

**IN THE APPEAL COURT OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) 5/2022**

In the matter between:

<b>EXECUTOR OF ESTATE LATE THABO KABELI MOERANE APPELLANT</b>	<b>1<sup>ST</sup></b>
<b>EXECUTOR OF ESTATE LATE 'MASEOEHLANA MALWAZE SHALE APPELLANT</b>	<b>2<sup>ND</sup></b>
<b>EXECUTOR OF ESTATE LATE MOTLASTI PAUL MOROLONG APPELLANT</b>	<b>3<sup>RD</sup></b>
<b>CO- EXECUTOR OF ESTATE LATE NTOLO MAUREEN MOHALE FUNNAH APPELLANT</b>	<b>4<sup>TH</sup></b>
<b>MOTENE RAFONEKE N.O. APPELLANT</b>	<b>5<sup>TH</sup></b>

and

<b>CO- EXECUTOR: ESTATE OF THE LATE THAKANE CHIMOMBE (TARU CHIMOMBE) RESPONDENT</b>	<b>1<sup>ST</sup></b>
<b>CO- EXECUTOR: ESTATE OF THE LATE THAKANE CHIMOMBE (K. CHIMOMBE) RESPONDENT</b>	<b>2<sup>ND</sup></b>
<b>TEBOHO KIKINE RESPONDENT</b>	<b>3<sup>RD</sup></b>
<b>MAMPOI TAOANA RESPONDENT</b>	<b>4<sup>TH</sup></b>
<b>MASTER OF THE HIGH COURT RESPONDENT</b>	<b>5<sup>TH</sup></b>

**THE ATTORNEY GENERAL  
RESPONDENT  
NEDBANK LESOTHO LIMITED  
RESPONDENT**

6<sup>TH</sup>7<sup>TH</sup>

**CORAM:** PT DAMASEB, AJA  
J VAN DER WESTHUIZEN, AJA  
P MUSONDA, AJA

**HEARD:** 14 APRIL 2022

**DELIVERED:** 13 MAY 2022

***Summary:***

*The High Court, exercising its ordinary civil division, declined to hear matter on the basis that it was commercial in nature and that court therefore lacked jurisdiction. The court relied on Rule 10 1(c) and (m) of the High Court Commercial Court Rules, governing commercial matters.*

*Held that the Commercial Court is a court created as a division of the High Court of Lesotho and is not a court separate from the High Court. Therefore, the High Court had jurisdiction.*

**JUDGMENT**

**PT DAMASEB, AJA:**

**Introduction**

[1] This appeal raises the question whether the commercial division of the High Court of Lesotho is a separate court from the High court created under the Constitution of Lesotho (the

Constitution). In other words, is it competent for a judge of the High Court to decline to hear a matter on the basis that it is a commercial dispute which must be instituted in terms of the Commercial Court Rules<sup>1</sup> promulgated by the Chief Justice of Lesotho on the authority of his or her rule-making power in terms of s 12(1) of the High Court Act<sup>2</sup>?

### **The pleadings**

[2] The fifth appellant (Mr Rafoneke) brought an urgent application in the High Court seeking to review and set aside a decision by the fifth respondent (the Master) appointing fourth respondent as executor in four estates: estate late Thabo Kabeli Moerane, estate late 'Maseoehlana Malwaze Shale, estate late Motlasi Paul Morolong and estate late Ntolo Maureen Mohale Funnah (the four estates).

[3] Mr Rafoneke further sought an order interdicting the first to fourth respondents from taking any decisions relating to the files in the four estates, pending the finalization of the review. He further sought an order for the first to fourth respondents to release to the Master all the files relating to the four estates. In addition, Mr Rafoneke sought an order interdicting the seventh respondent from co-operating with and dealing with the fourth respondent in respect of the accounts held by seventh respondent for the four estates.

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<sup>1</sup> As opposed to the ordinary rules of court.

<sup>2</sup> High Court Act 4 OF 1967.

