LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 27/20

CIV/APN/300/2018

In the matter between:

COMMANDER LESOTHO DEFENCE FORCE **1ST APPELLANT**

ATTORNEY GENERAL **2ND APPELLANT**

AND

PALESA MAIEANE RASELEMANE **RESPONDENT**

CORAM: DR K E MOSITO P

MH CHINHENGO AJA

DR J VAN DER WESTHUIZEN AJA

HEARD: 13 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

This is an appeal against the High Court order granting the respondent a 2 ontestatio that her late father, Kelebone Maieane, ex-member of Lesotho Defence Force, discharged from Force after conviction for robbery and other offences and dying in prison be deemed not to have been discharged as at time of death and that his salary and terminal benefits be paid to his estate for the period he was in prison up to his demise as if he had not been discharged;

After 1st appellant re-instated some of Maieane's co-convicts in light of decision in ***DPP v Bofihle Letuka,*** *respondent, Maieane's daughter, sought the said declaratory relief;*

Held: contrary to Appellants' contention, respondent had necessary locus standi to seek declaratory orders on the basis of the relationship to the deceased and as potential heir and beneficiary and that first Appellant had not shown any basis for not treating the respondent's father in same way as his co-convict;

Appeal dismissed and declaratory order of High Court upheld – no order as to costs.

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] This is yet another of many appeals from judgments of the High Court in which the court makes a final order in a contested matter without providing reasons for its decision.

[2] In this case, the daughter of a deceased member of the Lesotho Defence Force ("LDF") sued the appellants for payment of

the deceased's salary and benefits that she claims would have accrued to him over a period he was serving a jail sentence until his death in prison. The basis of that claim is that after her father's death, other members of the LDF, similarly circumstanced, were re-instated into service and paid arrear salary and benefits for the period that they were in jail. She averred that her father was discriminated against by being denied a salary and benefits up to the time of his death when others received them. After hearing the parties, the judge *a quo* issued an order that "The application is granted as prayed" and did not give reasons for his decision. This is an appeal against that order.

[3] This Court has stated, times without number, that it is absolutely necessary for judicial officers at every level to give reasons for their decisions. We have said as much in this Session of the Court in *Director of Public Prosecutions & 2 Others v Pitso Ramoepana & 28 Others.*[1] This is not idle talk on the part of the Court of Appeal nor should it to be seen as some form of harassment of judicial officers. In *Pitso Ramoepana,* we said the following:

> "14. ... The neglect or failure to give reasons has become a perennial problem that litigants face with some judges of that court. It does not appear to be possible to arrest this trend or tendency unless the Chief Justice takes a firm stance against it. Deliberations of this Court are severely hamstrung by that neglect, nay refusal, of the judges. It is disconcerting that in this case the judges did not see it fit to give reasons for their decision.

[1] C of A (CIV) No.49/2020

15. It must however be said again and again that judges have a public duty to give reasons for decisions that they make, especially where those decisions are taken on appeal. Without reasons it is not possible for this Court to know why the court made the order it did. In matters of immense national importance, such as these criminal cases, it is absolutely essential, not only for the credibility of the High Court, but also the justice system as a whole, that reasons be given. It now appears as if it is sheer defiance of this Court's supplications that impel judges not to give reasons for their judgments.

16. The duty to give reasons derives from the public law proposition that decision-makers must act fairly, rationally and for proper law purposes. To discharge this duty, it is necessary to fully record the actual reasons for a decision, disclose findings on material questions of fact and the reasoning process leading to the conclusions reached. Thus, the statement of reasons must explain the path of reasoning by which the court arrived at the opinion it formed on the question referred to it. The statement of reasons must explain in sufficient detail to enable this Court, on appeal, to see whether or not the opinion does not involve an error of law. If the statement of reasons fails to meet this standard, we think that that failure itself may amount to an error of law on the face of the record upon which appropriate relief may conceivably be sought and granted in order to remove the legal effect of the opinion. Thus, issues that are vital to a judicial officer's conclusion should be identified and the manner in which he resolved them explained. This need not involve a lengthy judgment but requires the judicial officer to place on record those matters which were critical to his decision. Although it is difficult to argue that a decision should be overturned because of an absence of reasons, in our view, there will be occasions when, on a very restricted approach, an application to overturn a decision on the basis of absence or inadequacy of reasons, may be made if a litigant is able to satisfy a court that he or she is unable to understand why the judicial officer reached a decision adverse to him or her. An appellate court should always be placed in a position in which it can properly assess the correctness of the decision – whether it is patently unreasonable, that is to say, it is openly, clearly, and obviously unreasonable or that there is no evidence that can rationally support it, or that the decision was made arbitrarily or in bad faith, due to an improper purpose or whether mostly irrelevant factors were considered or the court failed to take into account things that the law requires must be taken into account. The consequences of neglect or refusal to give reasons are there for all to see in this appeal."

