ex parte application and Granting ex parte interim relief in the form of interdicts and restraining orders which have a final effect, amongst others literally freezing appellant’s bank account without the appellant being given an opportunity to make representations, and there being no rigorous justification

-2-

The learned Judge erred and misdirected himself in granting the application and giving all the rights to 1<sup>st</sup> to 4<sup>th</sup> respondents/applicants when there was no shred of evidence linking them to the vehicle in para 6(f) of the judgment in that;

- (a) The vehicle in issue was clearly purchased by the appellants father as evidenced by the Credit Agreement between Mokibe Mohlouoa and Mortimer Toyota “MM2” and the subsequent agreement concluded after the demise of appellant’s father, was also between the appellant and Mortimer Toyota “MM4”, and there being no proof of payment from the respondents/applicants.
- (b) The registration documents of the vehicle in issue are all in the names of Mokibe Mohlouoa and none of the 1<sup>st</sup> to 4<sup>th</sup> Respondents/Applicants appear in the documentation of the vehicle;

-3-

The learned judge erred and misdirected himself in granting all the rights to the 1<sup>st</sup> to 4<sup>th</sup> respondents/applicants, especially the 4<sup>th</sup> respondent when the vehicle was purchased in October 2016 and 4<sup>th</sup> respondent (Big 4 PTY (LTD)) was only registered as a company on the 1<sup>st</sup> March 2017 and has no trader's license and as such being an inoperative company.

-4-

The learned Judge erred and misdirected himself in reconciling himself to the glaring disputes of fact as evidenced by his proposition in Para 15 of the judgment that their stories are diametrically opposed that they cannot both be true, so much that he reconciled himself with the issue of calling oral evidence.

-5-

The learned Judge erred and misdirected himself in failing to address the issue of who has a clear right to the vehicle in issue based on the evidence as filed of record, and decided to address the issue of who is telling the truth as a core issue, all to the detriment of the appellant.

-6-

The learned judge erred and misdirected himself in concluding that there is sufficient evidence on papers for the court to reject appellant/ 1<sup>st</sup> respondent version outright and grant Applicants the relief sought, whilst the inversely, based on the evidence filed off record, there was sufficient evidence clearly depicting that the appellant/ 1<sup>st</sup> respondent had a clear right to the vehicle issue by virtue of inheritance, and should have dismissed the application with costs.

-7-

The appellant reserves the right to file further grounds of appeal upon receiving the complete record of proceedings.”

[9] On 12 May 2019, the Appellants filed the following additional ground of appeal:

“-1-

The learned judge erred and misdirected himself in granting judgment in favour of 1<sup>st</sup> to 4<sup>th</sup> respondent while it was evident that in pursuing their ex parte application , 1<sup>st</sup> to 4<sup>th</sup> respondents failed to comply with section 8(19) of the High Court Rules in that they cited the estate of Mokibe Mohlouoa and the Master of the High Court. They then proceeded and

obtained the order ex parte without serving the appellant and the Master of the High Court, thus denying the Master of the High Court an opportunity to make a report in accordance with the law.”

[10] The additional ground of Appeal was also served on the Respondents.

[11] When the appeal was called the appellant argued the above additional ground of appeal. They submitted that the Respondents had not complied with Rule 8 (19) of the High Court Rules. The said Rule provides as follows:

“When an application is made to court, whether ex parte or otherwise, in connection with the estate of any person deceased, or alleged to be a prodigal or under legal disability mental or otherwise, a copy of such application, must, before the application is filed with the Registrar, be submitted to the Master for his consideration and report. If any person is to be suggested to the court for appointment of curator to property such suggestion shall also be submitted to the master for his consideration and report. There must be an allegation in every such application that a copy has been forwarded to the Master.” (My own underlining)

The Appellants alleged that Respondents made an *ex parte* application and all parties, including the Master of the High Court, were only served with the said application together with the Court Order on the 7<sup>th</sup> of March 2018. The Appellants submitted that on that ground alone the case of the 1<sup>st</sup> to 4<sup>th</sup> Respondents ought to have failed. Indeed if the Appellants are correct it would mean there was never a proper application before the High Court. That, in my view, would be the end of the matter.

**Determination on failure to comply with Rule 8(19) of the High Court Rules 1980**



[12] I therefore now proceed to determine whether or not the failure by the Respondents to comply with Rule 8(19) was fatal, as submitted by the Appellants.

[13] Counsel for the Respondents conceded that the rule had not been complied with and that there was never any application for condonation. He then, from the bar, asked for condonation under Rule 59. The Rule provides as follows:-

“Notwithstanding anything contained in these Rules the court shall always have discretion, if it considers it to be in the interest of justice, to condone any proceedings in which the provisions of these rules are not followed.”

[14] The issue of compliance with Rule 8(19) has been before this court on a number of occasions and at all occasions the court has pointed out that in the absence of condonation, compliance with that Rule is mandatory. I want to believe that proper application in the Court *a quo* for condonation could have, if granted, cured the irregularity. As already seen, no such application was ever made.

In **Maphunye Qacha and 3 others vs Hape Nthongoa, C of A (CIV) 49/16 Mosito P**, endorsed the decision in **Mphalali vs Anizmland Others CIV/APN/260/2003** where it was said:

“This rule in providing specifically that even if application in connection with deceased estate are brought *ex parte* they must still be first submitted to the Master before filing with the Registrar, leaves very little discretion with the court to grant condonation for failure to comply. Not only that, the Master is further enjoined to consider the matter and then to make a report. Such a report might

lend a totally different colour to the outcome of proceedings. A copy of this application must therefore have been forwarded to the Master for his consideration and report, otherwise we would be trespassing on the Master's territory *ex parte*, a proceeding that is specifically not allowed by the rules.<sup>1</sup>"

In *casu* the Respondents were fully aware of the need to cite the Master of the High Court. That they did. This was because they recognised the interest(s)/rights they wanted to lay hands on involved a deceased estate. For reasons not explained, they only proceeded to serve the Master of the High Court with the application after it had already been issued. They did not record that fact in their founding papers and there was no report from the Master of the High Court. As already shown in the cited case authorities, the failure to comply with the mandatory rule was irregular.

In view of the foregoing, the conclusion I come to is that the irregularity was fatal. That application was not properly before the High Court. There was no proper application for determination by the High Court. Accordingly on that ground alone, the appeal must succeed with costs.

[15] It is therefore ordered as follows:

1. The appeal succeeds with costs
2. The decision of the Court *a quo* is set aside

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<sup>1</sup> *Supra*, p.3

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**N. T. MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

**I agree**

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

**I agree**

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

**For the Applicant:**      **Adv. K. J. Nthontho**  
   **with Adv F Sehapi**

**For the Respondents:**      **Adv. R. Setlojoane**