IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) No. 11/2017

In the matter between:-

PHIRI NKOE **APPELLANT**

And

NTHABISENG LITABE **1ST RESPONDENT**

THE MESSENGER OF COURT **2ND RESPONDENT**

CORAM: CHINHENGO AJA
MTSHIYA AJA
MOKHESI AJA

HEARD: 20 November 2018
DELIVERED: 7 November 2018

SUMMARY

Application to declare appeal lapsed in terms of Rule 52 of High Court Rules lodged but not heard when presiding judge heard counsel for respondent not properly before him and invited respondent to file application for re-instatement of lapsed appeal; Judge making other orders on the face of them irregular and without foundation on the pleadings and record of proceedings

and without giving reasons therefor; Appellant appealing against order on grounds properly for review; appeal dismissed in exercise of court's power to supervise inferior courts and directing applications pending in High Court be heard in shortest possible time

JUDGMENT

CHINHENGO AJA:-

Introduction

1. This is an appeal with leave of a judge against the decision of the High Court delivered on 12 December 2016 in which the court made the following order-

> "It is ordered that-
>
> 1. Advocate Khumalo is given leave to file an application for reinstatement of his legal representation in this matter.
>
> 2. The respondent file an application for reinstatement of an appeal by 14th December 2016.
>
> 3. The matter is adjourned to the 14th December 2016."

2. In ordinary parlance this Order invites and authorises the 1st respondent's legal practitioner to formalise his assumption of agency for the first respondent by making an application therefor to the court. It also invites and

authorises the 1st respondent to apply, within the two days, for the reinstatement of her appeal, which lapsed some nine years or so before in 2007. In terms of the last paragraph of the Order the matter was adjourned to 14 December 2016, the date by which the two applications should have been filed. It is not clear what the object of the adjournment was as by that date the appellant would obviously not have filed any response to the applications. It is equally unclear why the 1st respondent was required to apply to assume agency when ordinarily he would have had only to file a notice to that effect.

History of litigation

3. In order to understand the issues in this matter it is necessary to set out the history of the litigation. I must however observe, as did MOKGORO in *Capricons Consultants (Pty) Ltd & Another v Butt Motors & Parts (Pty) Ltd* C of A (Civ) 39/2015 that –

> "This matter comes as an appeal against the order of the Court *a quo*, given without reasons for the order. In view of the need for finality and in the interests of justice, this Court uses its discretion, treating the matter as an appeal. (See in *General Billiton Aluminium t/a Hillside and Others*; CCT 72/09 [2010]; ZACC 3 for the discretion of Courts to dispense with the rules of Court where necessary).

4. In 1981 the appellant owned a site in the area around Maqalika Dam in Mapeleng Area, Maseru. He and others in the same area, including the 1st respondent's father, were relocated by virtue of the Declaration of Selected Development Area (Mapeleng) Notice (Legal Notice No. 4 of 1981) and by way of compensation for losing their land. The appellant was allocated Plot 13282-043 situated at Mapeleng, Maseru Urban Area. A lease conferring title to the land was issued to him in 1983. It seems that the 1st respondent's father was allocated a site in the same area about that time also.

5. In 2007 the appellant discovered that the 1st respondent was in occupation of his site. He instituted proceedings in the magistrate's court to stop the 1st respondent from putting up structures on the site. He was successful and on 31 May 2007, the court issued an order that –

> "1. Respondent/defendant is hereby interdicted and restrained from putting up a structure on applicant's land situated at Mapeleng, Maseru Urban Area pending finalisation of ejectment proceedings pending in this Honourable Court in the matter between *Phiri Nkoe v Nthabiseng Litabe* CC 447/07;
>
> 2. Respondent/defendant is hereby interdicted and restrained from damaging and/or disposing of applicant/plaintiff's building materials or any

property that is within the site of the Applicant at Mapeleng Maseru Urban pending the finalisation of the ejectment proceedings between the parties in CC 447/07.

