IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/246/2017

In the matter between:

MAKOAE MASUPHA **APPLICANT**

And

MOLEFI LIBE MASUPHA **1ST RESPONDENT**

PRINCIPAL CHIEF – HA 'MAMATHE **2ND RESPONDENT**

MINISTER OF LOCAL GOVERNMENT & CHIEFTAINSHIP AFFAIRS **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

Neutral Citation: Masupha v. Masupha and Others [2022] LSHC 42 Civ (10 March, 2022)

Coram : His Honour Judge Keketso Moahloli

Orders delivered : 04 March 2020 and 6 November 2020

Written reasons : 10 March 2022

SUMMARY

CONDONATION - Application for condonation of failure to deliver an answering affidavit within the period stipulated in High Court Rule 8 (10) (b) – Applicant must in terms of Rule 59 satisfy the court that it is in the interests of justice to exercise its discretion in favour of condoning the failure to follow the rules – Nature of court's discretion and factors to be considered in exercising it discussed.

CHIEFTAINSHIP - Whether the King ought to be joined in proceedings challenging a legal notice made pursuant to section 14(2) of the Chieftainship Act.

King having acted on the advice of the Minister of Local Government and Chieftainship Affairs- Court finds it improper and unnecessary to cite or join the King in such proceedings- where the King in such circumstances has been so advised by the Minister he is obliged to follow the advice and act accordingly. Therefore, it is unnecessary to burden the King with service where no direct recourse is sought or may be obtained against him.

Reviewing and setting aside of the advice of the Minister of Chieftainship Affairs to the King, as to who should succeed to the office of Chief.

Setting aside of a government notice declaring a successor to chieftainship.

Declarator of the lawful and rightful Chief.

ANNOTATIONS

Cases:

1. *General Medical Council v Hayat [2018] EWCA Civ 2796*
2. *General Medical Council v Adeogb Levy v Ellis Carr [2012] EWHC 83(Ch)*
3. *Koaho v Solicitor General, LAC (1980-1984) 35*
4. *Makoae Masupha v Molefi Libe Masupha [2016] LSCA 1*
5. *Molapo v Molapo and Others, C of A (CIV) 61/2019*
6. *Mosaase v R, LAC (2005-2006) 206*
7. *National University of Lesotho and Another v Thabane, LAC (2007-2008) 476*
8. *Smith v Tsepong Proprietary Limited C of A (CIV) 22/2020*
9. *The Attorney General v His Majesty and Others, C of A (CIV) 13/2015*
10. *Yu Quang v Hata Butle and Others [2020] LSCA 32*
11. *Zainab Moosa and Others v Lesotho Revenue Authority, C of A (CIV) 2/2014*

Statutes:

1. *Chieftainship Act No. 22 of 1968*
2. *Government Proceedings and Contracts Act No.4 of 1965*
3. *High Court Rules 1980 [Legal Notice No.9 of 1980]*

Books:

1. *Black's Law Dictionary*
2. *Claassen's Dictionary of Legal Words and Phrases*
3. *Schwikkard & Van der Merwe Principles of Evidence*
4. *Zeffertt & Paizes The South African Law of Evidence*

MOAHLOLI, J

INTRODUCTION

[1] The Applicant in the main, Chief Makoae Masupha ("Chief Makoae") lodged an application seeking an order –

> *(a) Reviewing and setting aside the decision of the Minister of Chieftainship Affairs to recommend [Chief Molefi] as a Chief of Sefikeng Ha-Fako to the King.*
>
> *(b) Setting aside the Government Notice No.37 of 2001 which declared [Chief Molefi] as a Chief of Sefikeng Ha-Fako.*
>
> *(c) Declaring [Chief Makoae] as the lawful Chief of Sefikeng Ha-Fako.*
>
> *(d) Ordering [Chief Molefi] to pay the costs of this Application.*
>
> *(e) Ordering the 2nd Respondent to 4th Respondents to pay the costs only in the event of opposition.*

[2] The application was served upon 1st Respondent, Chief Molefi Libe Masupha ("Chief Molefi") on 5 July 2017, who on 7 July 2017 served his notice of intention to oppose on Applicant, but only filed it with the court on 25 July. However he failed to file his answering affidavit or deliver notice of intention to raise a question of law without any answering affidavit within 14 days of notifying the applicant of his intention to oppose, as required by rule 8(10) of the High Court Rules 1980 ("the Rules"). After a lapse of about 4 months Chief Makoae applied to the Registrar to set the application down for hearing on 16 November 2017.

