LAC/A/11/2002

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

TSEBO MONYAKO **APPLICANT**

and

LESOTHO TOURIST BOARD	**1ST RESPONDENT**
BOARD OF DIRECTORS	**2ND RESPONDENT**
LESOTHO TOURISM CORPORATION	**3RD RESPONDENT**
THE LABOUR COURT PRESIDENT (Mr Lethobane)	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

CORAM:

HON. MR ACTING JUSTICE K.E. MOSITO

PENALISTS: **MR L.O. MATELA**
MR R.L. MOTHEPU

HEARD : **18TH JANUARY 2007**

DELIVERED: **24TH JANUARY 2007**

SUMMARY

Condonation Application – Applicant not having complied with Rule 5 of Labour Appeal Court Rules – Requirements for condonation considered. Court exercising its discretion in terms of Rule 5 – Application of condonation granted.

Postponement – Principles of – when postponement to be granted.

JUDGMENT

MOSITO AJ:

1. This is an application for an order in the following terms:-

    a) Condoning Applicant's late noting of an appeal in LC/108/00
    b) Granting applicant such further and/or alternative relief.

2. This application arises out of a decision of Labour Court in which TŠEPO RAPOU, TSEBO MONYAKO, 'MAMOTHAE MOSHOLUNGU & MOKENYA CHELE, first fourth applicant respectively, had instituted proceedings in the Labour Court in LC 108/2000, against the present first and second respondents.

3. In the Labour Court Application, the said three applicants prayed for an order in the following terms:-

    "(a) That the respondents be ordered to pay the salaries of the applicants, together with yearly increments till they attain

the retirement age of sixty (60 years).

(b) That the respondents be ordered to pay up the insurance premiums of the applicants in terms of the Personnel Regulations up to the applicants' retirement age of sixty (60) years.

(c) That the severance pay be calculated up to the period of the applicants' retirement age of sixty (60) years.

(d) That the provisions of Section 79 (6) of the Code be made an Order of this [Labour Court] Court.

(e) That the first respondent declared liable under section 69 (4) & (5) of Code.

(f) That the respondents be ordered to pay costs. That the applicants be granted such further and/or alternative relief."

4. The Labour Court application was opposed by means of an Answer to the originating application. The said Answer was signed by one Van Zyl's incorporated, who described itself as an attorney of the respondents. The Labour Court heard the said application on the 2nd and 3rd days of April, 2002, and handed down its judgment thereon on the 24th day of April 2002, dismissing the application with costs.

5. On the 11th day of November 2002, the present applicant, TSEBO MONYAKO filed an application for review in this court. The matter was only heard on the 24th July and judgment was handed down on the 28th day of July 2006. This Court ordered that, the application before it was not ripe for hearing, and it directed the

applicant to comply with the terms of Rule 15 (6) (b) of the Rules of this Court on or before the 4th day of August 2006, and respondents file their answering papers on or before the 11th day of August 2006. It directed the applicant to file his replying affidavits (if any), on or before the 18th day of August 2006. The matter was to be heard on the merits on the 25th day of August 2006 in this Court.

6. On the 17th day of August 2006, Applicant filed a notice of appeal supported by six grounds of appeal. When the matter was called on the 25th day of August 2006, Mr Ntlhoki for the Applicant, and Mr Molete for respondent informed the Court that by consent, the application for review was to be withdrawn. The two Counsel told the Court that they could not agree on the fate of the application for condonation for the late filing of the appeal as Mr Molete had no instructions in respect thereof. He had to go and secure instructions thereon from his client before he could indicate his position thereon. This Court pointed to the necessity for the prompt dispatch of the business of the Courts but said that, that consideration would yield, when necessary, in order that justice might be done to a party who had suffered a misfortune. (See **Cosmetic Distributing Company v Industrial Products, 1944 W.L.D. 201).** This Court bore in mind that, litigants seeking a postponement would have to show a good and strong reason for the grant of that relief. We also bore in mind the ordinary canon of expediency that there should be an end to litigation. The postponement of a matter set down for hearing for a particular date

cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement should not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement should be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, the Court took into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. (**See National Police Service Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC) at 1112C –F).** Bearing in mind all the foregoing factors, this Court granted the postponement sought.