[4] Mr Rafoneke sought those orders on the basis that he was appointed executor by the Master to the four estates when he was a partner at Naledi Chambers Inc. The latter was dissolved by court order on 3 December 2021, following the death of one of its partners. According to Mr Rafoneke, he was not aware of any decision to revoke his appointment, as it could not have taken place without him being given an opportunity to be heard. It was his contention that the Master could not subsequently appoint the fourth respondent as executor to the same estates, without having revoked his appointment.

[5] Mr Rafoneke added that the appointment of the fourth respondent was unlawful as the latter is not a legal practitioner and that this is prejudicial to the four estates. He, in particular, took issue with the Master's appointment of the fourth respondent as executor, as it was not clear whether he and the fourth respondent are to serve as co-executors of the four estates or whether they are to serve as two parallel executors. He was further concerned by the fact that the four estates hold large amounts of money and that this requires accountability, which will be difficult to achieve with two different executors.

[6] The first to fourth respondents filed a notice of intention to oppose the matter and served a notice in terms of Rule 8(10) (c) of the High Court Rules - raising points of law on jurisdiction, misjoinder, non-compliance with the Rules of Court and lack of urgency. No answering affidavit was filed.

[7] The respondents contended that the High Court of Lesotho, sitting in its ordinary civil jurisdiction, lacked jurisdiction to hear the matter as it was commercial in nature and should have been lodged in the 'Commercial Court'. In that context, reliance was placed on the provisions of Rule 10(1) (a) and (c) of the High Court (Commercial Court) Rules of 2011. According to the respondents, the matter involves a partnership as Mr Rafoneke's appointment as executor was by virtue of him being a partner at Naledi Chambers at the material time.

[8] In response to the respondent's objection on jurisdiction, Mr Rafoneke maintained that the fourth respondent's appointment had nothing to do with Naledi Chambers, as the firm was dissolved. Therefore, the dispute had nothing to do with a partnership and therefore did not qualify as a commercial dispute.

### **The High Court's approach**

[9] The court *a quo* agreed with the respondents that the matter lacked urgency and further upheld the objection of lack of jurisdiction. The court held that Naledi Chambers had everything to do with the Master's appointment of Mr Rafoneke and fourth respondent as executors. The court further held that the appellant made reference to Naledi Chambers throughout his pleadings.

[10] The High Court concluded that the partnership was the basis of the appellant's appointment as executor, as is evident

from the letters of appointment which were issued in the name of Naledi Chambers and not in Mr Rafoneke's personal capacity. The learned Judge was satisfied that the matter involved a partnership, which fell squarely within the ambit of the Commercial Court, in terms of Rule 10, and as a result declined to entertain the matter due to lack of jurisdiction.

### **The appeal**

[11] Aggrieved by the High Court's decision, Mr Rafoneke approached this court on appeal, relying on the following grounds of appeal:

- (a) The learned judge erred and misdirected herself in declining jurisdiction when the matter was purely a review of a decision of a public functionary (The Master of the High Court).
- (b) The learned judge erred and misdirected herself in declining jurisdiction on the basis that it is the 'Commercial Court' which has jurisdiction when the Commercial Court is the division of the High Court; as such the judge ought not to have dismissed the application for want of jurisdiction, and instead ought to have referred it to the Commercial division.

### **Submissions**

[12] Advocate Setlojoane appeared for Mr Rafoneke on appeal. Counsel argued that the court below erred in concluding that the matter fell within the jurisdiction of the Commercial Court, as the main relief had nothing to do with the alleged commercial relationship, and that it was rather concerned with the review of

the exercise of an administrative power by the Master. Advocate Setlojoane relied on s 119 of The Constitution of Lesotho (as amended) and section 109 of the Administration of Estate Proclamation<sup>3</sup> (the Proclamation) as amplified by Rule 50 of the High Court Rules<sup>4</sup>, arguing that what was challenged is the appointment of a co-executrix by the Master.

[13] Section 109 of the Proclamation states:

*'Every appointment by the Master of an executor, tutor or curator, and every order or decision of or taxation by the Master under this Proclamation shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby and thereupon the Court may confirm, set aside, or vary the appointment, order, decision or taxation, as the case may be.'*

[14] The 'word' court is then defined in Section 2 of the Proclamation to mean the High Court.

