IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.11/2014

In the matter between:-

MAFUPU POKANE	**First Appellant**
MATHOO POKANE	**Second Appellant**

and:

MOFOLO POKANE	**First Respondent**
LIPHAPANG POKANE	**Second Respondent**
PAMELA EDITH MALIPHAPANG POKANE	**Third Respondent**
PUSELETSO POKANE	**Fourth Respondent**
POKANE POKANE	**Fifth Respondent**

CORAM: HOWIE, J.A
THRING, J.A
LOUW, A.J.A

HEARD: 08 OCTOBER, 2014
DELIVERED: 24 OCTOBER, 2014

SUMMARY

Urgency – Application brought ex parte – Rule 8(4) – Factual disputes not capable of resolution or even proper formulation on papers – Application converted into trial in terms of Rule 8(14).

JUDGMENT

THRING, J.A

[1] There is a dispute amongst certain members of the Pokane family about who is to receive certain benefits as a result of the death of the late Tlou Pokane on 24 December, 2009. The two appellants, who are his daughters, brought an urgent ex parte application before the Court a quo in which they sought certain interdictory and declaratory relief. On 11 April, 2012 the Court a quo (Hlajoane, J.) granted a rule nisi as prayed by the appellants, certain portions of which were to operate as an interim interdict against some of the respondents. On 21 August,

2012, an extended return day of the rule nisi, and in the absence of counsel for the respondents who, it seems, failed to appear, the Court a quo (Nomngcongo J.) made the rule final. It is common cause, although it is not apparent on the record, that this final order was subsequently rescinded by agreement between the parties, and the rule nisi was revived.

[2] The matter then appears to have been argued in the Court a quo before Mokhesi, A.J. On 31 January, 2014 he gave judgment and made the following order:

> *"The rule nisi which was granted in the interim is discharged and the urgent ex parte application is dismissed with costs on attorney and client scale, for lack of urgency, abuse of ex parte procedure and non-compliance with Rule 8(4) of the High Court Rules 1980."*

The learned Judge a quo did not deal in his judgment with the merits of the application.

It is against this order that the present appeal is directed.

[3] The first ground on which the Court a quo dismissed the application was lack of urgency. In so doing, I am of the view that the Court a quo erred and misdirected itself. In her founding affidavit the first appellant made the following averments:

> *"I have been reliably informed by our mother (Mantlibi Pokane) and I believe the information to be true that she has been to the office of the 7th respondent [the Lesotho Teaching Service Department] and was informed by the terminal benefits section of the 7th respondent that all preparations and calculations of the deceased's terminal benefits with 7th respondent have been completed, the file has already been sent to 9th respondent [the ministry of Education] to process payment after the latter has sought 3rd respondent's bank details from 7th respondent, in order to deposit the benefits in question in it. Which deposit is likely to be mistakenly made any time."*

These allegations are not substantively denied by the respondents. The Court a quo pointed out in its judgment that the appellants had not indicated when this information came to their attention or that of their mother. However, it cannot have been before 15 March, 2012, which is when, according to the appellants, it first came to their knowledge that the first to the fifth respondents had met and appointed certain beneficiaries of the deceased's estate. There would have been no reason for the appellants' mother to have gone to the seventh respondent's offices to make enquiries about the payment of the benefits before this date.

[4] Then the Court a quo relies on the fact that the appellants allowed some 26 or 27 days to pass between 15 March, 2012 and 10 April, 2012 before

launching their urgent application. However, this delay must at least in part have been due to the fact that the appellants and their mother all reside abroad: the first appellant in London, the second appellant in Berlin and their mother in Vienna. For them to communicate with each other and to give the necessary instructions to their attorneys in Maseru must consequently have been a more time-consuming process than would have been the case had they all resided locally. To me it does not seem that this delay was unreasonable or inordinate, or that it took away the urgency which the appellants allege.

