

LESOTHO / JUDGMENT

Dr. Mohale Phehlane V The Prime Minister,
Hon.
Sam Matekane &3 Others (CIV/APN/0384/2023)
[2024] LSHC 8 (22 March 2024)
[2024] LSHC 8

COURT
High Court

CASE / FILE NUMBER
CIV/APN/0384/2023

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IN THE HIGH COURT OF LESOTHO
HELD AT MASERU CIV/APN/0384/23

In the matter between:

DR MOHALE PHEHLANE APPLICANT
and
THE PRIME MINISTER OF LESOTHO 1st RESPONDENT
HON. SAM MATEKANE
NTHOATENG LEBONA 2nd RESPONDENT
PUBLIC SERVICE COMMISSION 3rd RESPONDENT
ATTORNEY GENERAL 4th RESPONDENT

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Neutral citation : Dr Mohale Phehlane v The Prime Minister of
Lesotho - Hon. Sam Matekane and 3 Others [2023] LSHC 08 Civ
(07 February 2025)

CORAM : KHABO J.,

HEARD : 22 MARCH 2024

DELIVERED : 07 FEBRUARY 2024

SUMMARY

Practice and procedure - Default judgment - Respondents failing to file
an intention to oppose and an answering affidavit to Applicant's notice
of motion - Applicant moving the court for a default judgment on account
of this failure - Also failing to invoke the procedure laid down in Rule 8
(13) of the High Court Rules, 1980 when Respondents failed to file an
intention to oppose and an answering affidavit - Non - compliance with
the Rules of court condoned and the matter set down for hearing to be
determined on the merits.

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ANNOTATIONS

Statutes and subsidiary legislation

High Court Rules, 1980

Cases cited

Lesotho

National University of Lesotho and Another v Thabane C of A (CIV)

No. 3 of 2008

Onyelekere v Mokula C of A (CIV) 31/2017

Other jurisdictions

Setlai v Road Accident Fund (A206/2006) [2007]

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JUDGMENT

KHABO J.,

Introduction

- [1] The Applicant is seeking, in the main, to be appointed by the Prime Minister, 1st Respondent herein, to the advertised position of Principal Secretary, Ministry of Finance and Development Planning. He avers that he was the successful candidate for the said position, and as such ought to have been appointed instead of the 2nd Respondent.
- [2] Aggrieved by this decision, he instituted the present application by way of review, seeking to challenge the said decision on grounds, inter alia, that it was unreasonable, irrational, or motivated by malice, and bias. The Applicant approached the court on an urgent basis. Counsel for the 1st, 3rd and 4th Respondents opposed the urgency, albeit, having not filed an intention to oppose having been served with the Page | 4 notice of motion on 22nd December 2023 at 11: 37 hours when the application was to be moved at 14:30 hours on the same day. Urgency was not granted for reasons set out in a judgment delivered on 19 January 2023.
- [3] What triggered the current request for default judgment was that Counsel for the 1st, 3rd and 4th Respondents never filed an intention to oppose nor an answering affidavit to the notice of motion despite the lapse of filing periods prescribed by the High Court Rules, 1980 (the Rules).¹ The request for default judgment
- [4] Applicant's Counsel filed the request for default judgment on 21 December 2023, and served it on the Respondents on 22nd December 2023. The application was moved on 19th February 2024.
- The basis of the application was that periods for filing an intention to oppose and an answering affidavit had since 1 No. 9 of 1980 Page | 5 expired, and Applicant's Counsel felt he was entitled to default judgment.

- [5] The Respondents ought to have filed an intention to oppose within fourteen (14) days of the receipt of the notice of motion in terms of Rule 8 (23) and an answering affidavit within fourteen (14) days of the filing of the notice of an intention to oppose. Despite his failure to file an intention to oppose and an answering affidavit, 1st, 3rd and 4th Respondents' Counsel appeared on the day of hearing of the default judgment to oppose it. He had, however, filed heads of argument.
- [6] His explanation for his failure to file an answering affidavit was that the matter was moved when the court was on recess, and that when the court is on vacation, its business is suspended, unless such matter is considered as urgent by the court. He argued that when the court is on vacation, pleadings are held in abeyance. Page | 6
- [7] Moreover, that since this is a review application, the Applicant ought to have sought the dispatch of the record of proceedings from the 1st Respondent within fourteen (14) days of the receipt of the notice from the Registrar of this court to submit such record in terms of Rule 50 (1) (b). He submitted that such a record was only availed on 19th February 2024. He submitted that the request for default was premature and, therefore, unsustainable. Counsel for the 1st, 3rd and 4th Respondents asked for the court's indulgence to condone the irregularities because they were only late by four days for the filing of the answering affidavit. He implored the court to exercise its powers under Rule 59.
- [8] The court is still operative in terms of filing and determination of urgent matters during vacation, so 1st, 3rd and 4th Respondents' Counsel's argument in this regard is unfounded. It is further this court's considered view that despite the absence of the record, Counsel ought to have filed 1st, 3rd and 4th Respondents' answering affidavit, and upon receipt of the record file supplementary papers, if he deems it Page | 7 necessary. It is also absurd that he relies on the absence of the record when he has direct access to such. The exercise of a discretion in condoning the non - observance of the Rules of this court
- [9] Not every irregularity is fatal to a case. The court has a discretion to overlook an irregularity unless it causes a substantial prejudice to the party complaining of it and interests of justice. The court held in *Setlai v Road Accident Fund*² that: There is ample authority on the difference between an irregular proceeding that can be cured by either an amendment or the grant of condonation and one that is fatally defective and cannot be condoned. Courts have a discretion to condone any irregularity in the observance of their Rules. Such discretion must, of course, be exercised judicially. 2 (A206/2006) [2007] at para. 6 Page | 8
- [10] Rule 59 provides on the exercise of a discretion in respect of condonation for non - observance of the Rules of this court that: Notwithstanding anything contained in these Rules, the Court shall always have a 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.
- [11] In *Tsótetsi v Lesotho Highland Development Authority*³ the court had the following to say on the exercise of a discretion, that: Certainly, condoning a departure from the Rules by an applicant for the purpose of denying respondent a right to put its case by denying an

