IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO 19/2021

LC/APN/15/2020

HELD AT MASERU

In matter between:

NOKO' MOTA N.O. (*Curator bonis* Estate of Rapotlaki Mota)

1ST APPELLANT

TELANG MOKHECHE N.O. (*Curator bonis* Estate of Rapotlaki Mota)

2ND APPELLANT

AND

ABDUL AZIZ NOOR MAHOMED	**1ST RESPONDENT**
ABDUL KARIM NOOR MAHOMED	**2ND RESPONDENT**
THE LAND ADMINISTRATION AUTHORITY	**3RD RESPONDENT**
THE LAND REGISTRAR	**4TH RESPONDENT**
THE MASTER OF THE HIGH COURT	**5TH RESPONDENT**
THE ATTORNEY GENERAL	**6TH RESPONDENT**
STANDARD LESOTHO BANK	**7TH RESPONDENT**

CORAM: MOSITO P

MUSONDA AJA

CHINHENGO AJA

HEARD: 18TH OCTOBER 2021

DELIVERED: 12TH NOVEMBER 2021

SUMMARY

Application for late noting of the appeal- Appellant waiting for reasons, when order of the Court is available- Appeal is against an order and not reasons- filing of appeal delayed by lack of confidence that there were prospects of success- No plausible reasons in support of condonation and no prospects of success- condonation refused.

JUDGMENT

MUSONDA AJA.

Introduction

[1] The parties shall be referred to as they were in the Court below. The applicants sued the respondents in the High Court, in relation to their interests over Plot No. 3008-164 situated at Botha Bothe. They sought the following reliefs:

a) The leave to be granted for the hearing of the matter before the Land Court instead of the District Land Court;
b) That it be declared that the estate of Rapotlaki Mota retains the lawful and all legal ownership of all rights in Plot No 30082-164, in Botha Bothe urban area;
c) That it be declared that the deed of transfer registered in favour of the 1st respondent under registration No. 2b549 on the 17th December 2001 is defective and/or unlawful and falls to be cancelled thereof;
d) The Deed of hypothecation registered in favour of Standard Lesotho Bank (the 7th respondent) over Plot No. 3000821-641 on

the 4th May 2007 is defective, unlawful and falls to be cancelled thereof;

e) Pursuant to the granting of both prayers (a) and (b), the 1st and 2nd and/or 7th respondents be ordered and directed to surrender the original lease Plot No. 300082-164 and the original deed of transfer and deed of hypothecation registered in favour of the 1st respondent to the 3rd (land administration Authority) and/or 4th respondent (Land Register) for cancellation.

f) That the 3rd and 4th respondents (Land Administration Authority) cause for the cancellation of the deed of hypothecation and deed of transfer with respect to Plot No. 300082-164;

g) That respondents be ordered to pay costs.

Background

[2] The appellants who were brother and brother in-law respectively to Rapotlaki Mota. They averred that they were co-***curator bonis*** purportedly appointed under section 30 of the Administration of Estates Proclamation No. 19 of 1935, which appointments were necessitated by Mr. Rapotlaki ailing medical health. To prove their appointment and, curatorship, the applicants attached Letters of Administration, which were ex facie under sections 31 to 34 of the Administration of Estates proclamation of 1935.

[3] Pursuant to the Letters of Administration the applicants challenged the transfer of land to the 1st respondent, as this property was registered in the names of Rapotlaki Mota as title-holder of land rights in respect of plot No. 300082/164, situated at Botha-Bothe,

normally referred to as Boloka Hardware. The property was registered on the 28th February 1991.

[4] It was averred that on or about the 22nd February 1989 Rapotlaki Mota duly represented by the ***co-curator bonis***, entered into a written sub-lease agreement in respect of the Plot. The sub-lease was concluded before the issuance of the lease. The lease was issued on 28th February 1991. The sub-lease was to be subsequently registered in order to comply with the law after the issuance of the lease. The 2nd respondent kept the lease during the duration of the sub-lease and he was to facilitate registration of the sub-lease. The 2nd respondent took occupation of the property. Rapotlaki Mota was paid monthly rentals by cheque. Occasionally 2nd respondent would instruct 1st respondent to release the cheque to Rapotlaki Mota.

