

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 28/19**

**CIV/APN/131/2019**

In the matter between:

**YU QUANG**

**APPELLANT**

And

**HATA BUTLE (PTY) LTD**

**1<sup>ST</sup>RESPONDENT**

**COMMISIONER OF POLICE**

**2<sup>ND</sup>RESPONDENT**

**OFFICER COMMANDING ROMA POLICE**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**CORAM:** DR P. MUSONDA, AJA

M .H CHINHENGO, AJA

N .T MTSHIYA, AJA

**HEARD:** 19 OCTOBER 2020

**DELIVERED:** 30 OCTOBER 2020

## **SUMMARY**

*Appeal against rejection of spoliation order- appeal lapsed- no proper application for condonation and reinstatement of appeal- application for reinstatement of lapsed appeal-dismissed.*

## **JUDGMENT**

### **MTSHIYA, AJA**

#### **Introduction**

1. This matter was enrolled as an appeal.

At the commencement of the appeal hearing, Counsel for the appellant, Advocate K.D. Mabulu, informed the court that the appeal had lapsed. He then conceded that in view of the lapsed appeal, there was therefore no appeal pending before the court. He said he had a few hours before the hearing, filed a notice of motion seeking condonation.

The relief sought being:

- “1. Condonation of the late filing of this application and dispensation of the normal rules and forms thereof.
2. Granting appellant leave to amend notice of motion in the application for condonation of the late filing of the record to include the prayer for reinstatement of appeal.
3. Granting postponement of the matter to the end of session in the event respondent opposing this application, to allow filing of papers.

2. Advocate Mpaka, for the respondents agreed that there was no appeal before the court. He said what was before the court was the application for condonation and reinstatement of the appeal. He submitted that the application was not filed in terms of the rules and should therefore be abandoned.
3. The court agreed with the parties that what was before it was the application for condonation and reinstatement of the appeal. Accordingly, before dealing with the application, I think it is only proper to give a brief narration on how the appeal came about before it lapsed. In view of the agreement on what is before the court I shall henceforth refer to the appellant as appellant.

### **Background**

4. The appeal is against a judgement of the High Court delivered on 5 August 2019. The said judgement, wherein a rule which was discharged related to an application for spoliation by the appellant.
5. In the spoliation application, the appellant had sought the following relief:
  1. “Dispensing with the normal modes periods and forms due to the urgency of this application thereof.
  2. Rule Nisi be issued calling upon the 1<sup>st</sup> respondent to show cause if any why the following orders should not be made final and absolute on the date and time to be fixed by this Honourable court.

- a) Granting appellant an order for restoration of the status anti quo by restoring his occupation of the filling station situated at Roma opposite National University Of Lesotho, with the assistance of the appellant or her agents, failing which the deputy sheriff be authorised to break the locks and open the doors in order to restore possession to the appellant.
  - b) Directing the Commissioner of Police through the office commanding of Roma Police to assist the Deputy Sherriff in implementing prayer 2 (a) and (b) above.
  - c) Cost of suit in the event of opposition hereof
  - d) Such further and/or alternative relief.
3. That prayer 1 and 2 (a) and (b) to operate with immediate effect as an interim order pending the final outcome hereof.”

### **Facts**

6. The appellant alleges that he has been on peaceful and undisturbed possession of the filling station situated at Roma Mafikeng opposite the National University of Lesotho, at all material times until 18th April 2019 when he was despoiled of possession of the filling station “when respondent unlawfully using force broke into the place armed with guns to illicitly take occupation of the place without due process of law.”
7. The appellant alleges that he was in occupation of the said filling station on the strength of a sub-lease agreement with

an entity known as Lesotho Observatory Foundation (LOF) which was concluded on the 10th April 2019.

8. The 1st respondent opposed the application for spoliation arguing that since it was a commercial dispute it ought to be decided in the commercial division of the High Court. It also denied that the appellant was in occupation of the premises in question.
9. In dismissing the application the court reasoned that the appellant had failed to prove occupation of the filling station and therefore the relief of spoliation was not available to him. On 6 May 2019, the court therefore made the following ruling:

“The rule is discharged and the application is dismissed with costs”
10. On 7 May 2019 the appellant filed a notice of appeal wherein there was only one ground of appeal couched in the following terms:

“The learned Judge erred and misdirected himself in law by upholding that the procedure is not suited for commercial transactions (for spoliation proceedings). Appellant reserves his rights to file additional grounds when upon the issue of the reasons of judgement.”
11. It is the above appeal that has lapsed. On the basis of these facts it means the said appeal lapsed around the second week of August 2019. The application for its reinstatement was filed on 19 October 2019.

