IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/APN/08/08**

REFERRAL NO.A/0686/2008

In the matter between:

LENKA MAPILOKO APPLICANT

AND

PIONEER SEED RSA (PTY) LTD 1ST RESPONDENT

PANNAR SEED (LESOTHO) (PTY) LTD 2ND RESPONDENT

PANNER SEED (PTY) LTD 3RD RESPONDENT

Coram: The Honourable Mr Justice K.E. Mosito AJ

Heard on: 21st January 2009

Delivered on: 26th January 2009

Summary

Labour Appeal Court sitting as a Court of first instance - Application in Chambers in terms of section 38A (3) of the Labour Code Amendment Act 2000 read with Rule 14 of the Labour Appeal Court Rules 2002.- Inexhaustive guidelines - on good cause shown – what constitutes -
Judgment

MOSITO AJ

1. This is an application brought before me in Chambers in terms of section 38A (3) of the ***Labour Code Amendment Act 2000*** read with Rule 14 of the ***Labour Appeal Court Rules 2002***. It is an application

in which the Applicant approached this Court for an order in the following terms:

(a) The matter be heard by this Honourable Court sitting as a Court of first instance; and

(b) Costs of suit in case of opposition;

© Further and/or alternative relief.

2. The facts leading to the institution of this application are strangely, not clearly sketched in the founding affidavit. It is however not for the first time that I become seized with the dispute between the parties. I first became seized with the dispute in this matter sitting with assessors in LAC/REV/05/07 on 25 June 2008. We handed down judgment in that application on 30 June 2008.

3. It is from that judgment that the facts relating to the dispute in this matter may be gleaned. Those facts were largely not in dispute. It was common cause that at all times material to the dispute between the parties and the originating application before the Labour Court, the applicant had been an employee of the 1st respondent. The first respondent was a South African company. The applicant was then assigned to carry out his duties in Lesotho under the second respondent. This was in accordance with the founding affidavit filed in LAC/REV/05/07as well as the originating application before the Labour Court. The applicant was employed by 2nd respondent in 1989. His contract was terminated by 2nd respondent on 22nd February 2006. The said termination of contract or dismissal of applicant was effected in consequence of a disciplinary enquiry that took place in Greytown in the Republic of South Africa. The applicant was not satisfied with the dismissal and he challenged it in the Labour Court. The Labour Court denied the applicant representation in that it

considered that the representative purporting to appear for applicant was not covered by the terms of section 28 of the ***Labour Code Order No. 24 of 1992.*** It also declined jurisdiction in as much as the matter before the Labour Court, although dubbed an act of unfair labour practice, it was in fact a dismissal.

4. Before this court, the review in that matter revolved around issues of representation, resolution to institute proceedings and jurisdiction of the Labour Court. This Court considered the above issues ultimately handed down judgment in which it referred the matter to the DDPR in as much as in the view of this court; the appropriate tribunal to handle the matter was the DDPR. The matter was consequently referred to the DDPR. While the matter was pending, as it is still today before the DDPR, the applicant brought the present application under section 38A (3) of the ***Labour Code Amendment Act 2000***. That section provides as follows:

> ***"38A Jurisdiction of Labour Appeal Court***
> *(i) The Labour Appeal Court has exclusive jurisdiction-*
> *(ii) to hear and determine all appeals against the final judgments and the final orders of the Labour Court;*
> *(iii) 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.*
> *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.
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.
Subject to the Constitution of Lesotho, no appeal lies against any decision, judgment or order given by the Labour Appeal Court".

5. The above-mentioned section should be read with Rule 14 of the ***Labour Appeal Court Rules 2002*** which reads as follows:

*"***The Court sitting as a Court of first instance**

14(1) *(a) A party may apply to the Judge in chambers, on good cause shown, for a direction that a matter before the Labour Court or the Directorate of Dispute Prevention and Resolution be heard by the Court sitting as a Court of first instance.*
(b) The application shall be made in writing, and served on the other parties;
(c) If the application is opposed, the Judge shall hear the parties in chambers before giving a direction.
(d) If the application is successful, the Judge shall give directions as to the future conduct of the matter.

