

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 35/2013

In the matter between:

‘NOKOANE MOKHATLA

Appellant

And

**LESOTHO BREWING
COMPANY (PTY) LTD**

First Respondent

**THE MANAGING DIRECTOR –
LESOTHO BREWING COMPANY
(PTY) LTD**

Second Respondent

**THE HUMAN RESOURCE
MANAGER –LESOTHO BREWING
COMPANY (PTY) LTD**

Third Respondent

**CORAM: HOWIE JA
 THRING JA
 CLEAVER AJA**

HEARD: 31 MARCH 2014

DELIVERED: 17 APRIL 2014

SUMMARY

Appeal from Labour Appeal Court which had confirmed a decision of the Labour Court refusing to grant a contempt application – In issue whether the Labour Court was, by virtue of the provisions of s 228E(5) of the Labour Code Act 1992 entitled to adjudicate on a contempt application. Held that a contempt application competent only in respect of an order of court, an award dealt with in terms of s 228E(5) is not an order of court – Finding of impracticality of implementing an arbitrator's award is a finding of fact and not appealable from the Labour Appeal Court.

JUDGMENT

CLEAVER AJA

- [1] This is an appeal against a decision of the Labour Appeal Court which dismissed the appellant's appeal against an order of the Labour Court which had dismissed the appellant's application to find the respondents guilty of contempt of court for failing to comply with an arbitrator's award.
- [2] Counsel appeared for the appellant, and although the respondents had been represented in the proceedings in the courts a quo, there was no appearance for the respondents. After ascertaining from the attorney who had previously acted for the respondents that he had not received

instructions to represent the respondents in the appeal, we proceeded without representation for the respondents.

[3] Before dealing with the appeal it is necessary to record the background to the appeal.

[4] On 23 October 2009 the appellant, who had been employed by the first respondent as a warehouse superintendent, was dismissed from his employment after an internal disciplinary hearing. The reasons given for his dismissal are not relevant to the determination of the appeal.

There then followed a number of steps taken by the appellant to overturn his dismissal, which he considered unjust, and to seek compensation for wrongful dismissal.

[5] A referral to the Directorate for Dispute Prevention and Resolution (DDPR) for his reinstatement was unsuccessful but an application to the Labour Court for a review of that decision was successful on 10 November 2010 (LC REV 65/2010), the court ruling that the matter

was to be referred back to the DDPR where it was to proceed on the merits before a different arbitrator.

- [6] On 28 December 2011 the appellant succeeded before the new arbitrator who ruled that he was to be reinstated in his position and that he was to be paid an amount equivalent to the salary for the 26 months he would have earned but for his dismissal. The first respondent was also ordered to compensate him for the loss of his cell phone allowance during his enforced absence from work (A 0932/09). It is common cause that for the period from the date of his dismissal up to the date of the award, the first respondent did not replace the applicant and did so only some time after the date of the award. This was to be the main factor relied upon by the appellant in the subsequent contempt proceedings which are at the heart of this appeal.

- [7] The first respondent duly paid the appellant the amount it had been ordered to pay but did not reinstate him. Instead, through the person of the third respondent (its Human Resource Manager) it endeavoured to achieve a settlement with the appellant. This would have involved the appellant not being taken back into employment as first

respondent had taken on an employee in the appellant's place, the first respondent contending that it would therefore be impractical to take the appellant back. The appellant was not satisfied with the proposal offered to him for he contended that any settlement had to take account of the fact that he had the expectation to remain in the employ of the first respondent until he reached the age of 60. Although no settlement was reached the first respondent refused to take the appellant back in to its employ.

- [8] The first respondent then sought a review of the arbitration award, mainly in respect of the cell phone allowance award, in the Labour Court but this was dismissed by the Court on 29 October 2012, with no order as to costs [CL/REV/04/12].
- [9] Faced with the first respondent's continued refusal to reinstate him, the appellant then applied to the Labour Court [LC/APN/56/2012] for the committal to jail of the second and third respondents on the ground that their failure to comply with the order of the arbitrator on 28 December 2011 amounted to contempt of court. Alternatively the appellant sought an order directing the respondents to pay him

compensation as a result of the first respondent's failure to reinstate him. The Labour Court found that appellant had failed to prove that the respondents' conduct constituted contempt of court and refused to grant a committal order.

[10] Although the appellant did not apply for a reinstatement order the presiding judge recorded in his judgment that during the course of argument appellant's counsel had submitted that in the event of the court finding that reinstatement was not practical, the Court should make an award for the payment of 12 years of employment, including salaries and bonuses to the applicant plus interest, as compensation for not being reinstated. The court declined to make such an order, but declared the enforcement of the award for reinstatement to be not practical. As to the claim for compensation the court ordered "that referral A0932/2009 is remitted to the DDPR to determine an alternative relief under Section 73 of the Labour Code Order 24 of 1992". No order as to costs was made.

