LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 14/2023

C OF A (CIV) 21/2008

In the matter between:

MAKO MOHALE **1ST APPELLANT**

NTSUBISE MOHALE **2ND APPELLANT**

MANKHAHLE MOHALE **3RD APPELLANT**

MANTOLO MOHALE **4TH APPELLANT**

AND

THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS **1ST RESPONDENT**

THE MINISTER OF LOCAL GOVERNMENT AND CHIEFTAINSHIP AFFAIRS **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

THATO MOHALE **4TH RESPONDENT**

CORAM: DAMASEB, AJA
MUSONDA, AJA
VAN DER WESTHUIZEN, AJA

HEARD: 17 APRIL 2024

DELIVERED: 3 MAY 2024

SUMMARY

Condonation– Reasonable explanation for the delay – Judgment delivered in 2009 – Only explanation for delay is that the record could not be traced – No efforts have been made to reconstruct the record – There is no suggestion by the applicants that poverty, ignorance or some other limiting social factor prevented them from pursuing a challenge to the 2009 judgment of this Court –Condonation application refused – Application dismissed with costs.

JUDGMENT

P T Damaseb AJA

[1] In 1982, the Principal Chief of Tajane, Ponts'eng and Ramoetsane was Chief Nkhahle Mohale (hereafter the 'late Chief Nkhale').

[2] Some time before March 1982, the late Chief Nkahle was suspended from office. In the wake of that suspension a dispute arose before Rooney J (in or about March, 1982) as to who had the "first right" to succeed him and to be acting Chief – in terms of s 13 (4) of the Chieftainship Act 1968.

[3] In motion proceedings before Rooney J, the applicant was the wife of the late Chief Nkhale married to him under civil rights. The respondent was Mr Mopeli Mohale who, as Rooney J observed in the course of his judgment, handed down on 23 March, 1982 "claims to be the eldest son and heir' of the [late] chief by a subsequent marriage.

[4] In that case Mamonica sought the following relief:

> "*(a) Declaring Respondent Mopeli Posholi otherwise known as Mopeli Mohale not to be the legitimate son of Nkhahle Mohale within the meaning of section 10 (1) of he Chieftainship Act No.22 of 1968 as amended.*
>
> *(b) Declaring applicant Chieftainess ALICE 'MAMONICA MOHALE the sole wife of Chief Nkhahle Mohale to be her lawful successor in terms of Section 10 (4) of the Chieftainship Act No.* 22 of 1968 as amended.
>
> *(c) Directing the Respondent to pay the costs of this application."*

[5] Rooney J recorded that the respondent opposed 'the application and [prayed] that this court should declare him the legitimate child of Chief Nkhahle Mohale and his wife 'Mamopeli Mohale."

[6] According to Rooney J:

"There is no dispute about the essential facts in this case. On the 21st January, 2051, the applicant married chief Nkhahle Mohale in the Roman Catholic church at Mpharane in the district of Mohale's Hoek and the marriage was duly solemnised and registered in accordance with the provisions of he Marriage Proclamation 1911. There was no issue of the marriage. Sometime during the year 1958, the Chief went through a form of customary marriage with the mother of the respondent. Bohali was paid and no question as to the validity of this marriage would have arisen were not for the fact that Chief Mohale was already married to the applicant under the Proclamation. It is said (and I have no reason to disbelieve it) that the purpose of the second marriage was to raise male issue so that there could be a successor to the Chieftainship."

[7] Rooney J held:

"In the present case the customary union which followed a civil rites marriage, does conflict with the common law which recognises only monogamous civil marriage.

. . .

Though it is not necessary to have the void customary marriage formally annulled, either party to it may, because a proper customary union is recognised in Lesotho, approach the Court to have it declared a nullity. Such a declaration does not change the status of the parties, but merely places on record that they are not married to each other."

. . .

I therefore, must conclude that the purported customary marriage between the respondent's mother and applicant's husband is likewise null and void ab inito".

