IN THE HIGH COURT OF LESOTHO

HELD AT MASERU	**CIV/APN/77/19**

In the Matter Between:-

MOSITO RAMAHLOKO	**APPLICANT**
AND	
THE LEARNED MAGISTRATE MR. KOLOBE	**1ST RESPONDENT**
THE CLERK OF COURT	**2ND RESPONDENT**
OFFICE COMMANDING MAFETENG POLICE	**3RD RESPONDENT**
THE COMMISSIONER OF POLICE	**4TH RESPONDENT**
'MAMOLEMO RAMAHLOKO	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

JUDGMENT

CORAM	:	**MOKHESI J**
DATE OF HEARING	:	**22ND AUGUST 2019**
DATE OF JUDGMENT	:	**12TH SEPTEMBER 2019**

CASE SUMMARY: *Civil Procedure- Abuse of ex parte and urgency procedure- Propriety of applicant's counsel certifying urgency considered*

ANNOTATIONS:

STATUTES: *High Court Rules 1980*

Joint Rules of Practice for the High Courts for the Eastern Cape

South African Uniform Rules of Court.

CASES: *Khaketla v Malahleha and Others LAC (1990 – 1994) 275*

Republic Motors v Lytton Road Service Station 1971 (2) SA 516

Pascoe v Ministry, Lands and Rural Resettlement and Others (HH 11 – 17, HC 12511/2016) [2017] ZWHHC 11 (11 January 2017 (unreported)

Commander, LDF and Another v Matela LAC (1995 – 1999) 799

Sealake (PTY) Ltd v Chung Hwa Trading LAC (2000 – 2004) 190

Lesotho National Development Corporation v LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315

Ashmore v Corporation of Lloyd's [1992] 2 ALL E.R 486

PER MOKHESI J

[1] This matter involves a feud over custody and access of the minor child by the parties. This is a review which was launched *ex parte* and on urgent basis for orders in the following terms:

> *1. That a Rule Nisi issue returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:-*
>
> *a) The Rule as to notice and form shall not be dispensed with on account of urgency;*
>
> *b) The proceedings and Interim Maintenance Order granted by the 1st Respondent on the 19th December 2018, in Access 01/2016, a matter of the Mafeteng Magistrate's Court, shall not be stayed pending the finalization hereof;*
>
> *c) The second maintenance order granted by the 1st Respondent on the 25th February 2019, in Access 01/2016, a matter of the Mafeteng Magistrate's Court, shall not be stayed pending the finalization hereof;*
>
> *d) The contempt proceedings before the 1st Respondent in CIV/APN/MFT/02/2019, a matter of the Mafeteng Magistrate's Court, shall not be stayed pending the finalization hereof;*
>
> *e) The 3rd Respondent and his subordinates shall not be interdicted and restrained from interfering with the Applicant and business premises in any manner whatsoever pending the finalization hereof;*
>
> *f) The 2nd Respondent shall not be ordered and directed to dispatch the typed records of proceedings in Access 01/2016 and CIV/APN/MFT/02/2019, the matters of the Mafeteng Magistrate's Court to the Registrar of the above Honourable Court within fourteen (14) days hereof;*
>
> *g) The proceedings and the Interim Maintenance Order granted by the 1st Respondent on the 19th December 2018, in Access 01/2016, a matter of the Mafeteng Magistrate's Court, shall not be reviewed, corrected and set aside;*

h) The second maintenance order granted by the 1st Respondent on the 25th February 2019, in Access 01/2016, a matter of the Mafeteng Magistrate's Court, shall not be reviewed, corrected and set aside;
i) That the matter in Access 01/2016, a matter of the Mafeteng Magistrate's Court, shall commence de novo before a different Presiding Officer and on a date to be agreed by the parties;
j) The contempt proceedings in CIV/APN/MFT/02/2019, a matter of the Mafeteng Magistrate's Court, shall commence de novo before a different Presiding Officer and on a date to be agreed by the parties;
k) The Respondent shall not be ordered to pay costs on attorney and client scale.

[2] In this certificate of urgency, Advocate R. Setlojoane who appeared for the applicant before this court, certified the matter to be urgent for the following reasons:

"I

The undersigned:-

RETHABILE SETLOJANE

AN ADVOCATE OF THE HIGH COURT OF LESOTHO, do hereby certify that I have considered the above matter and I bona fide believe it to be a matter of urgent relief by reason of the fact that, contempt proceedings have already been instituted against the Applicant on the basis of the Maintenance Interim Order that was issued by the 1st Respondent on the 19th December 2016, in terms of which the 5th Respondent was ordered and directed to fetch the minor child every Friday in the company of a police officer with whom she had deserted when the child was hardly twelve (12) months old and return the child to the custody of the Applicant in the evening of every Sunday.

