LAC/CIV/05/2009

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

BLANDINA LISENE APPLICANT

AND

LEROTHOLI POLYTECHNIC 1ST RESPONDENT

TSIETSI LEBAKAE 2ND RESPONDENT

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

ASSESSORS: MRS. M. MOSEHLE
MR. L. MATELA

Heard: 14th July 2009

Delivered 29th July 2009

SUMMARY

Application for contempt of court – jurisdiction of the Labour Appeal Court to punish defaulters for civil disobedience of its judgement - the principles applicable for contempt - Orders of reinstatement are orders ad factum praestendam –distinction between orders ad pecunium solvendum and orders ad factum praestendam- Respondents found guilty of contempt and fined. Costs to be paid to the applicant.

JUDGMENT

Mosito AJ:

1. The Applicant in these proceedings has instituted contempt of Court proceedings against the Respondents. The application arises from the judgement of this Court handed down on the 20th day of January 2009. In that judgement, this Court ordered the first respondent to reinstate the Applicant. This is an application for an order in the following terms:

    (a) Committing and punishing for contempt the second respondent for disobeying or unlawfully refusing to carry out or to be bound by an order of the Honourable Court to reinstate the applicant to[sic] her position as a Lecturer and to pay her all salaries she would have earned had it not been for the dismissal in terms of the judgment in LAC/CIV/05/2008/ LC/REV/122/2007 delivered on the 20th January 2009.
    (b) Ordering the respondents to jointly and severally pay the costs of this application.
    (c) Further and/or alternative relief.

POWER OF THE LABOUR APPEAL COURT TO PUNISH FOR CONTEMPT

2. A court of law usually has the inherent jurisdiction to summarily deal with and punish a person who commits contempt of court against such court or presiding judge (See in **Coyler v Essack N0. (1997) 9BLLR 1173** also reported in **(1997) 18 ILJ 1385 H-I** per Basson J). Thus, in advance of delving into the merits of the present application, I wish to begin by examining the powers of

this Court vis-à-vis punishing a party for contempt. This was necessitated by Mr. Letsika's contention that, this Court is a creature of statute. Its powers to punish must flow from within the four corners of the statute that created it. He argued that the power of this Court must flow from the ***Labour Code Order No.24 of 1992*** (as amended). It can therefore, only exercise those powers conferred either expressly or by necessary implication by the statute that establishes it. He further argued that this Court had no jurisdiction to entertain this application because it has to be executed n terms of section 34 of the ***Labour Code Order No.24 of 1992***.

3. It is correct that it is not every judgement that can be a subject of reinstatement and/or execution. Therefore, in cases of committal for contempt, an inquiry must be made as to whether a given judgement permits contempt or execution. A judgement that is *ad percunium solvendam* (i.e. one that sounds in money) is executable. One that is ad *factum praestandum* cannot be executable. A judgement is *ad percunium* if it is for payment of a sum of money, damages, breach, maintenance, purchase price, costs of litigation (or in sum any liquid or liquidated claim) will be executable judgement. As correctly pointed out by our Labour Court on 12 September 2000 in **NAMANE ZACHARIA KHOTLE v SECURITY LESOTHO (PTY) LTD CASE NO LC 44/98** in which the Labour Court held at pp. 4-5 that:

> *It is common cause that in his Originating Application, the applicant had sought an order declaring his dismissal unfair and an order reinstating him in his former position. In both these prayers the applicant was successful. The orders*

> *were granted against the respondent and it was the respondent who had to see to it that they are implemented. Failure to do so amounted to contempt and the applicant was correct to have pressed contempt proceedings. The fact that the applicant could also sue for payment of his dues for the period that he has not been allowed to work by the respondent despite the reinstatement order, does not preclude the applicant from also persuing contempt of court proceedings with a view to having the respondent committed.*

4. We agree with the above statement of the law. A judgement for reinstatement n terms of section 73(1) of the Labour (See also **LIMPHO POTSANE v MR. PRICE (PTY) LTD and Another LC/47/2007** as well as **Sarele v Wang and Another (LC/15/04)).** This Court was established by the ***Labour Code (Amendment) ACT 2000***. As far as relevant to this case, I should mention that the long title of the Act reveals that the purpose of the Act is *inter alia* to establish a Labour Appeal Court. Section 2 of the Act provides that "Court" means either the Labour Court or the Labour Appeal Court depending on the context. Section 38 of the Act provides for the establishment and composition of the Labour Appeal Court. The section proceeds to provide that:

> (1) There shall be a Labour Appeal Court.
> (2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court.
> (3) 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 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

> (4) one from a panel of employee assessors nominated by the employee members on the Industrial Relations Council….

