IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 58/2019

HELD AT MASERU

In the matter between

PRIME MINISTER	**1ST APPELLANT**
MINISTER OF DEFENCE & NATIONAL SECURITY	**2ND APPELLANT**
MINISTER OF LAW & CONSTITUTIONAL AFFAIRS	**3RD APPELLANT**
ATTORNEY GENERAL	**4TH APPELLANT**

and

TUMO LEKHOOA	**RESPONDENT**

CORAM: DR K E MOSITO P
DR P MUSONDA AJA
M H CHINHENGO AJA
DR J W VAN DE WESTHUIZEN AJA
MTSHIYA AJA

HEARD: 15 OCTOBER 2020
DELIVERED: 30 OCTOBER 2020

Summary

Appellants obtaining relief in High Court but lodging appeal nonetheless- appeal essentially against reasoning of court – real issue in dispute between parties having been determined appeal of no practical effect;

Court holding appeal lies only against substantive judgment or order of court and not reasoning of court- appeal accordingly struck off roll with costs

JUDGMENT

CHINHENGO AJA:-

Introduction

1. This appeal is to be decided on the papers filed of record. When the matter was called, counsel for the appellants advised that respondent's counsel was indisposed and that the parties had agreed that the matter should be disposed of on the papers and written submissions before the Court, that the application by the respondent for condonation of late filing of the heads of argument be granted by consent and that the respondent be permitted to file his heads of argument out of time. It was also confirmed that the respondent had abandoned the cross-appeal. We accordingly granted condonation by consent and proceeded to deal with this appeal as requested.

2. The respondent was employed by the Lesotho Defence Forces ("LDF") and held the rank of Colonel until 6 September 2016 when he was appointed on secondment to head the National Security Service (NSS) as Director General. His appointment was for 3 years effective from the date of secondment. On taking up the new assignment the respondent entered into a contract with the Government. On 10 July 2017 the Prime Minister (1st respondent) terminated the appointment by letter of that date. He did so in accordance with Clause J of the contract, which provides that –

"Notice to terminate secondment may be done by either party through a written notice of three (3) months. The termination shall not affect or otherwise limit any rights including benefits accrued to the Employee party during the subsistence of the secondment."

3. The Prime Minister's letter of termination reads:

"Dear Colonel Lekhooa,

RE:TERMINATION OF YOUR APPOINTMENT ON SECONDMENT AS DIRECTOR GENERAL, NATIONAL SECURITY SERVICE

The above matter refers.

You are hereby informed that your appointment on secondment as Director General, National Security Service (NSS) is hereby terminated with effect from 10th July, 2017. As you are aware, the appointment of your secondment was done on the 6th September, 2016, in accordance with Section 148(3) of the Constitution of Lesotho read with Section 6 of the National Security Service Act, of 1998.

Clause J of your contract with the Government of Lesotho on termination of secondment provides that, notice to terminate secondment may be done by either

party giving three (3) months' notice thereof. Please note that, you will be paid all your benefits accruing from your contract.

You are expected to handover the duties of your current office to Ms. Malejara Mothabeng, the Director of Administration, and also report yourself to the office of the Commander of the Lesotho Defence Forces, and assume your responsibilities in the army."

4. The respondent was aggrieved at the termination of his contract. He instituted review proceedings in the High Court exercising its constitutional jurisdiction for a declaration that the termination of his appointment on secondment was "unconstitutional, null and void and of no legal effect" and that he was "entitled to his emoluments and benefits for the unexpired period of secondment … calculated from 10th July 2017."

5. The High Court (PEETE, MAKARA & MOKHESI JJ) held:

"(a) That the termination of applicant's appointment on secondment as Director General of the National Security Service is declared unconstitutional.

(b) It is declared that the applicant is entitled to emoluments and commensurate benefits for three months' notice period as Director General of the

National Security Service calculated from the date of termination of Secondment.

(c) That Applicant is awarded costs."

