



LESOTHO

IN THE APPEAL OF COURT OF LESOTHO

**HELD AT MASERU
24/2023**

C OF A (CIV) NO.:

CIN/APN/225/2020

In the matter between:

**MAMPHAPHATHI KATISO
NKOEBE KATISO
APPELLANT**

**1ST APPELLANT
2ND**

AND

NTSEBO KATISO RESPONDENT	1ST
NINIKO KATISO RESPONDENT	2ND
MASTER OF THE HIGH COURT RESPONDENT	3RD
LITJOTJELA MALL (PTY) LTD RESPONDENT	4TH
THE REGISTRAR OF COMPANIES RESPONDENT	5TH
ATTORNEY GENERAL RESPONDENT	6TH

CORAM: P.T DAMASEB AJA

M. CHINENGO AJA
J VAN DER WESTHUIZEN AJA

HEARD: 16 OCTOBER 2023
DELIVERED: 17 NOVEMBER 2023

SUMMARY

Whether the High Court has jurisdiction to grant condonation for late reporting of a death as required by s 13 of the Administration of Estates Proclamation 1935. Held it does and the question whether Master of the High Court has similar power left open.

JUDGMENT

PT Damaseb AJA

Introduction

[1] The present is an appeal against a judgment and order of Makheta J handed down on 9 February 2023 granting the first and second respondents:

“1. Condonation of late filing of the Death Notice in terms of section 13 of the Administration of Estates Proclamation for the estate of the late Masupha Katiso . . .

2. Each party to bear its own costs”

Legislative backdrop

[2] Section 13 (1) of the Administration of Estates Proclamation 19 of 1935 (the Proclamation) states:

“Whenever any person dies within [Lesotho] leaving therein any property or a will, the nearest relative or connection of the deceased, or in default of any such near relative or connection, the person who at or immediately after the death has the control of the premises at which the death occurs, shall within fourteen days thereafter cause a notice, of death to be framed [in prescribed form], and shall cause that notice, signed by himself [or herself], to be delivered or transmitted -

(a) If the death occurs in the district wherein the office of the Master is situate, to the Master; or

(b) If the death occurs in any other district, to the District Commissioner of that district . . .”

[3] In terms of s 110 of the Proclamation, a person who fails to comply with the provisions of s 13 is liable on conviction to a fine or, on default of payment, to imprisonment for period not exceeding three months.

Common cause facts

[4] The late Mr Masupha Katiso (the patriarch) died in 1995. Upon his death, his son, Katiso Katiso (KK) who is also since deceased, took over control of the patriarch’s estate - apparently without complying with s 13 of the Proclamation. After having taken control of what appears to be a substantial estate of the patriarch, the late KK financially supported his siblings (the patriarch’s children including the first and second respondents) from the patriarch’s estate. The estate included

rentals received from fixed properties and shares in a company.

[5] KK died in October 2020 without finalising the estate of the patriarch. Disputes then arose between KK's heirs (first and second appellants) and KK's siblings including first and second respondents (Ntsebo Katiso and Niniko Katiso) who were respectively first and second applicants *a quo*.

[6] In or about August 2021, Ntsebo and Niniko approached the High Court seeking the following orders:

“1. Granting the Applicants leave to report death of their father, Masupha Ernest Katiso to the Master of the High Court out of time.

2. Ordering the 3rd Respondent to refrain from collecting rentals from the Estate property of the late Masupha Katiso pending finalization of matter.

3. Ordering the Master of the High Court to take control of the property of the late Masupha Katiso and appoint a Curator Bonis who shall collect the rentals from Estate's renting property at Hlotse.

4. Ordering the 4th Respondent [to desist] from paying dividends or any other benefits to the 2nd Respondent pending finalization of matter.

5. Ordering the 2nd and 3rd Respondents [to desist] from interfering with the property of the late Masupha Katiso pending finalization of this matter.

6. Costs of suit in the event of opposition.

[7] In that application the duo cited, amongst others, the Master of the High Court, KK's widow (Mamphaphathi), and Nkoebe who is the son of the union between KK and Mamphaphathi.

[8] In their application Ntsebo alleged (on behalf of herself and Niniko) that after KK's Mamphaphathi, and his son, Nkoebe, denied them any benefits from the patriarch's estate and refused to cooperate with them to finalise the patriarch's estate. She added that she also then realised that KK had not reported the patriarch's estate to the Master of the High Court.

[9] According to the deponent, Nkoebe also refused to give her a copy of the patriarch's death certificate. She approached the Ministry of Home Affairs and obtained therefrom an original a duplicate copy of the patriarch's death certificate.

[10] One of the reasons she approached the High Court for was her suspicion that Nkoebe was busy dissipating the patriarch's estate and that the rest of the patriarch's heirs will not enjoy any benefit from the estate through inheritance.

[11] Through the late reporting of the patriarch's estate the applicants wanted Nkoebe and Mamphaphathi divested of

control over the patriarch's estate and that it be placed under the administration of the Master of the High Court.

[12] The application was opposed by amongst others Nkoebe and Mamphaphati.

[13] The Master who had been duly cited and served with the application for condonation filed of record a report in terms of Rule 8(19) of the High Court Rules. The Master records in that report that should the court grant condonation for the late reporting of the death of the patriarch, the master will make a determination whether KK's estate fell for administration "as a native estate or European estate".

The High Court

[14] The High Court correctly concluded that the only issue that was properly before it was condonation of the late reporting of the patriarch's death. As the learned judge said:

"[32] In the light of the above analysis this court cannot, until the Master has provided a report on a determination of the legal regime to be applied to the deceased estate, decide on any prayers sought by the Applicants in the Notice of Motion, except a prayer for the granting of condonation of late reporting of their father's death as will be shown in the subsequent discussion. In terms of (g) above, it follows that once the Master has made a determination on

the legal regime applicable to the deceased estate, any of the parties who is not satisfied with the Master's determination is free to challenge it in this court. Where there is no challenge, it is clear then that the estate will be administered in accordance with the legal regime determined by the Master.

