

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/69/2020

In the Matter Between:-

PALESA MPOLOKENG RAMAILI

APPLICANT

AND

MASTER OF THE HIGH COURT

1ST RESPONDENT

PULE THOAHLANE

2ND REPENDENT

ATTORNEY GENERAL

3RD RESPONDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 25TH AUGUST 2020

DATE OF JUDGMENT : 15TH OCTOBER 2020

Summary:

ADMINISTRATION OF ESTATES: *applicant and the 1st respondent are siblings- the estate of the parties' parents not reported to the Master of High Court in terms of s.13 of the*

Administration of Estates Proclamation no.19 of 1935-Applicant applying for condonation for late reporting of same, five years after the death of the last surviving parent- Importance of reporting highlighted- Application granted as prayed.

Annotations :

Statutes :

Rules of High Court

Administration of Estates Proclamation No. 19 of 1935

CASES:

Ngaka Mohlouoa and Another v Mosito Motsamai and Others C of A (CIV) NO.49/2018 (unreported) dated 01 November 2019

Rabolou Josef Leteka v 'Mathabiso Leteka and Others C of A (CIV) NO. 48/2019 (unreported) dated 29th May 2020

'Maphunye Qocha and Others v Hape Nthongoa and Others C of A (CIV) NO. 49/2016 [2018] LSCA 19 (07th Dec. 2018)

Mphalali v Anizm'Lalali and Others CIV/APN/260/2003

(unreported)

PFE International Inc. (BVI) and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

National University of Lesotho and Another v Thabane LAC (2007 – 2008) 476

Airports Company South Africa v Big Five Duty Free (PTY) Limited and Others 2019 (2) BCLR 165 (CC)

PIO v Franklin NO and Another 1949 (3) SA 442 (C)

Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 ALL SA 108 (SCA)

MOKHESI J

[1] INTRODUCTION

This is an application in terms of which the applicant seeks condonation for late reporting of the death of her late mother 'Mampolokeng Franscoise Thoahlane, to the Master of the High Court.

[2] FACTUAL BACKGROUND

The parties' mother was the surviving spouse, and she passed away on the 24th December 2015. The deceased died leaving three major children, viz, the applicant, the 2nd respondent and the wife of her other son Mahapela who pre-deceased her and is survived by his wife 'Mamotolo Thoahlane. The applicant is a married woman, and a sister to the 2nd respondent. It is the applicant's case that when she went to the office of the 1st respondent in January 2020 to determine the progress on the administration of the estate of their late parents, she discovered that it was not reported to the Master of High Court (1st respondent).

[3] This application is opposed, and in his answering affidavit the 2nd respondent annexed a document which he says proves that the estate was reported to the 1st respondent. But before pleading over the 2nd respondent raised a point that the application ought to be dismissed on account of failure to comply with the mandatory provisions of the Rule 8(19) of the Rules of this Court. In reply the

applicant averred that she approached the office of the 1st respondent (Master of High Court) and was informed that the estate was not reported, and she then sought leave to attach annexure "PR5" as proof of same. However, no such annexure was ever attached. "PR5" is a report of the 1st respondent that the estate was not reported. As evinced by the date stamp, the report was issued on the 30th July 2020, two months after the Replying affidavit was filed and served. I will come to the relevance of this document in due course.

[4] In support of his assertion that the estate was reported the 2nd respondent annexed a document which emanated from the 1st respondent to the following effect: (in relevant parts):

"MHCO/GEN1

TO: Standard Bank

Dear Sir/Madam

***RE: ESTATE LATE MAMPOLOKENG FRANCOISE
THOHLANE A/C NO. 5036164008895600***

The THOHLANE family has introduced as we hereby do, Mr PULE THOHLANE (RCI30849) as their heir to the above-mentioned estate.

We have perused his documents and are satisfied that he is the rightful person to execute the said estate.

Kindly assist him close the deceased's account and have available funds released to him.

Your usual co-operation anticipated.

Yours faithfully.

T.M HLAISI (MRS)

Signed

ASSISTANT MASTER OF THE HIGH COURT."

