

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) 10/2012

In the matter between:

BOFIHLA MAKHALANE

APPELLANT

AND

LETŠENG DIAMONDS (PTY) LTD

1ST RESPONDENT

JOHN HOUGHTON

2ND RESPONDENT

JOHN TULLY

3RD RESPONDENT

CORAM: SCOTT, AP
HOWIE, JA
FARLAM, JA

HEARD: 3 OCTOBER 2013
DELIVERED: 18 OCTOBER 2013

SUMMARY

Application for transfer of matter pending before Labour Court to Labour Appeal Court in terms of section 38A (3) of Labour Code Order 24 of 1992, as amended – Ground relied on for transfer not established.

JUDGMENT

FARLAM JA

[1] After the application which forms the subject matter of the judgment in C of A (CIV) 10/2013, which is being delivered simultaneously with the judgment in this matter, was dismissed, the appellant brought an application in the Labour Court under case number LC 42/2011 against the three respondents, Letseng Diamonds (Pty) Ltd, the first respondent, Mr John Houghton, its general manager, the second respondent, and Mr John Tully, its finance manager, the third respondent, for:

- (a) orders directing the first respondent to pay him (i) what he alleged to be his unpaid salary for the period from 1st March 2010 to 31st August 2011, (ii)

a monthly salary from 1st September 2011; and (iii) interest; and

(b) in the event of first respondent's unreasonably refusing to comply with such orders, committing the second and third respondents to prison in accordance with section 34 of the Labour Code Order 24 of 1992 and Rule 48 of the Labour Code Rules; and

(c) an order that the respondents pay the costs.

[2] A week later he brought a further application against the respondents for, inter alia, an order under section 38 A (3) of the Labour Code Order 24 of 1992, as amended, that his application under case number 42/2011 be heard by the Labour Appeal Court sitting as the court of first instance. The appellant now appeals against the dismissal of this application by Mosito AJ in the Labour Appeal Court.

[3] What he described as his reasons or grounds for asking for this relief are set out in paragraphs 5.1 to 5.5 of his founding affidavit, which read as follows:

- ‘5.1 The President of Labour Court and the Deputy President of Labour Court have close friendship with the senior Managers of the 1st Respondent including, 2nd and 3rd Respondents.*
- 5.2 If both the President and the Deputy President of Labour Court have very strong friendship with the Senior Managers of the 1st respondent. It goes without saying that they will have a peculiar interest in this matter or rather, they already have a peculiar interest in this matter.*
- 5.3 If they have some peculiar interest in this matter, it therefore follows that, there can be no fair hearing as stipulated by Section 12 (8) of the Lesotho Constitution and the applicant does not foresee any possibility of impartiality, no bias and doing the substantial justice between the parties before them on the matter in dispute as stipulated by Section 27 (2) of the Labour Code Order No. 24/1992 as amended. Please refer to the attached letter “CK1”.*
- 5.4 The President of the Labour Court has shown that he is biased against the applicant when handling the matter before him, in the Case of Contempt of Court, LC/68/2010 Bofihla Makhalane V Letšeng Diamonds (PTY) LTD and 3 others. While the Deputy President of Labour Court Mrs Fumane Khabo showed that she was biased when handling the review/appeal application by Letšeng Diamonds (PTY) LTD VS Bofihla Makhalane LC/Rev/55/08.*
- 5.4.1 She engaged all the delaying tactics, her findings together with the way she handled the whole matter showed that she was biased. Copy of the judgment will be presented during the hearing.*

5.5 *The applicant has lost confidence in both the President and the Deputy President of Labour Court and he can not feel at ease to argue his case before anyone of them.'*

[4] The letter attached to the founding affidavit to which reference is made in paragraph 5.3 and which was dated 12th August 2011 was addressed to the registrar of the Labour Appeal Court. It reads as follows:

'APPLICATION TO APPLY SECTION 38 A (3) OF LABOUR CODE (AMENDMENT) ACT 2000 IN THE MATTER BETWEEN BOFIHLA MAKHALANE V LETŠENG DIAMONDS (PTY) LTD AND 3 OTHERS LC 68/2010.

