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The Systematic Failure Surrounding Records of Proceedings in the Lesotho Court of Appeal

Bokang Moshoeshoe*, Monaheng Edward Seeiso Rasekoai** and Mathalea Ntaote***

Abstract

The integrity of the appellate process hinges on the timely availability of a complete and accurate record of proceedings. Yet, in Lesotho, the preparation and filing of these records in the Court of Appeal has been marred by chronic dysfunction for decades. This article interrogates the enduring and institutionalised nature of this problem, one that has persisted unabated since the 1970s and continues to undermine justice to this day. Drawing on jurisprudence, historical analysis and procedural rules, the article exposes the systemic failures that have allowed this problem to fester at the very apex of the judiciary in the country. It attributes shared responsibility to litigants, legal representatives, judges of the High Court, registrars and other relevant court officers, all of whom have contributed, by action or omission, to a pattern of procedural decay. The result is delayed justice, denied appeals, and a crisis of confidence in the superior courts of record. This is more than a technical failing; it is a constitutional scandal. By critically examining how record mismanagement compromises the right to a fair hearing and erodes the authority of the appellate court, this article calls for urgent and radical reform. It makes several key recommendations to address the failures on the part of legal representatives, litigants, court officers and judges – all aimed at uprooting this longstanding plague, and ensuring the integrity, efficiency and accountability of the record-keeping process.

Keywords

record of proceedings, Court of Appeal, fair trial, justice, Rules, punitive costs

1. Introduction

In a legal system, the timely and accurate filing of complete appeal records is arguably one of the most crucial tools for ensuring access to justice, preserving the rule of law, and facilitating the fulfilment of the Court of Appeal's constitutional duties. Legal uncertainty

* LLB, LLM Candidate (National University of Lesotho), Advocate of the High Court of Lesotho, K & K Chambers, Research Assistant and Legal Counsel <https://orcid.org/0009-0006-2442-546X> e-mail: bokangmoshoeshoe918@gmail.com

** LLB, LLM, PhD Candidate (National University of Lesotho), Attorney of the High Court of Lesotho, Rarale Attorneys, Managing Director and Head of Research <https://orcid.org/0000-0001-9246-6892> e-mail: rasekoai@raraleattorneys.org

*** LLB (National University of Lesotho), Advocate of the High Court of Lesotho, T A Lesaoana Chambers, Legal Counsel <https://orcid.org/0009-0005-7144-1668> e-mail: mathaleantaote@gmail.com

and judicial inconsistency can contribute to poor access to the justice system. Inaccurate and incomplete records of proceedings and missing court records create legal uncertainty, which aggravates access to justice. A record of proceedings is integral to the appeal; it embodies the factual basis for the relevant case and is vital for framing the grounds of appeal. Gumboh posits that its availability and accuracy are indispensable to the enjoyment of the right to a fair trial.[1]

The courts of Lesotho have been struggling to maintain a healthy degree of public trust. Matlosa states that the courts of law enjoy the trust of only 44% of the public.[2] Thurston argues that lack of evidence in the form of records can lead to the justice system failing to ensure justice for citizens, and this leads to a loss of faith in the administration of justice.[3]

In the Lesotho Court of Appeal, late filings, incomplete records and problematic documentation are persistent issues that undermine the efficiency of the appellate process. This article explores the longstanding problem of delayed, missing and deficient appeal records in the Lesotho Court of Appeal, examining the legal implications, the systemic causes, and their impact on the parties involved and the broader administration of justice. Motsaathebe and Mnjama[4] opine that records are fundamental to the efficient and effective operation of the legal system of a country and even more crucial to the administration of law than to any other function of the public sector.

The effective running of the court depends on the accuracy, authenticity and reliability of records of proceedings. Their availability is crucial for purposes of appeal, and therefore a functional system for keeping records for the judicial system must be maintained. The court staff should have access to the records and should be able to retrieve them on time.[5] Musembi states that efficient court services are a strong foundation of good governance.[6] Missing court records, among other related problems, is a common phenomenon in African countries. Courts in Lesotho, Namibia, Ghana, Eswatini and South Africa, to mention a few, have grappled with this problem.[7] While defective, missing and incomplete appeal records are a common procedural issue in many jurisdictions,[8] the frequent occurrence of incomplete and problematic records in Lesotho has raised serious concerns

1 Gumboh, E 'Justice in Limbo: Missing Court Records in Malawi' (2025) 4(1) *Justices: Journal of Law* 1.

2 Matlosa, K 'When Democracy Fades Away: Loss of Faith in Local Government Elections in Lesotho, 1960–2023' in 'Nyane, H & Kapa, M (eds) *Local Governance and Decentralisation* 35.

3 Thurston, A 'Fostering Trust and Transparency through Information Systems: Reliable Official Recordkeeping Systems Provides Evidence that is Crucial to Accountable, Transparent Democracies' (2005) 36.

4 Motsaathebe, L & Mnjama, N 'The Management of High Court Records in Botswana' (2009) 19 *Records Management Journal* 173.

5 Wanjiru, MJ 'The Effectiveness of Records Management Practices at the Judiciary: A Case of Eldoret High Court Registry, Uasin Gishu County, Kenya, Mwangi June Wanjiru' (MSc Research Project, Kenyatta University, 2022).

6 Musembi, M 'Efficient record management as a basis of good governance (2005). <http://africa.peacelink.org/wajibu/articles/art_9633.html> accessed 13 May 2025.

