

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO. 57/2016

LC/APN/47/2013

In the matter between:

BAROLONG MOLISE

1ST APPELLANT

EXR COMPANY

2ND APPELLANT

And

ZION CHRISTIAN CHURCH

RESPONDENT

CORAM: MUSONDA, AJA
CHINHENGO, AJA
MTSHIYA, AJA

HEARD : 29 NOVEMBER 2018

DELIVERED : 7 DECEMBER 2018

SUMMARY

Failure to comply with mandatory Appeal Court Rules of 2006 namely Sections 5 (1) and 8 (1) matter struck off the roll.

JUDGMENT

MTSHIYA, AJA

[1] On 30 November 2016 appellants noted an appeal in this Court against a decision of the Land Court delivered on 22 November 2016.

[2] The dispute between the parties was over a piece of land allegedly allocated to the respondent in 1980. The respondent said it had been in peaceful occupation of the piece of land from 1980 until 2010 when the respondent, whom it had given the right of passage, suddenly started claiming ownership of the land. The matter went through a full trial in the Land Court resulting in the following order being granted in favour of the respondent:-

- a) *The respondents are interdicted from building on and fencing the applicant's site;*
- b) *The agreement between the applicant and the 1st respondent that the latter temporarily occupy or use the former's site is hereby cancelled;*
- c) *The 1st respondent is directed to remove the fence from, and vacate the portion of the applicant's site that it has already fenced and occupied.*
- d) *The applicant is hereby declared the rightful and lawful owner, and occupant of the site in issue;*
- e) *The 1st respondent is ordered to pay the costs of suit."*

[3] The appellant is now challenging the decision of the Land Court.

[4] The appeal was set down for hearing on 29 November 2018. At the commencement of the hearing, the respondent through its Counsel, raised two (2) points *in limine*, namely that:-

- a) The appeal had, in terms of Rule 5 (3) of the Court of Appeal Rules 2006, (the Rules) since lapsed due to failure on the part of the appellants to file the record of proceedings in accordance with Rule 5 (1) of the Rules; and
- b) Non-payment of Security for costs in terms of Rule 8 (1) of the Rules.

The respondent submitted that there had been no application for condonation in respect of the breaches.

[5] Upon listening to arguments from the parties, we upheld the points *in limine* and struck off the matter from the roll with costs. We then indicated that our reasons would be delivered on 7 December 2018. We therefore give our reasons here below.

[6] Sub paragraphs 1, 2, and 3 of Rule 5 of the Rules provide as follows:-

“(1) The appellant shall, in every appeal, not later than three months after notice of appeal has been filed or the certificate of the Judge of High Court has been filed, lodge with the Registrar seven copies of the record of the proceedings of the High Court and serve a copy of such record on each of respondents:

Provided that by consent of all parties portions of the record which will not affect the result of the appeal may be omitted. The Court may, however, order that the full record shall be available:

Provided further that if the same attorney represents more than one respondent, it shall suffice for one copy of the record to be served on such attorney.

(2) The time limit for lodging of the record may be extended by written agreement of all the parties to the appeal.

(3) If the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse.”

[7] The above Rule 5 (3) is couched in mandatory terms and it was not in dispute that the appellants had not complied with Rule 5 (1) for a period of almost two (2) years. Although not disputing the failure to comply, Advocate *Setlojoane* for the appellants, initially responded by stating that, in raising the issues, Advocate *Lesaoana* had ambushed him. He, for some unknown reason, argued that he should have been put on notice. He then informed the court that he had proceeded to file the record upon being directed to do so by the President of the court. It, however, turned out that he had misunderstood the general directive of the President, which, in the main, was aimed at ensuring that all matters on the roll should be heard during this session. That was not a suggestion that the Rules should not be observed.

[8] For her part, Advocate *Lesaoana* stated that, notwithstanding the fact that a roll call had been held on 19 November 2018, the appellants, knowing that the appeal had lapsed, had not bothered to make an application for reinstatement. She said since the date of the roll call, she had been calling upon the appellants to attend to the issue of the record. According to her, the full record was then only filed on 27 November 2016. She therefore prayed for the appeal to be truck off the roll.

Advocate *Setlojoane* then applied for a postponement so that he could then file an application for condonation. We rejected the application.

[8] With regard to the effect of breaches against the Rules in general, Rule 15 provides as follows:

- “1) *If an appellant breaches provisions of these Rules, his appeal may be struck off the roll.*
- 2) *The Court shall have a discretion to condone any breach on the application of the appellant.*
- 3) *Such application shall be by notice of motion delivered to the respondent and t the Registrar not less than seven days before the date of hearing.*
- 4) *Where the respondent consents to condonation, the application may be considered by a single Judge.*
- 5) *The Court, if it condones the breach, may order that the appellant shall comply with the rules breached within a specified time or may make any order which it deems just including any order as to costs.*
- 6) *The provisions of this Rule shall apply mutatis matandis to the appellant in a cross-appeal.*

- 7) *If the respondent on appeal breaches a provision of the Rules applicable to him he may be prevented from appearing to oppose the appeal:*

Provided that the Court shall have the same discretion to condone the breach as in the case of an appellant.