[44] The question whether the estate of the deceased Masupha is to be administered in terms of the customary law or European civil law is dependent upon a prior determination by the Master of the High Court as to the mode of life led by the deceased. The first step is to report the death to the Master, followed by her determination of the legal regime applicable to the deceased estate. The granting of condonation will facilitate the Master's determination of the legal regime applicable to the deceased estate.

[45] if any of the parties is not satisfied with the Master's determination, they can challenge the determination in this court. Until then, this court has no jurisdiction to determine the Applicants' prayers sought, which are based on Applicants' own determination of the legal regime applicable to the deceased estate."

[15] That is a correct statement of the law¹.

[16] The High Court was satisfied that the death of the patriarch was never reported to the Master and that without the death being reported the master's jurisdiction is not engaged.

¹ See this Court's judgment in *Bereng Molopo v Nkoebe Molopo and others C of A (CIV) no. 46/2020 CIV APN/358/2018*

[17] As regards the relief seeking condonation for the late reporting of the patriarch's death, the court *a quo* held that there is 'no bar' to the applicants reporting the patriarch's death late. According to the learned judge *a quo*, the fact that the failure to report a death attracts criminal sanction necessitates such relief.

[18] The court *a quo* rejected the respondents' assertion in opposition to the relief that the patriarch's estate did not fall under the Master's jurisdiction because it was, according to the respondents, a customary estate. For that conclusion, the court *a quo* relied on this court's dicta in *Bereng Molopo* (*supra*, *fn* 1) where the following is stated:

"[28] (d) The question whether a Mosotho abandoned tribal custom or married under European law is one to be decided by the Master;

(e) Once the Master decides that a deceased Mosotho abandoned tribal customs or married under European law, the estate is to be administered in terms of the 1935 Proclamation.

(f) If the Master decides that a Mosotho had not abandoned tribal customs or did not marry under European law, the estate is to be administered under customary law.

(g) Either decision under (d) and (f) can be challenged in the High Court.

[29] It follows that if the Master decides that a Mosotho's estate falls to be administered under the 1935 Proclamation, its

provisions apply both as to the administration machinery (such as the appointment of an executor) and the rights to inheritance.”

The appeal

[19] Mamphaphathi and Nkoebe assert in their grounds of appeal that:

- (a) The Master, not the High Court, has the jurisdiction (within its ‘administrative duties and quasi-judicial functions’) to grant condonation for the late reporting of a death as required by s 13 of the proclamation;
- (b) Having dismissed most of the relief sought by the applicants, the court *a quo* misdirected itself in not granting costs to the respondents as they were the successful party.

Discussion

[20] In *Bereng Molapo* this Court approved an order of the High Court granting condonation for the late reporting of the death of a person over whose estate there was a family dispute. In that case too it was suggested that the court lacked jurisdiction to grant such an order. In *Bereng Molapo* the issue was not specifically raised whether only the Master of the High Court has jurisdiction – to the exclusion of the High Court – to condone the late reporting of a death. That said, *Bereng Molapo* is authority for the proposition that it is permissible for a party to approach the High Court to grant

him or her condonation to report a death late so that the jurisdiction of the Master is engaged.

[21] Just as it was in the case in *Bereng Molapo*, the applicants in the present case had no reason to assume that the death of the patriarch was not reported. The late KK to whom the present respondents are heirs failed to report the death. If anyone was guilty of a s 13 contravention it was KK. The present applicants only became aware that the patriarch's death went unreported by KK when disputes arose between them and KK's heirs.

[22] I entertain no doubt that, as a matter of law, in the exercise of its inherent jurisdiction the High Court has the competence to grant condonation of a late reporting of a death, especially in circumstances such as the present, where the person who took control of an estate, unbeknown to the rest of the next of kin, failed to report the death.

[23] Whether the Master too has jurisdiction to grant condonation remains an open question and one that it is not necessary to decide in this appeal as I am satisfied that the High Court acted within its inherent jurisdiction to do so. The ground of appeal that the court *a quo* erred in granting condonation therefore stands to be rejected.

[24] As regards the appeal against costs, I am satisfied that the High Court did not err in the costs order it made. I am aware that a salutary practice has evolved in Lesotho in cases involving family disputes over deceased estates that the High Court prefers not to order costs against the losing party and at times it has ordered costs to be paid from the estate. That does not mean that in deserving cases the practice cannot be departed from. Certainly, if a party acts most frivolously or vexatiously costs can be ordered against it.

[25] In the present case, the applicants and the respondents have serious disputes over the manner in which the estate of the patriarch - which remained unfinalised by the late KK - should be dealt with. It is apparent from the record that Nkoebe and his mother - as heirs to KK - are not particularly open with the applicants about the affairs of the estate of the patriarch. In fact, the stance adopted by the respondents, and rejected by the High Court, is that the patriarch's estate is to be distributed in terms of customary law. That issue can only be decided by the Master of the High Court. The rejection by the High Court of the respondents' argument on the most foundational issue when it comes to inheritance is therefore an important victory for the applicants.

[26] I am not persuaded that the High Court acted on wrong principle by refusing to make a costs order against the applicants - and the ground of appeal against that order is also destined to fail.

[27] I see no reason why on appeal costs should not follow the result.

Order

[28] In the result, I make the following order:

1. The appeal is dismissed, with costs.



P.T DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT:

ADV. L D MOLAPO

FOR THE RESPONDENT:

ADV. M LEPHATSA