IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

CASE NO.: LAC/CIV/17/2009

CASE NO.: LC/15/2003

CASE NO.: LC/23/2003

In the matter between:

TSOTANG NTJEBE & OTHERS APPLICANTS

And

LESOTHO HIGHLANDS DEVELOPMENT

AUTHORITY RESPONDENTS

AND

CASE NO. LAC/CIV/A12/2004

LC/23/2003

TELANG LEEMISA & OTHERS APPLICANTS

And

LESOTHO HIGHLANDS DEVELOPMENT

AUTHORITY RESPONDENT

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

ASSESSORS: Mr. Mothepu

Mr Matela

Heard on: 24th JANUARY 2012

Delivered on: 3rd FEBRUARY 2012

SUMMARY

Application in terms of S38AA(2) of the Labour Code (Amendment) Act 2010 - certificate for Leave to appeal - Prescription Act 6 of 1861 not pleaded and therefore not included in the certificate for Leave to appeal - Principles in issuing a certificate for leave to appeal laid down - Need to define point of law.

JUDGEMENT

MOSITO AJ

INTRODUCTION:

1. This is an application in terms of S38AA(2) of the Code for a certificate granting the Lesotho Highlands Development Authority (Applicant) leave to appeal to the Court of Appeal of Lesotho. It is an application whose prayers a couched as follows:

> "1. That a certificate be issued by the Honourable Court granting leave to appeal to the Court of Appeal in accordance with the provisions of section 38AA (2) of the Labour Code as amended by Act 1 of 2010 against that part of the judgment of the Honourable Court under appeal case number LAC/17/2009 dealing with respondents' right to claim payment for overtime and costs.
> 2. That the costs of the application be costs in the appeal.
> 3. Further and/or alternative relief".

2. Section 17 of the Court of Appeal Act provides that: "Any person aggrieved by any judgement of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact." Considering the terms of Section 17 of the Court of Appeal Act in

Mohale v Mahao LAC (2005 -2006) 101, Ramodibedi, J.A.(as he then was) stated that:

> The plain meaning of this section is that any person who intends to appeal against the judgment of the High Court in its civil appellate jurisdiction, as here, must first seek and obtain the leave of the High Court or of this Court. Furthermore, leave may be sought only on a question of law. See Lesotho Union of Bank Employees, in re Moliko v Standard Bank Ltd 1985-89 LAC 86 at 87, Letsoela and Another v Letsoela 1980-84 LAC 275 at 276.

3. In my opinion, the same formulation applies *mutatis mutandis* to the terms of section 38AA (2) of the **Labour Code (Amendment) Act of 2010.** Ramodibedi, J.A went on to state that:

> 6] As guidance in future, therefore, it is now necessary to lay down the following principles:-
>
> 1. Practitioners who apply for leave to appeal and judges of the Court granting leave should ensure that the provisions of section 17 of the Act and the Rules of Court are strictly observed.
> 2. The application for leave to appeal should specify the grounds on which leave is sought.
> 3. The judge granting leave should clearly define the points of law on which leave is granted in compliance with the Rules.
> 4. When leave is granted, the certificate of the judge and the grounds of appeal should then be delivered by the applicant.

4. In my opinion, the same guidance should apply *mutatis mutandis* in respect of the terms of section 38AA (2) of the **Labour Code (Amendment) Act of 2010.** In line with the Court of Appeal's remarks in **Mohaleroe Sello & CO v Mphanya C OF A (CIV) NO.35 OF 1995** the pattern seems obvious. A litigant may appeal once as of right against a final judgment of the High Court as a Court of first instance. Similarly an appeal from the lower to the High Court is "free". A second bite at the cherry is only permissible should the Court of Appeal - in the interests of the litigant so far victorious - regard the matter as potentially

meritorious. To my mind, this suggests in addition that the judge is also enjoined to consider the existence or otherwise of prospects of success on appeal. There would otherwise be no merit in granting a certificate in a matter in which there are no prospects of success on appeal. In other words, the mere fact that a ground involves a question of law, does not mean that the ground is meritorious.