[5] About the year 2001, the property was partly damaged by fire. The 2nd respondent denied responsibility and withheld payments, but later he accepted that that was due to negligence of his staff. He accordingly made repairs the 2nd respondent indicated that he was to pay rentals in advance. Rapotlaki Mota (the sub-lessor) accepted the advance payment and 2nd respondent made an immediate payment of (M 25,000=00), which included rental arrears. The balance of (M 225, 000=00) was paid a month later into FNB in Ficksburg account in the Republic of South Africa. The appellant's plead that that was the tenor of the agreement and nothing more. In a nutshell they were pleading fraud, as property was transferred to the 1st respondent and

hypothecated for (M2,500,000=000) by the 1st respondent claiming to be the lawful title-holder.

[6] However, as it should be the issue *locus standi* by the applicants was raised as a preliminary issue. Both parties filed written submissions on whether the applicants were qualified to act in proceedings before the lower Court.

Consideration of the issue by the Court below

[7] It was the learned Judge's view that at common law, where someone is incapable of managing his own affairs by reason of physical handicap, serious illness, old age, mental weakness or retardation or any other condition rendering him incapable of managing his own affairs, the High Court can be approached to make a declaration to that effect and appoint a ***curator bonis*** to attend to the affairs or property of such person. ***Boberg, the Law of Persons and the Family, P. 156***. The learned judge cited the case of ***Pienaar v Pienaar Curator***[1] as supporting the common law position. It is clear from these authorities that under common law, the power to appoint a ***curator bonis*** to a person found to be incapable of managing his own affairs for whatever cause arising lies in the High Court.

[8] After interrogating section 6 of the Administration of Estates Act, as amended by section 16 of the Mental Health Act of 1964, it was clear, so the Judge opined, that the Master of the High Court

[1] (1930) OPD 171 at 174

supervises the administration of the affairs of persons whose property, is for various reasons described under the section under the control of a curator or tutor. To put in another way, the Master supervises the administration of a variety of estates, namely (a) minors, (b) deceased persons, (c) mentally challenged persons, (d) absent persons and (e) persons under curatorship.

[9] It was the learned Judge's view that though the Proclamation Act, is divided into six parts, the matter before him fell to be decided within the realm of Part II and III, which deal with the estates of deceased persons and estates of minors and absent persons, respectively.

[10] Section 30(1), of the Proclamation (under Part II) reads:

> *"In all cases where the Master deems expedient, he may appoint a* ***curator bonis*** *to take custody and charge of any estate until Letters of Administration thereof.*
>
> *Subsection 2 provides that every* ***curator bonis*** *may collect such debts and may sell or dispose of such perishable property belonging to the estate wherever situated within the territory as the* Master *may specifically authorize"*

[11] Part II (from sections 77 to 79) deals with appointment of tutors to administer estate of minors. These provisions are not applicable to the current circumstances.

[12] Section 80 provides for appointment of a curator dative, who is a ***curator bonis*** appointed by the Master to replace a previous curator, who did not perform to the Master's satisfaction. His duty is

to administer property of an absentee from Lesotho and issuance of Letters administration for that curator.

Section 81 (under Part II) provides as follows:

> *"Nothing contained in this chapter shall prevent the Court from appointing a* ***curator ad litem*** *to any person whenever and in the same manner in all respect as such an appointment might by law have been made by the Court if this proclamation had not been promulgated.*

Subsection (2) reads:

> *Whenever expedient, the* Master *may appoint a* ***curator bonis*** *used to take custody and charge of any property whenever situate within the territory, for the due administration and management of the same* Letters *of confirmation have been granted to some person as tutor testamentary or dative or as a curator nominate or dative, in manner herein before provided."*

[13] The learned Judge interrogated the Mental Health Act of 1964, it's not necessary to delve into the niceties of that piece of legislation as it is not applicable in the circumstances before us. Suffice to say that section 58, of that Act, mirrors the common law position, of the Court appointing a curator to manage property of persons with mental incapability. Under section 51(2) medical evidence is laid.

