

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LEROTHOLI POLYTECHNIC

1ST APPLICANT

TSIETSI LEBAKAE

2ND APPLICANT

AND

BLANDINA LISENE

RESPONDENT

CORAM: HONOURABLE MR JUSTICE K.E.MOSITO AJ.

ASSESSORS: MRS. M. MOSEHLE

MR. L. MATELA

Heard: 7th AUGUST 2009

Delivered 10th AUGUST 2009

SUMMARY

Application for stay of execution pending finalization of appeal from the Labour Appeal Court to Court of Appeal of Lesotho – whether Court of Appeal has jurisdiction to entertain appeals from Labour Appeal Court – no such jurisdiction existing – the issue whether appeals from Labour Appeal Court to Court of Appeal decisive on the issue whether to grant stay of execution of decision of Labour Appeal Court pending finalization of appeal in the Court of Appeal – fact that there is no appeal to Court of Appeal means that there can be no prospects of success on appeal.

Application for stay of execution dismissed – since there is no opposition to application, no order as to costs.

JUDGMENT

Mosito AJ:

1. In this application, the Applicants seek relief in the following terms:

- (i) That execution of judgment in LAC/CIV/05/2009 be stayed pending finalization of the appeal in C of A/25/2009 herein;
- (ii) Granting applicant costs of suit in the event of opposition;
- (iii) Granting applicant further and/or alternative relief

2. The present application is a sequel to a judgment delivered by this Court on the 29th day of July, 2009. In that judgment this Court fined the 1st and 2nd Applicants M60, 000.00 (sixty thousand Maloti) and M20, 000.00 (twenty thousand Maloti) respectively for contempt of Court. The judgment came after a protracted litigation between the Applicants and the Respondent which culminated in a judgment handed down by this

Court on the 20th day of January, 2009 in terms of which this Court ordered the Applicants herein to reinstate the Respondent. Notwithstanding that judgment, the Applicants herein did not reinstate the Respondent. The latter then instituted an application for contempt which was heard and finally determined on the 29th of July, 2009.

3. The Applicants herein were apparently not happy with that judgment in which they were found guilty of contempt and sentenced as aforesaid. They then noted an appeal to the Court of Appeal against that judgment. After noting the appeal they brought the present application for stay of execution pending the outcome of their appeal to the Court of Appeal.
4. I may mention that it appears that the Respondent's Counsel was served with the notice of motion and founding papers on which the present application is based and he signed it on the 31st day of July, 2009. There was however no notice of intention to oppose the application from the side of the Respondent. The Applicants' counsel, Mr. Letsika appeared before us on the 7th day of August, 2009 to move the application for stay. He assured the Court that the application for stay papers had been served on the Respondent's lawyers and signed for personally by the Respondent's Counsel. Mr. Letsika then moved the Court to grant the stay in the terms outlined in paragraph 1 above. We will accept what we have been told by Mr. Letsika that the signature that appears on the founding papers in apparent acknowledgment of receipt of the papers is that of Mr. Ntaote, Counsel for Respondent. We however observe that it would have been courteous of Mr. Ntaote to have appeared before this

Court to indicate that he does not oppose the granting of the stay. Quite regrettably Mr. Ntaote did not do so.

5. When the matter was called and Mr. Letsika rose to his feet, the Court put two questions to him. Firstly we asked him whether regard being had to the law governing the jurisdiction of the Court of Appeal and of this Court, whether the Court of Appeal has jurisdiction to entertain appeals from this Court. If it did not have such jurisdiction, whether that did not mean that there are no prospects of success of the appeal in as much as, once the Court of Appeal does not have jurisdiction to entertain the appeal, then it is clear that there would be no prospects of success in the appeal. The second question was whether this Court has jurisdiction to stay the execution of its judgment pending the outcome of an appeal to the Court of Appeal. If so, the Learned Counsel was invited to pinpoint the source of such power on the part of this Court.

6. In relation to the first question, the Learned Counsel argued that the Court of Appeal has held in **The Minister of Labour and Employment & Others vs Muso Elias Tseuo C of A (CIV)1of 2008** that it has jurisdiction to entertain an appeal from this Court. In relation to the second question, he pointed out that at common law; the mere noting of an appeal has the effect of staying execution. He went on to argue that since this Court was sitting as a Court of first instance when adjudicating over the contempt application, its decision is appealable to the Court of Appeal. Thus, so contended the learned counsel, the Court had jurisdiction at common law to stay the execution of its own judgment pending the outcome of the appeal to the Court of Appeal. It was on this

basis of the above contentions that the Learned Counsel argued that there were prospects of success in the appeal and that this Court should grant the stay of execution pending the outcome of the appeal.

