

C. OF A. (CIV) NO.19/94

IN THE COURT OF APPEAL OF LESOTHO

In the appeal of:

MAHOPOLANG KOALI

Appellant

and

MBONESO NKOSI

Respondent

HELD AT MASERU

Coram: STEYN A.P.  
BROWDE J.A.  
KOTZE' J.A.

JUDGMENT

KOTZE' J.A.

This is an application for condonation of the late lodging of an application for leave to appeal.

The litigation between the parties commenced in the magistrate's court for the district of Butha-Buthe where Mboneso Nkosi (respondent in this application) claimed against his mother-in-law Mahopolang Koali (applicant in this application) an order of ejectment from a residential property at Phaphama ha Sechele and certain ancillary relief. The ultimate outcome of the action was a judgment of ejectment in favour of respondent based on a finding that the property in question is his property.

An appeal to the High Court was dismissed with costs by MAQUTU J. on 14th March 1994. The application now before us was lodged on 3rd May 1994 i.e. forty-nine days after the date of judgment whereas in terms of the rules of court the application

for leave to appeal should have been lodged within twentyone days. The inordinate delay is not satisfactorily explained. Applicant states in her supporting affidavit:

"When judgment was delivered I was not present in Court. I live in the Butha-Buthe district which is some distance from Maseru. When I received notification from my attorneys of the outcome of my appeal in the High Court I learned from them, when I came to see them in response to their request that the time for making this application had lapsed and that I could only be heard by this Honourable Court if it should be indulgent and condone my default."

According to the respondent this explanation is false. He states in his replying affidavit that:-

"I categorically deny that when judgment was delivered the applicant was not present in court and put her to the proof thereof. I honestly state that the applicant was personally present in court when judgment was delivered on 14/3/94. She even approached me with her attorney for an amicable settlement of the matter outside Court."

The above statement has not been denied or explained by or on behalf of the applicant. Indeed when confronted with this situation at the hearing of the application by the learned Acting President, Mr. Sello, who appeared for the applicant, very properly stated that he would "concede she was in Court."

In the light of the foregoing the application for condonation should be dismissed. There are several reasons for this conclusion:-

- (a) It has repeatedly been held by this Court and the Courts of neighbouring South Africa that condonation of a failure to comply with the rules of Court require an acceptable explanation. In the present case there is no explanation and condonation should be refused for that reason alone.
- (b) There has been a flagrant disregard of the rules.
- (c) The applicant has come to Court with soiled hands. She has sought to mislead the Court in a totally inexcusable manner and the Court should, in such circumstances, decline to come to the aid of a litigant.

A consideration of the merits does not convince me that any injustice will be done by allowing either the single or the cumulative effect of the above considerations to outweigh the said merits.

Moreover Apart from the foregoing, it seems to me that there is a legal ground for refusing to grant condonation.

**Section 17** of the Court of Appeal Act No. 10 of 1978 provides:

"Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court... on any ground of appeal which involves a question of law but not on a question of fact."

In presenting his argument **Mr. Sello** foreshadowed that in the event of the application for leave being granted, he would advance only one submission in support of the appeal viz. that both the magistrate and MAQUTU J. erred in not receiving a copy of a judgment of the High Court in a boundary dispute between chiefs which has a bearing on the allocation of the land upon which the property at Phaphama ha Sechele is situate. This, in my view, is purely a question of fact which cannot be the subject of an appeal to this Court. In **Motlalentoa Matsumunyane v. Rex**, C.of A. (Cri) 16 of 86 AARON J. repeated a warning often uttered by this Court that care should be taken in not allowing questions of fact to be dressed up as questions of law. In attempting to advance the foreshadowed argument that a failure to receive a judgment determining a boundary as a question of law precisely amounts to an attempt to dress up a question of fact as one of law.

The application for condonation of the late noting of appeal is dismissed with costs.

*G.P.C. Kotze*

G.P.C. KOTZE'  
JUDGE OF APPEAL

I agree

*J.H. Steyn*  
.....  
J.H. STEYN  
ACTING PRESIDENT

I agree

*J. Browde*  
.....  
J. BROWDE  
JUDGE OF APPEAL

Delivered at Maseru This 28<sup>th</sup> Day of July... 1994.