The aforesaid order was granted in stark violation of the peremptory provisions of the Children's Protection and Welfare Act of 2011 which in a nutshell state that all actions concerning a child shall take full account of his best interest and the best interest of a child shall be the primary consideration of all the courts, persons including parents, institutions or other bodies in any matter concerning a child.

The court did not conduct an investigation wider in scope than the information placed before it by the parties when granted the said Interim Maintenance Order on the 19th December 2018 hence a need to review the proceedings at this stage. A battalion of the officers of the 3rd Respondent are interfering with the Applicant's business and his residential premises day and night on the basis of the second Court Order that was purportedly granted on the 25th February 2019. Notice on the Respondents in the circumstances of the present case would only serve to precipitate the mischief herein sought to be averted."

[3] As alluded to earlier the dispute in this matter concerns custody, maintenance and access of the minor child. The legal wrangle between the parties started in 2016. Certain orders were issued by the Mafeteng Magistrate court and later rescinded on 10th January 2018. The 5th respondent was only allowed access to the child. It would appear that sometime in 2017 the 5th respondent lodged an application in terms of which she wanted custody order amended and granted to her. The matter was to serve before Magistrate Thoso, but given what the 5th respondent perceived to be bias on the part of the learned Magistrate she sought his recusal. The pleadings were closed. The learned Magistrate Thoso then acceded to the request for his recusal, and the matter was allocated to the Chief Magistrate. It is the applicant's undisputed version that the learned Chief Magistrate had given counsel latitude to choose a date between 14/12/18 and 21/12/2018 for hearing of this matter; and this was communicated *via* a whatsapp message duly delivered and read by the applicant's counsel, Adv. Setlojoane. When Mr. Setlojoane would not respond, Adv. Mda set the matter down for hearing on the 14th December 2018. The applicant's counsel was given notice of this set down. On the 14th December 2018 only Adv. Mda for the 5th respondent appeared before court. The learned Chief Magistrate issued an interim relief in terms of which the minor child would be fetched " every Friday after 2.00 P.M. to applicant's home at Matholeng in the company of a police officer; and return the child to the custody of the Respondent in the evening of every Sunday in the company of a police officer." Reference to the "respondent" in this order is made to the current applicant. The matter was accordingly postponed to the 22nd March 2019 for hearing. It would appear that the applicant did not comply with the said order, thereby necessitating an institution of a contempt application. The contempt application was opposed and was by consent set down for hearing on the 25th February 2019, however the matter was not heard on that day, but was instead postponed and the *rule nisi* which was issued, extended to the 22nd March 2019 for arguments. While the

contempt application was awaiting to be heard, the applicant launched the current application *ex parte* and on urgent basis on the 06th March 2019. It is important to quote from his affidavit to gain a picture as to why he lodged this application in the manner he did.

"11.7 I was only shocked to my marrow when on the 1st, 2nd and 3rd March 2019, I was informed that an armed battalion of police officers from the 3rd Respondent arrived at my place of residence and business premises indicated that they were looking for me and further that they had come to arrest me for failure to comply with the order of the court a quo that was granted on the 25th February 2019. I was accordingly informed by my nanny who had no intentions whatsoever to lie to me and I verily believe the information as true and correct.

11.8 I must disclose that I was frustrated and did not know what to do then and I was only able to contact my counsel of record late yesterday and he was able to instruct his clerk to pursue the court's file to find out what might have transpired upon perusal of the court's file, it would appear that there is a court order that was allegedly granted on the 25th February 2019 in the presence of my counsel of record as well as the attendance of the litigants. A copy of the said court order is hereunto attached and marked "CC".

12.1 I have been adviced that the Notice of set down that was issued by the 5th Respondent's Counsel and indicating that the matter had been set down for hearing on the 19th December 2018 was irregularly issued regard being had to the fact that it was never precipitated by any Notice calling my Attorneys to appear in court to obtain a convenient date of hearing. The matter was unilaterally set down by the 5th Respondent's Attorneys without involving my Attorney.

12.2 The 1st Respondent acted on the basis of the aforementioned Notice of set down and granted an adverse Interim Order against me regard being had to the fact that I had filed an opposing affidavit in opposition of all the prayers thereof. The 1st Respondent, a Judicial Officer of significant experience then decided without affording me any hearing whatsoever, to issue an Interim Court Order that is not in the best interest of the minor child as I shall demonstrate. I have since and I have

verily believed same to be true and correct that that was a gross procedural irregularity that should be revised at this stage."

