

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/A/0007/2022

CRI/CPA/41/2020

In the matter between

RETS'ELISITSOE THOAHLANE

1ST APPLICANT

TUMO THOAHLANE

2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

Neutral Citation: Rets'elisitsoe Thoahlane v Tumo Thoahlane [2024] LSHC 159 Civ (10th June 2024)

CORAM : BANYANE J

HEARD : 25 APRIL 2024

DELIVERED : 10 JUNE 2024

Summary

Condonation for late filing of an appeal and leave to appeal-applicable principles restated-case raising important questions-condonation and leave to appeal granted.

ANNOTATIONS

Cited Cases

LESOTHO:

1. Fako v Director of Public Prosecutions (CRI/T/4/18)
2. Moosa and others v Lesotho Revenue authority C of A(CIV) 2/2014
3. Koaho v Solicitor General LAC (1980-1984) 35
4. Maphathe v Executors of the Estate of Maphathe and others LAC (2013-2014) 219
5. Smith v Tsepong (pty) Ltd C of A (CIV) 22 of 2020
6. Bokang Moliko v DPP C of A (CRI) 2 of 2014
7. Makoala C of A (CRI) 7 of 1995
8. Lesetla v Matsoso LAC (2000–2004) 444
9. Lesotho University Teachers’ and Researchers’ Union v National University of Lesotho LAC (1995–1999) 661
10. Leuta v Tab Consult (pty) Ltd LAC (1985 – 1989) 242
11. Inne Rangoanana v Barclays Bank International Ltd (1985-1989) 93

SOUTH AFRICA

1. Federated Employers Fire and General Insurance co Ltd & another v Mckenzie 1969 (3) SA 360 (A)
2. Chetty v Law society Transvaal 1985 (2) SA 756 (A) at 765
3. Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)
4. S v Smith 2012 (1) SA CR 567 (SCA)
5. Payayiotou and others v S (CC26/2016) [2018] ZAECPEHC 21

JUDGMENT

BANYANE J

Introduction

[1] This is an opposed application for condonation of late noting of an appeal and for leave to appeal a judgment granted by this court exercising its appellate criminal jurisdiction in CRI/A/0007/2022 on 12 May 2023. I granted the application on 10th June 2024. These are the reasons for this order.

Background facts

[2] The brief background facts of the application may be summarized as follows. The appellants are father and son. They were charged and convicted of sexual offences by the Children's Court sometime in 2020. Dissatisfied with their conviction and sentence, they appealed against the decision to this court based on several grounds. For purposes of the present application, I highlight only two of them. The first ground of appeal was that the second appellant, Tumo was wrongly convicted under section 9 of the Sexual Offences Act, 2003 because the evidence adduced revealed a single act of sexual intercourse against the complainant while section 9 envisages two or more acts to constitute persistent sexual abuse. The second ground of appeal was lack of jurisdiction which was raised for the first time on appeal.

[3] This Court upheld the appellants' argument that the Children's Court lacks jurisdiction to try adults and offences not listed in the schedule of the **Children's Protection and Welfare Act 2011**(CPWA). Despite this finding, the Court concluded that absence of jurisdiction cannot invalidate the proceedings and consequently entitle the appellants to an acquittal because firstly the point was not raised as of plea in terms of section 162 of the **Criminal Procedure and Evidence Act 1981**(CPEA), nor did the appellants apply for transfer of their case to a court having jurisdiction as permitted by section 146 of the CPEA. Their failure to adopt either route does not, on the reading of section 146 (3) of the CPEA, render the judgment of the

Children’s Court void. On the contrary, the section creates an exception to the rule that a judgment issued by a court having no jurisdiction over a matter is void.

[4] This Court further concluded that the 2nd appellant was not entitled to an acquittal merely because the evidence established a single act of sexual intercourse.

[5] It is against these two findings that the appellants seek to note a further appeal to the Court of Appeal. Section 8 of the **Court of Appeal Act 2006** governs criminal appeals. It reads as follows:

“8(1) any party to an appeal to the High Court may appeal to the Court against the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence.”

