IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **CASE NO. C OF A (CIV) 67/2019**

LAC/REV/07/2019

In the matter between:

NATIONAL UNIVERSITY OF LESOTHO **1ST APPELLANT**

REGISTRAR – NATIONAL UNIVERSITY OF LESOTHO **2ND APPELLANT**

COUNCIL – NATIONALUNIVERSITY OF LESOTHO **3RD APPELLANT**

And

MOTLATSI THABANE **RESPONDENT**

CORAM: DAMASEB AJA
CHINHENGO AJA
DR. VAN DER WESTHUIZEN AJA

HEARD: 28 OCTOBER 2019

DELIVERED: 1 NOVEMBER 2019

SUMMARY

National University of Lesotho putting out advertisement inviting suitably qualified persons to apply for post of Pro-Vice Chancellor; Respondent not an employee of the University, among other applicants, submitting his application; University putting out another advertisement inviting only suitably qualified employees of the University to apply for the same post; Respondent challenging by way of review in the Labour Appeal Court the propriety of the second advertisement and obtaining order in the absence of the University or its legal practitioners; LAC purporting to exercise original and exclusive jurisdiction in terms of the Labour Code Order 1992 as amended by Act No. 3 of 2000 and making order setting aside University decision putting out second advertisement and directing it to interview candidates who applied in response to the first advertisement only;

University in apparent ignorance of order proceeding with interviews and appointing Pro-Vice Chancellor

Application for urgent enrolment of appeal and hearing of condonation of late noting of appeal together with substantive appeal allowed by consent of the parties;

Appellants appealing against Labour Appeal Court decision and raising, inter alia, improper constitution of Labour Appeal Court and lack of jurisdiction;

Held, allowing the appeal, judge of Labour Appeal Court sat alone where s 38(3) required him to sit with assessors, such sitting contrary to the law and therefore court not properly constituted; Further that the court had no jurisdiction having regard to s 38A(1)(b)(iii) of Order 1992;

Condonation application granted and appeal allowed

Held in regard to costs of appeal - each party to pay its costs on account of appellants' several mis-steps in handling the proceedings in the Labour Appeal Court and this Court

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JUDGMENT

CHINHENGO AJA:

Setting down of appeal

[1] This matter was initially placed before us by the appellants as an urgent application for condonation of the late noting of an appeal and for the enrolment of the appeal in this October Session of the Court of Appeal. However, when the parties' legal practitioners appeared before us in chambers on 21 October 2019 they did not seem to have a problem with the application. A little while thereafter they filed with us a Deed of Settlement to the effect that –

"*1. The respondent to file answering affidavit to the condonation application on Wednesday 23rd October 2019.*

2. The appellant to file a replying affidavit by Thursday the 24th October 2019.

3. The parties to file heads of argument by Friday 25th October 2019 in both condonation application and the appeal.

4. The condonation application and the appeal be argued on Monday the 28th October 2019 at 8:30 am."

[2] The deed of settlement relieved us from having to hear argument on whether or not the matter could be heard urgently and in this, the October 2019 Session. The parties agreed that the condonation application and the appeal be heard and argued together. We are therefore seized only with the condonation application and the appeal as agreed by the parties.

Background

[3] The National University of Lesotho (1st appellant) (NUL) put out a general advertisement inviting applications from suitably qualified persons to apply for the position of Pro-Vice Chancellor of the University before 16:30 hours on Friday 29 March 2019.

Later NUL put out another advertisement, this time an "Internal Advertisement", the first paragraph of which reads-

> *"The National University of Lesotho seeks to appoint a qualified candidate for the position of Pro-Vice Chancellor. Applicants who made submissions in response to the call for applications for the deadline of the 29th March 2019 are not expected to re-apply."*

[4] The respondent, one of perhaps many, who responded to the general advertisement, was aggrieved by the NUL's decision putting out the internal advertisement. He instituted review proceedings against the appellants in the Labour Appeal Court (LAC) on 24 April 2019 and set out his grievance in part in paragraph 4 of the founding affidavit where he states:

> *"This is an application for review in which I sue the respondents for changing the goal posts after I had responded to their advert for employment of a candidate for the position of Pro-Vice chancellor of the National University of Lesotho. I seek an order whose purpose is to prevent the respondents from excluding me as a candidate for the said position."*