[14] It was the learned Judge's view that notwithstanding whether the Curator is appointed by the Court or by the Master, the constitutive documents must specify powers conferred. The common law still obtains in Lesotho regarding appointment of a Curator to

manage the affairs and property of persons incapable of managing their own affairs, so the Court below concluded.

[15] The Court below went on, that it cannot be deemed that the Master of the High Court is bestowed with power under these preceding provisions to appoint a ***curator bonis***. I am however unable to find a provision in the Act that grants power to the Master of the High Court to appoint a ***curator bonis*** to a person incapable of managing his own affairs. It is my view that the Master can only exercise powers conferred by law. This is inclusive of power to appoint curators. Absent such provisions, the Master lacks jurisdiction to do so.

[16] It means there are two legal procedures in terms of which a curator can be appointed to administer the affairs of someone who is found to be incapable of managing his/her own affairs. These are, (a) the application to the High Court, and (b) the procedure set out in the Mental Health Act.

[17] It follows in my view that the Master's role to supervise the administration of such an estate should be preceded by a declaration by the High Court that the person sought to be placed under curatorship is incapable of managing their own affairs and appointment of a curator to administer the person's estate. It is only after such an appointment that the Master would supervise the administration of such estate by the person appointed, in terms of section 6 of the Act.

[18] This common law powers residing in a Court to appoint curators is preceded by a proper inquiry into the state of the person who is sought to be placed under curatorship. Where he/she is incapable of understanding the proceedings, a ***curator ad litem*** must first be appointed as a curator. The South African decision in ***Ex parte Glendale Sugar Millers (Pty) Ltds[2],*** was cited in support of that proposition. Authorities of ***Ex parte Bell***[3] and ***Van de Berg v Van der Berg***[4], espouse the appointment of a suitable person as ***curator ad litem*** and where a person sought to be placed under curatorship is of sound mind, his consent is critical.

[19] The role played by the Master of the High Court is such appointment in consideration of the name suggested is mirrored in Rule 8(19) of the High Court Rules 1980, which sets out the procedure for the placing persons under curatorship. The Rule is couched in these terms:

> *"When an application is made to Court whether ex parte or otherwise, in connection with the estate of any person, deceased, or alleged to be a prodigal, or under any legal disability mental or otherwise, a copy of the application, must, before, the application is filed with the registrar, be submitted to the Master for his consideration and report. If any person is to be suggested to the Court for the appointment of curator to property such suggestions shall also be submitted to the* Master *for his consideration or report."*

[2] 1973 (2) SA 653
[3] 1953 (2) SA
[4] 1939 WLD

[20] Answering the question, whether the ***curator bonis***, can institute legal proceedings the Court below, analyzed Rule 46 of the Land Court Rules 2012, which spells out categories of persons entitled to audience before the Land Court. These are, (a) a litigant in person or his duly authorized representative, (b) a family member including spouse, child, brother, sister and parent or guardian, (c) an executor, (d) trustee or (e) curator, (f) an Attorney or Advocate only when duly instructed by an Attorney. It is clear from this rule that there is no specific category of curators that are entitled to appear before Court. The proper interpretation to be accorded to this rule in my view, is that a *curator* ***bonis*** may litigate or has capacity to bring proceedings on behalf of the person they are appointed to represent, so the Judge asserted.

[21] In support of that assertion, the learned Judge referred to the case of **Ex parte De Jages**[5], where the Court said:

> *"….. if I understand Mr. Miller correctly, his contention is, in effect, that one should not authorize a* ***curator bonis*** *in advance to institute legal proceedings on behalf of the patient since that patient has himself/herself, not been interdicted from entering upon the management of his or her affairs. That may be so, for in case of a mental patient, there may be a time/times when the patient's incapability has been temporary or permanently removed and the patient has thus been restored …… to his or her full legal capacity. In the appointment of a* ***curator bonis****, however, no express authority to engage on a particular litigation is conferred. But once it is agreed between all parties that the patient, as in the present case, is*

[5] 1950 (4) SA 334 at 336.

