

IN THE LESOTHO COURT OF APPEAL

In the Application of :

MOHLOUOA MATETE MOKOLOKOLO Applicant

v.

R E X Respondent

HELD AT MASERU

CORAM:

MAISELS, P.
TEBBUTT, J.A
VAN WINSEN, J.A.

J U D G M E N T

Van Winsen, J.A.

This is an application directed to this Court asking the Court to grant applicant leave to appeal against his conviction by the Magistrate for the district of Mafeteng on a charge of extortion and for condonation of the late filing of the application. Applicant had unsuccessfully appealed to the High Court of Lesotho against his conviction and the Judgment dismissing the appeal was delivered on the 23rd of February 1979. No action was taken by the applicant with the object of initiating a further appeal to this Court until an undated notice of an application for such leave was delivered to the Registrar of this Court.

Applicant had made no attempt to approach the High Court for leave to launch a further appeal against the Judgment of the Magistrate.

Section 8 of the Court of Appeal Act 10 of 1978 (the Act) provides as follows :-

"Any party to an appeal to the High Court may appeal to the Court against the High Court judgment with the leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence".

By Legal Notice No. 10 of 1980 the President of the Court of Appeal in the exercise of the powers conferred upon him by s.22 of the Act gave notice of the repeal of the then existing Court of Appeal Rules 1955 and the substitution therefor of a new set of Court of Appeal Rules (The Rules). These latter Rules (Rule 2) prescribe the procedure to be followed where an application for leave to appeal is necessary to this Court in a criminal matter in terms of s.8 of the Act where leave has been refused by the High Court.

The Rules however made no provision for the procedure to be followed by a litigant wishing to approach the High Court for leave to appeal to this Court. Similarly, there appears to be no procedure prescribed in the High Court Rules specifically dealing with the manner and the time within which an approach should be made to the High Court to obtain leave to appeal in terms of s.8 of the Act. This is an unfortunate lacuna in the Rules of the High Court and it may be thought desirable to remedy the position by an amendment of the High Court Rules. Until this is done it would not be inappropriate to seek such leave by verbal application at the conclusion of the trial or subsequently to approach the High Court for leave to appeal by way of an application on notice of motion as envisaged by the High Court Rule 8(1) and (2).

However that may be, the absence of any procedure prescribed in either set of rules for applying for leave to the High Court confers no jurisdiction on this Court to bye-pass the clear injunction contained in s.8 of the Act and itself assume the function of granting leave to appeal.

Applicant's counsel raised a doubt as to whether the Act had ever been put into operation. There is no reason to doubt that the Act is in fact in operation. The Act was assented to on the 6th of September 1978 and, it was published in Gazette No. 34 dated the 15th of September, 1978. Section 16 of the Interpretation Act 19 of 1977 provides that every act shall be published in the Gazette and shall come into operation on the expiration of the day next preceding the day of the publication unless the act concerned or some other law provides another day for its commencement. Neither the Act nor any other law provide for a date of commencement other than the date of the publication in the Gazette. It thus follows that the Act came into operation at the beginning of the day in which it was published in the Gazette, and that it was binding on the parties to the present litigation as from that date.

It is for the above reasons that the Court struck out the application to this Court for leave to appeal. The way remains open to applicant to follow the correct procedure by approaching the High Court for leave to appeal.

In the case of M. Mahloane v. Rex and Forrester v. Rex orders were also made striking off the respective applications from the roll. These cases are in pari materia with the present case and though the circumstances are not identical both the latter cases labour under defects similar to those present in the case being dealt with and the orders were there made for the same reason.

Signed: L.De V. Van Winsen
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L.VE V. VAN WINSEN
Judge of Appeal

I agree Signed: ..I.A. Maisels.....
I.A. MAISELS
President

I agree Signed: P.H. Tebbutt
.....
P.H. TEBBUTT
Judge of Appeal

Delivered this 12th day of January, 1981 at MASERU.

For Applicant:
For Respondent: