

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO 12/2022

LAC/CIV/A/06/21

In the matter between:

PALESA KHABELE

APPLICANT

AND

CHAIRPERSON OF THE DISCIPLINARY

HEARING COMMITTEE

1ST RESPONDENT

FINANCIAL INTELLIGENCE UNIT

2ND

RESPONDENT MINISTER OF FINANCE

3RD

RESPONDENT ATTORNEY GENERAL

4TH

RESPONDENT

CORAM:

K E MOSITO P

HELD ON: 31 MAY 2022

DELIVERED ON: 3 JUNE 2022

SUMMARY

Civil procedure - Application for stay of execution - Requirements for - application for leave to appeal and stay of execution - The order of the Labour Appeal Court is stayed pending the final determination of the appeal - Application for leave to appeal to be proceeded with before Court of Appeal comprising a panel of at least three judges - Costs of application to be costs in the appeal.

JUDGMENT

K E Mosito P Background

[1] On 16 March 2022, the applicant noted an appeal before this Court against the judgment of the Labour Appeal Court. The appeal is based on four grounds which will have to be determined by the Court comprising at least three judges. The said appeal is pending before this Court.

[2] There is also an application for leave to appeal. The application for leave to appeal will also have to be determined by the Court comprising at least three judges. If the application for leave to appeal is successful, the notice of application for leave to appeal has the same effect as a notice of appeal. The appeal will continue in the same manner as an appeal where leave is not required. Therefore, both the pending appeal and the application

for leave to appeal have to be determined by this Court comprising at least three judges as they are both potentially dispositive of the appeal pending before it.

[3] The other aspect of the present proceedings is the application for a stay of the judgment of the Labour Appeal Court pending appeal. What is being sought to stay here is the effect of the Labour Appeal Court judgment.

Factual Framework

[4] The substantive facts upon which the application for stay of the judgment of the Labour Appeal Court rest are not in dispute. They are that disciplinary proceedings are pending against the applicant. The applicant is not satisfied with how the proceedings are being conducted. She requested some information from the employer to prepare for her defence. She also objected to the panel hearing the disciplinary matter.

[5] Her preliminary objections before the disciplinary panel were unsuccessful. She approached the Labour Court for assistance. The Labour Court to entertain the matter. She unsuccessfully appealed to the Labour Appeal Court against the judgment of the Labour Court. The Labour Appeal Court upheld the Labour Court's judgment, but on different reasoning, hence the appeal and stay before this Court.

The issue for determination

[6] The issue for determination is whether this is the proper case for a stay of execution. In order to answer that issue, it is helpful to outline the legal principles relevant to the determination of the issue.

The applicable legal principles

[7] As a general rule, a court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done.¹ Put differently, the primary considerations in an application for a stay of execution are whether the applicant has prospects of success on appeal and the balance of hardships or convenience, as the case may be. The court has the discretion whether or not to grant such an application depending on the circumstances of the case. However, that discretion is not arbitrary but must be reached somewhat upon consideration of all relevant factors. Thus, it must be exercised judicially and not capriciously.

[8] Execution is a process of the court, and this Court has an inherent power to control its process subject to the Rules of the Court. This Court, therefore, has jurisdiction to grant a stay in the appropriate circumstance. However, it is pertinent to bear in mind that the position in Lesotho is that the noting of an appeal from the Labour Appeal Court does not automatically stay the execution of the Labour Appeal Court judgments in respect of appeals to the Court of Appeal.

¹ See *Strime v Strime* 1983 (4) SA 850 (C) 852 B.

Consideration of the application

[9] As indicated above, there is an appeal pending in this Court. Whether or not the pending appeal requires leave for it to be pursued

is a different matter from whether it is pending. In terms of Rule 18 of the Court of Appeal Rules, 2006, the application for stay is an interlocutory application where an appeal is pending in this Court. One turn then to consider the facts of the matter before me to determine whether there are prospects of success on appeal. However, one does not propose to add to the length of this judgment by dealing in detail with the facts. As Mr Ndebele correctly pointed out, the applicant could only approach this on appeal on the point of law. The applicant is challenging the decision of the court a quo that the Labour Court was correct in holding that it has no jurisdiction to hear an application involving pending disciplinary proceedings.

Jurisdiction is arguably, a question of law and not fact.

[10] Another ground is the exceptionality of circumstances in which the applicant complains to the learned Judge a quo determined without the benefit of an address from the parties. If this is what happened, it was arguably, improper. On these bases, I am of the view that arguably, there are prospects of success on appeal in this matter.

[11] The next consideration is about the balance of hardships or convenience. This leads me to the question of the balance of hardship or convenience, as the case may be. If this application is dismissed, I shall bear in mind that the applicant shall be obliged to go through the disciplinary process without the material she needs for preparing her defence. By the time this Court determines this, the appeal, in all probabilities, the disciplinary proceedings will be over. As advocate Phafane KC argued, on the other hand, if the application is upheld, the applicant will be availed of the said material, thereby leading to a fair trial as contemplated by section 12(8) of the Constitution of Lesotho. In my opinion, the balance of hardship or convenience favours the granting of this application.

Disposal

[12] In light of all the facts, I am inclined to grant the application for a stay of the court's judgment a quo.

Order:

[13] (a) The order of the Labour Appeal Court is stayed pending the final determination of the appeal pending before this Court. For the avoidance of doubt, the disciplinary proceedings against the applicant are, as a result, stayed pending the final determination of the appeal before this Court.

(b) The application for leave to appeal is to be proceeded with before this Court comprising a panel of at least three judges.

(c) The appeal and application for leave to appeal are referred to the next session of the Court of Appeal.

(d) Costs of this application shall be costs in the appeal.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

FOR THE APPELLANT: Adv. S Phafane
KC

FOR THE RESPONDENT: Mr. K Ndebele