

LAC/REV/03/08

LC/REV/64/07

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD IN MASERU

In the matter between:

ECLAT EVERGOOD TEXTILE MAN. (PTY) LTD APPELLANT

AND

MOHAU RASEPHALI

RESPONDENT

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

ASSESSORS: MR MOTHEPU

MR. MATELA

HEARD: 30TH JUNE, 2008

DELIVERD: 30TH JUNE, 2008

SUMMARY

Appeal – no record of appeal filed – application for dismissal of the appeal for non prosecution – appellant having not diligently pursued his application for review in the Labour Court – Labour Court having dismissed the review application.

Application for dismissal of appeal on grounds of non prosecution granted with costs. – appeal dismissed with costs.

JUDGEMENT

MOSITO AJ:

1. This is an application for the dismissal of an appeal lodged by the Appellant on the 22nd day of May, 2008. The appeal was lodged against the judgment of the Labour Court sitting as a court of review over an award of the DDPR in A0087/07. The matter was filed in the Labour Court under LC/REV/64/07.
2. The application was filed for review by the present Appellant challenging the award of the DDPR in which the later tribunal had decided the present applicant for dismissal of the appeal.. It appears that the present Appellant had failed on several occasions to appear before the DDPR until the later tribunal granted an award against the Appellant. The Appellant then approached the Labour Court for review for the award of the DDPR. The appellant also had required that record of proceedings in the DDPR be despatched to the Labour Court for the later to review the said proceedings.
3. The Appellant was reminded by the Registrar in the Labour Court on two occasions to collect tapes for transcription of the DDPR ‘s record of proceedings which was the subject of the review application. Despite being reminded twice by the Registrar of the

Labour Court in writing to collect the said tapes, the Appellant did not collect them.

4. The present Respondent then moved the Labour Court on motion to dismiss the said application as it appeared that the Appellant was not eager to have the matter disposed of. The grounds upon which the Respondent relied for the striking-off the roll of the said application for review were essentially that the matter was previously postponed at the instance of the Appellant's Counsel on the 26th July 2007. he also complained that the Appellant had failed to collect the said tapes for transcription of the DDPR's record despite being reminded twice by the Registrar of the Labour Court so to do.
5. In reaction to the application for striking-off, Appellant's Counsel had pleaded with the Labour Court to condone the delay in having the matter prosecuted. He had argued that the delay was not wilful and had advanced as his reasons that the matter had been entrusted to a junior officer in his office who through inexperience had failed to afford the matter the attention that it deserved. He submitted that the Labour Court being a court of equity should not be inclined to punish the Appellant for a mistake which is otherwise not attributable to appellant.
6. In considering the application for striking-off, the Labour Court quite correctly in our view, considered the length of delay and the circumstances that prompted such delay.
7. It appeared that the application had been instituted on the 31st day of May, 2007. It was initially set down for hearing on the 26th day of July, 2007. This setting down had been made without the

necessary record of proceedings which were sought to be reviewed. The absence of the record necessitated the postponement of the case. The Learned Deputy President of the Labour Court quite correctly in our view in exercise of her equitable jurisdiction postponed the matter as she considered the reasons reasonable. It however appears that subsequent to this postponement the Appellant never took any steps to have the matter brought to finality. The Registrar of the Labour Court by letters dated 4th July, 2007 and 29th October, 2007 respectively requested the Appellant to collect the DDPR tapes in the matter to facilitate the transcription of the record. She even warned the Appellant that failure to collect the tapes may ultimately lead to the matter being struck-off for want of prosecution. Notwithstanding this warning the Appellant still did not react.

8. The Learned Deputy President then had occasion to have the matter placed before her again at the instance of the present Respondent who was seeking the dismissal of the application for review on the basis that the Appellants were not eager to collect the tapes and have the record transcribed. The Labour Court then decided that the present Respondent in the appeal before us had made too many efforts to have the matter finalised and quite correctly in our view refused to condone the further delay when the matter came up for hearing. The Labour Court consequently dismissed the application for review on the basis that it was clear that Appellants were not eager through their Counsel to have the matter finalised. On the 8th day of May, 2008 the Labour Court

then dismissed the said application for review with costs for want of prosecution at the instance of the present Respondent.

9. The Appellant then filed an appeal before us on the 22nd day of May, 2008 on the following grounds;

1. The Learned Deputy President erred in making finding that Appellant Counsel handled the matter in tardy fashion.
2. The Learned Deputy President failed to give the matter a due consideration of Section 27 of the Labour Code.
3. The Learned Deputy President erred in punishing the Appellant because of the non-performance the attorney.