7. On the 13th day of September 2006, the 3rd respondent filed a notice of intention of oppose the condonation application. The answering affidavit of the 4th respondent's chief executive, one Mr Mtwalo Mtwalo was filed on the 10th day of October 2006. On the 1st November 2006, applicant filed a replying affidavit. The matter was then set down for hearing on the 17th day of January 2007. On that day, Mr Molete's firm withdrew from the matter as attorneys of record for the respondents. Advocate Phakisi, who is an

employee of 3rd respondent appeared for respondents on the 17th day of January 2007. On the same day, the matter was again postponed to the following day by consent, as Mr Ntlhoki had an urgent national election's application before Monapathi J to be argued and immediately disposed of on the same day. On the 18th day of January 2007, the matter proceeded.

8. As indicated above, this is an application for condonation for the late filing of the appeal. Rule 5 (1) of the Labour Appeal Court of Lesotho provides that:

> "In any matter in which there is a right of appeal to the court, a notice of appeal shall be filed by the appellant within six weeks of the judgment of order of the Labour Court, and that the court may condone the late filing of the notice of appeal upon good cause shown if it considers it to be in the interests of justice"

9. The phrase "good cause" is not defined anywhere in the Rules of this constitutes "good cause". It is a question that has to be decided by the trial judge upon consideration of all the facts. All of this shows that a Court is obliged to look at the total picture presented by all the facts and that, generally speaking, no one factor should be considered in isolation from all the others (See ***Thamae and Anor v Kotelo and Anor C of A (civ) No.16 of 2005***, at p.13, per Melunsky JA). Thus, in **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E)** Jones J said:

> "In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for has default, the Court is given a wide discretion in terms of Rule 31 (2) (b). When dealing with words

such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3). The Court 's discretion must be exercised after a proper consideration of all the relevant circumstances. While it was said in Grant's case that a Court should not come to the assistant of a defendant whose default was willful or due to gross negligence, I agree with the view of Howard J in the case of Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 615, that while a Court may well decline to grant relief where the default has been willful or due to gross negligence it cannot be accepted

> "that the absence of gross negligence in relation to the default is an essential criterion, or an absolute prerequisite, for the granting of relief under Rule 31 (2) (b)."

It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief. The above does not in my view detract in any way from the decision in this Court in Vincolette v Calvert 1974 (4) SA 275 (E).

10. The phrase "good cause" is, in our view therefore, synonymous with the phrase "sufficient cause." The Appellate Division of the Supreme Court of South Africa has laid down the general rule regarding the question whether or not to grant an application for condonation **Melane v Santam Insurance Co. Ltd 1962 (4) SA (A) at 532** as follows:

> "In deciding whether sufficient cause has been sown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts, usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course

that it there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success, which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases."

11. The case of ***Meintjies v H.D. Combrinck (Edms) Bpk., 1961 (1) SA 262 (AD) at p. 262A*** – **B** is also in point. The cogency of any of the said factors will vary according to the circumstances, including the particular Rule infringed. (See **Federated Employers Fire & General Insurance Co. Ltd and Another v Mckenzie 1969 (3) SA 360 (A)**. The Court of Appeal of Lesotho held in **Lesotho University Teachers and Researchers' Union LAC (1995-1999) 661 at 665B-C** that, the late noting of the appeal may not have been due to fault on the part of the appellant of his legal representatives, although the application for condonation could have been avoided had appeal been noted timeously. (See also **Mosaase v Rex C of A (Cri) No. 12/2005 at pp.5-6**). Steyn P also indicated in the latter case that, these factors should be comprehensively considered, and should not be compartmentalized.

