IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0097/2022**

In the matter between

LESOTHO COMMUNICATIONS AUTHORITY
(LCA) **1ST APPLICANT**
MINISTER OF COMMUNICATIONS, SCIENCE
AND TECHNOLOGY **2ND APPLICANT**
ATTORNEY GENERAL **3RD APPLICANT**

And

GLOBAL VOICE GROUP S.A (GVG) **RESPONDENT**

Neutral Citation: Lesotho Communications Authority LCA v Global Voice Group SA (GVG) [2023] LSHC 99 Comm. (11 May 2023)

CORAM: **M. S. KOPO, J**
HEARD: **25/04/23**
DELIVERED: **11/05/23**

SUMMARY

Civil Procedure – application for set down under rule 8 (13) wherein the Main Application was brought under Rule 50 – self review under rule 50 – matter being properly or not properly before court – results thereof.

Annotation

Lesotho

Nts'ekhe v Public Service Tribunal (C of A (CIV) 11/2019 [2019] LSCA 39 (01 November 2019)

Director General National Security Services v Lietsiso Mothala & 76 Ors (C OF A (CIV) 31/2019 [2019] LSCA 43 (01 November 2019)

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Cases

South Africa

Anthony Johnson Contractors (Pty) Ltd v D'Oliveira and Others 1999 (4) SA 728

Statutes

High Court Rules No. 9 of 1980

Superior Courts Practice Direction No. 2 of 2021 for the Management of Cases in Superior Courts During the COVID -19 Pandemic

RULING

[A] INTRODUCTION

[1] The main application in this matter, is a "self-review application" (as put by Mr. Rasekoai for the Applicant). It is a *sui generis* kind of application but brought under Rule 50 of the High Court Rules. While it is normal to always have differing views on the interpretation of the law by different jurists, legal scholars and legal representatives, those views will be more pronounced in applications of this kind.

[2] In the main the 1st Applicant launched this Application by filing a Notice of Motion on the **26th day of September 2022**. The Notice of Motion was styled as follows;

> *"APPLICATION FOR SELF-REVIEW IN TERMS OF RULE 50 OF THE HIGH COURT RULES LEGAL NOTICE NO. 9 OF 1980 READ WITH SECTION 119 (1) OF THE CONSTITUTION OF LESOTHO 1993 AND DECLARATORY RELIEF IN TERMS OF SECTION 2 (1) (b) OF THE HIGH COURT ACT NO 5 OF 1978"*

The application seeks to set aside the decision of the former Chief Executive Officer of the 1st Applicant to enter into a contract styled C-

Mart with and choosing the Respondent as a preferred bidder to be reviewed and declared *void ab initio* as well as condonation for late filing.

[3] Upon perusal of the record, it becomes apparent that on the 18th day of October 2022, Advocate Selimo appeared for the Respondent before my brother Justice Mokhesi but there was no appearance for the applicant. The matter was removed from the roll and costs of the day were awarded to the Respondent. Be that as it may, the subsequent minute shows that Advocate Tuke appeared for all the Respondents at the instance of Advocate Teele K.C. The only reasonable explanation is that Advocate Tuke was late to appear before court or had technological problems if the matter was heard virtually.

[4] On the 24th day of November 2022, the Applicants filed an application that the Respondent be served through edictal citation which was duly moved and granted by my brother Justice Mathaba on the 06th day of December 2021. Per the order granted by Justice Mathaba, the Respondent was to file a Notice of Intention to oppose the matter within 14 days of service. The Notice of Intention to oppose was dully filed on the 10th day of January 2023.

[5] On the 27th day of January, 2023, A Notice of Set down was filed of Record and dully served on the Respondent on the 25th day of January, 2023 for the matter to be heard on the 07th day of February, 2023. On the 23rd day of February, 2023, Mr. Rasekoai, with Advocate Tuke for the Applicant and Advocate Selimo for the Respondent appeared before my brother Justice Mokhesi. Mr. Rasekoai informed the court that the purpose of his appearance was to "have the matter re-enrolled and for the natural route of the rules to follow". Advocate Selimo applied for costs of the day as he argued that there was no need to have the matter set down for re-enrolment. The matter was enrolled but the issue of costs was deferred to be argued before me as the Judge allocated the matter.

