

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No.55/2011

In the matter between:

RAMPASANA MOKETE

APPELLANT

AND

LIKOLOBE TSIETSI

RESPONDENT

CORAM: RAMODIBEDI, P
 SMALBERGER, JA
 HOWIE, JA

HEARD: 20 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Appeal – Application for condonation of the late filing of appeal against a High Court decision in its appellate jurisdiction – Section 17 of the Court of Appeal Act 1978 – Certificate for leave to appeal failing to define point of law – Application for condonation of the late filing of

the record of proceedings – No explanation furnished for the delay – The appellant’s grounds of appeal raising issues of fact and not law – Application for condonation dismissed with costs – Appeal similarly dismissed with costs.

JUDGMENT

RAMODIBEDI P

[1] Essentially, the issue which primarily arises in this appeal is an application for condonation of the late filing of appeal as well as the record of proceedings.

[2] The dispute giving rise to this matter originated in the Matala Local Court some twenty-four years ago. The point at issue concerns a certain field (“the field”) situated at Ha Matala. The parties are on common ground that the field originally belonged to the respondent’s predecessor in title, namely, Likolobe Senior. It is the respondent’s case, which

has been accepted by all the three lower courts which have adjudicated upon the matter as well as the High Court, that after the death of Likolobe Senior, the field was used by one Motupu Maphepha (“Motupu”) as a caretaker on behalf of the respondent who was still young at that stage. The decisions of these courts were decisively in favour of the respondent and against the appellant.

[3] The case for the appellant on the other hand is to the effect that Chief Matala took away the field from Motupu in 1960 through an inspection, presumably under s 7 of the Laws of Lerotholi. This section empowers every Chief or Headman to frequently conduct an inspection of arable fields in his area with a view to reallocating them if, for example, the allottees fail for two successive years properly to cultivate them. See Molapo v Molefe 2000 – 2004 LAC 771 at 780 para [26]. It is the appellant’s case that the

Chief subsequently allocated the field to him in 1963. It turned out that the Chief was the appellant's brother-in-law, something that apparently irked the lower courts. There was simply no evidence on record to justify the revocation of the respondent's title or that of his predecessor to the field.

[4] On 2 March 2011 the High Court sitting in its civil appellate jurisdiction dismissed with costs the appellant's appeal. In terms of s 17 of the Court of Appeal Act 1978 ("the Act") this meant that the appellant could only appeal to this Court with the leave of the Court or upon the certificate of the Judge who heard the appeal. It is a mandatory requirement of the section, however, that an appeal to this Court only lies on a question of law and not on a question of fact.

[5] In terms of Rule 3 (1), (2) and (9) of the Court of Appeal Rules 2006, the appellant was obliged to apply to this Court for leave to appeal within twenty-one days of the delivery of the High Court judgment if he failed to obtain the Judge's certificate. No such application was made. Furthermore, there is no evidence on record to show whether an application for the certificate of the High Court Judge was made and, if so, when it was made. What is clear, however, is that for a full seven months after the High Court judgment the appellant had not obtained this Court's leave or the certificate of the High Court as enjoined to do so by the Act. In the absence of an acceptable explanation the conclusion is inescapable in my view that the appellant was extremely dilatory.

[6] On 5 October 2011 Peete J, who heard the appellant's appeal in the High Court, issued a certificate in favour of

the appellant in these terms:-

“JUDGE’S CERTIFICATE

WHEREAS the appeal of the above-named Appellant from the Subordinate Court at Judicial Commissioner’s Court Maseru was upheld by me in the High Court of Lesotho on the 2nd March 2011 I do hereby certify that the case is fit for an appeal on the grounds set out on the annexure hereto.

DATED AT MASERU THIS 5TH DAY OF OCTOBER, 2011

(signed)

.....
SIGNATURE OF JUDGE”.

[7] There was no annexure to the Judge’s certificate and, as can plainly be seen, the Judge’s certificate did not define the points of law on which leave was granted. This is regrettable. The Judge has apparently inexplicably disregarded the following guideline laid down by this Court in Mohale v Mahao 2005 – 2006 LAC 101 at page 104:-

“[6] As guidance in future, therefore, it is now necessary to lay down the following principles:

- (1) Practitioners who apply for leave to appeal and judges of the court granting leave should ensure that the provisions of s 17 of the Act and the Rules of Court are strictly observed.*
- (2) The application for leave to appeal should specify the grounds on which leave is sought.*
- (3) The judge granting leave should clearly define the points of law on which leave is granted in compliance with the Rules.*
- (4) When leave is granted, the certificate of the judge and the grounds of appeal should then be delivered by the applicant.”*

I should add that Adv. Potsane, counsel for the appellant, has conceded, and properly so in my view, that the Judge’s Certificate was defective.

[8] On 7 October 2011 the appellant filed a notice of appeal against Peete J’s judgment. He sought to rely on the following grounds of appeal:-

“1.

