

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.43/20**

**CIV/APN/300/2018**

In the matter between:

**PULE THOAHLANE**

**APPELLANT**

AND

**PALESA MPOLOKENG RAMAILI**

**(nee THOAHLANE)**

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

**RESPONDENT**

**MASTER OF THE HIGH COURT**

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

**RESPONDENT**

**ATTORNEY GENERAL**

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

**RESPONDENT**

**CORAM:** DR P MUSONDA AJA

M H CHINHENGO AJA

N T MTSHYA AJA

**HEARD:** 13 APRIL 2021

**DELIVERED:** 14 MAY 2021

### **SUMMARY**

*Appellant, brother to first respondent, is appealing against the decision of the High Court that their late mother's estate be reported to Master of High Court within 30 days of judgment - High Court finding as a fact that mother's estate not reported contrary to appellant's contention and directing estate should be reported;*

*On appeal, appellant raising for first time that court a quo should not have directed reporting of estate without determining that it is reportable under Administration of Estates Proclamation 1935, that deceased parents had abandoned customary mode of life and that the order in so far as it related to time within which to report not specifically sought by first respondent;*

*Held: decision of court a quo correct on facts of case before it and not proper for appellant to raise issue that court a quo should have determined the law applicable to estate for first time on appeal especially in light of the fact that part of the estate of the parents is already being administered in South Africa in terms of the common and statutory law and not customary law, and further that the order as to the period within which an estate is to be reported is ancillary to the relief sought;*

*Appeal dismissed with no order as to costs.*

## **JUDGMENT**

### **CHINHENGO AJA:-**

#### **Introduction**

[1] The appellant and the 1<sup>st</sup> respondent are siblings, brother and sister, respectively. Their parents passed on, the father on 13 April 2008 and the mother on 24 December 2015. The parties had one other sibling who pre-deceased the mother and left behind a spouse. It appears that their late parents had considerable assets in South Africa. The father's estate was or is being wound up in that country and the assets therein allocated to the beneficiaries, with the bulk of them inherited by their late mother. In this connection, the 1<sup>st</sup> respondent stated in the founding affidavit:

"3. The 2<sup>nd</sup> respondent is Pule Thoahlane, a Mosotho male adult of Moshoeshoe II in the district of Maseru, cited herein in his official capacity as the Executor in the Republic of South Africa, in the estate of the late Franscoise Mampolokeng Thoahlane. I beg leave to attach copies of the Liquidation and Distribution Account and a letter to that effect from Kramer Weihmann & Joubert and mark the annexures "PMR1" and "PMR2"".

9. My late parents had property both in Lesotho and South Africa. The South African estate is under the administration of the Master of the High Court, where I nominated my brother

Pule Thoahlane, to be appointed as the Executor and he was indeed so appointed.”

[2] It is the administration of the mother’s estate that brought the two siblings to court. Attached to the founding papers is the Final Liquidation and Distribution Account in the estate of their late father dated 17 January 2017 and prepared by Kramer Weihmann & Joubert Inc., a law firm in South Africa. As of 24 January 2020, the account was to lay open for inspection at the Master of the High Court at Bloemfontein and the Magistrate Court at Ladybrand for a period of 21 days. In terms of that account, the late mother was a beneficiary of her late husband’s estate to the tune of R337 883.48 and each of the three siblings is a beneficiary of the estate to the tune R29 294.49. Having regard to the date of death of the mother and the Final Liquidation and Distribution Account, it is clear that the beneficiaries had not yet received their shares from the father’s estate when the mother passed on. That explains why the appellant refers to the two estates in his grounds of appeal and the 1<sup>st</sup> respondent also states in her application that “it is evident that 14 days have lapsed within which the death of my parents should have been reported to the Master of the High Court”<sup>1</sup>.

### **Application and opposition thereto**

[3] The 1<sup>st</sup> respondent’s application cited the appellant, the Master of the High Court and the Attorney General as

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<sup>1</sup> Para 7 of founding affidavit

respondents. At first glance, her application appears to be a simple request for the late registration of the mother's estate. It would seem that she merely sought "condonation for late reporting of the death of [their late mother], Mampolokeng Franscoise Thoahlane, to the Master of the High Court." She averred in the founding affidavit that soon after the mother's death she left "the family responsibilities" to her brother and thereafter laboured under the belief that her brother had reported the mother's death to the Master within 14 days of death as is required by law. However, when she followed up on the issue in January 2020, she discovered that her brother had not registered the estate and no record of the administration of the mother's estate existed in that office. She averred that she is "the most appropriate next of kin to be allowed to report the death of [the] mother out of the stipulated period by law in this country". She prayed for an order directing the Master to permit her to report the estate.

