



LESOTHO

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C OF A (CIV) 23 OF 2023
LC/APN/32/2019**

In the matter between:

NTOETSI TAU-TONA

APPELLANT

AND

**'MAPHOKA RAMOEA
HER WORSHIP BANYANE**

FIRST RESPONDENT

(AS SHE THEN WAS)

SECOND RESPONDENT

**THE CLERK OF COURT
RESPONDENT ATTORNEY GENERAL
RESPONDENT**

THIRD

FOURTH

CORAM

MOSITO P

MUSONDA AJA

MOKHESI AJA

HEARD: 16 OCTOBER 2023

DELIVERED 17 NOVEMBER 2023

SUMMARY

Appeal - Court of Appeal - Leave to appeal — Appeal from decision of the Land Court on review from decision of the District Land Court— Leave of the Land Court, or failing that of Court of Appeal, an essential prerequisite.

Appeal - Judgment of District Land Court to the Land Court - further appeal to the Court of Appeal without the necessary leave in terms of section 17 of the Court of Appeal Act, 1978 - Its provisions are peremptory. In the absence of compliance, an appeal was struck from the roll.

JUDGMENT MOSITO P Background

[1] This is an appeal from a judgment of the High Court, sitting as a Land Court (Mahase J). Under CIV/APN/322/2019, the present first respondent brought an application for review to the Land Court. She asked that the court should order that: (a) the third respondent herein dispatch the record of proceedings in CC/253/2000 to High Court within fourteen (14) days; (b) condonation for the late filing of the review application; (c) the second respondent's judgment in CC/253/2000 against the applicant be reviewed and set aside; (d) Costs of the suit in the event of opposition; (e); Further and/or alternative relief. The appellant opposed the application. The Land Court heard the matter on 3 and 29 March as well as 23 April 2021. The learned judge handed down judgment on 30 November 2022.

[2] The learned judge ruled regarding the application for condonation brought by the appellant. She held that the appellant's application for condonation of the late filing of the review application is granted, and the second respondent's judgment for removal of the unspecified encroachment in favour of the first respondent is set aside as prayed. There was also an order on the costs of the suit.

[3] Dissatisfied with the ruling by the learned judge, the appellant noted an appeal to this Court on the grounds that (a), the court a quo erred in dismissing the appellant's special answer of *lis pendens* on the grounds that the noted appeal did not form part of the review proceedings and that it was not appropriately filed in the Land Court; (b), the court a quo erred in granting condonation when it was clear that the review was instituted in violation of Rule 86 of the Land Court Rules 2012; (c), the court a quo erred in upholding the grounds of review when the said review grounds were not competent in terms of Rule 86 of the Land Court Rules 2012; (d), the court a quo erred when it held that "the second respondent's judgment for removal of the unspecified encroachment in favour of the first respondent is set aside as prayed. She also complained that the court a quo had not had the benefit of the transcript of the evidence, which led to establishing that the first respondent had encroached into the appellant's site.

[4] At the commencement of the hearing of the present matter, Advocate Tlapana, for the appellant, applied that ground number

3 above be amended to substitute Rule 86 with 85. There was no opposition from the respondents, and the amendment was accordingly granted.

Application for leave to appeal.

[5] it is essential to begin with a consideration of the appeal by indicating that on the date of the hearing of this matter, Advocate Tlapana brought to the court's attention that he had been in doubt regarding whether he should have applied for leave to appeal regard being had to the fact that the proceedings in this matter started in the District Land Court. There was an appeal to the Land Court, which was never finalised. However, the present first respondent brought the application for review before the Land Court and ultimately to this Court.

[6] However, Advocate Tlapana's attitude was that it was unnecessary to apply for leave to appeal to this Court because what served before the Land Court and culminated in the present appeal was an application for review. Thus, the learned counsel submitted that where a matter started in the District Land Court, an application for review was filed in the Land Court, and the matter ended up on appeal before this Court, there is no need to apply for leave to appeal.

[7] Advocate Kao-Theoha, for the first respondent, held a different view. She submitted that where the matter began at the District Land

Court and later served at the Land Court on review, the appellant needed to have applied for leave to appeal. I shall revert to a consideration of this issue later in this judgment. Sufficeth to point out at this stage that once this Court finds that leave was necessary, both counsel agreed that the appeal would have to be struck off the roll for failure to comply with section 17 of the Court of Appeal Act 1978.