[3] I must mention that although the 2nd, 3rd and 4th Respondents were properly served with the application, none of them gave notice of intention to oppose.

INTERLOCUTORY APPLICATION FOR CONDONATION

[4] On the day of hearing when Chief Makoae's attorney (Mr Matooane) moved the application in the main, Chief Molefi's attorney (Mr Rasekoai) notified the court that he was seeking leave to apply for condonation of failure to file an answering affidavit within the period stipulated in the Rules. He said there were sound reasons for the delay, which he briefly set out. Mr Matooane disputed the validity of these arguments.

[5] After further exchange of arguments I directed the Applicant to file outstanding pleadings and written heads of arguments by 24 November and Respondent to file his heads by 30 November. It was only on 30 November 2017 that Mr Rasekoai filed a formal interlocutory application for condonation of late filing of his answering affidavit in the main. He sought the following reliefs:

> *"1. An order condoning the late filing of answering affidavit by [him] in the main case.*
>
> *2. Pursuant to the grant of Prayer 1 above, leave be granted in favour of [him] to file the answering affidavit.*
>
> *3. Costs be awarded only in the event of opposition to this matter.*
>
> *4. Granting [him] further and/or alternative relief as the Honourable Court may deem fit."*

[6] This interlocutory application (which Chief Makoae opposes) was brought in terms of Rule 59 of the Rules, which provides the following:

> *"**Savings as to the Court's discretion***
>
> *Notwithstanding anything contained in these Rules the court shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which the provisions of these rules are not followed." (My emphasis)*

[7] On the date of continuation of hearing Mr Rasekoai informed me that Mr Matooane was unable to attend on account of illness, and that they had agreed that I could proceed to make my condonation ruling on the papers as filed.

Legal principles applicable to condonation application

[8] Chief Molefi concedes that he has failed to deliver his answering affidavit within fourteen days of notifying Chief Makoae of his intention to oppose the main application, as required by Rule 8 (10) (b). In fact when the main application was moved on 16 November 2017 he had not yet filed an answer, when he should have done so by 22 July 2017 (i.e. within 14 days of notifying Chief Makoae of his intention to oppose). The answer is therefore about 4 months/120 days late.

[9] In order to succeed in his application for condonation, Chief Molefi must satisfy the court that it would be in the interests of justice to exercise its discretion to grant the indulgence sought. [see Rule 59 set out at para 6 supra]. The phrase "in the

interest of justice" is not defined in the Rules. In Black's Law Dictionary it is defined as:

> *"The proper view of what is fair and right in a matter in which the decision-maker has been granted a discretion."*

And in Claassen's Dictionary of Legal Words and Phrases it is interpreted as meaning "equitable evaluation of circumstances of each case required." Useful synonyms are 'for the sake of fairness', 'in order to be fair' and 'in the interests of ensuring or achieving fairness/equity/justice'.

[10] The courts have a wide discretion, which must be exercised judicially on a consideration of the facts of each. Although a judicial discretion is not absolute or unqualified and must be exercised in accordance with recognised principles, the rules have purposely conferred a very extensive discretion on the court and it is highly desirable not to abridge this.

[11] Among the factors that the court has regard to in exercising its discretion are[1]:

(i) the degree of non-compliance

(ii) the explanation of the delay

(iii) the prospects of success

(iv) the other party's interest in finality

(v) prejudice to the other side

(vi) the avoidance of unnecessary delay in the administration of justice

(vii) the degree of negligence of the persons responsible for the non-compliance.