[15] Counsel for Mr Rafoneke further contended that subordinate legislation cannot oust the jurisdiction of the High Court granted under plenary legislation. The argument goes that subordinate legislation, being the Commercial Court Rules, were merely promulgated for the purpose of prescribing a defined procedure for the pursuit of commercial disputes as defined in the Commercial Court Rules. The Commercial Court Rules did not create a court separate from the High Court but rather a specialized procedure for the institution and adjudication of commercial matters.

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<sup>3</sup>Administration of Estate Proclamation No. 19 of 1935.

<sup>4</sup> Legal Notice No. 9 of 1980 (as amended).

[16] Although counsel for Mr Rafoneke did not concede that the dispute is commercial in nature, it was submitted that in the event that the court *a quo* was correct in finding that it was, it ought to have referred the matter to the Commercial Court, instead of holding that the High Court does not have jurisdiction and dismissing the matter.

[17] The appellant's counsel prayed for the appeal to be upheld with costs, and for the matter to be remitted to the High Court sitting in its ordinary jurisdiction for determination on the merits. Alternatively, and without conceding that the matter is commercial in nature, for it to be remitted to the Commercial Court.

[18] Advocate Ntsiki appeared on appeal on behalf of the respondents. Counsel argued that although Mr Rafoneke had sought a review of the Master's decision, the matter fell within the ambit of the Commercial Court and that Mr Rafoneke could not proceed in the High Court exercising its original jurisdiction just because he framed the relief as a review application.

[19] Advocate Ntsiki relied on Rule (10)(1)(c) and (m) of the Commercial Court Rules, which provide:

*'The business of the commercial court shall comprise all actions arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, and shall include, amongst other things-*

...

*(c) agency and partnership;*



...

(m) a matter involving a business trust'

[20] According to respondents' counsel, the appointment of an executor by the Master arose from Mr Rafoneke's capacity as a partner in Naledi Chambers and any dispute arising from that is of a commercial nature and should be pursued in the Commercial Court.

[21] With regard to the remaining ground of appeal, advocate Ntsiki submitted that the court *quo* did not in its order dismiss the application, but merely declined to hear it on the ground that it lacked the requisite jurisdiction to hear the matter. Further, once the court made its order, it became *functus officio* and could not competently make an order to refer the matter to the Commercial Court. The respondents prayed that the appeal be dismissed with costs.

### **The law**

[22] In *Masule v Prime Minister of the Republic of Namibia* (SA 89/2020) [2021] NASC, the Supreme Court of Namibia recently dealt with an appeal from the High Court of Namibia which concerned the issue whether by creating a labour division of the High Court<sup>5</sup> the legislature created a court separate from the High Court created under the Namibian Constitution.

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<sup>5</sup> In terms of s 117(1)(a) - (i) of the Labour Act 11 of 2007.

[23] In an approach not dissimilar to the present case, in *Masule* the High Court had held that it lacked jurisdiction to hear and determine the matter on the basis that it was a labour matter and that it fell within the ambit of the 'Labour Court', a division of the High Court. It accordingly declined to hear the application on an urgent basis and struck it from the roll. Aggrieved, the appellant lodged an appeal to the Supreme Court.

[24] On appeal, the Supreme Court held that the 'Labour Court' is not a court separate from the High Court envisaged by Art 78(1)(b) of the Namibian Constitution. It is a division created for administrative convenience to deal with labour matters, presided over by judges appointed to the High Court and working under the supervision of the Judge President.

[25] The *ratio* in *Masule* applies with equal force to the present matter – more so because in *Masule* the labour court was created by primary legislation while in the case now before us the 'Commercial Court' was created by subordinate legislation. That is so because the Commercial Division of the High Court of Lesotho was created by the Chief Justice under subordinate legislation being the High Court (Commercial Court) Rules. The objectives of the division as stated in Rule 4 of the Rules are:

(a) *'To establish a commercial court within the High Court of Lesotho capable of delivering to the commercial community, an efficient, expeditious, and cost-effective mode of adjudicating disputes that affect the economic, commercial and financial life of Lesotho directly and significantly; and*

(b) *To put in place effective measures for designing the machinery for judicial resolution of commercial disputes and an accessible judicial and suitable case management system.*' (my emphasis added) (My underlining).

