

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 2/2014

HELD AT MASERU

ZAINAB MOOSA

FIRST APPELLANT

MOOSA CASH AND CARRY

(PTY) LTD

SECOND APPELLANT

BUILDING WORLD (PTY) LTD

THIRD APPELLANT

OSM MOOSA TRUST

FOURTH APPELLANT

And

LESOTHO REVENUE AUTHORITY

RESPONDENT

JUDGMENT

CORAM : Musonda AJA, Chinhengo AJA and Mahase JA

HEARD : 16th October 2015

DELIVERED: 06th November 2015

SUMMARY

Condonation – No application for condonation- Noting an appeal three months after judgment contrary to Rule 4(1) of the Court of Appeal Rules 2006. Appellant filing record a year later, instead of three months contrary to Rule 5 (1) – No application to re-enrol lapsed appeal – Condonation inappropriate due to inordinate delay and lack of prospects of success of appeal. Foreign law is a matter of fact to be proved by an expert. Documents supporting a party's case must be annexed to the founding affidavit. There is a distinction between the concept of “out of community” of property which is a creature of Sharia law based on the “Muslim Faith” and an “ante-nuptial” contract which is a creature of the parties to the marriage. An interdict cannot lie against attachment or execution after they have taken place. It is like “closing the stables when horses have bolted”.

ORDER

An appeal : The High Court of Lesotho (Hlajoane J)

Musonda AJA (Chinhengo AJA and Mahase JA concurring)

Application/Appeal dismissed with costs.

Musonda AJA, Chinhengo AJA and Mahase JA

BACKGROUND

- [1] The Lesotho Revenue Authority herein called the (LRA) had on the 26th February 2013 issued a warrant of distress against Selkol 1983 (Pty) Ltd and Osman Sally Mahommed Moosa herein called OSM Moosa. The distress warrant was issued pursuant to section 147 of the Income Tax Act.

FACTS:

- [2] It was common cause in the court *a quo* that the appellant and OSM Moosa were husband and wife. OSM Moosa had a tax liability of huge sums of money running into millions of maloti. Consequently some property from the couple's home was attached and was later to be removed and auctioned in order to extinguish OSM Moosa's tax liability.
- [3] The appellant canvassed in the court *a quo*, that the court release the property because it belonged to her though the appellant and OSM Moosa had been legally married, their Islamic marriage was subject of an *ante nuptial* contract.
- [4] The court *a quo* was asked to determine only one issue:
- (i) whether the property that had been attached belonged to the couple, and/or
- [5] The Respondent argued in the court *a quo* that the marriage between the first appellant and OSM Moosa was not based on "*ante nuptial* contract" according to the joint consent issued by first appellant and OSM Moosa when both wanted to assign their matrimonial property to the OSM Moosa Trust. The document had clearly indicated that their marriage was "in community of property". The document bore the Land Administration Authority date stamp dated 26th July 2012.

[6] The first appellant argued in response, that the Commissioner of Lands or whoever endorsed and/or issued the consent, made his own assumption that the said marriage was in community of property without having made any enquiry.

[7] The Learned Judge in the court *a quo* concluded:

7.01 The couple had approached the lands office to dispose of their property to the Trust. It was the couple who supplied the information to the officer who prepared the document;

7.02 It was inappropriate for the couple to request the Commissioner of Lands to come and clarify the correctness or otherwise of the consent document. It was not for the court to assist the parties to build up their cases, as the court may be perceived to have descended into the arena.

7.03 The first appellant had attached a marriage certificate to her founding papers, the certificate shows that they were married on the 7th July, 1979 in accordance with Islamic law. However, there was no indication on the marriage certificate that it was “out of community”.

7.04 In an effort to convince the court that Islamic marriages are by nature “out of community”, there was a document attached to heads of argument for the appellants styled, “muslims marriages Bill” not an Act. The Respondent was denied the opportunity to challenge the document.

7.05 Respondent counsel submitted that at common law each aspect of foreign law is a factual question and any evidence on that aspect must emanate from someone with necessary expertise.¹ Consequently the applicant provided nothing to show that their marriage was, “out of Community of Property”.

7.06 The Learned Judge characterised a letter from the “Lesotho Islamic Centre” confirming that the attached marriage certificate is based on Islamic Religion and is “out of community of property,” as not authentic.

7.07 Another attachment from the Muslim Judicial Council (SA) Social Department, which stated that the Islamic marriage is based on the “*Ante Nuptial Contract*”. This document in absence of affidavit from the author was hearsay and inadmissible.

¹ See *Schlesinger vs Commissioner for Inland Revenue* 1964 (3) 389

7.08 There was the absence of cogent evidence that the couple married, “out of community of property” and an “*Ante Nuptial Contract*”. Reliance was placed on annexure TJI, which she held clearly stipulated that the first appellant and OSM Moosa were married, “in the community of property”.