> *incapable of managing her affairs, then it seems to me that, so long as that incapacity lasts, litigation has to be instituted by the* ***curator bonis*** *and not by the patient himself because ex hypothesi the patient in incapable of managing her affairs."*

[22] It was of significance, however that is in the present matter, the appointment is clearly invalid, so are the Letters of Administration because both were made under inapplicable provisions. sections 31 to 34 of Administration of Estates Proclamation fall under Part II of the Proclamation which deals with estates of deceased persons. In addition, the duties outlined in these Letters relate to administration of deceased estate by an executor. These provisions are in applicable to an estate of a person allegedly incapable of managing his own affairs for whatever cause. In my view the instruments on which they rely as their basis for instituting these proceedings (i.e. Letters of Administration) are indispensable in the determination of their entitlement or qualification (to litigate on Mr. Rapotlaki's behalf).

[23] The applicant's appointment was invalid for being made by a person who lacked authority to do so, so are the Letters of Administration. No valid consequences can therefore flow from the appointment and subsequent Letters of Administration. In other words, they confer no power to the applicants to institute these proceedings. They are therefore not qualified to act in these proceedings. The preliminary objection must therefore succeed, so concluded the learned Judge. He struck off the application.

[24] Dissatisfied with the Ruling, the applicants appealed to this Court. They filed four grounds of appeal:

1. The Court a quo erred and caused a great misdirection by upholding the point raised in the **Special Answer** to the effect that the applicants had no *locus standi* with that of lack of authority.
2. The Court a quo erred by making an order invalidating the Letters of Administration issued to the appellants by the Master of the High Court, in the circumstances where the decision of the Master to issue Letters, had not been reviewed and set aside in a proper application for judicial review.
3. The Court a quo erred in dealing with the preliminary objection raised in the matter summarily, as opposed to adopting the procedure stipulated in the Land Court Rules, as fully explained in the matter of ***Likotsi Civic Association and Others v Minister of Local Government and Others LAC 2013-2014, page 35.*** Alternatively, the enquiry ought to have been made whether the Master of the High Court had authorized the appellants to institute the litigation and not for the Court to assume that the appellants were not authorized and or had no *locus standi* to initiate the proceedings.
4. The Court a quo erred in that it erroneously made a finding and judicial determination to the effect that the Letters of Administration were invalid even though there was no counter-application challenging the legitimacy and or otherwise of the instruments in issue. This is more so in light of the fact that the Master of the High Court was cited in the proceedings and did not oppose the matter or at best made an informed decision to abide by the decision of the Court. The Court a quo paid little or no attention to the citation of the Master of the High Court and drew no inference from the conduct of the said institution.

Reasonableness of the delay

[25] The appellants filed a condonation application for the late filing of the notice of appeal. The second appellant averred that the Land Court in the ex-tempore judgement followed by a written ruling on 7th December held that the two appellants did not have *locus standi*. Upon being informed by his counsel, he instructed him to note an appeal, but counsel advised that they wait for written reasons. The reasons were only accessed in March 2021. The appeal was filed on 12th March 2021 instead of 15th January 2021. There was a lockdown as well and the Courts were only dealing with urgent matters.

[26] The decision of this Court in ***Lesotho Nissan (PTY) Ltd v Katiso Mamaka*** is relevant[6]. In that case we deprecated the common practice by practitioners of raising technical objections, instead of letting appeals be heard on merits. We were urged to consider the degree of lateness in making the application, the prospects of success and the importance of the case. It was canvassed, following ***Melane v Sautam Insurance Co Ltd***[7], that these factors are not individually decisive, except that if there are no prospects of success there would be no point in granting condonation. However, 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.