Background

[4] The same statement applies to this appeal. The respondent's father, the late Kelebone Maieane ("Kelebone") became a member of the LDF in 1980 and remained in service until he was criminally

charged of robbery that occurred on 23 September 1998 at or near Mazenod Filling Station in Maseru. He was convicted and sentenced to a term of imprisonment together with his co-accused, also members of LDF. Whilst serving time in prison, the 1st appellant called upon him, in writing on 2 May 2002, to show cause why he should not be dismissed from service on account of his conviction. Apparently, Kelebone did not respond to that invitation. Consequently, the 1st appellant wrote to him on 6 May 2002, while he was still serving sentence, drawing his attention to his failure to respond to the show cause letter and advising him that with effect from the date of his receipt of the letter, he was discharged from service in terms of regulation 2(6)(a)(i) of the Defence Force Discharge Regulations 1998. Kelebone passed away on 9 May 2003, while still serving time in prison.

[5] Some of Kelebone's partners in crime were also discharged from service. However, after serving their sentences, some of them were re-instated into service in January 2017 following the decision of this Court in *DPP v Bofihla Letuka*[2], an appeal lodged by one of Kelebone's co-accused, Letuka.[3] It is in this context that in her application to the High Court the respondent averred:

> "-5- ... This Letuka was convicted together with my late father and he was the only one who took up the appeal hence the decision in C of A (CIV) No 38/14. Thus, it is clear that, as some members of LDF who

[2] C of A (CIV) No 38/14.
[3] Para 1 of the heads of argument, LDF admits that "on the basis of that Judgement [it] reinstated some of his co-convicts".

were convicted together with my late father got re-instated, he would as well have been re-instated had he been alive; otherwise the whole exercise would have been discriminatory and thus wrongful. This being the case, it would suffice to treat my late father's case up to his date of demise same as his co-convicts; he has to be regarded as having also been re-instated until his date of death which is the 3rd of May 2003. I aver that to continue treating his case as though he remained discharged is without question discriminatory thus wrongful in the circumstances. As I have mentioned some of my late father's colleagues have been reinstated and even paid their salary arrears, I wish to attach a copy of a letter to Pvt Motlatsi T'sukulu who was convicted and discharged together with my late father; it is marked "PMR3". The Honourable Court would know that after his re-instatement of Pvt T'sukulu, my request for the terminal benefits of my late father, who served more than 21 years, was turned down, attached herein is a copy of that letter and it is marked annexure "PMR4". It is on the basis of this letter that I request this Honourable Court to declare the treatment discriminatory and thus wrongful in the circumstances.

-6- I aver that the late Maieane's case has to be treated as though he was also reinstated up until his demise; thereby enabling his siblings entitled to receive all his terminal benefits rather than disqualifying him as the First Respondent has done."

[6] The respondent thus sought a declaratory order –

(a) that the 1st appellant's decision treating the late Kelebone as still discharged from the LDF as at the time of his death, to be discriminatory;

(b) that the late Kelebone was entitled to his salary arrears for the period up to his death; and

(c) that the late Kelebone was entitled to terminal benefits as having been in service until his death.

[7] The respondent also sought an order "directing the respondents to afford and treat the case of the late L/cpl Maieane same as his co-accused, reinstate him same as the other convicts".

[8] In opposition to the application, the appellants raised two preliminary issues. They stated that the respondent had no *locus standi* in the matter because she failed to show that she was a beneficiary: it was the deceased's spouse, as opposed to her, who, according to the records held by the LDF, "was entitled to benefit." The second objection was that the claim had prescribed in terms of section 6 of the Government Proceedings and Contracts Act, 1965, which provides that no action may be brought against his Majesty's Government after a period of two years from the time when the cause of action arose. The proceedings in the High Court were lodged after "sixteen years of inaction on her [respondent's] part."

[9] On the merits the appellants' crisp contention is that the respondent's father –

> "died having been discharged from the LDF, he can therefore not be re-instated in death in order to afford him his benefits. The Lesotho Defence Force does not re-instate deceased officers; even the decision to reinstate all other officers has been based on the facts and circumstances of each case."