5. In the present case, the grounds for leave to appeal as pleaded in the founding affidavit are detailed out in paragraph 8 of applicant's founding affidavit as follows:

> "8. It is respectfully submitted that the Honourable Court erred in the following instances:
>
> 8.1 it failed to appreciate that there was a fundamental conflict between the parties pertaining to the calculation of overtime, that the Labour Court correctly found in favour of applicant and consequently this Honourable Court came to an incorrect conclusion in paragraph 7 of its judgment;
>
> 8.2 in failing to comprehend that the Labour Court accepted the version of Mr Botha pertaining to the calculation of overtime set out under the heading "LHDA O/T @ CTC" in the seventh column from the right on annexure "MB4".
>
> 8.3 in failing to comprehend that the corrections done by Mr Botha as set out in the fifth column from the right on annexure "MB4" were merely done to show that even on respondents' version, they made calculations errors – because of the fundamental conflict between the parties and the different approach by them, the calculation in the fifth column were never done as an acceptance that those amounts were due and payable to respondents.
>
> 8.4 in failing to accept the judgment of the Labour Court to be correct, which Court accepted the version of Mr Botha and the basis for his calculations as set out in paragraph 4 of his affidavit and summarised underneath the columns in annexure "MB4" on pages 744-771;
>
> 8.5 in failing to accept that, even if applicant's claim that a portion of respondents' claims have become prescribed should not be

upheld, they were at best for them only entitled to the amounts set out in the seventh column from the right, the total of which is M1 134 810.00 (less what they have received) and not M12 685 890.08 as set out in the fifth column from the right;

8.6 in relying on the fact that section 226(2)(c) was amended in 2006 by inclusion of the words "or non-payment", whilst respondents were all along alleging that they were underpaid, which dispute of underpayment should have been dealt with for purposes of prescription with reference to section 226(2)(c) read with section 227(1)(b) of the Labour Code as amended in 2000.

8.7 in failing to accept that the Labour Court was correct in its finding that respondents claims for payment of overtime prescribed in respect of the period before April 2000, either based on the provisions of the Labour Code or the Prescription Act 6 of 1861, or both these statutory instruments;

8.8 in allowing the appeal with costs."

6. The present applicant is aggrieved with the decision of this Court handed down on 4 July 2011. The parts of the decision which the applicant contends are wrong in law are set out above. In his heads of argument Adv Woker for the applicant set out the grounds upon which he asked this Court to grant the certificate as follows

:

(i) The time limits provided for in section 227 of the Code have no application in calculating the amounts the respondents are entitled to as unpaid overtime.
(ii) The time limits in terms of the Prescription Act have no application in calculating the said amounts.
(iii) Legal Notice 108 of 1995 – which exempts watchmen from the application of Section 11 (1) of the Code – has no application in calculating respondents entitlement to unpaid overtime.

7. He informed the Court that these are the only grounds upon which he seeks the certificate. The said grounds are said to have been extracted from

paragraph 10 of the judgment handed down on 4 July 2011 in which this Court pointed out that:

> 10.The real issues in dispute we whether the point taken by the respondent at the trial had been correctly taken at that stage and whether or not the point was bad in law. The point to which reference was being made relates to the issue whether the calculations of the appellants' overtime pay should be limited by the Prescription Act of 1861 and/or section 227(1) of the Labour Code(Amendment)Act 2000, both of which limit the computation up to three years from the date of claim. Secondly in dispute was the issue whether the computations of overtime entitlements were governed by the contracts of employment of the appellants as embodied in the respondent's Personnel Regulations pertaining to the hours of work for watchmen; or legal Notice 108 of 1995 which exempts watchmen from the provisions of section 118 (1) of the Labour Code Order 1992 which limit the number of hours that a watchmen has to work for. Thirdly, the appellants also appealed against the quantum of compensation awarded to them by the Labour Court".

8. In essence, the applicant contends that, if the judgment of this Court is allowed to stand, the effect thereof will be that respondents are entitled to unpaid overtime from dates of engagement to date of dismissal. In some instances this is for a period of more than 11 years. Applicant further contends that if section 227 and/or the Prescription Act apply, the calculations will be restricted to three years. It argues that if section 118 (1) of the Code does not apply by virtue of Legal Notice 108 of 1995 then the amount of the calculations is further reduced. Applicant further contends that, in financial terms this makes a difference of some M11.5 million. It was argued on Applicant's behalf that, the financial consequences of this Court's decision being allowed to stand are profound. Applicant further contends it is the correctness of this Court's decision- that prescription has no application and section 118(1) applies – that is at the root of these consequences. Applicant argues that, if this

Court is correct then, the present applicant will be obliged to pay out M12, 685,890.08. However, if this Court is wrong then, it will only be obliged to pay M1, 134,810.10.

