

IN THE HIGH COURT OF LESOTHO

CRI/A/0012/2022

CRI/MSU/0692/2022

HELD AT MASERU

In the matter between

THE CURATOR BONIS: ESTATE LATE

MOOKHO RAFONO-MOJALEFA RAFONO N.O. APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

THE CLERK OF COURT

2ND RESPONDENT

THE COMMISSIONER OF POLICE

3RD RESPONDENT

MASTER OF THE HIGH COURT

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

Neutral Citation: The Curator Bonis: Estate Late Mookho Rafono-Mojafefa Rafono N.O. vs DPP & 4 others [2022] LSHC Cri 268 (6 September 2022)

CORAM : M.P. RALEBESE J.

HEARD : 23 AUGUST 2022

DATE OF JUDGMENT: 06 SEPTEMBER 2022

SUMMARY

Criminal appeal – Property of deceased seized by the Police in connection with commission of crime– Tainted property - Application for release of property dismissed by Court a quo –New issue being raised on appeal – Other grounds of appeal untenable- Appeal dismissed - No order as to costs.

ANNOTATIONS

CITED CASES:

LESOTHO

Makhele and others v Minister of Defence and Internal Security and Another LAC (1995 – 1999) 303

Thoahlane v Ramaili (C of A (CIV) 43/2020) [2021] LSCA 22 (14 May 2021)

SOUTH AFRICA

Patrick Bandawe v Malawi Congress Party CIVIL CAUSE NO. 1010 OF 2018 [2019] MWHC 3 (08 January 2019)

Trackman No v Livshitz 1995 (1) SA 282

STATUTES

Constitution of Lesotho 1993

High Court Act No. 3 of 1978

Money Laundering and Proceeds of Crime Act No.4 of 2008

Background and facts

1. The appellant is the *curator bonis* for the estate of his late mother, Mookho Rafono (the deceased) who was the applicant in the court a quo. This is an appeal from the judgment of the Magistrate Court in terms of which the latter dismissed an application for release of the property of the

deceased which had been seized by the police. The property had been seized in connection with offences of fraud in contravention of section 68(1) read with section 109 of the Penal Code Act No.6 of 2010, alternatively, contravention of section 25 (1)(b) read with subsection (2) of the Money Laundering and Proceeds of Crime Act No.4 of 2008 with which the deceased had been charged with others in the Magistrate Court.

2. The deceased had instituted an application in the court *a quo* seeking the release of the property which is the subject matter into her custody pending the finalisation of the criminal proceedings against her. The sole ground that the deceased had advanced in her founding affidavit was that the property had been seized by the police without her consent or the search and seizure warrant. The Magistrate dismissed the application on the grounds that appear in the written judgment.

3. The grounds of appeal advanced by the appellant are that:

(a)The court *a quo* erred and misdirected itself by finding that the applicant's property seized by the police is tainted property.

(b) The court *a quo* erred in finding that if the applicant's property that was seized was to be released to the applicant, it would continue to be used to commit crime.

(c) The court *a quo* erred and misdirected itself by finding that the applicant's seized property should not be released for the purposes of further investigations.

(d) The court *a quo* erred and misdirected itself by not finding that the respondents have failed to comply with provisions of section 67(2) of the Money Laundering and Proceeds of Crime Act No.4 of 2008 whilst seizing the said property.

(e) The court *a quo* erred by dismissing the application for release of seized property without considering the evidence provided before court that the property was not tainted.

(f) The court should find that death stays the proceedings and no further deterrence or punishment towards the deceased should still stand.

Analysis of the Grounds of Appeal

4. I will first address the ground that the court *a quo* erred and misdirected itself by not finding that the respondents failed to comply with the provisions of section 67(2) of the Money Laundering and Proceeds of Crime Act whilst they seized the property. This issue was never pleaded by the deceased in the lower court nor was it canvassed before that court.
5. As I have already indicated, the only ground that the deceased advanced in her founding papers before the court *a quo* for the release of the property was that the property had been seized by the police without her consent and without the search and seizure warrant. This is the case that the respondents in the court *a quo* answered to and which was argued before the Magistrate.
6. The issue that the property was tainted was raised by the respondents in their opposing affidavit in the court *a quo*. The deceased however never addressed it specifically in her replying affidavit and she never raised the

issue of non-compliance with section 67(2) of the Money Laundering and Proceeds of Crime Act by the police when they seized her property. Non-compliance with section 67(2) of the Money Laundering and Proceeds of Crime Act is being raised by the appellant for the first time in this appeal.

