

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV)20/2021

CIV/APN/246/2017

In matter between:

MOLEFI LIBE MASUPHA

APPELLANT

AND

MAKOAE MASUPHA

1ST RESPONDENT

**THE PRINCIPAL CHIEF-HA- MAMATHE
RESPONDENT**

2ND

THE MINISTER OF LOCAL

GOVERNMENT & CHIEFTAINSHIPAFFAIRS 3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM:

P.T.DAMASEB AJA

P. MUSONDA AJA

M. CHINHENGO AJA

HEARD:

20th APRIL 2022

DELIVERED ON:

13TH MAY 2022

SUMMARY

Application for condonation to file answering affidavit- Judge rejecting the application - Judge making an order in default - The discretion should be exercised judiciously - The credibility of the

explanation should be interrogated before rejecting the application.

JUDGMENT

P MUSONDA AJA

Introduction

[1] This is an appeal against the order of (Moahloli J) in default of an answering affidavit whose condonation was refused by the learned Judge.

[2] The 1st respondent sought the following prayers, reviewing and setting aside the recommendation of the appellant as Chief of Sefikeng Ha Fako by the Minister of Local Government and Chieftainship Affairs, setting aside Government Gazette Notice No 37 OF 2001, which declared appellant as Chief of Sefikeng Ha Fako, declaring the 1st respondent as the lawful Chief of Sefikeng Ha Fako in the district of Berea and costs.

[3] The sought prayers were all granted and became an order of the Court as set out in para 2.

[4] The 1st respondent averred in his founding affidavit that on or about May 2001, he launched an urgent application in the Berea Magistrate Court wherein an interdict was sought to prevent the installation of the appellant to the Chieftainship of Sefikeng, which application was granted.

[5] Concurrently the 1st respondent instituted an application CC108/2001 against the office of the Sefikeng chieftainship. Before these cases could be finalised the appellant was installed as chief CC108 and 109/2001 were consolidated and Judgment was entered in favour of the 1st respondent on 19th September 2013. The appellant successfully appealed to the High Court in Civil Appeal 13 of 2014 and Judgment was delivered on 27th April 2015.

[6] In April 2016 the matter came to this Court in Civil Appeal No 14 of 2015, where this Court held that although the 1st respondent had the first right to succession to the office of Chieftainship of Sefikeng, he cannot assume office until and unless the King's approval of the appellant had been set aside through review proceedings.

[7] It is clear from the wording of section 10 (7) and 8 of the Chieftainship Act 1968 that when approving the succession to the office of Chief, the King acts in accordance with the Minister's recommendation.

[8] It was evident that the Minister recommended the appellant to the King on the basis of the outcome of the case between appellant and one Maama Masupha to which proceedings the 1st respondent was not joined as a party. The Minister was unaware that the 1st respondent had a prior right to the Chieftainship, as

appellant was the son of the young brother to the 1st respondent's father nor did the Minister know that there was an interdict granted by the Berea Magistrate Court against the installation of the appellant. That was the 1st respondent's case in the Court below.

[9] Notice was given on 1st July 2017 of the intention to oppose the application. Subsequently, an interlocutory application for condonation for late filing of an answering affidavit in terms of Rule 59 of the High Court Rule 1980, was made supported by an affidavit.

[10] The appellant averred that he was served with the founding papers as far back as early July of 2017. He immediately engaged counsel, who filed notice of intention to oppose. Just after a week before he could liaise with his lawyers, he was evacuated to South Africa by his family for treatment. He stayed there for four months. He recuperated fairly in Mid-November 2017 but does go for medical checkups. His medical records were availability for scrutiny by the Court and the 1st respondent if desired.

[11] Because of his indisposition explained above, he had prayed that he be allowed to file the answering affidavit, more so because the issues in contestation were of public importance and could not be dealt with by default as desired by the 1st respondent in the Court a quo.