[8] The learned judge went on to say:

"Mr Sello for the respondent nonetheless contended that because the customary marriage was entered into in good faith by at least the applicant's mother it should be regarded in law as a putative marriage the children of which would be legitimate. The difficulty that I have in deciding his question one way or the other arises from the fact that other persons besides the parties to these proceedings may have an interest in this matter and they have neither been identified nor joined as parties.

*The respondent,who is married man, has not previously sought from this Court a declaration that he is legitimate. Prima Facie, children of a void marriage are illegitimate (I**saacs A.J. in Thoka v Hoohlo CIV/T/29/77** unreported). That is the position in which the respondent stands today. Until he has established his legitimacy he can set up no rights of succession against the applicant.*

> *The respondent admitted that when his mother entered into the customary union with Chief Mohale, she was aware that the Chief was already married by civil rites to the applicant and that that marriage still subsisted. She could not have been unaware that a marriage contracted in a Roman Catholic Church was essentially a monogamous union. It would be difficult in the light of this to accept her assertion that "I have always bona fide believed that my marriage to the said Nkhahle Mohale is a lawful marriage." the allegation that the marriage was contracted with knowledge and blessings of the applicant, even if it were substantiated, does not take the matter any further."*

[9] Rooney J therefore granted prayers (b) and (c) of the notice of motion.

[10] Sometime in 2008, Mopeli and 'Mamopeli initiated an action in the High Court under *CIV/T/525/2004*, citing Tlali Mohale as the first defendant and the Attorney General as the second defendant.

[11] The first defendant is the legitimate son of the marriage between the late Chief Nkhale and 'Mamonica Mohale who was the applicant in the proceeding before Rooney J.

[12] In their declaration, the plaintiffs sought a declarator that 'Mopeli is the legitimate son of . . . [the late] Chief Nkhahle Mohale in terms of s 10 of the Chieftainship Act of 1968."

[13] The plaintiff's declaration alleged:

" In or about 1958 the 2nd plaintiff entered into a customary marriage with the late Chief Nkhahe Mohale.

5.

The marriage was entered into in compliance with the prescribed ceremonies inasmuch as;

i. The said Nkhahle and he second plaintiff agreed to get married to each other.

ii. The parents (or those in loco parentis) of the *second plaintiff and he said Nkhahle agreed that the said 2nd plaintiff and Nkhahle should* get *married.*

iii. The parents (ore those in loco parentis) of Nkhahle and 2nd plaintiff agreed on a quantum of bohali and at least part of bohali was paid.

6.

The 2nd plaintiff contracted the said marriage in good faith inasmuch as at the time of the marriage, the second plaintiff was ignorant that the said Nkhahle had contracted his subsisting previous marriage, first customarily and later went through civil rites ceremonies of marriage. She was therefore ignorant of the impediment (s) to their marriage.

7.

The mistake by 2nd plaintiff was reasonable inasmuch as she was neither informed nor was she aware of the previous subsisting civil marriage between the said Nkhahle and he late 'Mamonica.

8.

In CIV/APN/109/1981 in the judgement of the case between Mamonica Mohale and Mopeli Mohale it emerged that the said Nkhahle Mohale had on the 21st day of January 1951 married 2nd plaintiff by civil rites.

9.

Plaintiffs allege and submit that the said customary marriage between the said Nkhahle and 2nd plaintiff was putative.

10.

Plaintiffs allege further that the said Nkhahle and 2nd plaintiff begot children, in eldest of whom is 1st plaintiff. Plaintiffs allege that the 1st plaintiff is biologically the child of the sid Nkhahle Mohale.

11.

Plaintiffs allege consequently that the children born of he said marriage were legitimate.

12.

Plaintiffs allege that the 1st plaintiff is the legitimate son of he said Chief Nkhale Mohale, he being the biological son of he said Chief as afore-mentioned."

