

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) No.60/2016
LAC/REV/7/16**

In the matter between:-

'MALENA LEBONE-MOFOKA	1ST APPELLANT
TS'OANA 'MALIFUO MAPETLA	2ND APPELLANT

And

MINISTER OF LABOUR	1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF LABOUR	2ND RESPONDENT

INDUSTRIAL RELATIONS COUNCIL	3RD RESPONDENT
ATTORNEY GENERAL	4TH RESPONDENT
TEBOHO THOSO	5TH RESPONDENT
RATS'OLO THULO RESPONDENT	6TH

CORAM: CHINHENGO AJA
DR MUSONDA AJA
MTSHIYA AJA

HEARD: 29 November 2018

DELIVERED: 7 December 2018

SUMMARY

Labour Appeal Court, on review, setting aside the imminent appointment two persons to post of arbitrator in Directorate of Dispute Prevention and Resolution for irregularities and illegalities committed by appointing authority;

Court refusing to appoint applicants in place of those already appointed and ordering each party to bear its own costs;

One of appointed persons appealing against order setting aside their appointment; applicants for review cross-appealing against order refusing to appoint them as well as against costs order;

Appointing authority complying with court order by re-advertising posts and procedurally appointing persons thereto before hearing of appeal, including appellant - thereafter appellant withdrawing his appeal - appeal court seized only with determining cross-appeal

Whether compliance with court order by appointing authority renders moot appeal seeking appointment of cross-appellants to posts - requirements for mootness restated - judge's decision refusing to direct appointment of cross-appellants confirmed;

Whether Labour Appeal Court's costs order susceptible to interference by appellate court - principles of law where parties partially succeed discussed - costs order of court a quo confirmed

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The appellants instituted review proceedings against the respondents in the Labour Appeal Court on 7 October 2016 seeking the setting aside of an offer by the 1st to 4th respondents to the 5th and 6th respondents of employment as arbitrators in **the Directorate of Dispute Prevention and Resolution** and their appointment to those posts in place of the 5th and 6th respondents. The respondents opposed the application. The appellants partially succeeded in that the court set aside the decision to appoint the 5th and 6th respondent but refused to issue an order directing the respondents to appoint the appellants.

[2] Aggrieved by the decision of the court, the 6th respondent appealed the judgment to this Court. The appellants cross-appealed the same judgment on two grounds, which I set out below. The 6th respondent withdrew his appeal on 8 November 2018. His

reasons for withdrawing his appeal are not contested. They appear at paragraph 12 of the 4th respondent's heads of argument, where it is stated –

“The 6th respondent, being dissatisfied with the judgment of the court *a quo* of reviewing and setting aside his appointment, appealed to this Honourable Court. The 6th respondent has, however, withdrawn his appeal. This was after the two positions, which were the subject matter of the litigation in the court *a quo* were re-advertised in line with the judgment of the court *a quo*. The 6th respondent was appointed to one of the positions hence the withdrawal of his appeal. The 2nd appellant even applied for the advertised positions.”

[3] The appellants persisted with the cross-appeal. We are accordingly concerned with the cross-appeal only. I will refer to the cross-appellants simply as “the appellants”.

Background

[4] The background to this appeal is that the Director of Dispute Prevention and Resolution (DDPR) flighted an advertisement in the Public Eye newspapers to fill one post of arbitrator. It later turned out that there were actually three posts of arbitrator that the DDPR wanted to fill, as found by the Labour Appeal Court. The appellants were among persons who applied, were shortlisted and interviewed for the position. They were not successful. They were aggrieved by what they

considered to be a failure by the 1st to 4th respondents to follow the recruitment procedures laid down by law, in particular the **Labour Code** and by the fact that the 1st respondent appointed the 5th and 6th respondents who had neither been shortlisted nor interviewed for the positions thereby disregarding the outcome of the interviews and recommendations of the interviewing panel and the 3rd respondent. They contended that the 1st respondent's decision to appoint the 5th and 6th respondents was unfair and influenced by favouritism, among other reasons, thus rendering their appointment "discriminatory, irregular and unjustifiable" in effect. They alleged that the employment procedures for arbitrators were flouted, due process not followed and the process of offering employment to the 5th and 6th respondents was "arbitrary and capricious" and should be declared null and void.