[4] I have deliberately quoted from the applicant's affidavit to demonstrate that the so-called urgency is self-made. The applicant has not seen it fit to even attach a confirmatory affidavit of the domestic worker who informed him about the "Battalion of armed police officer" who came looking for him. This is inadmissible hearsay. The real reason, as I see it, which precipitated this application is the Interim Order which was granted by the learned Chief Magistrate on the 14th December 2018. I will come back to this aspect in due course when I discuss the urgency of this matter.

[5] In opposition, the 5th Respondent had raised points in *limine* and pleaded over, however I wish to deal with this matter solely on the basis on the points in *limine* raised, *viz,* abuse of ex parte and urgency procedures by bringing an urgent application not accompanied by a properly issued certificate of urgency as the certificate was issued by the Applicant's counsel.

[6] (i) *Ex Parte* Procedure

Rule 8(4) of the **High Court Rules 1980** provides:

> *"(4) Every application brought ex parte shall be filed with the Registrar before noon on two court days preceding the day on which it is to be set down to be heard. If brought upon notice to the Registrar, such notice shall set forth the form of order sought, specifying the affidavit filed in support thereof and request the Registrar to place the matter on the roll for hearing…."*

[7] It is without a doubt that *ex parte* procedure by its nature breaches one of the most important principles of our procedural justice the *audi alteram partem* principle. However a rule that a party cannot be condemned unheard is not cast in granite, as there may be circumstances justifying departure from rule, for example, where the Rules or Statute specifically provides or where the applicant is the only person interested in the relief sought, or in a situation where the relief sought is merely a preliminary step in the proceeding. The departure from the rule requiring notification of the person of the impending proceedings against him or her is to be done as an exception, for example,

where notice would render nugatory the very same relief the applicant seeks to obtain by moving the application ex parte ***(Khaketla v Malahleha and Others LAC (1990 – 1994) 275 at 280 C – F; Republic Motors v Lytton Road Service Station 1971 (2) SA 516 at 518****.*

[8] Even in terms of Rule 8(4) an application moved ex parte must comply with two days' notice to the respondent(s) before an application can be moved. In the present case the applicant filed and moved this application on the same day, i.e. 5th March 2019. It has not been stated why this was the case. It has not been suggested that the 5th Respondent has an interested party would render nugatory the relief sought if she is served as per Rule 8(4) above. In his founding affidavit the applicant avers that the reason for proceeding ex parte is the following:

> *"13.5 In the result, my detention is going to be detrimental to my state of health. If the court does not grant the orders herein being sought ex parte, I would have been already arrested and would have been kept in custody for simply no reason whatsoever except the satisfaction of the 3rd Respondent and/or his subordinates, more so when they have an interest in this matter as they had made supporting affidavit to support the 5th Respondent's case in the court a quo. Notice on the Respondents in the circumstances would only serve to precipitate the mischief herein sought to be averted."*

[9] Quite plainly, no reason whatsoever is advanced why service to the 5th Respondent would have precipitated the applicant's arrest. I have already alluded to the issue of the applicant's arrest as unfounded as it is based on inadmissible hearsay. Even if I were to assume in the applicant's favour that there was an impending arrest, there is simply no reason why the 5th respondent was not served with this application per Rule 8(4). The reasons for proceeding *ex parte* without notice merely relates to the police and not the 5th respondent. On this ground alone the Interim Order granted on the 05th March 2019 ought not to have been granted.

[10] (ii) Urgency, Certificate of Urgency and the propriety of Applicant's Counsel certifying urgency:

Rule 8(22) of the Rules of this Court provides that:

> *"(22)(a) In urgent applications the court or a judge may dispense with forms and service provided for in these rules and may dispose of such matter at such time and*

place in such manner and in accordance with such procedure as the court or judge may deem fit.

(b) In any petition or affidavit in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he cannot be afforded substantial relief in a hearing in due course if the periods presented by this Rule were followed.

(c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and he bona fide believes it to be a matter for urgent relief."

[11] It is the 5th Respondent's argument that Adv. Setlojoane should not have deposed to the certificate of urgency as he is the applicant's counsel, in the words of Adv. Mda, Adv. Setlojoane then became a judge in his own cause. It is worth noting that Rule 8(22)(c) does not prohibit the applicant's counsel from certifying the urgency of the matter, only that "he has considered the matter and he *bona fide* believes it to be a matter for urgent relief."