[14] Tlelai defended the action. The defence raised to the action by the plaintiffs was described as follows by Majara J in her judgment of 3 December 2008:

"Having filed a notice of intention to defend, 1st defendant filed his plea and in his averments contained therein, he raised the plea of res

> *judicata. It is his case that the issue of the customary marriage between 2nd plaintiff and the late Chief Nkhahle Mohale has already been decided both by his Court and the Subordinate Court of Mohale's Hoek. He added that this Court is now functus officio for the reason that it has already pronounced itself on this issue in* ***CIV/APN/109/81.*** *Although the plea of res judicata was not raised by way of a special plea, the parties through their respective counsel approached this Court,sought and were granted permission to address it on those points of law first. The Court directed them to prepare written submissions and file their heads of argument in that regard."*

[15] Majara J rejected the proposition made on behalf of the defendants that in 1982, Rooney J determined the legitimacy or otherwise of Mopeli. She correctly found that Rooney J "undoubtedly refrained from definitively deciding the question of the legitimacy of [Mopeli]" adding that all the learned judge stated was that on authority, children of a void marriage are *prima facie* illegitimate. In other words, that is the position until the contrary can be established.

[16] Majara J wrote:

> *"Mr Ntlhoki also made the submission that 1st plaintiff herein failed to take prompt action which factor leads to the dismissal of a claim where there is unreasonable delay and manifest prejudice to other parties. This end he referred this Court to the case of* ***Molapo vs Molefe LAC (2000 - 2004) 771 at 783 - 784*** *and that of* ***Khang v Mokuku Lac (2000 - 2004) 600*** *at* ***605****."*

[17] The learned judge continued:

> *"In the present case, the judgment of Rooney J which was never appealed and in which the 1st plaintiff herein was given the leeway to institute proceedings for a declarator that he is legitimate was delivered in 1982. He however only instituted the present action in 2004 after a period of twenty-two (22) years since the judgment was delivered in 1982. This is undoubtedly a very unreasonable delay especially given the fact that at some stage he did institute such an action, only to withdraw it before the matter could be determined thought I might add that his actions were already belated even at that time in the year 2000 almost nineteen (19) years later.*
>
> *In the meantime,he and 1st defendant herein engaged in lengthy litigation which dealt with lot of issues but that of legitimacy I find this quite strange to say the least. One would have thought that the 1st plaintiff would have taken advantage of the Judge's remarks in* ***CIV/APN/109/81*** *that; "until he has established his legitimacy he can set up no rights of succession against the applicant." For some unfathomable reason,he failed to do so but contented himself with litigation on every other issue but that crucial one.*
>
> *While the Court therein was specifically referring to matters that are brought on review, it is my opinion that the same principle is equally applicable to the present matter for the reason that it had already been placed before the Court and the 1st plaintiff had been advised to take action to have his status declared by a Court of law before he*

could even make other claims with respect to his rights of succession to the chieftainship of Pontseng. He failed to do so for a period spanning twenty-two (22) years.

It is my view that the resultant prejudice to the 1st defendant who has been placed and gazetted as the rightful person to take over the office which would be occasioned by such a delay cannot be disputed. It is my view that none can be blamed for coming to the conclusion that the 1st plaintiff herein had practically abandoned his right (if any) as a result of this delay. See also the Court's remarks on the issue of unconscionable delay in the case of ***Monyane v Manager of the Mafeteng LEC Primary School and Another LAC (2000 - 2004) p364 at 366 (C****).*

It is for the reason of the unreasonable delay that I find that 1st plaintiff's application ought to fail with costs and I accordingly so order."

[18] Majara J's judgment and order were appealed to this Court and the appeal was heard in March 2009 and judgment delivered on 9 April 2009 (Ramodibeli, P, Melunsky and Scott JAA). The Court came to the conclusion that it was a misdirection for Majara J to dispose of the matter on the basis of unreasonable delay as that issue was not properly before her.

