

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.20/12**

In the matter between:

**LIKOTSI MAKHANYA**

**APPELLANT**

and

**MALEFETSANE PHEKO**

**FIRST RESPONDENT**

**STERLING AGENCIES (PTY) LTD**

**SECOND RESPONDENT**

**DEPUTY SHERIFF**

**THIRD RESPONDENT**

**LAND ADMINISTRATION AUTHORITY**

**FOURTH RESPONDENT**

**CORAM:**

RAMODIBEDI, P  
MELUNSKY, JA  
SCOTT, JA

**HEARD** : 9 and 10 OCTOBER 2012

**DELIVERED** : 19 OCTOBER 2012

**SUMMARY**

*Civil appeal – Withdrawal of appeal without tendering costs  
– The respondent entitled to costs – The appellant’s  
counsel’s ineptitude responsible for the costs – This conduct  
also deserving of censure.*

## **JUDGMENT**

### **RAMODIBEDI P**

[1] The central focus of attention in this appeal is whether the appellant is liable to pay the costs occasioned by his noting of an appeal against rescission of default judgment. He filed and served a notice of appeal in the matter on 18 June 2012. Hardly a month later, namely, on 4 July 2012, he withdrew the appeal. But in so doing, he failed to tender costs. It is common cause that the appellant's counsel, Adv Habasisa, withdrew the appeal after Mr Letsika for the first respondent had drawn his attention in writing to the fact that the noting of appeal without leave of the court was incompetent since the rescission order in question was interlocutory.

[2] The background facts show that on 11 August 2011, the appellant obtained default judgment against the first respondent in the sum of M160,000.00 for his alleged removal of the appellant's water pipes and metre installed on his premises as well as allegedly cutting the electric

cables thus affecting the appellant's property and resulting in more consumption of electricity unnecessarily.

[3] On 13 June 2012, the first respondent obtained rescission of the default judgment in question. He was given leave to defend the action.

[4] On 18 June 2012 as mentioned earlier, the appellant filed and served the notice of appeal against the order rescinding default judgment. He did not seek and obtain leave of the court to do so.

[5] Now, the right of appeal to this Court in civil cases in this jurisdiction is governed by s 16 of the Court of Appeal Act 1978. In relevant parts the section reads as follows:-

*“16. (1) An appeal shall lie to the Court –*

*(a) from all final judgments of the High Court;*

*(b) by leave of the Court from an interlocutory order...”*

[6] The law is well-settled in this jurisdiction, as it is in most jurisdictions, that an order rescinding default judgment is an interlocutory order. See, **Makape v Metropolitan Homes Trust Life (Pty) Ltd 1990-1994 LAC 137.**

[7] It follows that it was incompetent for the appellant to file and serve a notice of appeal without leave of the Court. In fairness to him, Adv Habasisa now concedes the point. Strangely enough, he says that he was not aware of s 16 (1) (b) of the Court of Appeal Act, something that must surely reflect poorly on counsel. It is axiomatic, and indeed elementary, that any counsel who appears before this Court must at the very least familiarise himself or herself with the Court of Appeal Act and the Rules of this Court. As it has turned out, counsel's ineptitude has escalated the costs in this matter. He could offer no acceptable explanation why a tender as to costs was not made. He was happy to leave the matter in the hands of the Court.

[8] I find comfort in the following statement in LAWSA: Second Edition 3 Part 2 at p249:-

*“A plaintiff or applicant who withdraws his or her action or application is in the same position as an unsuccessful litigant because, after all, such claim or application is futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party.”*

Although the foregoing principle was stated in the context of an action or application, it is a principle which I am happy to apply to withdrawal of appeals. In my view, there is no reason why the costs should not follow the result in this matter. After all, it is not in dispute that the first respondent has incurred costs arising from the noting of the appeal in the matter.

[9] It follows from these considerations that the first respondent is entitled to the costs arising from the appellant's withdrawal of the appeal.

[10] I would be shirking my duty if I do not comment on Adv Habasisa's deplorable conduct before this Court,

something that has moreover unnecessarily escalated the costs in the matter. When the matter was called on 9 October 2012, Adv Habasisa failed to make an appearance. He has not made suitable arrangements to be represented. In fairness to the appellant, the Court reluctantly adjourned the matter to 10 October 2012. On the latter date, Adv Habasisa appeared in Court and simply proceeded to make submissions without tendering any apology for his non-appearance on the previous day. The Court was horrified by this conduct and duly confronted counsel. His explanation was even more startling. He said that he had been sick, suffering from an abcess. He went to some “doctor” at Motsekuoa but he could not produce a medical certificate because the “doctor” in question does not issue any medical certificates. He could not offer a reasonable explanation why he failed to make proper arrangements if he was sick as he claimed. I am left in no doubt that counsel treated the Court with disdain and disrespect. Such conduct deserves censure. I can only express the hope that this Court shall never encounter such dismal conduct from counsel again.

[11] We have seriously considered awarding costs *de bonis propriis* against Adv Habasisa. The only factor which saved him is that he was not forewarned so that he could, in all fairness, be prepared to deal with the issue. He must now realise that he escaped the punitive order by the skin of his teeth. Others following in his footsteps might not be so lucky.

[12] It follows from the foregoing considerations that the following order is made:-

- (1) The appeal is withdrawn.
- (2) The appellant shall pay the first respondent's costs arising from the noting of the appeal including the hearing on 9 October 2012.
- (3) It is ordered that Adv Habasisa shall not recover his fees from the appellant. If he has already done so, he shall refund the appellant forthwith.

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**M.M. RAMODIBEDI**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:

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**L.S. MELUNSKY**  
**JUSTICE OF APPEAL**

I agree:

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**D.G. SCOTT**  
**JUSTICE OF APPEAL**

**For the Appellant** : Adv T.N. Habasisa  
**For the Respondent** : Mr. Q. Letsika