[5] The respondent sets out in paragraph 16 of his founding affidavit the grounds upon which the review application is based and then the relief that he sought, on an urgent basis, as a *rule nisi* calling upon the appellants to show cause why-

(a) pending the finalization of the application the respondents should not be prohibited from "continuing

with the process of employing the candidate for the position of Pro-Vice Chancellor of the National University of Lesotho";

(b) the respondents should not be ordered to submit to the Registrar of the LAC the record of proceedings in terms of which they made a decision abandoning or changing the advertisement for the position of Pro-Vice Chancellor of NUL attached to the founding affidavit as Annexure "MT2"; and

(c) the respondents' decision cancelling or changing the advertisement for employment of the Pro-Vice Chancellor of NUL should not be set aside on review.

[6] On 6 may 2019 the parties' legal practitioners appeared before Moahloli J in the LAC and the judge gave directions for the submission to his court of the "reasons for decision" of NUL by 10 May 2019 and for the filing of all papers by 24 May 2019. After giving the directions the judge postponed the hearing of the application to 31 May 2019.

[7] On 10 May 2019 the Registrar of NUL (2nd appellant), sent a letter to the respondents' legal practitioners, which reads –

" 'WITHOUT PREJUDICE'

RE: MOTLATSI THABANE VS NATIONAL UNIVERSITY OF LESOTHO & TWO OTHERS LAC/REV/07/19

Sirs,

Please be advised that in my capacity as the Registrar of the National University of Lesotho, I have had occasion to discuss the matter with the Joint Committee of the Council and Senate pursuant to Statute No. 5 of the National University of Lesotho Statutes.

The Committee has decided to withdraw our letter to you dated the 3rd of May 2019 which informed you that an advertisement for the position of Pro-Vice Chancellor ought not to have been advertised externally per the University regulations, thus effectively disqualifying your application automatically. The Committee appreciates that you had already developed an interest in the post and taken steps to submit your application.

Consequently, the Committee has re-considered your circumstances and decided to assure you and four (4) other external applicants that you have not been disqualified by the re-advertisement. You and the other four (4) external applicants will not therefore be prejudiced by the re-advertisement as both internal and external applicants will be considered on an equal footing.

You will therefore be informed of the out-come in due course.

Further, please be informed that the University has no interest in opposing the matter in LAC/REV/07/19 as it is not necessary.

You are therefore served, along with this letter, with a Notice of Withdrawal of the Intention to Oppose previously filed. This is done deliberately to stem any further step to be taken in this matter to avoid unnecessary costs.

[signed]
Leteboho Maqalika Lerotholi
Registrar"

[8] On the day fixed for the hearing of the application, 31 May 2019, the respondent's legal practitioner, Advocate *T. Ts'abeha*, was in attendance and the respondents or their legal practitioner, Advocate *R. Mofoka,* were not. The following is recorded as having transpired at the hearing:

"Ts'abeha hand up a letter dated 10th May 2019 from second respondent to him advising that respondents have decided to withdraw their second advert and have a notice of withdrawal of their intention to oppose. He asks for prayers 2(c) and 3. Court: intention to oppose not in file.

Order: The court having perused the letter dated 10th May 2019 issued by the second respondent to applicant's counsel;

- *And having heard counsel for applicants; and*

- *Having noted that respondents' counsel has failed to attend today's hearing as directed on 6th of May 2019 orders that prayers 2(c) and prayer 3 in the notice of motion are granted."*

[9] In consequence of the granting of the two prayers the following order was drawn up and signed by the judge –

> *"IT IS ORDERED AS FOLLOWS:*
>
> *a) that the decision of the respondents to cancel and/or change the advert for the employment to the position of Pro-Vice Chancellor of the National University of Lesotho attached as "MT2" to the founding affidavit be reviewed, corrected and set aside.*
>
> *b) Directing respondents to hold interviews in line with the first notice (attached as "MT2" to the founding affidavit) only."*

[10] It appears that respondents believed that the Registrar's letter of 10 May 2019 had put the complaint by the respondent to rest. The letter advised the respondent that he and the other four external applicants for the Pro-Vice Chancellor post would not be excluded from candidature. The respondents therefore went ahead with the interviews and then appointed as Pro-Vice Chancellor, Dr Kananelo Mosito. Interviews for the position were conducted by NUL's Joint Committee of Council and

Senate (JCCS) of which Dr Mosito was a member until he resigned on 10 April 2019 after the second advertisement in order that he could apply to be considered for the post.

