LAC/CIV/APN/08/05

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between

TELCOM LESOTHO (PTY) LTD APPLICANT

AND

TEBOHO MAFATLE RESPONDENT

AND

LAC/CIV/APN/05/06

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between

TEBOHO MAFATLE APPLICANT

AND

TELCOM LESOTHO (PTY) LTD RESPONDENT

CORAM: HON. MR. ACTING JUSTICE K. E. MOSITO

ASSESSORS MR. L. O MATELA
MR. D. TWAlA

HEARD: 25 JANANUARY 2007

DELIVERED: 31 JANUARY 2007

SUMMARY

Practice –Appeal record not filed as per Rule 7 of LACR –Consideration of Rule 7(1), (12) and(14) – Interpreted and applied
"Deemed"- meaning of considered – Effect of failure to file record timeously- Application from bar that Court make order- competency of such orders – Court not empowered to make orders attaching to it a condition, which no party has asked for.- Motion proceedings – Respondent not filing opposing affidavits – effect thereof-Abuse of process of Court –Court entitled to protect itself and litigants against abuse of court process.
No appeal pending as it is deemed withdrawn, and consequently, nothing standing on the way to the execution of the Labour Court judgment.

JUDGEMENT:

MOSITO AJ:

1. In this judgement, we will refer to Mr. Teboho Mafatle as Mr Mafatle, and Telcom Lesotho (Pty) Ltd, as the company. This is because there have been more than one legal battle both in this Court and in the Labour Court between the parties, with one party at one stage or another becoming either applicant or respondent. The objective is to avoid unnecessary confusion resulting from the use of the words "applicant" or "respondent" as the case might be. This application arises out of a fierce legal battle in the Labour Court between the parties culminating in the present two applications before this Court.

2. In the Labour Court, Mr Mafatle, instituted proceedings against the company (his former employer), for the payment to him of his terminal benefits that the company had withheld on account of debts allegedly owing to the company by him. It was common cause that he had been employed by the company from January 2000 to February 2005 when he resigned. He was employed as Accountant Manager.

The transcript of the evidence that was tendered before the Labour Court is not available to us (which issue is actually the basis of the present battle in this Court). However, it appears from the judgement of that Court that, Mr. Mafatle's version was that, upon giving notice of his resignation, he talked to Mr. Lesitsi of the company, who was the Benefits, Compensations and Industrial Relations Officer about payment of Mr. Mafatle's terminal benefits. Mr. Lesitsi assured Mr. Mafatle that the benefits would be paid, which promise never materialised. Mr. Mafatle interacted with Mr. Lesitsi on several occasions on this issue to no avail. Mr Mafatle ultimately lodged an appeal with senior level management. He was however informed that he owed the company M52, 154.55, which amount he partly disputed. Mr. Mafatle further informed the Labour Court that he was owed some further amount of M3, 492.00 by the company. The company on its part, insisted that Mr. Mafatle was owing it the amounts aforementioned. After considering the evidence before it, the Labour Court directed the company to pay Mr. Mafatle's severance pay with interest calculated from 10 March 2005. It also ordered that Mr. Mafatle be paid his pension benefits, which had been withheld by the company with interest, and costs of suit. This judgement was handed down on the 8th day of November 2005.

3. On the 5th day of December 2005, the company noted an appeal against the judgement of the Labour Court. No record of proceedings as required by Rule 7 of the Rules of the Labour Appeal Court was however filed to date by the company.
4. On the 20th day of March 2006, Mr. Mafatle's attorneys notified the

company's attorneys that, Mr. Mafatle intended to apply to the Registrar [of the Labour Court] on the 22nd day of March 2006 at 9.00am or so soon thereafter as the matter may be entertained, for taxation of a bill of costs as the company was deemed to have withdrawn its appeal [in terms of Rule 7(14) of the Rules of this Court]. On the following day, the company's attorneys answered that, they were in the process of finalising the record and that the preparation of the record was a time-consuming activity. They went on to express their surprise at Mr. Mafatle's notice, as they had not heard from Mr. Mafatle's attorneys relating to the record.