[6] C of A (CIV) 72/14
[7] 1962 (4) SA 531 (A)

[27] The appellants cited our decision in the ***National University of Lesotho and Another v Thabane***[8], in support of their application. We said therein:

> *"The rules of Court are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals, consequently the rules must be interpreted and applied in the 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 cast in peremptory 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 rules injudiciously as an expedient to cause unnecessary delay or in an attempt to cause thwart an opponent's legitimate rights. Thus what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains discretion to condone a breach of the rules in order to achieve a just result."*

[28] It was conceded by Mr. Lebakeng that he knew of the existence of the Order on 7th December 2020 and that the appeal had to be against the order. It was an error of judgement on his part.

His explanation may not be good, as he was supposed to file an appeal after 7th December 2020. The condonation application filed in March 2021, was supposed to file Heads of arguments 28 days before

[8] LCA (2007-2008)

the session in terms of Rule 9 (1). The record was filed in time, but the Heads of arguments were filed on 6th October 2021 instead of 20th September, which was 16 days later. Simply put the respondent waived their right to oppose the late filing of the appeal.

[29] When dealing with grounds two and four, it was submitted that there is the presumption of legality of administrative decisions. The principle was aptly stated in ***Oudekraal Estates (PTY) Ltd v The City of Cape Town and Others***[9]. It was therefore argued that the decision of the Master of the High Court remains valid. There was no absence of jurisdiction on the part of the Master, as has been stated in ***Mothobi and Another v The Crown***[10].

[30] The decision was grossly erroneous about a report of the Master of the High Court as envisaged in Rule 8(19) to which the Court a quo ironically referred in paragraph 24 of the judgement but to no avail. The nature of the points raised required comprehensive evidence in form of a report of the Master of the High Court, which would enlighten the Court.

[31] The Letters of Administration having been issued pursuant to sections 31-34 of the proclamation, which according to the Court a quo relate to deceased estates, there were two conflicting issues which would have been addressed by the report of the Master of the High Court, which report the Master did not present. The issues are (i) whether the curators were appointed to manage the deceased's

[9] 2004 (6)SA 222
[10] LAC (2009-2010) page 465atp. 472 para. F.

estate; (ii) whether they were appointed to manage the affairs of a person who was unable to manage his affairs temporarily.

[32] The appellants insisted that they were appointed ***curator bonis*** to perform duties under section 30(2) in the absence of Letters of Administration. It was not necessary for the Master of the High Court to issue Letters of Administration to the curator appointed in terms of section 30 and or 81(2), as the sections do not provide for issuance of such Letters. In short they are recanting the evidence they produced in Court. The appellants rejected the argument that only a ***curator ad litem*** could litigate on account of incapacity of his charge.

[33] They reiterated the violation of Rule 64, of the Land Court Rules. It was mandatory for the Court a quo to deal with the matter in terms of the Land Rule, as enunciated in ***Likotsi Civic Association and Others v The Minister of Local Government and Others***[11]. These heads were augmented by oral submissions.

[34] Adv. Lebakeng graciously and honestly said, even upon receipt of reasons they were uncertain about the prospects of success of the appeal at one time. However later they formed the opinion that this Court should determine whether a ***curator bonis*** can sue regarding the estate.

Prospects of success

[11] 2013-2014 LAC

[35] It was canvassed in ground one, that the respondent's **Special Answer** that the appellants had no *locus standi* was inappropriate as no evidence was heard in support of that preliminary issue. It was further argued that the estate under consideration was not that of the deceased person, but that of an individual incapacitated by ill health. The Master of the High Court should have explained. It was argued that the appellants had complied with Rule 8 (19) of the High Court Rules. Mr Lebakeng did say that, "it was not pleaded that Mr. Mota was incapable." There was no declaration made by the High Court. Two outstanding concessions were made by Mr. Lebokeng (a) that Letters of Administration relate to the estate of a deceased person, (b) a ***curator bonis*** is appointed under section 30 and not 31-34 of the Proclamation of 1935.

