IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.20/08

In the matter between:-

MOTHUSI SEKHOANE **APPELLANT**

And

'MASECHABA SEKHOANE **RESPONDENT**

CORAM : **RAMODIBEDI, P**

Heard : 21 **April** 2009

Delivered : 29 **April** 2009

JUDGMENT

RAMOBIDEDI, P

[1] It is appropriate, I think, to commence this judgment by pointing out that on 20 October 2005, and in the case of **Sekhoane v Sekhoane** 2005 - 2006 **LAC** 264 between the same parties herein, this Court upheld the present respondent's claim against the appellant for a relief declaring her minor son Malakia Sekhoane to be the heir of the late Kuni and 'Mateboho Sekhoane. The Court also granted her sequential relief by way of interdicts. These included an order directing the appellant to vacate the late Kuni Sekhoane's residence at Qoaling ("the premises").

[2] On 5 April 2006, the respondent launched contempt proceedings in CIV/APN/141/06 in the High Court on the

ground that the appellant defiantly continued to remain in occupation of the premises notwithstanding the aforementioned order of this Court to vacate them.

[3] On 14 November 2008, the court a quo held the appellant to be in contempt of this Court's order referred to in paragraph [1] above. The court then directed the appellant to comply with the order in question and submit himself to that court on 21 November 2008 for sentence.

[4] The parties are on common ground that the appellant did not submit himself to the High Court on 21 November 2008 as ordered or at all. It is not disputed however, that he was ill in hospital on that date. Thereafter, the appellant seems to have

taken up the attitude that he could not approach the court because he had never been told of a new date for sentence.

[5] It was submitted in effect on the respondent's behalf on the other hand that the appellant was simply playing delaying tactics. It was incumbent on him, so it was argued, to approach the court after he had been discharged from hospital. In the light of the conclusion I have arrived at as fully set out below, I deem it unnecessary to reach a concluded view on the matter. It shall suffice merely to say that what has weighed heavily with this Court is that the proceedings before the High Court have not reached finality. This must clearly be the case as long as sentence has not yet been passed in that court.

[6] On 5 December 2008, and notwithstanding the fact that the proceedings were still pending sentence in the court a quo, the appellant filed a notice of appeal against the contempt order in question.

[7] On 12 March 2009, the respondent filed an application with this Court seeking relief in these terms:-

> "1. *Barring the Appellant from arguing his appeal until he has submitted himself to the High Court for sentencing in CIV/APN/141/2006;*
>
> 2. *Striking the appeal from the roll;*
>
> 3. *Directing the Appellant to pay costs."*

[8] It is important to note that this judgment is concerned solely with the application referred to in the preceding paragraph. It has nothing to do with the merits or demerits of the contempt

order in question. Furthermore, I should perhaps mention that I heard this application sitting as a single Judge in terms of Rule 18 (2) of the Court of Appeal Rules 2006.

[9] But before proceeding further, it is necessary to record at the outset that **Adv Mohau KC** for the respondent readily conceded, and properly so in my view, that strictly speaking it would not make much sense to grant both prayers 1 and 2 at the same time. Thus, for example, if the appeal is struck from the roll in terms of prayer 2, there would be no need to grant prayer 1 barring the appellant from arguing his appeal. The logic which immediately appeals to one's mind here is that once the appeal is struck off the roll, then there can be no appeal pending. Hence there is no need to bar the appellant as suggested.

[10] In determining the respondent's application, it proves useful to have regard to the following provisions of section 6 (1) of the Court of Appeal Act 1978:-

> "16. (a) *An appeal shall lie to the Court —*
>
> (b) *from all final judgments of the High Court."(Emphasis supplied.)*

[11] I would lay it down as a general rule in this country that this Court will be loath to exercise its appellate functions upon the unconcluded course of proceedings in a lower court. See, for example, such cases as **Francis & Another v Rex** 1919 **NPD** 255; **Wahlhaus And Others v Additional Magistrate, Johannesburg And Another** 1959 (3) **SA** 113 (**A**); **S v Benade** 1962 (1) **SA** 301 (**C**).

[12] The main motivation underlying the principle referred to in the preceding paragraph is to prevent piecemeal litigation which in turn may invariably lead to the unnecessary clogging of the courts, something that should be avoided at all costs. It must be emphasised, however, that this Court retains its inherent power to do justice depending on the particular circumstances of each case. Such a power is one which is to be exercised sparingly and upon exceptional circumstances. In my view, the present matter is not such a case.

[13] **Mr Mphalane** for the appellant relied heavily on the fact that the appellant has since purged his contempt by vacating the premises on 3 December 2008. He submitted, accordingly, that

the matter was brought to its *"logical conclusion"* at that stage.

Furthermore, as he contended in his heads of argument:-

> *"The sentencing will not serve any purpose as such Sentence would be suspended an (sic) condition that the appellant vacates the disputed premises."*

[14] I consider that these submissions are disingenuous in the circumstances of this case. I reject them entirely. It must surely beat one's imagination how anybody could assume that the court a quo will necessarily suspend sentence in the matter. The fact remains that the question of sentence remains pending in the court a quo to date. That court has a judicial discretion to impose any appropriate sentence which it deems fit in the circumstances. In this regard **Adv Mohau KC** submitted that the appellant is a fugitive from justice in

the sense that he has bolted from sentence in the High Court. I am inclined to agree. The fact that the appellant has to date failed to submit himself to the High Court for sentence says it all. It is a telling factor against him that he has not bothered to enquire about a new date for his sentence. Nor has he sought the date from the court himself as it was his right to do so.

[15] In the light of the foregoing considerations, I am of the view that the respondent's application must succeed with costs in terms of prayer 2 thereof. Accordingly, the following order is made:-

> "(1) The appellant's appeal is struck from the roll.
>
> (2) The appellant is ordered to pay the costs of this application."

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M.M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

For Appellant : Mr N. Mphalane

For Respondent : Adv K.K. Mohau KC