

# IN THE HIGH COURT OF LESOTHO

**HELD AT MASERU**

**CIV/APN/08/2022**

In the matter between:

**THE EXECUTOR ESTATE LATE THABO  
KABELI MOERANE**

**1<sup>ST</sup> APPLICANT**

**EXECUTOR OF ESTATE LATE  
'MASEOEHLA MALWAZE SHALE**

**2<sup>ND</sup> APPLICANT**

**EXECUTOR OF ESTATE LATE  
MOTLATSI PAUL MOROLONG**

**3<sup>RD</sup> APPLICANT**

**CO-EXECUTOR OF ESTATE LATE NTOLO  
MAURREN MOHALE FUNNAH**

**4<sup>TH</sup> APPLICANT**

**MOTENE RAFONEKE N. O**

**5<sup>TH</sup> APPLICANT**

AND

**THE CO-EXECUTOR ESTATE LATE  
THAKANE CHIMOMBE (TARU CHIMOMBE)**

**1<sup>ST</sup> RESPONDENT**

**CO-EXECUTOR: ESTATE OF THE LATE  
THAKANE CHIMOMBE (K. CHIMOMBE)**

**2<sup>ND</sup> RESPONDENT**

**TEBOHO KIKINE**

**3<sup>RD</sup> RESPONDENT**

**MAMPOI TAOANE**

**4<sup>TH</sup> RESPONDENT**

**MASTER OF THE HIGH COURT**

**5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**6<sup>TH</sup> RESPONDENT**

**NEDBANK LESOTHO LIMITED**

**7<sup>TH</sup> RESPONDENT**

**Neutral Citation:** The Executor Estate Late Thabo Kabeli Moerane and 4 others V The CO Executor Estate Late Thakane Chimimbe LSHC 249 Civ 2022(29 SEPTEMBER 2022)

**CORAM** : **HLAELE J.**  
**HEARD** : 06 SEPTEMBER 2022  
**DELIVERED** : 29 SEPTEMBER 2022

### **SUMMARY**

*Failure to comply with High Court Rule 8(19)-consequently the matter being struck off the roll-failure to comply with High Court Rule 8(13) leading to the interim rule being discharged.*

### **ANNOTATIONS:**

#### **CITED CASES:**

1. Leteka v Leteka (C of A (CIV) 48/19) [2020] LSCA 19 (29 May 2020).
2. Ramaili v Master of High Court (CIV/APN/69/20) [2020] LSHC 22 (15 October 2020).
3. Ngaka Mohlouoa and Another v Mosito Motsamai and Others C of A (CIV) NO.49/2018 (unreported) dated 01 November 2019.
4. Rabolou Josef Leteka v 'Mathabiso Leteka and Others C of A (CIV) NO. 48/2019 (unreported) dated 29th May 2020.
5. 'Maphunye Qocha and Others v Hape Nthongoa and Others C of A (CIV) NO. 49/2016 [2018] LSCA 19 (07th Dec. 2018) (hereafter Qocha).

### **STATUTES**

1. High Court Rules

# **JUDGMENT**

**HLAELE J**

## **[1] INTRODUCTION**

1.1 This is a review application wherein the applicants sought the following orders:

1. That the rules of court pertaining to the modes of service and form be dispensed with in account of the urgency of this matter.
2. That a rule nisi be issued returnable on the 28<sup>th</sup> day of January 2022, calling upon the respondents to show cause if any why:
  - a. The fifth respondent shall not be ordered to dispatch within fourteen (14) days of receipt of the Order of Court herein the record of proceedings and the concerned documents where a decision to appoint the fourth respondent as executor in estate late Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Motlatsi Paul Morolong and estate late Ntolo Maureen Mohale Funnah was made and reached at.
  - b. The decision of the fifth respondent to appoint the fourth respondent as executor in estate late Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Motlatsi Funnah shall not be stayed pending the final determination hereof.
  - c. The first to fourth respondents shall not be ordered to refrain from taking any decisions relating to files and matters in estate Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Ntolo Maureen

Mohale Funnah shall not be stayed pending the final determination hereof.

