IN THE HIGH COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 31/2017**

CIV/APN/ 435/14

In the matter between:

EMMANUEL ONYELEKERE **APPELLANT**

AND

MOKULA **RESPONDENT**

CORAM: DR. K E MOSITO P

DR. P MUSONDA AJA

M H CHINHENGO AJA

HEARD: 14TH OCTOBER 2020

DELIVERED: 30TH OCTOBER 2020

Summary

Civil procedure- Appellant noting an appeal without grounds- Appellant appealing against award of costs without leave- Section 16 of the Court of Appeal Act 1979, require Leave to appeal against an interlocutory and costs Order- Appeal struck off- whether notice of intention to oppose amounts to opposition- when no answering affidavit has been filed.

JUDGMENT

DR. P. MUSONDA AJA

Introduction

[1] This is an appeal against the High Court judgement (Peete J) rejecting rescission judgement with costs. The Appellant contends the cost order was inappropriate as the respondent in prayer 6 in the notice of motion stated that the respondents pay costs hereof in the event of opposition. Appellant having filed a mere notice of intention to oppose does not amount to opposition as no further papers were filed.

Background

[2] The respondent was engaged to build a structure for the Appellant. There was a dispute as to the quality and extent of the works. The appellant sued the respondent in the Magistrates Court. The Learned Magistrate inspected the structure, asked the parties to appear before him for setting the matter for trial the following day the respondent avers that he informed the Court that the following day was not suitable as he had a prior commitment.

[3] However, on 28th April 2014 proceedings were held in the absence of the respondent. The record of proceedings in the Magistrate's Court MH3, there appears to be no sworn testimony. The then Plaintiff, who is appellant in this appeal made a statement that he wanted the respondent the defendant, to finish the project or in the alternative pay damages in breach of contract.

He further informed the Court he had negotiated with another Contractor who charged him M 13,500 = 00 which should be split between the respondent (defendant) M7,500=00 and the appellant (plaintiff) M6,000=00.

[4] On that basis judgement was entered as claimed in the Summons plus costs of the suit. The judgement was to be executed within thirty (30) days from the date of the order.

[5] There was a warrant of arrest. The respondent's Attorney applied to have the judgement and consequential orders set aside on the 16th October 2014 and there was an intention to oppose filed the same day. However the interim Order was granted on 10th February 2015 with costs. A writ of execution was issued for the sale of movables against the appellant to defray the taxed costs.

[6] The appellant applied for the motion to set aside the order of execution, to condone the late filing of the rescission application, costs of the suit, which was opposed.

[7] On 29th October 2015, Peete J. granted the appellant an interim order to stay the Order of execution. On 15th December 2015 the rescission application was dismissed with costs albeit the judgement delivered on 25th November 2015 is not part of the appeal record and none of the parties seem to have it.

[8] Curiously in this matter the respondent averred that the Learned Magistrate entered judgement without giving him an opportunity to be heard and applied for review by the High Court. The respondent makes the same allegation that he was not heard when costs were ordered against him during review proceedings in the High Court. It has been impossible to access the judgement, despite the appellant having approached the Judges Clerk, secretary and the respondent who at one time had the judgement.

[9] Dissatisfied with the Order as the Appellant did not access the judgement, the Appellant filed essentially one ground of appeal. The Learned Judge erred and or misdirected himself and made a serious mistake as to the interpretation of the law as is enshrined in the statute in coming to his final conclusion against the appellant, which wrong has led to a substantial miscarriage of justice needing the correction of the Appellate Court. The second ground, though styled as a ground is not one at all, it is a lamentation of the absence of the judgement in couched in these terms:

> *"The appellant reserves the right to file further and better grounds of appeal as and when same may arise especially upon receipt of a written judgement which to date is still wanting for reasons unconvincing as advanced"*

Appellant's case

[10] The Appellant applied for condonation of the appeal. He avers that his earlier advocate Ramakhula filed an intention to oppose

the respondent's Review Application. Advocate Ramakhula kept on telling him that things were taken care of. He was later personally served with the writ of execution by the Sheriff. When he approached Advocate Ramakhula, he served him with the Notice of Withdrawal as his Counsel which shocked him. Because of his financial strain he approached Legal Aid who served the current Attorney of record from the Firm by the name and style of Messrs T.M. Maleane & Co.

