

IN THE COURT OF APPEAL OF LESOTHO

C. OF A. (CIV) NO.23/97

In the Appeal of :

MIKE NKUATSANA

Appellant

vs

MALUTI MOUNTAIN BREWERY

Respondent

HELD AT MASERU

Coram :

**Steyn, P.
Van den Heever, JA
Gauntlett, JA**

J U D G M E N T

Van den Heever, JA

The appellant, a loss control manager, was dismissed by the respondent, his employer, for having misappropriated company funds. The facts are set out in the judgment of the High Court against which the present proceedings purport to be an appeal. That dismissal occurred in March of 1994, after a disciplinary hearing at

which he pleaded guilty. He did not avail himself of domestic appeal procedures until after he had consulted the Labour Department in November 1997. That appeal was unsuccessful. He approached the Labour Court which had become functional in October of 1994, only in March of the following year. The Labour Court (case 47\95) held that he required no condonation for his delay in doing so: that his dismissal had been unfair; and that he should be reinstated with not only back pay from the date of his belated domestic appeal, but also a further six months' wages as "compensation", if I understand the papers correctly.

Not surprisingly, the employer approached the High Court to review the proceedings in the Labour Court. An appropriate *rule nisi* was sought, calling on the President of that tribunal to transmit its record of the relevant proceedings and judgment to the Registrar of the High Court, and that the latter set aside the order of the Labour Court as having been arrived at on the basis of gross misdirections.

On the extended return day of the rule originally granted, Ramodibedi J on 5 August 1997 in a well-motivated judgment confirmed the rule with costs and set aside the award by the Labour Court.

The party responsible for costs in terms of that order is a matter of some

concern. I return to this later.

An appeal was noted against the judgment of Ramodibedi, J., by *Mr Mpopo* of “Phal Offices, P.O. Box 0383, Maseru”. It appeared from an affidavit handed up on the date on which the appeal was set down, 28 July, that *Mr Mpopo* is not in private practice but is “a Litigation Officer at Community Legal Resource and Advice Centre, a human rights centre carrying on business at PHAL office, Constitution Road, Maseru”. He informed us from the Bar that that was the position also when he had appeared for the appellant in the Labour Court itself and in the Court *a quo*.

It is clear from the chronology outlined in the first paragraph of this judgment, that the appellant had been extremely leisurely in his attempts to obtain redress for what he purports to have regarded as an unfair dismissal on a charge of dishonest conduct to which he had pleaded guilty. The adage that “justice delayed is justice denied” cuts two ways : a respondent compelled into court by a lackadaisical claimant suffers the injustice occasioned by the uncertainty as to whether the sword over his head will descend and how sharp it will prove to be.

The application to review the Labour Court judgment was launched in

December of 1995. A *rule nisi* was granted also in that month, which i.a. stayed execution of that tribunal's judgment pending finalisation of the review. No reasons are given why, according to the judgment of the Court *a quo*, the matter was postponed and rule extended "several times", being finally argued only on 22 May 1997 : more than three years after the appellant's dismissal. Judgment was delivered on the 5th of August of that year, and the present appeal noted on the 4th September.

The matter was set down for this the July session of the Appeal Court which commenced on the 22nd. On that day *Mr Mpopo* was warned of deficiencies in the record and that the matter would not be heard before Tuesday the 28th.

Those flaws in the record are material. There are deficiencies of format in that the records are bound back to front : commencing with the notice of appeal followed by the judgment of the Court *a quo*, then coming to the heads of argument used in that court, the erstwhile employee's opposing affidavit, and only then the notice of motion, and so on. The index is scarcely useful. It lists only five items, the very last being "NOTICE OF MOTION32-93". This had many components since the supporting affidavit refers to a number of annexures : the respondent's disciplinary code, conditions of employment, and so on, which one

would have expected to be separately itemized.

