IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.11/2013

CIV/APN/294/2007

In the matter between:

'MATEBOHO HOOHLO	**APPELLANT**
and	
THABO HOOHLO	**FIRST RESPONDENT**
LAND SURVEY AND PHYSICAL PLANNING	**SECOND RESPONDENT**
ATTORNEY GENERAL	**THIRD RESPONDENT**
HOOHLO PROPERTIES (PTY)LTD	**FOURTH RESPONDENT**

CORAM: HOWIE, J.A.
THRING, J.A.
CLEAVER, A.J.A.

HEARD: 9 OCTOBER, 2014

DELIVERED: 24 OCTOBER, 2014

SUMMARY

Applications for condonation and reinstatement of lapsed appeal – Explanation for breach of Rule inadequate – Prospects of success of appeal remote – Applications dismissed with costs.

JUDGMENT

Thring, JA:

[1] In 2007 the appellant, who subsequently died some-time in 2013, launched an urgent application in the Court a quo. The matter proceeded, at a very leisurely pace, through a number of procedural entanglements until, eventually, on 8 February, 2013 the Court a quo (**Nomngcongo, J**.) gave judgment and made an order dismissing the application in its entirety with costs. On 28 February, 2013 the appellant timeously noted an appeal to this Court against this order. However, she thereafter failed to lodge with the Registrar of this Court seven copies of the record of the proceedings in the Court below in terms of Rule 5 (1) of this Court, which stipulates that the appellant in every appeal shall lodge such copies not later than three months after his notice

of appeal has been filed. Rule 5(3) goes on to provide that –

> *"If the appellant fails to lodge the record within the prescribed period … the appeal shall lapse".*

It follows that this appeal lapsed on or about 31 May, 2013. There is an application dated 31 January, 2014, that is after the death of the appellant, for the reinstatement of the appeal. There is also a separate application for condonation of the late lodgement of the record. These applications are supported by affidavits deposed to by **'Mathabo Makamolo**, who says that she is the daughter and heiress of the late appellant, and who also brings a separate application for her substitution as appellant in the place of her late mother. I shall refer to her henceforth as "the appellant's daughter." All these applications are opposed by the fourth respondent. In the view which I take of this matter, it is necessary to deal only with the applications for condonation and reinstatement of the appeal.

[2] Where there has been a breach of a provision of the Rules of this Court, Rule 15 (2) provides that –

"The Court shall have a discretion to condone any breach on the application of the appellant."

[3] The explanation put forward by the appellant's daughter for her and her mother's failure to lodge the record timeously is most sketchy and unsatisfactory. She does not say when in 2013 her mother died. She simply says that since her mother's death there have been "some family feuds and misunderstandings", that the funeral took longer than anticipated, and that she was busy with that and "the preparations that followed therefrom." In a separate affidavit in her application for condonation she says, in addition, that she "was preoccupied and could not pursue the matter on appeal" and could not instruct her mother's attorneys timeously so as to enable them to file the record expeditiously. She furnishes no dates or other details in this regard. In particular, she does not say precisely how these events impinged upon her ability to comply with the Rules and cause the necessary copies of the record to be lodged with the Registrar. The record is not a long one: it consists of only about 110 pages. Since the matter was brought on motion, there was no **viva voce** evidence to be transcribed. All the appellant had to do was to collate,

paginate and index the papers and make the required number of copies thereof. Nor does she explain why it took eight months, from 31 May, 2013, when the appeal lapsed, until 31 January, 2014 for her to launch the applications for condonation and reinstatement of the appeal: these applications ought to have been launched without delay. See **Napier v Tsaperas,** 1995 (2) SA 665 (AD) at 671C. In the absence of any satisfactory explanation, the period of eight months was far from reasonable, in my view, and constituted an undue delay. The interest of the respondents in the finality of the judgment of the Court a quo must not be lost sight of: see **Napier v Tsaperas, supra**, at 671C – D.

[4] The other factor which must be taken into consideration in applications of this kind is the prospect of the appeal succeeding if it were to be resuscitated. The dispute in this matter centres on the appellant's alleged entitlement to a certain plot of land which she said was *"owned"* by her and her late husband and *"held under Title Deed No.107."* The title deed or a copy thereof is not included in the papers. The appellant did not say how she came to be a *"co – owner"* of this land, save to say that she and her late husband were married *"by civil*

rites" in 1949. She said that she had been informed that the first respondent, a son of her late husband's by another marriage, *"holds a lease to this property of mine."* There is a material dispute of fact on the papers as to who is entitled to the property. In an opposing affidavit deposed to on behalf of the fourth respondent by its managing director, **Ashraf Abubaker**, he says that the fourth respondent bought the property from the insolvent estate of the first respondent with the approval of the Master of the High Court, which disposition was endorsed by an order of that Court. But whether and how either the appellant on the one hand or the first respondent on the other might have acquired some entitlement to the property remains shrouded in conflict and uncertainty on the papers.

[5] But in any event, Abubaker's allegations that the property was purchased by the fourth respondent from the first respondent's insolvent estate are not denied by the appellant. If, as appears to be the case, title to the property has already been transferred to the fourth respondent, then, no matter how good the appellant's title to it may have been in the past, the fourth respondent's present title may now be unassailable,

provided that the latter purchased the property in good faith and without notice or knowledge of the appellant's title: see **Sookdeyi and Others v Sahadeo and Others,** 1952 (4) SA568 (AD) at 571 H-572F; **Joosub v J.I. Case S.A. (Pty) Ltd**, 1992(2) SA 665(N) at 671 F-G; and **Mookrey v Smith N.O. and Another**, 1989 (2) SA 707 (C) at 713 E – F.

[6] Before us, counsel for the appellant conceded that the factual dispute about entitlement to the property was not capable of resolution on the papers. The concession was well made. She suggested that the matter be remitted to the Court a quo for the hearing of oral evidence, but, especially as this relief was not asked for in the Court below, I see no reason why this Court should make such an order. The factual dispute was foreseeable by the appellant before she launched these proceedings: yet she chose to go by way of motion.

[7] In his judgment in the Court a quo **Nomngcongo, J**. said:

> *"..... I do not know how the applicant could have sought relief by way of notice of motion, if only*

because the disputes of fact were plainly there for all to see. These proceedings should never have been brought on notice of motion."

I agree. In my opinion the prospects of the appellant or her daughter succeeding on appeal in having this finding reversed are remote.

[8] For these reasons the applications for condonation of the late lodgement of the record and for reinstatement of the appeal are dismissed, with costs.

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W.G. THRING

JUSTICE OF APPEAL

I agree:

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C.T. HOWIE

JUSTICE OF APPEAL

I agree:

_____

R.B. CLEAVER

ACTING JUSTICE OF APPEAL

For appellant/applicant : M. Chonela

For fourth respondent : T.R. Mphaka