LAC/CIV/A/03/15

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:

SINOHYDRO CORPORATION (PTY) LTD APPELLANT

And

HLALELE RALIENYANE RESPONDENT

INTERLOCUTORY ORDER

CORAM : The Hon. Acting Justice Keketso Moahloli

ASSESSORS : Mrs. M. Thakalekoala
Mrs. M. Mosehle

Date of Hearing : 4 August 2015

Date of Order : 28 August 2015

SUMMARY

Practice and procedure – Appeal from a decision of the Labour Court – Appellant failing to deliver record of proceedings within stipulated time limit and failing to apply for extension - Appellant deemed to have withdrawn the appeal – May the Court excuse appellant for non-compliance with Rules relating to filing of record and application for extension – requirements for "for sufficient cause shown".

ANNOTATIONS

Cases:

- Chotbhai v Union Government & Another, 1911AD 13
- Classiclean (Pty) Ltd v CWIU & Others, [1999] 4 BLLR 291 (LAC)
- Dalhouzie v Bruwer, 1970 (4) SA 566 (CPD)
- Kajee and Others v G. & G. Investment and Finance Corporation (Pty) Ltd, 1962 (1) SA 575 (DCLD)
- Makenete v Lekhanya, N O and Others (No.1), LAC (10)-1994)127.
- Mpaiphele Maqutu v Lesotho Electricity Company (Pty) Ltd and Another, LAC/CIV/A/27/2
- Ogus v Secretary for Inland Revenue, 1978 (3) SA 67 (TPD)
- Smith N.O. v Brummer N.O. and Another, 1954 (3) SA 352 (OPD)
- Steel v Shauta Construction (Pty) Ltd, 1973 (2) SA 537 (TPD)
- Telecom Lesotho (Pty) Ltd v Teboho Mafatle, LAC/CIV/APN/08/05 and Teboho Mafatle v Telcom Lesotho (Pty) Ltd, LAC/CIV/APN/05/06

Statutes:

<u>Lesotho</u>

- Labour Appeal Court Rules 2002 [“the Rules”]

<u>South Africa</u>

- Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court 1996 [“the LAC Rules”]

- Uniform Rules of Court 1965 [“the Uniform Rules”]

Moahloli AJ

INTRODUCTION

[1] On 4 March 2015 Sinohydro Corporation (Pty) Ltd ("the Employer") noted an appeal in this Court against a judgment of the Labour Court (LC/REV/69/14) delivered on 11 February 2015 refusing a review application against an award of the DDPR made in favour of Hlalele Ralienyane ("the Employee") on 17th June 2014 (case number A0235/13).

[2] Four months later on 20 July 2015 the Employee lodged an urgent application for an order, inter alia, declaring that the Employer's notice of appeal be (in terms of Rule 7 of the Labour Appeal Court Rules), deemed to have been withdrawn, for the reason that the Employer does "not have an interest or does not want [the] matter to reach finality or just wants to delay … fairness and justice as the matter has been pending almost four months before the court lacking prosecution". The Employee requested that the case be heard urgently because he believed that the Employer had been given up to the end of July 2015 to finish off his work in Lesotho and hand over the project to the government.

[3] On 23 July 2015 the Employer filed a notice of intention to oppose, contending that the matter is not urgent. It avers that "until now the dam is not finished and has not been handed over to the Government. For that matter the dam is far from being finished." The Employer further contends that it "has always been eager to have [the]matter finalised, [but] the only problem is that the cassette containing the record of

proceedings from the Labour Court cannot be found after an extensive search", which still continues.

[4] The Employee refutes this, arguing that if the Employer is eager to have the matter finalized it could have applied for extension of time for the filing of the record before the 14 day time limit stipulated in the Rules.

[5] On the same date it filed the notice of intention to oppose, the Employer filed an application for the reinstatement of its appeal and extension of the period to file the record of proceedings. Its reason for doing so is that "the appeal is, in terms of the rules…, deemed to have been withdrawn". The Employer avers that its application should succeed because it "has prospects of success in the appeal on the grounds appearing on the notice of appeal".