[1] Koaho v Solicitor General, LAC (1980-1984) 35 at 36-37; Yu Quang v Hata Butle & Others [2020] LSCA 32 at para 25-27; National University of Lesotho & Another v Thabane, LAC (2007-2008) 476 at para 11-17; Mosaase v R, LAC (2005-2006) 206 at 207-209; Smith v Tšepong Proprietary Limited, C of A (CIV) No.22/2020 at para 28-34, 61, 63 and 65.

[12] Our apex court, in *Zainab Moosa & Others v Lesotho Revenue Authority*[2], laid down the following important guidelines for dealing with applications for condonation (of late noting of an appeal):

> *"[15] The standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. Fairness includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.*
>
> . . . . .
>
> *[18] An application for condonation is not a mere formality. It is triggered by non-compliance with the Rules of Court. Accordingly when there has been non-compliance, the applicant should, without delay apply for condonation and should give cogent reasons for non-observance of the Rules initially.*
>
> *[19]Where non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted whatever the prospects of success might be, the prospect of success is important, but not decisive."*
>
> . . . . .

Application of legal principles to the facts

[13] The reasons that Chief Molefi gives for not delivering his answering affidavit within the prescribed period are set out as follows in his founding affidavit to the condonation application:

> *"4.1 I wish to humbly bring to the attention of this Honourable Court that I was served with the founding papers as far back as early July of 2017 (this year) even though I cannot distinctly remember the specific dates. I immediately engaged the services of a legal practitioner and I understand an intention to oppose was expressed thereof by the said legal representatives.*

[2] C of A (CIV)2/2014 (16 November 2015)

4.2 Shortly after a week or so when I was supposed to meet again with my legal representative I suffered a near death experience and my family arranged for me to go to the Republic of South Africa where I have been staying for the past four months.

4.3 I was only able to recuperate quite fairly in mid-November of 2017 but I am still going for regular medical check-ups with doctors in the Republic of South Africa owing to my delicate medical status. I am prepared to transmit the entire dossier of my medical documents which serve as proof of my ill health in this regard but otherwise uncomfortable attaching them to the present affidavit as they would put my medical history open to public perusal and scrutiny but shall be ready to present them for inspection by both the court and the Applicant should he demand them.

4.4. I aver that it is clearly in the interests of justice that I be allowed to file my answering affidavit and oppose the matter efficiently because the issues of contestation have the public interest dimension and cannot be dealt with my way of default as is proposed by the Applicant. The issues at play have to do with the issue of chieftaincy over the designated area and as such it is not an issue that can be put to bed by way of default as is proposed by the Applicant.

4.5 I wish to bring this Honourable Court to my confidence and emphasize that the delay in filing the necessary answering affidavit was neither deliberate nor wilful but as a consequence of the factors that I have already alluded to above. In any case the Respondents are not going to suffer any prejudice which cannot otherwise be cured by an order as to costs to which I am ready to tender should the court demand that I do so. This is coupled with the fact that I have high prospects of success as articulated in my heads of argument to the extent that:

(i) *The non-joinder of His Majesty the King is fundamental flaw which vitiates the entire application because one cannot review the recommendation of the Minister as is sought in Prayer (a) of the Notice of Motion.*

(ii) *I aver on the basis of the advise rendered upon me by my legal representatives of record is to the extent that the repository of power who authored and or authenticated the gazette is not the 3rd Respondent (Minister of Local Government and Chieftainship Affairs) but His Majesty the King himself. I aver that a review can only be made against the actual repository of power who made the decision not a person who made a mere recommendation as it the case in the main application. I aver that the recommendation by the 3rd Respondent, prior to the acceptance*

thereof by His Majesty the King, did not impose any burden on the Application nor did such a recommendation at the stage, remove rights from the Applicant.