[11] The LAC order set aside the University's decision putting out the internal advertisement and directed the University to hold interviews only in line with the first advertisement. The respondents aver that they did not become aware that this order had been issued by the LAC following their non-attendance, and that of their legal practitioners, on 31 May 2019 when the order was issued. They only became aware of the order when the respondent served upon them a notice of motion, again issued out of the LAC, seeking an order that –

> (a) the Registrar produce to the LAC within fourteen days the record of proceedings in terms of which Dr Mosito was appointed to the position;
>
> (b) the decision appointing Dr Mosito be set aside as irregular, null and void for violating the LAC order of 31 May 2019, alternatively, the decision to appoint Dr Mosito be set aside "for being unfair" by virtue of his position as former member of the Joint Committee of Council and Senate (JCCS);

(c) the respondents be directed to comply fully with the order of the LAC dated 31 May 2019.

[12] The notice of motion was filed with the LAC on 25 September 2019 requesting a date of hearing for 30 October 2019. It was served together with the founding affidavit upon the respondents on or about 27 September 2019. The respondent is opposing that application.

[13] The position with regard to service of the order upon the University is that it was served on 13 June 2019 and date stamped and signed by an officer in the Registrar's office. Faced with this evidence counsel for the appellants could only say that the order was due to the negligence of the officer concerned, not brought to the attention of the Registrar or other relevant person who could have acted on it. Whatever the explanation given by the appellants may be, I accept that the order was served upon the appellants and no action was taken, perhaps for the reason advanced by their counsel. And consequently I accept that there was a long delay in filing the appeal. This is one of the factors that I have to consider in deciding whether or not to condone the late filing of the appeal.

Condonation application and appeal

[14] As I have stated above, we are seized with an application for condonation for "late filing of appeal" lodged on 14 October 2019, and the substantive appeal against the order of the LAC of 31 May 2019, the notice of appeal which was filed on 8 October 2019, nearly 13 weeks out of time, where the Rules require that such notice be filed within six weeks of the order appealed against.

[15] It is not unusual that an application for condonation for late noting of an appeal is heard together with the main appeal. This is so because in a condonation application the court has to be satisfied, among other things, that there are good prospects of the appeal succeeding.

[16] In an application for condonation such as this, no exhaustive definition of circumstances in which indulgence will be granted, is possible. It is trite that an application for condonation is not had for the asking: the applicant must satisfy the court that there is sufficient cause to excuse the non-compliance with the rules of court. The degree of non-compliance, the explanation for non-compliance, the importance of the case, the prospects of success on appeal, the respondent's interest in the finality of the judgment, the convenience of court and avoidance of unnecessary delay in the administration of justice, are all factors to be considered. Accordingly condonation will be granted depending on the

reason for default, the nature of the case, the probability of success on the merits, the time that has elapsed, the benefit to applicant and the nature of the default. These factors are considered cumulatively – *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D; *Kahao v Solicitor General* C of A (CIV) No. 3/1980.

[17] Counsel on both sides traversed most of these factors but it seems to us that two preliminary points raised by the appellants may dispose of the condonation application and the appeal, all at the same time. The preliminary points are the composition, and hence the competence, of the LAC when it issued the order appealed against; and, generally, on its jurisdiction to entertain, at all, the respondent's application as a court of first instance.

Composition of LAC to hear respondent's application

[18] Section 38(3) of the Labour Code 1992 as amended by s 12 of the Labour Code (Amendment) Act, 2000 (Act No.3 of 2000) provides as follows –

> *"The Labour Appeal Court consists of –*
>
> *(a) a judge of the High Court who shall be nominated by the Chief Justice acting in consultation with the Industrial Relations Council; and*

(b) two assessors chosen by that judge –

(i) one from a panel of employer assessors nominated by the employer members of the Industrial Relations Council; and

(ii) one from a panel of employee members on the Industrial Relations Council."