5. On 7 April 2006, the company filed what it termed "Notice in terms of Rule 7(12)(B)" in which it sought an order in the following terms:
    a. That the periods for submission of record of proceedings in the Labour Court be dispensed with.
    b. That condonation be granted for the late filing of this application.
    c. That respondent [Teboho Mafatle], pay costs in the event of opposition
    d. Further and alternative relief as the Court deems fit.

6. Mr. Mafatle opposed this notice largely on the grounds that, it constituted an abuse of the process of this Court; material non-disclosure; and that the matter was *lis pendens* in the Labour Court because, Mr. Mafatle had filed an application in that Court in LC24/06, seeking to enforce the judgement of the Labour Court.
6. On 8 November2006, Mr. Mafatle filed an application in this Court

for an order in the following terms:

a. The respondent be deemed to have withdrawn the appeal
b. The respondent pays costs of suit
c. Further and alternative relief.

7. The company did file a notice of intention to oppose, but never filed any opposing affidavits.

8. The matter was set down for hearing on the 25th day of January 2007. When the matter was called on that day, this Court asked the parties whether it was not convenient that the two applications (i.e. LAC/CIV/APN/08/05 being "Notice in terms of Rule 7(12)(B)", and LAC/CIV/APN/05/06, being application in this Court mentioned in paragraph 6 above), should be heard together as they were interrelated. Both parties asked the Court to exercise its discretion. The Court exercised its discretion by ordering that the applications be heard together on the basis of convenience. In this judgement therefore, both cases will be decided.

9. We first begin with the company's application, i.e. LAC/CIV/APN/08/05 being "Notice in terms of Rule 7(12)(B)". The first prayer in that application is that, "the periods for submission of record of proceedings in the Labour Court be dispensed with." At the hearing of this application, the Court asked the Learned Counsel for the company, Mr Matooane, whether the Court could correctly order that "the periods for submission of record of proceedings in the Labour Court be dispensed with" without anything more, and if so, in

terms of which Rule this Court could justifiably do so. This question was posed because that prayer did not seem to the Court to ask that, the period for the filing and service of the record be extended as contemplated by Rule 7 (12)(b) of the Rules of this Court, but that it be dispensed with. Confronted with this rather tricky issue, the learned counsel argued that, the prayer had been inelegantly drawn. He contended that the intention of its drafter was to apply for extension in terms of Rule 7(12)(b). He further submitted that this Court should exercise its discretion in terms of Rule 19(1) of the Rules of this Court, to order the extension of the period, as opposed to the dispensation with the Rules. Rule 19(1) provides that, "the Court may, for sufficient cause shown, excuse the parties from the compliance with any of these Rules." While it is true that this Court has the discretion to order the extension of the period, and to excuse the parties from compliance with any of the Rules, we do not opine that this Court can order the dispensation with the Rules, without putting anything in its place. The judge of this Court can only order the extension of the period upon application made to that effect. There was neither such an application before the judge of this Court in terms of Rule 7(12)(b), nor before this Court to enable it to excuse the parties from compliance with any of these Rules in terms of Rule 19(1) of the Rules of this Court. We cannot grant an order, attaching to it a condition, which no party has asked for. This Court has no power to grant an order sought by neither party, or at variance with the relief sought. (***see Salley v Stadtsbuchler LAC (1990-94)648; Phori vDurrow t/a J and E Enterprices LAC(1995-99)391; Lefosav Mooki LAC(1995-99)551***).