Your attention is kindly drawn to the above captioned subject matter.

The reasons for this application are as follows:-

- 1. The President of Labour Court who is also the Presiding Officer in this matter, Mr L. Lethobane is so biased and so unfair.*
- 2. Despite the applicant's application for his recusal he is refusing to recuse himself while at the same time he is declining to hand down a written judgment for his refusal to recuse himself so that the applicant can appeal against this decision.*
- 3. Mr. L. Lethobane as the Presiding Officer in this matter has shown some peculiar interest so that it becomes very difficult to distinguish him from the respondents' legal representatives or even from the respondents themselves so, there is no way that Section 12 (8) of the Constitution and Section 27 (2) of Labour Code Order 1992 as amended can apply when he acts as both the player and the referee. I have got no doubt in my mind*

that the written judgment of this matter is already prepared and ready in his desk drawers just waiting to be delivered. I am sure the respondents have contributed a substantial amount as I am convinced there is an ongoing communication between himself and the respondents while this Case is still pending in the Labour Court.

- 4. The record of proceedings as I write is in shambles and a complete mess, as affidavits and other materials which are not supposed to be part of the record are still in the record, and the Presiding Officer does not care about this mess since that is where he is going to go through as his loophole, so that he can manoeuvre and refer to matters which will suit him best.*
- 5. As I talk of the record, I hope the Registrar of Labour Court Ms Maserame Kotela will be closely monitored as she has been tampering with the records earlier on in other Cases in the Labour Court and in this Honourable Court.*

The main reason for this application is to make sure that substantial justice is done as far as this matter is concerned. There is no substantial justice that the applicant will ever get from the President of Labour Court Mr L. Lethobane, and even in this Honourable Court my conviction is that this matter will get the substantial Justice only if it is before the President of this Honourable Court (Labour Appeal Court) and no other judge.

I wish to thank you in advance hoping that this application will get the favourable response and justice will be the order of the day.'

[5] In paragraph 5.6 of the founding affidavit the applicant stated that he had also lost confidence in Peete J since he was, so the appellant alleged, biased against him when he presided in the High Court matter between the appellant and the first respondent, civil application 150 of 2010, where he gave judgment against the appellant, a judgment which was confirmed on appeal in this court in a judgment delivered on the 20th April 2011 (See **Bofihla Makhalane v Letšeng Diamonds (Pty) Ltd, C of A (CIV) 14/2010.**)

[6] The appellant went on to say in paragraph 5.7 of the founding affidavit:

'It therefore goes without saying that, it is only His Lordship Dr K. Mosito AJ (KC) who qualifies to preside over this matter as he had presided in a fair and just manner in the appeal application – LAC/CIV/09/09.'

[7] In paragraph 4 of the founding affidavit the appellant said, under the heading 'Background', that what he called the background information was set out in his founding affidavit in the application brought under case number LC 42/2011 and he sought leave 'to

transfer the notice of motion [which I have summarised in para [1] above] and the founding affidavit in [that matter] before this Honourable Court.’

[8] In that founding affidavit he outlined the dispute between himself and the first respondent. He said that he had worked at the first respondent’s diamond mine as security manager from April 2006 until 8 October 2007 when he was dismissed. He referred the dispute arising from his dismissal to the Directorate of Dispute Prevention and Resolution and the arbitrator who sat in the matter found that his dismissal was unfair both procedurally and substantively and she ordered the first respondent to reinstate the appellant in his position and to pay him his outstanding wages.

[9] The first respondent applied to the Labour Court for an order reviewing and setting aside the arbitrator’s award. The Deputy President of the Labour Court upheld the first respondent’s contentions and set aside the award. On appeal to the Labour Appeal Court Mosito AJ and his assessors allowed the appellant’s appeal and reinstated the arbitrator’s award.