(2) Any party who is dissatisfied with the decision or order of the Court sitting as a Court of first instance may appeal to the Court of Appeal of Lesotho and the Court of Appeal Rules 1980 shall mutatis mutandis apply".

6. It is clear from the above Rule that the main consideration for an application under section 38A (3) read with Rule 14(1)(a) of the Rules of this Court is the existence of a *good cause*. By providing in Rule

14(1) (a) of the Rules of this Court that a party may apply to the Judge in chambers, on good cause shown, for a direction that a matter before the Labour Court or the Directorate of Dispute Prevention and Resolution be heard by the Court sitting as a Court of first instance without in any way specifying what would constitute 'good cause', the Legislature clearly intended to confer a wide discretion on the Judge dealing with an application for such an order. (See ***Shelton v Commissioner, South African Revenue Service 2002 (2) SA 9 (SCA)***) at para 6. In ***HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300H - 301A***, The Court pointed out that:

> *'In determining whether or not good cause has been shown,... When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words.... The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'*

7. As Mr Kgoadi correctly submitted, while the foregoing provisions of section 38A (3) of the ***Labour Code Amendment Act 2000***. and Rule 14 of the ***Labour Appeal Court Rules 2002*** confer a discretion on this Court to order that the matter be removed from the DDPR and/or the Labour Court for hearing by this Court sitting as a Court of first instance, there are no guiding principles contained in the said two pieces of legislation. In my view the following inexhaustive guidelines may shed some light upon the types of considerations as to whether a good cause exists:

(a) I think it can fairly be said that there may be cases which it may be appropriate, on good cause shown, to bring them to this Court notwithstanding that their determination may depend on conflict of evidence - where the decision rests on the impression one gets of the credibility of a witness - are difficult, and cases of that kind are decided every day in the DDPR and Labour Court and have to be decided at those *fora*.

(b) A party to a case which raises issues that span the divides between the exclusive jurisdictions of the DDPR, the Labour Court and this Court, and in respect of which these *fora* have no concurrent jurisdiction over all the issues or some of them, may apply to this Court for the matter to be heard by this Court sitting as a Court of first instance under section 38A(3) of the Labour Code Amendment Act 2000, read with Rule 14(1) of the Labour Appeal Court Rules 2002.

(c) There may be cases that may have to be heard by this Court sitting as a Court of first instance under section 38A(3) of the Labour Code Amendment Act 2000, read with Rule 14(1) of the Labour Appeal Court Rules 2002 on account of some logistical requirements at the DDPR and Labour Court, such as, for example, where a case pending before the DDPR involves the Directorate itself, or where a matter has already passed through the hands of both the President and Deputy President of the Labour Court, and yet has had to go back to that Court.

8. The referral, so it was deposed, raises issues which may call for determination of the dispute at the Labour Court. The applicant further deposes that "[t]his will implore (sic) the Court to interpret the

labour laws and principles of Lesotho (sic) and public policy, (sic) and to arrive at conclusions that may be beyond the jurisdiction of the DDPR". He further deposes that the dispute *inter alia,* is a challenge of the purported hearing on the basis of extra-territorial limitations based on the purported hearing that was held outside of Lesotho at Greytown, South Africa whereas the applicant's place of work was in Maseru. He further contends that there is a question of whether there was a hearing at all which leads to his contention that the dismissal was unlawful as a result.

9. According to his founding affidavit (which is his only affidavit as there is no replying affidavit), the appellant advanced the following case: He contends that, the hearing was extraterritorial and that he was charged and heard by a person other than his employer. He contends that he was denied a right to a representative and witnesses. He disputes the fairness of the dismissal on the grounds of the invalidity of the reason for dismissal, lack of impartiality, failure to comply with sections 69 and 76 of the Code and that this will warrant the interpretation of section 226 (2) of the Labour Code Amendment Act 2000.

10. Mr Brian Hayes filed an answering affidavit on behalf of 2nd and 3rd respondents. In his answering affidavit, he denies that 1st Respondent is still in existence, it having changed its name to 2nd Respondent in 1992. He further contends that there is no good cause justifying the granting of the order sought. He avers that all the issues raised can competently be handled by the DDPR. He also contends that the hearing of the matter by this Court will prejudice the Respondents in that they would have been denied their right to ventilate their matter

from the lowest labour *fora* up to this Court. He also refers the Court to the affidavit filed in support of the application at the DDPR but which affidavit was supposed to have been annexed to deponent's affidavit, but was not. He also disputes that the issues raised in the DDPR would necessitate the interpretation of section 226 (2) of the Labour Code Amendment Act 2000. He then prays that the application be dismissed with costs.