[12] The failure to file the answering affidavit was neither deliberate nor willful and there was no prejudice to the then applicant which could not be atoned by costs which the appellant was ready to tender. It was his averment that he had good prospects of success for the following reasons;

- (i) The non-Joinder of His Majesty the King is a fundamental flaw which vitiates the entire application because one cannot review the recommendation of the Minister as is sought in prayer (a) of the Notice of Motion.
- (ii) The repository of power who authored the gazette was not the 3rd respondent (Minister of Local Government and Chieftainship affairs) but His Majesty the King himself. The review can only be made against the actual repository of power who made the decision not a person who made a mere recommendation which did not impose any burden on the appellant.
- (iii) The review of 3rd respondent's recommendation cannot succeed for the simple reason that the conduct of the 3rd respondent is not a reviewable administrative action.

The appellant craved for the indulgence of the Court to be condoned for the delayed filing of the answering affidavit.

[13] The Court a quo proceeded to grant all the prayers and no reason were given for not condoning the late filing of the answering affidavit nor for the granting the prayers.

[14] Aggrieved by the non-condoning to file an answering affidavit, the appellant noted an appeal against the refusal of the relief he sought.

[15] The appellant filed three grounds of appeal. In Ground one, the Court a quo is faulted for failing to grant the application for condonation in favour of the appellant. Ground two, that the Court a quo erred and or misdirected itself by failing to recognize in its determination of the issues that the recommendation to be reviewed and set aside was not and is not a reviewable administrative action within the meaning of the Chieftainship Act.

[16] The appellant sought condonation in respect of the late filing of the appeal and that generally, an application for condonation is not for asking.

[17] This Court in **Mosaase U R**¹, following the decision of the Court of Appeal in South Africa in **Melane V Santam Insurance Ltd**², has laid down the general rule as follows:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised Judiciously upon a consideration of all the facts, and in essence it

¹LAC (2005-2006 206, 208)

²1962 (4) SA 531 at 532 C-F

is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there would be no point in granting condonation. Any attempt to formulate rule of the thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate, for a long delay. The respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerges from decisions of this Court."

The appellant's case.

[18] It was canvassed for the appellant that once the appellant was served with the Notice of Motion, he promptly instructed the attorneys, who filed an intention to oppose. The attorneys, however, did not file the rest of the paper timeously. Until the application for condonation of late filing of the answering affidavit was dismissed, the notice of appeal being filed, but not filing the record. The then appellant's attorney have never formally withdrew from acting on the appellant's behalf.

[19] The appellant has pursued the litigation touching on the Chieftainship since 2000 consistently. The delay was not of the appellant's own making but of the attorneys who are officers of the Court and that failure should not be visited upon the appellant³. Therefore, the Court below ought to have condoned the late filing of the answering affidavit.

³Thamae and Another V Kotelo and Another LAC (2005-2006) 283, 293 para 17

Prospects

[20] The prospects of success in the matter cannot be divorced from the grounds of appeal.

[21] The 1st respondent has not joined His Majesty the King when in Terms of Part 111 of the Chieftainship Act 1968, the King acting on the advice of the Minister can refuse to approve a person to be successor to the office of Chief⁴. The King ought therefore to have been joined and the failure to do so was fatal. A plethora of decisions of this Court on non-Joinder were referred to in support of the proposition, for example, **Matime AND Others V Moruthoane and Another**⁵ in which this Court said; *“That non-Joinder is a matter that no Court, even at the late stage in proceedings can overlook because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have had no opportunity to present their case”*

[22] According to the appellant, in the absence of the King as a party, the Court a quo dealt with the review wherein the decision maker was not cited. It is improper that the matter was dealt with in that manner in light of the provisions of the Chieftainship Act.

⁴Section 10(7)

⁵1985-p1989 LAC 198 and 200

[23] This Court was therefore urged to uphold the appeal and make an order in the following terms;

- (i) That the application for condonation of late filing of the appeal be granted;
- (ii) That the appeal is upheld;
- (iii) That the matter be remitted to the Court a quo to be dealt with de novo before a different Judge;
- (iv) That His Majesty the King be joined as a respondent
- (v) That the appellant is granted leave to file his answering affidavit;
- (vi) That the matter be given priority on the roll to be disposed off.

