



**LESOTHO**

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
20/2023**

**C OF A (CIV)**

In the matter between-

**METSING JEREMIAH KHOETE**

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

**MAHLAHA MOEJANE M GERALD  
APPELLANT**

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

**MOTEAPHALA CASTON THAANYANE  
APPELLANT**

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

and

**HATA-BUTLE (PTY) LTD  
RESPONDENT**

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

**MOTEBELE PETER MABATHOANA  
RESPONDENT**

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

**CLARK MAFITOE  
RESPONDENT**

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

**KUTLO MOROJELE  
RESPONDENT**

**4<sup>TH</sup>**

**YU QUANG  
RESPONDENT**

**5<sup>TH</sup>**

**BAFANG (PTY) LTD  
RESPONDENT**

**6<sup>TH</sup>**

**THE COMMISSIONER OF POLICE  
RESPONDENT**

**7<sup>TH</sup>**

**O/C ROMA POLICE STATION  
RESPONDENT**

**8<sup>TH</sup>**

**REGISTRAR OF COMPANIES  
RESPONDENT**

**9<sup>TH</sup>**

**ATTORNEY GENERAL  
RESPONDENT**

**10<sup>TH</sup>**

**CORAM:** DAMASEB AJA  
CHINHENGO AJA  
BANYANE AJA

**HEARD:** 13 OCTOBER 2023

**DELIVERED:** 17 NOVEMBER 2023

### **SUMMARY**

*In application for interim and final relief involving two parties concerning exercise of right to lease premises and to receive rental from building complex, ownership of which has not been resolved, High Court granting interim relief interdicting respondent in that court from leasing any portion of complex or collecting rent from tenants thereon either by himself or through persons acting as his agents or under his authority; interim order disobeyed by respondent and/or his agents or persons acting under his authority, two of whom had entered into sublease agreements with third parties;*

*Application lodged in High Court for respondent therein and those who entered into sublease agreements as sublessors to be found in contempt of interim order; Court finding respondent and two sublessors guilty of contempt of court;*

*On appeal 'contemnors' filing record of proceedings and condonation for filing of same out of time; further filing heads of argument out of time without applying for condonation; 'contemnors' also failing to provide security for costs and eventually entering security in an amount determined by themselves;*

*Held: non-compliance with rules of court egregious and appeal accordingly struck off the roll with costs.*

## **JUDGMENT**

### **CHINHENGO AJA:-**

#### **Introduction**

[1] This appeal is replete with irregularities touching on non-compliance with rules of court that impel this Court to accede to the 1<sup>st</sup> respondent's prayer to strike the appeal off the roll. I refer to 1<sup>st</sup> respondent as "the respondent" throughout this judgment because the other respondents are not involved in this appeal at all.

[2] There are two reasons for the respondent moving to strike off this appeal. The first is the appellants' failure to file the record of proceedings and heads of argument in time. The second is the appellants' failure to enter security for costs before setting down the appeal and only furnishing some security for costs in an amount that the appellants determined by themselves to be adequate. Before dealing with these two

issues, it is necessary to set out what this case is all about by way of background.

## **Background**

[3] The High Court (Chaka-Makhooane J) made an interim order on 27 March 2017, which has given birth to this appeal. The order appears at the end of her judgment and reads:

*“(a) Prayer 2 is referred to the hearing of oral evidence.*

*(b) Prayer 3 in the notice of motion is granted to operate as interim relief with immediate effect.*

*(c) Costs shall be costs in the cause.”*

[4] The reliefs sought in the notice of motion referred to in the interim court order are not reproduced in the judgment itself. To know what exactly the interim order provides one must look at the notice of motion and the order later prepared by the registrar of the court for the judge’s signature.

[5] In my view the formulation of an order in the way done by the learned judge at the end of her judgment falls short of what a well-prepared order should contain or look like. A judicial officer must draw up his or her order in specific terms and incorporate it in his or her judgment as the last, self-contained, paragraph thereof. That will enable the parties to readily see the terms of the order without having to read the notice of motion or the whole judgment. A sound re-wording of a draft court order by the judge making it helps to clear any

imperfections that the draft order appearing in the notice of motion may have. It is quite frustrating to have to peruse a record of proceedings to get a clear understanding of the order when the operative part of a judgment is all that is needed show what relief was granted by the court. The order prepared by the registrar and counter-signed by the judge still contains, as part thereof, a paragraph that *“Prayer 2 is referred for oral evidence”*.

[6] The interim order granted by the learned judge affected two parties only – the appellant and the respondent. They were the only two parties to the proceedings before her. The other appellants and respondents in this appeal were not parties to those proceedings.

