

IN THE LABOUR APPEAL COURT OF LESOTHO**HELD AT MASERU****LAC/CIV/A/02/2013****In the matter between:****‘NOKOANE MOKHATLA****APPLICANT****AND****LESOTHO BREWING COMPANY (PTY) LTD****1ST RESPONDENT****THE MANAGING DIRECTOR – LESOTHO****BREWING COMPANY (PTY) LTD****2ND RESPONDENT****THE HUMAN RESOURCE MANAGER****3RD RESPONDENT****CORAM: THE HONOURABLE MR JUSTICE K.E.MOSITO AJ****ASSESSORS: MR. R. MOTHEPU****MRS. P. LEBITSA**Heard on : 18TH JULY, 2013Delivered on: 18TH JULY, 2013*Summary*

Application in terms of S38AA(2) of the Labour Code (Amendment) Act 2010 - certificate for Leave to appeal –Grounds as fore-shadowed in the application considered so as to distil points of law therefore. - Principles in issuing a certificate for leave to appeal laid down. – Costs – no order as to costs of the present application.

Judgment

INTRODUCTION

1.1 This is an application for a certificate to appeal in terms of section 38 AA (2) of the Labour Code (Amendment) Act 2010. It must be mentioned from the outset that, the decision for the granting of a certificate revolves around a question of law. The decisions of the court on this subject are in essence those of a judge as they relate to a question of law, and not those of the majority inasmuch as the majority of the court makes decisions on a question of fact. I say this because in my opinion, although the assessors were in attendance in this matter, there was strictly no need for them to be present other than just that, probably they helped the court to have a coram. In this case, the applicant/appellant applies for an order in the following terms:

- “1. That applicant/appellant be granted certificate in terms of section 38AA(2) of the Labour Code Act 1992 as amended by section 5 of the Labour Code (Amendment) Act 2010 to appeal the decision of this Honourable Court delivered on the 3rd July 2013 in LAC/CIV/A/02/2013.
1. That the certificate referred to above be in terms of and applicant/appellant be allowed to appeal on the grounds as appear at paragraph 13 of the founding affidavit herein.
 2. That respondents pay costs hereof only in the event of opposition.
 3. That applicant /appellant be granted such further and/or alternative relief as this Honourable Court may deem meet.”

1.2 This application arises out of a judgment of this court handed down on 3 July 2013. In that judgment, the court dismissed an appeal by the appellant against the judgment of the Labour Court in which the appellant had asked for the finding of contempt of court against the respondents.

2. **FACTUAL BACKGROUND**

2.1 The legal battles between the parties have lasted for about 4 years to date. The present appeal arises out of the judgment of the Labour Court in one of the various legal battles between the parties. The Appellant had approached the Labour Court to seek an order committing and punishing the second and third Respondents for allegedly disobeying or unlawfully refusing to carry out or to bound by the award of the DDPR in A0932/2009 following the dismissal of the review application. The application for contempt was dismissed by the *court a quo*. The Appellant subsequently appealed against the decision of the Labour Court in the present appeal. It is that appeal against which this court handed down a decision as mentioned above. The appellant now seeks a further appeal against the decision of this court to the Court of Appeal.

2.2. In the present case, the grounds for the certificate to appeal as pleaded in the founding affidavit are detailed out in paragraph 13 of applicant's founding affidavit are as follows:

“INTENDED GROUNDS OF APPEAL

13.1 Whether, in view of the imperative or peremptory provisions of Rule 26 of the Labour Court Rules, 1994, read in the light of section 14 of the Interpretation Act 1977 and/or the ordinary rules of interpretation as well as the general law on authority to represent artificial persons in judicial proceedings, the authority of third

respondent herein to represent, oppose and depose to an affidavit on behalf of first and second respondents herein had, in law, been sufficiently established.

