

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) NO. 5/2009

In the matter between:

NEO ANDREAS MOTAKE

APPELLANT

and

**BERENG MOQHOAI
ASSUMPTION RCM CHURCH
(PARISH PRIEST)
MKM
BOLIBA
LESOTHO STANDARD BANK
REGISTRAR-GENERAL
ATTORNEY-GENERAL
MASTER OF THE HIGH COURT**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT**

CORAM:

RAMODIBEDI, P
MELUNSKY, JA
HOWIE, AJA

HEARD : 1 APRIL 2009
DELIVERED: 9 APRIL 2009

SUMMARY

Appeal against High Court judgment – Application for condonation of late filing of appeal – Rules 4(1) and 15(2) of the Court of Appeal Rules 2006 – Principles applicable in an application for condonation – Non-joinder of an essential party.

J U D G M E N T

RAMODIBEDI, P

[1] Despite a strongly worded warning by this Court in **Ntloana And Another v Rafiri 2000 - 2004 LAC 279** at 284, deprecating the use of corpses as pawns or test cases for disputes over inheritance of the deceased's estates, the instant matter is a typical example of this mischief which the Court sought to prevent in the first place.

[2] Following the death of Matšepang Arcilia Moqhoai ("the deceased") on 4 June 2008, the appellant brought an urgent application on notice of motion in the High Court seeking the following relief with costs against the respondents:

- "(a) Interdicting and restraining the 1st Respondent from burying the body of **MATŠEPANG ARCILIA MOQHOAI (born Motake)** pending the finalization of this application.*
- (b) Interdicting and restraining the 3rd Respondent from releasing the body of **MATŠEPANG ARCILIA MOQHOAI***

(born Motake) to anybody including the 1st Respondent pending the finalization of this application.

- (c) Interdicting and restraining the 4th Respondent from releasing funds in the account of the late **MATŠEPANG ARCILIA MOQHOAI (born Motake)** to anybody including the 1st Respondent pending the finalization of this application.
- (d) Interdicting and restraining 5th Respondent from releasing funds in the account of the late **MATŠEPANG ARCILIA MOQHOAI (born Motake)** to anybody including the 1st Respondent pending the finalization of this application.
- (e) Interdicting and restraining the 1st Respondent from removing household property in the house he occupied with the deceased pending the finalization of this application.
- (f) Declaring the marriage certificate (NM"2") null and void **ab initio** in as much as it was fraudulently obtained.
- (g) Declaring the Applicant the heir of the late **TLONTLOLLO ERNEST MOTAKE** and consequently having the right to bury **MATŠEPANG ARCILIA MOQHOAI (born Motake)**.
- (h) Declaring the Applicant the guardian of the (sic) **MATŠEPANG ARCILIA MOQHOAI (born Motake)**'s children namely, **MOHAU MOTAKE, TŠEPANG CHRISTOPHER and TŠEPISO."**

[3] The admitted facts show that the appellant is the eldest son in the family of the deceased's late parents, Tlontlollo Ernest Motake and 'Mamotaung Cecilia Motake. The deceased was the appellant's third younger sister.

[4] On 27 March 1990, the first respondent was married to the deceased by civil rites at the Roman Catholic Church at Assumption. There were two minor children born of the marriage, namely, Tšepang Christopher and Tšepiso. A copy of the marriage certificate, annexure “NM2”, was annexed to the appellant’s founding affidavit as proof of the marriage in question. It requires to be recorded at the outset, however, that the appellant challenges the marriage on the ground that the deceased did not obtain parental consent, contrary to what is recorded in the marriage certificate. He says that in 1990 when the marriage took place, his father was “already dead”. Accordingly, he contends that the deceased was at all material times unmarried, thus making him the heir in her estate.

[5] As I see it, the appellant's objection relating to the so called lack of parental consent can quickly be disposed of. This is so because the marriage certificate, annexure "NM2", shows that the first respondent and the deceased were aged 30 years and 27 years respectively at the time of the marriage. It follows that they did not need any parental consent, either from the late parents or from the appellant himself as he erroneously contends.

[6] It is necessary to point out that in his answering affidavit the first respondent did not only aver that parental consent was obtained before the demise of the deceased's father but he also raised a point in *limine* concerning the non-joinder of the Master of the High Court as a necessary party. It was the first respondent's contention that this was contrary to Rule 8 (19) of the High Court Rules 1980.

[7] On 4 July 2008, the High Court (Mahase J) upheld the first respondent's point in *limine* as set out above. Although a subject of some controversy, we are prepared to accept that the Master of the High Court was joined as the eighth respondent in the matter. The learned Judge *a quo* then proceeded to dismiss the appellant's application with costs.