[19] As this Court noted, the only issues before Majara J were *res judicata* and *functus officio*. This Court also concluded that it was

common cause that the plaintiffs (as appellants) were not given an opportunity to address the court *a quo* on the question of delay. The Court was therefore satisfied that the plaintiffs were "clearly prejudiced":

[20] According to Ramodibeli P:

> *" [11]As will be demonstrated shortly, this error on the part of the court a quo does not, however, dispose of the matter in the particular circumstances of this case."*
>
> *[12] We have now been told by the appellants' counsel what the reason for condonation of the delay in question would have been it they had been given an opportunity to address the issue in the court a quo. Basically, it is the applicants' contention that they could not institute any action on the issue of the first appellant's legitimacy as long as the Chief was alive. They contend that legitimacy and chieftainship go together. Hence they awaited the Chief's demise before taking further action. This contention is, in my view, untenable. There is no acceptable explanation why legitimacy and chieftainship should be tied together. The conclusion is inescapable, in my view, that the appellants' explanation is itself unreasonable.*
>
> *[13] It follows from the foregoing considerations that the appellants do not have an acceptable explanation for the inordinate delay in the matter. In the meantime, the parties are on common ground that the first respondent had already been gazetted as the Principal Chief of the area concerned. Int his regard it is convenient to repeat.*

[14] Weighing all of he foregoing considerations, it follows that the appeal cannot succeed. It is accordingly dismissed with costs".

The review

[21] On 24 August 2023, four individuals (first to fourth applicants) filed an originating application in this Court seeking to review the appeal decision of this Court taken on 9 April 2009. That is 14 years ago.

[22] The applicants for review are the children of Mopeli who are the grandchildren of Mamopeli. It will be recalled that Mopeli and Mamopeli were the plaintiffs' in the action before Majara J that culminated in the appeal to this Court finally determined in 2009.

[23] To achieve the objective of reviewing the 2009 judgment and order of this Court, the applicants in the first place seek an order to replace Mopeli and Mamopeli as 'appellants' in the 2009 appeal under C of A (CIV) 21/2008 (the first substitution relief).

[24] Next they seek an order that the fourth respondent (the son of the late Tlali who was the respondent in the 2008 suit before Majara J) be substituted as a party (in the place of his late father) in the 2009 appeal in this Court (the second substitution relief). With the substitution complete, if granted, the applicants ask this

Court to rescind and correct its 2009 decision that dismissed the appeal on the basis that it was unreasonably delayed.

[25] It may all sound confusing, but that is what is before us on this occasion: A request to correct a decision of this Court taken some 15 years ago.

[26] On the assumption that the substitutions are granted, the applicants seek the following substantive relief:

> *"3. That the judgment of this Honourable court in Mopeli Mohale and MaMopeli Mohale v Tlali Mohale and Attorney General C of A (CIV) 21/2008, reported 2009-2010 LAC 48 be and is hereby varied to the extent that it decided that Mopeli and MaMopeli Mohale, were precluded by delay to seek a declaratory order that the late Choef Mopeli was legitimate and the marriage between Mamopeli and Nkhale Mohale was putative.''*

The affidavit

[27] The founding affidavit is deposed to by the first applicant (hereafter Mako) with supporting affidavits by the rest of the applicants. Mako is the only son of the late Mopeli while the other applicants are his sisters, also children of the late Mopeli.

[28] Mako states that his father, Mopeli, is the son of the late Chief Nkhale – a hereditary chief in his lifetime. Mako states that

the late Chief Nkhale and his civil-law wife Mamonica had no male heir and only a daughter who is deceased. According to Mako, the late Chief Nkhale 'married' Mamopeli for the 'sole purpose . . . that he could produce an heir to the chieftainship of Nkhale Mohale'.