7 Gumboh (note 1).

8 In a paper on Kenya and court records, Mnjama states that 'the system for managing records in courts is seen as inefficient and ineffective with common cases of missing files from court records

about the integrity of the appellate process. The failure to meet prescribed deadlines, along with the submission of incomplete or improperly prepared records, disrupts the judicial process, causing unnecessary delays in resolving disputes and contributing to injustice in the Court of Appeal. Furthermore, these issues place a significant burden on the parties seeking redress and the court itself, creating an environment where justice is often delayed and sometimes denied.

This article examines the legal framework governing the filing of appeal records in the Lesotho Court of Appeal, the longstanding nature of these issues, and their impact on the administration of justice. By analysing relevant case law, court practices, and institutional challenges, the article provides a comprehensive view of the matter, emphasising both the systemic factors that contribute to the problem and possible solutions.

2. Constitutional framework: The Court of Appeal as a superior court of record

The Constitution of Lesotho does more than establish a court structure; it embeds a vision of how justice should function in practice. Part of that vision includes the requirement that both the High Court and the Court of Appeal must be recognised as superior courts of record.[9] On the surface, this may seem like a formal classification. However, upon closer inspection, it carries profound and practical implications – especially with regard to the dignity, independence, and effectiveness of the judiciary. The Court of Appeal, the highest court in the land, as a general rule, does not hear evidence afresh.[10] The court works from what is already on the record – records that should reflect everything that transpired in the courts below. It goes without saying, then, that its ability to deliver justice depends

management unit'. See Mnjama, N 'Corruption, Court Records and Justice Administration in Kenya' (ESARBICA, 2007). See also Maseh, E 'Records Management Readiness for Open Government in the Kenyan Judiciary' (UKZN, 2015) who argues that the absence of appropriate systems in place for record-keeping and controls has led to collusion between court officials and lawyers, which has resulted in the subversion of the course of justice. See also a case study by Saman, W & Haider, A 'Electronic Court Records Management: A Case Study' (2012), which indicates that there were several legal issues in the court records management. In a case study of the High Court of Botswana, Mnjama, N 'The Management of High Court Records in Botswana' (2009) 19(3) *Records Management Journal* 173-189 revealed that the court was faced with various challenges such as retrieval, misplacement and/or loss of records, and also issues of inadequate storage. South African courts grappled with the issues of incomplete or defective records of proceedings in cases such as *S v Mthembu* 2012 (1) SACR 517 (SCA) para 17, where Ponnan JA and Petse AJA (writing for the court) with reference to two earlier SCA decisions, namely *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA), stated that 'a fair trial enquiry does not occur in vacuo, but ... is first and foremost a fact-based enquiry'. The effect of an incomplete record on appeal, which applies equally to reviews, which impacts such fact-based enquiry, was aptly stated in *S v Chabedi* 2005 (1) SACR 415 (SCA). Also see *S v Sebothe and Others* 2006 (2) SACR (T) para 5: 'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recording of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible.'

9 Constitution of Lesotho, sections 119(3) and 123(4).

10 *Hoohlo v Hoohlo* NO LAC (1995-1969) 266-281 at 276.

almost entirely on the accuracy, completeness and availability of those records. A defective or missing record is not just a clerical error; it can derail an appeal, obscure the truth and ultimately deny justice.

The Constitution makes this dependence clear. Section 119(3) refers to the High Court as a superior court of record, and section 123(4) does the same for the Court of Appeal. But what does this really mean? At a basic level, a court of record can be defined as a court whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony.[11] Furthermore, those records carry legal weight. They are meant to be authoritative accounts of what happened in court – presumptively correct, unless proven otherwise. The moment that standard drops, the system starts to crumble.

This is not just a theoretical concern. In many cases – especially criminal appeals – the record is all that an accused person can use to challenge a conviction or sentence. The stakes are often incredibly high. Recognising this, section 12(3) of the Constitution guarantees that any person tried for a criminal offence is entitled, upon request and subject to a reasonable fee, to a copy of the record of proceedings 'within a reasonable time'. This is not a luxury. It is a right tied directly to the right to a fair trial and to the possibility of appeal.

But rights are only as strong as the systems that support them; this is where the challenge lies. Poor record-keeping practices – manual systems, lost files and inaudible recordings – are not just an administrative problem; they represent a structural weakness that goes to the heart of justice delivery. Even though the government attempts to support the courts, if the judiciary itself does not modernise and invest in better record management, the system will continue to fail. This is why the state's constitutional duty to assist the courts cannot be narrowly interpreted. It must extend to providing proper infrastructure, digitised systems, trained personnel and ongoing support to ensure that the record of proceedings is not only generated but preserved and made available when needed. This is also why judicial leadership must treat record management as a matter of institutional priority, not as an afterthought. Ultimately, the designation of the High Court and the Court of Appeal as superior courts of record is not only about status – it is about responsibility. It reflects a deeper constitutional commitment to the rule of law, procedural fairness and public trust in the justice system. And unless we take that commitment seriously – through deliberate policy, sound administration and adequate resources – we risk turning that constitutional promise into an empty label. The Court of Appeal cannot function in a vacuum. Its authority rests on the integrity of the records before it. And if the records are broken, justice will be too.

