CIV/APN/313/00

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEROENG MPHENETHA APPLICANT

and

TANKISO NTSEBENG 1ST RESPONDENT

TANKISO NTSEBENG 2nd RESPONDENT

JUDGEMENT

Delivered by the Honourable Acting Mrs Justice
A.M. Hlajoane on the 9th August, 2001

This was an application for an order declaring the Respondents' appeal noted on the 24th May, 1999 to have lapsed. The matter had started at the Magistrate's Court in CC 1134/94, and judgement had been granted against the Respondents on the 29th October, 1997.

On the 9th August, 2001, Mr Mohau appeared for the Applicant and there was

no appearance for the Respondents. Mr Mohau in moving his application had indicated that the Respondents had clearly displayed the attitude of reluctance to prosecute their appeal. I therefore granted the order and showed that reasons would follow. This case was a typical portrait of Litigants who would just note an appeal merely to frustrate the execution of judgement against them or apply for rescission of judgement for same purposes.

Turning now to the facts of this Application. The Applicant was still the Applicant in the Court a *quo*, similarly were the present Respondents the Respondents.

The case arose out of the negligent driving of the first Respondent's vehicle by the second Respondent, which resulted in a collision with Applicant's vehicle. According to the record of the case, the Applicant who was represented by Mr Mohau, had given his evidence together with his witnesses. They had been duly cross-examined by the Respondents' Counsel. The Respondents had failed to testify in their defence, neither did they show up, despite the fact that their Counsel had informed the Court that he had duly notified them of the date of hearing. Judgement was thus given against them.

It was only a year after judgement had been granted, that on the 7th November, 1998 Respondents applied for rescission of judgement. The Application was on the 12th May 1999 refused by the Magistrate. The Respondents then noted an appeal to this Honourable Court on the 24th May, 1999.

Counsel for the Applicant, Mr K. Mohau approached the Court for a Declaratory Order, relying on Section 52 (1) (a) and (d) of the High Court Rules 1980. This was after he had served the Respondents' Counsel with notice in terms of Rule 39(2) of the High Court Rules, on the 6th December, 2000; inviting him to approach the Office of the Registrar to come and set the matter down for hearing. The notice of set down was also served on the Respondents' Counsel on the 10th May, 2001.

The Rule read as follows:-

Rule 52(1) (a) "When an appeal has been noted from a judgement or order of a Subordinate Court, the Appellant may within four weeks after noting of the appeal apply in writing to the Registrar for a date of hearing."

52(1)(d) "If neither party applies for a date of hearing as aforesaid the appeal shall be declared to have

lapsed unless the Court on good reasons shown shall otherwise order."

Rule 52 goes on to show under subsection (4)(a) that:

> "It shall be the duty of the Appellant or of the party who has applied for a date of hearing to prepare and lodge with the Registrar four typed or photocopied copies of the record of the case ....."

When I proceeded to deal with this Application, the Respondents had not prepared the record for appeal neither was a photocopy made. It was the Applicant's Counsel who had made himself photocopied scripts from the Magistrate Court, whilst the Respondents had shown no interest in the matter that had been pending before Court. The Respondents had failed in all material respects to show that they had been genuine when they noted this appeal. Contrary to the mandatory Rules of this Court, this had been evidenced by the following:-

(a) They failed to prepare the record of proceedings either in the form of a typed record or photocopy.

(b) They failed to set the appeal down for hearing.

(c) They failed to give security for costs,

and this as already stated had been a clear indication that their noting of appeal was merely to delay and frustrate the execution of judgement against them. See Dr S.M.

Kaleem vs M. Hlajoane 1997-98 LLR and LB 506. They never intended to prosecute this appeal because even from the Magistrate's Court it was only after a year had gone and had been served with a writ of execution that they had unsuccessfully decided to apply for rescission of judgement.

In the result, the Application for an order declaring the appeal to have lapsed was granted with costs as prayed for in the notice of motion.

A.M. HLAJOANE
ACTING JUDGE

13th August, 2001

For the Applicants: Mr Mohau
For the Respondents: Mr Sekake