(iii) *I aver therefore that to the extent that the Applicant seeks to have the recommendation to be reviewed and set aside in terms of the provisions of The Chieftainship Act, the Applicant's challenge on this ground cannot succeed for the simple reason that the conduct of 3rd Respondent culminating in the recommendation, does not constitute a reviewable administrative action within the meaning of the Chieftainship Act.*

Degree of lateness

[14] As mentioned previously, Applicant's answering affidavit was 4 months or about 120 days late. For a document that must have been filed with 14 days, the degree of lateness was inordinate. A very good justification is required.

Reasons for the delay

[15] Chief Molefi claims that the delay was occasioned by his ill-health, which he chose not to disclose to the court. His lawyer requested the court to decide the condonation application on the papers, without taking the court into his confidence about the nature and effect of his client's alleged illness. Chief Molefi's personal testimony ought to have disclosed more details of his illness and it should have been backed by an independent opinion of his doctor (e.g. a medical certificate/sick note) stating the date on which he/she examined him and the exact nature of his ailment. And crucially, if it is not self-evident, why the ailment prevented him from being able to understand the proceedings sufficiently to instruct his lawyer adequately and depose to an answering affidavit or seek an extension of time[3]. In other words, Chief Molefi ought to

[3] General Medical Council v Hayat [2018] EWCA Civ 2796; General Medical Council v Adeogba Levy v Ellis Carr [2012] EWHC 83(Ch);

have disclosed to the court exactly why he did not wish to reveal the exact nature of his illness, and his doctor must have explained to the court how that type of illness incapacitated him from properly and timeously instructing his lawyers. As things stand he has not provided the court with a cogent, reasonable and acceptable reason for failing to comply with the rule, apart from the superficial and inadequate averments in his affidavit. He has fallen short a showing that his failure to take the appropriate steps was not avoidable. Chief Molefi has failed to make a full and frank disclosure of all the relevant facts that led to his non-compliance.

[16] The reason why I am insisting that Chief Molefi ought to have supported his affidavit with a comprehensive doctor's certificate or better still affidavit, is that it is a trite principle of our law of evidence that medical issues such as this one cannot be properly decided without expert evidence. Firstly, because the skill of a medical expert on such matters is greater than that of the court. Secondly, because the court can receive appreciable help from such opinion. And thirdly, because when the issue is one of science or skill the medical expert can be asked the very question which the court has to decide. [see Schwikkard & Van der Merwe Principles of Evidence, at pages 89-90 and the cases cited therein; Zeffertt & Paizes The South African Law of Evidence, at pages 323-326 and the cases cited therein].

[17] Another issue which is not explained is why Chief Molefi did not apply for condonation immediately when he became aware that his answering affidavit was late. Our law is very clear that once there has been non-compliance with the rules the defaulting party must without delay apply for condonation. Mr Rasekoai received the notice of set down on 24 October 2017, but did not immediately apply for condonation even though this must have reminded him that Chief Molefi's answering affidavit was still outstanding. Even on the date

of hearing (16 November 2017) Mr Rasekoai had still not filed the condonation application. He still spoke of seeking leave to apply for condonation, whatever that is. It was only on 30 November 2017 that he finally got round to filing a substantive interlocutory application for condonation. No explanation whatsoever was proffered for not applying for condonation without delay once non-compliance became apparent.

Prospects of success

[18] Chief Molefi contended that he had very bright prospects of succeeding in the main, primarily because the Applicant has committed a fatal non-joinder by failing to cite His Majesty who is the author of the impugned government gazette. I however doubt the correctness of his cause for optimism. I *prima facie* tend to agree with the counter argument of Chief Makoae, that the Minister, whose advice and recommendations the King was obliged to follow is the appropriate person to mount the challenge against. The applicable provision of the Chieftainship Act, section 10(7) states unequivocally that "no succession to the office of the Chief--- shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof". [My emphasis].

[19] I do not agree with Mr Rasekoai's contention that the Minister's advice to the King is merely a recommendation (which is therefore not reviewable). Our law is very clear and settled that where a person is empowered to do something in accordance with the advice of another person, this means that he must do it in a manner conforming with (i.e. in a way that agrees with) the other person's advice. In such instances the advice is binding or mandatory (not just advisory).