[4] The appellant opposed the granting of the relief on the following grounds: firstly, the Court had no jurisdiction to determine the matter in the absence of a report from the Master arising from the failure of the 1<sup>st</sup> respondent to comply with rule 8(19) of the High Court Rules 1980 before lodging her application, and secondly, that the application was an abuse of court process. He averred that the Master's office wrote a letter on 4 April 2016 in relation to their late mother's estate which could only have been written because the death had been reported, thus the Master already knew about the death.

[5] The said letter is addressed to Standard Bank by an Assistant Master, Mrs TM Hlapisi, and reads –

“Re: Estate Late ‘Mampolokeng Franscoise Thoahlane A/C No 5036164008895600.

The Thoahlane family has introduced as we hereby do, Mr. Pule Thoahlane (RC130849) as the heir to the above-mentioned estate.

We have perused his documents and are satisfied that he is the rightful person to execute the said estate.

Kindly assist him close the deceased’s account and have the available funds released to him.”

[6] On the strength of the above letter the appellant contended that the late mother’s estate had been reported and that had the 1<sup>st</sup> respondent “inquired from me about the issue she could have been accordingly apprised.”

[7] The 1<sup>st</sup> respondent averred in reply that the Master could not have been expected to file a report on the late mother’s estate when that estate had not been reported or registered: the first step is to report the estate then only may the Master be in a position to issue a report thereon. For this reason, she contended that the court had jurisdiction to determine her application. She disputed the appellant’s averment that the letter of 4 April 2016 is any evidence that the estate had been reported. It makes no reference to a report having been made.

She said it “was intended to be used for a specific and single notification and transaction at the Standard Bank” as stated therein. The Master’s office had also formally advised her that the estate had not been reported.

[8] The 1<sup>st</sup> respondent correctly observed that the appellant was not opposed to the reporting of the estate because he stated in his affidavit that, according to him, it had been reported albeit without showing when and by who it had been so reported. She also averred that the appellant did not show that he would in any way be prejudiced by the registration of the estate.

[9] The court granted the application and directed the 1<sup>st</sup> respondent to report the estate within 30 days of the judgment.

## **Grounds of appeal**

[10] The appellant was aggrieved by the decision of the High Court and appealed to this Court. He challenges the decision of the High Court on four grounds, in that it erred:

- (a) in holding that “the estate of the appellant’s parents was subject to be reported to the 2<sup>nd</sup> respondent under the Administration of Estate Proclamation 19 of 1935 without first

determining whether the appellant's parents had abandoned the customary law mode of life in terms of the Proclamation";

- (b) in holding that "the estate of the appellant's parents was governed by the Proclamation 19 of 1935 despite the fact that the family meeting had presented the appellant to the [Master] as the heir under customary law and after finding that the family letter to the Master was just proof of authority and not a letter of administration under the Proclamation";
- (c) in "accepting the 2<sup>nd</sup> respondent to report that the estate of the appellant's parents was not reported without determining whether such estate was supposed to have been so reported in terms of the said Proclamation"; and
- (d) in appointing the 1<sup>st</sup> respondent to report the estate while the 2<sup>nd</sup> respondent knows that the appellant had been appointed by the family as legal heir to the said estate;" and
- (e) in directing that the 1<sup>st</sup> respondent should report the estate within 30 days when she had not specifically asked for such relief.

[11] The main issue canvassed in the notice of appeal, whether or not the mother's estate was to be administered under customary law or the Administration of Estates Proclamation, was not raised in the application before the High Court, nor did the appellant advert to it. Now the grounds of appeal revolve around that issue with the appellant contending that the estates of both deceased parents are not subject to the provisions of the Proclamation unless it is shown that the late



parents had abandoned “the customary law mode of life.” In other words, the appellant now argues for the first time on appeal that the estates of the parents should be administered under customary law unless it is shown that they should be administered under the Proclamation. It bears repeating that the single issue in the court below was whether the mother’s estate had been reported or not - the one sibling, 1<sup>st</sup> respondent, saying it had not, and the other, appellant, saying it had.

