



IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
12/2024**

C OF A (CIV) NO:

CIV/APN/0364/2023

In the matter between:

**LITLHARE NKHATI
MAPOLOKO NKHATI**

**FIRST APPELLANT
SECOND APPELLANT**

AND

**TEBOHO LETŠELA
MINISTER OF FOREIGN AFFAIRS
RESPONDENT
MINISTER OF SOCIAL WELFARE
MASTER OF HIGH COURT
MATSIENG CENTRAL COURT
ATTORNEY GENERAL**

**FIRST RESPONDENT
SECOND
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT**

CORAM: MOSITO P
SAKOANE CJ
CHINHENGO AJA

HEARD: 17 APRIL 2024

DELIVERED: 3 MAY 2024

SUMMARY

Interlocutory order – appeal – jurisdiction – lack of leave to appeal – appeal struck off the roll with costs.

JUDGMENT

MOSITO P

Background

[1] This appeal revolves around a minor child. On 5 December 2023, the appellants instituted an application in the High Court for an order: First, interdicting the first respondent from interfering with, disrupting or restricting in any manner whatsoever the first applicant’s Armani Letšela pending finalisation of this matter. Second, an interdict directing that the minor child Armani Letšela be allowed to visit his mother [first applicant] in the United Kingdom during January 2024.

[2] Third, an interdict that the first respondent releases the minor child aforesaid to the first applicant pending finalisation of this matter. Fourth, the appellant further sought an order directing the first respondent to do all that is necessary, sign all required documents and carry out all the obligations arising in relation to the trip of Armani Letšela to the United Kingdom.

[3] Fourth, the appellants sought an order declaring that the breakdown of the marriage between the first applicant and the first respondents should not be used by any of the parties to inconvenience an innocent minor child. Fifth, they also requested an order declaring that the rights of Armani Letšela under section 22 of the constitution of Lesotho, to freedom of movement, have been contravened by the actions of 1st respondent. Lastly, they asked for costs of suit on an attorney and own client scale, as well as further and/or alternative relief.

[4] The application was opposed by the first respondent on 6 December 2023. He filed the notice of intention to oppose and Answering Affidavit. On 2 February 2024 counsel for the appellant (Adv Lephuthing) appeared before Mokoko J and obtained an order that 'the minor child Armani Letšela be allowed to visit his mother first applicant on the weekends of 2 - 4 February 2024 and next weekend 9 - 11 February 2024.'

[5] On 19 February 2024, the first respondent filed an application in court for an order: First, declaring the first respondent to be in contempt of the Order of this Honourable Court granted on 2 February 2024 consequently; Second, calling upon the first respondent to show cause why she cannot be ordered to purge her contempt of the Order of Court dated 2 February 2024 failing which; an order committing the first respondent to be imprisoned for a period that the Court could consider appropriate. Third, there was

also a prayer directing the second and third respondents (O/C Headquarters Police and The Commissioner of Police respectively) and/or their subordinates to arrest the appellant in putting the committal prayer into effect. The prayers went further to seek costs against the appellant as well as further and/or alternative relief.

[6] The contempt application was opposed. On 23 February 2024, after hearing Advocate Molapo for the applicant (Teboho Letšela) and Advocate Lephuthing for the present appellant (Litlhare Nkhati) Mokoko J ordered that:

1. The Applicant is directed to report the child (Armani Letšela) as missing to the Police so that the child may be brought before this Honourable Court when found as there are matters involving the parent before the Court.
2. The third Respondent is directed to liaise with his/her South African counterpart to ensure that the child (Armani Letšela) is brought back to the Kingdom of Lesotho.

[7] Dissatisfied with the above order, the appellant noted an appeal to this court on two grounds. First, she complained that the court a quo erred regarding the basis and context within which it made an eventual decision that the child Armani Letšela be reported missing when he had been released to his mother on the coercive power of the court order. Second, she contended that the court a quo erred in failing to pronounce itself on the kind of powers it claimed to

exercise in directing the authorities of the foreign country to act on the misinformation that the child is missing.

[8] It will become clear that the order of Mokoko J appealed from was an interlocutory order given within the context of contempt proceedings. This court was informed by counsel that the learned judge postponed the hearing of the contempt application and proceeded to give the above order. The proper understanding of the order is that the learned judge was not prepared to hear the contempt application affecting the interest of a child while that child was outside the jurisdiction of his court.

Issues for determination

[9] Based on the above identified grounds of appeal, the following issues would fall for determination in this appeal:

First, whether the court a quo erred regarding the basis and context within which it made the eventual decision that the child Armani Letšela be reported missing when he had been released to his mother on the coercive power of the court order.

Second, whether the court a quo erred in failing to pronounce itself on the kind of powers it claimed to exercise in directing the authorities of a foreign country (South Africa) to act on the misinformation that the child is missing.

