IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 7/2012

In the matter between:

LESOTHO HIGHLANDS AND DEVELOPMENT AUTHORITY **APPELLANT**

and

TSOTANG NTJEBE & OTHERS **RESPONDENT**

And in the matter between:-

LESOTHO HIGHLANDS AND DEVELOPMENT AUTHORITY **APPELLANT**

AND

TELANG LEEMISA **RESPONDENT**

CORAM: RAMODIBEDI P
SCOTT JA
HURT JA

HEARD 16 August 2012
DELIVERED 3 September 2012

SUMMARY

Application for leave to appeal against a decision of the LAC in terms of s 38AA (2) of the Labour Code.

JUDGMENT

SCOTT, JA

[1] After hearing this application this Court granted leave to the applicant to appeal against a judgment of the Labour Appeal Court (LAC) on a ground involving a question of law, namely;

> *"whether the Prescription Act 6 of 1861 is applicable to proceedings in the Labour Court and, if so, whether in the circumstances of the present case the applicant is entitled to rely on its provisions in respect of the respondents' claims for overtime payments."*

The Court indicated that its reasons would be furnished on 3 September 2012. Here are the reasons.

[2] A certificate was previously granted by the presiding judge in the LAC **(Mosito AJ)** in respect of two grounds of appeal. The learned judge refused a certificate in respect of a third ground and it is this ground that is the subject of the present application.

[3] The proceedings in the courts below were protracted. It is necessary to set out briefly the course they took.

[4] Following their retrenchment in March 2003, the respondents sought relief in the Labour Court in two separate applications which were heard together. Their claims which included claims for overtime, were dismissed by the Labour Court on 15 October 2004. On appeal, in a judgment handed down on 6 February 2009, the LAC set aside the decision of the Labour

Court and because *"the requisites for the purpose of computation of how much the [respondents] would be entitled to [in respect of overtime] were not placed before the Labour Court"* remitted the matter to that Court for the parties to provide this information. The respondents in due course deposed to affidavits in support of their claims for overtime, many of which extended back well in excess of three years. The applicant filed an answering affidavit in which it raised the defence of prescription, albeit without reference to the Prescription Act of 1861. According to the founding affidavit filed in the present application, the passage in the answering affidavit read as follows.

> *"3,7 At best for the applicants [ie, now the respondents] and on the basis that the Honourable Court rules that it could have been approached directly, all claims in respect of difference in salary prior to May 2000 may be dismissed as these claims have become prescribed."*

There is no indication whether the respondents filed a replying affidavit dealing with the issue of prescription, which no doubt they could have had they wished to do so. When the matter came before the Labour Court for the second time counsel for the applicant argued that by reason of the provisions of section 227 of the Labour Code the respondents' claims for overtime were limited to overtime worked in the three-year period immediately preceding the commencement of proceedings. No argument founded on the Prescription Act was apparently advanced. In its judgment delivered on 16 November 2009 the Labour Court appears to have left open what I shall refer to as the *"section 227 point"* and instead held that overtime worked more than three years prior to the commencement of proceedings had prescribed in terms of the Prescription Act 1861 which it ruled was

binding on it. The Court accordingly limited its awards in respect of overtime to time worked in the three year period. The respondents again appealed. The LAC in its judgment dated 4 July 2011 rejected the argument on the section 227 point and held further that the Labour Court had not been entitled to rely on the Prescription Act because it had not been pleaded. The Court also expressed doubt as to whether the Prescription Act had application to proceedings in the Labour Court. In the result, the Court substituted an award for overtime which in some instances went back for more than 12 years.

[5] As previously indicated, the LAC granted a certificate to the applicant permitting it to appeal on two grounds involving questions of law, one of which was the section 227 point. It refused to grant a

certificate on the issue whether the Prescription Act is applicable to proceedings in the Labour Court and, if so, whether in the circumstances of the case the applicant was entitled to rely on the Prescription Act. It found, correctly, that both inquiries involved questions of law but refused a certificate on the basis of the applicant's failure to plead the Prescription Act of 1861.

[6] The test for whether leave to appeal should be granted is well established. It is whether the applicant has a reasonable prospect of success on appeal. In **Attorney- General**, **Transvaal v Nokwe 1962 (3) SA 803 (T) at 807A** Trollip J, following earlier cases, held that there was a further criterion, namely, whether or not the case was of substantial importance to the applicant or to both the applicant and the respondent.

In **Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 560I Corbett JA** expressed doubt whether the further criterion still obtained and it would seem that in subsequent cases this criterion has not been required. As I shall show, the present case is, indeed, one of substantial importance to the parties and nothing turns on the existence or otherwise of the further requirement. What is, however, of importance is that although leave is sought to appeal a judgment of a court which itself had exercised an appellate jurisdiction, there is nothing in section 38AA to suggest that a more stringent test is to apply. (Compare for instance **Westinghouse Brake & Equipment,** supra, where the statute made provision for *"special leave"*.)

[7] There can be no doubt that the case is of substantial importance to the parties. According to the applicant, the amount involved, depending on whether or not the defence of prescription were to be upheld, is something in the region of M11.000.000. The question as to whether or not the Prescription Act of 1861 is applicable to proceedings in the Labour Court is of relevance not only to the present case but also to cases in the future. It is also worth noting that in as much as there is already an appeal pending the addition of a further ground is unlikely to add significantly to the costs.

[8] With regard to the question of the prospects of success, it is undoubtedly so that a substantive defence such as prescription must, generally speaking, be properly raised at an appropriate stage in the

proceedings. But a court has a wide discretion and will not lightly debar a defendant from raising a substantive defence to a claim, even at a late stage, in the absence of unfair prejudice to the other party. The applicability of the Prescription Act 1861 to labour matters, being the first leg of the ground on which the applicant seeks leave to appeal, is purely a question of law and provided the parties are afforded the opportunity of considering the issue, no prejudice can arise from the failure to raise the issue earlier. The further question is whether the entertainment by the Court *a quo* of the defence of prescription under the Prescription Act in the present case would have unfairly prejudiced the respondents.

[9] As noted above, the issue of prescription was raised by the applicant prior to the second hearing

before the Labour Court. Admittedly, no reference was made in the passage quoted above to the Prescription Act 1861 and it may well be that the deponent had in mind no more than the provisions of section 227 of the Labour Code. But the passage in question would certainly have alerted the respondents to the fact that the applicant was raising the defence of prescription. But whether the respondents would have been unfairly prejudiced or not depends ultimately on whether they would be deprived of the opportunity of putting evidence before the court in answer to the defence which would otherwise have been available to them. Having regard to the nature of the claims and the circumstances in which they arose – matters which would have been fully canvassed in evidence – any possible prejudice the respondents may have suffered is not readily apparent, particularly if regard is had to

the provisions of the Prescription Act. Nor is there anything in the papers before us to suggest such prejudice. In the circumstances it seems to me that the applicant has a reasonable prospect of success on the issue of prescription under the Prescription Act and the application had to succeed.

[10] The costs of the application are to stand over for determination by the Court when hearing the appeal.

_____

D.G. SCOTT
JUSTICE OF APPEAL

I agree:

_____

M.M. RAMODIBEDI
PPRESIDENT OF THE COURT OF APPEAL

I agree:

_____

N. V. HURT
JUSTICE OF APPEAL

For the applicant	Adv. H.H.T Woker
For the respondents	Adv B. Sekonyela Mrs V.V.M. Kotelo Adv.M.V.Khesuoe