10. The problem did not end in the Labour Court. Despite the fact that no record of proceedings of the DDPR were not transcribed, the Appellant filed the present appeal with the Registrar of this Court but never took further steps regarding filling the record as required by Rules of this court. The Appellant allowed a period of 30 days to lapse without filling a record in support of the appeal lodged before us in flagrant violation of the rules of this court relating to the filling of records.

11. The present Respondent on appeal then filed an application for dismissal of the appeal for non prosecution. He also filed an affidavit in which he detailed out the history of the matter. It may be pointed out that when he realised that the record of appeal had not been filed, he approached the President of the Labour Court to have the award of the DDPR enforced. This was on the 2nd day of June, 2008. He was surprised to find that a Notice of Appeal had

been filed in the Labour Court record and yet he had not been served with the same. He was informed by the Learned President of the Labour Court that he could not be helped by that Court in as much as the noting of an appeal automatically stays execution of judgement. The Learned President was correct in this view.

12. It was in reaction to the above circumstances that the Respondent in the appeal approached this court by way of application seeking this Court's intervention in the matter. One of his complaints was that;

In terms of Rule 5 of the Labour Appeal Court Rules, 3002, "after an appeal has been noted, the appellant shall in the accordance with Rule 7 (1) serve a copy of the record of the proceedings of the Labour Court on each respondent and file five copies of the record with the registrar" and as contemplated by Rule 7 (1) hereof, the appellant ought to deliver to the office of the Registrar a record of proceedings within 14 days in the case of civil appeals of the date of the filing of the notice of appeal.

13. He complaint that in conflict with the above rule, the Appellant had not filed the record of proceedings within the period prescribed. He consequently submitted that the appeal should be struck-off the roll and / or dismissed.
14. He tried to serve the Notice of Application on the attorneys of Record at the physical address given, but the later were no where to be found. The Attorneys of Record were Messrs M. M. Klass and Co. The Respondent (who is now applicant before us in respect of the dismissal of application) took the further trouble to

serve the Appellant with the Notice of Application for dismissal of this appeal for lack of prosecution. He went to the Post Office and served his application by registered mail and addressed it to the postal address of the Attorneys of Record. He filed the original of the receipt for the registered mail dated 30th May, 2008. It is receipt No. “B No. 36529”.

15. At the hearing of this application, there was no appearance for the Appellant despite this service. Rule 13 of the Rules of this Court confers discretion to dismiss an appeal for lack of prosecution. (**S. v Isaacs, 1968 (2) SA 184 (AD) at p. 186A**). In our view, we are satisfied that the applicant for the dismissal of the appeal has taken all the reasonable steps to see to the service of the Notice of Application. We are satisfied that this application was served on the Appellants. We are also satisfied that as the Labour Court did find, it does appear that Appellant is no longer eager to have this matter finalised. An injustice would result if this appeal be left in a state of protracted uncertainty.
16. The issue is whether we should dismiss this appeal and grant this application for dismissal of the appeal. The approach which we are bound to apply is not simply whether more than a reasonable time has elapsed. We have to assess whether a facility which is undoubtedly available to appellant was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such a fashion that the manner of exercise of that right would cause injustice. The issue is whether there is behaviour which oversteps the threshold of legitimacy. (See. **Molala v Minister of Law and Order and**

Another 1993 (1) SA 673 (W) at 677). The increase in respondent's problems is, a factor insofar as the Court, on an overall view of the case, is to exercise a discretion. We have to, *inter alia*, and have regard to why appellant acted in the way in which he did. This opens up a wide range of possibilities; what he strove to achieve; what he realised would follow from his behaviour apart from any avowed aim; what evidence points to lack of good faith, etc. In our view, the way this case has been handled by the appellant is a clear abuse of process.

17. We therefore decided that this matter has to come to an end. It is clear that the Appellants are not eager to proceed with their review application as well as their appeal before us.
18. In the circumstances it is only fair to dismiss this appeal for lack of prosecution. We therefore order that this appeal is dismissed with costs. The application for the dismissal of the appeal is also granted with costs.
19. My assessors agree.

K.E. MOSITO AJ.

JUDGE OF THE LABOUR APPEAL COURT

For Appellant: No appearance

For Respondent in the appeal (Applicant in the dismissal application): Mr.
Mohau Rasephali in person