3. Legal framework and procedural duties

This section outlines the legal framework governing the preparation and filing of appeal records, and highlights the rules and duties imposed on different persons. It also examines the consequences of non-compliance and the Court of Appeal's discretion to condone procedural defects in appropriate cases. The filing of records in the Court of Appeal is

11 Kumar, K S, 'Article 129 - Supreme Court to Be a Court of Record' (November 30, 2019). Available at SSRN: <https://ssrn.com/abstract=3496027> or <http://dx.doi.org/10.2139/ssrn.3496027> accessed 21 May 2025.

governed by the Court of Appeal Rules, 2006.[12] Rule 5 provides that the appellant shall, in every appeal, lodge with the Registrar seven copies of the record of proceedings from the High Court.[13] This must be done no later than three months after the appeal has been noted or a certificate of the judge has been filed.[14] A copy of the record must also be served on each respondent.[15] This period may be extended by a written agreement between the parties to the appeal.[16] However, failure by the appellant to file the record within the prescribed or extended period results in the appeal being deemed to have lapsed.[17]

Responsibility for the preparation of the record lies with the appellant or their legal representative in civil matters, and with the Director of Public Prosecutions (DPP) in criminal matters.[18] In the event of dereliction of this duty, such persons may be subjected to an adverse costs order, including costs *de bonis propriis*.[19] A certificate confirming the correctness of the record, signed by the appellant or their attorney, or the DPP, must accompany the record and be served on all parties to the appeal.[20] The Rules provide that if the appellant breaches any provision of the Rules, their appeal may be struck off.[21] However, the court retains the discretion to condone such breaches upon application by the appellant.[22]

On the other hand, the High Court Civil Litigation Rules, 2024,[23] while mainly relevant in High Court procedure, contain several provisions relevant to the present discussion, most notably Rules 157 and 158. Rule 157 defines a record of proceedings, outlines the modes of recording and transcription, affirms the parties' right of access to transcribed records, and assigns duties to various court officers concerning the maintenance and availability of such records.

Rule 9(5) further affirms that the Registrar is the ultimate custodian of court records, and parties entitled to such records may access them through the Registrar's office. Rule 158(4) addresses instances where the record of proceedings in completed cases is lost or goes missing. In such cases, the Registrar must, by affidavit, declare that the record has been lost and initiate a process of reconstruction. This involves obtaining the presiding judge's notes as well as affidavits from legal representatives and witnesses regarding the content of the lost record. Sub-rule (5) ensures procedural fairness by requiring that parties and their witnesses must be given an opportunity to review the reconstructed record and submit their respective versions.

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12 Court of Appeal Rules 182 of 2006.
13 Rule 5(1). See *Thamae v Molotsi and Others* C of A (CIV) No. 20/2017 para 12.
14 Ibid.
15 Ibid.
16 Rule 5(2).
17 Rule 5(3).
18 Rule 7(1).
19 Ibid.
20 Rule 7(2).
21 Rule 15(1).
22 Rule 15(2). Whenever an appellant realises that he has not complied with the rule he should, without delay, apply for condonation. See also *Croeser v Standard Bank* 1934 AD 77; *Reeders v Jacobsz* 1942 AD 395.
23 High Court Civil Litigation Rules 65 of 2024.

The dual framework created by the Court of Appeal Rules, 2006 and the High Court Civil Litigation Rules, 2024 reveals both a vertical and a horizontal diffusion of responsibility in the preparation of appeal records. Vertically, the appellant, the legal representatives, the DPP and the Registrar each have clearly delineated roles. Horizontally, these roles are interconnected, and a failure by one actor often disrupts the procedural chain, resulting in significant delays and, in some cases, injustice. While the Court of Appeal Rules emphasise timelines and consequences, the High Court Rules focus on the integrity and accessibility of records. The interaction between these frameworks is not always seamless, particularly when a missing or incomplete record triggers Rule 158, compelling a laborious process of reconstruction that can undermine the reliability of the appellate process.

The reliance on strict procedural compliance must arguably be balanced against the broader aims of justice. The Court of Appeal's discretion to condone procedural breaches is an acknowledgement of this balance, but it also introduces a degree of legal uncertainty. The exercise of discretion, often guided by factors such as prejudice to the respondent's prospects of success and the importance of the subject matter of the appeal, means that outcomes in similar cases may diverge. This can lead to inconsistency, especially where condonation is granted despite prolonged or repeated defaults. The judgments of the Court of Appeal reflect a tension between procedural rigidity and judicial pragmatism – one that raises questions about the fairness and predictability of appellate adjudication. This tension is further complicated by systemic issues, including chronic administrative inefficiencies, understaffing, and outdated technologies for recording and transcribing proceedings. These structural deficiencies shift what should be personal accountability into the realm of institutional failure, blurring the line between negligence and impossibility. As the following historical analysis and case study demonstrate, the problem is not new. Instead, it is part of a recurring pattern where legal rules, although clear on paper, falter in practice – inviting a critical assessment of whether the current procedural architecture is fit for purpose in ensuring meaningful access to appellate justice.

4. A persistent procedural breakdown: Institutional and individual failures

The issue of late, incomplete or inaccurate records in the Lesotho Court of Appeal is a persistent procedural defect that has, over time, become a recurring problem. Despite the clarity of the Court of Appeal Rules and the expectations they impose, non-compliance has become alarmingly routine. This section examines the extent of the problem by tracing its historical roots, identifying current manifestations and exposing the systemic flaws – administrative, professional and institutional – that allow it to persist with impunity.

