IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **CASE NO. LAC/CIV/APN/04/11**

In the matter between:

BOFIHLA MAKHALANE APPLICANT

AND

LETS'ENG DIAMONDS (PTY) LTD FIRST RESPONDENT

JOHN HOUGTON, GENERAL MANAGER SECOND RESPONDENT

JOHN TULLY, FINANCE MANAGER THIRD RESPONDENT

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

ASSESSORS: Mrs M. Maloisane

Ms P. Lebitsa

Heard on: 19th JANUARY 2012

Delivered on: 30TH JANUARY 2012

SUMMARY

Application that the - Labour Appeal Court sits as a Court of first instance - in terms of section 38A (3) of the Labour Code Amendment Act 2000 read with

Rule 14 of the Labour Appeal Court Rules 2002 – allegations of bias on the part of the President and Deputy President of the Labour Court, and also, His Lordship Mr Justice Peete (a Judge of Labour Appeal Court) not proved. -No good cause shown.

As a matter of public policy Court not allowing a litigant to "judge-pick". - the *section 38A (3) of the Labour Code Amendment Act 2000 read with Rule 14 of the Labour Appeal Court Rules 2002 application refused and dismissed with costs.*

JUDGEMENT

MOSITO AJ

1. This application is part of a protracted legal battle between the parties. By order dated 28th January 2010 this court resurrected the reinstatement order of the DDPR under Referral No. J026/07. A dispute between the parties concerning whether or not Lets'eng Diamonds actually complied with its obligations to reinstate the applicant followed. Lets'eng said it did, the applicant said it did not. In the process the applicant approached the High Court where he appeared before my brother Peete J, which was finalised. Applicant approached this Court which matter was also finalised. Applicant then approached the Court of Appeal against the judgement of my brother Peete J which matter was also finalised. He approached the Labour Court in two separate matters; these matters are both still pending, one of them is LC/42/2011, the other is LC68/2010. He has now approached this court in two new applications, viz this application and LAC/CIV/APN/08/11.

2. The present application has been brought pursuant to section 38A(3) of the ***Labour Code (Amendment) Act 2000*** read with Rule 14 of this

Labour Appeal Court Rules 2002, to have this court direct that a matter presently pending before the Labour Court, to wit LC/42/2011, be heard by this court sitting as a court of first instance. Rule 14 of the **Labour Appeal Court Rules 2002** requires an applicant who approaches the Labour Appeal Court in terms of section 38A(3) to show "good cause" for the court to exercise its discretion in favour of removing a matter from (in this instance) the Labour Court to the Labour Appeal Court.

3. A perusal of the founding affidavit in this application reflects as the basis for this application a suggestion that the President and the Deputy President of the Labour Court are biased against the applicant. It is suggested *inter alia*, that the reason they are biased is because they are allegedly close friends with senior managers of the first respondent. In the case of the Deputy President it is alleged in addition that she is biased because she found against the applicant in the review application before her which decision this court set aside on appeal. The applicant says he has lost confidence in the President and Deputy President of the Labour Court, also in His Lordship Mr Justice Peete (a Judge of this Court). The three of them are alleged to be biased against the applicant. Therefore, applicant wants the matter transferred to this Court and that I, in particular, must preside over his cases.
4. This Court has in several of its decisions in the past, considered the circumstances in which the section 38A (3) of the ***Labour Code Amendment Act 2000*** procedure may be used. (See **Lenka Mapiloko**v **Pioneer Seed RSA (pty) LTD and Others LAC/APN/08/08**; **Bofihla Makhalane v Lets'eng Diamonds (pty) LTD LAC/APN/01/10; Fetohang Letsoela v Lesotho Nissan (pty) LTD and Another LAC/REV/33/02).**, in Mapiloko's case, this court went on to hold that it has a wide discretion

when dealing with applications of this nature. The court listed three considerations it would consider when deciding whether a good cause exists. In this regard, the Court stated that:

> 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.

5. The term '*good cause*' is a relative one and is dependent upon the circumstances of each individual case. *Good cause* is a legally sufficient reason for a ruling or other action by a judge. In argument before this Court, applicant pointed out that, the reason the President and Deputy

President of the Labour Court are biased is because they are close friends with senior managers of the first respondent. In the case of the Deputy President he argued in addition that she is biased because she found against the applicant in the review application before her which decision this court set aside on appeal. The applicant reiterated his stance that he has lost confidence in the President and Deputy President of the Labour Court, also in His Lordship Mr Justice Peete (a Judge of this Court). Therefore, applicant wants the matter transferred to this Court and that I, in particular, must preside over his cases. In argument, he clarified that, the reason for mentioning my name in his papers as the only judicial officer he would like to hear his case is that, he is aware that there are only two judges of this Court namely; Mr Justice Peete and me. Having counted out my brother Peete J, applicant pointed out that I was therefore the only one left to hear his case.

