

IN THE HIGH COURT OF LESOTHO

In the matter between:

JIM MPHETHENG

APPLICANT

and

JUDICIAL COMMISSIONER

1ST RESPONDENT

TIEHO RAMOKOBO

2ND RESPONDENT

TS'EHLE BELEME

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

Coram	:	L. Chaka-Makhooane J
Date of hearing	:	07th February, 2011
Date of Judgment	:	29th November, 2012

Summary

Application for leave to appeal – Prospects of success on appeal – Grounds of appeal and subordinate court's judgment showing prospects of success – Application granted with costs.

ANNOTATIONS

CITED CASES

1. Noebejara Molahlehi v Rex LLR 1999-2001 500
2. Numsa v Fry's Mentals (2005) 3 ALLSA 318
3. Lesetla v Matsso LAC (2000-2004) 444
4. Lesotho Union of Bank Employees, In re Rangoanana v Barclays Bank International Ltd (1985-1989) 93
5. Lesotho University Teachers' and Researchers' Union v National University of Lesotho LAC (1995-1999) 661
6. Leuta v Tab Consult (Pty) Ltd LAC (1985-1989) 242

STATUTES

1. Central and Local Court Proclamation, No. 62 of 1938

BOOKS

1. Herbstein & Van Winsen on The Civil Practice of the Supreme Court of South Africa 4th Edition

[1] The applicant approached the High Court on the 3rd March, 2009 seeking leave to appeal the decision of the 1st respondent. He had successfully sued the 2nd and 3rd respondents ("the respondents") in the Salang Central Court for damages on the ground that the respondents had stolen his eighteen (18) sheep. In turn, the applicant's claim was upheld and the lower court ordered respondents to

compensate the applicant. However, the respondents then lodged an appeal with the 1st respondent's court, and the latter upheld the appeal.

[2] It is common cause that the time within which the applicant is required to apply for leave to appeal to this Court, had expired. Having noted this delay, the 1st respondent refused to accept the applicant's leave to appeal to the High Court. Consequently, the applicant launched proceedings in the High Court seeking among others, that, "*1st respondent be directed to accept my (applicant's) notice of leave to appeal to this Honourable Court and issue a certificate*"¹.

[3] While the application for leave to appeal to the High Court was pending, the 1st respondent delivered a ruling in which he refused to grant the applicant leave to appeal². It is upon this ruling that the applicant initiated the present proceedings. The applicant submits that he has a *prima facie* triable and justifiable case against the respondents, and further claims that the 1st respondent's decision to refuse to grant him leave to appeal to this Court was based on hearsay evidence.

[4] I now turn to the respondents' contentions to the above claims. It is noteworthy from the onset that only the 2nd respondent has opposed this application, whose answering affidavit was filed after a

¹ This prayer appears in the notice of motion filed under CIV/APN/232/07.

² A copy of the ruling is attached in the founding affidavit as annexure "JM2".

disturbingly long delay of more than three months³. The 3rd respondent only filed a notice of intention to oppose but never filed his answering affidavit. However, due to the unsophisticated nature of the parties' lifestyles, I feel inclined to condone the 2nd respondent's delay in this regard. Nonetheless, the 2nd respondent contends that the applicant should have initially filed with the 1st respondent, an application seeking condonation for the late application for a certificate.

- [5] The 2nd respondent strongly supports the 1st respondent's decision to deny the applicant leave to appeal to this Court, and further states that his decision was based on the fact that the applicant did not have any prospects of success on appeal. He denies that the 1st respondent relied on hearsay evidence since his witness was his chief who was fully conversant with the earmarks of the sheep in issue. He claims that the applicant failed to advance concrete reasons as to why he had applied for a certificate so late.
- [6] I pause here to observe some guiding principles in matters of this nature. It is now trite law that the benchmark, when considering whether to permit or refuse leave to appeal applications, is whether there is a reasonable prospect that the appellate court may come to a different conclusion⁴. **Herbstein & Van Winsen**⁵ state that leave to

³ His notice of intention to oppose was filed on the 16th March, 2009 while his opposing affidavit was filed on the 31st August 2009.