[20] This is the position even in terms of our Constitution. The Court of Appeal had occasion to discuss the constitutional powers of the King vis-à-vis Ministers of government in *The Attorney General v His Majesty & Others*[4]. At para [16] the court summarised this relationship in the following words:

> *"….the constitutional scheme is clear. The King will be advised, either by cabinet, or by a minister acting under its general authority. He is then obliged to follow the advice. However, as s98(2) makes clear it is the cabinet, and not the King, that is responsible to parliament for that advice and its consequences."*

[21] Secondly, Mr Rasekoai's argument about non-joinder is assailable because it is arguable that in all civil matters where the government is being sued it suffices to cite only the Attorney General as nominal defendant or respondent [per section 3 of the Government Proceedings and Contract Act No. 4 of 1965].

[22] Lastly, for purposes of motivating an application for condonation non-joinder cannot be cited as a good defence available to the applicant because it is not a defence as such but merely a dilatory point of law.

[23] After careful consideration of the above submissions, I dismissed the application for condonation with costs. Upon his request, I allowed Mr Rasekoai an opportunity to make written reprentations to substantiate why he was still entitled to be heard sans answering affidavits. He never did so and never approached the Court thereafter.

ON THE MERITS

[4] C of A (CIV) 13/2015 Cons/Case/02/2015 (12 June 2015)

[24] This case is concerned with the question of who is entitled to succeed the late Chief Mojela Masupha to the chieftainship of Sefikeng Ha Fako. The contestants are Chief Molefi, the son of Chief Mojela's younger brother, and Chief Makoae the son of one of the wives of Chief Mojela.

[25] The litigation between the two parties has a very long history. Most aspects of the case's merits have already been fully ventilated and determined in the Berea Magistrates Court (CC/108/2001 and CC109/2001), the High Court in CIV/A/13/2014 and the Court of Appeal in C of A (CIV) No. 41/2015.

[26] The definitive factual position is authoritatively laid out in the afore-mentioned Court of Appeal case of *Makoae Masupha v Molefi Libe Masupha, d*ecided on 29 April 2016[5]. I will quote extensively from this judgment. It reads as follows, in relevant part:

> *"[3] The appellant (Makoae) was the fourth of four plaintiffs who instituted an action in the magistrate's court. They claimed to be the legitimate sons of the late Chief Mojela Masupha who died in 1987 and thus to be entitled to the chieftainship in 'descending order'. The first three plaintiffs withdrew their claims at the commencement of oral evidence before the Magistrate's court and Makoae remained as the sole plaintiff.*
>
> *[4] The respondent Molefi Libe, is the son of the late Libe Masupha who was the younger brother of the late Chief Mojela Masupha. At the time of the institution of the action, the respondent had already set in motion proceedings to become the holder of the chieftainship.*
>
> *[5] Makoae as remaining plaintiff, sought orders declaring that Molefi Libe was not entitled to succeed to the chieftainship and that he, Makoae was entitled to succeed to the chieftainship.*
> ……
>
> *[9] Makoae presented the evidence of eight witnesses before the magistrate. Molefi Libe was the only witness who testified on his behalf.*
>
> *[10] It appears from the evidence that after chief Mojela died in 1987, one of his wives, 'Mankata acted as chieftainess until her death in 1995, whereafter one Masira Masupha acted as the chief.*

[5] [2016] LSCA 1

[11] The principal challenge to Makoae's entitlement to succeed to the chieftainship was founded on the contention that his mother 'Mamakoae was not married to the late chief Mojela. On the basis of the evidence presented before her, the magistrate concluded that the appellant's mother 'Mamakoae had been married to the late chief Mojela and that Makoae was the rightful successor to the chieftainship and that Molefi Libe, being the son of a younger brother of the late chief Mojela ranked behind the appellant and therefore had no right to succeed to the chieftainship.