6. It is the respondent's submission that, this application cannot succeed upon an application of the "good cause" test. Advocate Woker for the respondent argued that applicant has not shown that good cause exists for this matter to be removed from the Labour Court to this Court to be heard by the Labour Appeal Court sitting as a Court of instance, particularly since the applicant almost goes so far as to say: "I will accept one Judge and one Judge only and that is His Lordship Dr K. Mosito". Advocate Woker further argued that, as far as the applicant is concerned, Judge Mosito is the only judicial officer who will preside "in a fair and just manner". He criticised the applicant's approach as constituting "forum shopping", a practice which the courts have denounced. He borrowed from the words of the Court of Appealin **Jurgen Fath & Anor v Minister of justice and Anor LAC (2005-2006)572**

at 593H-594 that "[Good cause] does not contemplate an elective opt-out when a .....litigant considers that beneficial". He argued that the applicant cannot just bye-pass the Labour Court for no good reasons; he cannot decide – particularly for the respondents – who should/should not hear his matters.

7. Advocate Woker further argued, and correctly so in my view, that as a matter of public policy this Court will not allow a litigant to "judge-pick". If a precedent were set in this regard in this matter, one can only begin to imagine where the use of that precedent would take matters. Advocate Woker further argued that there is a strong public policy reason why this application cannot succeed.
8. The test relating to the determination of the existence or likelihood of bias is now well-settled. In **Sole v Cullinan & Others LAC (2000-2004) 572 at 586**, the Appeal Court of Appeal of Lesotho quoted with approval the following passage from **President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (4) SA (CC) at 177B-D**.

> "The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any

> irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."

9. The sort of reasonable, objective and informed person that the Courts are referring to above, must be one aware of the legal traditions and culture of the jurisdiction (see ***Taylor v Lawrence*** **[2003] QB J28 at [61] – [64] per Lord Woolf CJ.**), the traditions of integrity and impartiality that form part of the background – and of the judicial oath (***R v S (RD)*** **[1997] 3 SLR 484** per Cory and Iacobucci JJ at [111], ***President of Republic of South Africa v S. African Rugby Union*** **1999 (4) SA 147 at 177** para [48], ***Helow v Advocate General*** **[2007] CSIH 5 at [35]**). However, as Lord Steyn has warned in ***Lawal v Northern Spirit Ltd*** **[2003] UKHL 35, [2004] 1 All ER 187 at [22]**, such a person may not be wholly uncritical of this culture because imputing too much of this culture uncritically to the non-specialised observer would not promote the confidence of the general public that the test is designed to produce. In **S V Basson 2007 (3) SA 582 (CC) at 606E- F**, the South African Constitutional Court added that "[t]here exists a presumption against partiality of a judicial officer".

10. In **Rex v Anthony Clovius Manyeli C of A (CRI) No. 14 of 2007**(unreported), the Court of Appeal of Lesotho stated that:

> " Bias in the sense of judicial bias has been said to mean:
> "A departure from the standard of even-handed justice which the law require from those who occupy judicial office"

11. This type of departure is not apparent from the Founding Affidavit. In **S V Roberts 1999 (4) SA 915 (SCA)** at p.924E – 925D, the South African Supreme Court of Appeal said:

> "(1)....
> (2)The suspicion [of bias] must be that of a reasonable person in the position of the accused or litigant.
> (3)The suspicion must be based on reasonable grounds.
> (4)The suspicion is one which the reasonable person referred to would, not might, have".

12. In **BTR Industries South Africa (Pty) Ltd & Others v Metal and Allied Workers Union & Ano 1992 (3) SA 673 (A) at 695D-E** the South African Supreme Court of Appeal stated that:

> "It is important.....to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstition or the intelligence of particular litigants."

13. As I understand it, in order to decide the case before me, I am in an unenviable position in which I am required to decide the applicant's apprehended bias claim against my colleagues. As Bleby J aptly put it, "the judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of a fair-minded lay observer, the judge must be clothed with the mantle of someone the judge is not … one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other" (see ***Southern Equities Corp Ltd v Bond*** **(2000) 78 SASR 339 at [126]}**. Laws LJ has endorsed the above view *of Bleby J in* ***Sengupta v Holmes*****, Times 19 Aug. 2002 at [10]**,

cited in ***Re* P (*a barrister*) [2005] 1 WLR 3019 at [46]**. But he went on to say that, "surely we should not attribute to him so pessimistic a view of his fellow man's own fair-mindedness so as to make him suppose that the latter cannot or may not change his mind when faced with a rational basis for doing so."(See ***Sengupta v Holmes* (above) at [37] cited in *Re P (a barrister)* (above) at [48]**).