[10] The appellants disputed the allegation of discrimination and stated further that not all those who were discharged were re-instated. They gave as an example, Sergeant Mokoatsi, who was

convicted together with the late Kelebone and was not re-instated. They emphasised the point that each case was considered on its own facts and, as such, the allegation of discrimination was unfounded.

[11] In reply, the respondent contended that she has *locus standi* as the only daughter of the late Kelebone. In any event, she contended, she had not purported to be a beneficiary. That, to her, is a separate issue to be dealt with at the appropriate time. In relation to prescription, the respondent's contention was that the cause of action arose on 10 May 2017 when the 1st appellant turned down her claim for reinstatement of, and payment to, her late father's estate of arrear salary and terminal benefits otherwise due to him. She also averred that the cause of action arose when other officers were re-instated and, at that time, "[her] case assumed a new dimension hence the current application."

[12] The respondent briefly addressed the 1st appellant's averments on the merits. She stated that whilst she does not dispute that her late father died after being discharged, the decision in *Letuka* laid a solid foundation for the re-instatement of officer Molatsi T'sikulu and "the same spirit has to be extended to all the convicts in that case". In this sense it really does not matter that Sergeant Mokoatsi was not re-instated: if her late father was alive, he would have deserved the same treatment as that given to other officers who were re-instated.

Grounds of appeal

[13] The appellants' grounds are only two in number. The first is that the High Court erred in holding that the respondent has *locus standi* to apply for the relief sought. The second is that the court erred in holding that the late Kelebone was "entitled to terminal benefits as having been in service until his demise." As earlier stated, in the answering affidavit the appellants raised, as a preliminary issue in addition to that of *locus standi*, that the respondent's claim had prescribed because her father died in 2003 and, in terms of s 6 of the Government Proceedings and Contracts Act 1965, no action lies against His Majesty's Government after the expiration of two years from when the cause of action arose. The respondent answered both preliminary issues. The respondent has not pursued the issue of prescription in the face of a reasonable assumption that in making the order in favour of the respondent, the court *a quo* proceeded on the basis that the claim had not prescribed. I consequently leave the issue of prescription where it is.

[14] This Court cannot determine what the leaned judge *a quo* based his decision on. All there is, is an order dated 15 June 2020 that "the application is granted as prayed." We are entitled to assume that the leaned judge *a quo* found as a matter of law that the respondent had the necessary standing to institute the proceedings and that the claim had not prescribed. We are further constrained to assume that he found as a fact that the circumstances of the late Kelebone were the same as those of the

officers who were reinstated and paid their dues. He also must have rejected the 1st appellant's averment that each case had to be considered on its own facts and that LDF does not re-instate officers posthumously.

The *Letuka* case

[15] The facts in *Letuka* are clearly set out in the judgment:

> "[10] The applicant is a former member of the Lesotho Defence Force. On 20 November 2000 he appeared, together with six co-accused, in the magistrate's court in Maseru under Case No CR 1066/98 on 13 counts arising from political disturbances that occurred in Lesotho during 1998. The charges included attempted murder, armed robbery, assault with intent to cause bodily harm and malicious damage to property.
>
> [11] On 4 March 2002, the applicant and his co-accused were convicted as charged. The applicant was sentenced to seven years imprisonment. Together with his co-accused, he promptly lodged a notice of appeal, dated 5 March 2002, against both conviction and sentence. He also applied for bail pending the appeal, but the application was refused, and he proceeded to serve his sentence."

[16] As a sequel to the above facts, Letuka's conviction was set aside by the High Court sitting as a constitutional court (Mosito AJ), as he then was, having authored the judgment). The setting aside of the conviction was as a result of the failure of the clerk of the magistrate's court to produce a record of the criminal proceedings over a period of 14 years. The court held that the non-availability of the record of proceedings, which meant that Letuka could not prosecute his appeal, violated his right to a fair trial,

encompassing as it does, the right to appeal to a higher court. That decision was upheld on appeal on 28 October 2016. **Farlam AP** and Griesel AJA (writing the judgment) and myself, constituted the Court of Appeal panel in that appeal.

[17] The record before this Court shows that Kelebone and Letuka were co-accused in at least the charge of robbery committed on or about 23 September 1998 in respect of which they were convicted and sentenced to 7 years imprisonment together with others. It shows that the accused persons were convicted and sentenced on several other charges which are not apparent from the record. The appellants do not dispute the essential point made by the respondent that her late father was similarly placed with Letuka and others whose conviction and sentences fell away, as it were, after the *Letuka* judgment and were reinstated and generally treated as if they had never been convicted. The appellants do not therefore dispute that had Kelebone appealed against conviction in the absence of the record of proceedings, he too would have been discharged of the offence.