The archives of the Court of Appeal reveal a trail of cases where justice faltered – not for lack of merit, but due to technical non-compliance and institutional inertia. In *Lesotho Electricity Corporation v Forrester*,[24] the filed record of proceedings was extremely lengthy and gravely deficient with regard to both inclusion and omission.[25] Parts of the record constituted duplications and application papers relevant to the issues on appeal were omitted. There

24 LAC (1970-1979) 321.
25 Ibid at 332J.

were gaps in the record of evidence.[26] No attempts were made to reconstruct the omitted but relevant portions of the record until the Court of Appeal stated its requirements.[27] This was a civil appeal governed by the Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal Rules, 1955.[28] According to the 1955 Rules, the Registrar of the High Court was required to prepare the record, and in doing so, she had to provide an opportunity for the parties or their counsel to appear before her and be heard.[29] The rules mandated that the Registrar, the parties and their counsel had to exclude all irrelevant documents not relevant to the subject matter of the appeal and generally reduce the bulk of the record as far as practicable, taking special care to avoid duplication of documents and unnecessary repetition.[30]

The court stated that the state of the record considerably increased the burden on the judges of appeal who heard this case.[31] The court was of the view that, in terms of Rule 31, the parties could not evade responsibility for an inadequate record, particularly the appellant, who needed to ensure that the record had the materials needed to challenge the judgment of the court *a quo*.[32] The court proceeded with the record as supplemented, although it was in a poor state.[33] The court expressed its frustration, stating that if it had been necessary to postpone, it would have been at the appellant's cost and probably on the attorney–client scale.[34] The court further warned that, in the future, litigants might expect that if the record was like the one in this case, the appeal would be struck off the roll with costs on an appropriate scale.[35]

Lesotho Electricity Corporation v Forrester reveals both institutional and individual failures, reflecting the systemic weaknesses prevalent at the time. Institutionally, the Registrar of the High Court bore a statutory duty under the 1955 Rules to prepare a concise and relevant record,[36] ensuring parties were heard in the process. The failure to meet these obligations, alongside the absence of timely corrective action, points to a breakdown in procedural rigour and oversight. The appellant, tasked with ensuring the adequacy of the record, neglected this responsibility by failing to supplement or rectify the deficiencies until prompted by the court. The result was a burdensome, incomplete[37] and disorganised record that hampered the appellate process. This dual lapse underscores a broader systemic issue: ineffective coordination between court administration and litigants, weak enforcement of procedural rules, and a culture of tolerating procedural laxity, all of which threaten the integrity and efficiency of the appellate system.

26 Ibid at 333A-D.
27 Ibid at 333B-C.
28 Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal Rules 141 of 1955.
29 Ibid Rule 31(1).
30 Ibid Rule 31(2).
31 *Forrester* (note 24) at 332J-333A-B.
32 Ibid at 333D-E.
33 Ibid at 333F-H.
34 Ibid.
35 Ibid at 333G-H.
36 Namakula, CS 'The Court Record and the Right to a Fair Trial: Botswana and Uganda' (2016) 16 *African Human Rights Law Journal* 177.
37 *Matilda Baidoo v Alfreda Davis* Suit HI/180/07 Court of Appeal of Ghana, judgment of 12 May 2011: 'An incomplete record does not aid the delivery of justice to the parties.'

In *Makenete v Lekhanya NO and Others*,[38] the appellant failed to file the record of proceedings timeously. There was an application for the enrolment of the appeal, which was dismissed for flagrant failure to comply with Rule 3(7) and for failure to apply for condonation for non-compliance with that rule. In terms of Rule 3(7) of the Court of Appeal Rules, 1980,[39] the appellant was obliged to file with the Registrar the required copies of the record no later than three months after the filing of his notice of appeal. The appellant had cited, *inter alia*, an inability to obtain a transcription of the record.[40] Ackermann JA remarked that it had become clear that many practitioners were displaying a lamentably lax attitude to the rules of court, bordering on contemptuousness.[41] He stated that the attitude evinced that the rules of court were unimportant, could be disregarded at will, and that non-compliance would be overlooked or condonation granted as a matter of course and right.[42] The court expressed its frustration about non-compliance with the rules and said that practitioners could not rely on the mistaken impression and the misconceived idea that their disregard of the rules would be overlooked because of the prejudice that their clients might suffer.

This case illustrates the serious procedural and ethical implications of disregarding appellate rules and the judiciary's increasing intolerance for such conduct. The appellant's failure to file the record timeously – without seeking condonation – highlights a growing culture of procedural complacency among legal practitioners. Ackermann JA's stern rebuke underscores a pivotal lesson: the rules of court are not mere technicalities but essential safeguards for judicial efficiency and fairness. The court's frustration signals a shift away from leniency towards stricter accountability, warning that repeated non-compliance will no longer be excused on the basis of client prejudice. This reflects an important recalibration of judicial discretion – one that seeks to protect the integrity of the appellate process by placing professional responsibility above tactical leniency. The case thus serves as a cautionary tale, demanding a renewed culture of diligence and respect for procedural rules among legal practitioners.

The case of *Jerinah Goolam Essaney v Abraham Joseph and Others*[43] further illustrates the longstanding issue in question. In casu, there were many problems with the record, especially with the irregular reconstruction of the evidence, from the High Court judge's notes. Ultimately, the appeal was struck off with costs on an attorney–client scale. Similarly, in *Qhobela v Attorney General and Another*,[44] the record of proceedings was filed extremely late, which the court called flagrant non-compliance with the rules of court.[45] The appellant applied for condonation, but the court refused the condonation based on the degree of lateness in the filing of the record and the prolonged threat to the respondent's right to a final judgment.[46] The condonation application was dismissed with costs.

38 (No. 1) LAC (1990-1994) 127.
39 Court of Appeal Rules 10 of 1980.
40 *Makenete* (note 38) at 129B-D.
41 Ibid at 129F-G.
42 Ibid at 129F-H.
43 C of A (CIV) No. 12/2025 para 3.
44 LAC (1990-1994) 243.
45 Ibid at 244I-J.
46 Ibid at 245C-D.