[12] During the course of his evidence before the magistrate, Molefi Libe handed in as exhibit D1, a Government Gazette containing Government Notice No. 37 of 2001, being a Chieftainship (Succession to the office of Chief) Notice, 2001, which reads as follows:

> *"I, King Letsie III, pursuant to section 10(7) of the Chieftainship Act of 1968 and acting in accordance with the advice of the Minister of Local Government approve of the succession to the office of chief by the person whose names appear in the schedule below."*

[13] Molefi Libe's name appears in the schedule which reflects that his Majesty King Letsie III has approved of his succession to the position of chief of the Sefikeng area in Berea district.
……..

[17] The learned judge a quo, correctly in my view, held that despite the fact that on the evidence presented before the magistrate, Makoae had the first right to succeed as chief, the approval by the King of the succession to chief of Molefi Libe cannot simply be ignored and thereby rendered nugatory. As long as the approval by the King of Molefi Libe's succession to the chieftainship is not set aside on review, it stands and it may not be ignored, even if it is considered that the approval was incorrectly granted.……..

[18] It follows that the appeal cannot succeed and must be dismissed. The order made by the High Court must for the sake of clarity be amended.

[19 The following orders are made:

1. *The appeal is dismissed with costs.*
2. *The judgment and order of the court a quo is replaced with the following order:*

   "The order made by magistrate is set aside and it is declared that while Government Notice No. 37 of 2001 (exhibit D1) remains in force, the appellant, Makoae Masupha is not entitled to succeed to the area

chieftainship of Sefikeng Ha Fako in the district of Berea."

[27] Armed with this judgment, Chief Makoae approached this Court for the review and declaratory orders set out in paragraph [1] above. He contends that the Minister's decision to recommend chief Molefi as successor should be reviewed and set aside on the grounds that: (a) the Court of Appeal has now confirmed that Chief Makoae has the first right to succeed his father as chief; (b) the recommendation of Chief Molefi to His Majesty as successor was made before pending cases were finalised at the Berea Magistrates Court which included an interdict prohibiting such recommendation; and (c) it is clear that the advice given by the Minister was blatantly wrong.

[28] Regarding prayer (b), Applicants contend that the gazette issued by His Majesty should be set aside because: (a) His Majesty had acted on wrong advice by the Minister; and (b) strictly speaking, it is not His Majesty but the Minister who is given the responsibility, in terms of section 14(2) of the Chieftainship Act of giving public notice for general information of the names of persons holding the office of chief.

[29] The Courts received further clarification and guidance on this important and vexing issue of succession to chieftainship in the Court of Appeal case of *Peete Molapo v Retselisitsoe Molapo and Others*[6], where the court confirmed the *ratio decidendi* of Masupha v Masupha, by holding that a challenger to chieftainship was not entitled to a declarator order before successfully instituting a review and settling aside the King's approval of a sitting Chief, as there was no vacancy to be filled.

[6] C of A (CIV) 61/2019 (29 May 2020)

CONCLUSION

[30] Upon applying the legal principles discussed above to the facts as outlined, I find that the applicant has made a case for the granting the reliefs sought.

[31] In the premises, I granted the following order on 6 November 2020:

1. The decision of the Minister of Chieftainship Affairs to recommend **Molefi Libe Masupha** as **Chief of Sefikeng Ha Fako** in the district of Berea to His Majesty the King is hereby reviewed and set aside.

2. **Government Notice No. 37 of 2001** which declared the said **Molefi Libe Masupha** as **Chief of Sefikeng Ha Fako** in the district of Berea is hereby set aside.

3. The applicant **Makoae Masupha** is hereby declared as the lawful and rightful Chief of **Sefikeng Ha Fako** in the district of **Berea**.

4. The 1st Respondent Molefi Libe Masupha must pay the costs of this application.

[32] These are the written reasons for my interlocutory and substantive orders.

……..……

KEKETSO L. MOAHLOLI
JUDGE

Appearances

Mr T. Matooane for Applicant in the main
Mr M.S. Rasekoai for 1st Respondent in the main