

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MAKOETLE KOETLE

Applicant

V

BENJAMIN SELLO

Respondent

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 13th day of April, 1989.

Applicant seeks an order of this Court :

- (a) Condoning her failure to comply with Rule 52 in that she did not apply in writing to the Registrar for a date of hearing within four weeks after noting of the appeal in JC. 134/81 resulting in CIV/A/22/87 of this High Court.
- (b) Granting her leave to proceed with her appeal in the said CIV/A/22/87.
- (c) Granting her further and/or alternative relief
- and (d) For costs of suit in the event of opposition.

The application is opposed.

In a brief argument in support of applicant's averments in the supporting affidavit Mr. Ramodibedi sought the indulgence of this Court relying on Rule 59 in order to realise prayers set out above.

It appears to me from applicant's founding affidavit that Mr. Ramodibedi was briefed fairly late in the day. This may account for irregularities that he set about trying either to put right or to obtain the Court's indulgence to have them condoned.

On the papers before me it is reflected that a CIV/A/22/87 number involving the present parties was allotted to a record in that regard. Furthermore in

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terms of a photocopy of a receipt filed along with applicant's papers marked "A" it seems a total sum of M45.40 plus M60 was paid in respect of appeal and preparation of the record fees.

In argument Mr. Sello drew my attention to respondent's opposing affidavit wherein in Para 7 relating to applicant's averments in paragraph 12 of her founding affidavit he said

"I humbly submit that applicant cannot be condoned for failure to apply for a date for a matter that is not before this Court."

Taken aback by the boldness of this averment in the light of the fact that in the ordinary run of things a reference to a record number forming part of the usual series of appeal cases in this Court, presupposes the existence of an appeal filed of record, I set about looking for the CIV/A/22/87 Koetle vs. Sello record and discovered that it contained no formal notice of appeal nor grounds thereof.

Our Rules have regard to the filing of power of attorney in respect of parties who are represented by legal practitioners. The fact that sub-rules 2(a) and (b) of Rule 15 refer to any proceedings and any time with regard to representation makes no exception for the need to legal representatives to file powers of attorney. The power of attorney should accompany the Notice of appeal.

Needless to say the file does not contain the power of attorney either.

The rules enjoin the Registrar of this Court not to accept any record proceedings purporting to be an appeal as referred to above unless the above-mentioned requirements have been met. But "alas" this is just what he did.

It stands to reason therefore that whereas in CIVAPN/385/86 Maphilimon Motlalentoa vs. Monyane and Another (or C. of A. (CIV) No. 20 of 1987) the Court declined to exercise its discretion to accommodate

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applicant's plea for condonation of its failure to comply with the rule requiring that a date be applied for in writing to the Registrar within four weeks of noting the appeal for the hearing of his appeal (See Rule 52(1)) it would be an abuse of the exercise of that discretion where no appeal has been noted.

I make a distinction between the instant case and that of Montseng Letsoela vs. Michael Nkhope CIV/APN/140/87 (unreported) because in the latter case the attorney had gone out of his way to deceive his client by saying that the appeal had been noted when he knew fully well that none had been.

May I strongly give a warning that the office of the Registrar of this Court should acquaint itself with rules relating to conditions and requirements which have to be fulfilled before a record can be received and given a number forming part of the series of numbers allotted to records of this Court. I need hardly emphasise that in order for an appeal to be regarded as properly before this Court from the J.C. Court, it has to have a Judicial Commissioner's certificate, a notice of appeal accompanied by the grounds of appeal. Further that if the appellant is represented then there has to be a power of attorney to that effect.

I do concede that introduction of the present rule 15 is no improvement on the provisions of rule 9 of the repealed rules sub-rule (2) of which clearly prevented the Registrar setting down a civil appeal brought by an attorney unless accompanied by power of attorney signed by the appellant. Rule 15 merely leaves this process to inferences. That is, in my view, regrettable.

In the instant application I make an allowance for the fact that I may have assumed more than is justified, but it seems to me that even at this stage respondent appears to have adopted the attitude that if applicant had applied for leave to appeal out of time his opposition could perhaps have been relaxed; for in paragraph 7 he says

".....Applicant's application is misconceived inasmuch as applicant ought to have applied for

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leave to appeal out of time and not have brought this present application."

In that event even in the face of respondent's opposition the court's discretion would be exercised one way or the other in terms of Rule 59 subject to the well known rule that considerations ad misericordiam should not be an invitation to laxity. As matters stand there is no other way than that this application ought to be dismissed with costs.

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J U D G E.

13th April, 1989.

For Applicant : Mr. Ramodibedi  
For Respondent : Mr. Sello.