Qhobela v Attorney General demonstrates the Court of Appeal's firm stance on upholding procedural discipline, particularly regarding the timely prosecution of appeals. The court's refusal to grant condonation, despite the application, underscores a critical implication: that an excessive delay in filing the record of proceedings not only undermines the rules of court, but also poses a serious threat to the respondent's right to finality in litigation.[47] We maintain, in line with the wisdom of Steyn P (as he then was), that finality is the key objective of litigation.[48]

By treating the delay as 'flagrant' non-compliance, the court reinforced the principle that justice delayed is justice denied – not only for appellants but also for respondents.[49] The dismissal of the condonation with costs sends a strong message that procedural rules are integral to the fair and efficient administration of justice, and that dilatory conduct will attract punitive consequences. The case serves as a decisive lesson that the right to appeal is not unfettered; it must be exercised within the bounds of lawful procedure and with respect for the rights of opposing parties.

In *Malefane v Mphana*,[50] the record filed was incomplete in material respects (there was no order and no judgment of the court *a quo*) despite the fact that the Registrar certified that the filed record was checked, certified, and constituted a correct copy of the proceedings in the court *a quo*.[51] The court condemned the carelessness and remarked that it was self-evident.[52] The court highlighted that counsel in this matter and others had complained bitterly from the bar about delays in the delivery of judgments and their transcription. The court noted that these concerns were valid.

The court even quoted Ackermann JA in *Letsie v DPP*,[53] where he stated that justice delayed is justice denied. The court added that there was no justification for a judicial officer not delivering reasons for a judgment or delaying these unduly.[54] However, the court stated that the profession itself must take part of the blame.[55] The court concluded that the court officials, the practitioners and the Bench are the foundation stones on which a respected system of justice is built. Should they fail to deliver products – in the form of orders and judgments – efficiently and without tardiness, confidence will wane and respect will diminish.[56] The court stated that practitioners, officials and judges must meet to appraise the situation and to ensure that they collectively take steps to address delays and inefficiency. The appeal was struck off the roll with costs.[57]

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47 See also *Lepule v Lepule and Others* LAC (2015-2016) 28 where the maxim of *interest reipublicae ut fini litim* (it is in the State's interest that there should be an end to litigation) was applied. This is another reason why there should be finality in litigation. See also *Joy to the World v Malefane* LAC (2015-2016) 563.

48 *Lesotho Brake and Clutch* (note 1) at 82G-H.

49 See *Letsie v Director of Public Prosecutions* LAC (1990-1994) 246.

50 LAC (1990-1994) 270.

51 Ibid at 272F-G.

52 Ibid at 274F.

53 Note 49 at 2581.

54 *Malefane v Mphana* at 275B-C.

55 Ibid at 274G-H.

56 Ibid at 275C-D.

57 Ibid at 275D-E.

Erasmus,[58] writing about the South African position on records of proceedings in review cases, puts it quite plainly: the record is essential because it allows both the applicant and the court to properly understand how a decision was made, and whether it was lawful. Without that record, he argues, the court simply cannot do its job, which is to ensure that decisions are made fairly and within the bounds of the law.[59] Interestingly, he also notes that the absence of a record does not stop a review from happening altogether; a review can still go ahead even if no formal record was kept.[60] Although Erasmus is referring specifically to reviews and not appeals, the basic principle remains the same in both contexts. Whether a court is reviewing a decision or hearing an appeal, having a proper record of what happened in the original proceedings is critical. It allows the court to check whether the process was fair, whether the law was properly applied, and, ultimately, whether justice was done.

Malefane v Mphana exposes the deeply entrenched systemic flaws in the administration of justice, where institutional negligence and professional complacency intersect to erode the integrity of appellate litigation. The filing of a materially incomplete record – omitting the very order and judgment appealed against – despite certification by the Registrar's office, reveals a troubling lack of diligence and accountability in court administration. The court's frank acknowledgement of the valid concerns raised by counsel regarding delays in judgment delivery and transcription further amplifies the broader implications: that inefficiency within the judiciary, if unaddressed, threatens public confidence in the justice system. Importantly, the court's insistence that blame is shared among court officials, legal practitioners, and the Bench signals a collective failure demanding a collective remedy. The striking-off of the appeal with costs and the call to 'clean the Augean stables' reflect both the gravity of the problem and the urgent need for introspection, coordination and reform across all pillars of the justice system.

In *Leribe Poultry Cooperative Society v Minister of Agriculture and Others*,[61] the record of proceedings was not filed timeously and it was defective. The court held that the failure to comply with the requirements for the proper prosecution of the appeal could not be attributed wholly and substantially to the appellant and the delays in filing the record and the defects were not serious.[62] It was further held that the substantive issues raised by the appeal were important, not only for the appellant, but for all co-operative societies and the Minister of Agriculture.[63] The condonation applications for the relevant breaches were accordingly granted, but the appellant was ordered to pay the costs thereof.[64] The court stated that practitioners were, in more than one instance, experiencing difficulties in obtaining typed orders from the Registrar's office as well as written judgments.[65]

58 Loggerenberg, DE *Erasmus: Superior Court Practice* (1994, Juta) at D1 – 710B – C.
59 *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).
60 *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA).
61 LAC (1990-1994) 294.
62 Ibid at 294I-J.
63 Ibid at 294J-295A.
64 Ibid at 302F-G.
65 Ibid at 296I-J.