[6] A question of law is a question that must be answered by applying the relevant legal principles to the interpretation of the law, whereas a question of fact is answered by reference to facts and weighing the strength of evidence as well as inferences arising from those facts. Answers to questions of fact are generally expressed in terms of broad legal principles. They can be applied in many situations rather than depending on particular circumstances or factual situations.¹

¹ *Fako v Director of Public Prosecutions* (CRI/T/4/18), [2020] LSHC 20 (29 January 2020) para 15

The proper approach in a condonation application

[7] I turn to consider the reliefs sought in the present matter. It is appropriate to start with the condonation application. It is well-established that condonation is not a right but an indulgence that the court grants on good cause.² The Court considering an application for condonation must exercise its discretion judicially upon consideration of all the relevant factors.³ Factors that usually weigh with the court include the degree of lateness or non-compliance, the adequacy of the reasons advanced for such delay, the importance of the case, the convenience of the court, the avoidance of unnecessary delay in the administration of justice as well as the applicant's prospects of success. These factors are ordinarily interrelated and are not to be considered

² Moosa and others v Lesotho Revenue Authority C of A(CIV) 2/2014, para 18-19

³ Koaho v Solicitor General LAC (1980-1984) 35 at 36-37, Maphathe v Executors of the Estate of Maphathe and others LAC (2013-2014) 219

in isolation but cumulatively. Where the inordinate delay is not satisfactorily explained, the applicant's prospects of success are immaterial.⁴

[8] A party seeking condonation must apply for such as soon as non-compliance with the Rules of Court is apparent. The party must make a full and frank disclosure of all the relevant facts that led to the non-compliance, must explain every period of the delay and also set out the prospects of success.⁵

[9] In **Darries v Sheriff, Magistrate's Court, Wynberg and another** (cited with approval in **Smith v T'sepong**) Plewman JA stated the position as follows:

“Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation not only of, for example, the delay in noting an appeal, but also where this is the case, any delay in seeking condonation must be given. An appellant should whenever he realizes that he has not complied with a rule of the court apply for condonation as soon as possible. Nor should it be simply assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general, important though not decisive. When an application is made for condonation, it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success, which is but one of the factors relevant to

⁴ Koaho v Solicitor General LAC (supra), Smith v Tsepong (pty)Ltd, C of A(CIV) 22 of 2020, Maphathe (supra at 219), Federated Employers Fire and General Insurance co Ltd & another v Mckenzie 1969 (3) SA 360 (A) at 362 G-H. See also Chetty v Law society Transvaal 1985 (2) SA 756 (A) at 765.

⁵ Moosa v LRA (supra), Smith v Tsepong (pty) Ltd, (Supra)

the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success.”⁶ (underlining mine)

[10] In Uitenhage Transitional Local Council v South African Revenue Service⁷ the Court said:

“...Condonation is not to be had merely for the asking; a full, detailed, and accurate account of the causes of the delay and their effect, must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”⁸

[11] The appellants advance the following reasons for delay in noting the appeal. The first is that although the order of this court was issued on 12 April 2023, they received copies of the Judgment on 12 May 2023.

[12] The second is that following their conviction and incarceration, the 1st appellant was dismissed from his employment in 2022. Resultantly, he has no source of income, neither does his wife. In the circumstances he was forced to seek financial

⁶ 1998(3) SA 34(SCA) at 40H-41E

⁷ 2004(1) SA 292(SCA), para 6

⁸ Para 6 of the judgment

assistance from his brother to pay the legal fees for their appeal. Moreover, his wife frustrated attempts to sell some household property in order to pay the required fees.

[13] The Crown counter-argued that financial difficulty is not a valid ground or excuse for the delay in noting the appeal because Legal Aid Services are available to indigent litigants. For this reason, the explanation for the delay is not reasonable. It further asserts that the delay is inordinate.

[14] It is common cause that the order of this court was issued a year ago, in April 2023 but the parties received written reasons in May 2023. The delay in seeking condonation and noting the appeal is therefore considerable. Despite this degree of lateness, I am persuaded that explanation for delay is adequate in the circumstances because this is undisputed that the appellants had been incarcerated since their conviction and that the 1st appellant was dismissed from work after the conviction. To my mind, their financial situation became an obstacle for acting swiftly in the circumstances.

