CIV/A/21/88

IN THE HIGH COURT OF LESOTHO

In the Appeal of

AARON LEBONA — Appellant

vs

MPHASANE TSEOLE — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi, Acting Judge on the 28th day of February, 1994

This is a matter in which the Applicant had originally applied for relief on the 2nd April, 1992 in terms of section 8 of the Court of Appeal Act No.10 of 1978, as follows

(a) Granting Applicant leave to appeal against the whole judgment in CIV/A/20/88 to the Court of Appeal.

(b) Directing Respondent to pay costs only in the event of opposition.

(c) Granting Applicant such further and/or alternative relief.

Having been served, Respondent later filed his notice of intention to oppose on the same date of the 2nd April,1992. Respondent later served and filed a notice of intention to raise a question of law in terms of Rule 8 (10)(c). It is useful to reproduce a statement of the points as they appear in the notice as follows

"1. APPLICATION IN THE COURT OF APPEAL

In terms of Section 17 of the Court of Appeal Act No. 10 of 1978 any person who is aggrieved by the judgment of the High Court in its appellate jurisdiction may appeal to the Court of Appeal with the leave of the Court of? Appeal or upon the Certificate of the Judge who heard the appeal. This application for leave to appeal ought therefore to be made to the Court of Appeal.

2. APPLICATION OUT OF TIME

Without conceding or agreeing the jurisdiction of the above Honourable Court, in terms of Rule 2 (7) of the Court of Appeal Rules of 1980 the Notice of Motion together with affidavits including the judgment of the High Court shall be delivered within Twenty-One (21) days of the date of judgment

(Rule 22). A written judgment was delivered by his Lordship Mr.Justice B.K. MOLAI on the 12th day of March, 1992. It will be submitted that the date of judgment should be reckoned as the 12th February,1992. If the Applicant contends that the written judgment came to his notice late he should seek leave to apply for leave to Appeal out of time. It will further be submitted that the six weeks within which the applicant could file grounds of appeal in terms of Rule 3 (6) if Court of Appeal rules expired on the 25th March, 1992.

3. GROUNDS OF APPEAL SHOULD INVOLVE QUESTION OF LAW BUT NOT OF FACT.

In terms of Section 17 of the Court of Appeal Act No. 10 of 1978 the grounds of appeal should involve a question of Law but not a question of fact. The grounds of appeal proposed by the Applicant raise a question of fact."

This above statement serves very well to show what arguments were before me by learned Counsel Mr.Matabane for Applicant and Mr.Mathe for Respondent.

It appears that on the 6th May 1992, the Applicant filed a Notice of Motion in the following terms·

(a) Substituting Section 17 for Section 8 wherever it appears.

(b) Substituting "the learned Judge's certificate for the word leave in prayer (a)

This notice was unopposed and in the Amended Notice received and filed on the 8th June 1992 as the Registrar's stamp does show. My impression that the Notice of Intention to raise a question of law was filed before the Intended Amendment is correct because the notice was served on the 1st May 1992. Counsel made sufficiently brief arguments in the circumstances. The arguments revolved around the above question of law including an application from the bar for condonation to late filing of leave to appeal. The circumstances were that the appeal ought to have been noted not later than six (6) weeks calculated from the date of judgment of my brother Molai J namely the 12th March, 1992. The question of the meaning of Section 17 of the Court of Appeal Rules, gave rise to the inquiry whether I would be properly seized of the matter. This was in reaction to the amended notice of the Applicant. The section reads

" Any person aggrieved by any judgment of the High Court in its Civil Appellate's jurisdiction may appeal to the Court with leave of the Court or upon the certificate of the judge who heard the appeal or on agreement of appeal which

involves a question of law but not a question of fact." (my underlining).

Having apparently abandoned the question of application for leave to the Court of Appeal itself, the option remaining was for a certificate of a Judge who heard the appeal. It is Molai J who heard the appeal and who properly should hear this application. Indeed Mr.Matabane went about explaining the efforts he took to have the matter placed before Molai J who was unavailable and on commission. I was unhappy that this question was not raised at the onset of the arguments. I pitied myself for not having had an early appraisal of the rule. Mr. Matabane wanted to persuade me against the clear, plain and reasonable meaning and interpretation of the section to say that "any Judge" can hear the application as against "the Judge who heard the appeal". I do not agree. Indeed this shall entail some considerable inconvenience to the Applicant. But when one considers the advantage of a Judge who heard the appeal in that amongst others, that he is better able to reflect on the prospects of success and the depth of the judgment. I feel that Mr. Matabane should accept the consequence of the momentary reverse and a disappointment of some kind at the same time. That is litigation.

This matter of the appeal has travelled a long way from the

local courts to here. One is bound to feel inclined to sympathise with the Applicant for the justice delayed and for the Respondent who has a judgment in his favour but there is nothing one can do against the effect of the Section 17 of the Court of Appeal Act 1978.

It is obvious that, the view I take is that this application be removed and be taken for hearing before Molai J. Costs are awarded to the Respondent.

T. MONAPATHI
ACTING JUDGE

For the Appellant Mr. Matabane

For the Respondent Mr Mathe