[10] However, when the appeal proceeded before us, the true character of the matter against which the appeal was based became clearer. The appeal had been lodged against the order of

Mokoko J who had postponed the hearing of the contempt application, pending the return of the minor child to Lesotho, within the jurisdiction of the High Court. To characterise whether this order is indeed interlocutory in the given context, there is a need to bear in mind that, an interlocutory order does not deal with the merits of the case, but is merely ancillary to it.¹ In the case of *Zweni v Minister of Law and Order*², the Appellate Division of South Africa held that "an interlocutory order is one which does not decide the principal matter, but is issued pending the final decision of the main dispute, whether raised in the same case or some other proceeding."

[11] In the present case, the order by Mokoko J directing the applicant (Teboho Letšela) to report the child (Armani Letšela) as missing to the police and the third respondent to liaise with South African authorities to bring the child back to Lesotho was issued within the context of contempt proceedings. It did not decide the main dispute between the parties concerning the custody and visitation rights over the child. Instead, it was an ancillary order aimed at facilitating the hearing of the

¹ *Mothepe Nkaku and Another v Director of Immigration and Others C of A (CIV) No 12 of 2018* at para [26].

² *Zweni v Minister of Law and Order 1993 (1) SA 523 (A)* at 532,

contempt application by ensuring the child's presence within the court's jurisdiction.

The law

[12] In the case of ***Basotho Enterprises (Pty) Ltd v Litšitso***, the Court of Appeal of Lesotho held that "an appeal against an interlocutory order does not lie as of right but only with the leave of the court which granted that order or of the Court of Appeal itself."³ Similarly, in the South African case of ***Zweni v Minister of Law and Order*** (supra), the Appellate Division stated that "as a general rule, no appeal lies against an interlocutory order unless leave to appeal has been granted." The rationale behind this principle is to avoid piecemeal appeals and unnecessary delays in the proceedings, as interlocutory orders are not final determinations of the main dispute, but rather ancillary orders issued to facilitate the progress of the case.

[13] Therefore, if the order by Mokoko J is characterised as an interlocutory order, this Court has no jurisdiction to entertain an appeal on that order unless leave to appeal was granted by either the court that issued the order (in this case, the High Court) or by the Court of Appeal itself. In the absence of such leave to appeal, the Court of Appeal lacks the necessary jurisdiction to hear and determine an appeal against an interlocutory order, as per the established principles in cases

³ *Basotho Enterprises (Pty) Ltd v Litšitso* 1997-1998 LLR-LB 242 (CA).

like *Basotho Enterprises (Pty) Ltd v Litšitso* and the South African precedent in *Zweni v Minister of Law and Order*.

Application of the law to the appeal

[14] The order issued by Mokoko J, directing the applicant (Teboho Letšela) to report the child (Armani Letšela) as missing to the police and the third respondent to liaise with South African authorities to bring the child back to Lesotho, has been characterised as an interlocutory order. This characterisation is consistent with the established principles laid down in the cases of *Zweni v Minister of Law and Order (supra)* and *Mothepe Nkaku and Another v Director of Immigration and Others (supra)*, which define an interlocutory order as one that does not decide the principal matter but is issued pending the final decision of the main dispute.

[15] According to the binding precedent set by the Court of Appeal of Lesotho in *Basotho Enterprises (Pty) Ltd v Litšitso (supra)*, an appeal against an interlocutory order does not lie as of right but requires leave to appeal from either the court that granted the order or the Court of Appeal itself.

[16] In the present case, there was no indication that leave to appeal the interlocutory order of Mokoko J had been granted by either the High Court or the Court of Appeal of Lesotho. Consequently, in the absence of such leave to appeal, this

Court lacks the necessary jurisdiction to entertain the present appeal against the interlocutory order of Mokoko J.

Disposal

[17] Therefore, applying the legal principles established in *Basotho Enterprises (Pty) Ltd v Litšitso* and *Zweni v Minister of Law and Order*, the present appeal should be struck off for lack of jurisdiction. The Court of Appeal cannot properly adjudicate the merits of an appeal against an interlocutory order without first being granted the requisite leave to appeal, as such an appeal does not lie as of right.

[18] In conclusion, based on the foregoing principles and precedents, the Court of Appeal of Lesotho lacks jurisdiction to entertain the present appeal against the interlocutory order of Mokoko J, and the appeal should be struck off accordingly, due to the absence of leave to appeal, as required by the binding authorities on appealing interlocutory orders.

Order

[19] The following order is made:

1. The appeal is struck off the roll with costs.



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

I agree



**S P SAKOANE
CHIEF JUSTICE**

I agree



**M H CHINHENGO
ACTING JUSTICE OF APPEAL**

FOR THE APPELLANTS: ADV C J LEPHUTHING
FOR THE RESPONDENTS: ADV L E MOLAPO