[5] The respondents argued that the appellants had no *locus standi* to challenge the appointment of the 5th and 6th respondents, that the 1st respondent's decision was in accordance with the Labour Code and that the court had no power to appoint arbitrators: the Labour Code vests that power in the 1st respondent and the court would be usurping the power of the Executive if it were to order that the appellants be appointed.

[6] The judge found in favour of the appellants on the issue of *locus standi*. He held that they had a sufficient and

direct interest in the fairness of the process resulting in the appointment of the 5th and 6th respondents and their (appellants') disqualification from appointment. The judge held that the appointment of 5th and 6th respondents by the 1st respondent violated the Labour Code, in particular the DDPR's Recruitment and Selection Policy in that he did not consult with the 3rd respondent as required by s 240 (3) of the Labour Code. The judge accordingly found that the 1st respondent's exercise of administrative power and discretion was vitiated by illegality and procedural impropriety. This was another decision favourable to the appellants. The judge however did not find for the appellants on the one issue that was of the most practical significance to them. He refused to make an order directing the respondent to appoint the appellants as arbitrators in place of the 5th and 6th respondents. In this regard he stated briefly:

"26. In our opinion even though the Minister has not acted in accordance with the applicable laws and policies, it would not be appropriate, in the circumstances of this particular case, for the court to override the vital consultation aspect of the appointment process and itself decide who must be appointed, particularly in the case of 1st applicant who was not even shortlisted by the IRC."

[7] Many authorities support the judge's reasoning. The usual course in administrative review proceedings is to remit the matter to the administrator for proper

consideration- *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*¹ and *Gauteng Gambling Board v Silverstar Development & Others*.² In the latter case the point is made that

“An administrative authority that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.... That is why remittal is almost always the prudent and proper course.”

[8] This was endorsed in *Roma Taxi Association v Officer Commanding Roma Police Station and Others*³. In *Roma* the court went further to explain the exception to the general rule when a reviewing court may substitute its own decision for that of the administrator and stated at paragraph 29 of the judgment:

“Before a court can legitimately assume administrative decision making functions, proper and adequate information must be available, the court must have institutional competence and exceptional circumstances must exist.”

¹ 2015 (5) SA 245 (CC) at para 38

² 2005 (4) SA 67(SCA) at para 29

³ C of A (CIV) 20/215

[9] In the same vein in *Trencon (supra)* the judge put it eloquently thus:

“47 To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances inquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

48. A court will not be in as good a position as the administrator where the application of the administrator’s expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator’s process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may

concern decisions that are judicial in nature; in those - if the court has all the relevant information before it- it may very well be in as good a position as the administrator to make the decision.”

[10] Counsel for the appellants contented in his heads of argument that this case offers the exceptional circumstances necessary for the court to substitute its own decision. He submitted that a court should not remit the matter “where it is clear on the facts that there would be delay and procrastination of doing the right thing. This is more so where the functionary had acted unlawfully as the Minister had done in the present case.” I incline towards the reasoning of the judge *a quo*.

[11] The 1st respondent is the appointing authority. There are a number of factors, which he alone may have to take into account after consulting the 3rd respondent. That consultation process cannot be by-passed. The court is not in a position to conduct the consultation nor is it knowledgeable about all factors, which it is necessary to take into account in appointing an arbitrator. On the undisputed facts, the appellants had not performed the best at the interviews. They came the last two and it would be improper for this Court to impose them on the appointing authority in the circumstances of this case.