[29] Mako then recalls the order of Rooney J that declared 'the marriage of Mamopeli' to the late Chief nul and void but maintains that the *'issue of legitimacy . . . does not always depend on the validity of the marriage and that an invalid yet putative marriage has consequences of producing legitimate children.'*

[30] Mako adds:

> "*I am leggaly advised that the judgment of Rooney J did not foreclose the determination of the issue of putativity of the marriage between Nkhale and Mamopeli, but left it open on the basis that it would be incompetent to decide it when not all the interested parties were befor court'. Since it was not taken on appeal, Mako stats, the 'decision of Rooney J is 'correct and binding".*

[31] Mako says that his late father Mopeli made attempts to seek a declaration of legitimacy from the courts and this finally failed in 2009 with the decision of the Court of Appeal 'which we are seeking to rescind in this matter'.

[32] Mako avers that the fact that the late Chief Nkhale married Mamopeli in order to bear him a male issue is ‘under customary law…a legitimate and lawful reason for marriage of a surrogate/deputy wife (mala)’. And that: ‘’The probabilities therefore favour the conclusion that the late ‘Mamopeli and Nkhale were bona fide in contracting the second marriage in accordance with customary law for the legitimate purpose of raising a seed for the office of chieftainship’.

[33] According to Mako:

> *“The effect of the decision in the judgment of this court in 2008 is that all applicants in this matter, the siblings of my father, and their children are excluded from asserting their status in a court of law by reason of delay, whether or not we could claim any consequential relief based on such declaration.’ He maintains that, as confirmed by this Court in 2009, ‘legitimacy and chieftainship in the context of my father were separable.”*

[34] Mako states that the 2009 judgement of this Court prejudiced him and his siblings in violation of ss 18 and 19 of the Constitution, because that judgment has the effect of preventing the applicants from claiming their constitutional rights and that it is in the interest of justice that the judgment be rescinded.

[35] As to the timing of the application, Mako makes the following allegation:

> *"I have been looking in vain for the record of pleadings that my father had filed leading up to the appeal to this honourable court where he was asserting his legitimacy. I could not find those records in the High Court and in this court. I also tried to find those records from the lawyers that represented my father and could not find it there as well. My lawyers also tried to obtain the records of pleadings from the lawyers that represented the father of the fourth respondent to no avail. It has been my hope that I would be able to place those pleadings before this honourable court and I strongly believed that such pleadings would assist the honourable court in arriving as a decision in my favour. The long years of searching for these records have contributed to the present delay in bringing this application and I ask this honourable court to condone such delay. I am legally advised a verily believe that the issue of the status of an individual is such that it should be subjected to the rules of prescription because status may be asserted at anytime of one's natural life which could run into decades."*

Opposition

[36] The fourth respondent opposed the application and filed an answering affidavit. He starts off by accepting that after Rooney J's judgment in 1982, Mopeli and Mamopeli were 'never prevented from proving the legitimacy of Mopeli Mohale'.

[37] The deponent goes on to state that no facts have been pleaded by the applicants to support a declaration of a putative marriage. He adds:

> *“Some of the facts I know, while some of the facts I do not know. As the facts are historical and First Applicant is repeating as hearsay (sic), I do not wish to go into them. Furthermore, I wish to add that because of the inordinate delay my witnesses died to my great prejudice.”*

[38] Since at this stage the applicants do not seek a declaration of legitimacy arising from the alleged ‘’putative marriage’’ between the late Chief Nkhale and the late Mamopeli, I find it unnecessary to traverse the rebuttals by the fourth respondent on the factual averments made by the applicants in support of the putativity claim.

[39] The core issue in this application is whether the applicants have made out a case to be allowed to ‘rescind’ or ‘correct’ the 2009 judgment of this Court. In so far as that issue is concerened, the fourth respondent has stated that there has been an inordinate delay. He also claims that the delay has prejudiced him in that people he could have relied on as witnesses to resist the putativity claim have since died.

[40] It is a reasobnable inference that he also feels prejudiced by the incessant litigation that he has been subjected to by the first

applicant and Mopeli relying on Mopeli's birth to the late Chief Nkhale. It is common cause that the facts that underpin the legitimacy cause of action and that of the chieftainship are the same: Mopeli's birth to the late Chief Nkhale. That much has been clear since the judgment of Rooney J in 1982. Yet every litigation by Mopeli and his offspring since then only concerned the chieftainship claim and not that of legitimacy.

