

**IN THE COURT OF APPEAL OF LESOTHO**

**Held at Maseru**

**C OF A (CIV) NO.49 OF 2016**

**CIV/APN/392/2013**

**In the matter between**

**‘MAPHUNYE QOCHA**

**1<sup>ST</sup> APPELLANT**

**LIMAKATSO NKONE**

**2<sup>ND</sup> APPELLANT**

**MATISETSO NTHONGOA**

**3<sup>RD</sup> APPELLANT**

**J M NTHONGOA TRUST**

**4<sup>TH</sup> APPELLANT**

And

**HAPE NTHONGOA**

**RESPONDENT**

**CORAM:** DR K. E. MOSITO P

S.N. PEETE AJA

N.T. MTSHIYA AJA

**HEARD:** 28 NOVEMBER 2018

**DELIVERED:** 7 DECEMBER 2018

## **SUMMARY**

*Civil Practice –The effect of non-compliance with Rule 8(19) of the High Court Rules 1980- Whether the High Court had jurisdiction to entertain the application - Whether the High Court was entitled to grant the application – Appeal upheld with costs.*

## **JUDGMENT**

**DR K.E. MOSITO P**

### **BACKGROUND**

[1] In The court, the applicant approached the court for an order in the following terms:

- “2. *That a Rule Nisi be issued returnable on such and time as the honourable court shall determine for an order calling upon the Respondents to show cause, any why:*
  - 2.1 *the respondents shall not be interdicted and prevented from obstructing and/or interfering with the applicant’s administration of the estate of his late father in accordance with Sesotho customary law;*
  - 2.2 *the respondents shall not be ordered and directed to accept the applicant as the mojalefa of the late J.M. Nthongoa estate in accordance with the Laws of Lerotholi and Sesotho customary law;*
  - 2.3 *the respondents shall not be interdicted, prevented and restrained from collecting rentals from the immovable properties that belonged to the late J M Nthongoa in his lifetime and which now belong to the applicant in accordance with Sesotho customary law, namely residential Units at Moshoeshoe II, Upper Thamae and Teya-Teyaneng near Lioli garage in the district of Berea.*
3. *It is hereby declared that the applicant is a mojalefa to the estate of the late JM Nthongoa and in that regard is entitled to*

*all the rights and privileges of a mojalefa thereto in accordance with the Laws of Lerotholi and/or Sesotho customary law;*

4. *That prayer 1 and 2.3 operate with immediate effect as an interim court order pending finalization hereof.*
5. *That the applicant be granted costs of this application and of any opposition thereto.*
6. *Further and/or alternative relief.”*

[2] The application was granted as prayed with a qualification as to costs. The appeal is a sequel to that decision.

## **THE FACTS**

[3] In his founding affidavit, the applicant avers: that the respondents acting in concert and collectively have written to the tenants of my premises at Moshoeshoe II, Upper Thamae in the district of Maseru and Teya-Teyaneng near Lioli garage in the district of Berea advising them that 1 September 2013 they should make payments at Du Preez Liebetrau & Co because their new “landlord” is now JM Nthongoa Trust. In this regard I attach hereto a copy of the notice they have written to the tenants and mark it Annexure “HP2”. In this notice they have threatened to terminate the tenancy agreements if any tenant failed to comply with their instruction.

[4] The notice of the tenants that they should make payments at the offices of Du Preez Liebetrau & Co because their new sub-lessor is JM Nthongoa illegal He then goes on to say that: “[i]n terms of Sesotho customary law particularly the Laws of Lerotholi

I am the mojalefa and in my capacity as such I am entitled to succeed the whole estate of my deceased father. In terms of section 11 part 1 of the Laws of Lerotholi I am entitled to succeed to the estate of my late father, JM Nthongoa. I confirm that I accepted my rights thereto and was duly confirmed in that capacity by the Nthongoa family, who now accepted me to have taken the rights, privileges and responsibilities of my late father.” He then goes on to say that: the deprivation by the respondents of my rights as a mojalefa without a hearing and contrary to Basotho culture and customs has caused me serious prejudice.

### **ISSUES FOR DETERMINATION**

[5] The following issues fall for determination in this matter

- (a) The effect of non-compliance with Rule 8(19) of the High Court Rules 1980.
- (b) Whether the High Court had jurisdiction to entertain the application brought.
- (c) Whether the High Court was entitled to grant the application as it did.

### **THE LAW**

[6] It is now apposite to outline the legal principles applicable in the resolution of this appeal. In terms of Rule 8(19) of the **High Court Rules 1980**:

(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.