[12] It should be apparent that even if the point raised by the respondent, which I deal with later, that the appeal is

now moot, is not well taken, I would endorse the judge finding that this is not a matter in which this Court is in as good a position as the interviewing panel to make the decision whether or not to appoint the appellants: the matter was properly remitted to the administrative authorities. For this reason the appeal should be dismissed.

[13] The appellants' success in the Labour Appeal Court was only partial. They succeeded in having the decision to appoint the 5th and 6th respondents set aside but failed to secure an order appointing them as arbitrators in place of the 5th and 6th respondents. The Labour Appeal Court also ordered that the parties should bear their own costs. The appellants were aggrieved by this order also and appealed against it. For the sake of clarity it is necessary to reproduce the orders appealed against.

[14] The 6th respondent, though he has now withdrawn the appeal, appealed against the granting of two orders:

“(c) That the 1st, 2nd, 3rd and 4th respondents' act of offering the 5th and 6th respondents employment on permanent and pensionable terms be reviewed, corrected and set aside.

(d) That the 1st, 2nd, 3rd and 4th respondents' act of offering the 5th and 6th respondents employment on permanent and pensionable terms be and it is hereby declared null and void *ab initio*.”

[15] The appellants cross-appealed against the court's refusal to make orders in their favour, to wit:

“(e) That the respondents are ordered to employ the applicants (now appellants) on permanent and pensionable terms instead of the 5th and 6th respondents.

(f) The respondents be ordered to pay costs of suit including cost consequent upon employment of counsel.”

Issues for decision

[16] There are only three issues for decision in this appeal, two raised by the appellants and the third by the 4th respondent. The first is the refusal by the court *a quo* to grant an order compelling the respondents to employ the appellants. The second is the refusal by the court to grant an order of costs in favour of the appellants. The third is a contention by the 4th respondent, representing all the other respondents, and related to the first issue, that the appeal is now moot in view of the fact that the 1st to 4th respondents complied with the judgment of the court: they re-advertised the remaining posts, duly interviewed applicants for those posts and duly appointed the successful applicants.

Mootness of appellants' first ground of appeal

[17] Coming back to the issue of mootness, it seemed to us that the mootness alleged could only relate to the appeal

against the court's refusal to order that the appellants be appointed and not against the issue of costs in the Labour Appeal Court. We put this to counsel for the appellants. He conceded, first, that the mootness did not cover the issue of costs, and that in view of the respondents' compliance with the judgment of the Labour Appeal Court, the issue of appellants' appointment had indeed become moot. He agreed with the 4th respondent's general proposition that the positions to which the appellants wished to be appointed "have been filled after they were advertised in line with the judgment of the court *a quo*."

[18] The test for mootness is set out by FARLAM AP in *Tefo Hashatsi v The Prime Minister and 5 Others*⁴ at paragraph 15 where he said-

"The test for mootness which in my view should be applied in Lesotho is that stated by Viscount Simon LC in *Sun Life Assurance Co. of Canada v Jervis* [1994] 1 All ER 469 (HL) at 471A-B, which was quoted with approval by Plewman JA in *Coin Security Group v SA Union for Security Officers* 2001 (2) SA 872(SCA) at 875C-E. That test is whether there exists between the parties to an appeal a matter '*in actual controversy which (the Court) undertakes to decide as a living issue.*'"

[19] In my view that concession by appellants' counsel was proper. Advocate *Moshoeshoe* submitted at the very

⁴ C of A (CIV) 5/2016

beginning that the judgment of the Labour Appeal Court was correct. He did not make it clear whether he was referring to the whole judgment or only to that portion of it favourable to the appellants. He however proceeded to submit that the appeal had been overtaken by events, the basis upon which Advocate *Molati* also submitted that the appeal was now moot, but nevertheless contended that this Court must pronounce itself on the legal principles whether or not, in exceptional cases, this Court may not substitute its own decision for that of an administrator. We commented that the law in Lesotho is clear already as exemplified by *Roma's* case. We were of the view that Advocate *Molati* was merely inviting us to engage in an academic exercise, if all he wanted, as he said, was for this Court pronounce on the law. In any event the law on that point is clear.