[11] Counsel instituted review application against the said judgement specifically on the issue of costs made against him and putting a stop to the execution. The application was heard and judgement delivered on the 25th November 2016, ordering costs against him. Counsel sought a copy of the said judgement, but was told there were insufficient copies and was asked to go to court the following Monday. Counsel has checked with the Judge's Clerk and Secretary since then, but to no avail.

[12] What remains odd is that the Court itself does not have a copy of the judgement. Efforts to get a copy from the respondent's Counsel have been unsuccessful

[14] Advocate Mokobori's supporting affidavit reiterated the appellant's founding affidavit and further averred that it was impossible for him to issuably advise his client and take any step further accordingly

This Court said per Ramodibedi P. in ***Motake v Moqhoai***[1]

> *"The principles applicable in an application for condonation of late filing of an appeal are now well established in this jurisdiction. In essence, appellant must satisfy two requirements, namely;*

[1] CIV/APN/208/2008

1) *That there is sufficient explanation for the delay in question, sometimes expressed as 'sufficient cause' and;*
2) *That there are prospects of success on appeal"*

The Learned President went on that:

> *"It must be borne in mind that as application for condonation is a matter which lies pre-eminently within the discretion of the Court"*

[15] The law on condonation is well settled in this jurisdiction that it needs no further interrogation.

[16] The gravamen of the appellant's case albeit in absence of a written judgement is that having not opposed the Review Application with the context of Rule (10) (a) of the High Court Rules No. 9 of 1980, which is cast in mandatory terms, he should not have been mulcted with costs. He or she who intends to oppose must not only file notice to oppose, but deliver his answering affidavit (if any), together with any other documents he wishes to include.

[17] The argument by the appellant is that a mere notice of the intention to oppose unaccompanied by the answering affidavit does not amount to opposition in terms of Rule 8 (10) (a) and (b). Had the Learned Judge literally interpreted the rule, he would have so found and would have not mulcted the appellant with costs.

[18] A plethora of authorities on literal interpretation among them, ***Venter v. R***. In which case Innes CJ said:

> *"in construing the statute the object is of course to ascertain the intention of the Legislature meant to express from the language which it employed. By far the most important rule to guide the Courts in arriving at that intention is to take the language of the instrument as a whole, and, when the words are clear and*

unambiguous to place upon then their grammatical constitution and to give them their ordinary effect."[2]

The following decisions cited in support restate the same position ***Volshenk v Volshenk***[3]***, Minister of Interior v Machadodorp Investments***[4]***, Slabbet v Minister Van Lande***[5]

Respondent's case

[19] It was argued for the Respondent that once a person files a notice of intention, you cannot take away the action without informing the other party Rule 8 (10) say:

> A person who opposes the granting of an order shall:
>
> (a) Within the time stated in the notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept service of all documents;
> (b) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and
> (c) If he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.

[20] Within seven days of service upon him of the answering affidavit aforesaid the applicant may deliver a replying affidavit.

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[2] 1907 TS 9
[3] 1946 TPD 486 at 487.
[4] 1957 (2) SA 395 (A)
[5] 1963 (3) SA 620 (T)

[21] Where no answering affidavit nor any notice referred to in sub-rule 10 (c) has been delivered within the period referred to in sub-rule 10 (b) the applicant may within four days of the expiry of such period apply to the Registrar to allocate a date for the hearing of the application. Where an answering affidavit or notice is delivered the applicant may apply for such allocation within four days of the delivery of his replying affidavit or if no replying affidavit has been delivered within four days of the expiry of the period referred to in sub-rule 11. If the applicant fails to apply for such allocation within the appropriate period as stated aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the Registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party

[22] It was Adv Fiee's contention that the interpretation proffered by appellant's Counsel is flawed. A notice of intention to oppose is an opposition. The matter was opposed and the respondent could not obtain judgement *ex parte.* The effect of the notice is that you cannot proceed on your own. Counsel for the Appellant's instructions were to oppose the matter .Even if a party does not pray for costs, the Court has direction to order costs

[23] **Issues:**

(i) Is this a proper case for me to exercise discretion and condone the late filing of the appeal;
(ii) In absence of the judgement can the Appellant prosecute the appeal,
(iii) In absence of grounds of appeal is there an appeal before us;
(iv) In absence of the judgement of the lower Court, can this Court affirm or fault the Court a quo; and
(v) Failure to obtain leave of appeal against a costs Order, what are the consequences

Considerations of Appeal

[24] The delay in the filing the appeal was occasioned by the non- availability of the judgement from which grounds of appeal and heads of arguments could be distilled. The blame lies squarely on the Judiciary. The longer we allow lower Courts to do wrong things the more right they become. Such conduct is tethering on the brink of disorderly. The performance of any has two dimensions viz –

(i) Efficiency- doing things right, and;
(ii) Effectiveness- doing the right things.