The Respondent's case

[36] Adv. Mpaka, for the first and second respondents fiercely opposed the application. It was his submission that the conduct of the appellants in this appeal calls for censure, as they demonstrated a cavalier attitude towards the Court and exhibited no serious intention to prosecute the appeal. The appeal deserved to be dismissed with costs instantly. He cited the case of ***Sotho Development Corporation (PTY) Ltd v Nedbank (Lesotho)PTY Ltd***[12] in support.

[37] He went on that judgement in the matter was handed down on 7th December 2020, written judgement delivered on the 17th

[12] 1999-2000 UR LB 381 at 385-386

December, 2020. The appellants noted the appeal on 12th March 2021. The first respondent's lawyers were also served with an application for condonation on 18th March 2021 and simultaneously the record was filed. On 7th August 2021 the Deputy Registrar issued a circular calling upon appellants to file their heads of argument on the 20th September 2021 and a second circular, which was a reminder, was issued on 13th September 2021. In any event pursuant to Rule (1), the Heads of arguments should have been filed twenty-eight days before the date of the start of the session. The Deputy Registrar issued the first draft roll on 16th August 2021, the second draft roll on 23rd August 2021, and the final roll and updated final rolls on 7th September 2021 and 13th September 2021, respectively.

[38] It was argued that there should be a satisfactory explanation and good prospects of success of the appeal for the application to succeed. A plethora of authorities were cited in support of that proposition, ***Kaoli v Nkosi***[13]***, Immelman v Loubser Enn Ander***[14], ***Glazer v Glazer***[15], ***Saloojee and Another v Minister of Community Development***[16], ***Mothustane and Others v Selon and Another***[17]. Adv. Mpaka, urged us to follow ***Melane V Santan Insurance Ltd supra***, in considering whether good prospects of success have been shown.

[13] 1990-1994 LAC 631
[14] 1974 (3) SA 816 (A)
[15])1963 (4) SA 694 (A)
[16] 1365 (2) SA 135
[17] LAC 571 at 572 B

[39] It was argued for the respondents that the appellants were unable to explain the following delays, from the time the judgement was available, or at least after noting the appeal and, from the time the circulars and drafts were issued. That time, so it was argued, was unaccounted for, rendering the explanation for the delay not only unreasonable, but unacceptable. From the appellants own version by March 2021, they were in possession of a full written judgment, yet they claim absence of the same in the affidavit.

[40] Adv. Mpaka, asked the Court to reject the lockdown, as an explanation for the delay, as the appellants attested to the application in Maseru, despite residing in Butha Buthe. In any event this Court promulgated the Electronic Filing Rules last year.[18] He went to state the often stated statement by this Court and in South Africa, especially in ***Mothutsane supra that*** :

> *"The rules of Court are framed with the purpose of ensuring expeditious settlement of disputes. The Court is empowered to refuse the right to pursue further cause to a litigant who is in flagrant breach of the rules. But justice demands that a litigant's prospects of success should play an appropriate, though not necessarily decisive role in determining whether the Court should, in its discretion, permit a litigant who is in breach of the rules to pursue his cause further. Counsel's negligence or incompetence is not necessarily an excuse for the failure of a litigant to comply with the rules of Court."*[19]

The Court was urged to dismiss the application with costs.

[18] Court of Appeal (Amendment) Rules L/N No. 39 of 2020.
[19] Mothuntsane supra at 571 F- H

Prospects

[41] It was valiantly, argued that the **Special Answer** taken by the 1st and 2nd respondents is in terms of Rule 66, of the Land Court Rules 2012. The **Special Answer** is supposed to be dealt with in terms of Rules 67 (1), which for the present purposes allows for the production of evidence, which had already been done by allowing appellants an opportunity to furnish their Letters of Administration, which had been omitted from record.

The appellants having based their right on section 30, of the Administration of Estates Proclamation 1935 and the Letters of Administration issued by the Master of the High Court pursuant to sections 31-34 of the Proclamation. It is appropriate at this stage to address the same.