### **Filing of report in terms of rule 8(19) of High Court Rules**

[12] The 1<sup>st</sup> respondent did not comply with rule 8(19) of the High Court Rules when she filed her application. The rule requires an application relating to a deceased estate to be served on the Master of the High Court for his or her consideration and report as the Master may consider appropriate. The 1<sup>st</sup> respondent only did so after she filed her replying affidavit to which she did not attach the Master’s report although she stated therein that it was so attached. She only obtained the report after filing her reply. The appellant unsuccessfully applied for the report to be expunged from the record, the court holding that it was proper and necessary to admit it. I find no irregularity in the admission of the Master’s report in the circumstances of this case. The Master’s report puts it beyond any shadow of doubt that the mother’s estate had not been reported. It also explains that the letter written by the Master’s office to Standard Bank was intended only to enable the appellant to access funds in the account and did not

constitute an appointment of him as administrator of the estate. In any event, there is no appeal against the decision admitting into evidence the Master's report. Nothing more needs to be said about its admission.

### **Decision of court *a quo***

[13] The High Court determined, correctly in my view, that the mother's estate had to be reported to the Master so that letters of administration can be issued as necessary and as determined by the Master. That determination is in line with the dictates of section 13(1) of the Proclamation which provides that-

“Whenever a person dies within the territory leaving therein any property or will, the nearest relative or connection of the deceased at or near the place of death, or in default of any such near relative or connection, the person who at or near immediately after the death has control of the premises at which the death occurs, shall within fourteen days thereafter cause a notice of death to be framed in the form “A” in the First Schedule to this Proclamation, and shall cause that notice, signed by himself to be delivered or transmitted...”

[14] The learned judge found that even though the Proclamation under section 110 thereof imposes a penalty for failure to report a death within the prescribed period, that did not constitute a bar to the relief sought. He further found as a matter of fact that the mother's death had not been reported

and that the letter to Standard Bank by the Master's office was not proof of a report having been made. The order granting permission to the 1<sup>st</sup> respondent to report the death accords with section 13 of the Proclamation. On the case as presented to the court *a quo*, the learned judge's decision cannot be faulted.

[15] The appellant, as I have earlier stated, raised a new issue on appeal. In raising that issue, he did not state positively that in his opinion the estates of their parents are not to be reported or registered in terms of the Proclamation. He simply stated that the court *a quo* erred in not determining whether or not the estates are so reportable or registrable. He faults the court for having held, as he says it did, that the mother's estate was governed by the Proclamation whereas a family meeting had presented him as heir under customary law. In the same vein, he faults the court for concluding that the estates were not reported without satisfying itself that they were supposed to be so reported. Counsel makes reference to *Manthabiseng Lepule vs Teboho Lepule*<sup>2</sup> for the proposition that the fact that their parents were married in community of property is not conclusive whether or not they had abandoned the customary mode of life. In point of fact and more relevant to this appeal is that *Lepule* confirms the position that upon reporting the death to the Master's office, it is that office that will make an

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<sup>2</sup> C of A (CIV) N0.5/13.

assessment and determination whether the reported estate is to be administered either under customary law or under the Proclamation.

[16] Quite clearly the issue whether the estate of the mother or both estates are to be administered under customary law or under the Proclamation was not an issue before the court. The judge was not moved by any of the parties to deal with that issue. His decision was correct and cannot be impeached on the grounds set out by the appellant.

### **Disposal**

[17] In determining an appeal an appellate court is called upon to decide, on what was before the lower court, whether that court erred in any respect. The appellant has not shown how, if at all, and in what respects the court *a quo* erred. He has not explained why the issue about registrability of the estate in terms of the Proclamation is being raised for the first time on appeal. Unless the appellant's introduction of new matter on appeal is justified on some basis, this court will not entertain it. There are good reasons for that.