14. It is dangerous and futile to attempt to define or list the factors which may or may not give rise to a real possibility of bias. As laid down by the strongest possible English Court of Appeal (comprising the LCJ, the MR and the V-C) in ***Locabail v Bayfield Properties Ltd[2000] QB 451 at [25]***

> "Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations, or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curial utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers51 (KETCIC v. ICORI ESTERO SPA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any

> member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

15. Bearing the foregoing principles in mind and applying them to the facts of the case before this Court, I agree with Advocate Woker that the problem with the case made out in the Founding Affidavit is that it is based on bald assertions of bias without any evidence to back up the assertions. Bias, like other conclusions such as negligence,

unfaithfulness, untruthfulness, evasiveness, etc., is a factual conclusion that is arrived at on the basis of evidence. In this matter there is no acceptable evidence to support the allegation. Moreover, the allegations that senior managers of the Mine are close friends of the President and Deputy President of the Labour Court are emphatically denied by the respondents. On the basis of the correct approach to disputes of fact on affidavits, the respondents' version has to be accepted. There is simply nothing to support this assertion.

16. In my view, the applicant's remedy is not to remove his matter to this court. Rather it is for him to proceed with the matter to finality before the Labour Court and thereafter, if still not satisfied, either take it on appeal or review. I also opine that, it simply does not follow that because a litigant has a sense that certain judicial officers are biased this entitles him to cherry-pick his Judge in the next court up, especially in a court which is essentially a Court of Appeal.

17. Advocate Woker submitted that, bias alone on the part of two judicial officers in the Labour Court does not give rise to good cause for purposes of removing LC/42/2011 to this Court. If what the learned Counsel meant by this submission is that, bias alone on the part of two judicial officers in the Labour Court does not give rise to good cause for purposes of removing a matter to this Court, I would not agree with that submission. I am not prepared to lay down a general to this effect. There may be cases premised on proper and supportable facts that , bias alone on the part of the two judicial officers in the Labour Court may on the facts of such cases, give rise to good cause for purposes of removing a matter to this Court. It is unnecessary to burden this judgment with

examples of such cases. It suffices to mention that the present case is on its facts, not such a case.

18. I am also not persuaded that the applicant's suspicion that all concerned are biased against him is that of a normal, reasonable person as required by law. The facts as alleged simply do not point to bias. Indeed neither the President nor the Deputy President of the Labour Court has said or done anything in any of the matters which they have handled (which involved the applicant) which is indicative of bias. The President is accused of having refused to recuse himself after ruling against Applicant in respect of substituting an affidavit. Had he acceded to the application for recusal in these kind of circumstances, the President would to my mind, be as wrong to yield to this tenuous or frivolous objection as he would to ignore an objection of substance, as the English Court of Appeal has stated (See ***Locabial (UK) Ltd v Bayfield Properties Ltd*** **[2000] QB 451 at [21**]). The applicant's grounds for suspecting bias are not reasonable.

19. As emphasized by Mason J of the High Court of Australia, although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour(See ***Re JRL ex p CJL (*****1986*****)*** **CLR 342 at 352 endorsed in *Locabail (UK) Ltd v Bayfield Properties Ltd [*****2000*****]* QB 451 at *[*****22*****]***). The Applicant's basis for accusing my brother Peete J of bias is an example of an allegation of bias which is totally without factual substantiation.

20. It must be borne in mind that, by virtue of their professional background leading up to their appointment, judicial officers are assumed to be persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances (See ***United States* v *Morgan* 313 US 409 (1941) at p 421 cited by L'Heureux-DubÉ and McLachlin JJ in *R* v *S* (*RD*) [1997] 3 SCR 484 at [32])**. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. The judge can be assumed, by virtue of the office for which he has been selected, to be intelligent and well able to form her own views (see ***Helow v Sec of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416 at [8].** Thus there is a "presumption of impartiality" which "carries considerable weight."(Per L'Heureux-Dubé and McLachlin JJ above at [32]. Also, see ***Rees* v *Crane* [1994] 2 AC 173**.

21. In the present case, I was unable to find any fact indicative of bias or its likelihood on the part of either the President or the Deputy President of the Labour Court as well as my brother Peete J. It follows therefore that, the very foundation upon which Applicant approached this Court for relief is absent. If bias is absent then good cause is absent. If good cause is absent then this application cannot succeed. In the present case, there is simply no proper case of bias established against the President and Deputy President of the Labour Court. It follows that good cause to remove the matter to this Court simply does not exist. Absent good cause, this application falls to be dismissed with costs and I accordingly so order.

K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Applicant: In Person

For Respondent: Adv. HHT Woker