**Application for Condonation of lapsed Appeal.**

12. I have at page 2 of this judgment reproduced in his application for the reinstatement of the lapsed appeal. Under that relief the appellant makes reference to a previous notice of motion which is not before the court. That being the case I take it that the application before the court was filed on 19 October 2020.
13. Given the circumstances of this application and in order to be fair to the appellant, I find myself being compelled to reproduce the averments of his Counsel in full. The said averments are found in his Counsel's founding affidavit filed on 19 October 2020. Counsel avers:
- 2) "Appellant herein noted appeal against the order of the High Court sometime in May, 2019, 06.
  - 3.1) For the purpose of brevity, I beg leave of court to refer to paragraphs 2,3 and 4 of the founding affidavit which is attached to the application for leave for condonation of the late filing of the record, in an endeavour to describe the parties herein.
  - 3.2) It is prudent to show that the rest of the paragraphs of the founding affidavit as they stand form the basis of this application and it needs not be repeated except to include the prayer for condonation of the late filing of this application and leave to include prayer for reinstatement of appeal.
  - 4) It is apposite to mention that the late filing of the record automatically caused the appeal to lapse and the application for condonation of the late filing of the record

was intended to revive the appeal, though my mistake the prayer to reinstate the appeal was omitted.

5) It is further submitted that respondents will not suffer any prejudice if the prayer for leave to reinstate appeal and leave for condonation late filing are sought, which are canvassed in the affidavit filed to the notice of motion for condonation of the late filing of the record more so when this affidavit does not introduce any new facts.

It is prudent to show that a dummy file had to be opened by respondent's counsel for the purpose of taxing the costs at the lower court as the file was not found.

6) It is submitted that it is the discretion to condone the rules and grant condonation; leave for amendment of application which discretion should apply judicially, making consideration of all facts circumventing the matter in totality.

7) In the event of this court finding it not prudent to deal with this application, it has a discretion to grant postponement of the appeal to the end of the roll to give the respondent opportunity to respond to the application if need be and to enable the filing of papers in the event of opposition, making consideration of the fact the judgement was only ready just a preceding the last day before the expiration of the period for filing of the record, and given the fact that it was only availed to appellant in September 2019 way out of time for filing the record, exacerbated by the pandemic disease of covid 19 which

thereafter stunt the operations, justifies the allowing of filling in the event of opposition of the application for amendment.”

14. The above averments make reference to an application which is not before this court and there is total silence with respect to prospects of success. I suppose that is justifiably so because there is no agreed record of appeal before the court. However, notwithstanding the inadequacy of the information before the court, the appellant still believes that his application should be entertained and determined on the basis of his Counsel’s averments quoted in full above. That, in my view, is an impossible task.
15. The parties agree that there was never any agreement on the record to be used for the lapsed appeal.

### **The Law**

16. The lapsed notice of appeal was filed on 7 May 2019 and according to Advocate Mpaka for the respondents it was opposed.
17. In terms of rule 5 (1) an appeal record should be lodged by the appellant within three months of the delivery of the judgement being appealed against. This appeal was based on the judgement delivered on 6 May 2019. The record prepared by the appellant should have been lodged around the second week



of August 2019. There was no record lodged and up to this day the parties have not yet agreed on the record to be filed. The rules say if no record is filed within 3 months after delivery of judgment the appeal lapses.

18. The relevant provisions of rule 5 of the Court of Appeal Rules, 2006 (the “Rules”) state:

5 (1) “The appellant shall, in every appeal, not later than three months after notice of appeal has been filed or the certificate of the Judge of the High Court has been filed, lodge with the Registrar seven copies of the record of the proceedings of the High Court and serve a copy of such record on each respondent:

Provided that by consent of all parties portions of the record which will not affect the result of the appeal may be omitted. The Court may, However, order that the full record shall be available:

Provided further that if the same attorney represents more than one respondent, it shall suffice for one copy of the record to be served on such attorney.

5(2) The time limit for lodging of the record may be extended by written agreement of all the parties to the appeal.

5 (3) If the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse.”

19. Clearly in terms of rule 5 (3) there is no appeal before this court. Rule 5 (1) was breached and there is no indication of any attempt having been made by appellant to approach the

respondent in terms of rule 5 (2). The appellant agrees that there is no appeal before this court and hence the hurriedly prepared application for condonation and reinstatement of the lapsed appeal.

20. Rule 15 of the Rules allows for the application that is before the court. The rule provides, in part, as follows:

“15 (1) If an appellant breaches provisions of these rules, his appeal may be struck off the roll.

15 (2) The Court shall have a discretion to condone any breach on the application of the appellant.