The facts

[8] Before considering the aspect relating to the need or otherwise of application for leave to appeal, it is necessary to briefly outline the facts that have given rise to the contest between the parties. The parties in this matter have been in and out of court regarding a claim relating to the alleged appellant's encroachment into the site of the first respondent. The parties' sites, which are adjacent to each other, are situated in the urban area of Khubetsoana in the district of Maseru.

[9] The litigation in this matter commenced in the year 2000, wherein the husband of the current appellant, Rapelang Ramoea, had been sued by the current first respondent for encroachment into the first respondent's site. So, effectively, this matter has been the subject of litigation for twenty-three years to date. The current appellant was later substituted as a party after the death of her husband.

[10] The judgment regarding this matter was delivered on 26 April 2017 by Her Worship, Banyane (as she then was) in

CC/253/2000, in which she granted judgment in favour of the first respondent.

[11] The current appellant was ordered to remove all the developments she had effected on the portion only of the first respondent's site to the extent of her alleged encroachment.

[12] An appeal was noted to the Land Court in 2017. It was submitted on behalf of the appellant that there was no appeal instituted on her behalf because "the names of the applicant in that appeal are to her unknown." The appellant is denying the existence of the appeal simply because there is a misspelling of the surname of her late husband in the appeal. On the other hand, the first respondent says there is such an appeal, which was noted but is pending before the High Court in CIV/APN/43/2017 (CC/253/2000).

Issues for determination

[13] The first issue to be determined is whether the appellant needed to apply for leave to appeal before her appeal can be heard. The second set of issues arises from the grounds of appeal, as summarised above.

The law

[14] In this matter, it will be apposite to begin by examining the law on whether the appellant is obliged to seek leave of this Court to appeal against the High Court's (Land Court's) judgment where the

High Court (Land Court) was exercising its review jurisdiction. Section 17 of the Court of Appeal Act¹ provides that: '[a]ny person

aggrieved by any judgement of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact.' Purposive interpretation enjoys statutory *imprimatur* in this country. Section 15 of the **Interpretation Act, 1977** provides that every enactment must be deemed remedial and given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This provision prescribes a purposive approach to interpretation.

[15] Thus, the primary purpose of section 17 of the Court of Appeal Act is to provide a legal avenue for individuals or parties dissatisfied with the High Court's judgment in its civil appellate jurisdiction to seek further consideration of the case. It ensures that individuals can challenge decisions made by the High Court. This is a crucial gatekeeping mechanism to manage the caseload of the higher court. It allows appeals on "any ground of appeal which involves a question of law but not on a question of fact." This means that the Court of Appeal will primarily consider appeals that challenge the legal interpretation and application of the law by the High Court rather than reevaluating factual findings. In addition to obtaining leave from the Court of Appeal,

¹ Section 17 of Court of Appeal Act No.10 of 1978.

the section allows for an alternative route to appeal. Suppose the judge who heard the initial appeal in the High Court issues a certificate indicating that the case involves a question of law. In that case, this certificate can serve as a basis for proceeding with the appeal. This certificate is a way to fast-track the process in cases where it is clear that a legal issue needs further consideration.

[16] The first question is, what does the section mean by ‘its civil appellate jurisdiction.’? Does the phrase include the review jurisdiction over proceedings of a lower court? The phrase *its civil appellate jurisdiction* typically refers to the authority or power of a higher court (such as an appellate court) to review and hear appeals from decisions made by a lower court (such as a trial court) in civil cases. In summary, *civil appellate jurisdiction* does indeed include the review jurisdiction over proceedings of a lower court, but it pertains explicitly to civil cases rather than criminal cases.

