



IN THE COURT OF APPEAL OF BOTSWANA HELD AT
GABORONE

CACGB-103-12
High Court Case No. CVHLB-001397-10

In the matter between:

AT & T MONNAKGOTLA TRANSPORT (PTY) LTD.
PHILLIP TUMELO

1st Applicant
2nd Applicant

and

RICHARD OSITANG

Respondent

Ms. M. D. Naicker with Mr. M. Maswabi
for the Applicants
Mr. C. Duncan for the Respondent

R U L I N G

LESETEDI J.A.:

1. The Applicants attempt to appeal the decision of the High Court delivered on the 26th September 2012 against them in favour of the Respondent did not commence on a a

misapprehension of the rules of this Court and the forms contained in the schedule of the rules were not only the plight that bedeviled the attempt.

2. The attempt commenced by way of grounds of appeal which were filed with the High Court on the 14th of November 2012. The filing of the grounds of appeal was a clear breach of Rule 11 of the High Court rules which requires an appeal to be instituted by way of a notice of appeal. Rule 12 of the High Court Rules goes on to stipulate what such notice of appeal shall set forth. Grounds of appeal are the one of the important components of such a notice.
3. The second blight in the effort to appeal the decision of the High Court was that these grounds of appeal were filed five days after the prescribed six-week period for the filing of a notice of appeal as required under Order 13(1) of the Court of Appeal Rules. No officer of the Court either at the Registry or otherwise was competent to allow the filing of the grounds of

appeal as a form of institution of an appeal let alone after the prescribed six-week period.

4. The attempt was made not only with a notice of opposition from the Respondent but also with a notice to raise points of law in objection on the two breaches referred to above.
5. In response the Applicants first tried to file a notice of appeal as a separate document around the 6th December 2012 but this effort was correctly rejected by the Registrar. It was then this application was launched.
6. The application too is bedeviled by a number of breaches of practice and procedural improprieties. Firstly, the application is supported by an affidavit deposed to by the Attorney of the firm purporting to represent the Applicants in this appeal. No confirmatory affidavits from any of the Applicants have been filed. Secondly, no power of attorney from any of the two Applicants have been filed by the said Attorneys. The need for the filing of a power of Attorney were pointed out by this Court in *Regardas v. Martins* 2002 (2) BLR 63 at 66. A power of

attorney is a warrant entitling a legal practitioner to institute proceedings in court on behalf of a party. It also constitutes a certificate of validation to the other side that indeed the party in whose name the proceedings are being brought as sanctioning the proceedings such that in event costs are granted the party can be able execute the costs order without a reasonable risk of the party in whose name the attorney has instituted the proceedings, denying liability on the ground of not having instituted or defended the proceedings.

7. In so far as the Applicants' Attorney having deposed to the affidavit in support to the application for extension of the time period for lodging the appeal is concerned, it has been argued by the Respondent's Counsel and quite properly that this was an improper step on the part of the Applicants' Attorneys in the absence of any explanation as to why the Applicants themselves or their representatives (in the case of first Applicant) could not have deposed to the affidavit let alone deposing to a confirmatory affidavit to show that indeed it was the Applicants and not their Attorneys who were the litigants.

The Courts in this jurisdiction have stated on several occasions the undesirability of Counsel taking the cadger on behalf of their clients and descending into the arena as witnesses of fact instead of remaining on their pedestal of being legal representatives and officers of the court. See

There may be those rare occasions when certain particular facts may be within the peculiar knowledge of the practitioner and not the litigant. In such a situation the attorney may in such situation file a confirmatory affidavit to that of the litigant in so far as that narrow area is concerned. In the present case, the Applicants' Attorney's affidavits (both the founding affidavit in respect of the applicant and the replying affidavit) stand on their own without confirmation or support from the litigants. The affidavit covers not only the reason why there was a delay in the institution of a proper notice of appeal, at least timeously, and the prospects of success on appeal. It is unacceptable for a legal practitioner to depose to an affidavit of prospects of success on the merits of an appeal by his client when he is not the litigant. The Court can only condone such conduct in exceptional circumstances where a

good cause is shown why the litigant itself cannot depose to such an affidavit.

8. In the present case, no explanation was rendered why the Applicants' Attorney had to depose to the two sets of affidavits without the parties themselves being part of the process. In the absence of such explanation, the court will not condone such conduct.
9. Turning back to the issue of absence of a power of attorney, although the Court does not have a discretion to condone its non-filing, it is a discretion that is to be exercised on a conspectus of facts and circumstances placed before it explaining such non-compliance. A circumstance that comes to mind is where the party c... of wellness or unavailability which is excusable, was unable to depose to the power of attorney in time for the proceedings to be launched. In such a case, the Court can condone the breach and put the litigant on terms as to when such power of attorney should be filed. In the present case, no explanation has been rendered as to

why such a power of attorney was not filed by either of the two Applicants. The first Applicant is a body corporate with its office in Gaborone. The Applicants' Attorneys have their office in Gaborone and at the time of the filing of this application the seat of the Court of Appeal had moved to Gaborone. In the absence of the necessary facts being placed before the Court, the Court cannot meaningfully exercise its discretionary power judicially. Failure to exercise its discretionary power judicially amounts to a misdirection.

10. As this application was argued both on the legal points raised by the Respondent and by the Court as well as on the merits, it is appropriate to briefly deal with the question of whether the Applicants had they complied with the requirements referred to above, would have been able to satisfy the Court on the requirements of Rule 8(2) of the Court of Appeal Rules. That rule requires that an application for extension of time shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to