Respondents case on appeal

[24] The 1st respondent's counsel had intimated by letter to this Court that he will rely on the Heads of arguments filed herein.

[25] It was argued for the 1st respondent that the appellant had no prospects of success because the 1st respondent has a prior right to the office of the Chief. The only obstacle was the Gazette, whose basis was the recommendation of the Minister, which was challenged in the Court a quo and was set aside.

[26] The King only acts in accordance with the advice of the Minister and since the Minister is the effective decision maker it was unnecessary to join the King. The argument went that the King cannot act against the recommendation of the Minister. In

terms of Section 14, of the Chieftainship Act, the Minister is the depository of the powers to issue the Gazette which shows the people who have been approved. On the contrary, the approval of the King need not be gazetted.

[27] It was the 1st respondent's case that the appellant in the lower Court applied for rescission on the ground that, he was unable to instruct the attorneys as he was very sick. Although he alleged that he spent a lot of time in hospital in the Republic of South Africa, there was no medical evidence tendered, yet in this Court he blames his attorneys.

[28] The decision of this Court in ***Sakoane V Ministry of Local Government***⁶ is apposite. There Ramodibedi JA (as he then was) said:

"In terms of Section 3 of the Chieftainship (Amendment) Act 1984, the King merely approves the succession to the office of the Chief acting in accordance with the advice of the Minister. There is no provision that obliges him to issue a gazette to that effect himself. It follows therefore that the question whether or not the King approved or not is a question of fact to be determined by each case."

⁶LAC 2000-2004 at P 242

The decision in ***Mapetoane V Ministry of Interior***⁷, was also relied upon in support of that proposition.

[29] For the above reasons, we were urged to dismiss the condonation application as there are prospects of success. The first respondent supported the court a quo's decision to seek proof of medical evidence in the circumstances.

[30] **The Issues:**

- (i) Did the Court a quo judiciously exercise its discretion in rejecting the condonation application to file the answering affidavit late?
- (ii) Is this a matter in which this Court can exercise the discretion in favour of granting condonation for late filing of the appeal?
- (iii) Should His Majesty the King be joined as a respondent?
- (iv) Can this Court make an order that the Chief Justice give this matter priority?

Consideration of the appeal

[31] The appellant had offered to tender medical evidence of his absence from the Kingdom seeking medical treatment in South Africa.

⁷LAC (1985-1989) 71

He had tendered costs. Had the learned Judge allowed the answering affidavit to be filed, he would have had an opportunity to determine whether the explanation was reasonable. The prospects of success would have been interrogated as well. In my view the discretion was injudiciously exercised.

[32] The Minister gazettes and he who gazette can degazette. Gazetting symbolizes appointment, and degazetting symbolizes disappointment. The pivotal role is therefore played by the Minister and not the King. The Minister and the Attorney General can sufficiently represent the state, of which the King is titular Head. There was therefore no need to join the King to these proceedings. Any outcome does not affect the King personally. The authorities cited have relevance in circumstances, where an individual who is deprived or making representations will personally be affected by the outcome of the proceedings.

[33] The Appellant had therefore made out a case for the relief he sought a quo and since it was refused, ought to succeed in his appeal.

[34] The appellant had prayed that should his appeal be allowed; the matter be remitted to the High Court to be heard by another judge and to be accorded priority. We do not think that it is

proper in the circumstances of this case or this court to interfere with the discretionary power of the Chief Justice in that way.

Order:

[35] The order of the High Court is set aside and substituted with the following:

- (i) Appeal is allowed
- (ii) The application for condonation for late filing of the appeal is granted.
- (iii) That the matter be remitted to the Court a quo to be dealt with *de novo* before a different Judge.
- (iv) That the appellant is granted leave to file his answering affidavit.
- (v) Costs of the appeal are awarded to the appellant.



P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree



M. CHINHENGO

ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV. L.A. MOLATI

FOR RESONDENT: MR. T. MATOOANE