

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
04/2022**

**C OF A (CIV) No**

**CIV/APN/457/2021  
CIV/APN/457/2021**

In the matter between-

**MOTEBANG  
APPELLANT**

**RAMAHLOKO**

And

**COMMISSIONER OF POLICE  
RESPONDENT**

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

**ATTORNEY GENERAL  
RESPONDENT**

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

**CORAM:** KE MOSITO P  
J VAN DER WESTHUIZEN AJA  
NT MTSHIYA AJA

**HEARD:** 13 APRIL 2022

**DELIVERED:** 13 MAY 2022

***Summary:***

*The appellant challenged his transfer in the High Court. Without any answering affidavit having been filed and without hearing submissions by counsel, the Court refused the application. No proper reasons for the order were furnished. The appeal cannot proceed meaningfully, or at all. The matter is remitted back to the High Court.*

## **JUDGMENT**

**J van der Westhuizen, AJA:**

### **Introduction**

[1] “The present appeal is, we bet, the shortest in this session.” These bold words are the opening sentence in counsel’s written heads of argument on behalf of the appellant. Indeed, after some debate in court involving counsel and the bench, counsel for the appellant and the respondent agreed that the matter should be remitted to the High Court; and that costs must be costs in the cause. Thus, I provide only brief reasons for making an order accordingly.

### **Facts and litigation history**

[2] The appeal and previous proceedings concern the appellant’s alleged unlawful transfer from Maseru Urban Pitso Ground to Police Headquarters, High Court. According to the appellant, this took place as punishment, because he had arrested a friend of his superior. The transfer was allegedly arbitrary, capricious and revengeful. Although the two workstations are in close proximity in Maseru, it was in no one’s interest to transfer a seasoned investigator of criminal cases to

a station where he would serve as a court orderly. Thus, the appellant submits.

[3] The appellant approached the High Court on the basis of urgency, a rule *nisi*; stay of his transfer pending finalization of the matter; and that the transfer be declared null and void; as well as costs. The respondents gave notice of their opposition.

[4] On 31 December 2021, when the matter was supposed to be heard, no answering affidavit had been filed by the respondents. The respondents' counsel appeared in court. So did the appellant's counsel.

[5] Makara J dismissed the appeal, without having heard counsel. An order was made, signed by the judge.

**“IT IS ORDERED AS FOLLOWS:**

**a) That the applicant ought to have approached the court by way of Rule 50 of the High Court Rules, therefore the application is refused.**

**b) There is no order as to costs.”**

[6] Other than the order, no reasons were provided by the High Court. The appellant appealed to this Court.

**Submissions**

[7] On behalf of the appellant it was submitted that the failure of the High Court to furnish reasons justified the inference that there were no sound reasons for the order. On this ground alone the order must be set aside, and the appeal must succeed. Counsel relied on several decisions by this and other courts about the unacceptability of orders without reasons.

[8] It was, however, further submitted by the appellant that the High Court had erred in concluding that Rule 50 of the High Court Rules, providing for review proceedings, was the only way to have a transfer set aside. The appellant also argued that the appellant's transfer was irregular and unlawful for the reasons mentioned above and should be set aside.

[9] Counsel for the respondents submitted that the High Court had not concluded that Rule 50 was the only avenue to set aside a transfer. The court instead found that in a case like this one Rule 50 should have been used, given how far the transfer had already proceeded.

[10] Counsel referred extensively to authority regarding the meaning, purpose and scope of application of Rule 50.

**On hearing counsel; the state of papers; and the absence of reasons**

[11] For this Court it is neither necessary, nor appropriate, to attempt to reach a judicial conclusion on whether the appellant should have used Rule 50 instead of the path of an urgent application, which he chose. The same applies to any interrogation of the appellant's case that the transfer had been done in bad faith and unlawfully.

[12] As to the last-mentioned issue, the respondents had not filed an answering affidavit. Their version of the merits of the transfer was and still is unknown. Technically, they have not rebutted the appellant's case.

[13] Before one even gets to that, an enquiry regarding the applicability of Rule 50 cannot get out of the starting blocks. The High Court appears not to have given counsel an opportunity to address the court at all, especially on the very point on which the court dismissed the appeal, namely whether Rule 50 should have been used by the appellant. The possibility that the judge merely intended to issue a direction, in the same way that judges may sometimes indicate that a matter is not urgent, must be considered. In such a situation counsel can request the court to make submissions. However, the emphatic order to “refuse” the application and paragraph (b) as to costs - quoted in paragraph 5 above - indicates otherwise. An order was made, with a reason included in it. As the application was dismissed, a direction could get the appellant as applicant nowhere. To make an order against a party, without hearing their counsel, who is present, is unacceptable.

[14] This situation is exacerbated by the absence of reasons for the order. Perhaps the judge in the High Court was of the opinion that the mentioning of Rule 50 in the order constituted sufficient reasoning. It does not. An order is an order; and reasons must be given for that order. As a matter of logic and law the order and the reasons should not be conflated. The order cannot justify itself. The different interpretations of the order by counsel for the appellant and respondents in this case illustrate that. This Court cannot consider the correctness or otherwise of the High Court’s view of Rule 50, if that view is neither clear nor explained by the judge.

[15] This Court has repeatedly expressed its strong condemnation of High Court orders without reasons. So has other courts. The President of this Court and the Chief Justice have been involved in attempts to root out this unholy practice. (See eg *Lesotho Teachers Trade Union v Director of the Teaching Service Department and Others* LAC (2002-2004) 803 AT 805 CD; and *Commissioner of Police v Motseki (C of A)(CIV/31/2020) LSCA 15 (14 May 2021)*). It is unnecessary to repeat the many strong reasons why reasoned judgments are required out of respect for litigants and the public, and why is indeed essential to the rule of law.

## **Conclusion**

[16] Without counsel having addressed the High Court and the court's view of the arguments presented; without any answering affidavit by the respondents; and – especially – without a reasoned judgment of the High Court, this appeal cannot proceed. This, counsel for both parties agreed on, as ethical and responsible officers of the court indeed ought to do. They also agreed that the matter should be remitted to the High Court to be dealt with properly, with all necessary papers available, opportunity for all parties to make submissions and general requirements of fair proceedings being adhered to.

## **Order**

[17] In view of the above it is ordered that -

(a) the matter be remitted to the High Court; and that-

(b) costs will be costs in the cause.




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

I agree:




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**KE MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:




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

**FOR THE APPELLANT:**      ADV LA MOLATI  
    ADV PM MOKOBOCHO

**FOR THE RESPONDENTS:** ADV T MOHLOKI