[26] It is clear from the above that the 'Commercial Court' exists as a division of the High Court of Lesotho for administrative convenience, and it is not a court separate from the High Court. It was therefore a misdirection for the judge *a quo* to treat it as such and declining jurisdiction.

[27] What the court *a quo* ought to have considered, on the assumption that the dispute was commercial in nature, is whether the appellant exhausted the procedures and remedies for the resolution of such disputes – being the Commercial Court Rules. That is the effect of the principle of subsidiarity which this court explained in *Russel*<sup>6</sup>.

[28] The rationale of the principle is to eschew the creation of parallel systems of law and a recognition that the legislature has the competence to make legislative choices as long as they are rational and constitutionally compliant. The legislation in question must either be relied on and applied, or it must be challenged on whatever ground it is considered not to pass constitutional muster. Not doing so will result in parallel legal systems and lead to chaos.

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<sup>6</sup> *PS Ministry of Labour and Employment and others v Russel* C of A (CIV) 27/2021.

[29] In *Masule*<sup>7</sup>, the Namibian Supreme Court held that it is a misdirection for a judge of the High Court to decline to hear a matter that comes before him or her on the ground that it falls within the jurisdiction of the Labour Court, as that would imply that the Labour Court is a forum of adjudication other than the High Court, which would amount to a constitutional anomaly. The court held that the real issue in such situations is one of exhaustion of remedies and procedures delineated for a particular dispute and not of jurisdiction. The Supreme Court held that if a matter comes before a judge who at that time was not assigned duties in the labour division, he or she must stand the matter down and seek the intervention of the head of jurisdiction to have the matter placed before a judge performing duties in the labour division.

[30] Similarly, Rule 7 (b) of the Lesotho High Court (Commercial Court) Rules grants the Registrar the power to allocate cases to judges regardless of the stage the pleadings are at. Based on that, when a judge sitting in the ordinary civil division of the High Court is faced with a matter that ought properly to be heard in the commercial division, the prudent thing would be to approach the Registrar (assuming a litigant followed the relevant rules) to re-allocate the matter to a judge serving in the Commercial Division, as opposed to declining jurisdiction to hear the matter.

### **Disposal**

[31] The Commercial Division of the High Court of Lesotho is not a court separate or distinct from the High Court established

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<sup>7</sup> *Supra*.

under section 119 of the Lesotho Constitution. Disputes of a commercial nature must be prosecuted in terms of the rules promulgated by the Chief Justice for that purpose. Litigants must make use of the rules and processes designed for the resolution of commercial disputes. Therefore, if a dispute falls within the category of disputes covered by the Commercial Court Rules and a litigant has not followed those, the case may be struck or dismissed on that basis.

[32] It follows that it was a misdirection for the judge *a quo* to have declined to hear the dispute presented before her on the basis that the High Court lacked jurisdiction. The question which the court should have inquired into is whether the applicant exhausted the procedures, processes and remedies created by the rule-maker for the resolution of commercial disputes - assuming that the dispute is commercial in nature.

[33] It therefore becomes necessary for the matter to be remitted to the High Court to be heard *de novo* on the papers as they stood when the High Court declined jurisdiction.

### **Costs**

[34] There is no reason that costs should not follow the event, both on appeal and *a quo*.

### **Order**

[35] I make the following order:

(ii) The appeal succeeds and the judgment and order of the High

Court are set aside and replaced with the following:

'The point in limine is dismissed, with costs'

(iii) The matter is remitted to the High Court for determination of the appellant's application *de novo* as the papers stood on the date the High Court made its order declining jurisdiction.

(iv) The appellant is granted costs of appeal.



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

I agree:



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

I agree:



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

**FOR THE APPELLANT:**

ADV R. SETLOJOANE AND  
ADV. M RAFONEKE

**FOR THE 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup> AND  
4<sup>TH</sup> RESPONDENTS:**

ADV. T. D. NTSIKI