

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.48/2019

HELD AT MASERU

In the matter between:

RABOLOU JOSEF LETEKA

APPELLANT

And

‘MATHABISO LETEKA

1ST RESPONDENT

LESOTHO HIGHLANDS DEVELOPMENT

AUTHORITY

2ND RESPONDENT

THEMASTER OF THE HIGH COURT

3RD RESPONDENT

ATTORNEYGENERAL

4TH RESPONDENT

CORAM:

DR K E MOSITO P

P T DAMASEB AJA

M H CHINHENGO AJA

HEARD:

14 MAY 2020

DELIVERED:

29 MAY 2020

SUMMARY

Civil Practice –The effect of non-compliance with Rule 8(19) of the High Court Rules 1980- Whether the High Court had jurisdiction to dismiss the application – High Court order set aside and replaced

with one striking the application from the roll – Appeal upheld with costs.

JUDGMENT

K E MOSITO P

Introduction:

1. The appellant approached the High Court on an urgent basis for an order interdicting the second respondent from paying out compensation in respect of a fields which formed part of the estate of the late ‘Mathabiso Leleka. The said fields had been expropriated from the deceased by the second respondent. The application was subsequently placed before Moahloli AJ. The learned judge granted an interim order on 19 June 2015. The order interdicted the second respondent from handing over the compensation money to the first respondent pending finalisation of the application for a declaratory order on who has a better right to the compensation after the demise of the late ‘Mathabiso Leleka. The first respondent duly filed her opposing papers.
2. The matter was subsequently set down for hearing on 24 November 2016. However, on 4 April 2016 the first respondent filed an intention to raise points of law. The points raised were one as to the existence of a dispute of fact and non-joinder of the Master of the High Court. In reaction thereto, the appellant filed a document styled “objection to the points of law.” The application for joinder of the Master was placed before Hlajoane J on 27 September 2017. The learned judge granted the

application as it was not opposed. It is not apparent from the record what happened on the 24th day of November 2016, on which the main application was set down for hearing. All that can be said is that the matter was not heard on that date. Before going further into the merits of the appeal, it is apposite at this stage to briefly comment on the parties involved in this appeal.

The parties

3. The appellant is a male Mosotho adult and the eldest son of the late Matséliso Leteka and Rammethe Leteka. The first respondent is the widow of the late Khethisa Leteka, who was the younger brother of the appellant. The second respondent is a statutory authority established in terms of the Lesotho Highlands Development Authority Act, 1986. In terms of the said Act, the authority may purchase, take on lease or otherwise acquire and hold any property and interest in or rights over land, water rights and any other rights which the Authority deems necessary or expedient and which will facilitate the efficient performance of its functions under the said Act; and carry out such activities as may appear to it requisite, advantageous or convenient for or in connection with the performance of its functions under the Act or with a view to making the best use of its assets.

The factual matrix

4. The late Matséliso Leteka was predeceased by her husband. She and her late husband had fields around the area of Ha Makotoko in the district of Maseru. During her lifetime, the second respondent expropriated her fields in order to conduct a

water provisioning project. Before Matsëlisso passed on, she was receiving periodic payments of sums of money as compensation.

5. According to the appellant, after the deceased's death, the appellant and his siblings decided that the said periodic payments should be received and shared equally amongst them. This is however denied by the first respondent. The latter's version is that it is her late husband who was appointed to receive this compensation. She further denies that there was an agreement that the said periodic payments should be received and shared equally amongst them. She further adds that since her marriage to her late husband was in community of property, she is the one entitled to the compensation payments. It is these periodic payments of sums of money which formed the basis of the dispute in the court *a quo*. As indicated above, the application was dismissed for want of compliance with the terms of Rule 8(19) of the High Court Rules. It is on the grounds spelt out below that the appeal is based and to which I must now turn.

