

**IN THE LABOUR APPEAL COURT OF LESOTHO****HELD AT MASERU**

LAC/REV/08/13

LC/ENF/ /12

DDPR: A0887/12

**In the matter between:****CHEN YUN BO**

APPLICANT

**AND****PABALLO MARTIN THEKO & 2 OTHERS**

RESPONDENTS

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

Heard on : 23 JANUARY 2014

Delivered on : 27 JANUARY 2014

**SUMMARY**

Application for a certificate for leave to appeal from the Labour Appeal Court (LAC) to the Court of Appeal. – LAC refusing the application on the basis that the determination of the question whether a real and genuine dispute of fact exists is a question of fact for the Court to decide not of law.

Application refused with costs.

**JUDGEMENT****MOSITO AJ**

## 1. INTRODUCTION

- 1.1 In these proceedings, the Applicant filed two applications. The first application related to stay of execution of the judgment of this Court handed down on 7 November 2013. The second application is one for a certificate for leave to appeal to the Court of Appeal of Lesotho.
- 1.2 Both applications were not opposed and for that reason, it erroneously be assumed that because they were not opposed, this Court could just grant them as such.
- 1.3 The present proceedings have the effect of showing that such assumptions are not correct in law. The mere fact that the other party does not oppose an application or a trial action, does not relieve the Court of its duty to consider the merits of the claim before it.
- 1.4 In the first mentioned application (that of stay of execution), it seems that the application was filed on 15 November 2013 for an order in the following terms:
  - 1) That a rule nisi be issued, returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause, if any, why:-
    - a) The rules of Court pertaining to the mode of service and time limits shall not be dispensed with due to the urgency of the matter.
    - b) The 3<sup>rd</sup> Respondent shall not be restrained from releasing the sum of Fifty Three Thousand One Hundred and Twenty Eight Maloti and Twenty Lisente (M 53,128.20) deposited in its coffers by the Applicant to 1<sup>st</sup> Respondent pending the final determination of this application and the appeal against the Judgment of this Honourable Court on the 7<sup>th</sup> November 2013.
    - c) Respondents shall not be ordered to pay the costs of suit in the event of opposition.
    - d) Further and/or alternative relief.
  - 2) Prayers 1 (a) and (b) shall not operate with immediate effect as Interim Interdict.

1.5 The matter was placed before my brother Peete J. on 20 November 2013 and he granted an interim order staying execution of the judgment of this Court which had been given on 7 November 2013. I must say that in that judgment, this Court had not made an order in the nature of the one contemplated by prayer 1(b) above. In other words, this Court had not ordered that payment should be made to any of the parties. In fact, the order that we had given was in the following terms:

1. Prayers (e) and (f) are by agreement granted.
2. Prayer (g) of the Notice of Motion fails.
3. There will be no order as to costs.

1.6 It is clear therefore that this Court had not made an order directing the releasing of the sum of Fifty Three Thousand One Hundred and Twenty Eight Maloti and Twenty Lisente (**M 53,128.20**) deposited in the coffers of the DDPR by the Applicant to 1<sup>st</sup> Respondent. It was difficult to understand how therefore the interim order was granted in the terms of the prayers outlined above.

1.7 At the hearing of this application on 23 January 2014, the above problem was brought to the attention of the Counsel for the parties. In all fairness to Adv. Chobokoane, he immediately conceded the point and withdrew the application. He did so because he was aware that the order sought to stay an order that had not been given by this Court previously and the notice of motion in this case had no prayers directed at the order sought and granted as an interim order, by my brother Peete J. Adv. Khumalo for the 1<sup>st</sup> Respondent agreed to the withdrawal of the application. He however urged this Court to include in its judgment an order that the party who succeeds in the applications before this Court should have the sum of money contemplated in paragraph (b) above released to them.

This request was made notwithstanding the fact that there was no prayer by either party to that effect. However, Adv. Chobokoane agreed to this proposal so much so that, even though the parties had not pleaded and specifically prayed for that order, this Court will grant it by agreement of the parties in those terms.

- 1.8 It was against the above background that the stay application was withdrawn and the interim order granted by my brother Peete J. fell away. I will revert to this issue in the order to be made below.
- 1.9 The second application relates to a certificate for leave to appeal. When this application was considered, the attention of both Counsel were drawn to the requirements of section 17 of the **Court of Appeal Act 1978** read with **Rule 13 of the Court of Appeal Rules 2006** as well as the guidance given by the Court of Appeal in **Mohale vs Mahao LAC (2005-2006) 101** as to the principles that the Court of Appeal required judges to bear in mind when considering an application for a certificate for leave to appeal. It was on that basis that the parties were invited to address the Court regarding the second application.

## **2. CONSIDERATION OF THE APPLICATIONS**

- 2.1 As appears above, the application for stay has been withdrawn and there is no need for this Court to consider it, regard being had to the agreement alluded to above.
- 2.2 Regarding the second application, the Applicant's case was based on the following alleged grounds of appeal upon which the granting of the certificate was to be based. The grounds are reproduced below for convenience.

