

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 56/2013

In the matter between:

EMILE SEALA

APPELLANT

and:

**BETHUELE PITORI SETAI
MATSELISO MOSHOESHOE
CHADZINGWA**

FIRST RESPONDENT

SECOND RESPONDENT

CORAM : Thring, J.A.
Louw, A.J.A.
Cleaver, A.J.A.

Heard : 4 April, 2014

Delivered: 17 April, 2014

SUMMARY

Costs de bonis propriis – Legal practitioners against whom order sought not given notice thereof, and not before court – Order refused.

JUDGMENT

THRING, J.A.

- [1] When this matter was called in this Court on 4 April, 2014 the appellant, represented by **Ms Lephatsa**, withdrew it and tendered the costs of the appeal. Only one aspect remains for decision, and that is her contention that, in the circumstances of this case, this Court should order that the costs be borne *de bonis propriis* by the attorneys and counsel who previously represented the appellant in these proceedings, but who are no longer doing so.
- [2] The gravamen of the appellant's complaint against these practitioners is that:
- (a) Having noted an appeal to the Court *a quo* from a decision of a magistrates court, they failed to apply in terms of High Court Rule 52(1) for a date of hearing of the appeal, so that it lapsed;
 - (b) They brought the present appeal to this Court against an order to that effect made by the Court *a quo* without having applied for the necessary leave to do so, and without delivering heads of argument; and

- (c) They failed to advise the appellant properly on the merits of his case.

[3] The attorneys and counsel concerned have not been given notice of the appellants' intention to seek an order against them, and they are not before this Court.

[4] It would be quite improper, in my view, for this Court to make an order of the kind sought by the appellant without his erstwhile attorneys and counsel first being given notice of his intention to do so, and without them being afforded an opportunity to be heard. But neither of these things has happened, and they are not before the court. **Ms. Lephatsa** referred us to the decision of this Court in **Mahlakeng and Others v Southern Sky (Pty) Ltd and Others, 2000-2004 LAC 742**, where costs were ordered *de bonis propriis* against counsel, but the position there was entirely different from the present case : in that case counsel concerned, who was still appearing in the appeal, was given prior notice of the possibility of costs being awarded against him *de bonis propriis*, and he delivered heads of argument and made submissions to the Court on the point. It would be a gross negation of the fundamental principle of *audialterampartem* if we were to make such an order in the present case without notice to those who would be most directly affected by the order.

[5] It is accordingly noted that the appeal has been withdrawn.
The appellant is ordered to bear the costs of the appeal.

W.G. THRING
Justice of Appeal

I agree:

W.J. LOUW
Acting Justice of Appeal

I agree:

R.B. CLEAVER
Acting Justice of Appeal

For appellant : Ms L.M.A. Lephatsa

For respondent : Q. Letsika