[12] Perhaps before I deal with this issue of urgency and its certification by counsel who is apposite to undertake a small survey of our neighbouring states to see how this issue is dealt with.

Rule 12 of **Joint Rules of Practice for the High Courts of the Eastern Cape** provides as follows:

"In urgent applications:

The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, it is insufficient merely to refer to passages in the papers and sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers, which will not be read until such time as a proper certificate of urgency has been filed.

Details of why the applicant alleges a matter of urgency should also be set out in the founding affidavit.

In all applications brought as a of urgency, the matter should be set down for hearing at a time which has been determined as convenient for the judge who is to hear the matter."

The above Eastern Cape Rules have been made to augment Rule 6(12) of the Uniform Rules of Court.

[13] The debate about the propriety of the applicant's counsel certifying urgency is not novel, it has been raging for quite some time in Zimbabwe. I propose not to deal with all the cases which espouse two conflicting schools of thought on this issue. I however propose to quote from a decision which I find to espouse a position which I find persuasive, sensible and in accord with the scheme of rule 8(22) (c). I venture to suggest that the position is in accord with the scheme of Rule 8(22). The decision is ***Pascoe v Ministry, Lands and Rural Resettlement and Others (HH 11 – 17, HC 12511/2016) [2017] ZWHHC 11 (11 January 2017 (unreported) (available at zimlii.org)*** where Chitapi J had this to say:

"…(citation omitted) [T]he point *is made that a legal practitioner who prepares and signs a certificate of urgency must have led to his belief that the application is urgent. (Citation omitted) Gillespie J made the remark at p. 303 that,*

'…where a legal practitioner could not reasonably entertain the belief that he professes (i.e that the matter is urgent) he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly, in giving his certificate of urgency'.

I am inclined to belief that these remarks could not properly apply to applicant's legal practitioner. If this were not so, it would mean that another legal practitioner who has simply been given an application prepared by another to read and formulate an opinion as to urgency would run the risk of being charged for unprofessional conduct by granting his or her certificate where the court considers that such certifying legal practitioner could not have reasonably believed on the facts of a matter that it was urgent.

There is also another aspect which was not considered by Cheda J when he held that it was improper for the applicant's legal practitioner or a legal practitioner in the

same firm to attest to a certificate of urgency. The learned judge was of the view that objectivity of the applicant's legal practitioner and members of his firm would have in wanting to earn fees. Further the learned Judge reasoned that the same firm would seek to advance its goodwill by seeking to bring a client's matter to a successful (I would say speedy) conclusion. The aspect which rings in my mind is one of privilege between a legal practitioner and his client. In short, communications and files of one legal firm should not be for consumption of another firm or its legal practitioners to express an opinion on save where such privilege is waived expressly by a client or because a public record has been opened. I am not prepared to accept that the intention of the rules on urgency were intended that where an applicant files an urgent application, at least two firms or two legal practitioners not from the same firm should become involved in the matter. Suppose an urgent matter arises and a legal practitioner is instructed to petition the judge and it is late at night, can it be seriously argued that the rules would require that the applicant's legal practitioner engages in a manhunt for another legal practitioner in the wee hours of the night so that such other legal practitioner reads through the application and prepares and signs a certificate of urgency…. It would be absurd to require the certifying legal practitioner to leave his own work and to devote hours to reading through an application simply for purposes of preparing a certificate of urgency. Would such legal practitioner charge for such work and using what role? I am not leastwise persuaded that the purport of the rule on preparing a certificate of urgency was intended that another legal practitioner, equally qualified and trained should submit a prepared application in a different law firm to scrutinize his application and express an opinion and express an opinion as to the urgency of the matter…"

[14] I am in respectful agreement with the views expressed eloquently above. Rule 8(22) (c) nowhere does it prohibit applicant's counsel from certifying urgency of the matter, only that he sets out that he has considered the matter and that he *bona fide* believes it to be a matter for urgent relief. There is nothing inherently wrong with applicant's counsel certifying urgency, as already seen, in the Eastern Cape, Rule 12 of that region's Rules of Practice specifically provides that the practitioner who appears for the applicant must certify the urgency of the matter. Therefore, the argument by Adv. Mda that the applicant's counsel is not entitled to certify urgency of the matter must fail.

However, the problem with the current certificate of urgency as I see it, lies elsewhere. The problem lies with Adv. Setlojoane treating the certification of urgency in a perfunctory and formalistic way unmindful of the duty cast upon him as counsel in this regard. In the ensuing discussion I endeavor to elucidate this point.