[5] On 17th August 2020, the 2nd respondent lodged an application in terms of which he sought an order expunging annexure "PR5" from the record of proceedings and a consequent order of costs on attorney and client scale. Both these applications were heard together on the 25th August 2020.

[6] NON-COMPLIANCE WITH RULE 8(19)

I wish first, to deal with the issue of non-compliance with Rule 8(19) of the rules of this court. The said Rule provides that:

"(19) When an application is made to court, whether ex parte or otherwise in connection with the estate of any person deceased ..., a copy of such application, must, before the application is filed with the Registrar, be submitted to the Master for his consideration and report. If any person is to

be suggested to the court for appointment of curator to property such suggestion shall also be submitted to the master for his consideration and report. There must be an allegation in every such application that a copy has been forwarded to the Master.”

[7] This rule has been subject of much litigation of late: see ***Ngaka Mohlouoa and Another v Mosito Motsamai and Others C of A (CIV) NO.49/2018 (unreported) dated 01 November 2019; Rabolou Josef Leteka v 'Mathabiso Leteka and Others C of A (CIV) NO. 48/2019 (unreported) dated 29th May 2020.; 'Maphunye Qocha and Others v Hape Nthongoa and Others C of A (CIV) NO. 49/2016 [2018]LSCA 19 (07th Dec. 2018) (hereafter Qocha).***

[8] In ***Qocha*** the court endorsed what was said by Nomngcongo J in ***Mphalali v Anizm'Lalali and Others CIV/APN/260/2003 at p. 3 (unreported)*** where the learned Judge said:

"This rule in providing specifically that even if applications in connection with deceased estate are brought ex parte they must still be first submitted to the Master before filing with the Registrar, leaves very little discretion with the court to grant condonation for failure to comply. Not only that, the Master is further enjoined to consider the matter and then to make a report. Such a report might lend a totally different colour to the outcome of proceedings. A copy of this

application must therefore have been forwarded to the Master for his consideration and report, otherwise we would be trespassing on the Master's territory ex parte, a proceeding that is specifically not allowed by the rules."

[9] In *casu*, it is clear that the applicant, as decreed by the rule, did not make an allegation in her founding affidavit that a copy of the application was submitted to the Master for consideration and report, neither was the application submitted to the Master before being filed with the Registrar. To this extent the application is defective. However, despite the applicant alleging that the report was annexed to the replying affidavit as annexure "PR5" it appears the report was issued in July 2020, and it forms part of the documents before this court. Although compliance with rule 8(19) is mandatory I do not consider that it enjoins a formalistic approach to its non-compliance.

[10] The adage that the rules are made for the court and not the court for the rules, applies in the circumstances of this case. I am attracted to the comments of the court in ***PFE International Inc. (BVI) and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)***

"[30] Since the rules are the made for the courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court

the master of its own process. It enables a superior to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interests of justice depart from its own rules.

*[31]In some cases a mechanical application of a particular rule may lead to an injustice. For example, the Supreme Court of Appeal issued directions dated 28 February 2011 in terms of which parties are given permission to deliver applications for leave to appeal to the Registrar of that court even if some documents required by its rules are outstanding. These directions also exercise parties from lodging formal applications for condonation for not complying with section 21(2) of the Supreme Court Act, regarding the period within which an application for leave should be submitted to the court. It is therefore necessary for courts to have power to adjust the application of rules to avoid injustices. Moreover, the court rules are tailored to facilitate introduction and management of cases under the courts' supervision." (See also: **National University of Lesotho and Another v Thabane LAC (2007 – 2008) 476 at 480 para. 4**)*

[11] In the exercise of my discretion in terms of Rule 59 of the Rules of this court I condone the procedural imperfections alluded to above, and therefore conclude that annexure "PR5" is part of

the documents annexed to the applicant's papers. In my considered view, given that the report (PR5) forms part of the documents which are before this court, I consider that there has been substantial compliance with the rule 8(19). I am fortified in this approach by a trite principle that even where the requirements of the statute are peremptory, every deviation from its prescripts should not be regarded as fatal so long as there has been a substantial compliance therewith and the purpose for which the provision is directed is achieved (***Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 ALL SA 108 (SCA)***).