[7] The interim relief, as appears in the order prepared by the registrar, is that:

1. *The rules prescribing service and time limits are dispensed with and this application shall be treated as an urgent application.*
2. *Prayer 2 is referred for oral evidence.*
3. *The Respondent is directed, either personally or in his representative capacity or through his agents or persons acting under his authority or through "Hata-Butle" as his alter ego be interdicted and restrained from occupying and or letting out premises at the Hata-Butle Centre, Roma, Maseru, presently occupied by Pep Stores (Pty) Ltd to any third party in any manner whatsoever.*
4. *The Respondent is interdicted and restrained, either personally or in his representative capacity or through his agents or persons acting under his authority or through "Hata-Butle" as his alter ego from entering into an*

*agreement regarding the letting out and occupation of the premises at Hata-Butle Centre, Roma, Maseru.*

- 5. The Respondent is interdicted and restrained, either personally or in his representative capacity or through his principal or agent or persons acting under his authority or through "Hata-Butle" as his alter ego from contacting, communicating, or negotiating with any of the tenants and/or occupants of the shops of Hata-Butle Complex who entered into agreements with the Applicant then and there being represented by Du Preez Liebetrau & Co and who paid rental to Du Preez Liebetrau & Co in terms of written agreements of sublease.*
- 6. The Respondent is interdicted and restrained, either personally or in his representative capacity or through his agents or persons acting under his authority or through "Hata-Butle" as his alter ego from in any way negotiating, concluding or advertising agreements of sublease in respect of any premises or portion of Hata-Butle Centre, Roma, Maseru.*
- 7. That the above prayers are granted with immediate effect and operate as an Interim Court Orders. Costs to be costs in the course."*

[8] Prayer 2 was concerned with whether an act of spoliation had taken place in respect of the premises known as Hata-Butle Complex. It consists of shops and perhaps other spaces for leasing to would be tenants. The dispute between the respondent and the 1<sup>st</sup> appellant is over ownership or possession of the Complex. The respondent's position is that the owner of the Complex is either E.E. Hattingh or Bllinx (Pty) Ltd. E.E. Hattingh through Bllinx (Pty) Ltd apparently purchased all the shares in the respondent hence the contention that the respondent it is an entity owned by E.E. Hattingh or Bllinx (Pty) Ltd and can sue or be sued in its own name.

[9] The 1<sup>st</sup> appellant's position is that Hata-Butle (Pty) Ltd has not been purchased as alleged. He is a shareholder together with others and is entitled to deal with the Complex. In the words of respondent's counsel in the application before the High Court, 1<sup>st</sup> appellant holds himself out unlawfully as being a representative Hata-Butle (Pty) Ltd, an entity referred to in the affidavits as 1<sup>st</sup> appellant's *alter ego*." This explains why Prayer 2 in the application in the High Court sought an order directing the appellant –

*“either personally or in his representative capacity or through his agents or persons acting under his authority or through Hata-Butle (Pty) Ltd as his alter ego, to restore omnia ante possession and control of the premises occupied by Pep Stores (Pty) Ltd situate at Roma known as Hata-Butle Complex to Mr Steve Buys as legal representative and agent of Applicant by releasing the keys to the shop.”*

[10] It is the prayer that Chaka-Makhooane J referred for oral evidence. To note is that the ownership or lawful possession of the Complex is at the heart of the dispute between the parties and that dispute has not been resolved for years now. Its existence impels the respondent to use the words “Hata-Butle as his alter ego” in reference to the appellant. The entity Hata-Butle (Pty) Ltd is claimed by each side to be the vehicle through which it owns or controls the Complex.

[11] It must be emphasised that Chaka-Makhooane J's interim order placed the obligation of obeying that order squarely on the appellant. It was he who had to ensure that the interim order was not disobeyed by anyone acting on his behalf. The order was an order *in personam* and not *in rem*.

## **Contempt application and disposition thereof**

[12] The interim order was disobeyed, as alleged, not only by the appellant but also by other persons acting on his behalf. For instance, it is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants entered into sublease agreements with 5<sup>th</sup> and 6<sup>th</sup> respondents as cited in the contempt application. Consequently, the respondent approached the court *a quo* on urgency for an order of contempt of court on or about 2 December 2019. In the contempt application, finally disposed of by Kopo J, respondent cited the appellants and others as parties in that application. This, to my mind, was an attempt at some remedial work, to bring into the loop persons that respondent had missed out on in the application before Chaka-Makhooane J. The idea was to secure that they be bound by the contempt order and other new reliefs to be made by the Court at that stage. Respondent impliedly must have realised that those other persons were not covered by Makhooane J's interim order and could not, without more, be caught in the net together with the 1<sup>st</sup> appellant. They simply were not parties to the original application. What the respondent had failed to secure against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants and other respondents before Makhooane J, was now to be secured by an order of court of contempt accompanied by new reliefs directed at the other appellants as appears in the notice of motion in the application that eventually served before Kopo J.



[13] The notice of motion in the contempt application prays for an order -

*“1. Dispensing with all the rules of Court regulating service of process and time limits regarding thereto and directing that the application may be set down without complying with such rules;*

*2. Directing that the 1<sup>st</sup> to 7<sup>th</sup> Respondents to appear before this Honourable Court on a date and time to be determined by this Honourable Court to show cause why they should not be held in contempt of an order of the Honourable Justice Chaka-Makhooane dated the 27<sup>th</sup> of March 2017 and why they should not be dealt with accordingly;*

*3. Interdicting and restraining any of the Respondents to negotiate with or communicate with any of the occupants of the shops at Roma being the property of the Applicant and to threaten and/or to obstruct them from carrying on their business and pay rentals in terms of agreements with the Applicant;*