[10] The respondents opposed the application under section 38 A (3) of the Labour Code Order, as amended. The main opposing affidavit was deposed to by the first respondent's Chief Executive Officer, Ms Mazvivamba Maharasoa. In her affidavit she 'emphatically' denied that there is a close friendship between the President and Deputy President of the Labour Court, on one hand, and senior managers of the first respondent on the other. She also made the point that even if the alleged close friendship did exist (which, as I have said, she denied) that in itself would not be enough to justify the transfer of the matter to the Labour Appeal Court because, if there was no other incumbent in the Labour Court who could hear the matter, then an acting appointment could be made.

[11] She contended further that the appellant's suspicion of bias against the President and Deputy President of the Labour Court and also Peete J was not that of a reasonable person. She pointed out that no reasonable grounds of suspicion were stated. She denied that any of the said judicial officers had said or done anything in

the matters in which they had been involved which was indicative of bias.

[12] Confirmatory affidavits deposed to by the second and third respondents, in which they denied that senior managers of the first respondent have a close friendship with the President and Deputy President of the Labour Court, were filed.

[13] The application was dismissed by Mosito AJ. In paragraph 21 of his judgment he said:

'In the present case, I was unable to find any fact indicative of bias or its likelihood on the part of either the President or the Deputy President of the Labour Court as well as my brother Peete J. It follows therefore that, the very foundation upon which Applicant approached this Court for relief is absent. If bias is absent then good cause is absent. If good cause is absent then this application cannot succeed. In the present case, there is simply no proper case of bias established against the Present and Deputy President of the Labour Court. It follows that good cause to remove the matter to this Court simply does not exist. Absent good cause, this application falls to be dismissed with costs and I accordingly so order.'

[14] In his grounds of appeal the appellant did not challenge Mosito AJ's finding that appellant had not established bias or the likelihood thereof on the part of the President and Deputy President of the Labour Court. Instead he contended that Mosito AJ had referred to cases that were irrelevant and that he had failed to discharge his main function by failing to give 'the direction as to the future conduct of the matter before him'. He proceeded to request this Court 'to give the direction as to the future prospects of [the] matter'.

[15] In his heads of argument he went further and asked this Court to deal with and finalise the matter itself as, so he said, 'it is clear that it was not given any fair hearing at Labour Appeal Court and the possibility that this matter will be given a fair hearing either at Labour Appeal Court or at Labour Court is absolutely not there.' This Court has, of course, no power to hear this matter as a court of first instance and this request can accordingly not be granted. It has no inherent jurisdiction and the statute creating the Court confers no such power.

[16] What the appellant is in effect seeking is an order that the President and Deputy President of the Labour Court would have to recuse themselves if the matter were to come before them. He has not, however, joined them in the application despite the fact that if the relief he seeks were granted and the finding of bias on their part which he asks for were made this would undoubtedly impact very severely on them. The normal practice is for a recusal application to be brought initially before the judge whose recusal is sought, who decides thereon (subject, of course to appeal where the judge refuses to recuse himself or herself).

[17] It is not necessary however, to deal further with this aspect of the matter because I am satisfied in any event that the appeal must fail.

[18] The basis for the application, as Mosito AJ pointed out in the extract from his judgment quoted above, was bias, which was not established. Apart from the allegation of close friendship with senior managers of the first respondent, the appellant contented himself with bald assertions, which in any event were denied by the

respondents. The allegations of close friendship were specifically denied by the respondents and this denial must, be accepted as correct on the application of the rule in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**, a decision frequently followed in this Kingdom (see, e.g **African Methodist Episcopal Church (African) and Others v Eighteenth Episcopal District, African Methodist Church LAC (2007 – 2008) 96 at 101 E – G**).

[19] This approach also renders it unnecessary to consider the point raised by the first respondent's Chief Executive Officer, which I have summarised in the last sentence of para [10] above.

[20] The following order is made:

The appeal is dismissed with costs.

I.G. FARLAM
JUSTICE OF APPEAL

I agree

**D.G. SCOTT
ACTING PRESIDENT**

I agree

**C.T. HOWIE
JUSTICE OF APPEAL**

For Appellant : In person
For Respondent : HHT Woker