5. Section 31 of the Act provides for the amendment of the Labour Code Order 1992 by inserting section 243 after section 242 of the principal Act. This new section provides for transitional provisions. It states that, notwithstanding the provisions of section 38(3), the first judge to be appointed to the Labour Appeal Court shall be appointed in terms of section 120 of the Constitution of Lesotho. As far as I am aware, my brother Peete J and I do not sit in this Court as the judges contemplated by section 243 of the Act, but as serving judges of the High Court nominated by the Chief Justice, acting in consultation with the Industrial Relations Council in terms of section 38(3) of the **Labour Code (Amendment) Act of 2000**. This is because the law is clear that, in the case where the person to be appointed judge of the Labour Appeal Court is serving judge, the Chief Justice shall, in consultation with the Industrial Relations Council, assign such person as the judge of the Labour Appeal Court. (See section 243(3) of the Act). It is not necessary in my view, to review the High Court's judges' powers to punish for contempt. It suffices to point out that, when we sit in this Court discharging judicial functions, we still retain our statutory and common law powers to punish for contempt as judges of the High Court. In any event, this Court has power to enforce its decisions by contempt proceedings as it is a Court of law or tribunal exercising a judicial function in terms of section 118 of the Constitution of Lesotho. (See **CGM v Lecawu and Others 1999-2000 LLR-LB 1 at 7**; **A. Makhutla v Lesotho Agricultural Development Bank** 1995-1996 LLR-LB 191 at 194; **Attorney General v Lesotho Teachers Trade Union and Others** 1995-1996 LLR-LB 345 at 359-360). The manifest purpose of the legislature in

establishing the Labour Court was to create a specialist tribunal with expertise in labour matters. As **Botha JA** said in **Paper, Printing, Wood & Allied Workers' Union & Pienaar NO** 1993 (4) SA 621 (A) at 637 A-B. That is precisely what the legislature sought to achieve by the enactment of the Code.(**the Minister of Labour and Employment v 'Muso Elias Ts'euoa** C of A (CIV) 1/2008).

THE PRINCIPLES INVOLVED IN AN APPLICATION FOR COMMITTAL TO PRISON FOR CONTEMPT OF COURT

6. It is now settled that in an application for committal to prison for contempt of court, an applicant must, in order to be successful, prove that there is an underlying court order and that the respondent with the knowledge of the order acted in a manner which is in conflict with the terms of that order. Once the applicant proves the jurisdictional requirements then she is *prima facie* entitled to the relief sought subject to the court's wide discretion. The respondent can defend him or herself by adducing evidence to establish that he or she did not breach the underlying court order wilfully and not acted in bad faith. It is clear that the evidential burden regarding the respondent's *bona fides* is on him or her. He or she has the evidential burden of showing absence of intention to disobey the order. However, unreasonableness of conduct *per se* does not reflect the absence of *bona fides*.

7. In the **KHOTLE'** s case(*supra)*, as here, Counsel for both sides were in agreement that civil contempt entails willful disregard and deliberate flouting of the order of the court. (**See also Motlalentoa & Another .v. Tlokotsi C. of A.(CIV) No.28 of 1991; Makhobotlela Nkuebe & 313 Others .v. LTC & Another CIV/APN/224/98 and**

