

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.22/ 2011

In the matter between:

MORENA SELLO

APPLICANT

AND

'MAMETSING SELLO

FIRST RESPONDENT

REGISTRAR OF DEEDS

SECOND RESPONDENT

ATTORNEY GENERAL

THIRD RESPONDENT

CORAM:                   RAMODIBEDI, P  
                                  SMALBERGER JA  
                                  FARLAM, JA

HEARD:                   16 APRIL 2012  
DELIVERED:             27 APRIL 2012

## SUMMARY

*Appeal – Application for condonation of the late filing of an application for leave to appeal – Principles applicable – Prospects of success – No good cause shown to justify condonation – Application dismissed with costs.*

## JUDGMENT

### RAMODIBEDI P

[1] This is an application for condonation of the late filing of an application for leave to appeal against the judgment of the High Court dated 5 May 2010. In that judgment the High Court dismissed the applicant's application for leave to appeal against an order of rescission of default judgment granted in favour of the first respondent.

[2] The central bone of contention between the parties is a dispute over a certain site No. 1328-702 situated at Sea-

Point, Maseru Urban Area. The dispute has incredibly been dragged out in court since 1993, a period spanning almost 19 years to date.

[3] A chronology of the relevant facts shows the following:-

- (1) In 1993 the late applicant's mother Maleshoane Sello, ("the deceased") brought the present proceedings in the High Court against the respondents under case No. CIV/ T/ 593/ 93.
- (2) In 1997 the High Court (Guni J) granted default judgment in favour of the deceased.
- (3) On 20 September 2000 the deceased died. Nothing further happened for a period of nine years.

- (4) In 2009 the applicant, who claims to have inherited the disputed site as the deceased's heir, brought proceedings for ejectment against the first respondent. This prompted the latter to file an application for rescission of the default judgment granted in 1997 under case No. CIV/ T/ 593/ 93. She alleged that she had not been aware of the default judgment all along.
- (5) On 3 August 2009 the High Court granted rescission of default judgment in favour of the first respondent. It did so principally on two bases, namely:-
- (a) that the present applicant failed to file an answering affidavit in the matter and

- (b) that the first respondent had not been joined as a party in case No.CIV/ T/ 593/ 93 in question. Neither was she served with the papers in the matter.
- (6) On 26 August 2009 the applicant brought an application in the High Court for leave to appeal against the order rescinding default judgment dated 3 August 2009.
- (7) On 5 May 2010 as indicated in paragraph [1] above the High Court dismissed the applicant's application principally on the ground that he had failed to file an answering affidavit. As a result, the court only had the first respondent's version to consider. Accordingly, the court accepted the latter's version that she had not been aware of the

default judgment in the matter all along until the applicant brought ejectment proceedings against her.

- (8) On 18 May 2011, which was a period of 12 months after the High Court had dismissed his application, the applicant filed the present application in this Court. He seeks an order in the following terms:-

- “(a) Granting appellant (sic) condonation for late filing of leave to appeal against the judgment of her Ladyship Madame Justice N. Majara delivered on the 05<sup>th</sup> May 2010 refusing to grant Applicant leave to appeal her decision of 03<sup>rd</sup> August 2009.*
- (b) Ordering Respondents to pay costs in the event of opposition.*
- (c) Granting Applicant further and/ or alternative relief.”*

[4] It is trite that an order rescinding default judgment is interlocutory. As such it is not appealable without leave.

This is so in terms of s 16 (1) of the Court of Appeal Act 1978.

[5] An application for leave to appeal to this Court is governed by Rule 3 of the Court of Appeal Rules 2006. Subrules (1) and (2) provide that the application shall be made by way of notice of motion which shall in turn be delivered within twenty-one days of the date of the delivery of the judgment or order of the High Court.

[6] A simple calculation will show that 21 court days from 5 May 2010 expired on Thursday 3 June 2010. It follows that the applicant should have filed the application for leave to appeal on the next working day, namely, on 4 June 2010. He failed to do so. As indicated above he only filed the application on 18 May 2011. He was hopelessly out of time. On his own version in paragraph 7.3.2 of his

founding affidavit the applicant admits that he “learnt” about the High Court’s refusal to grant him leave to appeal as far back as May 2010.

[7] The applicant has tried to shift the blame for the delay to his counsel. There is, however, no acceptable explanation from Mr Manyeli, the counsel who filed a supporting affidavit on behalf of the applicant, why the application for leave to appeal was not lodged timeously. In this connection I am mainly attracted by the following apposite remarks of Steyn CJ in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141 B-E:-

*“I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad*



*miserericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”*

[8] Now, the principles applicable in an application for condonation of the late filing of an application for leave to appeal are well known in this jurisdiction. Essentially, the applicant must establish 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.

[9] Furthermore, it is of fundamental importance to recognise that the court has a discretion whether or not to grant condonation for the late filing of leave to appeal. This is, however, a judicial discretion which must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion. The relevant factors will often include *“the degree of delay in approaching the court for condonation, the adequacy of the reasons advanced for such delay, the prospects of Applicant’s success on appeal, and the Respondent’s interest in the finality of the judgment.”* See Koaho v Solicitor General 1980 – 1984 LAC 35 at 36-37.

[10] It is essential to observe that the applicant’s application suffers from two fatal defects in the circumstances of this case, namely:-

- (1) He has failed to furnish an acceptable explanation for his inordinate delay in filing an application for leave to appeal.
  
- (2) He has failed to establish that he has good prospects of success on appeal. This is so because he failed to establish good cause for condonation of his failure to file an answering affidavit in support of his opposition to rescission of the default judgment in the court a quo. His trademark explanation for this remissness is that he expected the High Court to put him to terms as to the filing of an answering affidavit. Quite plainly, this is a bad explanation. It is a flagrant disregard of Rule 8 (10) (b) of the High Court Rules 1980 which provides in mandatory terms that the respondent shall deliver his answering

affidavit within fourteen days of the notice of intention to oppose the application.

[11] It is a telling factor against the applicant, in my view, that he was consistently late, in complete disregard of the Rules of Court as highlighted above.

[12] Finally, I have taken into account the fact that the applicant is not without a remedy. He is at liberty to enter the principal case since the court a quo has only granted rescission of default judgment.

[13] It follows from the foregoing considerations that the applicant's application cannot succeed. It is accordingly dismissed with costs.

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M.M. RAMODIBEDI  
PRESIDENT OF THE COURT OF APPEAL

I agree:

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J.W. SMALBERGER  
JUSTICE OF APPEAL

I agree:

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I.G. FARLAM  
JUSTICE OF APPEAL

For the Appellant:

Adv. M.P. Phekani

For the 1<sup>st</sup> Respondent:

Miss M. Ramafole