3. Respondent/defendant is ordered to pay costs on attorney and client scale."

6. The record of proceeding before this Court does not enlighten as to whether or not the ejectment proceedings were ever pursued or finalised. It seems the ejectment became one of the issues in another matter between the parties, an application for 1st respondent's committal for contempt, Case no. CIV/APN/MSU/0502/07. That matter was commenced in December 2007 and was only heard on 7 February 2014. Judgment in that matter was delivered on 28 April 2014, which was some seven years or so from the time that the interdict against putting up structures was granted. The purpose of Case no. CIV/APN/MSU/0502/07 was for the magistrate's court to find that the 1st respondent was in contempt of the court for failure to comply with the order of 31 May 2007. It did so but did not impose a penalty. Instead "it invited the parties to address it on the appropriate sentence to be meted out on the respondent."

7. It was not until 8 March 2016 that the parties were heard on the issue of sentence. The court appears to have held

the wrong end of the stick when it considered the appropriate sentence. It was made to believe that the 1st respondent had been in occupation of the site for some time after she was ordered to vacate but had then vacated and as such she was being punished for a past contempt. She however appears to have remained in occupation either in person or through other persons exercising that right through her.

8. The court cannot be faulted for holding the wrong end of the stick at that time because in a later exchange of letters between the parties the 1st respondent's legal practitioner gave the other side to believe that she had vacated the site. It would appear that during the parties' endeavours to reach agreement on the appropriate sentence, the 1st respondent's lawyers wrote on 4 December 2014 to the appellant's lawyers as follows:

> "**Re: Phiri Nkoe v Nthabiseng Litabe –CC/447/07 & cc/502/07**
>
> The above matter refers.
>
> The main object of contempt proceedings is to ensure compliance, as we understand it. In this matter client relinquished occupation of the site in favour of your client and as such there has been compliance already. Consequently an imprisonment would not

be in line with the spirit of the main principle behind civil contempt. We therefore would suggest that the respondent be warned and that the matter be closed."

9. At the end of the judgment of 8 May 2016 and by way of imposing the punishment for contempt, the magistrate stated as follows-

> "Consequently the court orders that within 30 days from today and by the 23rd May 2016 respondent to have completely vacated the site in question with all her agents or people answerable to her and to destroy the building structure she made thereon for the applicant to assume possession and control of the same. If she fails to do so she shall be imprisoned for (3) three years or pay a fine of M15 000.00. Costs are on the ordinary scale."

10. On 14 April 2014 the 1st respondent noted an appeal to the High Court against the magistrate's judgment of 8 May 2016 setting out eight grounds therefor. She did nothing else to have the appeal heard.

11. On or about 8 July 2016 the appellant filed a notice of motion in the High Court seeking a declaration that the 1st respondent's appeal had lapsed and that the judgment of the magistrate's court of 8 April 2016 be enforced with

immediate effect. The appeal was noted without leave of a judge. For that reason the appellant withdrew it and noted it again, this time with leave. That appeal has not been heard.

12. Whilst the appellant was noting his appeal and withdrawing it and again noting it with leave, the 1st respondent by notice of motion on or about 16 December 2016, applied to the High Court for an order reinstating her "lapsed appeal in the CC/447/07, CC/502/07 and for condonation for the "late filing of this application". In her affidavit she accepted that the appeal had lapsed in terms of Rule 52 of the High Court Rules. She gave a rather incredulous explanation for the delay in making the application. She said that she instructed her lawyers back in 2007 to note the appeal and all along until July 2016 she was "labouring under the impression that that (her) case was being worked on." She said:

> "I was only surprised when around July I was handed my file that I passed on to my present counsel of record. Upon perusal of the file and advice of my present counsel I realised that the appeal has lapsed."

13. At paragraph 10 of her affidavit she also says-

"I must also state that this matter is very urgent in that the respondent (appellant) has appeared before court showing that he is very desirous of pursuing his application for declaration of the lapsed appeal in his favour."

14. The 1st respondent's application for reinstatement of the appeal was clearly designed to forestall the appellant's application for a declaration that the appeal had lapsed and that the magistrate's court judgment should be executed forthwith.