The Honourable Judge of the High Court erred and misdirected himself in deciding the dispute between the parties [on] the basis of an issue that was not, and could not have been investigated by the trial Court, namely whether the [revocation] of the allocation made to the Respondent’s grandfather had been lawfully done.

The said [revocation] was never challenged by the Respondent’s grandfather at the time it was made. The Respondent cannot claim that which his grandfather did not have when he died.

2.

The Honourable Judge of the High Court erred and misdirected himself in holding that because Chief Matala was gazetted as chief in 1967, he had no authority to conduct the inspection that led to Appellant being allocated the disputed field in 1963.

The Court overlooked the fact that in his evidence before the trial Court, Chief Matala testified that he acted for his sickly father from 1943.

3.

The Honourable Judge of the High Court erred and misdirected himself in overlooking the fact that the Respondent could not dispute succession to property which did not belong to the person he claims to have inherited it from, at the time of his death.”

[9] In terms of Rule 5 (1) of the Court of Appeal Rules 2006 the appellant was obliged to file the record of

proceedings in this Court not later than three months after the Judge's certificate. However, the appellant breached the Rule by failing to file the record timeously. The record was only filed on 2 March 2012. He has not furnished any explanation at all for this delay. I shall return to this aspect of the case later.

[10] On 19 March 2012 the Court requested counsel in writing to file heads of argument on the following issues:-

- (1) An explanation as to why the appellant's appeal was not prosecuted in the High Court until January 2011?*
- (2) If condonation is sought, does the appellant have prospects of success on appeal?*
- (3) Does the appeal raise a point of law as envisaged by section 17 of the Court of Appeal Act ('the Act')?*
- (4) If the appeal raises issues of fact, does the court of Appeal have jurisdiction in the matter in view of section 17 of the Act?*
- (5) Does Peete J's certificate in the matter comply with section 17 of the Act read with the Court of Appeal Directive as laid down in Mohale v Mahao 2005 – 2006 LAC 101 at para*

[5] (3) on the need to 'define' the points of law on which leave is granted?

(6) Was the appeal to this Court noted within 30 days of Peete J's certificate?"

[11] In paragraph 3 of his heads of argument filed on 2 April 2012, Adv Mohau, KC, the appellant's then counsel, explains the appellant's delay in prosecuting the appeal in the following terms:-

"The reason why the appeal to the High Court was only argued in January, 2011 is that the translation of the record and its transmission to the High Court by the Judicial Commissioner's Court was unduly delayed. The said record was only forwarded to the High Court in February, 2005."

[12] Counsel's submission on this point is not supported by any affidavit. But, assuming counsel is correct, there is simply no explanation why for six years the appeal was not prosecuted after February 2005 when the

record was forwarded to the High Court on counsel's own version.

[13] I digress here to revert to the aspect of the appellant's delay in filing the record of proceedings in this Court. As pointed out earlier, there is simply no explanation furnished for the delay. This, in my view, is a factor for consideration in dismissing the appellant's application for condonation. The appellant evinces a dangerous attitude that the Rules of this Court are unimportant and that condonation is simply there for the mere asking.

[14] As this Court said in Morena Sello v 'Mametsing Sello and Others C of A (CIV) No. 22/2011 at para [8], which was decided in this session, the applicant in an application for condonation must satisfy two requirements, namely:-

- “(1) He must establish good cause for condonation. In this regard he must explain his failure to act timeously. He must show that he was not wilful.*
- (2) He must show that he has good prospects of success on appeal.”*

[15] Moreover, it is well settled that the Court has a discretion whether or not to grant condonation. This Court has repeatedly stressed strongly enough that the discretion in question should not be exercised arbitrarily. On the contrary, it is a judicial discretion which must be exercised upon a consideration of all the relevant factors. See, for example, Koaho v Solicitor General 1980 – 1984 LAC 35 at 36 – 37.

[16] On the question whether the appeal raises a point of law or fact it is necessary to have regard to the provisions of s 17 of the Act, namely:-

“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.”

[17] In my view, none of the appellant’s grounds of appeal as fully reproduced in paragraph [8] above raise a question of law. On the contrary, they are all designed to attack the analysis of the evidence made by the lower courts on the facts. That is not the function of this Court in a matter such as this. The effect of s 17 of the Act is to limit appeals to this Court to issues of law only. See, for example, Letsoela and Another v Letsoela 1980 – 1984 LAC 275 at 276-277. The motivation for this principle is the need to relieve this Court of the burden of deciding factual issues in circumstances where the lower courts have already done so. This conclusion renders it unnecessary, in my view, to go further.

[18] It follows from these considerations that the appeal cannot succeed. The following order is made:-

- (1) The appellant's application for condonation of the late filing of appeal as well as the late filing of the record of proceedings is dismissed with costs.
- (2) The appeal is similarly dismissed with costs.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

For the Appellant: Adv. E.T. Potsane

For the Respondents: Mr E.M. Sello