

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

LAC/CIV/A/13/2013

In the matter between:

'MANAPO MAISA AND 142 OTHERS

APPELLANTS

AND

NEIN HSING INTERNATIONAL (PTY) LTD

RESPONDENT

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

Heard on : 16 JANUARY 2014

Delivered on : 21 JANUARY 2014

SUMMARY

Application for a certificate to appeal to the Court of Appeal – applicant complaining that the court had considered the issue of discrimination which was not before it as it had been abandoned in the Labour Court – applicant also complaining that costs ought not been granted in this case.

Court holding that the question of the absence of objective criteria for non-reinstatement of the applicants in the main case was a question of fact and does not qualify to be appealed against to the Court of Appeal as it is a question of fact and not law. – court rejecting the argument about costs as the costs were granted under the principle that costs follow the event which was the success of the appeal.

JUDGMENT

MOSITO AJ

1. INTRODUCTION

1.1 This is an application for a certificate in the following terms:

- “(a) That the applicant be granted a Certificate in terms of section 5 of the Labour Code (Amendment) Act 1 of 2010 to appeal to the Appeal Court of Lesotho against the order of the Labour Appeal Court dated 7th November 2013 under the above case number, declaring that the dismissal of the respondents both procedurally and substantively unfair and ordering costs in an unfair dismissal case;
- (b) Costs of suit only in the event of opposition hereof; and
- (c) Granting applicant such further and/or alternative relief.

1.2 This application follows a decision of this court in the main case handed down on 7 November 2013 in which this court made the following order:

- “1. The appeal succeeds with costs.
- 2. The dismissal of the Appellants is declared both substantively and procedurally unfair.
- 3. The matter is referred to the Labour Court to determine whether reinstatement of the appellants is practicable. If impracticable, then the parties should file affidavits establishing their monetary quantum of appellants’ entitlement as compensation.
- 4. The Registrar is requested to give this matter priority on the roll.
- 5. This is a unanimous decision.”

1.3 This Court held that, as foreshadowed in the originating application, the applicants’ complaints were that there were no objective criteria used in deciding whether or not to leave appellants out of the reinstatement arrangements. This was their complaint in paragraphs 4.4(a), (b) and (d) of

the originating application. The Respondent (present applicant) had argued that this was done in accordance with the Agreement between itself and the two unions. This Court accepted that this might be so, but that did not answer the issue as to the existence or otherwise of objective criteria used in deciding whether or not to leave appellants “out in the cold.” In the result, the Court held that, there was substance in the complaint that the Labour Court misdirected itself by failing to determine the aspect of consistency in the application of disciplinary measures in the alternative to the claim of discrimination, more especially, the issue as to the existence or otherwise of objective criteria used in deciding whether or not to leave appellants “out in the cold.” In its affidavit in support of the application for a certificate, the present applicant raises two complaints.

- 1.4 First it argues that “in the above Honourable Court, it was the case of the appellant company that the issue of selective non-reinstatement was treated as part of discrimination in the Labour Court and had been withdrawn and all evidence relating to it, as such should not have been considered by this Honourable Court”. Second, it argued that, “the Honourable Court awarded costs yet it had earlier held that cost in unfair dismissal cases are not awarded unless the party was frivolous.” It was on the basis of the foregoing that applicant complained that, “I am of the view that the Court of Appeal of Lesotho now has to clarify on the issues of costs and on the issue of whether the withdrawal of the discrimination matter covered the selective non-reinstatement.”

2. DETERMINATION OF THE APPLICATION

- 2.1 In my view and for the reasons that follow, before this court advocate Kao correctly conceded that it was not the decision of this court to uphold the appellants contention that the issue of discrimination should be considered. In fact in our judgment of the 7th November 2013, this court specifically rejected the invitation by Mr Rasekoai that the court should consider the issue of discrimination. The reason given by this court was that Mr Rasekoai had abandoned the relief on discrimination. What Mr Rasekoai was arguing before us was not the issue of discrimination when he raised the issue of absence of objective criteria. He was in effect arguing that the reinstatement was undertaken arbitrarily. This was common cause. There was no argument that the objective criteria existed. The parties agreed that they did not exist.
- 2.2 What Mr Kao was arguing before me was to conflate the question of arbitrariness with the question of discrimination. This question of arbitrariness was never disputed by his client that there were no objective criteria for the non-reinstatement of the appellants in the main case. It was for that reason that the appeal was upheld. It was not upheld because the issue of selective non-reinstatement was treated as part of discrimination. It was upheld because of the absence of objective criteria, which rendered the selective non-reinstatement arbitrary.
- 2.3 Mr Kao contends that it was wrong for this court to consider the absence of objective criteria as a different issue from discrimination. He in fact argues that the absence of objective criteria is a subset of discrimination. In my view the absence of objective criteria is a question of fact not of law, the applicant cannot rely on this issue and seek to

have it determined by the Court of Appeal as it is not a question of law. For this reason I would decline granting the application for a certificate.

2.4 The second point is that Mr Kao argued that it was wrong for this court to award costs on appeal because the case is one about unfair dismissal. What this court granted was costs that followed the appeal in the exercise of its discretion. It did not grant costs oblivious of the facts that the cause of action was unfair dismissal. It granted costs because the appeal was successful and the ordinary principle is that costs follow the event.

3. CONCLUSION

It is for the above reasons that this court considers that the application cannot succeed. It is accordingly so ordered. As there were no papers filed in opposition of the present application for a certificate, I make no order as to costs. The following order is therefore made:

(a) The application for a certificate fails.

(b) There is no order as to costs.

DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellants : Advocate T. Kao

For the Respondent : Advocate M.J Rampai