13.2 Whether, in view of applicant/appellant's averments at paragraph 6, 12,16,17,23,25,26 of the Founding Affidavit and paragraph 14 of the Opposing Affidavit and the generality of evidence and arguments herein as well as this Honourable Court's finding at paragraph 1 of the judgment that what was sought to be enforced was the award of the DDPR as against the finding both by this Honourable Court, at paragraph 13 of its judgement, and the court a quo, relied on at paragraph 19 of the judgment herein, that it was the judgment in LC/REV/04/12 that was being enforced, section 228E(5) read with section 24(2) (j) of the Labour Code Act 1992 were not applicable herein and applicant/appellant subject to protection thereof.

13.3 Whether, considering the circumstances of this case as whole, it was competent and/or permissible in law to have dismissed the appeal against a finding of impracticability by the court a quo thereby retaining such order.

13.4 Whether, in view of prayer 1 of the notice of motion and applicant/appellant's averments at paragraphs 6,12,16,17,23,25,26 of the Founding Affidavit read together with paragraph 14 of the Opposing Affidavit in LC/56/2012, it was competent in law for this court to dismiss the appeal upon its finding that the challenge/complaint was against the judgement in LC/REV/04/12 without hearing the parties on this aspect."

THE LAW

3.1 Section 17 of the Court of Appeal Act provides that: "[a]ny 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. 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 Labour Court as a Court of first instance. Similarly an appeal from the Labour Court to the Labour Appeal Court is "free". A second bite at the cherry is only permissible should the Labour Appeal Court - in the interests of the litigant so far victorious - regard the matter as potentially meritorious. 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.

CONSIDERATION OF THE PROSPECTS OF APPEAL

5. The first point on which Applicant relies in this application, is whether, in view of the imperative or peremptory provisions of Rule 26 of the Labour Court Rules, 1994, read in the light of section 14 of the Interpretation Act 1977 and/or the ordinary rules of interpretation as well as the general law on authority to represent artificial persons in judicial proceedings, the authority of third respondent herein to represent, oppose and depose to an affidavit on behalf of first and second respondents herein had, in law, been sufficiently established. This point was dismissed in the judgment

from which the appeal is sought even though it was sought in exactly the same terms. As it stands, it is clear that what is sought to be achieved in this appeal in this regard is the effect of the Labour Court Rules, 1994, read in the light of section 14 of the Interpretation Act 1977 and/or the ordinary rules of interpretation as well as the general law on authority to represent artificial persons in judicial proceedings. May be the Court of Appeal may interpret this issue differently. I am prepared to err on the side of justice. I grant the certificate on this ground.

6. The second point on which Applicant relies in this application, is whether, in view of applicant/appellant's averments at paragraph 6, 12,16,17,23,25,26 of the Founding Affidavit and paragraph 14 of the Opposing Affidavit and the generality of evidence and arguments herein as well as this Honourable Court's finding at paragraph 1 of the judgment that what was sought to be enforced was the award of the DDPR as against the finding both by this Honourable Court, at paragraph 13 of its judgement, and the court a quo, relied on at paragraph 19 of the judgment herein, that it was the judgment in LC/REV/04/12 that was being enforced, section 228E(5) read with section 24(2) (j) of the Labour Code Act 1992 were not applicable herein and applicant/appellant subject to protection thereof. At the hearing of this ground, the court asked the learned counsel for the applicant to extract the legal principles and then help formulate the true ground which he contemplated should be conveyed by this ground as it looked like it contained a lot of factual issues and little points of law. In the result, the learned counsel formulated the issues contemplated as embodied in paragraph 2 of the certificate towards the end of this judgment. In the manner formulated in

paragraph 2 of the order, I have no difficulty with granting the certificate on that basis as well.

7. The third point on which Applicant relies in this application, is whether, considering the circumstances of this case as a whole, it was competent and/or permissible in law to have dismissed the appeal against a finding of impracticability by the court *a quo* thereby retaining such order. The problem with this ground is that it is too general. It is usually undesirable to formulate a ground of appeal or point of law in such broad terms as “considering the circumstances of this case as a whole”. Formulations such as this are to be discouraged. They are similar to formulations such as “the finding is against the weight of evidence”. It was not clear which circumstances of this case as a whole applicant was contemplating here. In any event I am of the view that the consideration of the case on appeal may still be adequately achieved by determining the case on the basis of either the one or the other of the grounds upon which the appeal is to be permitted in this application. I would restrict this ground to the issues that have been raised in the appeal before us and hold that what the applicant intends to achieve by this appeal is simply that reinstatement ought to have been granted. If this is so, I am of the view that this ground whether granted or not will not affect the decision in this case in respect of the issue of reinstatement. For that reason, and for what it is worth, I will grant that ground as well.
8. The last point on which Applicant relies in this application, is whether, in view of prayer 1 of the notice of motion and applicant/appellant’s averments at paragraphs 6,12,16,17,23,25,26 of the Founding Affidavit read together with paragraph 14 of the Opposing Affidavit in LC/56/2012, it was competent in law for this court to dismiss the appeal upon its