[41] As the fourth respondent states in his answering affidavit:

> *"6.4 Mopeli and or the First Applicant had been pursuiong unsuccessful succession claims against my father, Tlali Mohale, and later myself... When he realized he has not paid my ...costs in CIV/A/08/2016, he avoided the High Court and irregularly brought this matter in the Court of Appeal which has no jurisdiction in matters such as this one. He is burdening me with heavy legal fees by instituting legal proceedings with no reasonable prospects of success."*

[42] It is trite that this Court has jurisdiction to review and correct its own decisions but only in exceptional circumstances such as where there is a patent error or a miscarriage of justice. As Mosito P put it in *Hippo Transport (Pty) Ltd and another v The Commissioner of Customs and Excise and another*:[1]

> *"This court can only exercise its review power in exceptional circumstances. This court will view circumstances as exceptional only*

[1] C of A (CIV) NO.: 06/2017 at para 22.

when gross injustice and or a patent error has occurred in the prior judgment. The power of this court to review its own decisions should therefore not be a disguised rehearing of the prior appeal. It is therefore not a disguised rehearing of the prior appeal, going over it with a fine comb for the re-determination of aspects of that judgment. It is therefore not done for purposes other than to correct a patent error and or grave injustice, realised only after the judgment had been handed down."

[43] An application to review and correct a judgment and order of this Court is not had for the asking. A proper basis must be laid for it and this Court has a discretion in the matter, to be exercised judicially. Inordinate delay in pursuing the remedy may tilt the balance in favour of refusing the remedy.

The approach where there is unreasonable delay

[44] In my view, the principles to be applied where there has been a delay in seeking review and correction of a decision of this Court are broadly the same as the principles that apply at common law where there has been a delay to challenge administrative action.[2] Except, it must be added, that the application of the test would be more stringent where a decision of this Court is involved.

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[2] Generally see Hoexter C. (2007) *Administrative law in South Africa* Juta: Cape Town pp 532-534; Baxter (1984) *Administrative law* Juta Cape Town p 254-256 and a discussion of the principles in the following Namibian cases which in turn discuss the leading cases from South Africa: *Keya v Chief of the Defence Force & others* (SC) para 28, *China State Engineering Construction Corporation v Namibia Airports Company Ltd* (SA 28/2019) [2020] (7 May 2020) paras 67-69.

[45] As Mokgoro AJA said in *Lepule v Lepule* [3]

> *'[83] Based on its jurisdiction as the apex court, in the context of the principle of stare decisis and in view of the jurisprudential need for finality, certainty and the rule of law in any hierarchical court system, any matter dealt with and decided by an apex court, is of necessity final'*.

[46] Mr Teele KC for the applicants submitted that, implied in the notion of unreasonable delay, is that a party waived its rights. Counsel added that this being an assertion of status, unreasonable delay does not apply because status cannot be waived.

[47] I wish to make two points about that submission.

[48] The first is that it is not a basis on which this Court's earlier judgment was impugned. Secondly, the right asserted in the application is to review a judgment of this Court. That review must be brought within a reasonable time. It cannot be otherwise. If it was not stated previously, it needs to be stated now: Applications for review of this Court's earlier judgment must be brought within a reasonable time. The public interest in the integrity of the administration of justice and finality of litigation demand no less.

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[3] *Lepule v Lepule and others (*Cof A (CIV) No. 34/2014) para 75.

[49] It is in the public interest that litigants and the public act on the basis that judicial decisions (especially those of the apex Court) are final in effect. It undermines public interest in the fonality of litigation if a disappointed litigant is permitted to delay unreasonably in challenging a judicial decision of the apex Court which in any event can only be done exceptionally – and on the strength of which litigants directly involved may have arranged their affairs.

[50] Where, in legal proceedings, unreasonable delay becomes an issue, not only must there be a satisfactory explanation for the delay under oath but the errant party must also give a satisfactory explanation for every period during which there was inaction.