*4. Directing the 1<sup>st</sup> to 7<sup>th</sup> Respondents to report to this Honourable Court, within 7 days from date of service of this order upon them, jointly and in their personal capacities, and by detailed statement and account for all rentals recovered from the tenants of the Hata-Butle Complex after the 27<sup>th</sup> of March 2017 and to debate the accounts with the Applicant or its attorneys;*

*5. Directing that the 1<sup>st</sup> to 7<sup>th</sup> Respondents pay to the Applicant any amounts which may be found to be due in terms of such accounting, and releasing and handing over to the Applicant's attorneys all records accumulated in respect of contracts entered into by any one of the Respondents with a tenant at the Hata-Butle Complex;*

*6. To issue a notice to each of the tenants from whom any of the Respondents collected rentals, advising those tenants that 1<sup>st</sup> to 7<sup>th</sup> Respondent are not entitled to receive any rentals and authorize and agree thereto that rentals be paid to the agents of the Applicant as may be nominated and to hand the notices to the Applicant's attorneys to be distributed among the tenants;*

*7. Authorizing the Applicant to place notice boards at the premises of the Applicant at Roma advising the public not to*

*pay any rentals or enter into any agreements in respect of the complex with any of the 1<sup>st</sup> to 7<sup>th</sup> Respondents and allow the Applicant to display these notices for a period of 6 months;*

*8. Directing that an interim order be issued to operate with immediate effect in respect of paragraph 3 as an interim interdict operating with immediate effect pending the outcome of this application;*

*9. The 9<sup>th</sup> and 10<sup>th</sup> Respondents are directed to assist, protect and support the Applicant and deputy sheriffs in regard to the enforcement hereof; and*

*10. Granting such further and/or alternative relief as this Honourable Court may deem necessary in the circumstances; and*

*11. Directing that the 1<sup>st</sup> to 7<sup>th</sup> Respondents pay the costs of this application jointly and severally on the attorney and client scale.”*

[14] The orders sought this time around were against eight respondents (including the three appellants herein and enforcement agencies) unlike the interim order of 27 March 2017, which was against the 1<sup>st</sup> respondent only. It is apparent that only prayer 2 related to the contempt of court then under consideration. The rest of the prayers sought new reliefs against the other appellants so that, in the future, the too could be found in contempt of court should they disobey the orders. For reasons that need not be stated in this judgment in detail, the respondent contended that the interim order granted on 27 March 2017 was extant, and that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and others cited in the application were bound by it as 1<sup>st</sup> appellant’s agents and/or persons acting under his authority and or as his *alter ego*.<sup>1</sup>

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<sup>1</sup> Para 8.2 of founding affidavit

[15] It was submitted that the appellants and other persons were involved in litigation with the respondent in up to twenty other cases and thus embroiled in a multifaceted litigation mainly pitting the respondent against 1<sup>st</sup> appellant. In Makhooane J's judgment it is stated that as at that time there were at least ten pending cases involving the respondent and the 1<sup>st</sup> appellant. To me it seems that unless the Chief Justice gives directions that the question of rights of ownership in the Complex is decided finally, the saga relating to the Complex will be with us for years to come.

[16] It was averred against the three appellants and others that *"... notwithstanding the interim order referred to hereinbefore, or these proceedings, they continue to interfere with the affairs and business of the Applicant and to intimidate, threaten and bully tenants not controlled by them."* Thus, they were all cited for contempt of the order of 27 March 2017.

[17] In the answering affidavit, 1<sup>st</sup> appellant raised three dilatory pleas. The first was a plea of mis-joinder alleging that the Chaka-Makhooane J's interim order was directed only at him and not the other persons now made party to the contempt proceedings. This plea is not without substance. The second was a plea of *lis alibi pendens*, alleging that the respondent had instituted three other contempt proceedings under Case No. CC/0397/16 and Case No. CA/0022/17 based on Chaka-Makhooane J's order, which are pending in the High Court. The third was a plea of non-joinder alleging that the entity, Bllinx

(Pty) Ltd, said to be the sole shareholder of the respondent was not made a party to the application. The 1<sup>st</sup> appellant also stated that in Case No. CCT/0346/2016, E.E. Hattingh or Blinx (Pty) Ltd seeks to be declared the sole shareholder of Hata-Butle (Pty) Ltd, which means that ownership by respondent of the Complex has not yet been finally decided upon and the respondent cannot claim rights that EE Hattigh or Blinx (Pty) Ltd does not have.

[18] In relation to the merits of the order of contempt sought by the respondent, the 1<sup>st</sup> appellant's cryptic response was-

*"On record I have answered all allegations pertaining to the contempt allegation against myself and I herein incorporate such answer herein as the same application for contempt has been repeated."*

[19] Obviously the 1<sup>st</sup> appellant was referring to his averments in affidavits that he filed in relation to prior contempt proceedings. If his response is helpful, I cannot think of any that is not. He invited the court to have regard to the papers which he filed in the contempt proceedings in Case No. CC/0397/16 and Case No. CA/0022/17, a not so enviable task for any court. On that basis he prayed the court to dismiss the application with costs on a *"higher scale."*

[20] The 3<sup>rd</sup> appellant deposed to an answering affidavit for himself, the 2<sup>nd</sup> appellant and others cited in the application. The response is a replica of the 1<sup>st</sup> appellant's answering

affidavit, more or less word for word. In relation to that response, the learned judge *a quo* very appropriately commented:

*“The 1<sup>st</sup> to 5<sup>th</sup> respondents have taken an unusual approach in defending this matter. In attempting to plead over, they just averred that they have answered the contempt allegations previously as the record will show. This says the respondents (1<sup>st</sup> to 5<sup>th</sup> Respondents) are asking this court to look into the previous proceedings and take the averments therein and incorporate same in these proceedings. This is untenable.”*

### **Issues for decision before Kopo J**

[21] Apart from the issues of late filing of the record and heads of argument and the furnishing of an adequate amount as security for costs, the issue for decision in this appeal, as I see it, would be whether the 2<sup>nd</sup>, 3<sup>rd</sup> appellants and 5<sup>th</sup> respondent (Yu Quang) were in contempt of Chaka-Makhooane J’s interim order in circumstances where the interim order was made against the 1<sup>st</sup> appellant only, and intended to ensure that he would procure that anyone acting as his agent or with his authority, would obey that interim order. Kopo J correctly identified this issue in his judgment<sup>2</sup> where he says-

*“It is the case of the Applicant [respondent on appeal] that 2<sup>nd</sup> to 5<sup>th</sup> Respondents act for the 1<sup>st</sup> Respondent as his agents or under his authority. It is therefore a matter of evidence if indeed they do. It would be premature to conclude that they are wrongly joined before delving into the merits and investigating if indeed there is evidence or not. The order that the Applicant got was directed to the 1<sup>st</sup> Respondent, his agents, those acting under his authority and using Hata-Butle as their alter ego. It is therefore the Applicant's case that the 2<sup>nd</sup> to 6<sup>th</sup> Respondents are agents of the 1<sup>st</sup> Respondent. This is what the court must find out, and therefore it cannot rule*

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<sup>2</sup> Para [30]

*that they have been mis-joined before looking at the evidence and considering if it does prove that they were acting as the agents, or under the authority of 1<sup>st</sup> Respondent or using the name of Hata-Butle as their alter ego."*

[22] Kopo J correctly noted that the interim order was made against the 1<sup>st</sup> appellant only. Having so stated, he fell into the trap set for him by the respondent herein and viewed the interim order as also directed to, and personally binding on, agents or other persons acting on 1<sup>st</sup> appellant's instructions or authority. Once he took that bait, his approach was pre-ordained. He had, as he says, to be satisfied on the evidence adduced whether the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and others were 1<sup>st</sup> appellant's agents or acted on his authority. To me, once it was established that the interim order was directed at the 1<sup>st</sup> appellant only, the seemingly contemptuous conduct of anyone acting on his behalf became contemptuous conduct of the appellant himself. Thus, if it were established that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and others were 1<sup>st</sup> appellant's agents or acted on his behalf or on his instructions or authority, *cadit quaestio*: the appellant was himself in contempt of court and not anyone else.

[23] I think that any inquiry as to the role of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and others acting in apparent disobedience of the interim order was simply to provide the necessary link of 1<sup>st</sup> appellant to contemptuous conduct and nothing more: the conduct of agents or other persons acting on behalf of the 1<sup>st</sup> respondent could not by or of itself result in a finding that they were guilty of contempt in their own right. As earlier stated, the

interim order was an order *in personam* against the 1<sup>st</sup> appellant. It was him alone that had to ensure that the interim order was obeyed by himself and by anyone else associated with him.

### **Decision of Kopo J**

[24] The High Court was satisfied that the evidence as a whole proved that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants acted as agents of the 1<sup>st</sup> appellant or on his authority and that Yu Quang was also aware of the interim order and acted in contempt of it.

[25] I would have no difficulty accepting the judge *a quo*'s conclusion that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and Yu Quang acted as agents or under instruction of the 1<sup>st</sup> appellant. The judge reasoned that it could not possibly have been out of the blue that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and Yu Quang acted in the manner alleged against them without instruction from 1<sup>st</sup> appellant. No claim or right independent of the 1<sup>st</sup> appellant was shown to exist on their part as would have justified the conduct alleged against them.

[26] My point of departure from the judge's conclusion is simply that his conclusion does not warrant the further finding that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and Yu Quang were bound by the interim order in their personal capacities so as to find them in contempt of the interim order, which order was *in personam* against the 1<sup>st</sup> appellant. The crux of the matter, whether in relation the charge of contempt or in relation to accounting for

rentals and other ancillary matters raised in the respondent's application, is to understand or appreciate that the interim order, allegedly disobeyed by all and sundry, was directed against the 1<sup>st</sup> appellant only. If anyone acted for him or on his instructions or authority, it was the 1<sup>st</sup> appellant to bear the consequences of any disobedience of the interim order by whomsoever. The buck stopped with him.