7. In our view a proper determination of the issue whether we should grant stay of execution should revolve around the above two issues in this case. The reason for this view is that once this Court determines that the Court of Appeal has no jurisdiction to entertain appeals from this Court, then there can be no talk of the applicant having any prospects of success because the jurisdiction of that Court to entertain appeals emanating from this Court is the key to the consideration of the issues raised in the appeal. Once the Court of Appeal has no jurisdiction to entertain the appeal from this Court, it then follows that the appeal would not succeed and there can be no way in which the Court of Appeal can entertain their appeal. However meritorious the grounds of appeal raised may be, once that Court has no jurisdiction, it will have to decline to hear the appeal.

8. It is now necessary to begin by examining the law relating to the jurisdiction of the Court of Appeal to entertain appeals emanating from this Court. By asking this Court to stay the execution of its judgment, the Applicants are in effect moving this Court to exercise a discretion. This is a discretion that the Court must exercise judicially. 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. See *Strime v Strime* 1983 (4) SA 850 (C) 852 B¹ and *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484. Execution is a process of the Court and the Court has an inherent power to control its own process subject to

the Rules of Court. This Court therefore, has jurisdiction to grant a stay in appropriate circumstance. The court will, generally speaking grant a stay of execution when real and substantial justice requires such a stay or, put otherwise, where injustice would otherwise be done. (See **Marais v Aldridge and Others 1976 (II SA 746 [TPD])**).

9. The application is consequent upon the decision of this Court in case number LAC/CIV/05/2009 in which on the 20th day of January 2009 the Court granted judgment against the Applicants and in favour of the Respondent. This was followed by a contempt application handed down in favour of the Respondent on the 29th day of July as aforesaid. At common law, the execution of all judgments is suspended upon the noting of an appeal. The rationale behind this common-law rule is to prevent irreparable harm being done to the intending appellant should he turn out to be the eventual winner on appeal for it is conceivable that situations may well arise where he may not be able to recover what he paid in satisfaction of the judgment appealed against. The courts in South Africa have stuck to the above mentioned common-law principle and have thus proceeded on the premise that the noting of an appeal operates as an automatic suspension of the judgment appealed against. (See the leading case of **South Cape Corporation (Pty) Ltd v Engineering Management Services 1977 (3) SA 545 (AD)**). This principle has been embodied in the Rules of Court in that country more especially Rule 49 (11) of the Supreme Court Rules.

10. It is pertinent to bear in mind that the position in Lesotho differs *toto caelo* from that which obtains in South Africa as stated in the preceding

paragraph. In respect of appeals to the Lesotho Court of Appeal, the position is statutorily regulated by Rule 13 of the **Court of Appeal Rules 2006** which provides in no uncertain terms that the noting of an appeal does not operate as an automatic stay of execution. That rule reads as follows:-

13 (1) subject to these Rules, the noting of an appeal does not operate as a stay of execution of the judgment appealed from.

11. Unlike in South Africa, Rule 13(2) places the *onus* squarely on the appellant himself to apply to the *judge of the High Court* whose decision is appealed from or if not available, to any other *judge of the High Court* to stay execution at any time after he has noted an appeal. Then comes sub-rule 13(3) and (4) which read as follows:-

- (3) On the application mentioned in sub-rule (2), the Judge of the High Court may make an order as he sees just and in particular, without in any way depriving him of his discretion, may-
- (a) Order that execution be stayed subject to the appellant giving such security as the Judge thinks fit for payment of the whole or any portion of the amount he would have to pay if the appeal should fail;
 - (b) Refuse that execution be stayed subject to the respondent giving security for restoration of any sum or thing received under execution; or
 - © Order that execution be stayed for a specified time but that after the lapse of such time execution may proceed unless the appellant has within such time furnished security for such sum as the Judge may specify.
- (4) The Judge of the High Court hearing such application may make such order as to costs as he may deem fit.