[18] The respondent's contention that those of Kelebone's co-accused were reinstated and paid their dues because of the decision in *Letuka* and her father should be similarly treated, is clearly and eloquently set out. She puts it this way:

> "I aver that it was during his jail term that my father lost his life. However, his co-accused and co-members in the LDF who were also discharged from their services as LDF members, after their jail term they got re-instated by the first respondent [Commander LDF],

> sometime in January 2017. The Honourable Court would be pleased to know that the basis for their re-instatement as the letter from the first appellant reads, was the decision of the Court of Appeal in the case of *DPP v Bofihla Letuka* C of A (CIV) No 38/14. This Letuka was convicted together with my father and he was the only one who took up the appeal hence the decision in C of A (CIV) No. 38/14. Thus, it is clear that, as some members of LDF who were convicted together with my father got reinstated, he would have as well been re-instated had he still been alive, otherwise the whole exercise would be discriminatory and unlawful ...."[4].

[19] The appellants' response was an admission of the contents of paragraph 5 of the answering affidavit[5] but immediately after making that admission, they went on to dispute the contents of the same paragraph 5.[6] They averred that the respondent's father died after discharge and cannot be reinstated after his death: the decision to re-instate all other officers was based on individual facts and circumstances. Not all officers have been re-instated. They gave one example of Sergeant Mokoatsi, who was not re-instated.

[20] The respondent's reply was to this effect:

> "In as much as it is not disputed that my late father died having been discharged but what is a fact here is that per annexure "PMR 3", it is clear that Officer Molatsi T'sukulu has been reinstated on account of the case [*Letuka's* case] in which he was not a party, thus the same spirit has to be extended to all the co-convicts in that case. Whether Sergeant Mokoatsi has not been re-instated is neither here nor there. As a matter of fact, annexure "PMR 3" says it all that my late father if still alive should have been given the same treatment hence my prayer that at least his re-instatement should be up to the time of his demise... he must be treated as having died in service and thus entitled to his

[4] Para 5 of founding affidavit.
[5] Para 9 of answering affidavit.
[6] Para 10 of answering affidavit.

full benefits up to that time. The Honourable court would like to know that not only did the co-convicts with my late father get re-instated, they also got paid their salary arrears covering the whole period since their discharge to the period of reinstatement. I have asked my counsel to request leave of the Court to produce on the hearing date proof that those re-instated officers have been paid their arrear salaries. I thus reiterate that there is discrimination in so far as this case is concerned."[7]

[21] Annexure "PMR 3" to respondent's founding affidavit is a letter addressed to T'sukulu. It is dated 16 January 2017. To me it confirms the respondent's position. It reads:

"YOUR RE-INSTATEMENT

Receipt of your request for reinstatement dated 12 December 2016 is acknowledged, contents thereof have been read and understood.

... (copy unclear) your request for reinstatement on the basis of the decision in *DPP v Bofihla Letuka C of A (CIV) No. 38/14* which was delivered on 28th day of October 2016, has been considered and hereby upheld.

You are therefore requested to report yourself to the Office of the Assistant Chief of Staff Human Resources (AcoS HR) at Ratjomose Barracks on Wednesday ... (date not clear) day of February 2017 at 0800 am."

Request by Court of additional submissions

[22] After perusal of the record of proceedings and before the hearing of this appeal, this Court requested the parties to address the question whether the fact that when the respondent's father died, he had not claimed, let alone instituted legal proceedings, for re-instatement and recovery of the amounts that his daughter now seeks to recover, would make any difference to the respondent's

[7] Para 3 of replying affidavit.

claim. The Court was of the preliminary view that the answer to the question might help in determining the transmissibility of the claim and might also be relevant to the issue of the respondent's *locus standi*. Unfortunately, the question as put to the parties by the Registrar was not clearly or properly formulated so as to achieve its purpose. The appellants state that the question put to the parties, (and the respondent confirms), was –

> "Whether or not a claim for non-patrimonial damages arising out of the alleged detention of the deceased, is transmissible on the death of the deceased to his estate/heirs."