7.09 The Learned Judge disallowed documents attached to the Heads of arguments. She mentioned that appellant’s case had to stand or fall by facts contained in the founding affidavit, not in the Heads of Arguments. She cited the case of *Lesotho National Olympic Committee v Morolong*², for that proposition of the law.

7.10 In conclusion the court *a quo* made a finding of fact that the marriage between the first appellant and OSM Moosa is in “community of property” and not “out of community of property”. That the property they own is in community and not individually owned, he dismissed the application.

[8] Dissatisfied with the Learned Judge’s judgement the appellant appealed to this court.

[9] Before arguing the substantive appeal, the appellant applied for condonation of the late filing of the record. The appellant

² Lesotho National Olympic committee Vs Morolong (2000-2004) LAC 450 at 457

acknowledged the respondent's view of the law of failure to file the record within the prescribed timetable. Appellant however differed with the respondent on the justification of non-filing and prayed for the revival of the appeal.

[10] The appellant argued that an application for condonation was required to revive the appeal³.

[11] It was submitted that the appellant was not informed of the judgement timeously. Once she knew about the judgement she quickly filed an appeal. Having no knowledge of the judgment was the cause of the delay.

[12] Delay in filing the record was attributed to the negotiations with the respondent, the husband and the appellant. During the currency of the negotiations, she was not too sure whether to pursue the appeal. It was in February 2015, when they agreed that she pursues the appeal in so far as the status of their marriage was concerned.

[13] The respondents valiantly opposed the application for condonation. They started off by quoting Friedman JP's statement⁴ that:

“The Rules of court contain qualities of concrete particularity. They are not of an aleatoric quality.

³ Dengetenge Holdings (pty) Ltd & Southern Sphere Mining and Development Company Ltd & Others case No 61/71/12

⁴ See Telcom Lesotho (Pty) Ltd v Mafatle LAC (APN/08/2005 unreported

Rules of court must be observed to facilitate strict compliance with them, to ensure the efficient administration of justice for all concerned. Non-compliance with the said rules would encourage casual, easy-going and slipshod practice, which would reduce the high standard of practice, which the courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with, justice and the practice and administration thereof cannot be allowed to degenerate into disorder”.

THE LEGAL POSITION:

[14] It was canvassed that the application for condonation ought to be dismissed on the following grounds:

- (i) The appellant has misconceived the remedy by applying for condonation while her appeal had lapsed;
- (ii) No satisfactory explanation has been provided by first appellant as to why she did not note an appeal within the period prescribed by the rules;
- (iii) Unreasonable explanation has been provided relating to the filing of the record beyond the period prescribed by the rules;

- (iv) Once the appeal has lapsed the proper remedy on the part of the appellant is to apply for reinstatement of the appeal not condonation, *Telecom Lesotho (Pty) Ltd v Mafatle supra*.

[15] The standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. Fairness includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success, *Brumer v Gorfil Brothers Investments (Pty) Ltd*⁵.

[16] In the present case first appellant states that her counsel never informed her of the outcome of the judgement, no explanation has been provided by the appellant with respect to why she did not file an application for condonation as far back as December 2013 or January 2014. She does not even tell the court what prevented her from asking about the judgment.

[17] Where the appellant blamed their correspondent attorney for the delay in filing the application, The Constitutional Court of South Africa held the explanation to be less than

⁵ See *Brumer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837

satisfactory, *Ferris and Another v Firstrand Bank Limited and Another*⁶.

[18] An application for condonation is not a mere formality. It is triggered by non-compliance with the Rules of Court.

Accordingly when there has been non-compliance, the applicant should, without delay apply for condonation and should give cogent reasons for non-observance with the Rules initially, *Estate Woolf v Johns*⁷.

[19] Where non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted whatever the prospects of success might be, the prospect of success is important, but not decisive, *Darries v Sheriff, Magistrate's Court Wynberg and Another*⁸.

[20] I have anxiously exercised my mind as to whether this is a proper case to condone non-compliance with the Rules of court.

[21] The procedural steps to be taken on appeal are governed in this case by rule 4 (1) and 5(1) of the Court of Appeal Rules 2006. The appeal should have been noted within six weeks, but was noted four months later. The applicant/appellant should have filed the record within three months after the notice of appeal had been filed. She filed a year later. This

⁶ See *Ferris and Another vs Firstrand Bank Limited and Another* 2014 (3) BLLR (CC) Para 11

⁷ See *Estate Woolf vs Johns* 1968 (4) SA 495 at 497

⁸ See *Darries v Sheriff, Magistrate's court, Wynberg and Another* (1998) 3 SCA 34 at 41

was inordinate delay. She had a cavalier attitude towards this appeal.

[22] The applicant had rushed to court with expedition to seek an interdict. When the application was rejected on 13th September, 2013, she lodged the appeal on 14th January 2014, four months later instead of six weeks prescribed by the Rules. The appeal record was filed a year later after noting the appeal on 24th March 2015. There was inordinate delay, without a plausible explanation.

[23] The appeal had lapsed. Lapse is defined by the concise Oxford English Dictionary Tenth Edition as:

“In law the termination of a right or privilege through disuse or failure to follow appropriate procedures”.