The court cautioned that the recurring issue of legal practitioners being unable to obtain typed orders and judgments does not, in the absence of an application for condonation, excuse the filing of an incomplete record.[66]

Leribe Poultry Co-operative Society highlights that while procedural breaches in filing the record may, in some instances, be excusable, they still demand proper justification through condonation applications. The court acknowledged systemic challenges – such as delays in obtaining typed orders and written judgments from the Registrar's office – but emphasised that these do not automatically excuse non-compliance. Importantly, the decision underscores that the gravity and public significance of the issues on appeal may influence the court's discretion in favour of condonation. This case illustrates that while leniency may be extended in light of institutional inefficiencies, it is not unconditional and must be sought through proper procedural channels. Leniency also reflects the court's attempt to balance procedural rigour with substantive justice.

Another case in which the late filing of the record was condoned due to the public importance of the subject matter of the appeal is *Lesotho Medical, Dental and Pharmacy Council and Another v Musoke*.[67] The court made it clear that the condonation was granted not because the parties satisfactorily explained the remissness, but because of public importance. The case illustrates that, in rare instances, the court may condone procedural non-compliance not because delays are adequately explained, but due to the compelling public importance of the issues at stake. This signals a judicial willingness to prioritise substantive justice in matters affecting broad societal interests. However, the case also serves as a warning: condonation on this basis is exceptional and does not excuse remissness. Practitioners must not assume that public interest alone will routinely cure procedural defects. In *Molapo v R*,[68] the absence of a proper record of proceedings was impeding the hearing of the appeal. The delay was largely due to the fault of the prosecution authorities and not the appellant.[69] There were no prospects that a proper record would be made available soon.[70] The principle that justice should not be delayed was applied.[71] The court decided the appeal with the available information. *Molapo v R* underscores the judiciary's commitment to preventing justice from being derailed by institutional inefficiencies, particularly those attributable to the prosecution. Despite the absence of a proper record, the court prioritised the principle that justice must not be delayed and proceeded to decide the appeal using the available information.

66 Ibid. See the South African case of *Phiri v S* Case No: CA 55/2015, where the court held as follows: 'This appeal was previously struck off the roll due to incomplete record of proceedings. It has now been re-enrolled, and the record is still incomplete. The missing portions of the record are the appellant's entire evidence including cross examination. The evidence of one state witness who was with the appellant and the complainant on the day of the incident is also missing from the record. There was no explanation from the appellant what steps were taken to obtain the complete the record or if the record could be reconstructed. This court is not able to deal with the appeal when the version of the appellant is not part of the record. The appeal should be removed from the roll and the appellant file the complete record for consideration of the matter.'

67 LAC (1995-1999) 346.

68 LAC (2000-2004) 23.

69 Ibid at 24G-J and 25A-D.

70 Ibid at 25C-D and 25H-I.

71 Ibid at 25E.

This reflects a pragmatic approach, where the court, in the face of systemic failure, opts to safeguard the appellant's right to timely justice rather than perpetuating delay. The case serves as a reminder that while accurate records are crucial, courts may adopt flexible measures to uphold fairness when state actors cause delays. In *Seate v R*,[72] Ramodibedi JA stated that regrettably, the problem of sloppy records had engaged the attention of the Court of Appeal for a long time, but seemingly to no avail.[73] He affirmed the stance of Gauntlett JA in *Motlatsi v DPP*,[74] that practitioners should be warned that the presentation of shabby and/or incomplete records of proceedings must attract adverse consequences (including personal costs orders against practitioners) in appropriate instances.[75] Notably, the court stated that the need for complete and proper records could be too strongly emphasised as the fate of litigation might very often turn on the quality of the record alone, which was a far cry from true justice.[76] The court further warned that the presentation of shabby and incomplete records reflected badly on the parties concerned and was an insult to the court itself.[77]

Seate v R underscores the ongoing and unresolved problem of poor-quality records in appellate litigation, condemned by the Court of Appeal as both a threat to justice and a sign of professional negligence. Ramodibedi JA's support for Gauntlett JA's call for personal cost consequences indicates growing judicial impatience and a desire to hold practitioners accountable. The court's focus on the quality of the record as a key factor in litigation outcomes reinforces its importance for fair adjudication. Furthermore, the court's statement that incomplete records insult the judiciary highlights the reputational and institutional damage caused by such practices. The case therefore serves as a clear warning: negligent conduct now bears serious consequences.

In *R v Lebina and Another*,[78] the court recalled several past warnings about unsatisfactory records of proceedings,[79] and stated that slovenly records bring the justice system into disrepute and may very often lead to miscarriages of justice.[80] *R v Lebina* reinforces the enduring concern about how slovenly records can damage the integrity of the justice system. The court emphasised that this was not a new or isolated issue but a persistent one that continued to undermine public confidence in judicial processes. The warning that such records may lead to miscarriages of justice highlights the grave consequences of procedural negligence – not merely administrative inconvenience, but potentially unjust outcomes. This case underlines the urgent need for systemic reform and professional accountability to safeguard both the quality of justice and the credibility of the courts.

Due to the persistent problem of defective records and the failure to file records timeously, the President and Justices of Appeal, in consultation with the Chief Justice and the

72 LAC (2000-2004) 215.
73 Ibid at 217C.
74 LAC (1995-1999) 652; 1999-2000 LLR-LB 23 (CA).
75 *Molapo v R* (note 68) at 217C-E.
76 Ibid at 217F.
77 Ibid. See also *Sarele v R* LAC (2017-2018) 361 at 362D-H.
78 LAC (2000-2004) 464.
79 Ibid at 467B-D. See also *R v Ts'osane* LAC (1995-1999) 635; 1999-2000 LLR-LB 78 (CA).
80 Ibid at 467H.

