IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 9/2017

In the matter between:

KELEBONE RATSIU **APPLICANT**

And

PRICNCIPAL SECRETARY
MINISTRY OF FORESTRY **1ST RESPONDENT**

ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: DR K**.** E. MOSITO P
M .A. MOKHESI AJA
DR P. MUSONDA AJA

HEARD: 26 NOVEMBER 2018

DELIVERED: 7 DECEMBER 2018

SUMMARY

Civil practice-----Court issuing orders without written reasons - Impropriety thereof.

Court not to accede to prayers which cannot be enforced.

Civil contempt of Court – to be proven beyond a reasonable doubt.

JUDGMENT

MOKHESI AJA

[1] **INTRODUCTION**

This appeal has its genesis in the issuance of summons by the appellant against the respondents for an order in the following terms:

> "a) That the plaintiff be paid for the overtime of 8 hours per day from January 2001 to date of judgment.
>
> b) That plaintiff be declared as employed on permanent and pensionable terms by Lesotho Government's Ministry of Forestry.
>
> c) That 1st defendant be ordered to disclose the formula he or she used to compute plaintiff's arrear underpayment for past and present to the Registrar of this Honourable Court."(sic)

d) That the plaintiff should pay plaintiff interest at the rate of 18.5% per annum from date of judgment to date of final payment.

e) Costs of suit on attorney and own client scale.

[2] The respondents/defendants did not enter appearance to defend and as a result **Majara J** (as she then was) granted judgment in favour of the appellant by default on the 28th October 2013. It would appear that consequent to this judgment the appellant was employed by the 1st respondent on permanent and pensionable basis as Office Assistant with effect from 03 June 2013, in apparent compliance with paragraph (b) of the terms of the order of Court granted by default. Prayers (a) and (c) were not complied with until the appellant decided to launch application for contempt of court on 29 September 2014.

[3] In the application for contempt of court, the appellant sought relief in the following terms:

a) That the act of 1st respondent of failing to comply with an order of this Honourable Court made on 09th March 2010 is contemptuous conduct in so far as it relates to paying the applicant

b) That in the event that the 1st respondent continues to fail to comply with the final order in the main the 1st respondent be committed to prison for six months.

c) Costs of suit at attorney and client scale.

[4] This application served before **Nomngcongo J** on the 15 February 2017 who dismissed it without giving any written

reasons to date. I will revert to the issue of orders being made without written reasons, in due course.

[5] **FACTUAL BACKGROUND**

The factual matrix of this case is quite a straightforward one, and it is undisputed. The appellant has been employed in the Ministry of Forestry since 1994 to date. From the year 2001 to 02nd June 2013 the appellant alleges that he has been working sixteen (16) hours per day while his wages were for eight (8) hours. It was on the basis of this brief factual synopsis that the appellant issued summons for the relief as mentioned earlier para.[1].

[6] **ORDERS GIVEN WITHOUT WRITTEN REASONS**:

The application for contempt of court was dismissed without any written reasons whatsoever since the year 2014 to date. So, the applicant's Counsel drafted and filed grounds for appeal in total darkness. Even this court was in the same predicament when this appeal served before it. We simply did not know the reasons why contempt application was dismissed. This made our job quite frustrating and difficult to carry out. On the one hand this occasioned prejudice to the applicant as he had to prepare and file grounds of appeal in darkness as already alluded to. The tendency of issuing orders without accompanying written reasons has been deprecated over and over in this Court. In this regard, the

following remarks in **Hlabathe Makibi and Another v Mamoorosi Makibi** C of A **(CIV) 19/2014 [2014] LSCA 50** (24 October 2014), are worth repeating

> *"[3] It is also the responsibility of the Judge to write judgment. Parties expend anxious time and hard-earned money in taking a matter to the High Court. They are entitled to know the reasons for reaching the conclusion to which the Judge has come. In addition, where there is an appeal against the judgment or order the parties cannot fully prepare their cases in the absence of the reasons and this Court requires to know the reasons in order properly to bring a fully informed mind to bear on the question whether the Judge was right.*
>
> *[4] The state of affairs in this case is one of which we strongly disapprove. It reflects adversely on the presiding Judge's concern for the standards of care, responsibility and efficiency which the public, and particularly the litigants, are entitled to expect from the highest trial court in the land. The parties' advocates – both Senior Counsel – have drawn attention I their heads to the difficulties which this situation had imposed upon them in regard to the proper preparation of their cases. We have been required to endure similar difficulties. We trust echo our disapproval of this situation in any subsequent appeal!"*

I fully align myself with the sentiments expressed above.