[51] Although prejudice if established will be a relevant consideration, it is not necessary to establish prejudice for a delay to be unreasonable.[4]

[52] It is important to point out that, where a step is necessary to enable a party to bring a review, it should be shown to have been necessary and reasonable.

[53] Where delay is found to be unreasobale, the Court may condone it, if there is a satisfactory explanation for the delay. The Court may raise the issue of unreasobale delay *mero motu* but

[4] *Floria v Minister of interior LAC* (1990-94) 462 EF.

subject to the parties being afforded the opportunity to address it on the issue. In fact, the Court is obliged, in the public interest, to consider whether the delay should be condoned.[5]

Law to the facts

[54] It is clear from the applicants' founding affidavit that they acknowledge a delay in pursuing the present application. They therefore seek condonation. The notice of motion does not include a prayer for condonation but the applicants in the founding affidavit seek such relief. The fourth respondent resists both the application and the condonation of its delayed pursuit.

[55] Counsel for the fourth respondent submits in the heads of argument that there is 'no explanation for this delay of 14 years in attempting to reopen his late father's case, that could justify the court in condoning this excessive delay'.

[56] After this Court's judgment in 2009, the applicants took no immediate steps to seek review. It is common cause that the review was only lodged in September 2024 – 14 years after this Court's 2009 judgment. The only explanation offered for that delay is that the applicant was looking for the record to be able to pursue the relief now sought.

[5] Compare: *Mamabolo v Rustenburg Regional Council* 2001 (1) SA 135 (SCA) at 141J.

[57] Two things concern me. The first is the absence of any explanation why no attempt was made to reconstruct the record by asking the Judge *a quo* to type out her notes, if they were available, and to ask counsel who appeared at the hearing for their recollection of events and documents in their possession to put together the jig-saw puzzle.

[58] The second is, if the record was considered critical to the pursuit of the review, how is it that after 14 years the present proceedings were launched without the record?

[59] The applicants offers no explanation whatsoever why in the first six months, for example, after the judgment of this Court in 2009, they did not bring the proceedings. To obtain the record within six months would not have been a problem at all. Why did they not bring this application within one year, two years or three years, for example? The deponent's bare assertion that he was looking for the record is no satisfactory answer to those questions.

[60] In my view, the one thing that a person intending to pursue an a review cannot do is to simply fold his or her arms and wait until one day the record surfaces miraculously. If the record cannot be found after diligent search, it must be reconstructed and all those who have or had some connection with the matter should be approached for assistance. If they refuse that must be

stated on affidavit in the proceedings seeking condonation such as in the present case.

[61] A comparison can be made with what happens in criminal matters when a record, or parts of it, cannot be traced.

[62] The High Court of Namibia set out the invariable practice as follows in *S v De Almeida*:

> *"[9] In this jurisdiction it seems that the usual method of re-construction followed is based on the old case of R v Wolmarans 1942 TPD 279 which has found favour in various Provinces in the Republic of South Africa as well. In the unreported judgment of Uanee Muundunjau and two others versus The State (High Court Case No. CA 20/94 delivered on 22/8/1994), Strydom, JP (as he then was), with whom Muller AJ (as he then was) concurred, followed the procedure as laid down in the Wolmarans case and in other cases such as S v Stevens 1981 (1) SA 864 (C) and S v Malope 1991 (1) SACR 458 (B).*
>
> *[10] This approach was in general re-affirmed in a later case of this Court, Stephanus B Tiboth versus The State (High Court Case No. CA 49/95, unreported judgment delivered on 4/12/1995 by Strydom JP (as he then was) and Frank J), in which the steps to be taken were set out as follows (at p3-4):*
>
> > "*(a) The Clerk of the Court is expected to submit to the Court of Appeal the best secondary evidence of the last record which he or she can find.*
> >
> > *.....*

(b) The Clerk of the Court must obtain affidavits to prove the loss of the record.

