

THE COURT OF APPEAL OF LESOTHO

JUDGMENT

HELD IN MASERU

C. OF A (CIV) 67/2014

In the matter between:

KALINYANE MOHANOE

APPELLANT

And

‘MAMOEKETSI MOHANOE

1ST RESPONDENT

DEPUTY SHERIFF (MR. Lipholo)

2ND RESPONDENT

Neutral Citation

CORAM: Chinhengo AJA, Peete JA, Mahase JA

HEARD: 13 October 2015

DELIVERED: 6 November 2015

SUMMARY

Court of Appeal – Appeal against an order declaring that Judge was not functus officio refused – Appellant’s application for a the Judge to review and set aside her own orders dismissed – Court of Appeal Rules – None compliance deprecated – Withdrawal by Counsel for first respondent during current session of this Court . Appeal being struck off the roll.

- [1] This is an appeal against a number of orders emanating from the High Court in respect of the parties matrimonial estate. Parties having divorced, a number of court orders having been issued in respect of the parties' division of their estate, the appellant who is in possession of the bulk of their said estate, approached the High Court on numerous occasions asking it to stay execution of its orders.
- [2] He had also prayed for an interdict restraining the respondents from interfering with the smooth administration of his entire estate.
- [3] The above application had been filed by the appellant after the court a quo had, on the 15th November 2012, granted a final order in favour of the first respondent.
- [4] The net effect of that final order was to award to the first respondent certain property which formed part of the parties, joint matrimonial property.
- [5] Ultimately, in a judgment dated the 12 August 2014, the Judge who had granted the above orders of court declined to grant an application for a declaration in favour of the appellant, that its orders of the 15 November 2015 were irregular and to have

same reviewed and set aside, as well as the relevant writ of execution.

- [6] The learned Judge in the court a quo declined to deal with that application for the reason that having issued such final orders, she was *functus officio*. The application was, on this ground alone dismissed.
- [7] The appellant subsequently noted an appeal to this Court against that order.
- [8] The appeal in question was filed some four months after the 12 August 2014. This was contrary to Rule 4 (1) of the Rules of this Court. The prescribed period within which such an appeal should have been filed is within two weeks from the date of delivery of the judgment appealed against.
- [9] It had been argued at first that the appellant had not applied for condonation of the late filing of the appeal. This point was later abandoned because it turned out that such an application had in fact been filed on the 14 November 2014. It had not been opposed.

- [10] At the roll call, there was appearance only by the first respondent's counsel. Counsel for the appellant and his client were not in attendance.
- [11] Adv. V.V.M. Kotelo K.C. informed the court that parties had not yet filed written submissions even though the appeal was scheduled to be prosecuted on the next day, the 13 October 2015.
- [12] Such submissions had still not been filed by either party on the 13 October 2015 contrary to Rule 9(1) of the Rules of this Court as well as contrary to the numerous decisions of this Court that Rules of Court are to be complied with for the efficient and orderly functioning of the Court.
- [13] Very regrettably, the instant appeal is a further demonstration that our courts are still faced, at various levels with flagrant non-compliance with rules of court. This attitude does not only impact negatively on the proper administration of justice but in many instances, clients' are prejudiced by non-compliance by their counsel with the rules of court at clients' great expense.
- [14] Ackerman J.A. (as he then was) had occasion to comment on and warn against this attitude: that legal practitioners' minds have to be disabused of the mistaken impression and the

misconceived idea that their disregard of the rules will be overlooked because of the prejudice their clients might suffer. He further commented, and correctly so in my view, that:

*“Clients who suffer loss because of omissions on the part of their legal representatives may, in appropriate circumstances, have remedies against their advisers”.*¹

[15] In this appeal, it further transpired, to the dismay of this court, that in fact, in the afternoon of the 12 October instant, at around 12.25 p.m., Adv. Rasekoai, counsel who had not attended the roll call on the morning of the 12 October 2015, had filed and served upon counsel for first respondent and Registrar of this Court, a notice of withdrawal as attorney of record.

[16] Counsel for the appellant who had been ordered to appear before this Court, advanced as a reason and a justification for his having withdrawn as an attorney of record for the appellant, lack of full brief by his client. It is not clear why he did not file such a notice immediately after a circular dated the 10 September 2015 in which litigants were informed of the current sitting of the Court in this session.

¹ Makenete v Lekhanya, L.A.C (1990 – 94) pages 127 a 129

[17] Subsequently Adv. K.J. Nthontho appeared before us on the 13 October on behalf of the appellant. He informed the court that he had just been briefed and he applied for either a postponement of the appeal to the next session or that the appeal be heard before the end of the session so that he could prepare and file his submissions.