[23] The Court's intention was not to confine the parties to a claim of "non-patrimonial damages arising from the detention of the deceased" but it was that the question be so phrased as to cover, in general terms, the situation arising from the facts of the case. The substantive claim made by the respondent in the court *a quo* was for the payment to Kelebone's heirs or estate "salary arrears" i.e., the salary he would have earned during the time of his imprisonment, and payment of his "terminal benefits as having been in service until his demise." This, in my view, is a claim for patrimonial loss, ie., loss of salary and terminal benefits. The claim is not for damages for imprisonment which would be one for non-patrimonial loss.

Respective submissions by parties

[24] I will start with a consideration of the issue of *locus standi*. The appellants' contention on this issue was based on the fact that

the respondent had not shown that she is a beneficiary of her late father's estate. The beneficiary, according to the records held by the LDF was her late father's wife. Additionally, the respondent had not attached to her affidavit any document to support her right to claim. The appellants submitted, in reliance on *Mofomobe and Another v Minister of Finance and Another; Phoofolo KC and Another v The RT Hon. Prime Minister and Other*[8] that it was necessary for the respondent to show that she has a direct and peculiar interest in the declaratory order and consequential relief that she sought. Merely stating that she was the only daughter of Kelebone without showing that she is a beneficiary in his estate was not sufficient. Her standing was a prerequisite for the court to exercise its discretion under s 2(1)(b) of High Court Act 1978, which provides that-

> "The High Court for Lesotho shall continue to exist and shall heretofore, be a superior court of record, and shall have –
>
> (d) in its discretion and at the instance of an interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination;"

[25] Counsel for the Appellants, submitted that in *Monare and Another v Ndebele N.O. (Advocate) and Others*[9], the court cited with approval the case of *Adbro Investment Co Ltd v Minister of the Interior and Others*[10] when stating the law governing the award of

[8] (C of A (CIV) 15/2017 Const./7/2017 C of A (CIV) NO. 17/2017) [2017] LSCA 8 (12 May 2017).
[9] CIV/APN/301/11 [2011] LSHC 96 (21 September 2011).
[10] 1961 (3) SA 283 (T) at 285.

a declaratory order. Williamson J in the latter case, is quoted as having stated the following:

> "I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

[26] It will be apparent that the appellants limited their submissions to two issues namely, lack of *locus standi* and the propriety of the court's exercise of its discretion and, on this twin basis, prayed for the dismissal of the appeal.

[27] The appellants' submissions on the question we put to the parties dealt largely with the position relating to non-patrimonial loss. That is understandable in view of the wrong formulation of the question. In that regard he submitted, on the authority of *Elman Naidoo NO v Minister of Security & Another*[11] and *Solane v Commissioner of Police & Another*[12] that non-patrimonial loss is transmissible to the estate of a deceased person if an action instituted by him had reached the stage of *litis 16ontestation* when he died. That, I agree, is the law. He further submitted that the criminal appeal did not survive the death of the respondent's father, who before his death had not filed a notice of appeal, which is a personal right exercisable by filing such notice (*R v Smith*[13]). The respondent's father had also not applied for his arrear salary

[11] (1421/2011) [2019] ZAECPE HC 8 (12 March 2019).
[12] CIV/T/16 [2008] LSHC 77 (01 October 2008).
[13] 2004 1 S.C.R. 385, 2004 SCC 14.

or terminal benefits, which would have placed him in the same position as Ts'ukulu, whose application was approved.

[28] The respondent submitted that the claim here is for patrimonial loss. He cited Scottish authority – *Elliot v Glascow Corporation*[14] and *Mckay v Scottish Airways Ltd*[15] - and a South African case, *Bongani Nkala & 68 Others v Harmony Gold Mining Company Ltd & 31 Others.*[16] These cases are to the general effect that relatives of a deceased person or the executor of his estate are entitled to institute action for patrimonial loss if the deceased had a right to make the claim at the time of his death. I have not been able to lay my hands on the Scottish authorities. *Bongani Nkala* was mainly concerned with non-patrimonial loss but the reasoning therein supports the proposition that a relative, an heir or an executor has a right of action to sue for patrimonial loss if the deceased had such right.

[29] In terms of our law, a near relative has a right to report the death of a person to the office of the Master of the High Court. The deceased's daughter and only child would have that right in this case. Being the daughter of the accused she is also a potential beneficiary of his estate in addition to her mother. She averred that whether or not she is a beneficiary is not in issue in this case and her standing at law cannot be disputed on that basis. I agree with her. Her standing in my view derives from her status as the only child of the deceased and potentially an heir of his estate. *Elliot, Mckay* and *Bongani Nkala* support the view that she, as a relative of the deceased and potential heir, has the right to make the claim.

