

**IN THE HIGH COURT OF LESOTHO**

Held in Maseru

**CIV/APN/0055b/2023**

In the matter between:

**THABO MOTOKO**

**1<sup>ST</sup> APPLICANT**

**DR KAMOHO MATLAMA**

**2<sup>ND</sup> APPLICANT**

**ADV. BERENG MAKOTOKO**

**3<sup>RD</sup> APPLICANT**

**MASEKHOBE S. MOHOLOBELA**

**4<sup>TH</sup> APPLICANT**

**MATELA THABANE**

**5<sup>TH</sup> APPLICANT**

**AND**

**PRIME MINISTER OF LESOTHO**

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

**ATTORNEY GENERAL**

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

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

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Neutral Citation: Motoko & Others vs Prime Minister of Lesotho and Another  
[2023] LSHC 251 Civ (29 December 2023)

**Coram** : Hon. Justice Keketso L. Moahloli  
**Heard** : 17 May 2023  
**Date of order** : 17 May 2023  
**Date of written reasons** : 29 December 2023

## **SUMMARY**

*Civil Procedure – Application for leave to appeal an interlocutory order of the court – Whether leave to appeal should be sought in the Court of Appeal or the High Court which issued the order – Section 16 (1)(b) of the Court of Appeal Act No.10 of 1978 stipulates that an appeal against an interlocutory order of this Court may only be by leave of the Court of Appeal itself*

## **ANNOTATIONS**

### **CASES**

*Bedco v Khuele [1987] LSHC 58 (04 June 1987)*  
*DPP v Ramoepana [2021] LSCA 25 (14 May 2021)*  
*Lelimo v Letsie & Ors LAC (2011-2012) 44*  
*Lesotho Millenium Development Agency v Pressed In Time (Pty) Ltd [2019] LSCA 57 (01 November 2019)*  
*Mafeteng Property Group (Pty) Ltd v Maphathe [2022] LSCA 64 (11 November 2022)*  
*Makape v Metropolitan Homes Trust Life (Pty) Ltd LAC (1990-1994) 137*  
*Makhanya v Pheko [2012] LSHC 2 (09 February 2012)*  
*Makotoko v Mphane LAC (1990-1994) 397*  
*MEC for Social Development v Mdodisa 2010 (6) SA 415 (SCA)*  
*Metsing v DPP [2021] LSCA 21 (14 May 2021)*  
*Mphalane v Phori LAC (2000-2004) 49*

### **STATUTES**

*Court of Appeal Act No.10 of 1978*

## **MOAHLOLI, J**

### **Introduction**

[1] This is an application for leave to appeal against the orders I issued on 30 March and 5 May 2023. It was brought on an urgent basis and served upon the respondents at 15:55 on 15 May 2023 for hearing at 09:30 on 17 May 2023. The respondents delivered a notice of intention to oppose and an answering affidavit on 17 May 2023.

### **Background to the application**

[2] On 30 March 2023 after being allocated this matter and a similar CIV/APN/0061/2023, I issued the following directions *ex parte*:

- (1) *Respondents to file answering affidavits by 31 March 2023;*
- (2) *Applicants to reply by 11 April and file heads by 17 April 2023;*
- (3) *Respondents to file heads by 20 April 2023;*
- (4) *Matter postponed to 28 April 2023 for argument.*

[3] My order was a sequel to the order issued the previous day (29 March 2023) by my learned sister Madam Justice Makhetha, upon relinquishing handling this matter and CIV/APN/0061/2023. She had made her order after discussions with counsel for applicants and respondents (Adv C. Lephuthing and Adv D Cooke, respectively). Justice Makhetha by consent of all parties ordered as follows:

*“(1) The two applications are referred to allocation for the hearing of the main reliefs.*

*(2) The two applications are postponed to 30 March 2023*

*for the parties to appear before the substantive Judge.”*

**[4]** On the appointed day of hearing (28 April 2023), I instead heard oral submissions on an interlocutory filed on an urgent basis two days earlier on 26 April 2023. In that application the applicants sought orders, *inter alia* –

*“2...that the hearing date of 28 April 2023 was unilaterally obtained before the pleadings could be closed in the matter contrary to the Rules of this... Court;*

*3...that the affidavit of Hon. Ramoeletsi jurat 3<sup>rd</sup> April 2023 be regarded as an irregular or improper step or proceeding;*

*4...striking out the defense (sic) of the Crown (sic) as projected in the impugned affidavit in opposition to the substantive reliefs sought by Applicants.”*

[5] The Respondents opposed the interlocutory application, and filed extensive answering affidavits as well as heads of argument within the two days allowed by Applicants.