[18] Suffice it to mention that after a protracted argument, this Court was not persuaded to grant the application for a postponement.

[19] We were satisfied that to a large extent but in varying degrees, both counsel have not fully complied with the Rules of this Court. They have also not invoked Rule 15 of the Rules thereby failing to apply for condonation of the breach of the Rules of this Court.

[20] It is never an excuse for any counsel to come to Court at the eleventh hour to inform the Court that he or she has not been properly briefed. It is even worse where, as in the instant case, same counsel has been prosecuting or defending the matter in the Court a quo.

- [21] Further, it would appear that the appellant was not timeously informed by his previous counsel about the withdrawal. This probably explains why the appellant briefed another counsel to prosecute his appeal very late.
- [22] There is nothing in the Rules absolving the other party from filing such heads of argument for the reason that the other party or the appellant has not files same. What this means is that whether or not the appellant had filed its heads of argument, the respondent should have nonetheless filed its such heads of argument.
- [23] Therefore the argument that such could not be filed since the appellant had not filed its heads of argument is untenable. This is because litigants are mandated by Rules of this Court to file with the Registrar copies of heads of argument.
- [24] Rule 9(1) and (3) is couched in mandatory clear terms. Each litigant is to file heads of argument whether or not the other has filed such heads of argument. The appellant has to file same not less than twenty eight days before the date of the beginning of the session of the Court during which the appeal is to be heard. The respondent is to file same not later than fourteen days before the first day of the session of the Court.

- [25] In this regard, both counsel have disregarded the Rules in ways mentioned above.
- [26] They have also disregarded and failed to strictly comply with Rules 5 and 6 of the Rules of this Court. For instance, the application for condonation of the late noting of the appeal was not annexed to the paginated record and was therefore not part of the appeal record.
- [27] That explains why it has at first been argued by counsel for the first respondent that there was never any appeal before this Court with regard to which a postponement could be granted. The argument that since there was no application for condonation, and so the appeal had lapsed is reasonable in the circumstances.
- [28] However, very late into the addresses, Adv. Nthontho indicated that in fact such an application had been filed on the 14 November 2014 and that it was not opposed.
- [29] In other words, the record of appeal placed before this Court did not comprise the entire record of the proceedings as has been stated in the certificate of compliance.

- [30] Further, as a result of lack of clarity and the inelegant way in which grounds of appeal comprising of two separate documents of grounds of appeal as, well as a document styled amended notice of appeal, have been drafted, it was not very easy for the court to appreciate exactly how many cases were on appeal. Refer to pages 208 up to 213 of the paginated record.
- [31] Parties have also clearly not complied with Rule 6(1) and (5) of the Rules of this Court. The result is that the record of proceedings placed before this Court is over burdened with certain portions of the proceedings in the court a quo which are not necessary for the determination of this appeal.
- [32] In conclusion, it is apposite to warn counsel and litigants once again that no one has a choice to selectively or otherwise comply with the Rules of Court. Such rules are meant to assist courts in the administration of justice so that courts perform their duty with efficiency and ensure that high standards of practice are maintained.
- [33] To achieve the above, litigants have to strictly comply with these rules so as to ensure the efficient administration of justice for

all concerned. The remarks of Friedman JP are most appropriate as a guide to legal practitioners. He held that:

*“The Rules of Court contained qualities of concrete particularity; they were not of aleatoric quality; they had to be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the Rules would encourage casual, easy going and slipshod practice which could reduce the high standard of practice which the Courts are entitled to in administering justice. The provisions of the Rules were specific and had to be complied with; justice and the practice and administration thereof could not be allowed to degenerate into disorder. Practitioners were enjoined to ensure that notices of appeal complied with the Rules”.*²

[34] There is no doubt in my mind that the culture of non-compliance with the Rules of Court which I have observed in this session of the Court of Appeal is a serious matter and such a culture has to be rooted out if our courts are indeed to ensure high standards of practice.

[35] For the foregoing reasons, and regard being had to the surrounding circumstances of this case, and also regard being had to, but not limited to Rule 15, this appeal is struck off the roll with costs.

² Molebatsi v. Federated Timbers (PTY) LTD 1996(3) S.A. at 92

M. MAHASE
JUDGE OF APPEAL

I agree:

M. CHINHENGO
ACTING JUDGE OF APPEAL

I agree:

S. PEETE
JUDGE OF APPEAL

For Appellant:

Adv. M. Rasekoai

For 1st Respondent:

Adv. V.V.M. Kotelo K.C