- d. The first to fourth respondents shall not be ordered to release all the files relating to estate Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Motlatsi Paul Morolong and estate late Ntolo Maureen Mohale Funnah to the fifth application forthwith.
  - e. The seventh respondent shall not be ordered to refrain from cooperating and dealing with the fourth respondent in respect of the account number 22000164422 of estate late Thabo Kabeli Moerane, account number 12990373505 of estate late Motlatsi Paul Morolong pending the final determination hereof.
  - f. The decision of the fifth respondent to appoint the fourth respondent as the executor in estate late Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Ntolo Maureen Mohale Funnah shall not be reviewed and set aside as unlawful, irrational and unreasonable.
  - g. The first to fourth respondent shall not be interdicted from taking any decisions relating to files and matters in estate late Thabo Kabeli Moerane, estate late Maseoehlana Malwaze Shale, estate late Motlatsi Paul Morolong and estate late Ntolo Maureen Mohale Funnah.
3. The respondents shall not be ordered to pay the costs of this application on an attorney and own client scale.
  4. The applicant shall not be granted such further and /or alternative relief.
  5. That prayers 1,2 (a), (b), (c), (d) and (e) operate with immediate effect as interim orders.

## **[2] FACTUAL MATRIX**

2.2 It is imperative to narrate the factual matrix of this case, more so because this case has facts which are peculiar to it

that inevitably affect the issues for determination. The facts in a nutshell are;

- a. Agrieved by the decision of the 5<sup>th</sup> Respondent to remove him from being the executor of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicant's estate and being replaced by the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> Respondents, the 5<sup>th</sup> Applicant launched the review application herein. He sought the prayers outlined in paragraph 1.1 above. It should be stated that this application was filed on the 11<sup>th</sup> January 2022. The importance of this date will become clear later in the judgement.
- b. On or about the 11<sup>th</sup> January 2022, the 1<sup>st</sup> to 4<sup>th</sup> Respondents filed an intention to oppose the Application filed by the 5<sup>th</sup> Applicant.
- c. Exercising an option in terms of the High Court Rules, the 1<sup>st</sup> to 4<sup>th</sup> Respondent did not file any affidavits but opted to file a Rule 8 (10) (C) notice.
- d. The parties appeared before Khabo J. The court held that it had no jurisdiction to entertain the matter.
- e. Dissatisfied with the decision of Khabo J, the 5<sup>th</sup> Applicant herein lodged an appeal against the order of court.
- f. On the 13<sup>th</sup> May 2022, the Court of Appeal made the following order at paragraph 35 of the judgement. It is important to quote it verbatim:
  - (ii) *The Appeal succeeds and the judgement and order of the High Court is replaced by the following order; 'The point in limine is dismissed with costs'*
  - (iii) *The matter is remitted to the High Court for determination of the appellant's application de novo as the papers stood on the date the High Court made an order declining jurisdiction.*<sup>1</sup>  
(Own emphasis)
- g. Armed with the order of the Court of Appeal, the 5<sup>th</sup> Applicant filed a Notice of Set down for the matter to be heard on the 31<sup>st</sup> May 2022.<sup>2</sup>

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<sup>1</sup> C of A (CIV) 35 of 2021

<sup>2</sup> Page 54 of the record.

