

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 37/2013

In the matter between:

BOFIHLA MAKHALANE

APPELLANT

And

LETŠENG DIAMOND MINES (PTY) LTD

RESPONDENT

CORAM: Y. MOKGORO AJA
P. MUSONDA AJA
M. CHINHENGO AJA

HEARD : 30 JULY 2015

DELIVERED : 7 AUGUST 2015

SUMMARY

Appeal against refusal to stay a writ of execution – Appellant noting appeal but failing to comply with Rule 5 and Rule 15 of Court of Appeal Rules 2006 – Respondent lodging record of proceedings with Registrar and asking that appeal be heard –

Held: Appeal should be struck off the roll with costs – the appellant to pay costs of appeal before lodging any application to court.

JUDGMENT

CHINHENGO AJA

[1] At the conclusion of a brief hearing of this appeal we made the following order –

(a) The appeal is struck off the roll with costs.

(b) The appellant shall pay the costs of the appeal before he may make any application to reinstate this appeal.

[2] The brief facts that are relevant to our order are these. On 29 July 2013, the appellant, acting in person, noted an appeal against the judgment of **Monapathi J**, delivered on 3 June 2013. In terms of that judgment, the learned Judge

dismissed the appellant's application for the stay of execution of a writ of execution issued in respect of a taxed bill of costs in a matter between him and the respondent, heard and determined in favour of the respondent by **Peete J.**

[3] When the appeal was called, the appellant was in default. The Court was availed a letter written by the appellant to the registrar on 16 April 2014. The year 2014 should be an error because the registrar received the letter on 17 April 2015. Attached to the letter were two other letters written by him to the Chief Justice. In all these letters the appellant raised several complaints against the courts, judges and members of the registrar's staff. This is however not the occasion to deal with those complaints. Suffice it to state that the appellant indicated in the first mentioned letter that the appeal should not proceed until he had prepared a record of the proceedings in the court *a quo* and lodged it with the registrar. In the first mentioned letter he explained why he has to date been unable to lodge the record.

[4] Believing that the appellant was unnecessarily delaying the hearing of the appeal, the respondent prepared the record of the proceedings and lodged it with the registrar. With the record now available, the respondent's counsel urged us to proceed with the appeal in the absence of the appellant. He told us about the efforts by his instructing attorneys and the

registrar to contact the appellant to inform him that the appeal was set down for hearing. Those efforts did not bear fruit because the appellant was unreachable. He also told us that the appellant had however been advised about the date of the roll call and had absented himself.

[5] We considered that it would be inappropriate to proceed with the appeal in the absence of the appellant. The appellant had failed to lodge the record of proceedings within three months after he filed his notice of appeal as required by Rule 5(1) of the Court of Appeal Rules, 2006. We were satisfied that the appellant was in breach of the Rule on this score. Rule 15(1) provides that if an appellant is in breach of the Rules, his appeal may be struck off the roll. Sub-rules (2) and (3) give the Court a discretion to condone any breach on application by the appellant by notice of motion delivered to the respondent not less than seven days before the date of hearing. No such application was before us. We also considered Rule 5(3), which provides that if the appellant fails to lodge the record within the prescribed period or within the extended period as determined by the court, the appeal shall lapse.

[6] The subject matter of the appeal is the writ of execution in respect of a costs order in favour of the respondent. **Mr. Woker** contended that the respondent was prejudiced by the

delay in hearing the appeal and submitted that the appellant should at least be ordered to pay the costs incurred so far in the appeal before he may be permitted to make any application for the reinstatement of the appeal. We considered that this submission had merit, hence the order in that regard.

1. These therefore are the reasons for the order we made.

M. Chinhengo
Acting Justice of Appeal

I agree:

Y. Mokgoro
Acting Justice of Appeal

I agree:
Musonda

DR **P.**
Acting Justice of Appeal

For Appellant : No Appearance
For Respondent : Adv H.H.T. Woker