

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 60/2019**

In the matter between:

**MATHAI SETUKA**

**APPELLANT**

**AND**

**MAHALI NKOTSI (MATSEPISO SETUKA)**

**1<sup>ST</sup> RESPONDENT**

**THABISO SETUKA**

**2<sup>ND</sup> RESPONDENT**

**LITJOTJELA MUNICIPAL COUNCIL**

**3<sup>RD</sup> RESPONDENT**

**MINISTRY OF LOCAL AND CHIEFTAINSHIP**

**4<sup>TH</sup> RESPONDENT**

**MASTER OF HIGH COURT**

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

**ATTORNEY GENERAL**

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

**CORAM:** P T DAMASEB AJA

M H CHINHENGO AJA

DR J W VAN DER WESTHUIZEN AJA

**HEARD:** 20 OCTOBER 2020

**DELIVERED:** 30 OCTOBER 2020

### **Summary**

*An appeal cannot be heard against a judgment of which there is no indication in the record before a court of appeal, which may indeed have been reserved and not delivered. Thus this matter was struck off the roll. No cost order is made, as both parties have contributed to the waste of time and other judicial resources.*

## **JUDGMENT**

### **VAN DER WESTHUIZEN AJA**

#### **Introduction**

[1] This matter came before this Court as a purported appeal against a judgment of the High Court, refusing jurisdiction in a dispute about inheritance, apparently also involving one or more land issues. Documentation, including a record and heads of argument, was filed.

#### **Striking off**

[2] During the hearing of oral argument, in response to questions from the bench to counsel, it came to light that neither a reasoned judgment of the High Court, nor that court's order, was included in the record. Counsel for the appellant submitted that she had unsuccessfully requested the judgment from the clerk of the judge who presided in the matter. She also indicated that her knowledge of the High Court's decision that it lacked jurisdiction emanated

from “minutes” on a file of the judge. No official order of the court had been issued. Even the allegedly existing “minutes” were not in the record and thus before this Court!

[3] Counsel for the appellant proposed that the matter be postponed to the next session of this Court, “to afford the High Court an opportunity” to issue a proper order and a reasoned judgment. Counsel for the respondents submitted that the matter be struck off the roll.

[4] This matter cannot be heard as an appeal by this Court. Without at least an order of the court, it seems to be nothing more than a case where judgment was reserved and is still outstanding. There is no judgment to appeal against. Thus there is also nothing to be postponed. We do not know what the judge in the High Court considered, decided, or ordered. Counsel’s reference to “minutes” has no value in this regard. Theoretically a properly delivered eventual judgment may even favour the party who now wishes to appeal.

[5] The apparent conduct of the judge in the High Court is perplexing. On the face of it, it seems highly lamentable. Counsel should have considered – and might consider still to do so – to approach the head of the High Court to address the possible irregularity and to obtain a judgment.

[6] For these reasons, Damaseb AJA, presiding, with the agreement of the other judges on the bench, ordered on 20 October 2020 that this matter be struck off the roll of this Court.

### **Costs**

[7] The issue of costs was reserved. Counsel for the appellant argued that costs should not be ordered against the appellant, as this was “a family matter”. Counsel for the respondents insisted on costs, as the appellant should never have pursued an “appeal” this flawed.

[8] Costs cannot follow the result of a conclusion on the merits of this case, even on the issue of jurisdiction. Bringing the matter to this Court was wholly inappropriate, for the reasons mentioned above. One has sympathy for the respondent’s frustration in trying to obtain a judgment from the High Court. However, attempting to appeal on the basis indicated above, cannot be condoned. This Court’s time - in the middle of a hectically full roll - was recklessly wasted.

[9] In spite of realizing the inappropriateness of the above, the respondents filed papers, including written argument. Thus costs were incurred. The respondents’ conduct does not warrant a cost order in their favour. In a situation as unfortunate as this one it is appropriate not to order any costs.

[10] Counsel owe an explanation to their clients as to why they must pay costs for an exercise that achieved little but wasting time and money.

**Order**

1 The matter is struck off the roll.

2 No order as to costs is made.



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**J VAN DER WESTHUIZEN**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**PT DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**M CHIHENGO**  
**ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:**

ADV M RAKHAREBE

**FOR THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS:**

ADV NTSIHLELE