7. It is trite that an appellate court that is called upon to determine an appeal should confine itself to deciding issues that were canvassed before the lower court. The appellant should not be permitted to raise new issues that were not canvassed in the court a quo. As stated by the Court of Appeal in **Thoahlane v Ramaili**¹:-

“Unless the appellant’s introduction of new matter on appeal is justified on some basis, this court will not entertain it. There are good reasons for that.

In general, a court of appeal decides, that is to say, upholds the lower court’s decision or allows an appeal, on an issue pleaded in the court below. It must not decide on an issue not pleaded in the court below. It will only do so if a reasonable explanation is given as to why the issue was not raised in the court below and if that issue was fully canvassed in that court and no further evidence is required for its decision.”

See also **Makhele and others v Minister of Defence and Internal Security and Another**² where it was held that it was irregular to raise a new cause of action on appeal which was not canvassed before the lower court. The appellant cannot be permitted to take this new point in this appeal and it is in that regard dismissed.

8. The appellant contends that the court a quo erred in finding that the deceased property was tainted; and in dismissing the application without considering evidence that the property was not tainted. This point is also

¹ (C of A (CIV) 43/2020) [2021] LSCA 22 (14 May 2021) at paragraph 17-18

² LAC (1995 - 1999) 303 at 306-307

without merit as it will herein be demonstrated. In terms of section 2 of the Money Laundering and Proceeds of Crime Act “tainted property” is defined as property:-

“(a) used in or intended for use in connection with the commission of a serious offence;

(b) derived, obtained or realised as a result of or in connection with the commission of a serious offence.”

The learned Magistrate made the finding that the property was tainted based on considerations that the vehicle and the washing machine had been purchased within the period when the offence was alleged to have been committed and that was the basis for suspecting them to be proceeds of crime. Regarding the electronic devices (laptop, iPad and cell phone) and the ATM cards, the Magistrate did consider that they were suspected to have been used in the commission of the charged offences and that they could enable the applicant to commit further offences if they could be released to her. These findings by the Magistrate demonstrate that he considered the evidence presented before him and made the finding that the property qualified as “tainted property” pursuant to section 2 of the Money Laundering and Proceeds of Crime Act. The learned Magistrate’s finding that the property was tainted cannot be faulted.

9. Regarding the submission that this court should find that death stays the criminal proceedings, this cannot be a ground of appeal tenable before this court exercising the appellate jurisdiction. In terms of section 130 of the **Constitution of Lesotho 1993** read with section 8 of the **High Court Act No. 3 of 1978**, the appellate jurisdiction of the High Court is

confined to judgments, decisions and orders of the subordinate court. It follows therefore that this court does not have powers to exercise its appellate jurisdiction in a matter that has not been dealt with by the Magistrate court. The criminal proceedings were instituted and are pending before the Magistrate Court and it is the proper forum to make a determination on the fate of such criminal proceedings in view of the deceased's passing. This ground should on this basis fail.

10. Now coming to the ground that the court *a quo* erred in finding that the property could be used to commit further offences if it could be released to the deceased and that it was required for purposes of further investigations, these grounds should also fall off as misguided. The Magistrate's findings in that regard were based on evidence that had been put before the court by Detective Inspector Khoabane Kulehile in his opposing affidavit. Inspector Kulehile indicated in his affidavit that the electronic devices, passport and ATM cards could be used by the deceased to commit further offences or to conceal money that the deceased was suspected to have defrauded the Government of Lesotho. He further averred that the electronic devices comprising the laptop, the iPad and the cell phone were required for investigations that were ongoing and were to be submitted for forensic investigations to establish that the applicant had used them to launder money and produce some fraudulent documents. The appellant has not advanced any grounds upon which the court *a quo* could reject the evidence as untenable and this court has found none from the record of proceeding in the lower court. The appellant's grounds in this regard are thus dismissed.

11. On the conspectus of the foregoing analysis, I am not persuaded that the Magistrate was wrong in his decision to dismiss the application for the release of the property. In the result, the appeal is dismissed. Since the respondents did not oppose the appeal, no order as to cost shall be made.

M. P RALEBESE J

JUDGE

For the applicants: Adv. T. S Mohasoa
For the respondents: No appearance