Registrar, issued a Practice Note in October 2000.[81] This Practice Note was intended to address, *inter alia*, the proper constitution and timely filing of records of proceedings. Paragraphs 4, 5 and 6 of the Practice Note deal specifically with these procedural requirements, while paragraph 7 provides in mandatory terms that no matter shall be enrolled for hearing in the upcoming session later than 31 January 2001, or otherwise not in compliance with paragraphs 4 to 6, unless a written application is made to the President showing good cause, and after written notice to all parties to the appeal. These provisions are essentially a reiteration of the requirements set out under Rules 5 and 7 of the Court of Appeal Rules.

The issuance of the Practice Note of 2000 by the apex court highlights the gravity and persistence of the problem surrounding defective and late-filed records. By reiterating and reinforcing the obligations under Rules 5 and 7 of the Court of Appeal Rules, the judiciary acknowledged that procedural non-compliance was undermining the administration of justice. Paragraph 7's strict cut-off times and requirements for application for leave on good cause shown reflect an attempt to restore procedural discipline. However, the continued prevalence of the issue suggests that Practice Notes, while necessary, are insufficient in the absence of institutional accountability and sterner enforcement mechanisms.

In *Rev Father Khang v Bishop Mokuku and Others NNO*,[82] the court cited *Pelea v R*[83] in maintaining that it was the duty of the attorney of the appellant to peruse the appeal record and to correct errors and shortcomings therein. The court further cited *Venter v Bophuthatswana Transport Holdings (Edms) Bpk*,[84] which held that practitioners who failed in their duty were at risk of punitive costs orders.[85] The court in *Lebeta v R*[86] stated that it was regrettably necessary to once again comment on the unsatisfactory state of the record of proceedings,[87] which had been criticised in many cases, including *Stella Kaka v Lesotho Bank and Others*.[88] In *Lebeta*, parts of the case were recorded in Sesotho and not translated into English, in breach of both the High Court Rules, 1980 and the Court of Appeal Rules.[89]

In granting the condonation application for the late filing of an appeal record, the Court of Appeal, in *National University of Lesotho and Another v Thabane*,[90] stated that the rules must be interpreted and applied in a spirit which facilitated the work of the court. In the criminal appeal of *Makhetha and Others v R*,[91] in a storm of irregularities, a number of cassette tapes of evidence were missing and various files relating to the trial could not

81 Court of Appeal Practice Note 9 of 2000.
82 LAC (2000-2004) 600.
83 LAC (2000-2004) 223.
84 1997 (3) SA 374 (A).
85 *R v Ts'osane* (note 79) at 603E-F.
86 LAC (2007-2008) 220.
87 Ibid at 221G-H.
88 1997-1998 LLR-LB 327 (CA) at 328.
89 High Court Rules 9 of 1980 (as amended by Rule 2 of the High Court (Amendment) Rules 2006). See Rule 58(4) of the Court of Appeal Rules 182 of 2006; Rule 5(5), which states that the record shall be in English; *Ranthithi and Another v R; R v Ranthithi and Others* LAC (2007-2008) 245 at 245F.
90 LAC (2007-2008) 476.
91 LAC (2009-2010) 159.

be found in the offices of the DPP or the Registrar of the High Court.[92] The failure to safeguard the cassettes and the transcribed records of evidence was deplored.[93]

The court stated that it was not the first occasion on which cassettes have been lost or, perhaps, unlawfully removed from the custody of officials entrusted with their care.[94] The court emphasised that the responsible officials of all the courts of Lesotho must ensure that the records of proceedings and cassettes are preserved and kept in a completely secure place.[95] The loss of such material brings the administration of justice in the Kingdom of Lesotho into disrepute.[96] The court added that there was no doubt that a proper record of proceedings should be made available to a prospective appellant in a criminal appeal to the Court of Appeal within a reasonable time of noting the appeal.[97]

In *Takalimane v Serobanyane*,[98] the lower court's written judgment was not in the record and the court had to manage without it. The court held that this was very inconvenient for the Appeal Court and prejudicial to the parties who were obliged to argue the appeal without reasons for the judgment.[99]

A written judgment of the court *a quo* is a crucial part of an appeal record. In *Lelimo v Letsie and Others*,[100] the court stated that the appeal was one of several in which an order was made at the conclusion of the hearing in the court below, and a written judgment was produced a matter of days before the hearing of the appeal. The court highlighted the considerable inconvenience caused to it and the prejudice to the litigants, whose heads of argument were prepared without them seeing the written judgment.[101] In *Makibi and Another v Makibi*,[102] the Court of Appeal deprecated the deficiency of records of proceedings with no written judgment or order reflecting the High Court's decision and urged trial courts to fulfil their mandate properly. The court stated that it is not uncommon for there to be no written judgments in the High Court of the Kingdom of Lesotho. In such circumstances, it becomes difficult for litigants to lodge appeals properly.

92 Ibid at 163H-J. See also *Mothobi and Others v DPP* C of A (CRIM) No. 04/2019 paras 3 and 7. The record of proceedings was generally not in order.
93 Ibid at 164I.
94 Ibid at 164I-J.
95 Ibid at 164I-J and 165A.
96 Ibid at 165A.
97 Ibid at 165B. See also section 12 the Constitution of Lesotho, 1993: '3. When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgement a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.'
98 LAC (2011-2012) 222. See also LAC (2009-2010) 159 and LAC (2015-2016) 342.
99 Ibid at 222I. Further, in *Mensah v Adjudicator of the Teaching Service Commission and Others* LAC (2005-2006) 468 at 471G-I, the court criticised the failure of the High Court judge to furnish reasons for his order. It noted that this was not a novel occurrence and endorsed the remarks in *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27 where such conduct was described as an 'unacceptable procedure'.
100 LAC (2011-2012) 44.
101 Ibid at 47F-H.
102 LAC (2013-2014) 350.