The exercising of discretion in the circumstances in favour of condoning the late filing of the appeal is inescapable. The parties are not opposing each other's condonation application.

[25] The record must be adequate for proper consideration of the appeal. In this appeal Advocate Maieane has complained that it is impossible for him to proficiently prosecute this appeal. This is demonstrated as to how the grounds of appeal were couched. The judgement dealt with the refusal of rescission and the Appellant and this Court are not privy to the reasons for the refusal of the rescission application.

[26] In ***Walter Billy Ndhlovu v The State***[6], though this was a criminal case, it was held that:

> *On appeal, the record of the proceedings in the trial Court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will as a rule lead to a conviction and sentence being set aside. Depending on what the appeal Court decides, it can set aside, confirm or modify the trial Court's judgement or could even order a new trial.*

[6] (A778/2016) [2018] ZAGPPHC 883

[27] Zambian Supreme Court dismissed an appeal because the record did not contain the judgement of the High Court and Court of Appeal. In the case of ***Betrich Investments Ltd v Finance Bank Ltd (Pty)***[7]**,** Kaoma JS said:

> *I have considered the application made by Counsel on behalf of the applicant for leave to appeal to the Supreme Court against the judgement of the Court of Appeal Counsel for the applicant concedes that the application is incompetent because both the judgement of the Court of Appeal against which the applicant deserves to appeal and the High Court judgement are not annexed to the affidavit in support of the summons for leave to appeal. Counsel also concedes that this is a fatal omission on the part of the applicant and that the only consequence is that the application should be dismissed. Accordingly costs follow the event to be taxed in default of agreement.*

[28] I conclude it is extremely difficult to hear an appeal with incomplete grounds of appeal and heads of arguments and a judgement, which is the heart of the record.

[29] However reading the grounds of appeal so-called against the backdrop of the initial order of the costs order. The argument as to whether, filing the Notice to oppose unaccompanied by the answering affidavit is not opposition to an application. This Court is of the opposite view.

[30] Briefly when a notice top oppose is filed it has set in motion the deployment of material resources both financial and human to vigorously defend the action. When the respondent received the notice, they put on notice of opposition. In action proceedings where a letter of demand is sent and no payment is received until when summons had been issued, costs are incurred, as the proceedings are set in motion. If there is no answering affidavit after notice, there will be a hearing. A notice of intention is a notice to fight. The tenor of Rule 8 (13), by using the words, 'where an answering

[7] SCZ 8/09/2020 25th August 2020

affidavit or notice', which words by the insertion of 'or' are disjunctive meaning creating two situations.

[31] The Rules of the High Court 8 (10) (a) and 13 says any person to oppose must give notice. The Applicant may within 4 days apply to the Registrar to set the matter for hearing. This provides hearing in the absence of the affidavit.

[32] This Appeal is centred on costs, the argument whether there was opposition is merely ancillary or justification for appealing against the costs Order. The question is an appeal against a Court order competent. We said recently in this Court in ***Lesotho Millenium Development Agency v Pressed in Time (Pty) (Ltd)***[8]**.**

If one reads the grounds of appeal appears to be against a costs order only and therefore fell foul of section 16 of the Court of Appeal Act 1979 which states:

> (1) An appeal shall lie to the Court-
>
> a. From all final judgements of the High Court
> b. By leave of the Court from any interlocutory order, an order made ex parte or an order as to costs only.

Whichever way the matter is approached, the appeal is centred on costs, although there was concession by appellant's Counsel, that in absence of grounds of appeal, there is no appeal.

Conclusion

[33] The appeal is struck off the Roll in terms of Rule 15 (1) of the Court of Appeal Rules 2006.

Costs:

[8] (C of A (CIV) 73/18) [2019] LSCA 57 (01 November 2019)

[34] Will follow the event.

DR. P. MUSONDA

ACTING JUDGE OF APPEAL

I agree

DR. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

M. CHINHENGO

ACTING JUDGE OF APPEAL

FOR THE APPELLANT:	MR T MAIEANE
FOR THE RESPONDENT:	ADV FIEE