[7] **ISSUES FOR DETERMINATION**

The issue for determination is whether the Court *a quo* erred and misdirected itself by holding that the appellant was

enforcing an order *ad pecunian solvendam* by way of contempt proceedings, while in fact the appellant wanted – as he argued before this court- the first respondent to disclose the formula he or she used to compute appellant's underpayment to the Registrar of the High Court.

[8] It is common cause that the orders which the appellant sought to enforce by means of contempt proceedings relate to prayers (a) and (c) in the summons, viz,

(a) Payment of overtime and (b) Disclosure of the formula to be used in computing same.

[9] It is undisputed that prayer (a) sounds in money. It is trite that orders *ad pecunian solvendam* are not enforceable by means of contempt proceedings, with the exception of maintenance orders **(**see: **The Director of Statistics and Others v Mpho Malefane C of A (CIV) 43/2014)**.

In this regard therefore, the court a quo was correct to dismiss the application on the basis that the appellant was seeking to enforce an order sounding in money by means of contempt proceedings.

[10] The issue of lack of quantification of a claim in relation to prayer (a) was raised with **Adv. Molati** ,for the appellant, and he conceded, correctly in my view, that without a quantified claim it was impossible for the respondents to know how

much the appellant was claiming, and therefore, to comply with the order of the court a quo. It would seem in the bigger scheme of things, that the real problem started when default judgment was granted in terms of some of prayers which were, quite frankly incapable of enforcement. The court should not have granted prayers for overtime arrears in the absence of a quantified claim. The following remarks which were made in relation to request by parties in divorce proceedings that a settlement agreement be made an order of court are apposite and applicable even in this case, **Mansell v Mansell 1953 (3) SA 716 (N)** at 721 B-F;

> *"For many years this court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the court is not a registry of obligations. Where persons enter into agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of court is to cut out the necessity of instituting action and to enable execution. When, therefore, the court is asked to make an agreement an order of Court it must… look at the agreement and ask itself a question: is this sort of agreement upon which the obligee (normally the plaintiff can proceed to execution? If it is, it may well be proper for the court to make it an order. If it is not, the court would be stultifying itself in doing so. It is surely elementary principle that every court should refrain from making orders which cannot be enforced. If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears … to be so obvious that it is*

unnecessary to cite authority for it or to give examples of its operation." (Emphasis provided).

[11] Undoubtedly, *in casu*, the court a quo, by granting prayers for arrear underpayments, and disclosure of a formula for computing same, merely constituted itself as a *"registry of obligations"* which could not be enforced. It was not readily clear on what legal basis the said formula was sought and granted. This created a *cul-de-sac* the parties found themselves in, as the court created obligations whose actualisation was doubtful from the onset.

[12] In the circumstances, bearing in mind that the application in the court a quo was a contempt application, it is difficult to see how it could be said that the appellant discharged the onus placed on his shoulders, of showing that indeed the 1st respondent was guilty of contempt beyond a reasonable doubt.

[13] The contemporary approach to applications for contempt of court was stated in the oft-quoted decision of **Fakie No v CCII Systems (PTY) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA)** at para. 42 wherein Cameron JA said:

"[42]

1. *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*

2. *The respondent in such proceedings is not an accused person', but is entitled to analogous protections as are appropriate to motion proceedings*

3. *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*

4. *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides; should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt."*

[14] Now, applying these principles to the facts of this case, one is left in no doubt that the appellant has failed to prove contempt beyond a reasonable doubt as is required by the above-stated principles. The reason for this conclusion is simple, as already said the appellant made an unqualified claim for arrear underpayments, and was further granted a prayer for disclosure of a formula for computing same. In *casu* the fact that no legally recognized basis was posited by the appellant for the above-mentioned prayers, and absence of a quantification of same, made compliance with orders pertaining to same impossible to perform. The order in these terms being incapable of being carried out, leads to an ineluctable conclusion that *mala fide* and wilfulness on the part of the respondents could not be proved beyond a

reasonable doubt. This therefore means that the learned Judge a quo correctly dismissed the application for contempt.

[15] **COSTS**

Adv. Molati, for the appellant, submitted that in the event of this court dismissing the appeal, the appellant should not have a costs order being made against him as he is a man of straw. He intimated that he was representing the appellant on a *pro bono* basis on account of his impecuniosity. It is trite that costs follow the event, but the award of same being in the discretion of the court, taking into account the circumstances surrounding the appellant, the court is of the view that despite being on the losing side, justice of this case will be met by ordering that each party bear its own costs of appeal.

[16] **ORDER**

In the result the following order is made;

a) Appeal is dismissed.

b) Each party to bear its own costs.

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M.A. MOKHESI
ACTING JUDGE OF APPEAL

I agree

_____

DR K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree

_____

DR P. MUSONDA
ACTING JUDGE OF APPEAL

For Appellant	:	Adv. L. Molati
For Respondents	:	Adv. T. Lebakeng