

**C of A (CIV) No. 21 of 2007**

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

TEACHING SERVICE COMMISSION	1 <sup>st</sup> APPELLANT
TEACHING SERVICE DEPARTMENT	2 <sup>nd</sup> APPELLANT
PRINCIPAL SECRETARY	
MINISTRY OF EDUCATION	3 <sup>rd</sup> APPELLANT
ATTORNEY-GENERAL	4 <sup>th</sup> APPELLANT

**AND**

THE LEARNED JUDGE OF LABOUR APPEAL COURT	1 <sup>st</sup> RESPONDENT
THE REGISTRAR, LABOUR APPEAL COURT	2 <sup>nd</sup> RESPONDENT
THE PRESIDENT, LABOUR COURT	3 <sup>rd</sup> RESPONDENT
THE LEARNED ARBITRATOR DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	4 <sup>th</sup> RESPONDENT
BOKANG LELIMO	5 <sup>th</sup> RESPONDENT

HEARD 8 April 2008

DELIVERED: 11 April 2008

CORAM: **Steyn, P**  
**Melunsky, JA**  
**Gauntlett, JA**

SUMMARY

*Review - appellants seeking to review decision of Labour Appeal Court - Distinction between appeal and review - Appellants' purported review in substance an appeal - this impermissible.*

*Further, there is no right to review the decision of a judge of the High Court - judge sitting on Labour Appeal Court - not permitted to review decision of that court.*

**JUDGMENT**

MELUNSKY. JA

[1] The single issue that came before us in this appeal was whether,

having regard to section 119 of the Constitution of Lesotho and other statutory provisions, the High Court was entitled to review and set aside a decision of the Labour Appeal Court ("the LAC"). During the hearing of the appeal other questions were raised by the Court which are of fundamental importance and, indeed, determine the outcome of this matter.

[2] As far as it is possible to ascertain from the affidavits, which regrettably do not set out the facts in a clear and chronological order, the fifth respondent (who is the only respondent who opposes the appeal and is referred to herein as the respondent) was employed by the Semonkong High School. His salary was paid out of public funds. He was dismissed by the Teaching Service Commission, the first appellant, as long ago as September 2002. He challenged his dismissal before the Directorate of Dispute Prevention and Resolution ("the DDPR"), a body established under the Labour Code (Amendment) Act, 3 of 2000 ("the Amendment Act"). Subsequently an arbitrator of the DDPR ordered his reinstatement and, pursuant to a further arbitration, the first appellant was directed to pay him an amount of M12 892.85 in respect of salary arrears. The respondent applied to the Labour Court to enforce the award. His application was rejected by that court on the ground, inter alia, that he was a public officer and, in terms of the Exemption Order (LLN 22 of 1995) made under section 2(2)(b) of the Labour Code Order 1992, and was, therefore not subject to

the Code.

[3] Against that decision the respondent appealed to the LAC, consisting of Peete J and two assessors. The LAC held that a teacher in the position of the respondent was not a public officer for the purposes of LLN 22 of 1995 and it directed the Labour Court to enforce the award. This led to the appellants seeking an order in the High Court for the following relief, inter alia:

"Directing and ordering that the proceedings and judgment in LAC/A/04/05 a matter of the Labour Appeal Court and subsequent order of the Labour Court be reviewed and corrected and set aside".

**[4] The application came before Majara J who directed the parties to argue one point *in limine*, namely whether the High Court had the jurisdiction to review a decision of the LAC. The respective arguments were put before the learned judge by means of written submissions. She concluded that the High Court did not have the power to review a decision of the LAC and she therefore dismissed the application with costs. It is against that decision that the appellants appeal to this Court.**

[5] Majara J arrived at her decision on the ground that the LAC was not a "subordinate or inferior court" within the meaning of that expression in section 119(1) of the Constitution of Lesotho, and that it was not a "subordinate court of justice" in terms of section 7 of the High Court Act. It

is, however, not necessary for us to consider whether the reasoning of Majara J was correct. We arrive at the same result on different grounds, for in our view the application brought by the appellants in the court a quo was totally flawed for two reasons: first, that the purported review of the LAC was in substance an appeal, and second, that it is not permissible at common law or by statute for the High Court or, indeed, this Court, to review a decision of a judge of a superior court, save, possibly, in exceptional circumstances. These points will be addressed consecutively.