I intend to appeal against this judgment and the following are my grounds of Appeal:-

- 1) The learned Judge erred and misdirected himself in making a finding that there existed a substantial and genuine dispute of fact in this matter without any evidence by the Respondent to prove that either the Appellant CHEN YUN BO or his father CHEN YU BIAO is the director of CHEN FENG (PTY) LTD.
- 2) The learned Judge erred and misdirected himself in making a finding that Applicant alleges that he is not a director of CHEN FENG (PTY) LTD and his father has not explained away the averments by the Respondent that he had informed the Labour Court that Applicant was the director.
- 3) The learned Judge erred and misdirected himself in dismissing the Appellant's prayer (g) that the 3<sup>rd</sup> Respondent in the Court *a quo* return to Appellant or his father the sum of Fifty Three Thousand One Hundred and Twenty Eight Maloti and Twenty Lisente (**M 53, 128.20**) deposited in its coffers as security.
- 4) In the event that the Honourable Court finds that there exists a material dispute of fact, it is the Appellant's prayer that the mater be returned to the Labour Court for evidence to be led in order to find out whether the Appellant or his father CHEN YU BIAO is the director of CHEN FENG INTERNATIONAL (PTY) LTD.

### **3. FACTUAL BACKGROUND**

- 3.1 The facts that culminated in this case are that, 1<sup>st</sup> Respondent had instituted a claim for underpayments against a company called Chen Feng International (Pty) Ltd in the 3<sup>rd</sup> Respondent. The matter was heard on the 23<sup>rd</sup> November 2011, 1<sup>st</sup> February 2012, 21<sup>st</sup> March 2012 and 21<sup>st</sup> June 2012 and an award was issued on the 19<sup>th</sup> July 2012. At the time of the institution of the proceedings of this matter he avers that he was an employee of the Company.
- 3.2 During the proceedings of the matter, he averred that the directors of the Company had left for China and their business was closed. This led

to the withdrawal of the legal representatives of the company from the matter. The matter still proceeded to finality and the award was granted by default. Deponent further averred that after the closure of the business and the departure of the directors of the Company, he registered his own Company, Jie Rue Supermarket (Pty) Ltd on the 05<sup>th</sup> November 2010, and opened his own business. He attaches a copy of his company's trader's licence.

3.4 He further deposed that in October 2012, his father CHEN YONG BIAO was served with the summons addressed to a certain Mr Abum or Adum of Cheng Fen International (Pty) Ltd for him to appear before the Labour Court in terms of section 34 of the Labour Code Order 1992 on the 29<sup>th</sup> October 2012, to give reasons why he had not complied with the award of the 3<sup>rd</sup> Respondent. He averred that his father told the messenger of Court who was serving him that he was not Abum or Adum and that he had nothing to do with Chen Fen International (pty) Ltd. The messenger of Court advised him to appear in Court to explain before the 2<sup>nd</sup> Respondent that he was not the person summoned.

3.5 He averred that his father did appear before the President on that date and explained that he knew nothing about the matter that he was not ADUM or ABUM, and that CHEN FEN INTERNATIONAL (PTY) LTD was not his Company. Deponent averred further that his father explained further that deponent used to work at that Company but had since opened his own business after Chen Fen International (Pty) Ltd business was closed down.

3.6 Deponent deposed that he was only surprised on the 29<sup>th</sup> November 2012 when he was arrested and taken into custody on the allegation

that he had failed to comply with the Award of the 3<sup>rd</sup> Respondent of the 19<sup>th</sup> July 2012. Deponent went on to say that he had no relations with the said Chen Feng International (Pty) Ltd except being an employee like anybody else.

3.8 The Respondent filed an opposing affidavit wrongly styled “replying affidavit” and accused Applicant of non-disclosure of material fact in that deponent had failed to disclose that his father was the managing director of Chen Feng International (Pty) Ltd. She went further to indicate that the Applicant had not presented any document before the Court to prove that the said company had been dissolved. In the answering affidavit of the first Respondent, she alleged that the Applicant’s father had informed the Court *a quo* that he was the director of Chen Feng International (Pty) Ltd. She in effect averred that Applicant’s father was the Managing Director of Chen Feng International (Pty) Ltd. This Court formed an opinion that, there were genuine and substantial disputes of fact on the material aspects on the papers as to whether CHEN YONG BIAO or his son CHEN YUN BO are liable to abide by the award from the DDPR to pay the 1<sup>st</sup> Respondent. There was also a dispute of fact on the issue Biao was the managing director of Chen Feng International (Pty) Ltd. In view of the magnitude of these disputes of fact, this Court dismissed the application. It is against that determination of the existence of a dispute of fact that, the Applicant herein seeks a certificate to appeal to the Court of Appeal.

#### **4. THE LAW**

4.1 Section 17 of the **Court of Appeal Act No.10 of 1978** (“the Act”) provides for the right of appeal in civil cases in the following terms:-

“17. Any person aggrieved by any judgement of the High Court[ Labour Appeal 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.”

