

**IN THE COURT OF APPEAL OF LESOTHO**

**C OF A (CIV) 40/2018**

**HELD AT MASERU**

**In the matter between:**

**REENTSENG MAHANETSA** **1<sup>st</sup> APPELLANT**

**TŠOANELO KHOBOTLO** **2<sup>nd</sup> APPELLANT**

**YANG TING** **3<sup>rd</sup> APPELLANT**

**AND**

**BUSSTOP HOLDINGS**

**RESPONDENT**

**CORAM**

DR. K. E. MOSITO, P  
DR. P. MUSONDA, AJA  
N. T. MTSHIYA, AJA

**HEARD:**

**21<sup>st</sup> JANUARY 2019**

**DELIVERED:**

**01<sup>st</sup> FEBRUARY 2019**

**SUMMARY**

*Appeal – against an interim order – need for leave of the Court of Appeal – Section 16(1)(b) of the Court of Appeal No. 10 of 1978 – Application to comply with Rule 3 of the Court of Appeal Rules, 2006.*

## JUDGMENT

**DR. MUSONDA AJA**

### **BACKGROUND**

- [1] This is an appeal against the order of the High Court Commercial Division (by Justice Chaka-Makhooane J) on 31<sup>st</sup> July 2018.
- [2] The Respondent was applicant in the court **a quo** and the current appellants were the second, third and fourth respondents in the court **a quo**.
- [3] The respondent approached the court **a quo** for an order in the following terms:
1. Dispensing with rules and forms of service of this Honourable Court on account of the urgency of the matter.
  2. That a rule **nisi** be issued returnable on the date to be determined by this Honourable Court to calling upon the Respondents show cause (if any) why the following prayers shall not be made final?
    - (a) *The 1<sup>st</sup> Respondent shall not be restrained and interdicted from unlawfully terminating the sub-lease agreement between it and applicant without following due process of law and pending finalisation of **CCT/0096/2018, CIV/T/MSU/0128/2018 and CIV/T/MSU/0155/2018.***
    - (b) *The 1<sup>st</sup> Respondent shall not be restrained and interdicted from collecting rentals at BCP Mini Market from 2<sup>nd</sup> – 36<sup>th</sup> Respondents pending finalisation hereof.*

- (c) *The 1<sup>st</sup> respondent shall not be interdicted and restrained from interfering with appellant's enjoyment and exercise of its rights under sub-lease agreement pending the term of the agreement.*
- (d) *The 2<sup>nd</sup> – 36<sup>th</sup> Respondents shall not be ordered to pay rentals to the applicant in terms of the sub-lease agreements with the applicant or pending finalisation hereof.*

3. That prayer 1 operates as an absolute, while prayers 2a, b, c and d operate as interim order with immediate effect.
4. The 1<sup>st</sup> Respondent's decision to terminate the sub-lease agreement entered into between applicant and itself shall not be declared null and void *ab initio*.
5. Costs of suit.
6. Further and/or alternative relief that the court deems fit.

[4] The application was opposed in its entirety by the 2<sup>nd</sup> to the 36<sup>th</sup> respondents in the court ***a quo***. The respondents however raised two points ***in limine***, namely: that deponent to the founding affidavit was not duly authorised to launch and application and that the application was defective on account on non-joinder of a company known as Goodie Property Management and Consultation (Pty) Ltd.

[5] The learned Judge intimated in her ***ex tempore*** judgment, that her decision was going to be based on the merits and not on points ***in limine***.

[6] In her view the applicant had made out a case for an order of interdict as interim relief and she made the following order:

- (1) She granted prayer 1 and 2(a), (b), (c) and (d) as interim relief in the Notice of Motion.

Full reasons for her judgment were to follow. Those reasons have not been made available since 31<sup>st</sup> July 2018.

- [7] Meanwhile from this same **ex tempore** judgment, emanated two appeals to this court. The first Respondent in the Court **a quo** noted an appeal under **C OF A (CIV) 37/2018** which was heard by a bench constituted by **(Mahase ACJ, Musonda and Chinhengo AJJA)**. The appeal was in conflict with **Section 16(1)(b) of the Court of Appeal Act**<sup>1</sup> which is couched in these terms:

16 (1) An appeal shall lie to the Court –

(a) *from all final judgments of the High Court.*

(b) *by leave of the court from an interlocutory order, an order made **ex parte** or an order as to the costs only.*

(2) *The rights of appeal given by Subsection (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court.*

- [8] The appeal was struck off the roll by this court on 14<sup>th</sup> January 2019 for non-compliance with the above section.

[9] **ISSUES**

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<sup>1</sup>Act No 10 of 1978

Whether the application complies with the requirements of the section read with Rules of the Court of Appeal 2006.

[10] **EVALUATION OF THE APPEAL**

The appellants belatedly filed a notice of motion in terms of Section 16, of the Court of Appeal for leave to appeal against interlocutory relief in order for this court to consider the main appeal. The affidavit deposed to by one Reentseng Mahanetsa, was not commissioned.