(c) The Clerk of the Court must obtain affidavits from witnesses and others who were present at the trial to prove the evidence which had been adduced.

(d) In addition the Clerk of the Court must prove the charge or other relevant parts of the proceedings in the same manner [i.e. by affidavit, if the charges and other parts of the proceedings, e.g. the pleas are missing].

(e) After the record has been reconstructed it must be furnished to the accused to establish whether he agrees therewith or not. The reaction of the accused must be confirmed by affidavit.

(f) Then a further affidavit must be obtained from the magistrate to confirm the correctness of the record so reconstructed.

To this list I would add another requirement, namely if it is not possible to reconstruct the record, this must also be stated on affidavit together with the reasons why it could not be so reconstructed. "

[63] I commend this approach in Lesotho.

[64] The notice of motion comprises only the founding affidavit and supporting affidavits and a one-page annexure ‘’Family Tree. It begs the question: Why was the application in that form not filed the moment it became apparent that the applicants are

experiencing difficulty obtaining the relevant documents that constituted the record of proceedings before Majara J? There is no explanation on the record by the applicants.

[65] Even if one were to give the applicants the benefit of the doubt that it was necessary that the record of proceedings before Majara J were necessary for the determination of the present review application, would it really have been a great obstacle to reconstruct the record in the matter that served before Majara J? I think not.

[66] The documents eventually filed by the applicants on 10 April 2024[6] (during the current session of this Court) consist soley of pleadings and a one-page 'witness statement'.

[67] It is common cause that no evidence was led before Majara J. The record therefore could not include evidence. The matter was adjudicated by Majara J on the basis of points *in limine*. The learned judge disposed of the matter on the basis of a legal objection to the action instituted by the applicants in 2008. The documents that were critical to the determination of the appeal by this subsequent to Majara J's judgment would be the summons with the declaration, the plea to the claim and the minutes of the

[6] Under cover of a notice of motion seeking condonation for the late filing of the record which it is said in a supporting affidavit: ''M'e 'Manapo who is the fromer Secretary of the late Justice Ramodibedi got to know that we were looking for that record and she remembered it. She promised to locate it.' And that: ''The old record was found only on the 7th of March 2024.''

pre-trial conference. The other documents would be redundant in view of the issue now before this Court.

[68] Why it would take 14 years to put together those foundational documents is not plausible nor reasonable. It is the sort of documents which would readily be in the possession of the legal practitioners that represented the parties.

[69] Besides, there is no suggestion that the judge who heard the matter (or indeed the registrar of the High Court or the Court of Appeal) were approached to ascertain what documents relating to the matter they had under their control. The applicants' founding affidavit is totally lacking in that respect. Reference is made to M' e 'Manapo who it is said was the Secretary to the President of this Court in 2009. She is still the Secretary to the current President. No explanation is offered why she was only contacted in March 2024.

[70] Another consideration that seems to support the inference of inordinate (inexcusable) delay is an issue the Court raised during oral argument. It has not been demonstrated to the Court what the legal impediment was for the applicants to bring proceedings during the lifetime of Mopeli, the father of the present applicants.
[71] There is no suggestion by the applicants that poverty, ignorance or some other limiting social factor prevented them

from pursuing a challenge to the 2009 judgment of this Court.[7] If anything, the inference is inescapable – because of the history of prolific litigation on the chieftainship issue – that the legitimacy issue now sought to be pursued - is an after-thought after the comprehensive failure by the first applicant to succeed in the chieftainship claim.

[72] I am satisfied that the applicants have failed to lay a satisfactory basis for this Court to grant condonation for the inordinate delay in seeking its 2009 judgment and order that dismissed the appeal in C of A (CIV) 21/2008.

Order

[73] In the result, the following order is made:

1. The application is dismissed, with costs.

P.T DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

[7] Compare*: Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxusa 2001* (4) SA 1184 (SCA) para 11.

P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV. M.E TEELE KC

FOR THE 4TH RESPONDENT: ADV. S MALEBANYE KC