10. The next prayer was for condonation for the late filing of this application. In this regard, the Learned Counsel Mr. Matooane submitted that, since the application for extension could be made before the expiration of the 14 days period contemplated by Rule 7(1), what the company is seeking herein, is condonation for the late filing of the application itself, as well as condonation for the late filing of the application for extension of the time periods as contemplated by Rule 7(12)(b). It is indeed, permissible that, the company can apply for the extension of the periods if it considered that it would not be able to meet the time limits set therein, before the deemed withdrawal. As indicated in paragraph 9 above, there was however, neither an application before the judge of this Court in terms of Rule 7(12)(b), nor before this Court to enable it to exercise its discretion to excuse the parties from compliance with any of these Rules in terms of Rule 19(1) of the Rules of this Court. Once the appeal had been deemed withdrawn, the company ought to have filed an application for reinstatement of the appeal if it still had an interest in the appeal. Not unlike an application for condonation, an application for reinstatement of an appeal deemed to be withdrawn, falls to be considered upon a conspectus of all the relevant features including the degree of non-compliance with the Rules, the explanation therefor, the importance of the case and the prospects of success. (See **K*ekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA)*** at pp.651-652).
11. It is permissible under Rule 7 for a party to apply for reinstatement of an appeal once it has been deemed withdrawn. Such application must be made through a formal substantive application duly supported by

affidavit, establishing a good cause for such an application. Once the appeal has been reinstated, the time periods contemplated by the Rule may, on application be duly extended. Such prayers may be contained in one notice of motion. Any time limit prescribed by the Rules of this Court, other than those that may have been specifically excluded, may in appropriate circumstances be extended. An extension of time may be granted either before or after the period has expired upon proper substantive application. It follows therefore that, for the company to secure reinstatement of the appeal and extension of the periods thereof in the present case, it ought to have approached this Court by means of a substantive application. In the present case, the company did not do so. As was said in ***Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 135 (A)*** at p.141:

> [a] litigant… who knows…. that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney …. and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney.

12. As Holmes, J.A pointed out in ***Melane v Santam Insurance CO LTD 1962 (4) SA 531 (A)*** at p.532, in deciding whether sufficient cause has been shown, 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 therefor, 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 if there are no prospects of success there would be no point in granting condonation. 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.

13. The explanation for delay given by the company is contained in paragraphs 6, 7 and 8 of the founding affidavit of Sefabatho Mathaba. He deposes that, the registrar has not to date provided the record and that, deponent’s attorneys of record duly went to the registrar to enquire as to what was happening. He further testifies that he has been duly informed that the office of the registrar has many records to transcribe but will give it the highest priority it deserves. He also testifies that he has been informed that to transcribe the record of Court takes a long time and that the Appellant was not in wilful disregard of the rules. In paragraph 8, he testifies that, he has been informed that the records of appeals to this Court are prepared by the office of the Registrar of the Labour Court, and that they have been promising that the record would be available as soon as possible. There is neither an explanation for the degree of lateness in bringing this application, nor is there any reference to the prospects of success given in the company’s application for the delay in bringing the present application, even if it were to be considered an application for

condonation for the late filing of this application. For these reasons, this application cannot succeed.

14. The same weaknesses pervade the explanation for the failure to file the record timeously. It leaves much to be desired. In the first place, it is all hearsay and inadmissible either to prove what the contents of the statements were, or the truth of their contents.(See ***Nqojane v National University of Lesotho LAC (1985-1989) 369 at p.375).*** Not a single person has filed an affidavit in support of these averments. They cannot therefore be used to support this kind of application. It is also not correct that the office of the Registrar of the Labour Court prepares the records of appeals to this Court. Rule 7(1) of the Rules of this Court enjoins the Appellant to deliver to the office of the Registrar, a record of proceedings, not the other way round. It is in this connection that we consider the words of EM Grosskopf JA in ***Napier v Tsaperas 1995 (2) SA 665 (A)*** at 671 apposite. He said:

> For present purposes it suffices to say that there appear to be several weaknesses in the explanations offered for the late lodging of the record, and that the Court, in deciding on condonation, may also have regard to the appellant's failure to bring the application timeously. In Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G it is said that an appellant, when he realises that he has not complied with a Rule of Court, should apply for condonation without delay. His inaction may also be relevant, in my view, when he should have realised, but did not, that he has not complied with a Rule... .What is most important for present purposes is that none of the explanations tendered for the late filing of the record can justify or extenuate the failure to apply for condonation.