Appeal against High Court decision

6. The appellants were for some reason dissatisfied with the decision of the High Court and appealed. I express some surprise at the appellants' decision to appeal because the High Court decision in effect confirmed the propriety of the steps that the Prime Minister had taken , in particular the termination of the contract without notice but on payment of all the appellant's emoluments in lieu of the three months' notice as provided in the contract of secondment. An examination of the grounds of appeal will show that the appellants were not aggrieved at the result but by the reasoning of the court, which in any event did not affect the substance of the relief granted. The grounds of appeal are:

"1. The learned judges in the court *a quo* erred and misdirected themselves in concluding that the application was a constitutional matter as envisaged in the Constitutional Litigation Rules. In so concluding the learned judges in the court *a quo* erred and misdirected themselves in concluding that the nature of the application fell within purview and jurisdictional powers of the High Court sitting as a Constitutional Panel.

2. The learned judges in the court *a quo* erred and misdirected themselves on the same subject of jurisdiction expressed in paragraph 1 above by incidentally failing to exercise their judicial discretion in favour of constitutional avoidance to the extent that there were adequate means of redress for the contravention alleged and such means of redress were clearly available to the applicant under the law of contract.

3 Still incidental to the point of jurisdiction the learned judges in the court *a quo* erred and misdirected themselves by wrongly interpreting section 119(1) to be giving the High Court sitting as a constitutional panel the requisite jurisdiction to hear and entertain the matter. The Constitutional Litigation Rules derive their existence from the provisions of Section 22(6) not the relevant provisions.

4.The learned judges in the court *a quo* erred and misdirected themselves by failing to attach due weight to the national security dimension of the case and the factors which prompted the disengagement of the applicant from the intelligence agency.

5. The learned judges in the court *a quo* erred and misdirected themselves by failing to attach due weight

to the fact that there was an irreconcilable breakdown of the relationship of trust between the Prime Minister and the applicant which justified the termination of the contract.

6. The learned judges in the court *a quo* erred and misdirected themselves by failing to draw the line of demarcation between termination of a contract of engagement and dismissal from employment.

7. The learned judges in the court *a quo* erred and misdirected themselves by arriving at a factual finding that there was no evidence to support the Prime Minister's assertion that applicant is a security risk when in fact the court *a quo* disavowed itself of the opportunity to hear the evidence in camera as suggested by the Prime Minister."

7. The Prime Minister terminated the respondent's employment at NSS by invoking Clause J of the contract of secondment. In defending his decision in the High Court he must have been looking forward to a confirmation by that court that the termination of the contract on payment of emoluments due to the respondent over the three months period of notice was correct. The High Court gave that confirmation and specifically "declared that the applicant is entitled to emoluments and commensurate benefits for three months' notice period." This declaration was in stark contrast to what

the respondent had sought in the High Court – a declaration that "he was entitled to his emoluments and benefits for the unexpired period of secondment", by which he meant that he was entitled to be paid for the remaining period of the contract, that is, from 10 July 2017 to 6 September 2019. The High Court declined to award him this relief. On this issue, which no doubt was central to the termination of the respondent's contract, the appellants would have had no reason to be dissatisfied with the judgment of the High Court. This explains why the grounds of appeal do not challenge the High Court decision declaring that the respondent was entitled only to payment of three months' salary and benefits in lieu of notice.

8. Appellant's counsel recognised that the appellants could not possibly be aggrieved at the declaration confirming the Prime Minister's decision to terminate the appointment on secondment on the payment of cash in lieu of notice, as this arrangement is commonly known. See paragraph 2.6 of the appellants' heads of argument where it is stated:

> "The remedy awarded in the court *a quo* is in line with what the Prime Minister undertook to pay the respondent in the termination letter. We would then not have a big problem with the order in line with that letter, save to argue that it was given before a wrong forum and the reasoning employed does not rhyme with the law or adequately interpret the position of the law. We will

submit that the court *a quo* was not entitled to make a declaratory order of unconstitutionality as already alluded to above."