[8] On 3 February 2009, a period spanning almost seven months since the dismissal of his application by the High Court, the appellant filed a notice of appeal with this Court. In his grounds of appeal he sought to challenge the marriage certificate, annexure "MN2", as being fraudulent.

[9] Now, Rule 4(1) of the Court of Appeal Rules 2006 provides as follows:

"4 (1) *In every matter in which there is a right of appeal to the Court, the applicant shall, within six weeks of the date of the delivery of the judgment in the High Court, file a*

notice of appeal and such notice shall, as near as may be, be in accordance with Criminal Form I or Civil Form I, as set out in the First Schedule."

[10] As can be seen from Rule 4 (1), the appellant was, in my calculation, obliged to file his notice of appeal on or before 18 August, 2008. It follows that he was late by more than 5½ months when he filed his notice of appeal.

[11] It is necessary to record at this stage that on the same day as the filing of the notice of appeal, on 3 February 2009, the appellant filed a notice of motion for condonation of the late filing of appeal. The real issue which arises for determination in this matter, therefore, is whether or not condonation should be granted in the circumstances of this case.

[12] The principles applicable in an application for condonation of the late filing of an appeal are now well-

established in this jurisdiction. In essence, the applicant must satisfy two requirements, namely, (1) that there is sufficient explanation for the delay in question, sometimes expressed as “sufficient cause” and (2) that there are prospects of success on appeal. It must further be borne in mind that an application for condonation is a matter which lies pre-eminently within the discretion of the Court. See in this regard Rule 15(2) of the Court of Appeal Rules 2006.

This rule reads as follows:-

“(2) The Court shall have a discretion to condone any breach on the application of the appellant.”

[13] It is important to stress that the discretion referred to in the preceding paragraph is, however, not an arbitrary one. It is a judicial discretion which must be exercised upon a consideration of all the relevant factors which have a bearing on the matter. Such factors will usually include the degree of the delay in question, the explanation for

such delay, the prospects of success, the respondent's interest in the finality of the matter and the importance of the case (the list is not exhaustive). See, for example, such cases as **Koaho v Solicitor-General 1980 - 1984 LAC 35; Rev. Father Khang v Bishop Mokuku And Others NNO 2000 - 2004 LAC 600; CGM Industrial (Proprietary) Limited v Adelfang Computing (Proprietary) Limited C of A (CIV) No. 5/08** (and the cases cited therein).

[14] The appellant's purported explanation for the delay in question is contained in a single sentence in paragraph 5 of his founding affidavit. Therein he makes the following averment:-

"I was not able at the material time to give my counsel full instructions to lodge an appeal in the matter so that it should have been heard in the last session of this Honourable Court."

[15] Bearing in mind that the onus is on the applicant to persuade the Court that condonation should be granted, there can be no doubt, in my view, that the appellant's statement in the preceding paragraph falls far short of an acceptable explanation for the long delay of 5½ months since the High Court delivered its judgment. The appellant does not explain why he was "unable" to instruct his counsel to lodge an appeal. Nor does he explain why he could not lodge the appeal in person. On the contrary, the attitude evinced by the appellant in his bare statement that he was unable to instruct his counsel, without more, seems to suggest that condonation is a mere formality. It is simply there for the mere taking. As this Court has repeatedly held, it is not so. See, for example, **Commander of Lesotho Defence Force And Another v Rantšo Sekoati C of A (CIV) No.8/07; Makenete v Lekhanya And Others 1990 - 1994 LAC 127** at 129.

[16] In the light of the foregoing considerations I have come to the unavoidable conclusion that the appellant has failed to give a sufficient explanation for the delay in noting his appeal.

[17] Consistently with the appellant's attitude that condonation is a mere formality, he has not even bothered to deal with the issue of prospects of success at all. Indeed there is not even so much as a whisper in that regard, as I observe. In any event, it is clear from the record of proceedings that the appellant simply has no prospects of success on appeal. As indicated earlier, the first respondent and the deceased did not need any parental consent before entering into their civil marriage as evidenced by the marriage certificate, annexure "MN2". Furthermore, it was not proper, in my view, for the

appellant in the circumstances of the case to seek to prove the alleged fraud (which was denied) by way of an affidavit in an application as opposed to action.

[18] Giving full weight to all of the foregoing considerations, I have come to the conclusion that there is no merit in this matter. Accordingly, the following order is made:-

- (1) The appellant's application for condonation of the late noting of appeal is dismissed with costs.
- (2) The appellant's purported appeal is struck from the roll with costs.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

C.T. HOWIE
ACTING JUSTICE OF APPEAL

For Appellant : Adv. L.P. Nthabi

For Respondents : Adv. D.R. Serabele