

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:-

MOAFRIKA FM	1ST APPLICANT
THE EDITOR-IN-CHIEF (MOAFRIKA FM)	2ND APPLICANT
AND	
THE LESOTHO COMMUNICATIONS AUTHORITY (L.C.A)	1ST RESPONDENT
THE BROADCASTING DISPUTE RESOLUTION PANEL	2ND RESPONDENT
THESELE MASERIBANE	3RD RESPONDENT
THATO MOLAPO	4TH RESPONDENT
LEBOHANG MOTAUNG	5TH RESPONDENT
<u>TSITA LETSIE</u>	<u>6TH RESPONDENT</u>

JUDGMENT

CORAM	:	HON. ACTING JUSTICE M. MOKHESI
DATE OF HEARING	:	09 FEBRUARY 2018
DATE OF JUDGMENT	:	09 FEBRUARY 2018

Summary:

Mootness successfully raised by the court – costs order when point dispositive of the application successfully raised by the court.

[1] INTRODUCTION

The two applicants approached this court for the relief in the following terms:

- “[1] Dispensing with the Rules of court relating to service and process on account of urgency hereof.
- [2] That the rule must be issued returnable on such date and times to be determined by the Honourable Court, calling upon the respondents to show cause, if any, why:
 - 2.1 The decision of the 2nd Respondent contained in the latter (sic) dated 5th day of February, 2018 shall not be stayed pending determination hereof.
 - 2.2 The 1st and 2nd Respondents shall not be interdicted and restrained from demanding “**pale**” audios and or anything related to the same story from applicants pending determination hereof and in the future.
 - 2.3. The 1st and 2nd Respondents shall not be reviewed, corrected and set aside and or be declared null and void and of no force and effect.
- [3] That Prayer 1, 2, 2.1, 2.2 and 2.3 to operate with immediate effect as interim orders of the Honourable Court.
- [4] Costs of suit against each and all of the respondents, one paying others being absolved.
- [5] Further and/ or alternative relief that this Honourable Court may grant.”

[2] Factual Background:

The facts of this case have their genesis in the airing of a certain series by the 2nd Applicant titled “**LITOPO MABONE A KOLOI.**” This story focused on

“ATROCITIES ALLEGEDLY COMMITTED BY THE BASOTHO NATIONAL PARTY GOVERNMENT IN THE 1970”.¹

Aggrieved by the airing and content of this series, the 3rd, 4th, 5th and 6th Respondents, being members of the Basotho National Party, lodged a written demand with the 2nd Applicant as the Editor-in-Chief of the 1st Applicant. In it, the 3rd to 6th Respondent through their legal representative demanded a hand over of the audio clips regarding the “Pale” story mentioned above. It would appear the Respondents’ request hit a brick wall. Aggrieved further by the 2nd Applicant’s lack of corporation, the 3rd to 6th Respondents sought help from the 1st Respondent. In consequence thereto, the Chief Executive Officer of the 1st Respondent, on the 5th February 2018 addressed a letter to the 2nd Respondent. Contained in the letter was a referral of the Respondents (3rd to 6th) complaint for action by the 2nd Respondent.

- [3] Based on the referral by the Chief Executive Officer of the 1st Respondent, the Chairman of the 2nd Respondent, on the 5th February 2018, purportedly acting on the strength of section 39 of the Lesotho Communications Authority Act 2012 addressed a “directive” to the 2nd Applicant. The 2nd Applicant was advised that “our letter serves as directive to deliver the audio clips as requested and delivered to the affected parties as stated in their letters to you with immediate effect.” Immediately upon receiving the “directive” the Applicant launched this application *ex parte* for the relief as outlined above.
- [4] All the Respondents duly filed their Notice of Intention to oppose the application. When the matter was heard on the 9th February 2018 arguments centred mainly on whether the applicants were justified in approaching this court on urgent basis. Counsel for the Applicant Mr. Mafaesa N Y, argued that handing over the audio clips as per the directive would be prejudicial to the 1st Applicant as the said clips would ...“be used to close MOAFRIKA FM urgently per respondents averments contained in their letter attached in this application”.² Another reason which was advanced for approaching the

¹ See annexure MAFU2 to the Applicant’s Founding Affidavit

²See certificate of urgency

court in this manner was that, the “directive” to hand over the audio clips was issued in breach of *audi alteram partem rules* in that the 2nd Applicant was not given a hearing before the directive was issued.

[5] After Counsel for the Respondents (1st and 2nd), Mr. Rasekoai, had concluded his submissions, he advised the court from the bar of the fact that the audio clips, the subject matter of this application had been handed over by the 1st Respondent to the 3rd, 4th, 5th and 6th Respondents respectively. The court then raised a question as to what the effect of this revelation on this application was?, whether it did not render the application to be academic?. Mr. Rasekoai agreed with the court that indeed handing over the audio clips to the Respondents rendered this application to be academic. Mr. Lekobane who appeared for the 3rd to 6th Respondents also conceded that indeed the Respondents (3rd to 6th) were handed the audio clips. He further conceded that the application had been rendered moot thereby.

Mr. Mafaesa for the applicants, was constrained to concede that the revelation by the Respondents’ Counsel rendered the application moot. This concession was correctly made in my view, although it came after some spirited defense on his part.