application for rescission of judgment causes a breach of the audi ulteram partem principle. This, courts are often reluctant to do. 3 CIV/APN/445/99 Page | 9 The court went further to state that “if no prejudice to respondent is shown, then the court might at its discretion condone non - compliance with the Rules.”

- [12] The court discerns no prejudice that the Applicant will suffer if this matter is heard on the merits. When he approached the court, the 2nd Respondent had already been appointed, so whatever remedy he receives will not make a difference in respect of time. The interests of justice also dictate that the matter be heard on its merits. The gravity of the substantial issue raised by this case cannot just be disposed of on legal technicalities. The apex court remarked on easily disposing a matter on technicalities in *National University of Lesotho and Another v Thabane*⁴ that: ... what amounts to purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of an appeal on the merits. 4 C of A (CIV) No. 3 of 2008 at para. 4 Page | 10
- [13] This is a case in which the Applicant alleges that he has not been appointed to a Principal Secretary's position, a senior position in Government, when he was the successful candidate. Moreover, when the application for default was heard, Applicant's Counsel did not object to 1st, 3rd and 4th Respondents' Counsel's audience.
- [14] This is not to take court Rules lightly, but looking at the circumstances of this case, it is one befitting condone non - compliance with the Rules in terms of Rule 59. The court in the *National University of Lesotho and Another* (supra) 5 stated that Rules: ... are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals. Consequently, the Rules must be interpreted and applied in a spirit which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the Rules, most if not all of which are cast in mandatory terms. A failure to abide by the Rules could have serious 5 Ibid Page | 11 consequences for parties and practitioners alike – and practitioners ignore them at their peril. At the same time formalism in the application of the Rules should not be encouraged. Thus, the amount of purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of an appeal on the merits. The rules are not cast in stone (emphasis added). The court went further to remark that: Thus, it has been said that Rules exist for the court, and not the court for the Rules. The discretionary power of this Court must, however, not be seen as an encouragement to laxity in the observance of the Rules in the hope that the Court will ultimately be sympathetic...
- [15] These remarks were made in the context of appeal cases but they are just as relevant in the determination of cases before the High Court. Default judgment is not for the taking. So, it will not make any difference, whether the matter proceeds by default or not because the Applicant would still have to prove Page | 12 his case, as he would do if the matter is determined on the merits. Failure to follow the Rule 8 (13) procedure

- [16] The Applicant, on his part as well did not come with clean hands. Rule 8 (13) provides for a hearing in the absence of an answering affidavit. prescribes that the Applicant may approach the Registrar within four days for an allocation of a date of hearing where no answering affidavit has been filed and dates for doing so have expired. It reads: When no answering affidavit nor any notice referred to in sub - rule (1) (c) has been delivered within the period referred to in sub - rule (1) (c) the applicant may within four days of the expiry of such period apply to the registrar to allocate a date for the hearing of the application ... If the applicant fails to apply for such allocation within the appropriate period as stated aforesaid, the respondent may do so immediately upon expiry thereof. Notice in writing of the date allocated by the Registrar shall forthwith be given by applicant or respondent, as the case may be to the opposite party. Page | 13
- [17] The Applicant failed to observe this Rule in that he only applied to the Registrar on 12th February 2024 when Respondents' time to file the answering affidavit had already expired. Restating this Rule, the apex court in Onyelekere v Mokula⁶ pointed out that where no answering affidavit nor a question of law raised by the Respondent Rule 8 (10) (c)) within the referred to in Rule 10 (b) the applicant may within four days of the expiry of such period apply to the Registrar to allocate a date for the hearing of the application. This was, however, a case in which the Appellant had in the court a quo filed an intention to oppose, but not the answering affidavit, and the court considered the intention to oppose to have been an opposition to the claim.

Conclusion

- [18] I am persuaded to condone the irregularities cited above for the reasons aforementioned. On costs, the court wishes to express its displeasure at how 1st, 3rd and 4th Respondents' 6 C of A (CIV) 31/2017 at para. 21 Page | 14 Counsel handled this case, and signifies it by mulcting the said Respondents jointly or severally with an order of costs. ORDER
- (19) In the premises, the court makes the following order:
- (a) The request for default judgment is dismissed;
 - (b) 1st, 3rd and 4th Respondents are to file their answering affidavit within five (5) days from receipt of this order. Applicant to file a replying affidavit, if any, within three days of receipt of the answering affidavit. Applicants heads of argument to be filed on or before 24th February
2025. Respondents' heads of arguments by the 27th February 2025. Matter is scheduled to be heard within a week of the filing of heads of arguments;
- (c) The 1st, 3rd and 4th Respondent to jointly or severally, one paying the other to pay the costs of this application. Page | 15

F. M. KHABO JUDGE For the Applicant : Adv., C. J Lephuthing For the 1st, 3rd and 4th
Respondents : Adv., P. T. B. N Thakalekoala NB: No appearance for the 2nd Respondent Page | 16

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Prepared on 23 October 2026 · Esheria