[19] The judge who heard the respondent's application and issued the impugned order in the LAC on 31 May 2019 sat on his own, without assessors, and granted the order in favour of the respondent. This much is not disputed. Counsel for the respondent however submitted, rather tentatively and without conviction, that the judge was entitled to do so because he was dealing with a matter of law and not fact. For this submission counsel relied on s 38(8) of the Labour Code as amended, which says that:

"The decision of the Labour Appeal Court shall be-

(a) on matters of fact , the majority of the court; and

(b) the judge on matters of law."

[20] I cannot agree with respondent's counsel on this submission. Section 38 specifies how the court is to be properly

constituted. It is properly constituted when a judge and two assessors sit together. The only exception is set out in s 38(9) of the Labour Code which clearly provides that the proceedings of the LAC shall not be invalid merely because the appointment of an assessor was invalid or, after the commencement of the proceedings, the court proceeds without an assessor because the assessor is unable to continue to sit as such in the case, or the judge removes the assessor from the proceedings for good cause. The position is clear that when the LAC sits to consider any matter before it, the judge must be with two assessors. Short of such composition the court is not properly constituted and therefore incompetent to deal with any matter.

[21] The matters relating to decision making referred to in s 38(8) arise after the court is properly constituted. The submission by appellants' counsel that the decision of the LAC which was reached when that court was not constituted as required by law, is correct. The LAC is a creature of statute and can only do that which its enabling statute permits and in the manner prescribed. On this basis alone the decision of the LAC falls to be set aside as irregular and null and void.

Jurisdiction of LAC as court of first instance

[22] In terms of the Labour Code Order, the LAC is generally an appellate court. Section 38(2) provides in no uncertain terms

that the LAC "is the final court of appeal in respect of all judgments and orders made by the Labour Court." Section 38A(1), inserted by s 12 of Act No 3 of 2000, not only gives the LAC, in paragraph (a) thereof, exclusive jurisdiction to hear and determine all appeals against the final judgments and final orders of the Labour Court, but also, in paragraph (b) thereof, gives it original and exclusive jurisdiction -

> *"to hear and determine all reviews –*
>
> *(i) from judgments of the Labour Court;*
>
> *(ii) from arbitration awards issued in terms of this Act; and*
>
> *(iii) of any administrative action taken in the performance of any function in terms of this Act or any other labour law."*

[23] Jurisdiction in the present context means the power vested in a court to adjudicate upon, determine and dispose a an issue brought before it – *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424 and *Ewing MacDonald & Co Ltd v MM Products Co & Others* 1991 (1) SA 252 (AD).

[24] The jurisdiction of the LAC is not unlimited. In this case the limitation is placed upon the power of the LAC in relation to subject matter. The relevant provision for present purposes is s

38A(1)(b)(iii) that I have italicised. The appellants' contention in regard to this provision is that NUL's decision under challenge by the respondent is not an administrative action *taken by the University in the performance of a function under the Labour Code or any other labour law*. It is therefore axiomatic that to qualify for review by the LAC the action concerned must be (a) an administrative action (b) taken in the performance of a function (c) in terms of the Labour Code or other labour law.

[25] The question here is whether the decision of the University to put out the internal advertisement was an administrative act taken in the performance of a function in terms of the Labour Act. I think not.

[26] Appellants' counsel submitted that the LAC is given exclusive jurisdiction to review actions of functionaries under the Labour Code and that the University is not one of such functionaries. I accept this submission. I however do not think counsel's submission allied to this is correct. She states in the heads of argument at p. 7 that –

> *"Secondly the decision of the University to re-advertise the position of the Pro-Vice Chancellor cannot be classified as an administrative action. The decision was an internal procedural a matter."*

[27] To my mind, the decision of the University is indeed an administrative decision. What takes it outside the scope of the Labour Code Order is that it is an administrative decision that was not taken in the performance by the University of a function in terms of the Act, though administrative decision it is. This all makes it apparent that the view I take of the issue of jurisdiction is that the LAC had no jurisdiction to entertain the respondent's application in the circumstances.