[15] Rule 8(22) (c) is a gatekeeping mechanism in the case flow management duties of the court. It has to be borne in mind that by their very nature, urgent matter are placed ahead of other matters which would have been awaiting their turn to be disposed of. So that the administration of justice is not plunged into disrepute, judges and applicants' counsel have a critical role to perform when it comes to dealing with urgent matters. The applicant's counsel is enjoined to certify that indeed the matter is merited to be placed ahead of others which would have been queuing, by placing evidence on the certificate evincing this reality, and by further giving his opinion that, based on the alluded facts, he *bona fide* believes the matter to be worthy of such urgent treatment. This is a very important, for if it is not carried out responsibly, it has the real potential to imperil the administration of justice. The court on the one hand when faced with a certificate of urgency should not adopt a supine and mechanical attitude to it. It has to carefully scrutinize the certificate to determine whether it is laden with evidence evincing urgency. The court must not be a passive umpire in these matters. The roles of the court and counsel in the case flow management, and the importance of time in this regard, were aptly captured by Lord Roskill in ***Ashmore v Corporation of Lloyd's [1992] 2 ALL ER 486 at 488*** when he said;

> "In the Commercial Court and indeed in any trial, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tied as expeditiously and inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. ***Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."(***emphasis added)

In my considered view the above sentiments are equally applicable when dealing with certificates of urgency, in so far as they highlight the importance of time in case flow management in the administration of justice.

[16] It needs to be mentioned that while the issue of urgency relates to form, not substance of the matter and is not a prerequisite for granting of a substantive relief ***(Fakie NO v CCII Systems (PTY) Ltd 2006 (4) SA 292 (SCA) at 299 F – g),*** its treatment by counsel should not be formalistic, perfunctory and cursory. When counsel prepares certificate of urgency he does so performing his duties as an officer of the court, and must undertake that responsibility seriously. Counsel cannot use urgency procedure where it is unmerited as a ploy or stratagem to place his matter ahead of others which would have been queuing their turn for attention of a Judge. Were counsel to engage in these sort of stratagems my view is that they will be venturing into the realm of professional misconduct because by unmeritoriously using urgency procedure to skip the queue, counsel will be contributing in bringing the administration of justice into serious disrepute.

[17] To reflect the seriousness with which the courts in this jurisdiction view the certification of urgency, the apex court in decisions such as ***Commander, LDF and Another v Matela LAC (1995 – 1999) 799 at 805; Sealake (PTY) Ltd v Chung Hwa Trading LAC (2000 – 2004) 190 at 191; Lesotho National Development Corporation v LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315 at 325*** have admonished counsel who abuse urgency procedure and has even warned of imposing punitive costs of such counsel where they are found to have abused Rule 8(22) of the Rules of this Court. Counsel who prepares the certificate of urgency must remember that this is an extraordinary step in terms of which counsel must discharge his responsibility professionally, by providing "real evidence" of urgency in the certificate of urgency (***LNDC case ibid at 325 E***). When counsel certifies urgency, as already said, he is not discharging his responsibilities formalistically, but must substantively provide evidence which forms the basis of his or her *bona fide* belief that the matter is indeed urgent and deserving of such treatment by the court. In the absence of evidence of urgency in the certificate, the matter should not be treated as such.

[18] Reverting to the certificate in issue, it is clear from what Adv. Setlojoane says in his certificate that he considered the matter urgent because of the order which was issued on the 19th December 2018 granting the 5th respondent access rights to the minor child, and the fact that "A battalion of police officers of the 3rd respondent" were interfering

with the applicant's business. It needs to be recalled that the so-called battalion of police officers, are actually the police officers who in terms of the order of court required to accompany the 5th respondent to fetch the minor child over the weekends. This court-ordered arrangement seemed to have irked the applicant to the point where he used the urgency procedure as a stratagem to seek to review the proceedings before the learned Chief Magistrate which culminated in the order which was issued on the 19th December 2018. As to why he waited until 05th March 2019 to seek to review these proceedings, it is not clear, but what is abundantly clear is that he was not particularly pleased with it. To my mind, this case qualifies as a classic example of an abuse of *ex parte* urgent procedures. This type of conduct is reprehensible, for which a punitive costs order must be issued to mark this court's displeasure. The seriousness with which the courts view abuse of these procedures has already been articulated above.

[19] In the result the following order is made:

a) The application is dismissed with costs on attorney and client scale.

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MOKHESI J

FOR APPLICANT	:	**ADV. R. SETLOJOANE**
FOR RESPOMDENTS	:	**ADV. Z. MDA KC**