The efficient preparation of the record is essential for the proper functioning of the Court of Appeal.[103] Accordingly, if the Rules on record preparation and filing are needlessly breached, an appropriate order of costs against the offending party will be warranted.[104] The court stated that it was the responsibility of the presiding judge to ensure that the Registrar reduced the court's order to writing. The court added that the parties could not fully prepare their cases without reasons, and the Appeal Court was required to know the reasons in order to properly bring a fully informed mind to bear on the question whether the judge was right.[105] The court added that it reflected adversely on the presiding judge's concern for standards of care, responsibility and efficiency, which the public,[106] particularly the litigants, were entitled to expect from the highest court of the land.[107] In 2024, in *Commissioner of Police and Others v Lepoqo*,[108] the issue of the late filing of the record of proceedings was still on the table.

The recurring problem of incomplete, deficient or untimely records of proceedings in Lesotho's appellate system reveals both institutional and individual failures that seriously threaten the quality and integrity of justice. These failures include missing cassettes, untranslated Sesotho transcripts, missing judgments and orders, and failure by both court officials and counsel to fulfil their procedural duties. The implications are far-reaching: litigants are forced to argue appeals without crucial written reasons, and appellate courts are burdened with resolving disputes based on fragmented or unreliable material.

Such dysfunction undermines the right to a fair appeal, delays justice and diminishes public confidence in the judiciary. Worse still, it fosters a perception of indifference on the part of key institutions tasked with upholding legal standards. From these failures critical lessons arise. Attorneys are expected to be vigilant in reviewing and correcting appeal records, and must not rely on certification by court officials alone. The responsibility for a complete and accurate record is shared by counsel, court officials and judicial officers alike. Practitioners who neglect this duty risk adverse costs orders, while judicial officers who fail to produce timely written judgments are a poor reflection of the standard of care expected from the High Court.

These judgments underscore that rules of procedure are not mere formalities but essential safeguards of justice. The system can only function with diligence, cooperation and accountability from all actors involved. Without such reform and shared responsibility, the administration of justice risks further erosion with regard to both efficiency and legitimacy.

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103 *Maphathe v Mafeteng Property Group (Pty) Ltd* C of A (CIV) No. 26/2018 para 23.
104 Ibid.
105 Ibid at 351B-E. See also *Rats'iu v Principal Secretary for the Ministry of Forestry and Others* LAC (2017-2018) 356 at 358C-D, where the court expresses the same sentiments in the following words: '*This made our job quite frustrating and difficult to carry out* … prejudice to the applicant as he *had to prepare and file grounds of appeal in darkness*' (our emphasis).
106 See Code of Ethics of Judges 50 of 2024, sections 4(1), 22(1), 24 and 25(2).
107 Ibid at 352F-G.
108 C of A (CIV) No. 36/2024 para 40.

5. Conclusion

The persistent problem of late, incomplete and defective records of appeal in Lesotho reveals a systemic malaise that threatens the integrity, efficiency and fairness of the appellate process. From as early as *Lesotho Electricity Corporation v Forrester* to more recent decisions such as *Seate v R*, the Court of Appeal has consistently condemned the degradation of procedural standards, warning practitioners, condemning institutional failures, and striking matters off the roll or imposing punitive costs. These cases expose a multifaceted breakdown: a judiciary beset by administrative inefficiencies, legal practitioners demonstrating procedural complacency, and a court registry consistently unable to fulfil its duties with diligence. More concerning is that this culture of laxity persists despite repeated judicial admonitions.

While the courts have occasionally exercised discretion in favour of substantive justice – particularly in matters of significant public interest – such indulgence remains the exception, not the rule. The judicial decisions surveyed affirm a growing judicial intolerance for procedural neglect and signal an urgent call for reform. At its core, this issue is not merely procedural; it is constitutional, touching on the right to a fair trial, access to justice, and the duty to uphold the rule of law. The time has come for coordinated action that confronts the inertia, cultivates professional accountability, and restores confidence in the appellate system.

6. Recommendations

To effectively tackle the ongoing crisis surrounding the preparation, filing and management of records of proceedings in the Lesotho Court of Appeal, urgent and comprehensive systemic reform is essential.

First, institutional modernisation must be prioritised. The government must fulfil its constitutional obligation to support the judiciary by investing in modern, secure, and technologically advanced recording systems, including real-time digital transcription and electronic case management platforms. Outdated manual methods have proven to be entirely inadequate and unsafe, leading to systemic delays and inaccuracies that undermine the courts' dignity and effectiveness.

Secondly, professional accountability mechanisms need to be reinforced. Legal practitioners, who are mainly responsible for submitting accurate and complete records, should face stricter judicial scrutiny and personal cost orders for negligent preparation or failure to properly review records. The culture of complacency and misleading certifications of record accuracy and completeness by legal practitioners must be broken down by imposing tangible consequences for procedural defaults.

Third, the Registrar's office must be strengthened and equipped to fulfil its role as the keeper of court records. This includes adequate staffing, thorough training on record management, and clear accountability lines for lost, incomplete, or defective records. Certification of records must not be a mere formality but a result of diligent verification against primary court materials.

Fourth, there must be judicial emphasis on written judgments and court orders at the trial level. High Court judges should consistently provide written reasons.

Failure to produce judgments within a reasonable timeframe should initiate internal judicial disciplinary measures where appropriate.

Finally, these reforms must be implemented not piecemeal, but holistically and with urgency. As long as record mismanagement persists, the constitutional guarantees of fairness and effective access to appellate justice will remain dangerously hollow.

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