- h. The matter did not proceed on this day. It was thereafter set down, by issuance of another Notice of set down<sup>3</sup> on the 6<sup>th</sup> June 2022.
- i. On the 6<sup>th</sup> June 2022, the 5<sup>th</sup> Applicant appeared before Mokoko J. there was no appearance for any of the Respondents.
- j. Mokoko J granted an interim Order.<sup>4</sup> He effectively granted two prayers. That the matter is urgent and that the 5<sup>th</sup> Respondent should dispatch the record of proceedings and the concerned documents where a decision to appoint the fourth Respondent as an executor were made. For brevity I will mention that the prayers as appears in the Notice of motion were granted as prayed and they operated as interim relief.
- k. Upon service of the Mokoko J Order upon the Respondents, they filed a Notice of Anticipation of the order. This was interrupted by events beyond the control of the parties so much so that it was only until the 8<sup>th</sup> of August 2022 that the parties appeared before me.
- l. The parties appeared before me on 8<sup>th</sup> August 2022. I then ordered the parties to comply with the directives of the court and amongst others, ordered the filing of heads of argument. The rule granted by Mokoko J was extended to the date set before me which was the 5<sup>th</sup> September 2022.
- m. It is important to state that whilst filing the Notice of Anticipation, the Respondents filed an answering affidavit. In it the respondent “answered” the allegations made in the Founding affidavit filed by the 5<sup>th</sup> Applicant on the 11<sup>th</sup> January 2022.
- n. The matter was argued on the 5<sup>th</sup> and 6<sup>th</sup> August 2022 before me.

### **[3] ISSUES FOR DETERMINATION**

3.1 From the above-mentioned facts, the following issues require determination by the court:

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<sup>3</sup> Page 56 of the record

<sup>4</sup> Page 59 of the record.

- i. Interpretation of the order of the Court of Appeal.
- ii. Is the answering affidavit of the applicant properly filed of record?
- iii. The fate of 5<sup>th</sup> Applicant's application in terms of Rule 30 of the High Court Rules filed on the 10<sup>th</sup> August 2022.
- iv. Interrogate what rule 8(19) means in the light of an application for review.
- v. Was the order acquired before Mokoko J erroneously sought?
- vi. If it was and it is discharged what is the overall effect.
- vii. Was the filing of the answering affidavit an irregular step?

**[4]** In order to do justice to these issues, the court will deliberate on each issue and thereafter make factual and legal findings on each issue.

#### **a. INTERPRETATION OF THE ORDER OF THE COURT OF APPEAL**

During the hearing, the parties were at logger-heads about the interpretation of the order of the Court of Appeal. Whilst the order appears simple and straight forward and to the point, during argument the contrary was experienced. To put this into context the court will relate the different arguments raised by counsel on this point.

#### **[5] RESPONDENTS' CASE ON THE INTERPRETATION AND EFFECT OF THE COURT OF APPEAL RULING.**

5.1 Advocate Mpaka argued that whilst this court should read and interpret the order of appeal in its literal sense, it should not ignore the intervening events that occurred post the order.

5.2 He directed the attention of the court to the two Notices of Set Down filed of record that eventually gave rise to the Mokoko J interim order. He argued that these Notices did not comply with Rule 39 (4) of the High Court Rules.

5.3 His argument was that the appearance before Mokoko J and the subsequent granting of the rule stands to be discharged in that the Notice of set down enabling the Applicants to obtain the interim order did not comply with the rules.

5.4 He continued to argue that as at the 6<sup>th</sup> June 2022, the matter, although brought in terms of the same papers of January 2022, was no longer urgent six months later. For the Honourable court to have dispensed with the rules of court due to the urgency of the application rendered the rule dischargeable.

5.5 Asked whether his answering affidavit filed of record did not suffer the fate of not being on record as at January 2022 and could therefore not be part of the present application, advocate Mpaka graciously conceded that indeed, the proper construction of the order of the Appeal Court would confine the proceedings of the present case to page 53 of the record. That is Rule 8(10) (C) filed as at the 13<sup>th</sup> January 2022.