## **DISCUSSION AND APPLICATION OF THE LAW**

[7] The appellant contends in his first and second grounds of appeal that that the Learned Judge in the court a quo erred and misdirected himself in failing to uphold the Rule 8(19) point *in limine* as raised by Appellants. He goes further to say that, His Lordship's directive that the Master of the High Court be served with papers, is in conflict with the clear provisions of Rule 8 (19) of the High Court Rules and as such did not serve a legitimate purpose of the rule.

[8] In **Mokete and Others v Mokete (born Makhobalo) and Others**<sup>1</sup> this court had the following to say in relation to the breaching of this Rule:

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Bearing in mind that the present matter involves a deceased estate, persons under a legal disability (minor children), the appointment of a *curator* and an application of the provisions of section 3 (b) of the Administration of Estates Proclamation of 1935 ("the Proclamation"), this was *par excellence* a matter where the Master should have been joined as a party and the requirements of High Court rule 8 (19) complied with.

[9] Dealing with a similar situation in the High Court of Botswana in **Makgatlhe v Mattias**,<sup>2</sup> Masuku J pointed out that, '[i]t is clear from the wording of the above Rule that it is mandatory for every application in connection with a deceased 's estate or person under any legal disability, must be submitted to the Master for consideration and report before the same can be filed with the Registrar. It is an ineluctable fact that the peremptory provisions above were not followed by the Applicant as there is no evidence of submission of the application to the Master and clearly, there is no report. Such an application, whose conduct, flies in the face of clear and unambiguous provisions of the Rules must fail for that reason.' I endorse the above comments by the learned judge.

[10] In **Mphalali v Anizmi'halali and Others**,<sup>3</sup> Nomngongo J regarded non-compliance with this Rule as mandatory. He proceeded to point out that, 'the Rule is couched in mandatory terms. I consider this an indicator of the direction. He then went on to say that, in the present proceedings the applicant contrary

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<sup>2</sup> Makgatlhe v Mattias MISCAF 178/2005 at p. 6.

<sup>3</sup> Mphalali v Anizmi'halali and Others CIV/APN/260/2003 at p.3.

to Rule 8 (19) has filed his application with the Registrar without first submitting a copy of such application to the Master. He has also failed, *per force* to make an allegation that such copy has been so forwarded to the Master as required. In asking me to condone such noncompliance the applicant does not say what other relief he seeks consequent upon such condonation. Do, I for instance allow him to go back and rectify the matters in respect of which he is in default or do I proceed to hear the main application, ignoring the provisions of the rule.' The Learned Judge went on to say that:

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.<sup>4</sup>

[11] The learned judge proceeded to say that, '[t]he approach that I respectfully propose to adopt is that which was taken by Roux J in ***Small Business Development Corporation Ltd v Khubeka 1990 (2) SA 851 at 853 (H)*** viz "whether this irregularity may be condoned and, if so, should it be condoned." Of course if the inquiry ends in a negative answer to the question whether it may be condoned that is the end of the matter and condonation is refused. In embarking upon this inquiry, it has to be taken into

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<sup>4</sup> *Supra*, p.3.

account the wording of the rule noncompliance with which is sought to be condoned and whether or not condonation would defeat the very purpose of the rule.’ I endorse the above comments by the learned judge. I am of the view that failure by the applicant to comply with the above rule was fatal to the application.

## **JURISDICTION**

[12] The next issue is whether the High Court had jurisdiction to entertain the application brought. In his second ground of appeal, the appellant complains that, the Learned Judge in the court a quo misdirected himself in assuming jurisdiction over this matter as a court of first instance, when the relief sought was in terms of or in accordance with the Laws of Lerotholi and Sesotho customary law for ‘mojalefa. I do not agree with this argument. In terms of section 6 of the **High Court Act 1978**, the Court has a discretion whether to assume jurisdiction *mero motu*, even in matters falling within the Local and Central Courts.

## **OTHER GROUNDS**

[13] Although I do not find it strictly necessary to consider the last two grounds, I shall mention them *en passant*. I say so because as I indicated above, the application fell to be dismissed on the first two grounds. In his third and fourth grounds of appeal, the appellant contends that, first, that the Learned Judge in the court a quo erred and misdirected himself in granting the application as this was against the evidence that Respondent was never appointed or accepted as heir by the family. Second, he contends that, the



Learned Judge in the court a quo erred and misdirected himself in granting the application as the evidence reveals that the deceased parents had virtually abandoned customary way of life and adopted a European mode of life. In light of my decision on first and second grounds, I do not find it strictly necessary to consider these grounds.

## **CONCLUSION**

[14] I would uphold the appeal on the first two grounds. I accordingly order that the appeal succeeds with costs.

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**DR K E MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:

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**S.N.PEETE**  
**JUSTICE OF APPEAL**

I agree:

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**N.T. MTSHIYA AJA**  
**ACTING JUSTICE OF APPEAL**

**For the Applicant** : Advocate T.Mpaka

**For Respondents** : Mr. Q. Letsika