Steven Mokone Chobokoane .v. Solicitor General C. of A.(CIV) No.15 of 1984). As the Labour Court correctly pointed out in the **Khotle**'s case, in order for the court to determine whether there has been willful disregard of its orders by a juristic person, the judgment creditor must disclose on whom he served the order. The status of that person within the organisation has to be disclosed so that it can be ascertained whether he is a person capable of binding the organisation. In the present case, it was common cause that the respondent received the order of this Court. Civil contempt of court provides the ultimate sanction against the defaulter who refuses to comply with an order of court. The form of committal is to imprisonment or a fine. Such punitive coercion is intended to assist the complainant to enforce his or her remedy. It is unlawful to intentionally disobey an order of court since it savours of criminality. Section 6(1) (b) and (c) of the **Constitution of Lesotho** empowers this Court to punish for contempt. In **Fakie v CCII System [2006] SCA 54 (RSA) Para [6]** (CAMERON JA recognised the constitutional legitimacy in punishing civil contempt in the following terms:

> "This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."

8. In paragraph 8 of the judgement, the learned Judge of Appeal pointed out that, in the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil

proceeding that invokes a criminal sanction or its threat. While the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law. Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides:* should the respondent fail to advance evidence that establishes a reasonable doubt as to whether *non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.* It has also been held that a declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

9. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). Upon proper analysis the distinction between coercive and punitive orders has something to do with the intent of an applicant or the court but much to do with the consequences of the order. It is the latter aspect to which any judicial officer who is required to consider whether an order of committal for contempt of court should be granted should pay

careful attention. A coercive order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.

10. The requirements that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. It is clear from the discussions above that the test for contempt of court, as was decided by the Court of Appeal of Lesotho in **Thuso Motlalentoa vs Motsoalipakeng Tlokotsi Cof A (CIV) 28 OF 1991 at p3** is that contempt of court flowing from disobeying its orders requires a wilful disregard and deliberate flouting of the Courts order. This court has to make an inference bearing in mind that:

> *''While it is correct that the offence involves an intention to injure on the part of the accused, such intention can be established by the nature of the acts as pointed out by Ramsbottom JA. In* ***Roberts 1959 (4) SA (AD)*** *page 559 a man's intention is a fact which is usually proved by inference from his conduct''.*See Schreiner AJA in **MICHAEL MTHEMBU V LESOTHO SPORTS COUNCIL C of A (CIV) No. 3 of 1983** especially at page 6.

APPLICATION OF THE LAW TO THE FACTS

11. This application for contempt of court is a sequel to the decision of this Court in LAC/CIV/05/2008. In the later matter, this Court ordered the 1st respondent herein to reinstate the applicant in terms of section 73(1) of the **Labour Code Order 1992**. That section provided that:

> *(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.*

12. This happened after the applicant had been purportedly dismissed by the 1st respondent. Her dismissal was found fair by the Directorate of Dispute Prevention and Resolution (DDPR), but unfair by the Labour Court and this Court.

13. At the hearing of this matter it became apparent that the dispute between the parties revolved around whether or not the applicant had been reinstated. On the one hand, the applicant's case was that she had not been reinstated. She had reported at work after the judgment of this Court was handed down, and she was told to go back home. The respondent's contention on the other hand, was that the applicant had been reinstated and that it was not true what the applicant was saying. It became apparent that there was a dispute of fact on the papers in this regard. It was not possible to determine on the papers as to which typewriter to believe. Having discerned the existence of a dispute of fact which could not be resolved on the papers, and after

hearing the attitudes of the parties, the court ordered that *viva voce* evidence be led on the issue whether or not there was reinstatement.

14. In brief the applicant testified for herself. She informed the court that she reported at the 1st respondent's offices and met the 2nd respondent as well as the Registrar of the 1st respondent. The Registrar told her that they had received a judgment and were going to present it to Council which would decide as to how the judgment would be implemented. The Registrar informed the applicant to go home with a promise that she would be contacted in due course. The applicant kept on coming to the 1st respondent' offices to enquire as to when she would be reinstated, all in vain. She was ultimately called by Mr Nts'ala (the Registrar) to come to his office. On arrival applicant found Mr Nts'ala with Dr. Mpooa.

15. The Registrar informed the applicant that the 1st respondent intended to retrench her and she should talk about retrenchment. The applicant informed the Registrar that she did not expect retrenchment and she knew nothing about retrenchment. She told the Registrar that she expected to be reinstated and not to be retrenched.