Our records do not contain two of the annexures referred to in the founding affidavit “D” and “E”. The opposing affidavit consists of a long and rambling screed deposed to by the appellant personally, making i.a. averments of law which are questionable, to put it gently. One of the complaints voiced, is that the application is on appeal in the guise of a review, an appeal “which the applicant company has to date not noted nor applied for the late filing of same” Clearly neither the appellant nor his legal adviser could have read either the judgment of Ramodibedi J or the provisions of the Labour Order for something like this to be put on record. So, too, the complaint that

“annexures to the notice of motion and founding affidavit should have been handed in at the court *a quo*” that is, the Labour Court, “instead of being annexed as fresh matter at a review stage, as such they have to be expunged from the record”,

is somewhat impertinent in the light of the finding by Ramodibedi J that the Labour Court had perpetrated a reviewable irregularity by deciding the matter merely on the submissions made to it by counsel. That would indeed be an irregularity vitiating the proceedings entirely.

The Court *a quo* had before it the annexures referred to above, which are not

before us, because they were referred to in its judgment. Far more important, it appears to have had before it the Labour Court's record of its proceedings which the first respondent had been called upon in the *Rule Nisi* issued by the High Court to transmit to the registrar of the High Court. A necessary part of those proceedings are the "pleadings" provided for in the Labour Code. They must have been before the Court *a quo* otherwise it is inconceivable that it could or would have dealt with what it was specifically called upon to consider. Moreover, there is reference, again, to paragraphs in such documents in the judgment of the court *a quo*. But not a single page of the Labour Court proceedings which are the foundation on which the present appeal is built, were included in the appeal record. Having been alerted on the 22nd to the fact that he had problems since i.a. the Labour Court record was not included in the record, *Mr Mpopo* handed up from the Bar an "application for condonation of the deficient filing of the record of appeal" to which the affidavit is annexed, referred to earlier, in which he identifies himself as a Litigation Officer in what I assume from its name to be a well-meaning non-profit organisation aiming to right palpable wrongs in cases regarded as meritorious, therefore worthy of going into battle for.

His supporting affidavit -

- (1) gives no acceptable explanation why it was necessary for the court to draw his attention to deficiencies in the record, where

it is the elementary duty of an appellant's lawyer in a civil matter - for the discharge of which he in the ordinary course would charge fees - to see to it that there are none;

- (2) is palpably wrong in stating that the reason the Labour Court record had not become part of the appeal record, was that it had been "inadvertently omitted having been earlier omitted in the proceedings before the High Court on review";
- (3) admits that he was warned on the 22nd by this Court, "whereupon I procured the missing record and served it on the respondent company's Counsel and filed same of record".

I have already given reasons why the allegations in the second paragraph cannot be accepted. In support of the third contention above, he annexes a copy of the forwarding letter from the Labour Court to the Registrar of the High Court : "enclosed please find the record of proceedings in LC 47\95". That letter is dated the 12th of December, 1995.

Mr Mpopo conceded that his allegation that he "filed of record" what had been omitted from the appeal record, referred to the document which was made available to us in chambers. It is certainly not the entire Labour Court record, since the Originating Application and Answer by the parties are still not there.

When it was made clear to *Mr Mpopo* that his application for condonation was *per se* deficient both in tendering no acceptable reason for the delay in placing a proper record before court and in trying to remedy the defects by offering a further deficient instalment, he withdrew the application for condonation and asked for a postponement of the appeal so that, in effect, he could try again.

His request was refused, and the matter struck from the roll, reserving the question as to what costs order should be made.

He was given an opportunity to advance reasons why the costs order in favour of the respondent that must follow, should burden either the appellant or the organisation in which he serves, instead of coming out of his own pocket. None persuasive was forthcoming.

I mentioned in the beginning that the question, who the party is responsible for the costs order made by Ramodibedi J when confirming the *rule nisi* is a matter of some concern. That was, quite correctly, granted against the appellant, the respondent in the Court *a quo*. A client seeking help from an organisation such as the Community Resource Centre may be financially crippled should the organisation's employees not be careful in their judgment and meticulous in the

preparation of the assistance offered, every step of the way. When that does not happen, an inevitable slur is cast on the reputation of a body created to advance human rights.

The appeal has already been struck from the roll. Costs of appeal are awarded to the respondent. Those are to be paid by *Mr Mpopo de bonis propriis*. Nor are either *Mr Mpopo* or the Centre entitled to charge the appellant for any services in relation to the appellant's attempt at reinstatement, since they were not properly rendered.

VAN DEN HEEVER
Judge of Appeal

I agree
And it is so ordered

J.H. STEYN
~~President~~

I agree:

J.J. GAUNTLETT,
Judge of Appeal

Delivered this ^{31st} day of July, 1998 at Maseru