[6] The case was argued on 4 August 2015 and both parties handed up written heads of argument. Although I undertook to deliver an *ex tempore* judgment within a few days, it took me longer to research the applicable law as the heads of argument provided were inadequate and not very helpful.

THE LEGAL FRAMEWORK

[7] The applicable procedure in cases of this nature is set out in the Labour Appeal Court Rules of 2002 ("the Rules") as follows:-

> **"Record of proceedings**

7. (1) Subject to sub-rule (12), the appellant shall deliver to the office of the Registrar a record of the proceedings within 14 days in the case of civil appeals … of the date of the filing of the notice of appeal.

(2) ……

(12) Notwithstanding sub-rule (1), the period for the filing and service of the record may be extended if-

(a) the parties consent to an extension;

(b) the party concerned applies to the judge in chambers for an extension and the Judge, on good cause shown, grants the extension.

(13) An application contemplated in sub-rule 12(b) shall be on motion supported by an affidavit and accompanied with proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 14 days of service of the application.

(14) 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.

.....

Departure from these Rules

19. (1) The Court may, **for sufficient cause shown**, excuse the parties from the compliance with any of these Rules. [my emphasis]

ANALYSIS OF ARGUMENT

[8] Its abundantly clear that in a civil appeal from the Labour Court to the Labour Appeal Court the appellant must deliver a record to proceedings to the Registrar within 14 days of the filing of the notice of appeal. This

period, according to rule 2(1) of the Rules, excludes Saturdays, Sundays and public holidays.

[9] I have observed that this period is often found to be very short, particularly where the record consists primarily of recorded proceedings which need to be transcribed from audio. It is not surprising that the period is much longer in other courts and jurisdictions. For example, in the case of appeals to the Court of Appeal the record of the High Court proceedings has to be filed within 3 months of noting the appeal[1]. And in the case of appeals to the South African Labour Appeal Court the period is 60 days. [2]

[10] However our Rules provide for an uncomplicated and inexpensive way to extend the time limit and avoid the appeal being deemed to have lapsed. The appellant is allowed to approach the opposing side within the 14-day period for consent to an extension of time.[3] If this fails, the appellant may approach the Judge, relatively informally in Chambers, for an extension.[4] In view of this fairly easy access to the extension procedure the South African Labour Appeal Court was not sympathetic to an appellant who failed to apply for extension in **Classiclean (Pty) Ltd v CWIU**, and did not proffer a proper explanation for such non-compliance. It deemed the appeal withdrawn. This court came to a similar conclusion in **Mpaiphele Maqutu v Lesotho Electricity Company (Pty) Ltd** and **Makenete v Lekhanya (No.1).**

[11] In the present case I pressed the Employer's counsel for an explanation why they had not negotiated or applied for an extension, but no reason was

[1] Rule 5(1) of the Court of Appeal Rules 2006
[2] Rule 5(8) of the LAC Rules
[3] Rule 7(12) (a) of the Rules
[4] Rule 7(12)(b) of the Rules

forthcoming. Therefore on the strict authority of **Classiclean, Maqutu** and **Makenete** this Court is entitled to deem this appeal to have lapsed.

[12] Having said this, I must hasten to point out that the Courts will sometimes not leave an appellant without a remedy where no application for extension was made. In certain deserving cases the appellant may be excused from the non-compliance[5]

[13] *In casu* the Employer sought to salvage its appeal by lodging an application for condonation and reinstatement in terms of Rule 19(1). For them to succeed they must show sufficient cause why they should be excused from the non-compliance with the Rules.

[14] What does the phrase "for sufficient cause shown" mean? In other words what requirements must the appellant meet in order to succeed?