[28] Having now decided that the LAC was not properly constituted and therefore not a court for purposes of hearing the respondent's application and also that it had no jurisdiction to determine and dispose of the issue placed before it, it is needless to consider the other issues raised by counsel. For instance the issue of non-joinder. That is only relevant where the court has jurisdiction. The same applies to submissions on *locus standi* of the respondent, the contentions that the decision of the LAC was not supported by evidence; that the grounds of review were not established or that the case was moot arising from the import of the letter of 10 May 2019. All these issues could have been considered only if the court was properly constituted determine and dispose of the matter placed before it. In these circumstances, the appeal must succeed for the reason that the LAC was not properly constituted as a court and that, even had it been properly constituted, it lacked jurisdiction. It follows that the prospects of success for the

appellants are so overwhelming arising from the two issues determined in favour of the appellants that condonation must inevitably be granted.

Appellants' non-compliance with Rule 7(2)

[29] After the appellants' counsel completed her submissions, counsel for the respondent rose and for the first time raised the issue that the appeal fell to be struck off because the appellants failed to comply with rule 7(2) of this court's rules which states:

> *"A certificate certifying the correctness of the record, duly signed by the person referred to in sub-rule (1), shall be filed with the record and served on all other parties to the appeal."*

[30] Relying on authority of this court, counsel submitted that the rule was peremptory and that non-compliance results in a nullity. Counsel conceded though that the respondent suffered no prejudice but maintained that such was not required as non-compliance is incurable. The appellants' counsel submitted that prejudice is indeed a relevant consideration and that in view of its absence, she was entitled, even at this late stage to apply for condonation in terms of rule 15 which states:

> *"(1) If an appellant breaches provisions of these Rules, his appeal <u>may</u> be struck off the roll.*

(2) The Court shall have a discretion to condone any breach on the application of the appellant".

[31] The rule goes on to state that such an application for condonation must be brought within stated times. The important point of departure is that this appeal was fast-tracked as I pointed out at the beginning of this judgement. In other words, the normal rules did not apply in respect of the manner it was enrolled. It was therefore not possible for the appellant to have complied with the timeframes set under the rules for bringing a condonation application for the non-compliance; more so because of the timing of the respondent's objection as I already pointed out.

[32] It must also be apparent from the quoted part of the rule that the court has a discretion to strike off an appeal. Nullity is not the inevitable result of non-compliance as suggested by counsel for the respondent. The cases referred to by counsel for the respondent must be seen in the context of the absence of an application for condonation as required by the rules which, as I have shown, are abridged because of the manner the appeal was set down. Prospects of success are, of course, the overarching factor in such applications.

[33] Competence of a court order is at the heart of the rule of law. An order granted without jurisdiction strikes at the heart

of legality and the rule of law. Therefore, non-compliance with rule 7(2), we considered, if viewed against the seriousness of what is at stake given the legally incompetent order and the absence of prejudice, should not stand in the way of the appeal being heard. It was for that reason that we entertained the appeal and an appropriate order will be made.

[34] The issue of costs in this appeal can be easily resolved on the basis of the appellants' concessions during argument in relation thereto. Counsel for the appellants conceded that in view of the less than satisfactory manner in which the appellants handled the proceedings in the LAC and this Court, inclusive of the excuse for not attending to the order of the LAC after it was served on the Registrar of the University, the confusion relating to the advertisements, the delay in noting the appeal and the application for condonation thereof, it was only proper that the appellants should not be granted costs despite their success on appeal. Counsel for the respondent was content with the position adopted by the appellants. In the result each party will have to pay its on costs.

[35] No submissions were made to this Court in relation to costs in the LAC. The learned judge of that court did not make any order as to costs. This court has no reason to visit the costs in that court.

[36] The order of this Court is accordingly:

1. The appellants' non-compliance with rule 7(2) is condoned;
2. The appellant's application for condonation of the late prosecution of the appeal is condoned;

3. The Appeal succeeds in that the order of the Labour Appeal Court handed down on 31 May 2019 is set aside as being null and void.

4. Each party shall bear its own costs of the appeal.

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M. H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

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PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree

_____

J. VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

For the Appellants: Adv. M.P Ralebese

For the Respondents: Adv. S.S Tshabeha