15. It is not disputed that on 12 December 2016 when the judge made the order or decision under appeal to this Court, the parties' legal representatives both appeared before him and that the judge made the Order now appealed. Unfortunately a judgment has not been prepared and it is therefore impossible to know the reasons for the judge's decision. At the hearing of this appeal counsel for the appellant said that effort was made in vain to have the judgment prepared and made available to the parties. It is also not disputed, although that is not on record that on 12 December 2016, the day on which the appellant's application for a declaration that the 1st respondent's appeal had lapsed was to be heard at 2:30 pm, the judge had entertained Advocate Khumalo in his chamber in the morning at about 9:30 am whereat he had intimated that he would want to resume agency for the 1st

respondent and that the 1st respondent wished to apply for the reinstatement of her lapsed appeal.

16. Whilst that meeting is not contested, what transpired thereat remains unknown. Counsel for the appellant was able only to talk about what transpired when the parties appeared at before the judge at the time set down for hearing the appellant's application for a declaratory order at 2:30 pm. Counsel said that the parties made their submissions to the judge and he then made the order against which the appellant has lodged the present appeal.

Grounds of appeal

17. The grounds of appeal against the Order of 12 December 2016 are as follows. The judge erred and misdirected himself –

> "1… by ordering that the 1st respondent's withdrawn counsel to make an application for the reinstatement of the lapsed appeal without entertaining the already filed application in terms of Rule 52 of the High Court Rules;
>
> 2… by giving audience to Advocate Khumalo alone in the morning hours of the 12th December 2016 when he had withdrawn as counsel of record from the matter without formal re-appointment, while the matter was set down the same day at 02:30 pm;

3… by directing the withdrawn counsel for the 1st respondent to apply for reinstatement of an appeal when there is no formal application for leave to file the application for re-instatement. Which at, it was already out of time;

4… by not entertaining the application in terms of Rule 52 of the High Court Rules the effect of which is to dismiss the lapsed appeal and instead ordering the 1st respondent to apply for the reinstatement of the lapsed appeal of the 1st respondent, instead ordered 1st respondent to file an application for re-instatement of the lapsed appeal;

5… by failing to peruse and study the record before hearing on numerous dates set for hearing to find that indeed the appeal had lapsed and the 1st respondent failed to file opposing papers;

6… by failing to study the record and find that 1st respondent has no prospects of success on appeal and as a result the intended application for re-instatement stands to be dismissed;

7… by failing to entertain counsel for applicant on the 12th December 2016 at 2:30 pm in the application in terms of Rule 52 and adjourned the Court and

ordered the presence of the already withdrawn counsel for respondent to represent the 1st respondent."

Are grounds of appeal properly so?

18. The appellant's grounds of appeal reproduced above are not in our view properly grounds of appeal. We put this issue to counsel at the hearing. They were not sure but reluctantly conceded.

19. A perusal of the so-called grounds of appeal shows that they are not borne out by the record. To the contrary they require extrinsic evidence to establish them. They speak to possible irregularities committed by the presiding judge than to any error of law or fact that he may have committed. They allege that instead of hearing the application in terms of Rule 52, the judge invited counsel, who was not properly before him because he had renounced agency to make an application for him to be allowed to resume agency; in the morning the judge granted Advocate Khumalo audience in chambers in the absence of counsel for the appellant and despite that he had not assumed agency for the 1st respondent; the judge invited an application for the reinstatement of the lapsed appeal when no application therefor before him; instead of the judge simply entertaining and dealing with the application for a declaration that the appeal had lapsed, he did not do so despite that that was the purpose of the

hearing that afternoon; the judge failed "to peruse and study" the record of proceedings on numerous set down dates which would have revealed to him that not only had the appeal lapsed but also that the application for reinstatement of the lapsed appeal had no prospects of success and could only be dismissed and finally the judge, instead of dealing with the appellant's application at the appointed time, he adjourned the court and directed the 1st respondent to file an unmeritorious application for reinstatement of her lapsed appeal. These complaints by the appellant are founded on factors that cannot be found in the record of proceedings.