- 8) *The provisions of sub-rule (7) shall not apply to criminal appeals.*

- 9) *Where the respondent is prevented from opposing the appeal, the Court shall consider the merits of the appeal in the same way as if it were opposed and if it considers that the appeal has no merit it shall dismiss it and make such an order as to costs as it may think fit.”*

[9] Clearly, failure on the part of an appellant to take advantage of Rule 15 (2) above will definitely lead to the full enforcement of the breached Rules.

In casu a period of almost two (2) years, after the notice of appeal was filed, the full record was then only filed on 27 November 2018. There was no acceptable reason given for the delay and indeed no attempt was ever made to rectify the situation in terms of the enabling provisions of the Rules. We therefore found no basis for not upholding that point *in limine*. Rule 5 (1) was not complied with and therefore in terms of Rule 5 (3) the appeal had lapsed.

[10] In ***Mohapi v Sekasha C of A (CIV) No. 37.2014***, Mosito P, in a similar situation, remarked as follows:-

*“I find the following remarks by Plewman JA in **Darries v Sheriff, Magistrate’s Court, Wynberg, and Another 1998 (3) SA 34 (SCA) at p41-32** highly instructive and I have no hesitation in adopting them as reflecting the correct legal position in our jurisdiction as well:*

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 court apply for condonation as soon as possible... Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.”

[11] In the same judgment Mosito P said:-

*“This Court has in a number of its decisions, commented on the need to apply for condonation whenever it is realized that the rules of this court have been breached (see, for example, such cases as **Koaho v Solicitor-General 1980-1984 LAC 35; Rev. Father Khang v Bishop Mokuku and Others NNo 200-2004 LAC 600; CGM Industrial (Proprietary) Limited v Adelfang Computing-(Proprietary) Limited C of A (CIV) NO. 5/08; Neo Andreas Motake v Bereng Moqhoai C of A (CIV) NO. 5/2009** (and the case cited therein).”*

[12] Similar sentiments were expressed in ***Molise Transport and Plant Hire and Another v Mokoma C of A (CIV) No. 23/2015*** where Makara, AJA after striking off the appeal, had this in part to say:-

“....The breaches were in a nutshell described as indications of ineptitude with serious consequences. To demonstrate its displeasure, the court struck off the case from the roll and punished the attorney responsible for the breaches by ordering him to pay the costs de bonis proporis.

We are persuaded that the stated legal principles which this Court has maintained throughout in deciding the destiny of appeals where the breaches under consideration were committed, should be adhered to. This is intended to anchor professional standards and facilitate for expediency towards the conclusion of a case.”

[13] This court, as borne out by the above judgments, has taken a very strong view against the deliberate non-observance of its rules. That is the way to go in order to bring order to the system.

[14] With respect to the issue of security for costs Rule 8 (1) provides as follows:-

“Where the judgment appealed from in a civil matter has not been carried into execution by the respondent, the appellant shall, before lodging with the Registrar copies of the record, enter into security to the satisfaction of the Registrar for the respondent’s costs of the appeal.”

[15] My understanding of the above rule is that it is the crucial next step after filing a notice of appeal. It is also mandatory. Failure to comply with it, is in my view, fatal.

[16] Again as regard, the lapsing of the appeal, the appellants had no single reason to give for failure to comply with the rule, except to confuse costs granted in the court *a quo* with the “respondents’ costs of the appeal” i.e. the present appeal.

[17] The cases I have referred to above also deal with the issue of security for costs of appeal in this same manner and, as I have already said, the issue of security for costs is a pre-requisite for lodging an appeal record. There can be no appeal without the appeal record and therefore failure to comply with that rule is fatal.

There was again in this instance no application made to rectify the position.

[18] For the above reasons, we again upheld the second point *in limine*.

[19] Although we would have been inclined to order costs against the appellants on a higher scale, the respondent merely applied for the matter to be struck off the roll with costs.

[20] The above are our reasons for striking the appeal off the roll with costs on 29 November 2018.

N. T. MTSHIYA
ACTING JUDGE OF APPEAL

I agree:

DR P. MUSONDA
ACTING JUDGE OF APPEAL

I agree:

M. H. CHINHENGO
ACTING JUDGE OF APPEAL

For Appellants : Adv. R. D. Setlojoane
For Respondents : Adv. T. A. Lesaoana