15 (3) Such application shall be by notice of motion delivered to the respondent and to the Registrar not less than seven days before the date of hearing.”(my own underlining)

21. It should be noted that the application now before the court ought to have been filed in terms of rule 15(3) above. That is not what happened in casu. This application was filed less than two hours before the hearing of the matter on 19 October 2020. Furthermore the application was combined with an application for condonation of the late filing of the record, which record, in the circumstances, only becomes relevant when there is an appeal pending before this court. There is none.

22. The rules, in my opinion, envisage that when the appeal has lapsed, as in casu, the first thing to do on the part of the appellant is to “file an application through a notice of motion

and have same delivered to the respondent and to the Registrar not less than seven days before the date of the hearing.” That procedure enables the other party to respond before the hearing date. Such an application should strictly be directed to the relief sought, in this case the reinstatement of the lapsed appeal. The application should be accompanied by well stated reasons for the lapse and should also in the main state whether or not there are any prospects of success in the appeal if the application is granted.

23. It is difficult to understand why the appellant “allowed” the appeal to lapse when he could have applied for the extension in terms of the rules. He was always aware of the problems around the record to the extent that, as he claimed in submissions, he had taken it upon himself to prepare a dummy record from his own papers. Corrective action should have been taken as far back as the beginning of August 2019. The fact that the full judgment became available to the parties, assuming that is correct, in September 2019, does not explain why rules were not used to protect the appeal from lapsing.

24. Furthermore I am unable to understand why the appellant had to wait until the hearing date. It was not denied that on 28 February 2020, the respondents raised the issue with the appellant’s Counsel. The respondent submitted that no response was forthcoming from the appellant.

### **Analysis**

25. In applications of this nature the court will normally look at ‘the degree of none compliance, the explanation therefor, the prospects of success, the importance of the case, the

respondents interests in the finality of the judgement of the lower court, the convenience of the appeal court and indeed the avoidance of unnecessary delay of the administration of justice. It cannot be denied that there has been a long delay in the administration of justice'. These guiding principles cannot be ignored when dealing with applications of this nature. In casu the court immediately finds itself facing a false appeal and its mission to make sure that justice is achieved timeously is interfered with simply due to failure of the appellant to follow rules.

26. An application of the principles referred to on paragraph 25 above persuades me to agree with Advocate Mpaka that this is an application that ought to be dismissed. One just has to look at the unexplained failure over a long period, stretching from 7 May 2019 to 19 October 2020 to ensure that the appeal did not lapse. It does not make legal sense to then place an application for condonation, against the rules, on the morning the appeal is supposed to be heard.
27. In addressing the issue of none compliance with court rules, in **National University of Lesotho and Another V. Thabane (LAC 2007-2008)**, the court with reference to the rules said, in part,

“....They are primarily designed to regulate proceedings in this court and to ensure as far as possible the orderly, inexpensive and expeditious disposals of appeals. Consequently the rules must be interpreted and applied in a spirit which will facilitate the work of this court. It is incumbent upon practitioners to know, understand and

follow the rules, most if not all of which are cast in mandatory terms.

A failure to abide by the Rules could have serious consequences for parties and practitioners alike, and practitioners ignore them at their own peril. At the same time formalism in the application of the rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart opponent's legitimate rights. Thus what amount to purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of an appeal on the merits. The rules are not cast in stone. This court retains a discretion to condone a breach of its Rules (see rule 15) in order to achieve a just result. The attainment of justice is this court's ultimate aim. Thus it has been said that rules exist for the court, not the court for rules. The discretionary power of this court must, however, not be seen as an encouragement to laxity in the observance of the rules in the hope that the court will ultimately be sympathetic. There is a limit to this courts tolerance"

In the same judgement the court went on to say:

"...It is Incumbent upon the appellants to show sufficient cause for the granting of their application. In the matter of *Mosaase v R LAC (2005-2006) 206* this court quoted with apparent approval the general principles applicable when considering an application for condonation as enunciated in

Melane v Santam Insurance Co.Ltd 1962 (4) SA 531 (A) at 532c-F

In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are compatible with a true discretion, save of course that if there are no prospects of success, there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.

These principles have been consistently followed over the years in South Africa and may be taken also to apply to Lesotho.”

In saying there are no good reasons that have been given for the reinstatement of the lapsed appeal, I am, in arriving at that decision guided by the principles enunciated in the passages quoted above. Having said there are no convincing reasons as to

why condonation should be granted, I have come to the conclusion that this application should be dismissed with costs.

28. I therefore order as follows:

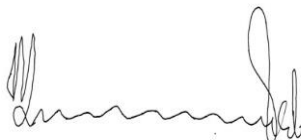
The application for condonation for the reinstatement of the lapsed appeal is dismissed with costs.



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

I agree



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

I agree



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**M.H CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:** MR K D MABULU

**FOR RESPONDENTS:** ADV T MPAKA