5.6 The culmination of Advocate Mpaka's argument is that Mokoko J's interim order stands to be discharged because the Notice of Set down did not comply with the High Court Rules. Secondly that the matter was no longer urgent when he granted the rule. I must disclose that Adv Mpaka also submitted that in fact Khabo J had made a ruling that the matter was not urgent. I have had occasion to glean at the rule of Khabo J.<sup>5</sup> The order is silent on the issue of urgency but what appears from the order is that the application was filed on the 11<sup>th</sup> of January and argued on the 14<sup>th</sup> of January. Three days in between the filing and the hearing. The matter was obviously heard on an urgent basis although jurisdiction was declined.

5.7 In a nutshell, Advocate Mpaka argued that this court should adhere to the order of the court of appeal by limiting itself to the papers as they stood in January 2022. That is pages 7-60 of the record.

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<sup>5</sup> Page 80 of the record



## **[6] 5<sup>TH</sup> APPLICANT'S SUBMISSIONS ON THE INTERPRETATION OF THE ORDER OF THE COURT OF APPEAL.**

6.1 Advocate Setlojoane conceded that the Notice of Set down that led to the matter being placed before Mokoko J did not comply with Rule 8 (13) of the High Court Rules. However, this court in the exercise of its discretion under Rule 59 can condone non-compliance with the failure to comply with the rule.

6.2 For this reason, he argued for the confirmation of the rule issued by Mokoko J on the basis that it was granted on the papers as they were as of January 2020 as ordered by the court of appeal. The matter was still urgent and, in any case, it was literally on the papers as they were in January 2022.

## **[7] THE LAW ON SET DOWN OF MATTERS**

**7.1** Rule 8(13) of the High Court Rules provides;

*(13) Where no answering affidavit nor any notice referred to in sub-rule 10(c) has been delivered within the period referred to in sub-rule 10(b) the applicant may within four days of the expiry of such period apply to the registrar to allocate a date for the hearing of the application. Where an answering affidavit or notice is delivered the applicant may apply for such allocation within four days of the delivery of his replying affidavit or if no replying affidavit has been delivered within four days of the expiry of the period referred to in 'sub-rule 11. If the applicant fails to apply for such allocation within the appropriate period as stated aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the Registrar shall forthwith be given by applicant or respondent as the case may be.*

## **[8] THE LAW TO THE FACTS**

8.1 Having conceded that the notice in terms of this rule was not issued, this effectively means that this issue is common course. Does the court condone this in terms of the application made by adv Setlojoane in terms of rule 59?

8.2 It is the court's view that in exercising its discretion, the court should make a decision based on the circumstances of each case. The question being, what would be just in the circumstances? Thus the court makes a judicious decision. In the specific circumstances of this case, I see no reason why the rule was not complied with. The first non-appearance of the Respondents' legal representatives on the 31<sup>st</sup> may 2022 should have been a warning to the Applicants that they cannot unilaterally set the matter down. The second non- appearance should have served as a confirmation that, despite being served with the Notice the respondents' legal representatives were indeed experiencing difficulties with a date set down unilaterally.

8.3 It is for this reason that I conclude that the case before Mokoko J was erroneously set down. Advocate Setlojoane had argued during the proceedings that in the event that the court finds an error, the appropriate course would be for the respondents to file a rescission. That may be so. But it is not the only course for this court to navigate. It is for this reason that this court discharges the interim rule granted by Mokoko J on the 6<sup>th</sup> June 2022.

8.4 The effect is then that the court has to make a determination whether to grant the final orders sought. The net effect of the discharge is that the answering affidavit filed by the Respondents suffers the fate that it is not properly before court as it was filed (a) in reaction to the interim order and (b) it did not form the record of proceedings as of January 2022 per the order of the Court of Appeal when Khabo J declined jurisdiction.

#### **[9] ARGUMENT ON RULE 8(10) (C)**

9.1 The parties on the 6<sup>th</sup> September argued the matter on the papers as they stood on the 14th January 2002. Advocate Mpaka commenced the proceedings in terms of Rule 8(10) (C).