[15] Moreover, it cannot be seriously disputed that this appeal raises questions of importance that affect, not only the appellants, but also other accused persons who face sexual offences charges against minors. The jurisdictional competence of

the Children’s Court in such matters is a question worthy of further consideration by the apex Court. Upon consideration of all these factors, the late noting of the appeal is condoned.

Leave to appeal

[16] It is well established that the test in an application for leave to appeal is whether the applicant has reasonable prospects of success on appeal.⁹

[17] In **S v Smith** 2012 (1) SACR 567 (SCA), the Court said the following in para 7;

“What the test of reasonable prospects of success postulated is a dispassionate decision, based on the facts and the law, that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

⁹ see *Bokang Moliko v DPP C of A* (CRI) No.2/14, *Makoala C of A* (CRI) 7 of 1995), *Lesetla v Matsoso* LAC (2000 – 2004) 444; *Inne Rangoanana v Barclays Bank International Ltd* (1985-1989) 93; *Lesotho University Teachers’ and Researchers’ Union v National University of Lesotho* LAC (1995 – 1999) 661; *Leuta v Tab Consult (pty) Ltd* LAC (1985 – 1989) 242.

[18] I turn now to examine the appellant's grounds of appeal to determine whether the appellants have reasonable prospects of success in the proposed appeal or put differently, whether the appellate court may come to a different conclusion.

[19] The appellants assert that the appeal before this Court ought to have succeeded because this court decided that the children's Court lacks jurisdiction to hear the case. It follows, in their view, that the proceedings before the children's Court and judgment culminating therefrom are a nullity. They argued that the Court of Appeal might come to a different conclusion on this issue.

[20] The second prong of their complaint relates to the conviction of the second appellant under section 9 of the **Sexual Offences Act, 2003** while the evidence established a single act of intercourse. The Section reads as follows:

Persistent sexual abuse of a child

9. (1) "A person who persistently abuses a child sexually commits an offence.

(2) A person who fails to report a sexual act referred to in subsection (1) commits an offence.

(3) For the purposes of this section, a person shall be taken to have sexually abused a child persistently if that person has engaged in a sexual act in relation to a child on two or more occasions."

[21] Counsel for the Crown conversely argued that the appellants failed to delineate their grounds of appeal to enable the court to assess their prospects of success. To establish prospects of success, the appellants must clearly, succinctly, and unambiguously delineate questions of fact from those of law to enable the court to determine whether they are sustainable.

[22] According to Counsel for the Crown, the appellants failed to delineate questions of law from the questions of fact because their challenge seems to be directed at evidential matters.

[23] The Crown is correct in submitting that grounds upon which an application for leave is predicated must succinctly, and unambiguously delineate questions of fact from those of law to enable both the Crown and the court to determine its parameters.¹⁰

[24] Although the grounds of appeal are not eloquently expressed, it seems that they involve questions of law. I say so because firstly the jurisdictional issue is undoubtedly a question of law. Secondly, the appellants' complaint is based on the application of the law to the evidence adduced. In this regard, the appellants are correct that the evidence adduced in the Court below revealed that the 2nd appellant committed a single act of sexual intercourse with the victim. However, this Court held

¹⁰ Payayiotou and others v S (CC26/2016) [2018] ZAECPEHC 21

that this fact alone does not entitle the 2nd appellant to an acquittal. Perhaps the Appeal Court might find differently that in such circumstances, the second appellant ought not have been convicted.

Disposal

[25] For reasons set out above, the application must succeed. Leave is therefore granted on the following questions of law:

- a) Whether failure to plead lack of jurisdiction under section 162 of the **CPEA** or failure to apply for transfer of the matter to a court having jurisdiction affects validity of the judgment of the children's Court.
- b) Whether section 146 (3) of CPEA overrides the common law rule that a judgment issued by a court having no jurisdiction is void where the accused failed to apply for transfer of his case before commencement of trial.
- c) Whether an accused person is entitled to an acquittal where charged under section 9 of the Sexual offences Act, 2003 but the evidence established a single act of sexual intercourse.

P. BANYANE
JUDGE

For Applicants : Advocate LD Molapo

For Respondent : Advocate Rafoneke