[6] The distinction between an appeal and a review is well-known and hardly requires elaboration. Appeal is the appropriate procedure where a litigant contends that a court came to an incorrect decision whether on the law or on the facts. Review, however, as Schutz JA emphasized in Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (A) at 401 I to 402 C (pars [34] and [35]), is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, being a means by which those in authority may be compelled to behave lawfully. In Johannesburg Consolidated Investment Co v Johannesburg Town Council 1909 TS 111, Innes CJ said at 114 that a review is

"... the process by which .... the proceedings of inferior courts of justice, both civil and criminal, are brought before the court (i.e. the reviewing superior court) in respect of grave irregularities or illegalities occurring during the course of such proceedings."

It only needs to be added that in an appeal the court is bound by the record

of proceedings, whereas in review proceedings facts and information not appearing on the record may be placed before the reviewing court.

[7] In terms of section 38A (4) of the Amendment Act, no appeal lies against any decision, judgment or order given by the LAC (see also Tseuoa v Labour Appeal Court of Lesotho and Others, C of A (CIV) 27/2004 at par [10]). In this matter the appellants did not attack the constitutionality of the section: it contended that the LAC did not deal with all of the issues before it and that it only addressed "the issue of jurisdiction", i.e. whether the respondent was a public officer. The deponent in the founding affidavit for the application for review went on to say:

"I aver therefore that the leaving out of the other issues by the Honourable Court was a gross irregularity which has vitiated the entire proceedings and the resultant judgment".

The omission by Peete J to deal with all of the points raised by the appellants- if, indeed, there was such an omission - does not amount to an irregularity, much less one that was "gross". The LAC might have been of the view that the finding made by it was dispositive of the case and that there was no need to deal with the other points; moreover the court's failure to mention the other issues does not mean that they were not considered. What is clear is that the appellants were dissatisfied with the outcome and considered that the judgment was incorrect. The proceedings in the court a quo were not aimed at the maintenance of legality; what the appellants sought to do was simply to overturn the LAC's decision on the

merits. In substance and in its essence the appellants attempted to argue an appeal in the High Court under the cloak of a review. This was clearly impermissible. An appeal remains an appeal by whatever name it is called. In our view the appeal to this Court cannot succeed.

[8] The second point raised by this Court on appeal is also fatal to the appellants' contentions. In terms of section 38 (3) of the Amendment Act, the LAC is to consist of a judge of the High Court and two assessors. The judge, however, is the sole adjudicator on matters of law (section 38 (8) (b)). It is clear from Pretoria Portland Cement Co. Ltd at p 400 - ff that there is no right to review a decision of a judge at common law. This principle was approved by this Court in PM Mosuoe v Judge of the High Court C of A (CIV) 18/2007, a judgment that will be delivered simultaneously with this one. I only have to add that there is no statute in Lesotho which authorises review proceedings against the decision of a judge of the High Court.

[9] The fact that Peete J was sitting as a judge of the LAC is, for the purposes of the right to review his decision, of no consequence. He was - and still is - a judge of the High Court and in the LAC he was exercising a judicial function. This is not to say that a decision of a judge would be subject to review if he acted in an administrative capacity. Nor is it of any significance that the assessors - contrary to the afore-stated provision of section 38 (8) (b) - concurred in Peete J's decision on a matter of law. It is conceivable that there may be cases in which a judge's misconduct is so

obviously grave and serious that a litigant would not be without a remedy. This, of course, is most certainly not such a case. Indeed, as we have already pointed out, there was no misconduct at all on the part of the learned judge.

[11] The order which is made if the following:

**The appeal is dismissed with costs.**

L.S. MELUNSKY

**Judge of Appeal**

I agree:

J.H. STEYN

**President of the Court of Appeal**

I agree:

J.J. GAUNTLETT

**Judge of Appeal**

For the Appellant: Adv. M Mapetla and Adv. M. Nkaota

For the 5<sup>th</sup> Respondent: Adv. P. Kgoadi