#### **[10] RESPONDENT'S SUBMISSIONS ON RULE 8(10) (C)**

**10.1** Advocate Mpaka argued that the applicant has failed to adhere to the dictates of Rule 8(19) of the High Court rules. The same reads

*(19) When an application is made to court, whether ex parte or otherwise (in connection with the estate of any deceased or alleged to be a prodigal or under any legal disability, mental or otherwise, 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.***

(Own Emphasis)

10.2 The highlighted part indicates the areas of the Rule which Advocate Mpaka submits the papers of the Applicant as they stand before this court, and as they were before Khabo J, failed to comply with the highlighted dictates of the rule. He continued to argue that as a result of Applicant's omission, the master has not complied with the rule. This, he said, was fatal to the case of the Applicants.

10.3 He relied on the case of **Qocha v Nthongoa**<sup>6</sup> to sustain the proposition that the courts have categorically stated that the rule is mandatory and must be complied with. Failure or non-compliance results in the application being dismissed for lack of compliance.

### **[11] APPLICANT'S SUBMISSIONS ON RULE 8(10) (C).**

At the face of this glaring omission, Advocate Setlojoane's submission was that the courts have since accepted that the failure to comply with the rule does not attract dismissal of the case but that the matter can be struck off the roll. For this proposition he relied on **Leteka v Leteka**<sup>7</sup>

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<sup>6</sup> QOCHA V NTHONGOA C OF A (CIV) 49 OF 2016 [2018] LSCA 19 (07 December 2018)

<sup>7</sup> Leteka v Leteka (C of A (CIV) 48/19) [2020] LSCA 19 (29 May 2020);

## [12] THE LAW

**12.1** Compliance or rather, non-compliance with Rule 8 (19) has been a subject matter of the courts of this jurisdiction. In *Ramaili v Master of High Court*<sup>8</sup> Mokhesi J cited these cases. He made mention of the following

*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).*<sup>9</sup>

12.2 In *Leteka V Leteka* Mosito JA held

The applicant would then have to apply for the re-enrolment of the matter after satisfying the requirements of Rule 8(19) of the High Court Rules. *I am of the view that the consequences of non-compliance with Rule 8(19) of the High Court Rules should be to strike off the application not dismissal.*<sup>10</sup>

12.3 This being the ruling of the Court of Appeal on this matter, I am inclined to disagree with advocate Mpaka that the matter stands to be dismissed for non-compliance with rule 8(19). As has been said in *Leteka V Leteka*, that;

*In practice where the matter has been struck from the roll, it may be re-enrolled upon the delivery of an affidavit explaining the reasons for the failure to comply with Rules of Court or practice directive and/or failure to appear when the matter was called. In this context therefore striking of the matter from the roll is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for re-instatement. Consequently, I find that when the court strikes a matter from the roll, it does not thereby bring to an end the litigation between the parties. Accordingly, the case is still*

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<sup>8</sup> *Ramaili v Master of High Court*<sup>2</sup> (CIV/APN/69/20) [2020] LSHC 22 (15 October 2020);

<sup>9</sup> At paragraph 7 of the *Ramaili* judgement.

<sup>10</sup> *Leteka v Leteka* (C of A (CIV) 48/19) [2020] LSCA 19 (29 May 2020); at paragraph 7

*pending before the court and it is up to the applicant to re-instate it.*<sup>11</sup>

### **[13] CONCLUSION**

13.1 This court finds that the Applicant in his papers has failed to comply with rule 8(19). As the courts have said in Ramaili and Leteka, the best route to take in such circumstances is to strike the matter off the roll and the Applicant be ordered to comply with the rule. This finding does not dismiss the case thereby bringing litigation between the parties to an end. The case is still pending before this court.

### **[14] ORDER**

Consequently, I make the following order

1. The matter is struck off the roll.
2. The Applicant is ordered to comply with Rule 8 (19).
3. The matter is still pending before this court.

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**M. G. HLAELE**  
**JUDGE**

**Applicant:**           **Adv R. Setlojane**

**Respondents:**       **Adv T. Mpaka**