[27] As can be seen from its application in the High Court, the respondent did not only seek an order of contempt against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and other persons, it also sought other reliefs as shown in the notice of motion. The judge *a quo* ably disposed of those other reliefs in these words:

*“Besides the prayer that the 1<sup>st</sup> to 7<sup>t</sup> respondents be held in contempt, the Applicant is seeking an interdict as shown in paragraph 2 above. The order granted against the 1<sup>st</sup> Respondent by Justice Chaka-Makhooane was interim and the proceedings in that matter were spoliation proceedings. The prayers in this matter ask of this court to grant an interdict that will have a permanent effect. Taking into consideration that there is an order that has already referred the spoliation proceedings to viva voce evidence due to a dispute of fact therein identified, an order interdicting the 1<sup>st</sup> to 6<sup>th</sup> Respondents herein will be on a collision course with the order by Justice Makhooane.”<sup>3</sup>*

[28] The learned judge accordingly did not make any orders restoring possession of the disputed premises to the respondent or interdicting 1<sup>st</sup> appellant from occupying or leasing the said premises to third parties or dealing with tenants in relation to the premises. He dismissed the application in respect of 4<sup>th</sup> to 6<sup>th</sup> respondents and made the

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<sup>3</sup> Para [45] of judgment



following orders, sought against the appellants and Yu Quang for the first time before him:

*“2. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 7<sup>th</sup> respondents (Yu Quang) are held in contempt and are directed to report to the 1<sup>st</sup> applicant within 7 days from the date of service of the order of this court, jointly in their personal capacities and by detailed statement and account for rentals recovered from the tenants by Hata-Butle (alter ego company) after 27<sup>th</sup> March 2017 and to debate the accounts with Applicant or his attorney.*

*3. 1<sup>st</sup>, 2<sup>nd</sup>, and 7<sup>th</sup> (Yu Quang) Respondents are directed to pay to the Applicant all amounts accumulated in respect of contracts entered into by any one of the Respondents with a tenant at Hata-Butle Complex.*

*4. 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents to pay costs of suit at attorney and client scale.*

*5. No order as to costs for 7<sup>th</sup> Respondent.”*

[29] These orders, in my view, contradict the orders denied to the appellants as stated at paragraph [45] of the judgment. They were new orders sought for the first time in the application. They were orders that should have been sought against all the appellants and Yu Quang, in the first place before Makhoane J.

### **Grounds of appeal**

[30] The appellants appealed against Kopo J’s orders on several grounds contending that he erred –

(a) in holding that the appellants are in contempt of court when the respondent failed to prove that 2<sup>nd</sup> and 3<sup>rd</sup> appellants had knowledge of the interim order and intentionally disobeyed it;

(b) in issuing an order *ad pecuniam solvendum* when the orders sought to be enforced were *ad factum praestandum*;

(c) by ignoring that the spoliation application in the main application had not yet been disposed of and, nevertheless, finding appellants liable to account to the respondent;

(d) by turning a blind eye to the fact that for the respondent to be entitled to the orders granted, it was supposed first to prove its entitlement to the premises: the spoliation application was yet to be decided and so the respondent had to prove ownership of the premises to be entitled to the orders, which it failed to do;

(e) in finding Yu Quang guilty of contempt when he only became aware of the interim orders through 1<sup>st</sup> appellant and at a much later stage;

(f) by failing to appreciate that the respondent's averment in the founding affidavit that it did not know the further and better particulars of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants meant that they could not have been agents of the 1<sup>st</sup> appellant or otherwise connected to him, more so in light of the court order to which they were not even parties;

(g) in finding that 1<sup>st</sup> appellant was in contempt of court when he did nothing against the interim order, and when the respondent "dismally" failed to connect the 1<sup>st</sup> appellant to 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

[31] Grounds of appeal (a), (e), (f) and (g) relate to the finding of contempt against the appellants and Yu Quang. The other grounds relate to the new orders tagged to the application for contempt.

[32] I think it is reasonably arguable that the learned judge was not correct in finding 2<sup>nd</sup> and 3<sup>rd</sup> appellants and Yu Quang in contempt of the interim order on the basis that they were not parties to the proceedings that gave rise to those orders and only the 1<sup>st</sup> appellant should be found in contempt of them. It is perhaps arguable that that the learned judge was correct in finding them in contempt of the interim order on the basis, as found by the judge *a quo*, that they were aware of the court

order and acted in defiance thereof at the behest of the 1<sup>st</sup> appellant. This would compel a compelling and incisive argument as to circumstances in which a person who is not a party to litigation may nonetheless be in contempt of a court order made in such litigation.

[33] Fortunately there is no need for this Court to finally resolve the issue whether or not the appellants and Yu Quang were in contempt of the interim order or whether the new relief tagged to the contempt application was to be granted. This is so because of the serious view this Court takes of the failure of the appellants to comply with the rules of court. I now return to consider the non-compliance.