16. She was then told by the Registrar to bring her banking details and that she would be called before any deposits could be made into her account. Nothing of the sort did however happen. Applicant kept on checking her account at the bank to see whether she had been paid all in vain. The last time she checked and found that she had not been paid was the 12th day of May 2009 in the morning. From the bank, she proceeded to her lawyers offices to enquire whether she had been paid but there was nothing to indicate that she had been paid. In her

evidence, the applicant submitted her bank mini-statements for the 12th and 26th of May 2009. The statement for the 12th May 2009 reflected that she had not been paid. The statement for the 26th of May 2009 indicated that payment was made into her account on the 12th day of May 2009. This clearly indicated that when she went to the bank to check in the morning of the 12th day of May, she had not been paid.

17. Regarding the issue of reinstatement, the applicant informed the court that she had not been reinstated. Under cross-examination she was asked whether she would deny that the respondents still intended to comply with the judgment. She could not deny. She was then told that the respondents had informed her that they could not reinstate her because they had already employed another person in her position and that this information was relayed to her on the 16th day of March 2009. This she denied.

18 In their defence, the respondents called the Registrar as their witness. The Registrar informed the court in essence that, the respondents still wanted to comply with the order of the court. He however pointed out that there was already another person who had been employed in the applicant's post. He testified that this fact was communicated to the applicant on the 16th day of March 2009. He further pointed out that the respondents told the applicant that, while she was redundant, they nevertheless still regarded her as their employee. Asked why the applicant had not been paid her salary for May and June 2009, the Registrar informed the court that if the applicant was not paid for the period of May and June 2009, it was a mistake because he knows that an instruction had been issued that the applicant be paid. The

applicant however was adamant that she had not been paid for the months of May and June. The Registrar was adamant that they considered the applicant for all intends and purposes as their employee.

SHOULD RESPONDENTS BE FOUND GUILTY OF CONTEMPT OF COURT?

19. The respondents intention whether or not to reinstate the applicant can at best be inferred from their conduct. Their conduct was that they did not really wish to reinstate the applicant. What they actually did was to inform applicant that she should consider the possibility of retrenchment. The reason for the retrenchment was that they had already employed another person in the position of the applicant. The fact that the respondents have testified that they intended to reinstate applicant and to comply with the court's judgment is not supported by their conduct.

20. Even their own explanation that they have always intended to reinstate the applicant is clearly devoid of truth for a number of reasons, firstly, if it is true that the respondents ever intended to reinstate the applicant in compliance with our order, how come that they did not pay applicant her salary for the months of May and June?! Secondly, assuming that there is truth in what Mr. Nts'ala told the court that the respondent intended to obey our order, how come that they did not take the trouble to see to it that the applicant was still being paid?! Mr. Nts'ala told this court that the respondents still regarded the applicant as their employee. If that is true, how come that the respondents did not pay applicant for the months of May and June?! In his explanation, Mr. Nts'ala could

not say why the applicant was not paid for those months. He merely contented himself with saying that if applicant was not paid for those months, then it must be a mistake on the part of the respondents. Thirdly, Mr. Nts'ala informed this court that they did reinstate the applicant while at the same time informing the court that the position that the applicant had held was filled up after the respondents won a case against the applicant in the Directorate of Dispute Prevention and Resolution (DDPR). It is clear that if indeed the applicant's post had already been filled there is no way in which the respondents could have intended to comply with the court order after the order of this court was handed down in January 2009 because there would simply be no position into which they could have intended to reinstate the applicant. The evidence of Mr. Nts'ala was clearly wanting in truth and was unbelievable.

21. If the respondents intended to reinstate the applicant, into which position did they intend to reinstate her?! Why didn't the respondents inform the Labour Court when the main case was being heard that there was no position into which they could reinstate applicant?! Why didn't they inform this court when the appeal was heard in January 2009 that the applicant's position had been filled?! In our view, the respondents are clearly not prepared to take this court into their confidence.