15. The following cases are also in point: ***Croeser v Standard Bank 1934 AD 77 at 79; Reeders v Jacobsz 1934 AD 77 at 397; Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449G - H; Meintjies v D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 264B.***

15. In the present case, the situation is exacerbated by the fact that, nothing at all is said in the present application about the prospects of success and the importance of the case. For the reasons aforegoing, we conclude that the company has not shown any good or sufficient cause for the condonation of its non-compliance with the Rule governing the lodging of the record of the trial proceedings; and that the application must fail. The application in LAC/CIV/APN/08/05 is therefore dismissed with costs. We now turn to consider LAC/CIV/APN/05/06. In his usually able and enviably concise argument, the learned Counsel Mr. Matooane for the company submitted that, LAC/CIV/APN/05/06 ought not to have been filed because, Rule 7 (14) was clear that, if a party fails to lodge a record within the periods contemplated in sub-rules 7(1) and (12), the appellant is deemed to have withdrawn the appeal. There was therefore, so the argument goes, no need for Mr. Mafatle to have filed the application as the withdrawal was deemed to have occurred by operation of law. In reaction thereto, the learned Counsel advocate Sello-Mafatle contended that, while she conceded that there was no Rule in the Rules of this Court expressly authorising such a procedure as adopted by Mr. Mafatle, it was, *ex abundante cautela,* necessary that such an application be made to put the matter of the pendency or otherwise of the appeal beyond all doubt. She contended that there was no other way in which this objective could be achieved, as appellant was apparently not prepared to file the record in terms of the Rules of this Court. She contended that the public policy consideration behind this Rule is that, there should be an end to

litigation. In reply, Mr. Matooane contended that, Mr. Mafatle was aware that respondent had already filed an application for condonation in terms of Rule 7(12)(b) in LAC/CIV/APN/08/05, and that, there was absolutely no need to file the application in LAC/CIV/APN/05/06. We have already held above that, there was effectively, no application filed in terms of Rule 7(12)(b) before us asking for the extension of the periods contemplated by Rule 7(12)(b). Thus, nothing turns on this reply in the present case.

17. That however, does not dispose of the issue whether the application in LAC/CIV/APN/05/06 ought to have been filed or not. The question is, ought Mr. Mafatle to have made this application or not regard being had to the terms of Rule 7(14). Mr Matooane emphasised the importance of the word "deemed" which appears in the Rule. The word "deemed" appearing in this Rule, has no technical or uniform connotation. As Cave J in ***R v County Council of Norfolk (1891) 65 LT NS 222 at 224,*** once pointed out:

> (W)hen it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is to be deemed to be. It is rather an admission that it is not that which it is deemed to be, and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act it is deemed to be that thing.

18. The precise meaning of the word "deemed", and especially its effect, must be ascertained from its context and the ordinary canons of construction.(See ***S v Rosenthal 1980 (1) SA 65 (A) at 75-76***). It has, for example, been held that, the words, "shall be deemed", are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, e.g. a person, thing, situation,

or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. Some of the usual meanings and effect it can have are the following: That which is *deemed* may be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e., extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely *prima facie* or rebuttable. It has thus, been held that, in the absence of any indication in a statute to the contrary, a *deeming* that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive. (See ***S v Rosenthal*** (*supra*)). The functions of a deeming provision are therefore various and the function intended in any particular legislation must be ascertained from an examination of the aim, scope and object of that enactment (See ***MV Jute Express v Owners of the Cargo Lately Laden on Board the MV Jute Express 1992 (3) SA 9 (A)*** at 18C – G).While a reference to *deeming* may be used merely to emphasise a position as opposed to extending a meaning, the primary meaning is that it extends the meaning to cases which would not otherwise be covered by the word (See ***MT Cape Spirit Owners of The Cargo Lately Laden On Board The MT Cape Spirit and Others 1999 (4) SA 321 (SCA)*** at p.323).