[15] In **Kajee and others v G&G Investment and Finance Corporation (Pty) Ltd** the court interpreted the phrase to mean the following:-

> "what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the Court's indulgence without giving an explanation. The explanation must be reasonable in the sense that … it must not show that his default was wilful or was due to gross negligence on his part. If the explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence.[6]

[5] For instance in Telecom Lesotho (Pty) Ltd v Teboho Mafatle
[6] At p577E-f

[16] In **Smith NO v Brummer NO** the court held that such applicant's affidavit must set out the following:-

> "(a) a satisfactory explanation for the delay. The explanation must contain sufficient particularity for the default.
>
> (b) the application must be *bona fide* and not intended to delay the proceedings.
>
> (c) the applicant must establish a *bona fide* defence/claim that is not patently unfounded and is based upon facts, that if proved, would constitute a defence/claim.[7]
>
> (d) the applicant must establish that the granting of the order will to prejudice the other party in any way that cannot be compensated for by a suitable costs order, and if applicable, a postponement.
>
> The relevant facts must be set out clearly and with particularity to enable the Court to exercise its wide discretion in term of the rule on a consideration of the case."

[17] In the present case the Employer's counsel could not provide me with any explanation why it did not use the avenues provided in Rule 7(12) (a) and

[7] This means that the appellant must set up a prima facie case facts alleged to substantiate this case, from which the Court can satisfy itself that the appellant is *bona fide* in his intention to appeal – Dalhouze v Bruwer at p572 C.

[7] See interpretation of the work "deemed " in **Telcom Lesotho (Pty) Ltd v Teboho Mafatle** at para 17-19; **Chotabhai v Union Government & Another** at p33 & 58-59; **Steel v Shauta Construction (Pty) Ltd** at p541A and 543A; **Ogus v Secretary for Inland Revenue** at p74f.

(b) to obtain an extension of time to deliver the record of proceedings. I made several efforts to tease an explanation out of him, to no avail.

[18] In the circumstances the inevitable conclusion is that the Employer must, in terms of Rule 7 (14), be considered or regarded[8] to have withdrawn the appeal.

[19] As intimated above, the Employer has applied for an order that its appeal be reinstated and the period for delivering the record be extended for a period to be determined by the Court. The Employer avers that it did not file the record in time because "the cassette containing the proceedings of the Labour Court has been misplaced at the Labour Court and has not been found, despite an extensive search for it." It makes a "plea that the period required for filing the record be extended … to enable the further search for the record, hoping that by the period to be extended … the cassette will have been found." Lastly, the Employer submits that it "has prospects of success in the appeal on the grounds appearing in the notice of appeal."

[20] In reply, the Employee contends that the cassette which is said to be missing is not an indispensable component of the record because it merely contains oral arguments made at the review hearing, which are essentially a regurgitation of what is contained in the available written heads of argument. The employee argues that the record of these proceedings comprises only the review pleadings plus the Labour Court judgement. Therefore it was disingenuous of the Employer to pretend that it could not file the record without the transcribed cassette.

[8] See interpretation of the word "deemed " in **Telcom Lesotho (Pty) Ltd v Teboho Mafatle** at para 17-19; **Chotabhai v Union Government & Another** at p33 & 58-59; **Steel v Shauta Construction (Pty) Ltd** at p541A and 543A; **Ogus v Secretary for Inland Revenue** at p74F.

[21] I agree that since the record in issue is not one of trial proceedings, it could have been easily compiled using the pleadings, judgment and written heads of argument. Consequently I do not find Employer's explanation for the delay to be reasonable. The Employer's unnecessary insistence on finding the missing cassette seems to be a delaying tactic. It could have been addressed if the Employer had taken the trouble to approach the judge in Chambers for an extension. In the premises, I do not consider this a proper case to grant the indulgence requested.

ORDER

1. The Employer, Sinohydro Corporation (Pty) Ltd, is deemed to have withdrawn the appeal.
2. The application for reinstatement of the appeal and extension of the period to file the record is not granted.
3. Sinohydro Corporation (Pty) Ltd must pay the costs of suit.

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MOAHLOLI AJ
JUDGE OF THE LABOUR APPEAL COURT

For Appellant : Mr. MJ Rampai

For Respondent: Adv. AM Chobokoane