### **Failures to comply with rules of Court**

[34] On 27 September 2023, respondent's legal representative sent a letter to the appellants' attorneys drawing their attention to a number of irregularities in the appeal. The letter was received on the following day as shown by the recipient's date stamp. The letter reads:

*"RE: METSING JEREMIAH KHOETE & 2 OTHERS V HATA-BUTLE (PTY) LTD & 9 OTHERS: C OF A (CIV) NO. 20/2023*

*The above matter refers, more especially your Record filed of record on 08<sup>th</sup> September 2023.*

*Having perused same, we have realised that the record is not in order more especially the founding affidavit in relation to the appeal.*

*Secondly, the record consists of papers which did not serve in the court a quo for purposes of the Contempt of Court proceedings, which can only comprise one volume.*

*Kindly attend to the rectification of same, failing which we will have no option but to apply for the striking off of the appeal on the basis of an erroneous record.*

*We have also realised that you only served your heads of argument on the 25<sup>th</sup> September 2023 a week later than the set deadline without applying for condonation for late filing. On this score also, kindly attend to this anomaly, failing which we will make an application for either dismissal or striking off of the appeal for non-compliance.*

*Lastly and since we have not taken the judgment into execution you should have filed security before filing the record in terms of the Court of Appeal Rules. You will agree with us that failure to file same is fatal to your appeal and we will also file an application for the dismissal of same on this ground also.*

*You will appreciate that we will not be filing our heads of argument until you would have rectified these issues.”*

[35] The appellants did not reply to the respondent’s letter. However, on 6 October 2023, they sent a letter to the registrar and copied to it to the respondent. In that letter they state:

*“Following the respondents’ letter dated the 27<sup>th</sup> of September 2023 complaining about the record we attended to it and kindly accept the new record as rectified.”*

[36] The new record of proceedings now comprises 2 volumes, vol.1 and vol 2. Volumes 3 and 4 are no longer part of the record. Some documents relevant to the appeal are found in the excluded volumes. The appellants applied for condonation of the late filing of the supposedly correct record on 12 October 2023. This was one court day before the scheduled day for the appeal to be heard.

[37] In the application for condonation, the appellants attributed their delay to everyone else except themselves. They noted the appeal on 8 March 2023. Thereafter they applied for a stay of execution of the judgment appealed from. The file was taken into possession by the judge who heard the stay application until 25 July 2023 when the stay application was dismissed. Realising that they were already out of time, appellants approached the registrar “to inquire if it was still permissible to file same after such three months.” They aver that the registrar answered them in the affirmative. They do not attach to their application an affidavit by the registrar confirming that he permitted them to file the record out of time. Is it not unusual that a legal practitioner would seek advice from the registrar as to the acceptability of a step that he takes?

[38] Having been permitted by the registrar as they allege, the appellants filed the record of proceedings on 8 September 2023. On 28 September 2023 they received the letter from the respondent’s attorneys dated 27 September 2023. They attended to filing the correct record. They averred that they believed that, in view of its letter of 27 September, the respondent would not object to the late filing. They further averred that had they not been given to believe that there would be no objection to the late filing of the record, they would have applied for condonation much earlier and within the time prescribed for such application. They contended that they have good prospects on appeal: the judge *a quo* was entirely wrong

in his finding that the appellants were guilty of contempt; the 1<sup>st</sup> appellant did not disobey the interim court order at all; the 2<sup>nd</sup> and 3<sup>rd</sup> respondent did not become aware of the interim order at any point in time; there was no evidence on record that 2<sup>nd</sup> and 3<sup>rd</sup> appellants were agents of 1<sup>st</sup> appellant; and the standard of proof applied by the judge *a quo* to establish contempt was wrong.

[39] It is to be noted that the appellants did not make any averments to show the *bona fides* of their application. They also did not address the other irregularities alleged by the respondent, namely the failure to apply for condonation of late filing of heads of argument and the failure to provide security for costs on time and in an adequate amount. The appellants also filed their heads of argument out of time and no application for condonation of that failure was made. They gave a brief explanation at the hearing. It was that they had to merge two sets of heads of argument and come up with one set, a lame excuse in my opinion.

[40] As earlier noted the appellants did not furnish security for costs before noting the appeal. When they did so they settled on the amount thereof on their own without consulting the registrar or the respondent as to the adequacy of the security.

[41] The respondent did not file its heads of argument in time because they believed that the irregularities that they had pointed out would inevitably result in the appeal being struck

off the roll. When respondent saw that the appellants had filed a condonation application for late filing of the heads of argument and furnished some security for costs, albeit late and not in terms of the rules of court, it applied, “out of an abundance of caution” for condonation for the late filing of its own heads of argument. The explanation was that due to appellants’ neglect or failure to comply with the rules, it anticipated a striking from the appeal. Its legal representatives had advised the appellants on two occasions that they would not file heads of argument, first in the letter of 27 September 2023 and at the roll call on 9 October 2023.

### **Rules of court not complied with**

[42] The problem with the filing of records of proceedings out of time and the contents of such records starts with litigants’ endemic disregard of Rule 5(1) of the Court of Appeal Rules 2006, especially the proviso thereto. The subrule is to the effect that-

*“The appellant shall, in every appeal, not later than three months after notice of appeal has been filed or the certificate of the Judge of the High Court has been filed, lodge with the Registrar seven copies of the record of the proceedings of the High Court and serve a copy of such record on each respondent:*

*Provided that by consent of all parties portions of the record which will not affect the result of the appeal may be omitted. The Court may, however, order that the full record shall be available: ....”*

[43] The rule contemplates that the parties will consult each other in good time on what papers or documents should be

contained in the record of proceedings. Most appellants now routinely file records of proceedings without consulting the other side or seeking the respondent's consent as envisaged in Rule 5(1). In many cases the record contains papers not relevant to the appeal. Some documents to be excluded from the record in terms of Rule 5(16) - argument and opening addresses, formal documents, discovery affidavits and similar documents, identical duplicates of documents, and documents not proved or admitted - are often included without regard to the rules and without any indication that the parties agreed that they should be included.