DEFINITION OF THE POINTS OF LAW ON WHICH LEAVE IS SOUGHT

9. Do the above grounds "involve a question of law but not a question of fact"? To answer this question it is convenient first to consider a few jurisprudential analyses of the concepts of *questions of law* and *questions of fact* as an aid to understanding the possible meaning of the expression "question of law" in this section. This subject is discussed in an enlightening section of Salmond on ***Jurisprudence***, 12th ed., pp. 65 to 75. The term *"question of law"*, the learned author states, is used in three distinct though related senses. In the first place it means a question which a Court is bound to answer in accordance with a rule of law - a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, *a question of law* is a question as to what the law is. Thus, an appeal on *a question of law* means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression *question of law* is used arises from the division of judicial functions between a judge and jury in England. The general rule is that questions of law in both the foregoing senses are for the judge, but that *questions of fact* (that is to say, all other questions) are for the jury. Any question which is thus within the province of the judge instead of the jury is called

a *question of law*, even though it may in the proper sense be a pure question of fact. When dealing with questions of fact, Salmond states that in its most general sense it includes all questions which are not questions of law. As the expression *question of law* has three distinct applications, it follows that a corresponding diversity exists in the application of the contrasted term. The learned author then continues in a passage (at pp. 68-9)

> "There is, however, a narrower and more specific sense, in which the expression question of fact does not include all questions that are not questions of law, but only some of them. In this sense a question of fact is opposed to a question of judicial discretion. The sphere of judicial discretion includes all questions as to what is right, just, equitable, or reasonable - so far as not predetermined by authoritative rules of law but committed to the *liberum arbitrium* of the Courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the Court. In determining questions of fact the Court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged, is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. The Companies Act empowers the Court to make an order for the winding-up of a company if (inter alia) the company is unable to pay its debts or the Court is of opinion that it is just and equitable that the company should be wound up. The first of these questions is one of pure fact, whereas the second is a question of judicial discretion. The Divorce Court is empowered to grant divorce for adultery, and to make such provision as it may deem just and proper with respect to the custody of the children of the marriage. The question of adultery is one of fact; but the question of custody is one of right and judicial

> discretion.
> Doubtless, in the wider sense of the term fact, a question whether an act is right or just or reasonable is no less a question of fact than the question whether that act has been done. But it is not a question of demonstrable fact to be dealt with by a purely intellectual process; it involves an exercise of the moral judgment, and it is therefore differentiated from questions of pure fact and separately classified."

10. It was submitted in this case that there can be no doubt that the present applicant's grounds raise questions of law. Advocate Woke argued that, this Court ruled that, as a matter of law, two statutory provisions have no application in performing the overtime calculations. He argued further that, moreover, this Court failed to pronounce on whether or not, by virtue of Legal Notice 108 of 1995, section 118 (1) of the Code applies in the performance of the calculations.
11. There is need therefore to consider the alleged grounds for granting the certificate sought. Concerning paragraphs 8.1 to 8.5 of applicant's founding affidavit, they are all questions of fact, and no certificate may be granted thereon. *Ex facie* paragraphs 8.6 to 8.8 of applicant's founding affidavit, they raise questions of law, and a certificate may be granted thereon if nothing more n in the nature of prospects of success were required.
12. Indeed whether or not section 227 and/or the Prescription Act apply is a legal matter. Once that question is answered then it is a fact whether one applies them or not. This case is about calculating the ex-employees' entitlement to overtime. The requisites that the parties were entitled to rely on are either valid requisites or invalid requisites in the eyes of the law. Put differently the validity of the requisites is determined by law. It is the legal validity of applicant's reliance on prescription that is in issue.

And for purposes of applicant's calculation it also performed its calculation on the basis of a normal day being a 12hour day (as provided for in Legal Notice 108 of 1995) and not on the basis of a normal day being an 8hour day as relied upon by the respondents. This allowance for a 12hour day instead of 8 hour day has profound effect on the overtime calculation. The effect is to limit the amount of overtime worked and hence the quantum of the claims. Again it is the legal validity of Botha's reliance on Legal Notice 108 of 1995 that is in issue. So there can be no dispute that the issues raise questions of law. It follows that the first leg of the test is met.

