

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO.41/12**

In the matter between

**‘MAMAPHOESA HOOHLO**

**APPELLANT**

and

**MPHEKELELI HOOHLO**

**RESPONDENT**

**CORAM:**           HOWIE JA  
                          LOUW AJA  
                          CLEAVER AJA

**HEARD:**           13 APRIL 2014

**DELIVERED:**     17 APRIL 2014

## **SUMMARY**

*Minor child – access- whether mother refused access in contempt of court order and whether liable to have been committed to jail. Condonation for late filing of record of appeal – costs.*

## **JUDGMENT**

### **HOWIE JA:**

[1] The litigants are the parents of a six year old girl, 'Malomile. For convenience I shall call the parties "the mother" and "the father" respectively. They were parties to divorce proceedings, the outcome of which is presently irrelevant. They have also been parties to protracted disputes concerning access to the child.

[2] On 1 March 2010 the High Court made an order providing for the father to have access to the child ("the access order").

[3] Later that year the father applied to the High Court for a rule nisi calling upon the mother to show cause why she should not be committed to prison for being in contempt of the access order. This was on the strength of an affidavit by the father. A rule nisi was duly granted on 22 November 2010, the return day being 29 November 2010.

[4] It would appear from the record presented to us that there was no opposing affidavit filed and, although this is by no means clear, that because somebody assured the court, that the mother would comply with the access order, no final order for committal was granted.

[5] During 2012 the father again applied for a committal order. Affidavits were filed on both sides. Eventually the application came before the High Court (**Mahase J**) on 30 November 2012.

[6] On Friday 30 November 2012 **Mahase J** committed the mother to prison. The appeal is against that order.

[7] On Sunday 2 December 2012 the mother applied to **Peete J** as a matter of urgency for her release and for a stay of the committal order pending appeal. He gave an order in the form of a rule *nisi* returnable on 3 December 2012.

[8] On 3 December the matter came before **Mahase J** who ordered the arrest and re-committal of the mother.

[9] The appeal record is in such a state, and was filed so late, that the mother has had to apply for condonation. In my view the fate of that application depends on the fate of the appeal.

[10] The application papers before **Mahase J** on 30 November 2012 revealed factual conflicts which the father's counsel on appeal before us rightly called irreconcilable. The father alleged that the mother had denied him access on several occasions which he proceeded to detail. She denied those allegations.

[11] The crux of the father's case is that he was denied access in about June, September, and October, 2011. Her answer was to say that it was not true that she refused access on those occasions. She alleged that from after 25 September 2011 the father of his own accord stopped seeing the child (implying that he had been seeing her up till then) following upon an incident when he assaulted her in the presence of the child and neighbours at her home. She reported the assault to the police. Then, in October 2011, when she was in Gauteng, South Africa, for medical reasons, she went to see the father and told him she would bring the child to him in the last week of November. However he said he was staying in circumstances not conducive to the child's safety.

[12] We were belatedly provided with a copy of the learned Judge's judgment in respect of the order appealed against. In the first paragraph she says that the facts of the case were correctly summarised by both counsel and need not be repeated as they "are incorporated herein". They are not.

[13] What the Judge did do was to hark back to the proceedings of 2010 which I have mentioned and to refer to them in some detail and in terms critical of the mother. Having recounted that she found on 29 November 2010 that the mother had been in contempt of the access order, the Judge said that that finding remained unchallenged. She concluded –

*“In the premises and for the foregoing reasons, the applicants’ application is granted as prayed ...”*

[14] The “finding” in November 2010 was made only on the father’s allegations. In the application of 2012 the mother alleges that she only got to know of the access order in December 2010 and denies that she was represented by anybody in the proceedings of November 2010. **Mahase J** did not refer to that allegation and plainly did not consider and evaluate it.

[15] The judgment makes no reference to the irreconcilable versions of the parties as to whether there was a refusal of access.

[16] It is clear that the version of the mother before the court on 30 November 2012 did not consist of bare denials. Her allegations were set in sufficient factual context to convey her case in acceptable detail. The Judge had no basis – and gave no reasons – for the rejection of the mother’s version or for preferring the father’s version. The necessary evaluation of the rival allegations was simply not undertaken. No court would have been in a position to come to a conclusion favourable to the father on the disputed facts before **Mahase J.**

[17] It follows that the appeal must succeed and that the order of 30 November 2012, and the order of 3 December 2012 which was consequent on the earlier order, must be set aside.

[18] There remains the matter of the application for condonation for the late filing of the appeal record. As the mother sought an indulgence she must pay the costs of an unopposed application for condonation. The issue then, is whether she should also pay the costs of opposition. That

depends on whether the opposition can be said to have been reasonable.

[19] Admittedly the father had much to complain about as regards the tardiness of the mother's former legal representatives in their lack of effort to produce a proper record timeously. So do we. But the crucial factor, to my mind, is that the grant of the order of 30 November 2012 was so patently without justification given the irresoluble factual conflicts that the father, through his legal representatives, should have been aware from the outset that opposition to the appeal would be unjustified. I accordingly find that the opposition to the condonation application was not reasonable.

[20] This Court's order is as follows:-

1. The appeal is allowed, with costs.
2. The orders of the court below for the committal to jail of the appellant, dated 30 November 2012 and 3



December 2012, are set aside and substituted for them is the following:

“The application is dismissed, with costs.”

3. The application for condonation of the late filing of the appeal record is granted. The appellant is to pay the costs of an unopposed application for condonation. The respondent is to pay the costs occasioned by his opposition.

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**C.T. HOWIE**  
**JUSTICE OF APPEAL**

I agree:

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**W.J. LOUW**  
**ACTING JUSTICE OF APPEAL**

I agree:

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**R.B. CLEAVER**  
**ACTING JUSTICE OF APPEAL**

For appellant : N. da Silva Manyokole

For respondent : M. Ramafole KC, C.J. Lephuthing