11. It is significant to reiterate that the applicant did not reply to the opposing affidavits of the Respondents. It is true that the delivery of a replying affidavit is not mandatory. However, where the applicant has already made out a sufficient case and/or cause of action in his originating affidavit, and the respondent issuably answers there to. It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. (See ***Titty's Bar and Bottle Store (PTY) LTD v ABC Garage (PTY) LTD and Others 1974 (4) SA 362 (T) p***. 369). In ***Theko v Commissioner of Police and Another LAC (1990-94) 239 at 242*** Steyn JA have the following to say in similar circumstances:

> "*I must point out that no attempt was made by the respondents to reply to or challenge the correctness of the averments contained in the affidavit of the attorney, Mr Maqutu. The issues in our view must therefore be resolved on the basis of the acceptance of the unchallenged evidence of an officer of this court".*

12. I respectfully agree with the said approach. In my opinion it follows that I must proceed on the assumption that the averments of fact that the respondents' deponent has made in his opposing affidavit are correct and that therefore the issues in the present case must therefore be resolved on the basis of the acceptance of the unchallenged evidence of respondents' deponent.

13. In so doing this Court will approach the issues on the basis of the extent to which the applicant has in the first place been able to make out a strong case in the founding affidavit. It is to this that I now turn. The first contention by applicant is that, the hearing was extraterritorial and that he was charged and heard by a person other than his employer. This is a matter as to authority to discipline and dismiss. This is a matter in respect of which the DDPR can exercise its jurisdiction. The next contention is that he was denied a right to a representative and witnesses. This is a matter of the procedural fairness of the disciplinary enquiry. In my view the DDPR has jurisdiction over questions of procedural fairness of this kind. It cannot be argued therefore that this is a matter beyond the jurisdiction of the DDPR. The applicant further complains that his dismissal was unfair on the ground of the invalidity of the reason for dismissal. This is an ordinary unfair dismissal complaint in terms of section 66 of the Labour Code Order No. 24 of 1992. That being the case it is clear that this is a matter of the substantive fairness or otherwise of the dismissal in respect of which the DDPR has jurisdiction. He also complains of the lack of impartiality of the disciplinary committee, which is clearly a matter of procedural fairness.

14. The applicant contends that his dismissal failed to comply with sections 69 (relating to the provision of written statements of reasons for dismissal) and 76(on accrual of rights of parties on termination) of the Code and that, this will warrant the interpretation of section 226 (2) (on the resolution of disputes of right) of the Labour Code Amendment Act 2000. In my opinion this are clearly matters within the jurisdiction of the DDPR. It is however difficult to determine the basis upon which it can be said that the DDPR would be required to interpret the Code in this connection. In any event if questions of the interpretation of the section arise, then the matter will be referred to the Labour Court. It is difficult to say in essence what is it you call for interpretation of that section in the present case in as much as the applicant has not even taken this Court in to his confidence by annexing a copy of his referral to the DDPR. Had applicant annexed such a copy to this application, it might probably help me in determining the existence or otherwise of a good cause and whether such cause is shown on the papers. In the present case, the applicant has not shown any good cause for the removal of this matter from the DDPR to this court. This is more so, because this Court has already said that this is a matter that may properly be resolved by the DDPR in the previous legal battle between the parties. The might be another reason on the basis of which applicant would like this matter to be heard by this Court sitting as a Court of first instance. In my view this is not a case that falls within any of the categories outlined in paragraph 6 above.

15. In the present case, the applicant has not made out even a skeleton of a case in so far as the showing of good cause is concerned. There is therefore no reason to grant his application regard being had to this fact.