20. The appellant's complaints summarised in the preceding paragraph are properly matters for review. A review in the technical sense is a process by which proceedings are brought before a reviewing authority in respect of irregularities or illegalities occurring in the course of proceedings. In this sense a review is not concerned with the decision but with the decision making process: the legality and not merits (*Krumm and Anor v The Master and Anor*[1]). In other words, the grievance raised in a review is against the method of trial hence the grounds of review do not ordinarily appear on the record but have to be established by extrinsic evidence. That I hold is the situation here. In essence the appellant's grievance is that the judge acted irregularly in conducting the proceedings

[1] 1989 (3) SA 944 (D)

before him. Whilst he was called upon to hear the appellant's application at 2:30 pm, he for reasons that he has not provided in a written judgment went off and dealt with issues not properly before him and made an order on those issues to the total exclusion of the issues that he should have considered that afternoon.

21. In the written heads of argument counsel for the appellant submitted that the main issue for determination in this appeal is "whether the learned judge in the court a quo erred or misdirected himself in failing to entertain appellant's application in terms of Rule 52 of the High Court Rules and granting an order for reinstatement of appeal in favour of 1st respondent instead."

Disposition

22. There can be no doubt at all that the grievances of the appellant are against the conduct of the judge and the irregularities apparent from the papers. Both applications by the the parties to this appeal- the appellant's application for a declaration that the 1st respondent's appeal has lapsed and the 1st respondent's application for a reinstatement of the lapsed appeal have not been considered by the court a quo. Those applications must be finalised in the shortest possible time ideally after consolidating them. They are concerned with the same issue, being whether the 1st respondent's admittedly lapsed appeal should or should not be declared to have so

lapsed or should or should not be reinstated. I am not oblivious to the fact that the 1st respondent did not defend this appeal. She merely neglected to respond to it and neither filed any opposition nor appeared at the hearing.

23. In light of the appellant's concession that the so-called grounds of appeal are in substance grounds upon which the judge's decision is reviewable, we asked counsel what order should this Court make. She submitted that the proper order in the circumstances is to direct that the parties should ensure that the two matters pending in the High court should be finalised as soon as possible. She also submitted that in the circumstances the court should not make any order regarding costs. We sympathise with the appellant who has had to wait now for ten years to have the dispute between him and the respondent resolved. This court has inherent power to control its processes and to supervise inferior courts in this country. In exercise of that power I hold that this court is fully entitled to exercise that supervisory function by setting aside the judge's order of of 12 December 2016 as irregular. He has not prepared a judgment to enlighten this Court on the unusual procedures he adopted in dealing with the appellant's application. He for no apparent reason neglected to deal with the appellant's application on the set down date. He invited the 1st respondent and her counsel to lodge applications, the one for counsel to assume agency which is completely

unnecessary and the other for the 1st respondent to lodge a formal application which she should have done on her own without any prompting from the judge. The criticism of the judge may appear too strong but that is explainable on the absence of any reasons by him why he conducted the proceedings in the manner he did. In *Capricons (supra),* Cleaver AJA whilst agreeing with the result that the appeal be dismissed, stated the position more clearly as follows-

> "The judgment entered against the appellants may more accurately be described as an order. It was not based on evidence, whether verbal or by affidavit but was by consent of the parties who were represented by counsel at the hearing. Consequently there are no reasons for the judgment, which can be challenged on appeal and an appeal is therefor not a competent procedure. In Rule 45 of the High Court rules provision is made for rescission of a judgment erroneously granted but the appellants chose not to follow that route.

24. I am constrained to say again that this Court strongly deprecates persistent failure by judges to give written reasons for their decisions, in this case reasons for the decision of 12 December 2016. As it has been said many times before, a judge is in dereliction of duty if he does not give reasons for his decision, in particular where a party

requests for those reasons. See similar strong disapproval in ….

25. Accordingly –

1. The appeal is dismissed and the Order of the High Court handed down on 12 December 2016 is set aside.

2. The applications by the appellant and the 1st respondent pending in the High Court under Case No CIV/APN/262/16 shall be heard and determined in the shortest possible time and as a matter of priority.

3. There is no order as to costs.

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CHINHENGO AJA
ACTING JUSTICE OF APPEAL

I agree:

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MTSHIYA AJA
ACTING JUSTICE OF APPEAL

I agree:

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MOKHESI AJA
ACTING JUSTICE OF APPEAL

For Appellant **:** Adv Maseko

For Respondents **:** No Appearance