12. Rule 5 (1) of the Rules of this Court gives the Court a wide discretion. The Court must be satisfied that, in exercising it, justice is being done. As was said in the headnote in S v Ackerman 1965

(4) SA 740 (O):

> In an application … by an applicant to condone his failure to note an appeal timeously, ….all the facts which the applicant puts forward directly in regard to his failure, and the merits of the case, as well as the consequences, such as prejudice to other interested parties, must be considered. It is essential in such an application that the applicant in any event gives reasons, matter how flimsy, which will explain his failure. The onus is on the applicant throughout.
>
> Where an applicant is legally represented and could and wanted to appeal ….but this was not done without any reason being given for his failure, then it must be taken that he willfully ignored the Rule and the Court will not, because of the willful disregard, no matter how slight, condone the failure.

13. It is against the foregoing background that we not consider whether we should grant condonation. The facts on which the application for condonation are based are reflected in paragraphs 7 to 13 of the founding affidavit of applicant. It may help to reproduce the said paragraphs hereinbelow as we have done herein. They are as follows:-

> 7.
> On **24th April 2002** the Labour Court delivered a judgment in **LC/108/00** in the matter between **TSEPO RAPOU and 3 others** versus Lesotho Tourist Board and another. I was one of the Applicants. A copy of the judgment is hereto attached and marked **annexed 'A'**
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> 8.
> On **21st October 2002** I filled an application for condonation of the late noting of a review of the judgment which is **annexure "A"**. The application was granted on **10th June 2005** but the matter kept being postponed until **24th July 2006** when the review application was argued before **MOSITO AJ**. On **28th July 2006** his lordship gave a ruling that the matter was not ripe for hearing as the parties still had to file their respective affidavits. He postponed the matter to **25th August 2006.**
>
> 9.
> When the review application was launched the matter was exclusively handled by a professional Assistant, in my attorneys' office. He has since left the said firm and the matter is now handled by **Mr NTLHOKI** personally.

10.

I am advised by my attorney and verily believe that is was never a wise move to try to review the judgment of the Labour Court. The correct remedy was to have noted an appeal if I felt that I had to pursue the matter. An appeal would have gone to the merits proper and finally dispose of them. It was also a cheaper and effective way to deal with this matter which did not require any further affidavits by the parties.

11.

It has always been my wish to pursue the merits of this matter and the initial advise an approach was not the best regrettably.

12.

I believe I have better prospects of success as more fully appears from my grounds of appeal attached hereto and marked **annexure "B"**

13.

WHEREFORE I am making this affidavit in support of the prayers contained in the notice of application.

14. The question that arises is whether the above discloses enough for purposes of condonation. The first issue is whether a "good cause" as required by Rule 5 (1) of this court has been shown for the delay in noting the appeal. Applicant contends that, when the review application was launched the matter was exclusively handled by a professional Assistant, in his attorneys' office. The Assistant has since left the said firm and the matter is now handled by **Mr NTLHOKI** personally. He goes on to say that he has been advised by his attorney that it was never a wise move to try to review the judgment of the Labour Court. The correct remedy was to have noted an appeal if he felt that he had to pursue the matter. An appeal would have gone to the merits proper and finally dispose of them. It was also a cheaper and effective way to deal with this matter, which did not require any further affidavits by the parties. The respondents do not dispute these allegations. The Court should attach significance to the fact that the respondents have not denied these averments. Consequently, the applicant's averments in his

founding affidavit before this Court have remained unchallenged. (**C.f ROMA boys FC & others v Lesotho Football Association & others 1995 -1996 LLR-LB 456 (CA) at 462; see also Theko v Commissioner of Police and another 1991-1992 LLR-LB 239 at 342.** The issue in our view must in such circumstances, be resolved on the basis of the acceptance of the unchallenged evidence of the applicant before this Court. This is because the affidavit made by the applicant constitutes and contains not only his allegations but also his evidence and if not controverted or explained; it will usually be accepted by the Court. In other words, the affidavit itself constitutes proof and no further proof is necessary (**see Chobokoane v Solicitor – General LAC (1985-89) 64-65).**

