

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.9 /2012

In the matter between:-

BOFIHLA MAKHALANE

APPELLANT

and

LETŠENG DIAMONDS (PTY) LTD

1ST RESPONDENT

JOHN HOUGHTON

2ND RESPONDENT

JOHN TULLY

3RD RESPONDENT

MAZVIVAMBA MAHARASOA

4TH RESPONDENT

CORAM : SCOTT AP

HOWIE JA

FARLAM JA

HEARD : 3 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

Summary

Costs – dismissal of application to Labour Appeal Court to hear committal application as court of first instance – appeal against costs order made – costs order competent as enforcement of original order sought as well as punishment of respondent allegedly in contempt of order.

JUDGMENT

FARLAM JA:

- [1] This is an appeal from a judgment of the Labour Appeal Court which dismissed an application brought by the appellant in which he sought orders (1) against all four respondents directing them to comply with an order of the Labour Appeal Court reinstating the appellant to the position he had held in the employ of the first respondent; (2) against the first respondent directing it to comply with certain paragraphs of an award of the Directorate of Dispute Prevention and Resolution made in favour of the appellant against the first respondent; (3) against second, third and fourth respondents directing them to ‘enforce’ the previous order; and (4) ‘committing and punishing the respondents for deliberately disobeying the order of court and unlawfully refusing to carry

out the order of this Honourable court to reinstate the [appellant] to his position as the security manager of [the first respondent] ...[which] amounted to contempt of court.’

[2] The court *a quo* dismissed the application with costs on the ground that the jurisdictional facts set out in section 38 A (3) of the Labour Code Order 24 of 1992, as amended, (namely that the application before it was pending in the Labour Court or the Directorate of Dispute Prevention and Resolution) and in Labour Appeal Court Rule 14 (which provides for an application to be made to a judge of the Labour Appeal Court in chambers for the matter to be heard by the Labour Appeal Court sitting as a court of first instance) were not present.

[3] The appellant’s appeal is directed solely against the costs order made against him and is based on two grounds, viz.

“1. *The Honourable Judge of the Court a quo had erred and misdirected himself by awarding costs in the matter for Committal for Contempt of Court. Civil Contempt is an amalgam of both Civil and Criminal Offence. It entails some criminal element. The Honourable Judge of the Court a quo had misdirected himself by awarding costs in the criminal case. That is injustice.*

2. *The Honourable Judge had also erred and misdirected himself by awarding costs in the case where he lacked jurisdiction to preside over the Contempt Case. He lacked necessary authority to preside. He had therefore exceeded his mandate. He could not even give the direction as to the future proper conduct for this matter.”*

[4] I do not agree that the court *a quo* erred in ordering the appellant to pay the costs of the application.

[5] In the South African case of **Naude en 'n Ander v Searle** 1970 (1) SA 388 (O) it was held that applicants who sought the committal of the respondent for contempt of court and did not pray that he should be ordered to comply with the court's order were not entitled to claim costs against the respondent. The reason given (at 392 H to 393 B) was that, as they had not asked for the order to be complied with, they were mere informants and thus not entitled to a costs order. It is clear that they would have been awarded their costs if they had asked that the court's order be complied with.

[6] The present case is distinguishable because in addition to asking that the respondents be punished the appellant did ask for an order enforcing the original order granted in his favour. The case was accordingly not solely a criminal one and a costs order was competent.

[7] The appellant relied on a dictum by Scott JA in the as yet unreported decision of this court in **Lerotholi Polytechnic and Another v Blandina Lisene**, C of A (Civ) 25/2009 (para [15]), which reads as follows:-

*‘[15] As pointed out above, contempt proceedings, even when initiated by a private party, invoke a criminal sanction and to this extent are criminal by nature. **In the circumstances** it seems to me that no order as to costs of appeal should apply to this court and in the court **a quo**.’*
(The emphasis is mine.)

[8] It is clear from the words I have emphasized that no general rule was being laid down in the dictum relied on and that the decision not to award costs was based on the particular circumstances of the case.

[9] The second ground of appeal relied on by the appellant is also devoid of merit. The court ***a quo*** had the power by necessary implication to decide whether it had jurisdiction in any case before it and that power would have included the power to make a costs order even if it came to the conclusion that it had no jurisdiction in a particular case.

[10] In my opinion the appeal must be dismissed with costs and I so order.

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 Respondents: **HHT Woker**