C of A. (CIV.) No 4 of 1984

IN THE LESOTHO COURT OF APPEAL

In the Appeal of

MICHAEL MTHEMBU — Appellant

and

LESOTHO BUILDING FINANCE CORPORATION — Respondent

HELD AT MASERU

CORAM

Schutz P
Odes J.A.
Schreiner A J.A.

J U D G M E N T.

Schutz P

This appeal has a lamentable procedural history It was first set down in this Court in January 1985 The record presented was in a disgraceful state, as was then pointed out. It was not properly paginated, contained much superfluous matter, and so on. This Court declined to hear the appeal because of the state of the record. Respondent's Counsel wished the appeal to proceed in order that finality could be achieved, but the Court found itself unable to accede to this wish The appellant's counsel requested that the matter be placed on the roll and postponed to the next session. This application was refused on the basis that no condonation application had been brought It was made clear that if the appeal was to be

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proceeded with access to the roll would not be gained unless a proper condonation application was brought In the result the appeal was struck off the roll on 25th January, 1985, and the appellant was ordered to pay wasted costs on the attorney and client scale.

Nothing more was heard of the matter at the July 1985 session The matter was then sought to be re-enrolled for the current session, which was originally set down in January 1986 and which was postponed to April 1986. A new and much shorter record was filed but no condonation application was brought before the appeal date.

The appellant's conduct has not only been most dilatory but is positively oppressive of the respondent which has a substantial judgment in its favour, but which is still waiting for its money

In the case of Mpho Mohapi v Maqentso Mohapi (C of A. (Civ) No 2 of 1982) this Court stressed, in a different context, the essentiality that there should be finality to a trial. No less is it essential that there should be finality to an appeal The appellant has had more than ample opportunity to apply for condonation of his earlier failures Among the things that would have been had to have been dealt with in such an application are the reasons for the non-compliance and the reasons for delay. That has not been done In Salojee and Another NNO v. Minister of Community Development 1985 (2)SA 135 (A) at 138E Steyn C.J said

> "It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration"

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As was pointed out in P.E Bosman Transport Works Committee and Others v. Piet Bosman Transport (Pty) Ltd 1980 (4)SA 794 (A) at 797 F, not only the interests of the opposite party are involved, but also the convenience of the Court, and the need to avoid unnecessary delays in the interests of the proper administration of justice. Further in that case, it was held, not for the first time, there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence (at 799 G)

The prospects of success in the appeal is one of the factors usually taken into account in a condonation application, but, as was stated in the Bosman case (above) at 799 D

> "In a case such as the present there has been a flagrant breach of the Rules of Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be "

When the appeal was called Mr Liebowitz, who appeared for the appellant, conceded that a condonation application should have been brought but had not been brought. He was allowed to make such an application from the bar, Mr Wright, who appeared for the respondent, having no objection to such a course. Mr Liebowitz was then bound to concede, as he did concede, that there was no explanation of the earlier procedural shortcomings or of the delays That being so, this case is, in my opinion, pre-eminently one in which the passage

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quoted from p 799 of the Bosman case should be applied Accordingly I would dismiss the condonation application without regard to the prospects of success on appeal Notwithstanding, we invited Mr. Liebowitz to address us on such prospects, which he did

Insofar as the prospects of appeal may be relevant, which in opinion they are not, I would say h that the appellant's prospects are very slim indeed It was admitted that the respondent had lent him money His defence was that he had repaid the loan His legal representative correctly conceded that the onus was on the appellant The Court below disbelieved him There was ample reason for doing so Let me cite but two grounds An attorney, ostensibly acting on his behalf, wrote a letter which is fundamentally inconsistent with his evidence. The appellant stated that he had not instructed the attorney to write the letter, but was at a loss to explain where the attorney had obtained the information needed to write the various details of the appellant's affairs contained in the letter. Secondly, the appellant's story of repaying the large sum of some M17,000 to a bank manager and not a teller, and in cash, without obtaining a receipt, is simply incredible The fact that the other party to the alleged repayment had died was an additional reason to scrutinise the appellant's version carefully.

In the result, if the prospects of the success are taken into account they do not strengthen, but rather weaken the appellant's case.

There being no proper condonation application before the Court, I think that the course adopted in Nankan v H Lewis and

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Co (Natal) Ltd 1959(1)SA 157(N) should be adopted and the appeal dismissed.

The order I propose is that the appeal be dismissed with costs

(Sgd.) .....
W.P Schutz
President

I agree (Sgd) .....
M W. Odes
Judge of Appeal

(Sgd) .....
W.H.R Schreiner
Acting Judge of Appeal

Delivered at Maseru this 9th day of April 1986.

For Appellant - Mr Liebowitz

For Respondent - Mr Wright