22. As Monaphati J correctly pointed out in **Makhobotlela Nkuebe & 313 Ors CIV/APN/224/98 at p13**

> *''Their intention can at best be inferred from their conduct. And their conduct was that they flagrantly violated the Order of the Court simply because they did not like it. All which show that they had the necessary intention to commit contempt. Speaking about a serious kind of contempt in this Court in yesteryears Contran CJ and Mofokeng J in the* ***Mthembu & Others (Maseru United Football Club) vs Lesotho Sports Council 1981 (2) LLR 527 said at 545:***
>
> *The court will ascertain the existence or otherwise of intent from the acts conduct and the language used. It is not sitting to examine motives''*

23. The legal position is clear that all orders of court, whether correctly or incorrectly granted have to be obeyed until set aside. See **S V Beyers 1968 (3) SA 70 (A), Byliefld v Redpath 1982 (2) SA 702 (A), Putco Ltd V TV and Radio Guarantee Co. (Pty) Ltd 1985 (4) SA 809 (A).**

24. We have come to the conclusion that the respondents had a clear intention not to comply with our order. We are also of the view that regard being had to his position as the hand, the ears and the eyes of the 1st respondent by reason of his being the senior most office bearer, there is no way in which the 2nd respondent can escape being found guilty of contempt if the 1st respondent is also in contempt. The Director of the 1st respondent occupies the position analogous to that of a Managing Director in a company. In ***Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another*** **1978 (3) SA 202 (W),** King AJ said, at 203C-E:-

> "A director of a company who, with knowledge of an order of Court against the Company, causes the Company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the Company to be in breach of the order of Court against the Company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order. ***Vide Halsbury*** **4th Ed Vol. 9 at 75."**

25. As was put by Cilliers and Benade ***COMPANY LAW 4th*** edition page 365-366

> *''This means that the Managing Director of a company is responsible in conjunction with inter alia the directors, manager and security, for a large number of corporate activities and that he incurs criminal responsibility if the requirements of the Act relating to these activities are not complied with''. See Company Law (Supra) 361*

26. In **Nkuebe's** case (*supra*) Monapathi J correctly relied again on the learned author's statement in Company Law (supra) where at page 727 they said:

> *CRIMINAL LIABILITY AT COMMON LAW 41.06, while S 332 (5) provides for the conviction of a director or a servant of an offence of which the company may be found guilty, this provision in no way detracts from the ordinary criminal liability of directors or servants for any other offence. Theft, fraud and so forth committed by these persons against the company shareholders, prospective shareholders, auditors etc is punishable in accordance with the ordinary principles of criminal law. So too a director who with knowledge of an Order of Court against a company causes the company to be in breach of that Order is himself also*

guilty of and punishable for contempt of court.'' (My underlining).

27. In **Höltz v Douglas and Associates (OFS) CC en Andere 1991 (2) SA 797 (O) at 801D-802E**, it was held that a person who contributes to the offence of contempt of a court order, can, without being a principal offender, be punishable as an accomplice. So we would easily find the second respondent also guilty of contempt.

28. Having found both respondents guilty of contempt of this Court, this court must hand out such punishment that should deter the likes of the respondents in future from disobeying orders of this Court. Contempt of court is an affront to the dignity of the court and it taints the court's reputation. As my brother Monapathi J correctly pointed out in ***Nkuebe's*** case, orders of court must be obeyed. In imposing punishment we will bear in mind as my brother Monapathi J did in ***Nkuebe***'s case (*supra*) that the 1st respondent is a wholly national concern. However as such an institution, the 1st respondent still has to obey the orders of the courts of this country, we consequently feel very strongly that we have to give out the kind of punishment to the respondents that should be exemplary.

PUNISHMENT

29. We repeat that orders of the courts of this Kingdom have to be respected and the courts will not countenance any flagrant

disobedience of their orders as well as any acts of disrespect for the courts authority and dignity.

30. In the result, it is found that the respondents are guilty of contempt and should be punished as follows:

1. The 1st respondent is to pay M60, 000.00 into court within 30 days of this judgment.

2. The 2nd respondent is to pay M20,000.00 into court within 30 days of this judgment failing which he shall go to prison for 30 days.

3. The costs of this application shall go to the applicant in this contempt application.

31. My assessors agree.

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K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For Appellant: Advocate N.T. Ntaote

For Respondent: Mr. Q. Letsika Attorney