12. I have underlined the word “may” to indicate my view that the High Court is vested with a judicial discretion whether or not to grant an application for stay of execution. It is further salutary to bear in mind that in exercising its discretion the High Court will be guided by considerations of what is just and equitable depending on the circumstances surrounding each particular case. I must also point out that Rule 13(2) is, in my view not concerned with a situation in which a Judge of the High Court is sitting as a Judge of a Labour Appeal Court. It is concerned with a Judge of the High Court who is approached for stay in respect of an appeal pending from the decision of the High Court not of the Labour Appeal Court. If that rule were to apply to a Judge of the High Court not sitting as a Judge of the Labour Appeal Court,, that would mean that every Judge of the High Court has jurisdiction to grant stay of execution in respect of an appeal to the Court of Appeal which emanates from the Labour Appeal Court. It would mean that all Judges of the High Court have power to grant a stay in respect of decisions of the Labour Appeal Court. The effect of this would be to make all Judges of the High Court Judges of the Labour Appeal Court contrary to the terms of the **Labour Code (Amendment Act) of 2000** which indicate the circumstances in which a serving Judge of the High Court may become a Judge of the Labour Appeal Court. In my view, Rule 13 does not apply to Judges of the Labour Appeal Court.

13. It follows therefore that if an appeal lies to the Court of Appeal from the decisions of this Court, the common law position would not apply

namely that, the mere noting of an appeal to the Court of Appeal, automatically stays execution of the judgment appealed from.

14. The peculiar problem however that faces the applicants in this case is one as to whether such an appeal is available to them to the Court of Appeal. In my view this is the real difficulty that the applicants face in this case.

15. The main considerations in an application for stay of execution pending appeal are usually whether the Applicant has prospects of success on appeal, prejudice as well as the balance of hardships or convenience, as the case may be. (See **South Cape Corporation v Management Services** (*supra*)).

16. It needs to be said that, the present application for stay of execution pending appeal to the Court of Appeal proceeds on the mistaken premise that an appeal competently lies against decisions of this Court to the Court of Appeal. This is not so. In our view, a reading of Rule 14 of the **Labour Appeal Court Rules 2002** may give the wrong impression that appeals lie from this Court to the Court of Appeal where this Court adjudicated a matter sitting as a court of first instance. In our view, if that Rule purports to confer jurisdiction upon the Court of Appeal to hear appeals from this Court, that Rule would clearly be *ultra vires*. It therefore cannot be enforced by this Court. We do not believe that a subsidiary legislation such as a rule of Court can confer jurisdiction upon the Court of Appeal without there being a substantive piece of legislation or constitutional provision to that effect. The **Labour Code**

(Amendment) Act 3 of 2000 effected a number of amendments to the **Labour Code Order 1992**. Important for present purposes are section 38 (which introduced a Labour Appeal Court, comprising a High Court judge, nominated by the Chief Justice, and two assessors chosen by him from designated panels), and section 38 A. The latter reads:

38A Jurisdiction of Labour Appeal Court

(1) The Labour Appeal Court has exclusive jurisdiction-

1. to hear and determine all appeals against the final judgments and the final orders of the Labour Court;
2. 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.
3. Notwithstanding the provisions of any other law, the Labour Appeal Court may hear any appeal or review from a decision of any Subordinate Court concerning an offence under this Code and any other labour law.
4. Notwithstanding the provisions of subsection (1), the judge of the Labour Appeal Court may direct that any matter before the Labour Court or a matter referred to the Directorate for arbitration in terms of section 227 be heard by the Labour Appeal Court sitting as a court of first instance.
5. Subject to the Constitution of Lesotho, no appeal lies against any decision, judgment or order given by the Labour Appeal Court.

17. It is trite that an appeal to the Court of Appeal only lies against a judgment or order of the High Court in terms of both the Constitution and the **Court of Appeal Act 1978**. The issue whether an appeal can lie against the judgment of this Court found its way for the first time into the Court of Appeal on the 14th of April 2005 in **Tseuoa v Labour Appeal Court of Lesotho and Others (27/04 LAC/REV/36/02)** On that occasion, the Court of Appeal made the following order:

After consulting the President of the Court of Appeal, we have decided that this appeal should be heard by the Full Court of five judges. This is because of the importance of the issue raised of the jurisdiction of this court to hear appeals from the Labour Appeal Court. The President has agreed with us that it is desirable that the Law Society of Lesotho be asked to appoint *amicus curiae*, that is an independent legal practitioner of standing, to assist the court at the hearing by advancing legal argument on the issue of jurisdiction. It will not be possible for *amicus curiae* to be appointed and the Full Court constituted during the current session. The appeal is accordingly postponed to be heard at the next session of the Court of Appeal in October 2005 by the Full Court. The issue of jurisdiction will be dealt with first. If it is decided in favour of the appellant, the appeal will proceed in relation to the merits of the appeal. Having heard the appellant in relation to the foregoing, it is so ordered.