THE MERITS:

[12] I turn now to deal with the issue whether the estate was reported. The 2nd respondent is resisting the filing of "PR5" because, in it, the Assistant Master of High Court informs the court that that estate was not reported as alleged. However, even if this court were to expunge "PR5" from the record, the 2nd respondent's argument falters at the first hurdle, as will be seen in the ensuing discussion. In terms of section 13 of the ***Administration of Estates Proclamation No. 19 of 1935***

"13 (1)Whenever any person dies within the Territory leaving therein any property or will, the nearest relative or connection of the deceased at or near the place of death, 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 the form "A" in the First Schedule to this Proclamation, and shall cause that notice, signed by himself, to be delivered or transmitted"

And in terms of S.31(1) of the same Proclamation once the estate of the deceased has been reported in terms s.13 (above) the Master of High Court is enjoined to issue Letters of administration to whoever in law is entitled to administer the estate and for its distribution. It does not matter whether the deceased died testate or intestate, administration of the deceased estate must be done under letters of administration.

[13] The proper approach to interpreting s.13(above) is by attributing the meaning to the words used in it; by deploying the ordinary rules of grammar and syntax; by taking into account the context in which the provision appears, and its purpose (***Airports Company South Africa v Big Five Duty Free (PTY) Limited and Others 2019 (2) BCLR 165 (CC) para. 29***)

[14] S.13(1) uses the word "shall" when it decrees that the estate of the deceased be reported to the Master of High Court within fourteen days after the death has occurred. But the use of the words "shall" on its own is not decisive as to whether it is mandatory to do so, other indicators which point in the direction

that it is mandatory to comply will have to be discerned from the statute as a whole. In order to decipher whether the word "shall," was intended to be peremptory or merely directory, guidance was summarized in ***PIO v Franklin NO and Another 1949 (3) SA 442 (C) at 451***, thus:

"(1) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directing.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases."

[15] S. 13 (1) must be read together with section 110 of the same **Proclamation** which provides that any person who fail to comply with the provisions of section thirteen, among others, shall be liable on conviction to fine not exceeding *forty rands*, or in default of payment thereof, to imprisonment of a period not exceeding three months. So, without doubt reporting of the deceased estate in terms of section 13 (1) is peremptory as non-compliance attracts a criminal sanction.

[16] I turn to determine whether the estate was reported as mandated section 13 (1) of the **Proclamation**. As already seen above, once the estate is reported to the 1st respondent, he or she is obliged to issue letters of administration in the form "B" in the First Schedule of the Proclamation. These letters are issued whether the deceased died testate or intestate. The purpose of the letters is for the 1st respondent to authorize the executor to administer the estate wherever situate. In my considered view the letter which was written by the Assistant Master and directed to Standard Bank upon which the 2nd respondent relies as prove of authority is not a letter of administration as contemplated in section 31 (1) and (2) of the **Proclamation**. Currently the estate is not reported, and the non-reporting of same continues to be a criminal blight on the individuals who are enjoined to do so. That the estate remained unreported for the past five years is of no moment, because the continued non-reporting constitutes a criminal offence. To nip this in the bud an appropriate order is

called for. The applicant has brought what is termed a “condonation” application but given that non-reporting constitutes a criminal offence I do not think that this court has a discretion to refuse any application to condone late reporting of estates.

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

- a) The application is granted as prayed with no order as to costs.
- b) The applicant is ordered to report the estate within 30 days of handing down of this judgment.

M. MOKHESI J

**FOR THE 1ST APPLICANT: Mrs Lephatsa from L.M. A
Lephatsa ATTORNEYS**

FOR THE 1ST RESPONDENT: NO APPEARANCE

**FOR THE 2ND RESPONDENT: ADV. TLAPANA INSTRUCTED BY
K. D. MABULU & CO. ATTORNEYS**

FOR THE 3RD RESPONDENT: NO APPEARANCE