

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.3/2011

In the matter between:-

LEBEKO SEQHOBANE

APPELLANT

AND

THE LIQUIDATOR; LESOTHO BANK
(IN LIQUIDATION)

RESPONDENT

HEARD : 13 April 2012

DELIVERED: 27 April 2012

CORAM: SMALBERGER, JA

FARLAM, JA

TEELE, AJA

SUMMARY

Practice – Record incomplete and unintelligible in part – not possible to improve it – Judgment set aside – case remitted for rehearing de novo before another judge.

JUDGMENT

Farlam, J A

[1] This is an appeal against a High Court judgment granted on 9 December 2010 by Lyons J against the appellant in favour of the respondent for payment of M84 008-91, interest and costs and declaring certain properties which are subject to deeds of hypothecation to be specially executable.

[2] The appellant appealed against this judgment on 10 January 2011 but failed to lodge with the Registrar the

copies of the record of the proceedings in the High Court required by Court of Appeal Rule 5 (1) or to serve a copy of the record on the respondent within the three month period referred to in the rule.

[3] On 28 April 2011 the President of this Court granted an order condoning the appellant's failure to file the record of the proceedings timeously and ordered him to do so on or before 27 May 2011.

[4] The appellant did not file the record as ordered. Indeed he experienced serious difficulties with the preparation of the record as the tape on which the evidence of the appellant was recorded was missing. The available tapes were transcribed but the transcripts contained

many grammatical and spelling errors and were impossible to read and understand.

[5] The incomplete and uncorrected record, such as it was, was filed but it was clear that it was not acceptable and that a reconstructed record would have to be filed.

[6] The matter was enrolled for hearing by this Court during the October 2011 term and on 3 October 2011 Scott JA postponed the appeal to this term to allow the appellant to file a reconstructed record.

[7] In his heads of argument, which were filed on 15 March this year, the respondent's counsel pointed out that the reconstructed record had not been filed and

he contended that the appeal should be held to have lapsed in terms of Rule 5 (3) of this Court's Rules or that the Court should strike the appeal from the roll with costs.

[8] The appellant's heads, together with what was described as the 'Reconstructed Record', was filed on 12 April 2012, the day before the date on which the matter was set down for hearing.

[9] In an affidavit handed up at the hearing of the appeal the appellant explained in some detail the difficulties his counsel had encountered in endeavouring to produce an acceptable record. Apart from the facts that the tape on which the appellant's evidence was recorded was missing and that attempts to reconstruct

what he had said had proved fruitless, it also appeared that a good deal of what was recorded on the tapes which were available was inaudible. In the circumstances counsel for the respondent very fairly conceded that the appellant had tried to comply with the order made by Scott JA on 3 October 2011 but that it was impossible to improve on the record.

[10] Counsel were then agreed that the procedure adopted in *Department of Justice v Hartzenberg* 2002 (1) SA 103 (LAC), where a similar problem had arisen, should be followed in this case, viz, that the order of the court a quo be set aside and the matter remitted to the High Court for hearing de novo before another Judge, with the costs at first instance and on appeal to be costs in the rehearing.

[11] That is clearly the correct order in the circumstances, subject to one point. There was no explanation as to why the appellant's heads and the 'reconstructed record' were only filed the day before the hearing and the appellant's affidavit asking for condonation of the late filing of these documents was only handed up at the hearing. This is clearly unacceptable and in my view it is appropriate that the appellant, even if he succeeds at the re-hearing, should be deprived of the costs of the hearing on 13 April 2012.

[12] The following order is made:

1. The appeal succeeds. The order of the court a quo is set aside and the matter is remitted to the High Court for rehearing de novo before another judge

2. The appellant is not entitled to the costs of the hearing in this Court on 13 April 2012. All other costs at first instance and on appeal are to be costs in the rehearing.
3. The Registrar of the High Court is requested to give the matter priority on the High Court roll.

I.G. FARLAM
JUSTICE OF APPEAL

I agree

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellant : Adv. M.M. Manyokole

For Respondent : Adv. S. Malebanye