[6] On the 11th day of April, 2023, a Notice of Set Down was filed of record showing that the matter was set down to proceed on the 23rd day of September, 2023. On the 19th day of April, 2023, another Notice of Set down was filed of record and served with the Respondent on the same date reflecting that the matter would proceed on the 25th day of April, 2023.

[7] A Notice titled "**A NOTICE IN TERMS OF DIRECTIVE 10 READ WITH DIRECTIVE 11 OF THE SUPERIOR COURTS PRACTICE DIRECTION NO. 2 OF 2021**", was filed of record and it showed the relief sought as the one reflected in the Notice of Motion (Application in

the main). However, Mr. Rasekoai filed the Heads of Arguments wherein he proposed an order that would direct the parties as to the filing of pleadings and putting them to terms as to when to file. This is the application that is presently before me.

[8] It is apposite to mention that on the 24th day of March, 2023, a Notice in terms of Rule 8 (13) was filed of record and had been served on the Respondents on the 17th day of March 2023. Probably, this is the date in which the Applicants secured the date that resulted in the Notice of Set Down mentioned in paragraph **[6]** above.

[9] This matter did not appear on the Weekly Roll for the 24th to the 28th days of April, 2023 and the Uncontested Motion Roll of the 25th day of April, 2023. It was, therefore, not enrolled.

[B] APPLICANTS' CASE

[10] Mr. Rasekoai for the Applicant argued that Rule 8 (13) of the High Court Rules[1] empowered the Applicant to approach the Registrar of court and have the matter set down when the Respondent has only filed a Notice of Intention to Oppose the Application but has not filed the necessary Answering Affidavit within the times stipulated by the rules of

[1] Legal Notice No. 9 of 1980

court. He argued that in the present matter the Respondent filed a Notice of Intention to Oppose on the 10th day of January 2023 but has not filed any Answering Affidavit up to today. He argued further that the fourteen (14) days required by Rule 8 (10) (b) of the High Court Rules has long passed but there is neither an Answering Affidavit nor a Notice to Raise a Point of Law per Rule 8 (10) (c).

[11] Mr. Rasekoai conceded that the matter had already been set down to be heard in September but due to the history of breaches of the rules by the Respondent, he felt that the Applicant had a right to acquire an earlier date.

[12] Finally, Mr. Rasekoai argued that the argument by the Respondent that per Rule 30, Applicant should have applied for an order of a dispatch of the record before an answering affidavit could be filed is flawed. He argued that since this is a self-review application, there was no need for the dispatch of the record as all that is necessary for the Respondent to answer has been annexed in the application.

[C] THE RESPONDENT'S CASE

[13] Advocate Selimo for the Respondent argued that the application has clearly been brought in terms of Rule 50 of the High Court Rules. He

argues that there are clear procedural rules guiding applications brought under that rule. The Rule demands that a record of proceedings that are to be reviewed is to be availed to the Applicant, Respondent, and the Court before any further filing of papers can occur. He cited a plethora of authority to support his case[2].

[14] The second argument for the Respondent is that the matter had not been properly set down and therefore was improperly before court. Moreover, it was not even on the roll. Advocate Selimo went on to argue that the matter had already been properly set down for hearing in September and therefore to unilaterally set down the matter for an earlier date was not proper.

[D] ISSUES FOR DETERMINATION

[15] The issues that stand for determination are;

a. Has the matter been properly set down?
b. If so, in a "self-review" application, is it necessary to follow the procedural steps of Rule 50, specifically the dispatch of the Record?

[2] Nts'ekhe v Public Service Tribunal (C of A (CIV) 11/2019 [2019] LSCA 39 (01 November 2019), Director General National Security Services v Lietsiso Mothala & 76 Ors (C OF A (CIV) 31/2019 [2019] LSCA 43 (01 November 2019)

[E] ANALYSIS OF THE MATTER

[16] The two issues identified for determination above are intertwined and will be tackled simultaneously. The applicant filed a NOTICE IN TERMS OF DIRECTIVE 10 READ WITH DIRECTIVE 11 OF THE SUPERIOR COURTS PRACTICE DIRECTION NO.2 OF 2021. In the said practice directive, the Applicant sought the matter to be enrolled in the unopposed motion roll. The matter was not publicised in the unopposed motion roll for the 25th day of April 2023. The confusion in the heading of the practice directive and the first sentence of the directive does not make the matter any easier. The heading suggests that it is an opposed matter while the first line say it is unopposed. Be that as it may, Mr. Rasekoai appeared in the unopposed motion court and the matter was called.