[20] It will be recalled that the appellants approached the Labour Appeal Court for relief that the decision of the 1st to 4th respondents to appoint the 5th and 6th respondents, who had not been shortlisted or interviewed for the advertised posts, be set aside. Following that decision, the respondents addressed the appellants' complaint by re-advertising the posts and opening them up for competition by interested persons, including the appellants. The posts have since been filled after due

process. The second appellant participated in the interviews at which the persons to fill the posts were chosen. There is therefore no practical purpose to be served in deciding the point raised by the appellants when their complaint had been addressed in compliance with the judgment of the court below; where they had been given an opportunity to compete for the posts and had either done so or neglected to do so for their own reasons. The issue has therefore been sufficiently and procedurally addressed and has, for that reason, become moot. This disposes of the appellants' first ground of appeal challenging the refusal of the court below to grant an order directing the respondents to employ the appellants following the setting aside of the decision to employ the 5th and 6th respondents.

Costs in court below

[21] The appellants' second ground of appeal is that the learned Judge *a quo* erred in refusing to grant an order that the respondents should pay the costs of suit. The appellants accept the principle that costs follow the event but that is subject to the general rule that they are awarded in the discretion of the judge. In this connection their counsel referred to *Union Government v Heiberg*⁵ and to *Ramakarane v Centlec (Pty) Ltd*⁶. The main argument advanced in favour of an award of costs is that the governmental authorities were dishonest. At

⁵ 1919 AD 477 at 484

⁶ Case No. (4907/2006)

paragraphs 13 of the appellants' heads they state that the respondents, despite earlier denials, supplied documents that clearly show that the processes and procedures for the recruitment of 5th and 6th respondents were not followed and the 2nd respondent and the Labour Commissioner deposed to affidavits in which they "contradicted even things they signed for in the record of the processes of appointment." They urged the court to indicate its disapproval of such conduct by awarding costs against the respondents. They persisted with prayer for costs in the court below but contended that each party should bear its own costs of appeal.

[22] The respondents' argument against an adverse order of cost to them is that this Court should not lightly interfere with the exercise of discretion by the lower court. Advocate *Moshoeshoe* urged us to adopt the approach in *Martin Phillip Vermaak v MEC for Local Government & Traditional Affairs, North West Province and 45 Others*⁷, a decision of the Labour Appeal Court of South Africa. In that case the judge quoted with approval another South African case and said:

"The rule of practice that costs follow the cause does not govern the making of orders of costs in the Labour Court and such orders are made in accordance with the requirements of the law and fairness. See in this regard

⁷ Case No. JA/15/2014 delivered on 10 January 2017

*MEC for Finance (KZN) and Another v Dorkin NO & Another*⁸
where Zondo JP explained the rationale for that approach:

‘[T]he norm ought to be that orders are not made unless those requirements (of law and fairness) are met. In making decisions on cost orders this Court should seek to strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer organisations from approaching the Labour Court and this court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and to this court frivolous cases that should not be brought to court. This is a balance that is not always easy to strike, but if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes....’”

[23] There is much to commend for this approach but unfortunately it is not the law in this country. Unlike in South Africa there is no similar statutory provision. I am, however, easily persuaded that access to the courts of law should be facilitated and not hindered. Employees, and employers too, must not be discouraged by orders of costs from approaching the Labour Court and this Court to have their disputes resolved. That, of course, without opening the doors wide for frivolous and vexatious litigation. This appeal is not the place to express any definitive position, as that would amount to

⁸ (DA16/06) [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC) (21 December 2007)

no more than *obiter dictum*. The appeal on costs can be disposed of on another and more proper footing.

[24] The award of costs is a matter within the discretion of the court making the award. I agree with *Vermaak*⁹ that -

“The court of appeal will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made. Put differently, a court of appeal’s power is limited to those cases where the exercise of judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court below, acting reasonably, could have made the order in question.”