Section 30 of the Proclamation provides:

1) "In all cases where the Master deems it expedient, he may appoint a ***curator bonis*** to take custody and charge of any estate until Letters of Administration granted for the due administration thereof.
2) Every ***curator bonis*** may collect such debts and may sell or dispose of such perishable property belonging to the estate, wherever situate within the territory, as the Master may specifically authorize."

The fist observation to be made is that the proclamation is meant to govern administration of the estates of deceased persons, minors and lunatics and of derelict estates. It is clear that no such allegation has been made in these proceedings. It is not clear whether it is a

deceased's estate, minor, lunatic or derelict. The appellants did not establish their authority to act in the proceedings.

[42] The Letters of Administration furnished were issued in terms of a different section, which provides for deceased estate which are either testate or intestate. A ***curator bonis*** being a creature of statute cannot perform functions beyond those conferred upon it by law. The case of ***Fedsure life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Coincil,***[20] was cited in aid of that proposition. The jurisdictional facts were therefore not pleaded. The proper approach is for one to be appointed ***curator ad litem*** by the Court. This is common law position that has been codified in this jurisdiction into Rules of the High Court read together with Mental Health Act, 1973, as amended by Act 17 of 2002. That is not the position in the Kingdom.

[43] The Land Court in the Kingdom, however provides for audience in Court of curators. That notwithstanding, there are different types of curators. ***Curator bonis*** is a person appointed by the Court to manage and control the property of another (not being a minor) who for reason satisfactory to the Court is unable to manage and control his own property, per Monapthi J's in ***Ramafieloane v Ramafieloane and Others***[21]**.** A ***curator ad litem*** is appointed by the Court as a legal representative for a person incapable of

[20] (1999) (1) SA 374 (CC)
[21] [1999] LSHC 134, 22ND December 1999.

managing his own affairs and property as determined by the Court.[22] However, there is no consensus on this in Lesotho.[23]

[44] It is the duty of a ***curator ad litem*** to make appropriate enquiries as to the extent of a patient's mental illness and that it be properly investigated. The curator should ensure that the proprietary and other interests of the patient are adequately protected in terms of the order made by the court. He/ she is responsible only to the Court for the proper discharge of his or her functions.

[45] The above discussion, so it was argued illustrated that the appellants cannot act in any other manner other than that prescribed in the Letters of Administration and that ground one of appeal had no leg to stand on. The second and fourth grounds were said to be misguided as they were anchored on remarks made obiter. What the learned Judge was saying was that the Letters of Administration conferred no power on the appellants to institute these proceedings. Advocate Mpaka submitted that the appellants raised the provisions of section 81(2) of the Proclamation for the first time, as that was not pleaded. In any event the Proclamation makes a provision for ***curator bonis*** and ***curator ad litem***.

[46] Regarding the third ground, it was submitted that, the issue was not raised in the Court a quo. The ground overlooks the provisions of Rule 67 (1). The evidence needed was the Letters of Administration, which were made available. The appellants agreed to

[22] Walter v Road Accident Fund and Another (ECP) (Case No. 2422/2008
[23] Ex-Parte Glendale Sugar Millers (PTY) Ltd 1973 (2) SA 653 (N)

the procedure adopted and cannot cry foul later as facts were common cause.[24] We were urged to reject the condonation application.

[47] **Issues**

i) Whether there were cogent reasons for considering the late filing of the appeal and head of arguments?

ii) Whether the appeal had any prospects of success?

Consideration

[48] The appellants aver that they laboured under a mistake that they could only appeal after a reasoned judgement, the order having been available on the 7th December 2020 notwithstanding. They were ambivalent in prosecuting the appeal, as they were not too sure the appeal could succeed. Simply put they belatedly made up their mind after they were of a conviction that there where prospects of success. In a nutshell that is the explanation of the appellants for the delay.