[17] The publication of the roll is an important tenet and practice of justice. It goes to the transparency and accountability of the courts. The business of the court is public, and the publication of the roll makes it known to all interested parties and the public at large, that the business of the court for that week will be as publicised. There is no doubt that by not publicising the business of the court, the very core mandate of the court is defeated, and justice may seem to not be done. The very Practice

Directive that Mr. Rasekoai relies upon demands that the matter be enrolled. This is trite.

[18] The purpose of the publication of the roll is not only for the benefit of making sure that the parties know that their matters are before court. It is also to organise the business of the court to efficiently dispense justice equally without fear or favour and/or to be seen to do same. The matter in question was set down for September. A bystander may perceive the bringing forward of the matter as favouritism. Moreover, access to justice of others has been compromised by the court's attention being diverted to an application that was packaged as an unopposed matter.

[19] Rule 8 (13) is not intended to be brought in an unopposed manner or in the unopposed motion roll or day. The Rule is clear, and it is apposite at this stage to reproduce the relevant potion as I herein do;

> *"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 of 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… Notice in writing of the date allocated by the registrar*

shall forthwith be given by the applicant… to the opposite party".

The rule makes it clear that after an applicant has obtained a date, the other party must be notified. While there has been a hybrid of the matter being handled as unopposed, unopposed, and urgent, the rule is clear that the matter should be treated as opposed. I am saying it is a hybrid because the Practice Note shows the matter being moved under section 10 of the Practice Directive which deals with opposed matters, but the body of the Practice Note mentions that the matter should be enrolled in the unopposed motion. It could be that it was a typographical error, but the fact that the matter was set down on a motion day and caused to be called in the motion roll says it was not. Moreover, the Notice of set down shows that it was filed on the 19th day of April 2023 with the date of hearing only three (3) working days later suggests that it was moved in haste.

[20] The application in question was not brought within four (4) days as provided for the Rule was not challenged and I believe rightly so. Be that as it may, it may be necessary to comment on the timelines provided by the rule. I am in agreement with the South African judgment by Knoll AJ in **Anthony Johnson Contractors (Pty) Ltd v D'Oliveira and Others**[3].

[3] 1999 (4) SA 728

The timeline provided for within which the application in question may be instituted is not peremptory.

[21] Mr. Rasekoai argued that even if the matter was not enrolled, the question that should be asked is whether there is any prejudice suffered by the Respondent. This may be another way of looking at it. However, the prejudice suffered by other court users and the compromise of the business of the court should be looked at as well. The matter had been set down to proceed in September. What the Applicant has now done is to unduly inconvenience the entire business of the court for that day and caused other matters to suffer. This outweighs the non-prejudice advocated for by Mr. Rasekoai.

[E] CONCLUSION, COSTS AND ORDER

[22] Having concluded that the matter should have been enrolled and that the date that had already been secured was properly set down, it is concluded that the business of the court is regulated so as to give the public equal access to justice. For that reason, therefore, the present matter is not properly before court.

[23] The inconvenience that has been caused by skipping the que, has to be discouraged. The Notice in terms of Rule 8 (13) filed on the 24th day

of March, 2023 shows that the date of the 26th day of September that was secured was for the same application that the Applicant is undertaking today. The costs should be at a higher scale.

[24] It is tempting to go into the interpretation of Rule 50 *vis-a-vis* the self-review application. However, it is my considered view that it would be improper now that I have ruled that the matter is improperly before court. The following order is therefore made,

a. The matter is improperly before court.
b. The Costs for the day are awarded to the Respondent on attorney and client scale.

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Kopo M.S.
Judge of the High Court

For 1st Applicant: **ADV. RASEKOAI**

For Respondent: **ADV. SELIMO**