18. The Law Society appointed me to appear in that matter *amicus curiae*, to appear before the Court of Appeal to argue the matter as aforesaid. The Law Society's approach was that the Court of Appeal had no jurisdiction to hear appeals from this Court. The Court of Appeal agreed with that approach and that application was dismissed by the Court of Appeal in **Ts'euoa v Labour Appeal Court and Others LAC (2005 -2006) 248**, on the basis that section 38A (4) of the **Labour Code (Amendment) Act, 3 of 2000** permits no such appeal, and any challenge to that provision would have to be made in the first instance to the High Court and not (as the respondent had sought to do) directly to the Court of Appeal. The comments of the Court of Appeal in **Ts'euoa v Labour Appeal Court and Others** (*supra*) are quite instructive in this regard. In paragraphs 9, 10 and 11 of the judgment, the Court went on to say;

(9) The jurisdiction of the Court of Appeal of Lesotho is more circumscribed than that of the Supreme Court of Appeal of South Africa. This is apparent from the wording of s 18 of the Court of

Appeal Act quoted in paragraph [3] above, and from the provisions of the following sections of the Constitution which deal with the jurisdiction of the Court of Appeal:

123 (1) There shall be for Lesotho a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

123(4) The Court of Appeal shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

129(2) Subject to section 69 of this Constitution, the Court of Appeal shall have such other jurisdiction with regard to appeals as shall be determined by Parliament.

(10) It, therefore, appears that the jurisdiction of the Court of Appeal is determined essentially by Parliament, and Parliament decided that no appeal shall lie against any decision, judgment or order given by the LAC. The provision of s 38A(4) is of course “subject to the Constitution of Lesotho”, but those sections of the constitution which prescribe the jurisdiction of the Court of Appeal do not in my view permit an appeal from the LAC.

(11) It is submitted by the appellant that the LAC is a creature of statute and that it was first established as a court after the Constitution had already been promulgated, with the result that the LAC was not properly provided for in the Constitution. That may be so, but it does not follow that we are entitled to assume jurisdiction and hear appeals from the LAC, especially where Parliament has determined that such appeals are not permitted.

19. The matter resurfaced again in 2008 in the case of **Minister of Labour and Employment and Others v Ts'euoa (C of A (CIV) 1/2008)**. The issue in the latter appeal was whether, measured against the Constitution, section 38A(4) of the **Labour Code (Amendment) Act, 3 of 2000**, validly

provides for the Labour Appeal Court to be the final and exclusive court of appeal in certain, but not all, labour matters. The court *a quo*, being the High Court sitting as a constitutional court in terms of section 22 of the Constitution (per Majara J, Monapathi and Mofolo, JJ concurring) had held this provision to be unconstitutional. Against its order to this effect the Minister of Labour and Employment, the Speaker of the National Assembly and the Attorney-General appealed to the Court of Appeal. Commenting on the subject of jurisdiction of the Court of Appeal to entertain appeals from this Court, the Court pointed out in paragraph 31 of the judgment that:

The second is that it is not immediately apparent that this court itself has the power to create a right of appeal to itself. In Ts'euoa v Labour Appeal Court, *supra*, in Para [8] and [9]), it was noted that the court is accorded an express jurisdiction "more narrowly circumscribed than that of the Supreme Court of Appeal [and, it may be added, Constitutional Court] of South Africa" (Para. [9]). How exactly the problem we have identified should be remedied is, it seems to me, properly a matter to be left in the first instance to Parliament. Parliament may either decide to end the two-stream approach to labour disputes which has evolved in Lesotho, in contrast to the unitary system, for instance, in South Africa, or it may decide to retain it - but providing in that event a substantially equal right of access to this court. (Parliament could do that by providing for a right of appeal from the Labour Appeal Court to this court, with leave, adapting the mechanism of s.17 of the Court of Appeal Act, 10 of 1978). The Legislature should be given an opportunity to address the deficiency identified in this judgment. Until it does so, it would be undesirable to consider whether (and if so, in what circumstances and respects) this court under the Constitution necessarily has an implied jurisdiction in a situation such as the present.