- 4.2 The decision of the Court of Appeal in **Mohale v Mahao LAC (2005 – 2006) 101** is instructive here. In para 4 of that decision, the Court pointed out that, the plain meaning of the above 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.
- 4.3 As to what are questions of law and what are questions of fact, see the instructive reasoning and the cases cited in the South Africa Court of Appeal in **Magmoed v Janse Van Rensburg and Others 1993 (1) SA 777 (A)**. In jurisprudence, the term “question of law” is used in various ways. 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 trier of law and a trier of fact. 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 trier of fact.

- 4.4 I must underscore the point that, the issue for determination for purposes of deciding whether or not to grant the certificate is not whether or not there existed a dispute of fact. The issue is whether a determination that there exists a dispute of fact is a question of law or fact. If it is a question of law, then a certificate may be granted with respect thereto. If it is a question of fact, then it is not competent to grant the certificate. (See section 38 AA(2) of the **Labour Code (Amendment) Act No.3 of 2010**).

## **5. APPLICATION OF THE LAW TO THE FACTS**

5.1 The issue that now falls to be determined is whether the above grounds as listed are grounds on questions of law or fact. Mr. Chobokoane accepted, and correctly saw in my opinion that grounds 2 to 4 are questions of fact. He accepted therefore that they cannot be relied upon and he did not urge this Court to consider them for purposes of his application for a certificate. He contented himself with ground 9(1) contained in the Applicant's founding affidavit. It was on this ground that the Counsel for the Applicant, Adv. Chobokoane, urged the Court to grant the certificate. Mr. Chobokoane's argument was that the issue whether or not there is a dispute of fact, is a question of law. He argued that it is a question of law because it is a legal appellation and not a factual one which comes as a result of a deduction from existing questions of fact. In other words, his argument was that the Court

begins with considering the factual issue whether or not there are genuine conflicting facts and then come to a decision that there exists a genuine dispute of fact which is a question of law.

5.2 The learned Counsel for the Respondent, Mr. Khumalo argued that that ground is incompetent to be used to found a decision for a certificate for leave to appeal because the issue whether or not there is a dispute of fact, is not one of law but one of fact. It seems to me that the Applicant's grounds of appeal as fully set out in paragraph [9] of his founding affidavit raise points of fact and not questions of law. In **Herbstein & Van Winsen, the Civil Practice of the High Courts of South Africa, 5<sup>th</sup> Edition, Vol. 1, 2009**, at 294, the following appears:

The determination of the question whether a real and genuine dispute of fact exists is a question of fact for the Court to decide. The Respondent's allegation of the existence of such a dispute is not conclusive. 'In every case the Court must ... see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.' If this were not done, the Respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the Applicant.

5.3 In dealing with the issue as to whether a dispute of fact exists, Erasmus; **Superior Court Practice** says the following at p.B1 - 48: "In every case the Court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence...." The learned author states in footnote 2 op. cit that: "Other terms used include 'genuine' (**Peterson v Cuthbert & Co Ltd 1945 AD 420 at 429; Khumalo v Director-General of Co-operation and**

**Development 1991 (1) SA 158 (A)** at 168A); 'genuine' and not merely illusory' **Parker v W G B Kinsey & Co (Pvt) Ltd 1988 (1) SA 42 (ZS) at 51E**); (**Van der Merwe v Meyer 1971 (3) SA 22 (A)** at 26G); 'bona fide' (**Von Steen v Von Steen 1984 (2) SA 203 (T)** at 205B)" Such dispute must also be material - i.e relevant for the purposes of the determination of the issues before Court. The Court was, for the purposes of adjudicating upon the issue as to whether Appellant's protest was in or out of time,<sup>12</sup> obliged to make certain findings of fact. Respondent submitted as follows:

"Therefore the main issue then is a question of fact relating to when did appellant know of his dismissal by-Respondent? Was it at least at 18th May 1995 as found by the Court, or the 5th of July 1995 as alleged by Appellant."

5.4 Whether an issue is a question of fact or law is not always clear.(See **Cruse v. Coldwell Banker, 667 So. 2d 714 (Ala. 1995)**). An issue may , of course, be characterised as a mixed question of law and fact. A mixed question occurs when the facts surrounding the case are admitted and the rule of the applicable law is undisputed; the issue then is whether the rule of law was correctly applied to the established facts. In the case before me, the facts surrounding the case are disputed.

## 6. CONCLUSION

6.1 In my view, whether or not there is a dispute of fact is a question of fact not law. A question of fact is a factual dispute between litigants which must be resolved by the Court. It is an issue that is material to the outcome of the case and requires an interpretation of conflicting views on the factual circumstances surrounding the case.

6.2 In the result, the following order is made:

- (a) The application for a certificate for leave to appeal is refused on the basis that, the determination of the question whether a real and genuine dispute of fact exists is a question of fact not of law.
- (b) By agreement of the parties, the DDPR is directed to release the sum of Fifty Three Thousand One Hundred and Twenty Eight Maloti and Twenty Lisente (**M 53,128.20**) to the 1<sup>st</sup> Respondent as the party who has won.
- (c) The first Respondent having succeeded in these proceedings, costs hereof are awarded to 1<sup>st</sup> Respondent.

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DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Applicant : ADV. A.M. CHOBOKOANE

For the 1<sup>ST</sup> Respondent : ADV. M.A.KHUMALO