[49] The explanation of delay in noting an appeal is ex facie unreasonable. It is trite that an appeal is against an order and not against the reasons,

Chawla v Mavel[25] The order was rendered on 7th December 202 in terms of Rule 4(1), the appeal should have been noted within six weeks. If Counsel and his client could have the luxury of noting the appeal, when they convince themselves that the prospects of the

[24] Ex-parte Campher (1951) (3) SA 248 (C)
[25] (69804/2017) [2019] 2AG PPHC

appeal succeeding are bright, the rules of Court will be rendered nugatory. In this Court's view the reasons for the delay are implausible.

Prospect of success

[50] In ***Simplex (PTY) Limited v Van and Others NNO***[26], ***Van der Merwe***[27], which cases were concerned with the provisions of section 6(1) of the Trust Property Act 1988 (No. 57 of 1988) provides as follows:

> *"Any person whose appointment as a trustee in terms of a trust instrument,* section *7 (which parenthesis provides for the appointment of trustee by the* Master*), or a Court order comes into force at the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the* Master*"*

Goldblatt J, rejected in ***Simplex supra,*** a contention on behalf of the respondent that prohibition in the section was directory and not peremptory, and held that it was a precondition of a trustee's right to act that he has to be authorized so to do in terms of Letters of Authority issued under section 6(1) of the Trust Property Act. The Judge was of the view that section 6(1) is not purely for the benefit of the beneficiaries of the trust, but in the public interest, as providing proper written proof to outsiders of the incumbency of the office of the trustee.

[26] [1996] (1) SA 11
[27] 2002 (2) SA 579 (K)

[51] In ***Simplex supra***, it was held that the Master must issue Letters of curatorship in terms of section 71(1) thereof. The point being made is that a curator instrument should prescribe the functions of the curator. In the matter before this Court, the Letters of Administration were issued pursuant to sections 31-34 of the Proclamation. It is important to quote in extension the prescribed functions:

a) Soon as Letters of Administration have been granted to him to make subscribe and transmit to the Master an inventory showing the value of all property belonging to the estate (section 44).
b) To cause notices to creditors and debtors to be published (section 46).
c) To lodge with the Master a liquidation and Distribution account of his appointment. Every executor who fails to do so without lawful and sufficient excuse shall forfeit all claims to any fees to which he may otherwise have been entitled and may be summoned before the High Court to answer for his default Section 68(2), 69 (3) and 100.
d) To open a special banking account as soon as he has funds of the estate in hand over and above the amount of M40.00. (section 116)

This serves to inform you that the above provisions of the law will be strictly enforced.

[52] The Letters of Administration deal with persons dying either testate or intestate. The appellants were not clothed with authority to act as legal representatives of the estate of Mr. Rapotlaki Mota. The

instruments consisting the office of trustee, ***curator bonis***, tutor, executor have to be strictly interpreted. The appellants claim they were appointed curators under section 30 of the Proclamation but produced Letters of Administration appointing them as executors under section s 31-34. The constitutive instruments reflect different functions under different provisions of the law.

[53] A ***curator bonis*** is appointed by the Court to manage the finances or estate of another person who cannot do so because of mental or physical incapacity. The duties of the ***curator ad litem*** are normally to present the patient during the legal proceedings and to compile a report of his/ her investigation into the appointment of possible a ***curator bonis*** and *curator* ***personam***, should it be required[28]. The Lesotho legal system is of Roman Dutch Law ancestry. It follows that although most of this literature is of South African origin, it is of significant persuasion.

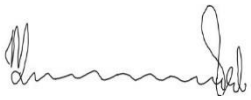
Conclusion

[54] The condonation application ought to be dismissed as no plausible reasons have been advanced. The prospects of success of the appeal are dim.

Costs

[55] Will follow the event.

[28] Appointment of a curator/Honey Attorneys.co.za



P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree

M.H CHINHENGO

ACTING JUSTICE OF APPEAL

FOR APPELLANTS/ APPLICANTS: ADV LEBAKENG.

FOR RESPONDENTS: ADV T MPAKA.