PROSPECTS OF SUCCESS

13. As I indicated above, deciding whether or not to grant the certificate sought also involves assessing the existence or otherwise of the prospects of success. This entails this Court accepting that may be its decision is wrong. This Court has to accept in principle that, may be the Court of Appeal may see things differently on not only the issue of prescription but also section 118 as well as costs. Concerning the application of section 118 of the Labour Code, although this Court specifically identified it as an issue to be decided, the Court did not pronounce on it for whatever reason. It was conceded on behalf of the present respondents that the Court did not pronounce on the issue for whatever reason. The parties were divided on the issue whether such failure to pronounce on the issue was a ground involving a question of law. I am prepared to err on the side of justice and accept that it does. This being so this question of law needs to be resolved, because it impacts materially on the calculations to be

performed. This Court is now *functus officio* on that issue. Thus, the Court of Appeal should be allowed to resolve the issue.

14. I now turn to the question of prescription. Under the common law the prescription period was generally thirty years (See, **for example, *Standard Bank of S.A. Ltd v Neethling, NO* 1958 (2) SA 25 (CPD) at 30A**). Prescription in general, has been dealt with in various works (see Loubser ***Extinctive Prescription*** (Juta, Kenwyn 1996) as well as "Towards a Theory of Extinctive Prescription" **(1988) 105 *SALJ* 34**). Rules of prescription providing that claims become extinct after a period of time are common in our legal system and apply to all civil claims. There is ample authority to show that prescription is an exception to all other special pleas which as a rule must be raised *in initio litis* and be established by evidence in the usual way.

15. Advocate Khesuoe, together with advocate Sekonyela and Mrs Kotelo for the respondents argued strenuously that, although the issue of prescription was crisply and in general terms, it was pleaded at a late stage when the case had been referred to the Labour Court for quantification purposes. She submitted therefore that, because prescription must be pleaded by way of a special plea, it cannot be pleaded at that stage. However, Herbstein and Van Winsen, **The Civil Practice of the Supreme Court of South Africa 4th Ed. P477** state that;

> "*the defence that the claim has prescribed, although relating to the merits of the action itself, can be raised by means of a special plea. This plea can be raised at any stage in the proceedings and need not necessarily be taken before litis contestatio."*

At p.472 the learned authors state as follows:

> "*it would appear, however, that a peremptory exception, for example prescription, can be raised even after litis contestatio, as can a plea to the court's jurisdiction in status matters."*

16. Clearly therefore, nothing turns on the argument that the plea of prescription was not pleaded at an earlier stage. Concerning the Prescription Act, No. 6 of 1861 this Court held that the Labour Court, in its judgment ought not to have determined the issues on the basis of the Prescription Act which was not in issue between the parties. This Court's main reason for so holding was that the issue of the Prescription Act was not raised on the pleadings, nor was it argued in the Court *a quo.* The three Counsel for the respondents argued strenuously in this Court that the above holding reflects the correct legal position.
17. Advocate Woke submitted that, while it is so that matters are normally not decided on the basis of issues that have neither been pleaded nor argued, the Court of Appeal has also held that "[t]here are circumstances in which such an indulgence [i.e. allowing a point of law [to] be raised at any time, even for the first time on appeal] will be granted..." (See **Mbangamthi v Sesing-Mbangamthi LAC (2005-2006) 295 at 306 D-F**). He referred to the case of **Government of the RSA v Von Abo 2011 (5) SA 262 SCA**, in which the South African Court of Appeal applying "the principle [that] the Court [is] not.....bound by what is legally untenable" (at p270G), held that it would be "intolerable" if the Court could not set right "the first order [which was granted and not appealed against] as a result of the incorrect advice followed by the appellants or an incorrect concession made by them". In other words the Court of Appeal just drew a line through an order made by the High Court – which was not appealed against – which as a matter of law should never have been granted. It was therefore argued that the same principles should apply here. Advocate Woke then submitted that in this matter, the same applies. It

was submitted if the Prescription Act applies then; the basis of the overtime calculation is materially impacted.

18. In relation to prescription, it is argued that this Court erred in failing to accept that the Labour Court was correct in its finding that respondents claims for payment of overtime prescribed in respect of the period before April 2000, either based on the provisions of the Labour Code or the **Prescription Act 6 of 1861**, or both these statutory instruments. So despite the fact that the Prescription Act was not pleaded and argued, Advocate Woke submitted that it contains a legal provision which the Court of Appeal may hold is applicable. And the fact that it was not argued or pleaded does not matter. He argued that, it can be fully argued before the Court of Appeal.

