

**IN THE COURT OF APPEAL OF LESOTHO**

In the matter between

**MOJALEFA RAKOMETSI**

**APPELLANT**

**and**

**SELLO RAMOKETSI  
RESPONDENT**

CORAM : M.M. RAMODIBEDI J.A  
M.E. KUMLEBEN J.A.  
A.M. HLAJOANE J

**SUMMARY**

*Appeal from a judgment of a subordinate court to the High Court, and a further appeal to the Court of Appeal without the necessary leave in terms of sec 17 of the Court of Appeal Act, 1978. Its provisions are mandatory and in the absence of compliance, appeal struck from the roll.*

## JUDGMENT

### **KUMLEBEN J.A. :**

1. This matter presently before us on appeal was initiated in the subordinate court, Maseru. The respondent, as plaintiff, claimed an order ejecting the appellant from certain premises in Maseru. The right to such occupation was disputed by the appellant. The matter came before Mrs K.M. Maputsoe. The claim was upheld in favour of respondent : an order for ejectment was granted with costs.
2. Next the case was heard on appeal in the High Court. After argument Mofolo J made an order that was in the nature of a declarator and reads as follows:

“In the result, sites in dispute are the property of the plaintiff [respondent] as heir to the estates of both his father and his uncle Makalo except the property on which a café stands as this site and all that goes with it is the property of the defendant by reason of the said Makalo being indebted to the defendant.

As both the defendant and the plaintiff have succeeded and failed, there will be no order as to costs.”

In the subordinate court the right to occupancy, and hence the question of ejectment, did turn on a finding as to which of the parties had inherited the premises. The judgment of the learned judge does not give an explicit answer in this regard and the order may give rise to problems of interpretation or implementation. However, for present purposes this order can be construed as partial success on appeal.

2. The appellant elected to take the matter further. He noted an appeal to this court against the High Court decision and sought to prosecute it. At the hearing before us Mr Thoahlane appeared for the appellant and Mr Ntlhoki for the respondent.
  
3. At the outset Mr Thoahlane was asked whether this court has jurisdiction to hear this second appeal having regard to the provisions of section 17 of the Court of Appeal Act, 10 of 1978. It reads as follows:

“17. 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 or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact.”

Counsel acknowledged that there had not been compliance with this section: no leave from this court had been sought nor had the required certificate been obtained.

4. Counsel, however, in the first place submitted that the provisions of section 17 were not mandatory: that we have in effect a discretion to disregard the requirements of section 17. But the wording of the section is plainly peremptory and conforms to the accepted principle that there should be only one appeal as of right.
  
4. Alternatively - and similarly it would seem – counsel’s request for an indulgence amounted to an impromptu application for condonation for failure to obtain the necessary leave or certificate. Rule 8(2) of the rules of this court does provide for condonation. It, however, requires a substantive application on notice of motion to - in this case - the respondent and implicitly an explanation on the part of the appellant for not having complied with section 17. No such application is before us.

5. Reverting to section 17 and its concluding reference to “any ground of appeal which involves a question of law but not on a question of fact” (Emphasis added.), Mr Thoahlane conceded that a pre-requisite when leave is sought from this court or from the judge of the High Court is that the question must be one of law. Counsel was then referred to the grounds of appeal as formulated with reference to both the appeal from the subordinate court and from the High Court. He was unable to point to any of the grounds that amounted to a question of law. Should this be the case it is in itself a reason for not entertaining the appeal (cf. LELUMA v R 1980-1984 LAC 55). But in fairness it must be said that it was obvious that counsel had not given this question due consideration. For this reason it need not be further examined and is not a ground for our decision in this appeal. It is, however, a question that deserves deliberation should any application for condonation still be contemplated.
  
7. In the result the appeal must be struck from the roll with costs and it is so ordered.

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M.E. KUMLEBEN

JUDGE OF APPEAL

I agree

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M.M. RAMODIBEDI

JUDGE OF APPEAL

I agree

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A.M. HLAJOANE

JUDGE

Delivered at Maseru this 20<sup>th</sup> day of October 2006.

**For Appellant : Mr Thoahlane**  
**For Respondent: Mr Ntlhoki**