9. And paragraph 2.8:

"It must be admitted that the consequential relief granted by the court *a quo* under paragraph (b) of the order does not do much harm to the case of the Prime Minister, if anything it is in line with the termination Clause J. But the declaratory (sic) and costs order do a great deal of harm in the following senses:

(i) the reasoning employed in justifying both orders is unsupportable in law;

(ii) the court does not accurately draw a distinction between termination of contract of employment and dismissal.

The two concepts are not synonymous in law notwithstanding the fact that they both lead to severing of ties between employer and employee."

10. The appellants' submissions above show quite clearly that the appellants are not concerned about the outcome of the litigation which was finalised in their favour: the respondent's appointment on secondment has been

terminated; he has vacated office and will or has been paid his dues. The litigation is ended. The appellants are evidently aggrieved at the declaration that the termination of the appointment on secondment was unconstitutional, and the reasoning of the Court in coming to its orders.

11. The respondent cross-appealed on the issue of damages awarded to him, that is, against the decision that he be paid his salary and benefits in lieu of three months' notice only. In so doing he must have aimed at obtaining an award of salary and benefits to the end of the three-year contract period. The papers relating to the cross-appeal are not in the record of proceedings and we have had to rely on the submissions of respondent's counsel in this regard. We were advised, and it is clear from the respondent's heads of argument, that the respondent is no longer pursuing the cross-appeal.

12. The crisp issue for decision in this appeal is, to my mind, whether the appellants had any real reason to appeal, regard being had to the substantial relief granted by the High Court and the fact that, so far as the real issue in dispute between the parties is concerned, it has been finally determined in favour of the appellant and there is no appeal or cross-appeal by the respondent.

13. The first reason put forward by the appellants for lodging this appeal is that they are aggrieved by the

reasoning of the court. The answer to this is that they cannot do that. Persuasive authority is galore in other jurisdictions. The South African Supreme Court in *Neotel (Pty) Ltd v Telkom SOC & others* (605/2016) [2017] ZASCA 47 (31 March 2017) set out the law on this point and came to the conclusion that an appeal does not lie against reasons for an order or decision, but against the substantive decision itself. The court declined jurisdiction to hear such an appeal. Its reasoning appears at paragraphs [22] – [26] of the unreported judgment:

> [22] The contentions of the appellant's counsel effectively required this court to jettison a sound principle which has been confirmed in numerous decisions, including decisions of this court over a long period and as recently as the same day on which the present matter was heard.
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> [23] While it is so that this court has in recent times, as is evident from the decisions referred to above, adopted a more flexible and pragmatic approach in determining whether interlocutory orders are appealable, that did not extend to making reasons of judgments, or orders, appealable.
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> [24] The approach contended for by the appellant not only holds the potential of 'opening the floodgates', with its inherent challenges, but also the undesirable

prospect of matters being disposed of in a piecemeal fashion. And, even more concerning, the 'hollowing-out', or erosion, of the substratum of judgments and orders that are not before this court, and the negative consequences accompanying such a process.

[25] In any event, I am not persuaded that there are any exceptional circumstances present that would justify what would be a radical departure from a sound, tried and, doubtlessly, trusted principle. The contention that the appellant and others, who may have to comply with s 9(2)*(b)* of the ECA, would not be able to do anything about the binding effect of the court *a quo*'s interpretation of that section and s 13 of the ECA, is, in my view, grossly exaggerated. There is nothing preventing anyone affected from challenging the correctness of that interpretation in a matter where it is properly raised. It was not for this court, in a matter such as the present, to anticipate what may or may not be faced by those that are required to comply with the BEE requirement, and to act precipitately and thereby unleash the undesirable consequences referred to above, which, until thus far, have been restrained by the sound principle that reasons for judgments and orders are not appealable.

[26] In truth the appellant was requesting this court to give an opinion on the meaning of s 9(2)*(b),* read with s 13(6), of the ECA, in circumstances where the

substantive order made by the court *a quo* is not before this court, and which, consequently, is incapable of being altered or substituted. That is not in the interests of justice.