[44] I think that for the smooth implementation of Rule 5 of the Court of Appeal Rules it is now time that counsel for the parties be required to file a joint statement to the effect that they have consulted and agreed on the contents of the record. The certificate in terms of Rule 7 as to the correctness of the record required of appellant's counsel does not appear to serve its intended purpose of ensuring that the record is proper in all respects.

[45] Security for costs is required under Rule 8(1), which provides that where the judgment appealed from in a civil matter has not been carried into execution by the respondent, the appellant shall, before lodging with the Registrar copies of the record, enter into security to the satisfaction of the Registrar for the respondent's costs of the appeal.



[46] Rule 9(1) and (3), respectively, require the appellant, not less than twenty-eight days before the date of the beginning of the session of the Court during which the appeal is to be heard, to file with the Registrar the heads of argument to be presented on appeal and the respondent to file heads of argument not later than fourteen days before the first day of the session of the Court.

[47] The rules of Court I have referred to are intended to enable the parties to prepare for an appeal in good time and to afford the judges of appeal a reasonable opportunity to familiarise themselves with the record and the written submissions. A failure to act in terms of the Rules not only adversely affects the smooth operation of the Court of Appeal but places all parties and the judges in a most unenviable position of having to deal with an appeal without adequate preparation.

[48] The session of the Court commenced on 10 October 2023. As shown above, the appellants filed the correct record of proceedings on 6 October 2023. It was placed before the judges on 7 October 2023 and served on the respondent on 9 October 2023. Security for costs was furnished on 12 October 2023 in an amount considered inadequate by the respondent. On its part, the respondent was constrained to file its heads of argument very late on 12 October 2023 and apply for condonation thereof a day before the appeal was heard on 13 October 2023. The appellants' failure to comply with the rules

placed the respondent in a position that it, inevitably, had to act out of time. Its delay is understandable.

[49] The rules I have referred to were not observed by the appellants. Theirs is an egregious disregard of the rules of this Court and lacking any reasonable excuse. They severally attributed their failure to other persons. None to themselves. I find their explanation for non-compliance wholly unsatisfactory. They would want this Court to accept their espousal of the registrar's alleged permission for them to file the record out of time as reasonable, unsupported as it is by any affidavit from that quarter. They would want this Court to accept their unfounded belief that the respondent was not going to pursue its remedies arising from the non-compliance. Appeals to this Court simply cannot be handled in this way.

[50] In *Smith v Ts'epong Proprietary Ltd*<sup>4</sup> this Court dealt extensively with a failure to comply with rules of court as regards delays in noting an appeal and applications for condonation thereof, same as has happened in the present appeal. The Court set out the proper approach in a condonation application:<sup>5</sup>

*"[28] A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the delay was not wilful. The court enjoys a very wide discretion. It is a matter of fairness to both sides. The condonation application must be bona fide, and applicant*

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<sup>4</sup> (C of A (CIV)22 of 2020) [2021] LSCA 11 (14 May 2021)

<sup>5</sup> The approach is amply supported by case authority referred to with approval by the Court – *Sello v Sello & Others* (C of A (CIV) No. 55/2021 [2012] LSCA 18 (27 April 2012); *Gumede v Road Accident Fund* 2007 (6) SA 304 (CPD) at 307D; *Koaho v Solicitor General* 1980 -1984 LAC 35 at 36-37

*must make a full and frank disclosure of all the relevant facts that led to the non-compliance. Every period of the delay must be explained and the application for condonation must be brought as soon as the non-compliance has become apparent, including setting out the prospects of success.*

[49] *The factors that the court will place in the scale whether or not to grant condonation will include:*

*'The degree of delay in approaching the court for condonation, the adequacy of the reasons advanced for such delay, the prospects of Applicant's success on appeal, and the Respondent's interest in the finality of the judgment.'*"

[51] From the portion of this judgment touching on the merits of the decision of the court *a quo*, it will be apparent that this Court might have been persuaded either way. That is now immaterial. I am constrained not to deal with the merits of the appeal because of appellants' disregard of the rules and the need to send an unequivocal message to litigants and their legal representatives that this Court requires them to act responsibly and comply with the rules of Court meticulously unless they can show good and sufficient cause for not doing so. Parties are not entitled to assume that the Court will hear an appeal because of its importance to one or other of the parties or both, even where there has been a blatant or flagrant disregard of the rules. It cannot be taken for granted that the Court will invariably grant condonation. In *Smith v Ts'epong*<sup>6</sup>, the court stated, unequivocally, that while prospects on appeal are generally considered in an application for condonation, they may recede to the background and the application dismissed if the breach of the rules is flagrant or gross: if the delay is inordinate and unsatisfactorily explained the prospects on appeal become immaterial. In this regard the Court referred to

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<sup>6</sup> Paras [30]-[34]

case authority to the same effect - *Moosa and Others v Lesotho Revenue Authority*<sup>7</sup>; *Tshivhase Royal Council and Another v Tshivhase and Another*<sup>8</sup>; *Darries v Sheriff Magistrate's Court, Wynberg and Another*<sup>9</sup> and *Saloojee and Another NNO v Minister of Community Development*.<sup>10</sup> The passage we quoted from from *Darries* is particularly apposite:

*“Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with the rules apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant’s attorney that condonation will be granted. In applications of this sort, the applicant’s prospects of success are generally an important though not decisive consideration. When application is made for condonation, it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant’s prospects of success. But the appellant’s prospects of success is but one of the factors relevant to the exercise of the court’s discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the rules has been flagrant or gross an application for condonation should not be granted, whatever the prospects of success might be.”*

[52] It is for these reasons that I think the irregularities immanent in appellant’s appeal, late filing the record of appeal and application for condonation thereof, failure to apply for condonation of late filing of heads of argument, and failure to provide security for costs as required by the rules - should not be condoned. The condonation applications must be dismissed,

<sup>7</sup> (C of A) (CIV) 2/2014 [2015] LSCA 36 (06 November 2015)

<sup>8</sup> [1992] ZASCA 185; 1992 (4) SA 852 (AD) at 859E-F

<sup>9</sup> [1998] ZASCA 18; 1998 (3) SA 34 (SCA) at 40H-41E

<sup>10</sup> 1965 (2) SA 135 (A)

and the appeal struck off the roll. The result is that the appeal is not considered on the merits.

[53] I think a part of the problems around the filing, late or just before the hearing of an appeal, partly emanates from Rule 15 of this Court's rules. The Court discussed the implications of the rule and its implementation in *Smith v Ts'epong* and whether it is a licence for an applicant for condonation to lodge such application not less than 7 days before the date of hearing of the appeal, as possibly envisaged by subrule 15(3).

[54] It is critically important to understand that the substantive and operative procedure for bringing an appeal to the Court of Appeal is set out in Rule 4 (requiring a notice of appeal to be lodged within 6 weeks of the order appealed from and if leave has been sought and granted within 3 weeks of such grant); Rule 5 (requiring the record of proceedings to be lodged not later than three months after the notice of appeal otherwise the appeal lapses); Rule 9 (requiring appellant to file heads of argument at least twenty-eight days before the hearing of the appeal and the respondent at least 14 before then); and Rule 10 (on powers of the President of the Court or a judge designated by him, to extend or reduce any prescribed time periods for compliance, condone any non-compliance with the rules and give directions on matters of practice, procedure and disposal of an appeal). These are the operative rules or procedures for lodging appeals.

[55] Rule 15 provides in subrule (1) that if the appellant breaches any of the rules, his appeal may be struck off the roll as a general rule. Subrules 15(2) and (3) give the Court a discretion to condone any breach by the appellant on application by notice of motion delivered to the respondent not less than seven days before the date of hearing of the appeal. If the respondent breaches the rules, he may, in terms of subrule 15(7) be prevented by the Court from appearing to oppose the appeal. In my opinion, Rule 15 is of very restricted application and can be resorted to only in exceptional circumstances where a breach has suddenly become apparent. It is not designed to be used or resorted to in disregard of Rules 4, 5, and 9. Non-compliance with prescribed time periods for noting an appeal, lodging the record, or applying for condonation as provided in Rules 4, 5, and 9 are to be excluded from the scope of Rule 15.

[56] It seems to me that in this jurisdiction where appeals are heard twice a year, it would be ideal for the President or a judge designated by him, to fix dates before the Court session begins or well before that, for him or designated judge to deal with applications for late noting of appeals, applications for condonation of failure to lodge records of proceedings and to file heads of argument and other breaches of the rules. As an example, if an appellant is out of time to lodge his notice of appeal in April and wishes the appeal to be heard in October session, he must apply for condonation and the court must decide the application so that the appellant is able to meet the timelines for filing the record and heads of argument in time,

rather than wait until the session begins to have the condonation application determined. This is why in *Smith v Tse'pong Damaseb AJA* observed –

*“[61] Condonation is not a right but an indulgence which the court grants on good cause shown. It is elementary that condonation must be sought as soon as the non-compliance becomes apparent. It is an abuse of the process of the court to wait for eight months and apply for condonation seven days before the hearing of an appeal when it was reasonably possible to do so much earlier. Worst still, where there is no satisfactory explanation for why the applicant for condonation waited for as long as it did before seeking condonation.*

...

*[64] ... this court's roll makes provision for hearing interlocutory motions as contemplated in Rule 18 of the Court of Appeal Rules before the roll call of the set down appeals. In other words the Court's preference is to dispose of interlocutory motions before the matter is heard on the merits. In that way the court's time is not wasted by entertaining interlocutory skirmishes when the focus must be on the merits of the matter.”*

[57] As foreshadowed in paragraph 50 of this judgment, appellants' application condonation for non-compliance with the rules must be refused. First appellant's failure to apply for condonation for late filing of heads of argument is not condoned and so also is the appellants' failure to furnish security for costs in terms of the rules.

### **Order**

[58] Accordingly, it is ordered that the appeal be and is hereby struck off the roll with costs to be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants, jointly and severally, the one paying the others to be absolved.

*M H Chinhengo*

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**M H CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

I agree



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

I agree



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**P BANYANE**  
**ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANTS:**

Adv J K Metsing

**FOR THE 1<sup>ST</sup> RESPONDENT:**

Adv T Mpaka