[5] The second ground on which the application was dismissed was that it ought not to have been brought ex parte. Here, too, I think that the Court a quo erred. In her founding affidavit the first appellant said:

> *"It is further my humble submission that I have approached this Honourable Court ex parte without serving the respondents since to do so would defeat the whole purpose of this application. It is my belief that by the time I serve them the money will have already been deposited into 3rd respondent's bank account."*

Whilst it is true that abuse of the ex parte procedure is something to be carefully guarded against, in my view these allegations, coupled with the justification of urgency to which I have referred above, warranted bringing the application without notice to the respondents in the circumstances. It follows that its dismissal by the Court a quo on this ground cannot stand.

[6] The third ground on which the application was dismissed was that, according to the Court a quo, the appellants had "flouted" the provisions of High Court Rule 8(4). The relevant portion of this rule reads:

> *"Every application brought ex parte shall be filed with the Registrar before noon on two court days preceding the day on which it is to be set down to be heard …"*

In the present case the appellants apparently caused their urgent application to be heard on the same day as it was initiated (10 April, 2012). However, High Court Rule 59 provides that:

> *"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."*

In her founding affidavit the first appellant prays:

> *"… for condonation from this Honourable Court for not complying with Rule 8(4) due to the extreme urgency of the matter."*

The learned Judge a quo says nothing in his judgment about this prayer for condonation. In view of the

urgency of the matter he ought, in my opinion, to have considered it and granted it.

[7] In my view the appellants' application ought not to have been dismissed on the grounds relied on by the Court a quo. It does not necessarily follow, however, that the relief sought by the appellants should have been granted.

[8] There are large disputes of fact between the parties, most of which emerge on the papers, but some others of which we were told about only from the Bar. They centre on the question of who is entitled to receive certain terminal benefits from the employer of the appellants' late father as a result of his death. There are also apparently the proceeds of a certain policy or policies in issue. It is in dispute whether the

estate of the deceased falls to be administered in terms of the customary law or under the Administration of Estates Proclamation, No.19 of 1935: this raises questions as to whether the deceased lived according to a traditional Basotho lifestyle or a European one. On this question there is no evidence on the affidavits. The second and third respondents apparently claim that the second respondent, having been elected as "administrator" of the estate in customary manner by the surviving relatives of the deceased, has been issued with letters of administration by the Master of the High Court. The appellants aver that these actions of the respondents were "fraudulent, malicious, and with full intent to deprive" them of their rights. However, these disputes and others have been so poorly and sketchily set out in the affidavits that it is not possible even to begin to formulate the issues with

any degree of accuracy. In my view the only satisfactory way in which the disputes between the parties can be resolved is by means of an action in which the parties can formulate the issues properly in pleadings and in which discovery and the rest of the machinery of a trial can come into play. I accept that such will be a costly and time-consuming exercise, but in my view it is the only way, other than amicable settlement, in which this matter can be properly resolved.

[9] Consequently the appeal is allowed, with costs. The order of the Court a quo dated 31 January, 2014 is set aside, and in its place the following order is substituted:

> *"(1) Pending the final determination of this matter, the sixth, seventh and ninth respondents are interdicted and restrained from paying out any*

terminal or policy benefits of the late TLOU POKANE to any person.

(2) In terms of Rule 8(14) this application is converted into a trial. To this end:

(a) The applicants' notice of motion shall stand as a summons;

(b) Within two months of today's date the applicants shall deliver a declaration;

(c) Thereafter, the provisions of the Rules relating to trials shall apply, mutatis mutandis, as if this matter had been a trial ab initio.

(3) All questions of costs shall stand over for determination at the trial."

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W.G. THRING
JUSTICE OF APPEAL

I agree: _____

C.T. HOWIE
JUSTICE OF APPEAL

I agree: _____

W.J. LOUW
ACTING JUSTICE OF APPEAL

For Appellants : A.M. Chobokoane
For Respondents : L.D. Molapo