15. All that the respondents say is that, applicant should resort to his attorneys for relief. For this contention, they rely on the Lesotho Court of Appeal decision in **Makenete v Lekhanya NO and ors LAC (1990-1994) 127 at 129**. It is true that in a proper case, a litigant may have recourse against his legal representative where the latter has mishandled his case to his prejudice. However, the present is not such case. This is not a case for damages against the respondent, but for condonation. Depending upon the circumstances a litigant may have to accept the consequences of his attorney's flagrant and gross non-observance of the rules. But it is certainly not the general rule that the neglect of an attorney, even if serious, should always be visited upon the client. (see **Thamae and Anor v Kotelo and Anor C of A (Civ) No.16 of 2005**, at pp.

18-19). Applicant is a layman, and was entitled to rely on the advice of his legal representative as he alleges in the peculiar circumstances of this case.

16. We Need hardly stress that, the tenacity and persistence with which applicant has been pursuing this case to date, shows the importance that he attaches to this case. Furthermore, the case is important to the respondent because applicant and his colleagues, seem to contend that they were taken over 3rd respondent when it took over from first respondent. This uncertainty has to be cleared definitively.

17. Coming now to consider prospects of success, where application is made for condonation of an appellant's failure to lodge an appeal timeously, it is advisable that the affidavit should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. The sole averment made in the present case is that: "I believe I have better prospects of success as more fully appears from my grounds of appeal attached hereto and marked **annexure "B"**" This is less than satisfactory. Something more and better could be done. However, the said **annexure "B"** (which is a notice of appeal), has a number of grounds of appeal attached to it, which we cannot ignore. Indeed as was said by Hoexter JA in **Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at p.131**:

> In applications of this sort the prospects of success are in general an important, although

> not decisive, consideration. It has been pointed out (Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and others 1985 (4) SA 773 (A) at 789C) that the Court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the Court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.

18. There is no need at this stage to examine all of the grounds listed in annexure "B". Only three of these grounds merit mention for our present purposes. Firstly, it is the applicant's contention that, the Court erred in holding that, regulation 31 (vi) of the Personnel Regulations which referred to "the establishment", did not include the successor of first respondent. On several occasions during the hearing of this matter, this Court asked Advocate Phakisi for the respondents to address it on the propriety or otherwise, of third respondent having been made a party to these proceedings, when it was not a party in the Court *a quo*. To our surprise, the learned Counsel was tenacious in arguing that it had been properly so made party because it had succeeded first respondent in terms of section 22 of the Lesotho Tourism Act 2002. that being the case, there might be merit in seeing some prospects of success in that basis. We elect to say no more on this at this stage.

19. The next point relates to consultations preceding the retrenchment of applicant. In this regard, the applicant complains that, the Court erred in holding that he was bound by retrenchment agreement, which he never signed. This raises the issue of the nature of the consultation that was undertaken, and whether it was a

contemplated by the laws of Lesotho. Indeed if applicant's contention is correct that he was not a party to the said agreement, then the issue whether he was discriminated against when others were taken over and employed by the third respondent. These issues, if properly prosecuted in this Court, point to the existence of prospects of success. We are not obliged to make definitive decisions on these issue and others at this stage, we however hold that there are prospects of success justifying the granting of condonation in this matter.

20. We consequently grant condonation for the late noting of this appeal.

21. We, however, wish to appoint out that, the number of application for condonation of failure to comply with the Rules of this Court, is a matter for grave concern. 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 realises that he has not complied with a Rule of Court apply for condonation as soon as possible. It should not be assumed that, whenever non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. Of much concern is the counsel's failure to file heads of argument. We wish to plead with legal practitioners to please comply with the rules of this Court.

22. My assessors agree.

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K.E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For the Applicant : Mr. M. Ntlhoki

For the 1st, 2nd, & 3rd Respondents : Advocate J. Phakisi