[11] The appellant challenged these findings in an appeal to the Labour Appeal Court (LAC/CIV/A/02/2013), contending that the fact that

first respondent had waited some 2 years after the date of his dismissal before appointing someone else in his place and then only after the award of the arbitrator had been made, demonstrated the respondents' willfulness and *mala fides* in ignoring the arbitrator's award which amounted to contempt of the award. The appellant also contended that the Labour Court had erred in finding that reinstatement was impractical. When dealing with the question as to whether the essentials of contempt of court had been established, Mosito AJ, who delivered the judgment of the Court, pointed out in para 13 of the judgment that the appellant had not complained about the failure to comply with an order of the Labour Court, but "about failure to comply with the judgment of the Labour Court which he contends had the effect of enforcing the award of the DDPR". Although no reason was furnished for the rejection by the Court of the appeal against the Labour Court's dismissal of the contempt application, the Court, in the portion of the judgment I have quoted, touched on the nub of the issue which is to be considered in this appeal.

- [12] The offence of contempt of court occurs when an order of a court is ignored or disobeyed. Before considering whether or not the

essentials of the offence were established it is thus necessary to establish whether it was an order of court that was ignored. The proceedings in the Labour Court were instituted pursuant to the provisions of s228E(5) of the Labour Code (Amendment) Act 2000 which reads:-

“An award issued by the arbitrator shall be final and binding and shall be enforceable as if it was an order of the Labour Court.”

Counsel for the appellant submitted that the effect of the section was that the award of the DDPR had become an order of the Labour Court when the appellant brought his application in that court.

- [13] It must be remembered that although a contempt order may be sought by a private litigant, it is an order issued by a court, for the essence of contempt lies in violating the dignity, repute or authority of the court. See Fakie NO v CCII Systems (Pty) Ltd 2006(4) SCA 326 p332 and fn5.

Cameron JA, who delivered the judgment of the court, expanded on this principle in para [8] at p333 of the judgment as follows

“In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a

civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.”

- [14] The right of a Labour Court to punish for contempt in the respect of non-compliance with its orders derives from s24(2) of the Labour Code Act 1992, as substituted by the Labour Code (Amendment) Act 3 of 2000 which reads:-

“The court shall have the power

(j) to commit and punish for contempt any person who disobeys or unlawfully refuses to carry out or to be bound by an order made against him or her by the court under the code.”

Thus the offence is committed in respect of an order of either the Labour Court or the Labour Appeal Court, depending on the context, as per s3 of the Code.

- [15] It is the court which makes an order which has the power to punish for disobedience of that order. The arbitrator who made the order, clearly had no power to punish for disobedience of the award. Although s228 E(5) permits the enforcement of an arbitrator’s award in the Labour

Court, its wording does not in my view elevate the award to an order of the Labour Court, nor can it. It remains an award which can be enforced by the court in other ways. Neither the Labour Court nor the Labour Appeal Court should therefore have entertained the contempt application and the appeal on this ground must fail.

- [16] The second main ground of appeal was that the Labour Appeal Court should have overturned the declaration by the Labour Court that enforcement of the arbitrator's award of reinstatement was not practical. It would seem that the Labour Appeal Court may have misconstrued this ground for it was under the impression that appellant had assumed that the Labour Court would on its own have granted the prayer for reinstatement, whatever that may mean. The finding as to impracticality by the Labour Court was a finding of fact, and the dismissal of that ground of appeal must mean that the Labour Appeal Court confirmed the factual finding. By virtue of the provisions of s38AA(2) of the Labour Code (Amendment) Act 2010 appeals from the Labour Appeal Court to this court are permitted only on grounds which involve questions of law, and not on grounds which involve questions of fact.

As this ground of appeal involves a question of fact it cannot be entertained in this court and the appeal on this ground must fail.

[17] In view of my findings on the two main grounds of appeal it is not necessary to deal with the submissions concerning the lack of authority of the second and third respondents to represent the first respondent.

[18] One cannot but have sympathy for the appellant who succeeded substantially before the DDPR in December 2011 but as yet has not been able to have his claim finalized. However, the result of this appeal is that the order of the Labour Court referring the matter back to the DDPR to determine alternative relief remains in force.

[19] The following order is made

- 1) The appeal is dismissed.
- 2) No order as to costs is made.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

C.T. HOWIE
JUSTICE OF APPEAL

I agree

W.G. THRING
JUSTICE OF APPEAL

Counsel for the appellant: P.R. Thulo