

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO.8/2018

In the matter between:

THEKO LETSIE

APPELLANT

and

MOEKETSANE L. LETSIE

1ST RESPONDENT

SEBETE LETSIE

2ND RESPONDENT

‘MAMOEKETSIE MACHELI (Nee) LETSIE

3RD RESPONDENT

LAND ADMINISTRATION AUTHORITY

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

CORAM : DR. K. E. MOSITO P

HEARD : 15 November 2018

DELIVERED : 16 November 2018

SUMMARY

Civil Practice - Competence of a single judge of the Court of Appeal sitting alone, to determine an application for condonation for the late filing and noting of appeal - Whether juridically appropriate - The application referred to the Full Court - no order as to costs these proceedings.

JUDGMENT

DR. K. E. MOSITO P

INTRODUCTION

[1] This is an application for an order in the following terms

- (a) That the Appellant be granted condonation of the late filing of the appeal in this matter.
- (b) That Respondent pay costs of this application only in the event of opposition thereof
- (c) That the applicant be granted further and or alternative relief.

[2] This matter was placed before me on 15 November 2018. At the commencement of the hearing, the court enquired from Counsel for the parties whether regard being had to s129 (3) of the **Constitution**; s6 of the **Court of Appeal Act 1978**; **Rule 18** of the Rules of this Court as well as the **Court of Appeal (Amendment) Rules 2009**, a single judge of this Court has the competence in law, to entertain the application for the late noting of an appeal.

THE FACTS

It is not really necessary to go into detail in sketching out the fact. The reason is that, the facts are really not material to this ruling. It suffices to say that, on 2 June 2016, a judgment was handed down by **Mahase J** against the Appellant/Applicant in which he was litigating against the respondents. It was noted on 28 January

2018. His was a delay of about a year. It is for that appeal that the condonation was asked for.

THE ISSUE

[5] After hearing from both Counsel preliminarily, in an ancient metaphor, this Court separated the wheat from the chaff by framing the issue as being whether a single judge of this Court, sitting alone, was competent to determine an application for condonation for the late filing and noting of an appeal. This issue was raised cognisant of the established learning in law that, a judgment should be given by a competent tribunal to dispose the particular case beforehand.

[6] It being accepted that a decision given by an incompetent body cannot have a binding effect over the subjects of the decision, there was need therefore to consider this issue first. Bearing the foregoing in mind, the above question was posed to the learned Counsel regard being had to the terms of s129 (3) of **the Constitution**; s 6 of the **Court of Appeal Act 1978**; Rule 18 of the **Court of Appeal Rules 2006** as well as Rule 3 of the **Court of Appeal (Amendment) Rules 2009**.

THE LAW

[7] Section 129 (3) of the Constitution provides that *‘The Court of Appeal shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of judges, not being less than three.’* Section 6 of the Court of Appeal Act provides that, *‘the court shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of judges, not being less than three.’* Rule 18 (1) and (2) provides that:

- (1) *In this Rule, an ‘interlocutory matter’ means any matter relevant to a pending appeal the decision of which will not involve the decision of the appeal.*
- (2) *An Interlocutory matter may be brought before a single Judge, but the Judge before whom the matter is brought may in his discretion hear, refuse to hear or refer the matter to the Full Court.*

[8] Rule 3 of the Court of Appeal (Amendment) Rules 2009, issued by the President of the Court of Appeal, ¹ provides that:

In respect of any appeal, the Court shall consist of those Judges, not being less than three, whom the President shall select to sit for purposes of hearing that appeal.

[9] The law is therefore that, a single judge of this Court can only competently preside over an interlocutory matter. A single judge can only give the kind of orders allowed by the Constitution, the Act and the Rules.

¹ Pursuant to s 131 (b) of the Constitution of Lesotho, read with s 22 of the Court of Appeal Act 1978 See: Legal Notice N0. 66 of 2009.

[10] It is clear from Rule 18 (1) that the interlocutory matter can only be relevant to a *pending* appeal. I am of the view that in order to determine the meaning of the word “*pending*” as used in Rule 18 (1), one must look to the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the provision and then decide whether the matter is what is called imperative or directory. In my view, an appeal is “*pending*” if it is pending decision. The word “*pending*” means awaiting a result and it means “*until*”.

[11] In my opinion therefore, an appeal is pending in terms of Rule 18, if it has been duly filed and is awaiting decision. An application for condonation for the late noting of an appeal is therefore a procedure that precedes the pendency of an appeal. Strictly speaking therefore, what is pending now is the condonation application and not the appeal itself. Until such condonation has been granted, it would seem that, the appeal is *pro non scripto*. The appellant must first seek condonation for the late prosecution of the appeal. Once an appeal has been duly filed, it can only then be said to be pending. This judgment is in consonance with the remarks of this Court in **Tlhoriso Makenete v Mookho Motanya C of A (CIV) NO. 46/2017** handed down on the same day as the present judgment.

APPLICATION OF THE LAW TO THE FACTS

[12] As matters now stand in *casu*, there is strictly speaking, no appeal pending in the present case. What is pending now is the condonation application and not the appeal itself. Thus, a single Judge, before whom the matter is brought cannot become seized with this matter because it is not an interlocutory matter. The following result to which the learned Counsel have agreed is the appropriate route.

THE RESULT

[13] Bearing the foregoing in mind:

- (a) The application for condonation for the late filing and noting of the appeal is referred to the Full Court for consideration.
- (b) There will be no order as to costs in present these proceedings.

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

For the Applicant : Adv B.Sekonyela Chambers

For Respondents : Adv B.M.R.Masiphole