Issues for determination: whether this application is moot

[6] DISCUSSION

In the **Rumdel Cape v South African Roads Agency**³ at para. 15 it was said:

“Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues.”

When the issue of mootness is raised, the court has a discretion whether or not to deal with the matter despite it being moot. In **Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (PTY) Ltd and Others**⁴ the court said the following at **para. 5**:

³ In the *Rumdel Cape v South African Roads Agency* (234/2015) [2016] ZASCA 23 (18 March 2016) : see further, Learned author Cora Hoexter; “Administrative Law in South Africa (Juta) at p.p. 520 – 521; Legal Aid South Africa v Magidwana and Others [2014] 4 A11 SA 570 (SCA)

⁴ In *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (PTY) Ltd and Others* 2013 (3) SA 315 (SCA) para 5

“The Court has a discretion in that regard and there are number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no issue arose.”

- [7] This matter clearly falls into the latter category of cases mentioned by the court in ***Qoboshiyane*** in that it does not present “a discrete legal issue of public importance.” The practical effect of handing over the audio tapes by the 1st Respondent, to the 3rd, 4th, 5th, and 6th Respondents, was to virtually destroy the basis upon which the Applicants’ case rested. All the prayers sought by the Applicants were basically aimed at preserving the applicants’ possession of the above mentioned audio clips. And, now with the audio clips firmly in possession of the 3rd to 6th Respondents’, applicants’ case had all but been rendered academic in my considered view.

[8] COSTS

What is left to be determined is the question of costs. Courts have judicial discretion whether to allow costs.⁵ Moreover where a point was successfully raised by the court, the cost order that normally follow is that the applicant should pay the costs, particularly where he/she did not concede the point but instead persisted with the application despite knowing about issue of mootness.⁶ Equally important is what was said in the ***Ethekwini Municipality v Samwu, that:***⁷

⁵ Jonker v Schultz 2002 (2) SA 360)

⁶ Deuschel v Pretoria v Dohmen and Others (34/2014) [2015] ZASCA 3 para. 10

⁷ Ethekweni Municipality v Samwu [2013] ZASCA 135 para. 20

“Moreover, the point which was held to be decisive of the matter was raised by the court and not one of the parties. In those circumstances it was deemed appropriate that each party be ordered to pay its own costs”.

- [9] In exercising my discretion, the following factors were taken into account; firstly, the applicants’ counsel argued apparently oblivious of the fact that the applicants’ case had been decimated by the handing over of the audio recordings to the 3rd, 4th, 5th and 6th Respondents, by the 1st Respondent. Mr. Mafaesa for the Applicants, denied that he was ever approached by Mr. Lekobane who appears for 3rd to 6th Respondent to tell him that the Respondents have the audio recordings in their possession. On the other hand Mr. Rasekoai who appeared for the 1st and 2nd Respondents only mentioned the issue of the audio recordings being handed over to the Respondents after he had fully made his submissions. Mr. Rasekoai did not say that he advised the applicants’ counsel about this state of affairs beforehand. It was Mr. Lekobane who informed the court of his approach to the applicant counsel. Mr. Mafaesa vehemently denied having been approached by Mr. Lekobane to advise him of this issue of audio clips being handed over to the Respondents (3rd to 6th).
- [10] Secondly, in my view the issue of notifying applicants’ counsel about the audio clip being in possession of the 3rd to 6th Respondents should have been dealt with much better. A better way in my view, of dealing with this would have been to write a letter advising the applicants’ counsel about the audio clips being in possession of the respondents’ (3rd to 6th) and for him to acknowledge receipt thereof. Instead, applicants’ counsel was allowed to argue his case in apparent darkness about the changed state of affairs.
- [11] Thirdly, even after the mootness point had been raised by the court Mr. Mafaesa still pushed his luck by arguing that the review aspect of the application was still tenable in the circumstances. Mr. Mafaesa was at pains to concede that the handing over of the audio clips to the 3rd to 6th Respondents had had a net effect of rendering his application academic. In the exercise of my discretion, it is just that the following order is made:
- (a) The application is dismissed.

(b) Each party is to pay its own costs.

M. MOKHESI (MR.)

ACTING JUDGE

FOR APPLICANT : ADVOCATE MAFAESA

FOR 1st & 2nd RESPONDENTS : ATTORNEY RASEKOAI

FOR 3rd – 6th RESPONDENTS : Advocate Lekobane

ANNOTATIONS:

BOOKS:

Cora Hoexter *Administrative law in South Africa (JUTA)*

CITED CASES:

1. Deutsches Alter sheim Preteria v Dohmen and Others (34/2014)[2015] ZASCA 3 para. 10
2. Ethekeweni Manucipality v Samwu [2013] ZASCA 135 para. 20
3. Jonker v Schutz 2002 (2) SA 360
4. Legal Aid South Africa v Magidwana and Others [2014] 4 A11 SA 570 (SCA)
5. Qoboshiyane NO v Avusa Publishing Eastern Cape (PTY) Ltd and Others 2013 (3) SA 315 (SCA) para. 5
6. Rumdel Cape v South African Roads Agency (234/2015) [2016] para. 15
7. Ethekeweni Municipality v Samwu [2013] ZASCA 135 para. 20