[11] When the matter proceeded before us, it was argued by the respondents that the application for leave was defective as it did not comply with section 16(1), of the Court of Appeal Act and therefore it should be struck off the roll with costs.

[12] In **Mphalane and Another v Phori** this court **Ramodibedi JA** as he then was said:

- (i) *the order made by the trial court was interlocutory because it did not have the effect of disposing of the substantive issue before the court, namely, the issue whether summary judgment should or should not be granted;*
- (ii) *further, that in terms of **Section 16 of Act 10 of 1978** leave of the Court of Appeal against interlocutory orders was required but had not been sought; and*
- (iii) *therefore, that the proceedings had not been properly instituted and they must be struck off the roll.*

The tenor of **Section 16**, is that there should be no impermissible intrusion by the Court of Appeal on matters

that have not been finalised in lower courts, unless the circumstances warrants such intrusion.

[13] The advocates for the appellant endeavoured to perfect the imperfection in the appeal before **(Mosito P, Musonda and Mtshiya AJJA)** as both appeals were against the same order.

[14] We acidly noted that, the application for leave lacked anchorage of Rule 3<sup>2</sup> of the Court of Appeal Rules, 2006, which is couched in these terms:

- (1) Where an application for leave to appeal to the court, is necessary in a criminal matter in terms of the Act, the application shall be made by way of notice of motion supported by affidavits
- (2) The notice of motion together with affidavits and relevant documents including the judgment of the High Court shall be delivered within twenty-one days of the date of the delivery of judgment or order of the High Court, and a copy of such notice shall be served upon the respondent.
- (3) Four copies of the notice of motion all documents together with the original shall be filed with the Registrar of the High Court.
- (4) The respondent shall, within fourteen days of the service of motion, deliver answering affidavits.
- (5) The applicant shall file replying affidavits within seven days of service upon him or on his attorney of the answering affidavits.
- (6) The times fixed within these Rule may be extended on good cause shown by a Judge in chambers or by the court.

[15] In the application for leave there was no affidavit as the affidavit was not commissioned, nor were other aspects of Rule 3, complied with. The appellants were seeking

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<sup>2</sup> Court of Appeal of Rules, 2006 Legal Notice No 182 of 2006

condonation of the late filing of the application pursuant to **Section 16(1) (b)**, of the Court of Appeal Act. There was therefore to be mitigation of the following:

- (i) *the degree of lateness;*
- (ii) *the reason for lateness;*
- (iii) *lack of prejudice to the other party; and*
- (iv) *crucially the prospects of success of the appeal*

The principles were laid down in **Melane v Santam**.<sup>3</sup>

[16] We recently said in this court in the case **Lebohang Setsomi and 22 others and Lesotho Police Staff Association and 2 others** that:

*[50] “The appellants had notice of withdrawal of the opposition. They never filed opposing papers pursuant to Rule 8 sub-rule 10. While we acknowledge that law is not a subject of mathematical precision, but surely where the Rules of procedure are contained in a primary instrument as in this case, the High Court Rules 1980, they can only be ignored by a litigant at his/her own peril. It is tremendously beneficial to abide by Court Rules, as they are there for orderly administration of Justice.”*<sup>4</sup>

[17] We cannot exercise our discretion to condone the breach in terms of Rule 15 (2), (3), (4) and (5), when the condonation application itself is defective.

[18] Later advocate Moepe conceded that the appeal should be struck off the roll for non-compliance with the rules. This was the only pragmatic step to take in the circumstances.

[18] **COSTS**

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<sup>3</sup> (1963) (4) SA 531

<sup>4</sup> C of A (CIV) No 55/2017

Mr. Rasekoai on costs, canvassed that the appellants be condemned in costs at a higher client i.e. attorney and client scale as the litigant committed the same omission before the other panel, which struck the matter off the roll. They knew the matter was ill-fated. He deprecated his colleagues' professional ineptitude, but he shied away from asking for costs ***de bonis propriis***. However the view that we take is that, in this matter the appellant had filed an application for leave to appeal trying to perfect the imperfection in the earlier appeal, but still fell short of adherence to the ***Section 16(1)(b) and Rule 3***. In any event in the written submission, what was asked for by the respondents, is the costs on attorney client scale. It was only during the oral hearing when costs on the upper attorney scale were asked for. We are also mindful that Adv. Maope did not argue the case before the other panel and she did concede that the appeal be struck off. We cannot characterise her conduct as in flagrant violation of the Rules.

[19] **DISPOSITION**

We make the following orders:

- (i) *The application for leave is dismissed.*
- (ii) *The appeal is struck off the roll with costs on attorney client scale.*



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**DR. P. MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree

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**DR. K. E. MOSITO  
PRESIDENT OF COURT OF APPEAL**

I agree

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**N. T. MTSHIYA  
ACTING JUSTICE OF APPEAL**

**FOR APPELLANTS:            ADV. T. MAHLAKENG**

**FOR RESPONDENTS:        ADV. M. RASEKOAI**