19. A plain examination of the terms of that Rule does not reveal that a

party who is of a view that his adversary is playing a hide and seek game with him in respect of the case of the first-mentioned party, cannot approach this Court for an order that a particular state of affairs exists, i.e. that, the appeal be deemed withdrawn. Regard being had to the aim, scope and object of Rule 7(14), we are of the view that, the use of the word "deemed" in that Rule serves an important purpose. Its purpose is to penalise dilatoriness in pursuing appeal proceedings once an appeal has been noted. The Rule is indicative of exhaustiveness of the subject-matter in question, that is, that, the appeal has been withdrawn. There would therefore, normally be no need for a formal application to have been made in such a situation for an order that the appeal be deemed withdrawn. We underlined the word *normally* to portray the message that, there are cases such as the present, where, due to instances of apparent deliberate dilatoriness, a party may approach this Court for relief as the present Mr. Mafatle in LAC/CIV/APN/05/06 has done. Thus, where a party still entertains some doubt whether in light of the circumstances, a particular state of affairs exists, we see no wrong in such a party approaching this Court for a definitive pronouncement on the state of affairs prevailing, i.e. that the appeal has been withdrawn in terms of the deeming provision of the Rule. Indeed this is consistent with a view that, the public policy consideration behind this Rule is that, there should be an end to litigation. To hold otherwise would thus be contrary to the aforesaid consideration. A party should not just file an appeal and then thereafter bask in the sun to the prejudice of the judgement creditor, and the public interest in the speedy administration of justice. In the circumstances, we hold that this Court has been correctly approached

for relief in LAC/CIV/APN/05/06.

20. The next question is whether or not to grant the application in LAC/CIV/APN/05/06. The respondent company did not deem it necessary to file opposing affidavits to this application. The Court should attach significance to the fact that the respondent has not filed any answering affidavits in this matter. 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 circumstance, 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; the Court will usually accept it. In other words, the affidavit itself constitutes proof and no further proof is necessary **(see Chobokoane v Solicitor – General LAC (1985 –89) 64 - 65)**.

21. In his founding affidavit, Mr Mafatle avers that he has been advised that the appeal is deemed to have been withdrawn for failure to lodge the record timeously. He avers that it is now one year since the matter was heard in the Labour Court, and the company has not hitherto prosecuted the appeal. He also avers that the company has denied him his livelihood as his terminal benefits are held by the same company to his prejudice and to the prejudice of his family. He complains that

this conduct by respondent, tramples upon his constitutional rights to a fair trial, equal protection of the law, and that, the company has been saying it was in the process of finalising the record when it was not. We have already indicated above that the appeal is deemed withdrawn. We do not find it necessary to decide the constitutional issues raised as the case can still be and has been decided through another avenue.

22. To sum up, this is a case in which it appears that this appeal was noted without a serious intention to see it to finality. There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. As was said by De Villiers JA in ***Hudson v Hudson and Another 1927 AD 259 at 268***:

> When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

23. As Mahomed C J once pointed out in ***Beinash v Wixley 1997 (3) SA 721 (SCA)*** at p. 734, what does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. (See also ***Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812 (W) at 820A—B***). In the present case, it is clear that the company has no serious intention to pursue its appeal to finality. The

reasons it gives for not proceeding with the preparation of the record do not only fly in the face of the Rules as shown above, but more significantly, they are not plausible at all. Indeed once a Court realises that a particular conduct constitutes an abuse of its process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse. (***Sher and Others v Sadowitz 1970 (1) SA 193 (C); S v Matisonn 1981 (3) SA 302 (A)***)It is obvious from the foregoing reasons that the following order ought to be made that:

(a) Application LAC/CIV/APN/08/05 is dismissed with costs.

(b) Application LAC/CIV/APN/05/06 is granted with costs.

24. For avoidance of doubt, it is hereby declared that there is no appeal pending before this Court, as it is deemed withdrawn, and there is consequently, nothing standing on the way to the execution of the Labour Court judgement.

25. My assessors agree.

K. E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For Applicant in LAC/CIV/APN/08/05 Mr. T. Matooane

(For Respondent in LAC/CIV/APN/05/06)

For Applicant in LAC/CIV/APN/05/06 Mrs T. Sello- Mafatle
(For Respondent in LAC/CIV/APN/08/05)