⁴ Our courts have termed this litmus test as, "reasonable prospects of success". See **Lesetla v Matso** LAC (2000-2004) 444; **Lesotho Union of Bank Employees, In re Rangoanana v Barclays Bank International Ltd** (1985-1989) 93; **Lesotho University Teachers' and Researchers' Union v National University of Lesotho** LAC (1995-1999) 661; and **Leuta v Tab Consult (Pty) Ltd** LAC (1985-1989) 242.

appeal will be granted when there is reasonable prospect of success on appeal. It therefore, follows that in order to gauge whether or not there are reasonable prospects of success, an analysis of the subject matter, which emanates from the proceedings in the court *a quo*, is inevitable.

- [7] The prospect of success or otherwise of the applicant's case on further appeal can thus be gleaned from examining the applicant's grounds of appeal, which grounds were filed in the 1st respondent's court⁶. These grounds are however not exhaustive, the 2nd respondent's response, together with the judgment of the 1st respondent, are further important for purposes of the present inquiry⁷. The applicant had couched his grounds of appeal in the following manner:

“NOTICE OF LEAVE TO APPEAL

*KINDLY TAKE NOTICE THAT Applicant herein applies for condonation and issuance of a certificate by the Learned Judicial Commissioner pursuant to **section 28 of the Central and Local Court Proclamation No. 62 of 1938** in order to appeal against the judgment of the Learned Judicial Commissioner in **JC 222/04** on the following grounds;*

1

The Learned Judicial Commissioner erred and misdirected himself by upholding the appeal where first Respondent's case herein was based on hearsay evidence.

⁵ On The Civil Practice of the Supreme Court of South Africa 4th Edition

⁶ The grounds are attached to the applicant's founding affidavit as annexure “**JM1**”.

⁷ The 1st respondent's judgment is attached to the 2nd respondent's opposing affidavit and marked annexure “**A**”.

The Learned Judicial Commissioner erred and misdirected himself in holding that there ought to have been an inspection in loco where there was clear evidence that Applicant's sheep were found among the sheep of Respondents and twelve sheep were missing. The parties had rival claims to them. So an inspection in loco, which is not compulsory, was unnecessary.

The Learned Judicial Commissioner erred in law and misdirected himself by missing the basic legal principle that where property of someone has been stolen the owner has a right to claim damages against the person who has stolen such property.

The Learned Judicial Commissioner erred in law and misdirected himself by entertaining an appeal of second Respondent where the second Respondent did not file any grounds of appeal.

Appellant reserves the right to add more grounds of appeal if occasion demands upon notice to the other side."

- [8] I now turn to examine the applicant's grounds of appeal in more detail. It is important to note in passing that, the point raised by the 2nd respondent to the effect that the applicant failed to apply for

condonation for late filing of his appeal, lacks merit. In turn, it is quite evident from the above grounds of appeal that the applicant had

indeed covered that aspect, in particular, in the first sentence of his notice of leave to appeal.

- [9] The ground which relates to the 1st respondent's reliance on hearsay evidence is somewhat not easy to assess without the benefit of perusing the record of the trial court proceedings. Nevertheless, it is common cause that the applicant's six (6) sheep were indeed found amongst the respondents' sheep. On this point, the 1st respondent held that the applicant is barred from claiming damages from the respondents because the other twelve (12) sheep were missing. I however find the opposite to be true.
- [10] The allegations that the applicant's six (6) sheep were found among the respondents' sheep appear in both the 1st respondent's judgment and in paragraphs two (2) and three (3) of the applicant's notice of leave to appeal. This is a clear misconception of the law. I am thus satisfied that these grounds of appeal are sufficient to render the applicant's case as having some prospect of success on appeal.

[11] The application for leave to appeal to this Court is therefore granted with costs.

L. CHAKA-MAKHOOANE
JUDGE

For applicant: Mr. Ntlhoki

No appearance for the respondents