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[14] 1932 SC 146.
[15] 1948 SC 254 at 258 and 263-4.
[16] Consolidated Case No.48226/12.

[30] The respondent submitted that there is a palpable move in many jurisdictions to relax the rules relating to *locus standi.* Counsel on behalf of the respondent, cited two cases, *Wood and Others v Ondangwa Tribal Authority and Another*[17] and *Veriava and Others v President, SA Medical and Dental Council and Others.*[18]

[31] I think that in considering *locus standi* and its purported expansion one must be careful to recall that the approach in other jurisdictions is dictated by statutory or constitutional provisions that have a bearing on that principle. South African jurisprudence is one such example. The South Africa cases cited by both counsel are typically informed by constitutional provisions. Be that as it may, no sound reason for disputing the respondent's right to institute proceedings has been put forward to constrain me to reach a different conclusion on the issue. In regard to the judge's exercise of discretion in favour of granting the declaratory relief, I must again assume that the judge did so find, despite my inability to assess whether the exercise of discretion was judiciously done because no reasons for the decision were given.

Discussion

[32] An award of patrimonial damages or loss aims to redress the actual or probable reduction of a person's patrimony as a result of the delict or breach of contract alleged. In bodily injury cases,

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[17] 1975 (2) SA 294 (AD).
[18] 1985 (2) SA 293 (TPD).

examples of patrimonial damages are past and future loss of income, past and future medical expenses, loss of earning capacity and loss of support. Non-patrimonial damages, also known as general damages, are claimed to redress highly personal legal interests that attach to the body and personality of a person. Ordinarily the breach of personal legal interests does not diminish the victim's estate and does not have a readily determinable or direct monetary value. These damages are illiquid and not instantly sounding in money. Examples are damages for pain and suffering, disfigurement and loss of amenities of life in bodily injury claims. The respondent's claim is quite clearly one for patrimonial loss and not for non-patrimonial loss.

[33] The basis of the respondent's claim is that after the decision in *Letuka*, the 1st appellant re-instated Kelebone's co-accused and paid them their arrear salaries and benefits. According to the respondent, her late father's arrear salary and benefits should also be paid to his estate for the period up to his death. The 1st Appellant did not dispute the basis of the claim and in fact, as already noted, his counsel conceded that on the basis of *Letuka*, the LDF "re-instated some of his co-convicts".[19]

[34] It is not unreasonable to say that in his answering affidavit the 1st appellant was not entirely candid. He did not state how many of, or by name, the "co-convicts" were re-instated after

[19] See footnote 3 above.

Letuka. He names only one of them. He does not disclose the factors pertaining to each individual that justified re-instatement. He does not disclose the number or names of those that were not re-instated on the basis of *Letuka*. I am satisfied that the evidence before the court below and this Court shows that *Letuka's* case determined the general treatment that was to be accorded to Kelebone's co-convicts. That to me, absent other evidence to the contrary, was the reason that the 1st Appellant re-instated them. There does not appear to be any reason that the respondent's father should not be deemed to have been re-instated and his arrear salary and terminal benefits paid up to the time of his death.

[35] I need however to advert to one issue which was not raised or dealt with by any of the parties. It is that a deceased estate is involved in this matter. A report from the Master of the High Court should have been submitted to the court for its consideration.[20] Since the appellants did not raise the issue of the report, whose non-submission to court is ordinarily fatal to an application of this kind[21], I can only caution the respondent to ensure that her late father's estate should be reported to the Master as provided by law.

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[20] See rule 8(19) of High Court Rules 1980.

> "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 a 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. ... There must be an allegation in every that such application that a copy has been forwarded to the Master."

[21] Mphalali v Anizmland & Others CIV/APN/260/2003:

> "The rule in specifically providing that even if the applications in connection with a deceased estate are brought *ex parte* they must still be first submitted to the Master

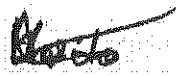
[36] Based on the above reasons, the following order is made:

1. This appeal is accordingly dismissed.
2. The order of the Court *a quo* is upheld.
3. The appellants shall pay the costs of appeal.

MH CHINHENGO

ACTING JUSTICE OF APPEAL

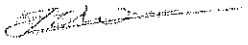
I agree



K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree



J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

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 make a report. Such a report might lend a totally different colour to the outcome to the 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."

FOR THE APPELLANT: ADVOCATE L MOTIKOE

FOR THE RESPONDENT: ADVOCATE T POTSANE