

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.7/2015

In the matter between

**MINISTER OF FOREIGN AFFAIRS
AND INTERNATIONAL RELATIONS**

APPELLANT

and

**BOTHATA TSIKOANE AND
THREE OTHERS**

RESPONDENTS

CORAM : FARLAM, AP
MOKGORO, AJA
LOUW, AJA

HEARD : 20 APRIL 2016

DELIVERED : 29 APRIL 2016

SUMMARY

Appeal cannot be brought without leave against reasons for judgment where only order made related to costs.

JUDGMENT

FARLAM, AP

[1] The four respondents, who are all senior diplomats employed in the Public Service of Lesotho, brought an application in the High Court against the appellants, the Minister of Foreign Affairs and International Relations, the Principal Secretary of the Ministry of Foreign Affairs and the Attorney General, seeking, *inter alia*, declarators that their recall from Foreign Service was unlawful on various grounds.

[2] Before the answering affidavits were filed on behalf of the appellants the letters of recall sent to the respondents were withdrawn.

[3] Simultaneously with the sending of the letters withdrawing the recall of the respondents further letters

were sent to them inviting them to show cause why they might not be recalled from the Foreign Service. They responded by launching a further application for a declaration that the letters inviting them to show cause were in themselves irregular, null and void but they abandoned the prayers for this relief before their first application came before the High Court. When it did come before Hlajoane J in the High Court it was no longer necessary for the Court to decide whether the recall of the respondents from their foreign postings was unlawful but it was still necessary for it to make a costs order as the withdrawal letters had not contained tenders to pay the respondents' costs.

[4] The learned judge expressed the view that it was improper for the appellants, as she put it, 'to have corrected their mistakes in Court by writing letters of show cause inside the proceedings in the main when the court is yet to make its final decision.' She went on to say that the writing of the show cause letters was in the circumstances against the *sub judice* principle.

[5] She said further that as the recall letters had been withdrawn ‘that ends the matter in the main. But regarding costs, the Court is going to demonstrate its displeasure against the Respondents [for not having] waited for the decision in the matter but rectifying their mistakes when the matter was *sub judice*.’ She accordingly ordered the appellants to pay costs on the attorney and client scale.

[6] The appellants appealed without leave against this order on various grounds in which the reasoning of the learned judge is criticized.

[7] Counsel for the respondent submitted as a preliminary point that the matter should be struck from the roll with costs on the scale as between attorney and client. He contended that the order appealed against is an order as to costs and that as the appellant had not obtained leave the appeal was not properly before the Court. He referred to section 16(a) of the Court of Appeal Act 10 of 1978, which provides:

'(1) An appeal shall lie to the Court –

- (a) From all final judgments of the High Court*
- (b) By leave of the Court from an interlocutory order, an order made ex parte or an order as to costs only.'*

[8] Counsel for the appellants contended that the order sought to be appealed was a final judgment, which could be appealed against without leave.

[9] In the commentary on section 12(2) of the South African Supreme Court Act 59 of 1959 the learned authors of Erasmus, Superior Court Practice say that the word 'judgment' can be used in two senses, first to mean 'the statement setting out the legal grounds (reasons) for the order made by a particular judge' and secondly 'the word "judgment" can be used to denote the final order of the court' (see Erasmus et al Superior Court Practice, Service 8, 1997, p A1-15).

[10] In my opinion the words 'final judgment' in section 16(1)(a) of the Court of Appeal Act refer to orders and not reasons given by the court in the course of

making interlocutory orders, *ex parte* orders or costs orders.

[11] It is a well-established principle in our law that appeals cannot be noted against the reasons for judgment but only against the substantive order made by a Court. See **Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd** 1948 (3) SA 353 (A) at 355, where Centlivres JA, after stating the rule in those terms, pointed out that it is open to a respondent on appeal to argue that the order appealed against should be supported on grounds that were rejected in the court *a quo*.

[12] I cannot accept that the drafters of section 16 (1) (a) could have intended to depart from that principle and make it possible for an appeal to be brought against reasons only.

[13] It follows in my view that the matter must be struck from the roll with costs because the appeal was noted without leave.

[14] Counsel for the respondent submitted that the costs order to be made in this court should provide for the costs to be taxed on the attorney and client scale but I do not think that that would be appropriate, as it seems clear that the omission to seek leave of the court before noting the appeal was due to a *bona fide* error.

[15] The following order is made:

The matter is struck from the roll with costs.

**I G FARLAM
ACTING PRESIDENT**

I agree:

**Y MOKGORO
ACTING JUSTICE OF APPEAL**

I agree:

**W J LOUW
ACTING JUSTICE OF APPEAL**

For Appellants : Adv T S Putsoane KC

For Respondent : Adv M S Rasekoai instructed
By Attorney M J Rampai,
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