[27] This court does not have jurisdiction in the present matter,…."

14. The law as set out in the above-cited case is actually trite law. While there is a plethora of authority on this topic in many Southern African jurisdictions, unfortunately we have not been able to lay our hands on more than one case in this jurisdiction. However, I have no doubt that there are many more cases on this point. In *Director of Public Prosecutions v Mokhopi* LCA (2004-2005) 190, this Court held that the appeal was misconceived and struck it off the roll because it was not an appeal against the decision of the High Court but against the reasoning of that court. The incontrovertible position, therefore, is that an appeal lies only against the substantive judgment or order of a court and not the reasoning of the court. See *Western Johannesburg Rent Board & another v Ursula Mansion (Pty) Ltd* 1948 (3) SA 353 (A) at 354, where Centlivres CJ said:

"This court *mero motu* drew counsel's attention to the fact that the so-called notice of appeal was not a notice of appeal at all, for it does not purport to note an appeal against any part of the order made by the court *a quo*.

> Even apart from sub-rules (2) and (3) of Rule 6 of this Court, it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court."

See also *Tecmed Africa (Pty) Ltd v Minister of Health & another* [2012] 4 All SA 149 (SCA), Ponnan JA put it thus (paras 16-17):

> "[16] Before us, Counsel was constrained to concede that securing a licence for the use of the machine by Cancare at the Durban Oncology Centre had indeed become academic. That notwithstanding, so he urged upon us, the appeal should nonetheless be entertained. His argument, consistent with the approach adopted in the affidavit filed on behalf of Tecmed on this aspect of the case, amounted to this: the approach and reasoning of the Full Court to the disputed factual issues on the papers would stand and were it not to be set aside by this court, would serve as an insurmountable obstacle in due course to the successful prosecution of its envisaged civil claim against the Minister. In my view, for the reasons that follow Counsel's submission lacks merit.
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> [17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees

with a lower court's reasoning would be of no consequence if the result would remain the same."

15. The other grounds of appeal raise important questions about the High Court sitting as a constitutional court in terms of the Constitutional Litigation Rules. Interesting written submissions were filed by counsel on those questions but I am not convinced that this is a proper case for addressing them. In a proper case it would be quite in order for this Court to pronounce itself again, or re-state, the law, as the case may be, on all the appellants' grounds of appeal. In the matter before us it is apparent that the appellants succeeded in the High Court when the substantive relief sought and defence proffered are compared against the substantive relief granted. The judgment that the appellants seek on appeal will have no practical effect or result. It will not change the outcome. For these reasons the appeal has to be struck off the roll.

16. I now turn to deal with the question of costs. In so far as the costs of appeal are concerned, the Court adverted to the impropriety of lodging this appeal but could not invite submissions in the absence of the respondent's counsel. We indicated then that we would determine the appeal on the written submissions before us on condition that we could raise questions and invite counsel to deal with them nonetheless. I think there is no compelling reason for us to invite counsel to make submissions on the point upon which this matter has been disposed of. The point that an appeal

can be noted only against the judgment or order, that is the substantive order, not against the reasons for judgment is one that the appellants and counsel should have been aware of. Equally they should have appreciated, as I have stated in the preceding paragraph, that the appeal would not have any practical effect or result. The appellants however persisted with this appeal even when they became aware that the respondent had withdrawn his cross-appeal. I think that it is only fair that the appellant pay the costs of appeal.

17. As for the costs in the High Court, the reason for awarding them in favour of the respondent in light of paragraph (b) of that court's order is not given in the judgment of that court. One may only surmise that it was because the respondent, as far as the court was concerned, had succeeded in showing that the procedure adopted in terminating his contract was irregular. Having declined to deal with the grounds of appeal on the merits, I do not propose to interfere with that order of costs.

18. In the result the appeal is struck off the roll with costs.

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

DR J VAN DE WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree:

NT MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANTS: MR M RASEKOAI

FOR RESPONDENT: ADV M E TEELE KC