It may be helpful to briefly comment on what Mr. Malebanye for the respondents said in reaction to the applicant's case. His main contention was that there is no good cause justifying the granting of the order sought. As indicated above I respectfully agree with this submission. I also agree that the aforementioned issues can competently be handled by the DDPR. He also contends that the hearing of the matter by this Court will prejudice the Respondents in that they would have been denied their right to ventilate their matter from the lowest labour *fora* up to this Court. Mr. Lebanye seemed to base his latter submission on a mistaken view that if this Court were to order that a matter pending before the DDPR or Labour Court be removed to this Court to be heard by this Court sitting as Court of first instance that would inherently be prejudicial to the parties. In his submissions before me however Mr. Malebanye sought to argue that the removal of the matter from the DDPR to this Court so that it is heard by this Court sitting as Court of first instance would be prejudicial in the sense that it will deprive this Court of the benefit of having the dispute receiving a second judicial opinion in as much as, so the argument goes, the Court of Appeal has held that one can appeal only in very narrow circumstances from the Labour Appeal Court to the Court of Appeal. For this proposition he sought to rely on ***The Minister of Labour and Employment and Others v 'Muso Elias Ts'euoa C of A (CIV) 1/2008.*** In my view that is not what the Court of Appeal said in Ts'euoa's case. In that appeal, the issue before the Court of Appeal was whether, measured against the Constitution, s.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 s.22 of the Constitution 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 appealled. The Court held that the appellants had not justified the infringement of s.4(l) (o) read with s.19 of the Constitution to which s.38A(4) of Act 3 of 2000 gives rise, and that on this basis, the impugned provision was unconstitutional. It did not hold nor give the impression that decisions from this Court can under the present legislative dispensation be appealed to the Court of Appeal. I am fortified in this view by its statements that:

> *"[30] More important is the question whether the Court* ***a quo*** *was correct to grant the second declaration, to the effect that the respondent and hence other private sector employees, as I have termed them, are to have an unrestricted right of appeal to this court. In my view, it erred in that regard, for two reasons. The first is that the respondent has succeeded on the basis of his claim to the equal protection of the law. Public sector employees do not have an unrestricted right of appeal in all matters from the High Court to this court. Any order seeking to undo the present inequality needs to take this into account - and not itself create a fresh imbalance.*
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> *[31] 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.*

16. In my view therefore, however one may read the judgement of the Court in that appeal, the Court of Appeal did not hold that appeals may lie from this Court to the Court of Appeal. It has even been doubted is even doubtful whether Rule 14(2) as quoted above which provides that "any party who is dissatisfied with the decision or order of the Court sitting as a Court of first instance may appeal to the Court of Appeal of Lesotho and the Court of Appeal Rules 1980 shall mutatis mutandis apply" is itself *intra vires.* (See also **Tseuoa v Labour Appeal Court of Lesotho and Others, C of A (CIV) 27/2004**).

17. Mr Malebanye further submitted that the issues raised by the dispute between the parties in the DDPR would not necessitate the interpretation of section 226 (2) of the Labour Code Amendment Act 2000. I agree with this submission. In any event, as I have already

pointed out above I cannot see what it is that would necessitate the interpretation of the section in question. The applicant himself has not even pointed out before this Court what it is that will necessitate such interpretation.

18. Mr. Malebanye further submitted that this application should be dismissed with costs. The basis of this contention was that his clients had been dragged into different *fora* by the applicant with impunity. He also indicates that even in the present case, there was no need for applicant to have dragged respondents into this court. He submits that this should be discouraged through an appropriate order as to costs. Mr Kgoadi contended on the other hand that it would be inappropriate to order costs in this case as this would be inconsistent with the long-established approach to costs in labour disputes. He cited as an example, the provisions of section 74 of the Labour Code Order 1992 which provides that:

> *"(1) No costs charges may be imposed in proceedings for unfair dismissal.*
> *(2) No costs shall be awarded in favour of either party in proceedings for unfair dismissal unless the Court decides that the party against whom it awards costs has behaved in a wholly unreasonable manner."*

18. In my view a reliance on this section would not be justified for the present purposes. This section should be regarded as an exception rather than a regular guiding principle to cases in which the DDPR, Labour Court and this Court should exercise their discretion as to costs. In my opinion where the case does not involve unfair

dismissals, there would be no reason why the ordinary rule that costs should follow the event should not be invoked. I accordingly invoke that principle and order that this application should be dismissed with costs.

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K.E.MOSITO AJ

Judge of the Labour Appeal Court