[25] The judge *a quo* did not give reasons for the order of costs he made, but it can safely be assumed, going by his impeccable reasoning in support of the other relief he granted, in particular the orders granting only partial success to each of the parties, that an order that each party bears its own costs was made on a sound basis. As it has been said, the mere fact a court of appeal would have made a different order as to costs is no ground for interfering with the lower court’s order. The limits to which this Court can interfere with an order made by a lower court are clear- there must be a failure to exercise discretion judicially and there must not be grounds on which a court acting reasonably could have made the

⁹ at paragraph [12]

particular order as to costs. See *Penny v Walker*¹⁰ and *Merber v Merber*¹¹.

[26] After the hearing we thought that counsel had not considered that each of the parties partially succeeded in the court below. We accordingly invited them to submit on this point in relation to the judge's cost order. Counsel very ably did so and drew our attention to relevant South African and English authorities. For example in *Llama Restaurant Francising Co. (Pty) Ltd v Ivano (Pty) Ltd*¹² in which the judge discussed various cost orders where partial success had been achieved on appeal and said-

"The foregoing citations illustrate, I think graphically, the variety of orders which may properly be made by a court of appeal when an appellant enjoys partial success. The citations also reveal, in my view, the three main factors, which will usually influence the court in the exercise of its discretion. They are: the measure of the appellant's success; the measure of appellant's failure; and the extent, if any, to which appellant has unnecessarily or unsuccessfully added to the costs."

[27] The factors mentioned in the above passage, in my opinion, equally apply to the exercise of discretion even in a court of first instance. Further guidance on this issue can be obtained from *Webb v Liverpool Women's NHS*

¹⁰ 1936 AD241 at 260

¹¹ 1949 (1) SA 446(AD) at 452, 453

¹² 1990 (1) SA 474 (C) at 478D-E

*Foundation Trust*¹³ and *Khaketla v Malahleha and Others*¹⁴; the latter in which the judge commented on the misdirection committed by the judge below as follows:

“Where Molai J fell into error was by equating appellant’s failure on the first point of law taken by her with a partial lack of success in her opposition to the application. Success in opposing an application is ultimately to be judged, not by whether the respondent has been successful or not successful in respect of any one or more of her reasons (legal or otherwise) for opposing the application, but by the extent to which the applicant is successful in respect of the relief claimed in the application. The relief claimed by the respondents in the second contempt application was an order committing the appellant for contempt of court because of her failure to comply with the court order in the salaries application. The respondents did not in the result obtain any relief at all. They were wholly unsuccessful and the appellant wholly successful in opposing the application.”¹⁵

[28] The test for success is therefore the relief sought and obtained. In the present case the respondents were successful in opposing the prayer for the appointment of the appellants and the appellants only successful in obtaining an order setting aside the decision of the 1st respondent appointing the 5th and 6th respondents as arbitrators. In my view the success or failure was evenly matched as between the parties. I am therefore in

¹³ [2016]EWCA Civ 365; [2016] ALL ER (D) 103 (Apr) LSG 15 April, para 27

¹⁴ LAC (1990-1994) 275

¹⁵ at 286F-G

agreement with counsel for the respondents that the judge below exercised his discretion judicially upon a consideration of the facts and circumstances of the case before him and that this Court has no grounds for interfering with his order of costs. The appeal on this issue is accordingly dismissed.

[29] Regarding the costs of this appeal, both parties submitted that each party should bear its own costs. I have no reasons to order otherwise.

[30] In the result -

1. The appellants' cross-appeal is dismissed.
2. There is no order as to costs of the appeal.

CHINHENGO AJA
ACTING JUSTICE OF APPEAL

I agree:

DR MUSONDA AJA
ACTING JUSTICE OF APPEAL

I agree:

MTSHIYA AJA
ACTING JUSTICE OF APPEAL

For Appellants: Adv. L. Molati

For Respondents: Adv. M Moshoeshoe