[18] In general, a court of appeal decides, that is to say, upholds the lower court's decision or allows an appeal, on an issue pleaded in the court below. It must not decide on an issue not pleaded in the court below. It will only do so if a reasonable explanation is given as to why the issue was not raised in the

court below and if that issue was fully canvassed in that court and no further evidence is required for its decision. As stated by Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*<sup>3</sup> -

“(A) court of appeal may in exceptional circumstances (usually in conjunction with an amendment of pleadings on appeal) allow the remittal of a case for further evidence on a point that was not in issue on the pleadings at the original hearing. Cases in which this has been done include the following: where the issue raised and requiring further investigation was one of illegality tainting the cause of action<sup>4</sup>; where the other party was to blame for the fact that the issue in question had not been raised in the pleadings<sup>5</sup>; ... and where it was likely that injustice would be done if the point in question were not fully investigated and decided.<sup>6</sup>”

[19] The situation in the present appeal is not comparable to any of those postulated in the preceding paragraph. The 1<sup>st</sup> respondent pleaded that their mother’s estate had not been reported to the Master of the High Court and the appellant pleaded that for all practical purposes it had. The learned judge was accordingly guided by the pleadings of both parties and decided the one issue that was before him. The notice of motion also sought only that one relief, namely-

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<sup>3</sup> Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa*, 4<sup>th</sup> ed., at p 911.

<sup>4</sup> *Marks v Model Hire Motor Services Ltd* 1928 CPD 476; *De Witt v Heneck* 1947 2 SA 423 (C).

<sup>5</sup> *Stiff v Davidson* (1927) 48 NLR 77.

<sup>6</sup> *Paul Mole v De Charmoy & Another* 1933 NPD 628 at 632-3; *Laidlaw v Crowe* 1935 NPD 241; *Kastner v Lawford* 1942 CPD 365.

“Condonation for the late reporting of the death of the late ‘Mampolokeng Fransciose Thoahlane to the Master of the High Court.”

[20] This conclusion is supported by the appellant’s own answering affidavit at paragraphs 6, 8 and 9 where he says;

“6. The deponent has been ill advised. I aver that the condonation application is nothing but an abuse of process. I wish to attach a letter from the office of [the Master of the High Court] dated 04<sup>th</sup> April 2016. That letter could not have been penned if at all the death of the late ‘Mampolokeng Fransciose Thoahlane had not been reported. The said letter is hereto attached and marked annexure ‘A’.

8. I aver that had the deponent inquired from me about the issue she could have been accordingly apprised.

9. I vehemently deny that the estate has not been reported and refer the court to annexure ‘A’.”

[21] The learned judge *a quo* determined that the estate had not been reported and concluded his reasons for that determination in these words:

“Currently the estate is not reported, and the non-reporting of same continues to be a criminal blight on the individuals who are enjoined to do so. That the estate remained unreported for the past five years is of no moment because the continued

non-reporting constitutes a criminal offence. To nip this in the bud an appropriate order is called for. The applicant has brought what is termed a “condonation” application but given that non-reporting constitutes a criminal offence, I do not think that this court has a discretion to refuse any application to condone late reporting of estates.”

[22] It was on this basis that the judge made the order now appealed against. Concerning the order itself, the learned judge correctly directed that the 1<sup>st</sup> respondent had to report the mother’s estate within 30 days of the order. Having granted the condonation, the directive relating to the period within which the report was to be made was merely consequential to the main order condoning the late reporting. There is no basis upon which the order of the court can be faulted.

[23] I have considered the issue of costs of the appeal and I am of the view that each party should pay its own costs. I also considered whether or not the costs should not be paid by the estate and came to a negative conclusion. Both siblings failed to comply with the law on reporting the estate and I find no reason why the costs should be paid by the estate.

[24] Finally, I considered the question, not raised in the appeal but is one of law only, the effect of the failure of the siblings to report the estate which in terms of section 110 of the Proclamation is a criminal offence. I think the learned judge a

*quo* should have directed that his judgment be sent to the appropriate authorities for them to take whatever action they consider necessary in light of the criminal offence already committed. This judgment should accordingly be brought to the attention of the Master of the High Court who may liaise in regard to it with the appropriate authorities as may be necessary.

[25] The decision of this Court accordingly is that-

1. The appeal is dismissed.
2. Each party shall bear its own costs.
3. This judgment is referred to the Master of the High Court for him or her to consult with the relevant authorities or take action as he or she may find appropriate regarding the failure to report the estate in terms of the law.



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**MH CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

I agree





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

I agree



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**NT MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:** ADV. B. SEKONYELA

**FOR 1<sup>ST</sup> RESPONDENT:** MS. M. LEPHATSA