finding that the challenge/complaint was against the judgement in LC/REV/04/12 without hearing the parties on this aspect.

9. At the hearing of this application, the court asked the learned counsel whether it is correct that the parties were never invited to address the court on the subject of decision which forms the basis of the complaint in this ground. After discussion of the issue, the learned assessor Mr Mothepu and I brought it to the counsel's attention that this issue was specifically put as a question to counsel to address in the nature of whether the proper way ought not to have approached the court for enforcement of the DDPR's award rather than the route the appellant had taken of seeking to enforce the judgment in LC/REV/04/12.
10. In all fairness to him, the learned counsel seemed to remember that the question was put to him and, he also remembered that his answer was that whether he proceeded by way of section 24(2) (j) of the Act, the result was the same. He seems to be of the view that, and this is my view as well, when the question was put, it seems the court and the counsel were not at the same wavelength and, although the learned counsel gave the answer he gave, he in fact did not understand the magnitude of both the question and the answer. This is regrettable. I however am of the view that in the manner in which the certificate has been formulated in the order below, the concerns of the learned counsel will be taken on board in this appeal. Put differently, the learned counsel accepts that the question was raised with the parties but that this is not the way he understood the question. In any event I do not believe that the certificate as formulated would not address this particular issue.

11. CONCLUSION

Following from the above, it is ordered that, a certificate to appeal is hereby issued pursuant to section 38AA (2) of the **Labour Code (Amendment) Act 2010** read with section 17 of the **Court of Appeal Act 1978** granting the present applicant leave to appeal to the Court of Appeal of Lesotho on the following grounds involving questions of law:

“1. Whether, in view of the imperative or peremptory provisions of Rule 26 of the Labour Court Rules, 1994, read in the light of section 14 of the Interpretation Act 1977 and/or the ordinary rules of interpretation as well as the general law on authority to represent artificial persons in judicial proceedings, the authority of third respondent herein to represent, oppose and depose to an affidavit on behalf of first and second respondents herein had, in law, been sufficiently established.

2. Whether in the light of section 228E (5) and section 24 (2) (j) of the Labour Code (Amendment) Act 2000 read with section 34 of the Labour Code Order 1992:

(a) Reinstatement awards of the Directorate of Dispute Prevention and Resolution (DDPR) are directly enforceable by the Labour Court in terms of sections 228E(5) read with section 24 (2)(j) of the Labour Code (Amendment) Act 2000.

(b) Whether section 34 of the Labour Code Order 1992 applies only to judgments/awards *ad factum praestandum*, or *ad pecuniam solvendam*, or both.

(c) In the light of paragraphs 2 (a) and (b) above, what is the relationship between the three sections aforementioned.

3. Whether in the light of the interpretation given in respect of the inquiry above, the respondents ought to have been held in contempt of court.

4. Whether, considering the circumstances of this case as whole, it was competent and/or permissible in law to have dismissed the appeal against a finding of

impracticability by the court a quo thereby retaining such order.

5. Whether it was competent in law for the court to dismiss the appeal upon its finding that the challenge/complaint was against the judgment in LC/REV/04/12 without hearing the parties on the aspect. (It worth noting that it was brought to the attention of counsel for the applicant, and he also agreed that this ground is granted for what it is worth regard being had to the comments on by this Court above). “

The applicant did not ask for costs in this matter. There is therefore no order as to costs.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the applicant Adv. P.R. THULO

Fore respondents No appearance