[6] On 5 May 2023 I delivered a detailed, reasoned decision to the following effect –

*“Finding*

*[16] For the above reasons I find that-*

- 1. Respondents have not taken any irregular or improper step.*
- 2. Consequently applicants were not justified to ignore and defy the court order of 30 March 2023.*
- 3. Applicants have failed to make a case for the defence to be struck off.*
- 4. Costs must follow the result.*

*Order*

*[17] In the premises, the application is dismissed with costs.”*

[7] It is against this interlocutory order and my directions set out in paragraph 2 above that the applicants are now seeking leave of this Court to appeal to the Court of Appeal.

**Relief Sought**

[8] Applicants have applied for an order in the following terms:

“1. ...

2. ...

3. *Applicants granted (sic) leave to appeal the interim orders of this Honourable Court dated 30<sup>th</sup> March 2023 and 5<sup>th</sup> May 2023 for adjudication of a host of grounds of appeal filed by the Applicants.*

4. *The Respondents be directed to pay costs in the event of opposition.*

5. *Applicants be granted further and/or alternative relief as the court may deem fit.”*

## **The Legal Framework**

[9] Civil appeals from the High Court exercising its original jurisdiction are regulated by section 16 of the Court of Appeal Act No.10 of 1978. It enacts the following:

“16. Right to appeal in civil cases

(1) *An appeal shall lie to the court –*

*(a) from all final judgments of the High Court;*

*(b) by leave of the Court from an interlocutory order, an order made ex parte or an order as to costs only.*

(2) *The rights of appeal given by subsection (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court.”*

[10] Section 2 of the Act states:

*“2. Interpretation*

*In this Act –*

*“the court” means the Court of Appeal*

*“judgment” means decree, order, conviction, sentence  
and decision”*

**The Applicants’ case**

[11] The applicants claim that they noted an appeal against my interlocutory order of 5 May 2023 on the very day it was handed down. They claim that this order is final because in their own words, “it is part of the record which must be acted upon.” They also claim that the order is appealable because I granted orders not prayed for.

[12] I will not get into the question whether the order I granted on 5 May 2023, declaring that the filing of an additional answering affidavit by the respondents to answer to the merits was not an irregular or improper step or proceeding, is appealable or not. The only matter that requires to be determined in the present application is whether leave to appeal against that interlocutory order ought to be sought from this Court or from the Court of Appeal.

[13] When I asked applicants’ counsel, Adv Lephuthing, what rule of court he was relying upon for his request for leave to appeal, he replied that he was

asking for leave on the basis of the common law. And when I asked for legal authorities for this, he referred to me to the cases of ***Makhanya v Pheko***, ***MEC for Social Development v Mdodisa***, and ***DPP v Ramoepana***. The full citations of these cases, as well as of other judgments referred to in this judgment, may be found in the “Annotations” section at page 2 supra.

- [14] The case of ***Makhanya v Pheko*** is not authority for what Adv Lephuthing claims it is, viz. the so-called common law leave to appeal. On the contrary the case unequivocally confirms respondents’ case that it is incompetent for a prospective appellant to file an appeal against an interlocutory order without leave of the Court of Appeal [at para 4-7].
- [15] ***MEC Social Development v Mdodisa*** is totally irrelevant. The case does not even remotely relate to the issue under discussion. Adv Lephuthing deliberately misled the Court by citing these two cases as authorities for his legal proposition. The ***Ramoepana*** case is not authority for this proposition either. I will discuss it shortly.

### **The Respondents’ case**

- [16] The Respondents’ counsel, Adv Cooke, has referred me to a number of decisions of our highest court in which it was authoritatively decided that leave to appeal against an interlocutory order of the High Court, as clearly stipulated in section 16 (1) (b) of the Court of Appeal Act, must be sought not from this Court but from the apex court itself. This is the position also with other appeals foreshadowed in section 16 (1) (b), namely appeals from an order made *ex parte* or an order as to costs only.



- [17] Adv Cooke referred me, for instance, to ***Makotoko v Mphane*** (1992), where the Honourable Mahomed P (at p.398A-C) held that an appeal against a costs order only is not properly before the Court of Appeal where the appellants have not sought and obtained leave to appeal as required by section 16 (1) (b).
- [18] Adv Cooke also referred me to ***Makape v Metropolitan Homes Trust Life*** (1991) where the learned President of the Court of Appeal (Mahomed P), at page 139B-H held that in terms of section 16(1) (b) of the Court of Appeal Act 1978, a litigant has no right to pursue a purported appeal against an interlocutory order of the High Court without obtaining leave of the Court of Appeal. The learned President aptly described an interlocutory order as one which did not have the effect of a final judgment because it left the issues in the main action undisturbed.
- [19] Adv Cooke also relied on ***Lesotho Millenium Development Agency v Pressed In Time (Pty) Ltd*** (2019) in which the Honourable Damaseb AJA, at paragraphs 18 and 26, confirmed that the Court of Appeal has no jurisdiction to entertain an appeal against an order of costs only unless the appellant has obtained leave to pursue its appeal from it. Respondents' counsel also cited ***Metsing & another v Director of Public Prosecutions & others*** (2021) in which the full bench of the apex court reiterated the legal position stated in the other judgments cited by Adv Cooke as follows:

*“[43] There is another reason why this appeal should be struck off the roll. The order made by the High Court was interlocutory because it did not have the effect of*

*disposing of the substantive issues before the court, namely, the issues raised in the Notice of Motion. Further, in terms of section 16 of the Court of Appeal Act, leave of the Court of Appeal against interlocutory orders is required. This has not been sought in casu. This means that there is presently no appeal pending before the Court of Appeal. It follows therefore that, this supposed appeal has not been properly instituted and must be struck off the roll. The tenor of section 16 is that there should be no impermissible intrusion by the Court of Appeal on matters that have not been finalised in lower courts, unless the circumstances warrant such intrusion.*

*[44]... Two issues must be clarified at this stage. First, in terms of section 16 (1) (a) of the Court of Appeal Act, 1978, this Court has jurisdiction to hear appeals from all final judgments of the High Court. The order (judgment) appealed against is not a final judgment. In terms of section 16 (1) (b) of the same Act, an appeal lies to the Court by leave of the court from an interlocutory order, an order made ex parte or an order as to costs only. There is no application for such leave before us. This court, therefore has no jurisdiction to entertain this appeal.”*

[20] Lastly, Adv Cooke referred the Court to the case of ***Mafeteng Property Group (Pty) Ltd v Maphathe (2022)*** in which the Honourable Justice of Appeal Damaseb, at paragraph 9 confirmed that appeals against interlocutory orders of the High Court may only be appealed with leave of the Court of Appeal, and at paragraph 11 to 16 set out the circumstances under which such leave could be granted.

[21] In my research I came across the case of ***Mphalane v Phori (2000)*** wherein the Court of Appeal, per the Honourable Ramodibedi JA (as he was then) - (i) sets out the test for determining whether a preparatory or procedural order is purely interlocutory or not; and (ii) confirms the rule that appellants against an interlocutory order will not be properly before the Court of Appeal unless they have obtained leave of the appellate court.

[22] The only case that departs from the position held by the plethora of Court of Appeal judgments referred to above is ***Lelimo v Letsie (2011)***, where the Honourable Scott JA (at para 12) said the following:

*“[12] Neither ruling amounted to a final judgment within the meaning of s 16 (1) (a) of the Court of Appeal Act, 10 of 1978 and was clearly no more than an interlocutory order within the meaning of s 16 (1) (b) of the Act. The leave of the court a quo was accordingly a prerequisite for an appeal to this Court. [my emphasis]*

[23] The judgment of the full bench of the apex court in ***DPP v Ramoepana (2021)***, at paragraphs 31 to 33 is also important on the question of leave to

appeal against interlocutory orders. A careful reading of these paragraphs, in my view, shows that the judgment does not really detract from the stance of the overwhelming majority of Court of Appeal judgments quoted above. The court decided that because of the centrality and overriding importance of the issue of jurisdiction in the particular circumstances of that case, the appeal was properly before it.

[24] From the above analysis of the applicable caselaw, it is crystal clear that the appellants' insistence on seeking leave to appeal from this court was misguided, spurious and never stood the slightest chance of succeeding. Their legal representatives resorted to sophistry in an endeavour to create an impression that their case was within the purview of *DPP v Ramoepana*. That is why for the first time they started labelling the orders they are appealing as "interim" orders while it is clear to all and sundry that they are not, but purely interlocutory orders. That is why they have attempted to raise some contrived, garbled jurisdictional objections. This sticks out like a sore thumb when one reads through their "Certificate of Urgency", "Notion of Motion" and "Founding Affidavit".

[25] In my view this application, which was deliberately brought against the overwhelming weight of legal authority from the apex court in this jurisdiction, could never have been in good faith. It is significant that it was filed only one day before the scheduled date for hearing of the merits. It is a textbook example of dilatory tactics and patent abuse of process.

[26] I agree with the remarks of the Honourable Sir Peter Allen J in *Bedco v Khuele* (1987), that where an appeal is lodged in the Court of Appeal against

an interlocutory order, without prior leave of that Court, such premature notice of appeal is meaningless and it can have no influence upon this Courts' actions.

[27] It was for the above reasons that I dismissed this application.

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**KEKETSO L. MOAHLOLI**  
**JUDGE OF THE HIGH COURT**

**Appearances:**

Adv CJ Lephuthing, instructed by T. Maieane & Co, for Applicants

Adv D. Cooke, instructed by Webber Newdigate Attorneys, for Respondents