20. The Court then proceeded to point out that, in Lesotho a two-stream labour law dispensation has evolved. Employees who are not public officers (as defined) are regulated by the Labour Code (as amended). Their disputes,

broadly stated, must progress through the Directorate, Labour Court and Labour Appeal Court. Public officers -a substantial part of the Lesotho workforce in formal employment -are however in significant respects exempted by the **Labour Code Exemption Order, 1995** (made in terms of s.2 (2)(b) of the Labour Code) from the Labour Code. The Court of Appeal then indicated that, the net effect of this is that public officers aggrieved by decisions of their employer or tribunals within the public service may resort to the High Court and thereafter (in appropriate matters, with leave) the Court of Appeal. It further indicated that no such complete bifurcation exists in, for instance, either the United Kingdom or South Africa, as Mr. Mohau demonstrated. Thus in Lesotho, according to the Court of Appeal, non-public officers have access to a Labour court, as opposed to the High Court, and thence to the Labour Appeal Court, comprising only one judge and two lay assessors. Mr. Letsika argued on the basis of paragraph 32 of that Judgment that the Court of Appeal held in the above case that it has jurisdiction to entertain appeals from this Court. That paragraph reads as follows:

At the same time however we cannot permit an indefinite prolongation of the current situation - both as regards the present respondent and the large number of Lesotho workers similarly circumstanced. Eight years ago, this court drew attention to the evident unconstitutionality of prescription legislation in Lesotho (and further referred the matter for the urgent attention of the Attorney-General) (Khalapa v Commissioner of Police [1999 - 2000] LLR & LB 350 (CA) at 356; see too Lesotho National General Insurance Co Ltd v Nkuebe (2000 - 2004) LAC 877 at 894 B-E). We are not aware that any steps have yet been taken to remedy that problem.

21. It is clear from the above quotation that nowhere in it does the Court of Appeal claim to have jurisdiction to entertain appeals from the Labour

Appeal Court. By the way, I am with respect even in doubt whether the Court of Appeal could have still held as it did that public officers are exempted from the application of the Labour Code had the **Public Service (Amendment) Act No. 3 of 2007** been brought to its attention at the time when the case was being argued. That Act was already in operation at that time. The Act provides for the establishment of a number of panels to constitute the Public Service Tribunal. It also provides that the disputes that arise from cases in the Public Service should be referred to the Labour Court for appeal, which is competent to deal with labour issues. The intention is clearly to allow for an efficient, effective and timely dispensation of justice and to avoid any unnecessary backlog of cases. In addition, there was clearly a need to gradually move towards a single labour system in Lesotho. The **Public Service (Amendment) Act, 2007** further provides that:

"30. The Labour Code Order 1992 shall not apply to public officers, except in relation to appeals to the Labour Court in pursuance of section 20 of this Act."

22. This necessarily means that since appeals from the Labour Court lie ultimately to this Court, it would be very difficult to see how the constitutional principle of equality would in the circumstances, have rendered section 38A (4) of Act 3 of 2000 unconstitutional. The **Public Service (Amendment) Act 2007** in fact confers appellate jurisdiction over the Labour Court from decisions of the Public Service Tribunals. The Court of Appeal had clearly not had the benefit of considering the effect of the **Public Service (Amendment) Act 2007**. The membership of the tribunals has now been duly gazetted and published in a Legal Notice entitled **Panelists for the Public Service Tribunal Notice (Legal Notice No. 92 of 2009)** on the 1st day of July 2009.

23. Whatever the case, it is clear from the above consideration of the law that, no appeal lies from this Court to the Court of Appeal. In the circumstances, we are not persuaded that there are any prospects of success in this appeal in as much as the Court of Appeal has no jurisdiction to entertain appeals from this Court even if it may correctly have held that section 38A (4) of the **Labour Code (Amendment) Act, 3 of 2000** constitutes an infringement of section 4(1) (o) read with section 19 of the Constitution. The reason for this view is that even if section 38A (4) of the **Labour Code (Amendment) Act, 3 of 2000** constitutes an infringement of section 4(1) (o) read with section 19 of the Constitution , that would not in itself, confer jurisdiction upon the Court of Appeal to entertain appeals from this Court. In any event, the Court of Appeal itself has acknowledged that fact. On this point alone, we consider that there are no prospects of success in this purported appeal. we cannot therefore see why the order of this Court as to Contempt should be stayed. In our view, no real and substantial justice requires such a stay.

24. Whatever the merits and demerits of this appeal, we do not consider that there is the remotest chance that this appeal can succeed before the Court of Appeal on grounds of that Court's lack of jurisdiction to hear the purported appeal. The applicants have clearly been misadvised. The present appeal is a clear attempt by the applicants to avoid complying with the orders of this Court. Unfortunately for Applicants, this is not possible. Orders of this Court must be respected. In the circumstances, the stay of execution is refused. The application for stay is dismissed for want of prospects of success. Since there was no opposition to this application, there will be no order as to costs.

25. My assessors agree.

K.E. MOSITO AJ.
Judge of the Labour Court

For Applicant: **Mr. Q. Letsika, Attorney**

For Respondent: **No appearance**