19. I have no difficulty with the principles enunciated by the Court of Appeal and the Supreme Court of Appeal referred to above. However, my reading of those two judgments does not give me the impression that the two Courts held in effect that a party may rely on prescription even when such prescription was not pleaded or argued. In several of its decisions the Court of Appeal of Lesotho has deprecated the practice of granting orders which are not sought for by the litigants. (See for example **The Presiding Officer N.S.S.(L. Makakole) v Malebanye Malebanye C of A (CIV) 05/07 at par 9; Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354**). Similarly, the Court of Appeal has more than once deplored the practice of relying on issues which are not raised or pleaded by the parties to litigation.(See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and**

Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449).

20. We have over the years also adopted the same principles both in this Court and in the Labour Court. In fact in the judgment of this Court handed down on 4 July 2011 between the present parties, Advocate Darfue SC who appeared for the present applicant informed the Court, and this was confirmed by the other counsel as well who appeared for the present respondents, that the issue of the Prescription Act was neither pleaded nor was the Labour Court addressed thereon. I am of a strong view that it is improper for a judicial officer to decide and issue before him or her on the strength of an Act on which he was neither addressed nor was it pleaded. I have crave difficulties with agreeing with proposition advanced by Advocate Woke that because the Court of Appeal may allow him to argue on the basis of Prescription, then this Court must decide to grant the applicant a certificate on the basis of a point in respect of which neither this Court nor the Labour Court granted a party to argue thereon notwithstanding that it was not pleaded. What is more, I have grave difficulties how this Court grant a certificate on the basis of the point which the Court of Appeal may or may not grant a litigant an indulgence to argue thereon when such point had neither been raised nor argued in both the Labour Court and this Court. I am of the opinion that this Court would not be entitled to grant the applicant a certificate based on the ground on a point of law the advancing of which is depended upon the exercise by another Court of its own discretion. I cannot grant a certificate on that basis.

21. In my opinion the proper way of raising prescription, whether it be in action proceedings or in proceedings before the Labour Court which have been held not to be civil proceedings by the Court of Appeal, but proceedings *sui generis*, is by way of a special plea in trial action or by way of specifically pleading it in the Answer in the Labour Court. The reason is that the plaintiff (or applicant in the Labour Court) may have a valid answer (such as delay or interruption) to the plea of prescription which may be raised in replication (See: **Murray & Roberts Construction (Cape) (Pty) Ltd vs Upington Municipality 1984 Vol. 1 SA 371 (A**)).
22. I am of the view therefore that the **Prescription Act 1861** having not been pleaded, and neither of the parties having been afforded an opportunity to address the Labour Court thereon, and even this Court on appeal, the question that that the Court of Appeal may allow such a point to be argued for the first time before it is one which is far-fetched. I cannot therefore grant the certificate on that basis.
23. Regarding the applicability of sections 227(1) (b) of the Labour Code as amended, I accept that this is a question of law. However, these sections apply to proceedings before the DDPR and they had no application to the proceedings before the Labour Court. However, since Advocate Woker insisted that the Court of Appeal might find otherwise, and while prepared to err on the side of justice, I am inclined to grant a certificate on this basis as well.

CONCLUSION

24. Following from the above grant a certificate for leave to appeal in the following terms:

"It is ordered that a certificate is hereby issued pursuant to section 38AA(2) of the **Labour Code(Amendment) Act 2010** granting the present applicant leave to appeal to the Court of Appeal of Lesotho on the following grounds involving questions of law:

(1) In determining the amounts the individual respondents herein are entitled to as unpaid overtime, is the calculation to be performed on the basis that section 118 of the Labour Code Order 1992 applies, that is, on the basis of a nine hour working day alternatively an eight hour working day as provided for in the respondents' contracts or has the application of section 118 and the applicants' contracts been rendered nugatory by Legal Notice 108 of 1995 so that, pursuant to this Legal Notice the calculation is to be performed on the basis of a twelve hour working day; and

(2) In determining the amounts the individual respondents are entitled to as unpaid overtime, is the calculation to be performed on the basis that the calculation is impacted by the provisions in sections 227 of the Labour Code (Amendment) Act 2000, such that the calculation is limited to three years calculated backwards from the date the claim was instituted in the Labour Court, viz. 31/5/2003. Or is the calculation to be performed on the basis that the period of computation is date of engagement to date of dismissal?"

25. Neither of the parties addressed this Court on the issue of costs in respect of this application. There will therefore be no order as to costs.

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K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Applicant: Advocate H.H.T. Woker

For Respondents: Advocates B. Sekonyela, M.V.K. Khesuoe and Mrs. V. Kotelo