6. Before doing so, let me dispose of the issue of condonation.

Condonation

7. In determining whether there was need for an application for condonation, I deal briefly with the factual background against which the issue has to be evaluated. The judgment of the High Court was delivered on 12 June 2019. The appellant lodged a notice of appeal against the order dismissing the application for non-compliance with Rule 8(19) of the High Court Rules on 19 July 2019. In terms of Rule 4, the notice of appeal should have been lodged within six weeks of the

judgment of the High Court. The latest date on which the notice of appeal should have been lodged is the 25th June 2019. It was therefore not late at all. No condonation ought to have been sought for the alleged lateness. There was no delay in the noting of the appeal. There is also no prejudice to the other parties.

8. I now proceed to outline the respective grounds of appeal hereinbelow.

The appeal

9. The notice of appeal reads that, the appellant notes an appeal against the whole of the judgment delivered orally by His Lordship Sakoane J on the 12th day of June 2019. The first ground is that the learned judge erred in dismissing the application on the 12th day of June 2019 when the matter had only come for a roll call and not for hearing and therefore not giving the parties an opportunity to address the point of non-compliance with rule 8(19) of the High Court Rules, by filing the heads of argument and setting the matter down for hearing.

10. The second ground is that, the learned judge erred in dismissing the application on the 12th day of June 2019, in the court *a quo* for non-compliance with rule 8(18) of the High Court Rules, ignoring the order of the 27th day of September 2017, which granted the appellant leave to join the Master of the High Court in compliance with the very same rule.

11. The third ground is that, the learned judge erred in dismissing the application on the 12th day of June 2019, in that the said dismissal had the effect of reviewing and setting aside the court Order granted on 27th day of September 2017 by Hlajoane J.

12. It is from the above grounds that I must consider the issues raised and the conclusions reached.

Issues

13. The following questions require determination:

- a. The effect of non-compliance with Rule 8(19) of the High Court Rules 1980.
- b. Whether the High Court had the power to dismiss a matter which was placed on the roll call and in respect of which the parties were not heard.
- c. Whether the High Court had jurisdiction to dismiss the application in light of the fact that the Master of the High Court had been belatedly joined.
- d. Whether the High Court was entitled to either dismiss the application or strike it from the roll.

The law

14. Section 131(a) of the Constitution of Lesotho and High Court Act,¹ empower the Chief Justice to make rules for regulating the practice and procedure of the High Court. The High Court of Lesotho has unlimited original jurisdiction.² As such, it has inherent jurisdiction to regulate its procedures. As Scott J.A pointed out in *Kali v Mahasele*³:

The High Court of Lesotho has unlimited original jurisdiction. (See section 119(1) of the Constitution.) As such,

¹ High Court Act No. 5 of 1978.

² See section 119(1) of the Constitution.

³ *Kali v Mahasele* C of A (CIV) 19 of 2011 at para 9.

it has inherent jurisdiction to regulate its procedures which would include the giving of directions for the procurement of evidence. In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (T) at 461H Botha J, after citing a number of cases in which such directions had been given, continued:

“Examples of the Court’s inherent power to grant relief outside the terms of the Rules of Court afforded by these cases are the ordering of production for inspection of machinery, including allowing the presence at such inspection of an expert of the party desiring the inspection (*MacKenzie’s case supra*) [*MacKenzie v Furman & Pratt* 1918 WLD 62 at 66]; the authorization of the presence at the inspection of documents of experts to assist the party requiring the inspection, such as accountants or other experts (*Cohen & Tyfield’s case supra*) [*Cohen & Tyfield v Hull Chemical Works* 1929 CPD 9 at 10]”

15. It is clear from the foregoing remarks that the High Court has broad common law powers to regulate its own procedure, both within the Rules and within and the common law, taking into account the interests of justice. The Rules of procedure are devised for the purpose of administering justice and not for hampering it; where the Rules are deficient the Judge would go as far as he/she can in granting orders which would help to further the administration of justice. If there is a construction of the Rules which would assist in this respect the Judge would be disposed to adopt it. The variety of its inherent power has to do purely with the conduct of litigation, with procedure - not with substantive law. In terms of Rule 8(19) of the **High Court Rules 1980:**

(19) When an application is made to court, whether *ex parte* or otherwise in connection with the estate of any

person deceased..., 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.