[17] In **Sello Khechane v Semonkong Urban Council**,² This Court was seized with an appeal from a judgment of the District Land Court to the Land Court and a further appeal to the Court of Appeal without the necessary leave in terms of section 17 of the Court of Appeal Act, 1978. In the Khechane matter, the counsel for the appellant conceded (as here), that there had not been compliance with section 17 of the Court of Appeal Act. It was also common cause that Mr Khechane had not obtained leave from the

² Khechane v Semonkong Urban Council (C of A (CIV) 36/2022.

court a quo nor of this Court. This Court held that the appeal was, therefore, a nullity and could not be entertained by this Court. The Court held that dismissal extinguishes the right of appeal. The proper order against an incompetent appeal is to strike it off the roll.

[18] Section 90 of the Land Act 2010 provides that when an appeal is lodged against the Land Court's decision, the Court of Appeal rules shall apply. In the case before us, counsel for the appellant conceded that there had not been compliance with section 17 of the Court of Appeal Act. It is common cause that the appellant had not obtained leave from the court *a quo* nor of this Court.

Application of the law to the facts

[19] In terms of section 74 of the **Land Act**³ 2010, the Land Court is a division of the High Court of Lesotho. Therefore, section 17 of the Court of Appeal Act catches an appeal to it.⁴ As Ramodibedi JA wrote about this section in **Mohale v Mohao**, '[t]he plain meaning of this section is that any person who intends to appeal against the judgment of the High Court in its civil appellate jurisdiction, as here, must first seek and obtain the leave of the High Court or this Court. Furthermore, leave may be sought only on a question of law.' He proceeded to point out that:

³ Land Act 2010.

⁴ Sello Khechane v Semonkong Urban Council C of A (CIV) NO. 36/2022.

[6] As guidance in future, therefore, it is now necessary to lay down the following principles: -

- (a) Practitioners who apply for leave to appeal and judges of the court granting leave should ensure that the provisions of section 17 of the Act and the Rules of Court are strictly observed. The application for leave to appeal should specify the grounds for seeking leave.
- (b) The judge granting leave should clearly define the points of law on which leave is granted in compliance with the Rules.

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- (c) When leave is granted, the certificate of the judge and the grounds of appeal should then be delivered by the applicant.

[20] The foregoing principles can generally be associated with legal clarity, fairness, and efficiency principles in the judicial system. They emphasise that practitioners (lawyers) and judges should adhere strictly to the relevant statutory law (in this case, section 17 of the Act) and the established Rules of Court. The idea is that the law and rules provide a structured and fair process for seeking leave to appeal. By ensuring strict observance, it helps maintain the integrity of the legal system. The philosophy behind these principles is to uphold the principles of justice, fairness, and procedural integrity within the legal system. By specifying these principles, the judiciary seeks to prevent procedural errors, misunderstandings, and inefficiencies in seeking leave to appeal. This ultimately contributes to a more effective and just legal system. The principles also promote transparency and

accountability, essential in maintaining public trust in the judiciary.

[21] Thus, cases decided by the Land Court as a division of the High Court can typically be appealed to the Court of Appeal. This provision ensures that parties involved in land disputes have recourse to the Court of Appeal, a higher authority, if they believe the Land Court's decision is erroneous or unjust. When a party wishes to appeal a decision of the Land Court to the Court of Appeal, the same rules and procedures governing appeals from the High Court to the Court of Appeal should apply.

[22] Given the situation, this Court has addressed the more immediate issue as a threshold question. Therefore, we rule that this appeal is improper before this court. That being so, it is unnecessary to go into the issues raised by the appellant.

Disposal

[23] Considering the preceding discussions, the appeal is, therefore, a nullity and cannot be entertained by this Court. The only issue is what order we should make. Dismissal is not appropriate when an appeal fails other than on the merits. A dismissal extinguishes the right of appeal. The proper order against an incompetent appeal is to strike it off the roll. However, as a specialised court, the Land Court may likely have its own rules and procedures for appeals in landrelated matters in the future. Without such rules, there is no reason why section 17 of

the Court of Appeal Act should not apply to appeals from the Land Court to the Court of Appeal.

Order

[24] The appeal is struck from the roll, with costs.



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

I agree



**P. MUSONDA
ACTING JUSTICE OF APPEAL**

I agree



**M. MOKHESI
ACTING JUSTICE OF APPEAL**

FOR APPELLANT:

ADV M P TLAPANA

FOR THE RESPONDENT: ADV M KAO-THEOHA