It follows the right to appeal was terminated and needed to be revived before an application for condonation can be entertained. I see force in Advocate Mofilikoane’s argument, that the application for condonation is misconceived.

[24] I am of the view that non-observance of the Rules can be a “trigger” of “judicial chaos”. This can undermine a fundamental policy objective of access to justice, which is a human right. Serious litigants will be denied their day in court, while judges attend to frivolous and vexatious applications by litigants who prolong litigation in order to

avoid making good of their liabilities. It is any “viable democracy’s” policy objective to offer to its citizens, speedy, efficient and quality justice, when disorder is injected in the administration of justice, such a policy is undermined.

[25] The unnecessary prolongation of litigation of this nature denies the treasury and consequently the government, the capacity to provide social services to the poor as their capacity to do so is undermined by tax defaulters.

[26] Quite frankly there were no plausible reasons for the delay. Yacoob J’s Judgement in *Brummer v Gorfil Brothers Investments (Pty) Ltd* supra is apt. I agree with Plawman J’s judgment in *Darries v Sheriff, Magistrates Court, Wynberg, and Another Supra*, that inordinate delay can vitiate the application for condonation, even if there were prospects for success of the substantive appeal.

[27] For what I have said the application for condonation is dismissed.

[28] Ordinarily that would have been the end of the matter. However, this appeal raised important legal issues which as the highest court of the land, we need to comment on. The first issue is the admissibility of foreign law, the second is the distinction between marital rights under Sharia Law and “*Ante Nuptial Contract*” and thirdly, when does the court issue an interdict.

- [29] In England foreign law since the 18th century is to be treated as a question of fact. The “fact doctrine”, is based on the old distinction between the courts of admiralty and the Courts of Common Law. While the former had jurisdiction in matters of foreign element, the later decided domestic issues. When the Common Law Courts extended their jurisdiction to matters with a foreign element in the 18th century, they were bound to treat foreign law as fact because the only “law” they could apply was English Common law. A party relying on foreign law must plead it as a fact⁹.
- [30] Under German procedural law, it is a generally accepted rule that foreign law is treated as law. The relevant provisions on proof of foreign law is in Article 293 of the German Civil Procedure Code (ZPO). Even in Germany the most common method of ascertaining foreign law in court, is the consultation of an expert directly by the court.¹⁰
- [31] It is patently clear that whether foreign law is treated as a fact, as it is, under English law or law as it is under German Procedural Law, there is a procedure laid down for its admissibility. Critical to that procedure is testimony of an expert. This procedure was not complied with in the court *a quo*. The Learned Judge therefore rightly rejected its admissibility. We therefore cannot interrogate inadmissible

⁹ See Fentiman, L.Q. Rev 108 (1992) 143-144

¹⁰ See Professor Dr Rainer Hausmann, Private International Law Civil Procedure, European Legal Forum 8th year January/February 2008

evidence, as such evidence was not before the Court *a quo* and is not before this court.

[32] The documents tendered by way of memo and articles were not annexures to the founding affidavits of the authors or those intending to rely on them.

[33] Sharia law is “a creature of Muslim faith” and all muslims are bound to follow. On the other hand an “*ante-nuptial* contract” is a consensual document between the parties to the marriage, which if freely negotiated. There is therefore no synonymy between “marital rights” under Sharia law and an “*anti-nuptial* contract”, as the applicant/appellant seemed to suggest.

[34] To paint a picture with broad strokes, the philosophy underlying the “out of community” concept in Sharia law, is that a muslim marriage is potentially polygamous. It would therefore fly in the teeth of logic for one woman to share her property with a husband and the other spouse, whom as human nature may have it, may be characterised as a “rival”.

[35] An interdict is “pre-emptive remedy” and can only be granted if the action intended to be prevented has not taken place. Otherwise you cannot “close the stables when the horses have bolted”.

Conclusion:

[36] The application for condonation is dismissed as misconceived as the appeal had lapsed. The applicant approached the appeal process in a less expeditious fashion than that of a serious litigant. The delay was inordinate and unreasonable. There was a clear observable contradiction. The appellant said she had no notice of the Court *a quo*'s judgment in one breath and in the other she said, she was waiting for the outcome of the negotiations between her husband and the Respondent. This renders her explanation implausible. This is a case where she was asserting her individual property rights and not those of the couple that was the essence of launching an urgent application in the court *a quo*. In any event the prospects of the appeal succeeding are dim. It must be planted in the minds of litigants that condonation is not "a matter of course". A proper foundation for the application being granted must have been laid. Be as it may the advocates for the Applicant and Respondent undertook industrious research, for which they deserve commendation.

[37] The following order is made:

- (i) Application for condonation dismissed with costs.

Dr. P. Musonda AJA

I agree

M.H. Chinhengo AJA

I agree

M. Mahase JA

For the Applicant/Appellant – Adv. K. Ndebele

For the Respondent - Adv L.A. Mofilikoane