

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 77/2018**

In the matter between:

**MAHOLA MATLOSA**

**APPELLANT**

**AND**

**KHABELE MATLOSA**

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

**COMMISSIONER OF LANDS**

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

**REGISTRAR OF DEEDS**

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

**ATTORNEY GENERAL**

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

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

**HEARD:           21 OCTOBER 2020**

**DELIVERED:     30 OCTOBER 2020**

***Summary***

*Appeal against judgment– Court a quo misplaced part of the record–  
appellant applying for condonation for failure to comply with the rules–*

*parties agreeing that in the absence of a proper record, condonation applications could not be considered- matter remitted to court for trial de novo before a different judge in order to rectify the mistrial.*

## **JUDGMENT**

### **MTSHIYA AJA**

#### **INTRODUCTION**

[1] Proceedings in this case were commenced by way of summons in the High Court by the appellant on 2 September 1994.

[2] On 6 September 2018 the High Court dismissed the appellant's claim with costs.

[3] Displeased by the court *a quo*'s order, the appellant now appeals against the court *a quo*'s judgment.

The grounds of the appeal, which was filed out of time, are listed as follows:

“1. The Learned Judge in the Court *a quo* erred/ misdirected himself by dismissing the appellant's action for cancellation of 1<sup>st</sup> respondent's lease despite there being evidence to the effect that 1<sup>st</sup> respondent had no proof as to how he obtained the said lease and also proof that the documents he had in his possession were not lawfully obtained.

2. The Learned Judge in the Court *a quo* erred/ misdirected himself by dismissing the appellant's action on considerations which were not relevant to the material facts in dispute on the basis of the fact that the appellant in the Magistrate's Court in an action for ejection against 1<sup>st</sup> respondent in 1992 had not been successful.

3. “The Learned Judge in the Court *a quo* erred/ misdirected himself by dismissing the appellant's action without properly considering who

between appellant and 1<sup>st</sup> respondent had a better title to the land in dispute before the lease was issued and only concentrated on who had a lease.

4. Appellant reserves the right to file further grounds of appeal once the written judgment has been obtained.”

## **BACKGROUND**

[4] In September 1994, following a land dispute, the appellant issued summons in the High Court for the following relief:

“1. Cancelling the lease No.12281-013 registered in the name of the defendant on the 2<sup>nd</sup> of March 1987.

2. Costs of suit, further and alternative relief.”

[5] The Appellant claimed the land in dispute belonged to him as he had been duly appointed heir to the estate of his late uncle Charles Matlosa, who died without issue during his lifetime.

[6] The Appellant alleges that the 1<sup>st</sup> respondent lodged an application for a lease in relation to the site in dispute on the 17 May 1985.

[7] The appellant further avers that he lodged an adverse claim with the Land Tribunal in terms of the Land Act of 1979 against the 1<sup>st</sup> respondent’s application. He says he did on 8 of July 1986. It appears the adverse claim was never resolved.

[8] The respondent claims that the site in dispute belonged to his father’s brother (uncle) the late Charles Letlatsa Matlosa, who died

childless and had donated the site to the 1<sup>st</sup> respondent hence his possession of the land.

### **Condonation Applications.**

[9] On 10 August 2020 the appellant filed a composite application for condonation to deal with:

- a) late filing of notice of appeal.
- b) amendments of the notice of appeal filed out of time and adding on one ground of appeal.
- c) late filing of security; and
- d) late filing of record.

The parties indicated their desire to reach common ground on the above issues. In the main, the parties were agreed that there was a mistrial in the court below.

[10] Rules 5(2) and 15(4) of the Appeal Court (the 'Rules') 2006 envisage a situation where the respondent can give consent to the application for condonation for late filing of the record of proceedings and for the breach of any other rule.

Rules 5(2) and 15(4) provide as follows:

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

“15(4) Where the respondent consents to condonation, the application may be considered by a single Judge.”

I believe the same would apply to an application for leave to appeal in terms of rule 3(9) if such application is not opposed.

I have referred to the law above mainly to indicate that applications for condonation are not for the taking. It does not follow that when parties agree on an application for condonation the court should automatically grant it. The court looks as to whether the consents so granted are proper in law. In short there must be convincing reasons for an application for condonation to be granted. As normally said applications for condonation are not for the taking.

[11] In *casu*, after considerable deliberations and following agreement between the parties on the issue of the application(s) for condonation, the court formed the view that, given the non-availability of the record and also the fact that there was a mistrial in the court below, it was in the interests of justice for the court to exercise its review powers in the matter. Furthermore, without the record the merits of the condonation applications could not be visited. The court therefore reasoned that the matter that the matter be referred to the court a quo for trial *de novo* before a different judge. That indeed is what both Counsel, namely, Mr Makhetha, attorney for the appellant and Advocate H.Nathane KC, for the respondents agreed to. The court therefore felt that given the agreement between the parties, it was proper in the interest of justice to entertain the appeal.

[12] In view of the proper agreement between the parties, it is therefore ordered as follows:

1. The order of the court a quo be and is hereby set aside.
2. The matter be and is hereby remitted to the High Court for it to be heard *de novo* before a different judge.
3. There is no order as to costs-



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


I agree



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

I agree



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

**FOR APPELLANT:** T.MAKHETHE & CO.

**FOR RESPONDENTS:** V.M.MOKALOBA & CO.