16. It is with the foregoing principles in mind that I proceed to consider the grounds of appeal.

Consideration of the grounds of appeal

17. In this Court, the appellant relies on three grounds of appeal. The validity of this first ground must be gleaned from the record. Sitting as a court of appeal, and being bound by the record, we should be slow to have regard to what may be contained in documents or reports that do not constitute part of that record.⁴ What appears on record is that, on 12 June 2019, the main application was placed before Sakoane J. The learned judge dismissed the application with costs. The order reads in part as follows:

Having read papers filed of record and having heard Adv L D Molapo for Applicant [and] Adv Lesenyeho for 1st Respondent. The matter is dismissed due to non-compliance with Rule 8(19) of the High Court Rules.

18. I shall return to the propriety or otherwise of this order later on in this judgment. The second ground has no merit as well.

⁴ Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd 2011 (2) SA 282 (SCA) at para 28.

There is no order on record indicating that the court a quo dismissed the application for non-compliance with rule 8(18) of the High Court Rules. This Court is confined to the four corners of the record before it. In any event, the learned judge did not purport to undo or ignore the order of the 27th day of September 2017, which granted the appellant leave to join the Master of the High Court in compliance with the very same rule.

19. The third ground is that, the learned judge erred in dismissing the application on the 12th day of June 2019, in that the said dismissal had the effect of reviewing and setting aside the court Order granted on 27th day of September 2017 by Hlajoane J. The case before Sakoane J was not one of review but non-compliance with Rule 8(19) of the High Court Rules. Bearing in mind that the present matter involves a deceased estate, this was a matter where the requirements of rule 8 (19) of the High Court Rules should have been complied with.

20. What then was to be the effect of non-compliance with the requirements of Rule 8 (19) of the High Court Rules? While I agree with the respondent's counsel's submission that the provisions of Rule 8 (19) of the High Court Rules are mandatory, I am however, of the view that Sakoane J ought not to have dismissed the application. Instead, what he ought to have done was to strike the matter from the roll. It is true that there is no express provision in the Rules for the striking of the matter from the roll. By the same analogy there is also no provision for removal of matters already set down for trial in the Rules.

21. In my view notwithstanding the absence thereof, Rule 8 (19) of the High Court Rules must be interpreted to have impliedly included the power of striking off. In civil matters it often happens that if a party has either failed to comply with practice directives or Rules of Court such as regards pagination, filing of heads of argument etc, or that the applicant or plaintiff failed to appear when the matter was called, the matter is struck from the roll.

22. In practice where the matter has been struck from the roll, it may be re-enrolled upon the delivery of an affidavit explaining the reasons for the failure to comply with Rules of Court or practice directive and/or failure to appear when the matter was called. In this context therefore striking of the matter from the roll is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement.⁵ Consequently I find that when the court strikes a matter from the roll, it does not thereby bring to an end the litigation between the parties. Accordingly the case is still pending before the court and it is up to the applicant to re-instate it.

23. The striking of the matter from the roll does not have the effect of *res judicata*. The proper procedure which should have been followed by the learned judge in the court *a quo* was to strike the matter from the roll, not to dismiss it. The applicant would then have to apply for the re-enrolment of the matter after satisfying the requirements of Rule 8(19) of the High Court

⁵ Skhosana v Roos t/a Roos se Oord 2000 (4) SA 561 (LCC) ([1999] 2 All SA 652) para.19; Goldman v Stern 1931 TPD 261 at 264.

Rules. I am of the view that the consequences of non-compliance with Rule 8(19) of the High Court Rules should be to strike off the application not dismissal.

Order

24. (1) The Appeal succeeds with costs

(2) The High Court judgment is set aside and replaced with an order that: The High Court judgment is set aside and replaced with one that: “The application is struck from the roll with costs”.



DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree



P T DAMASEB

ACTING JUSTICE OF APPEAL

I agree,



M H CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellant: Adv P D Malebanye

For the First Respondent: Adv N Lesenyeho