

CIV/APN/235/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

SCOTT HOSPITAL

APPLICANT

and

LUCY LERATA & 29 OTHERS

RESPONDENTS

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
On the 6th day of November, 1995

The applicant, in this matter, has applied to this Court to have the judgment of the Labour Court - L.C. 45/95 entered against this applicant on 26th April 1995, reviewed, corrected and set aside.

The facts as appear on the papers, briefly are as follows:

On 9th and 10th February, 1995 there was a strike action embarked upon by numbers 1 (one) to 27 (twenty seven) of the respondents who were at that time nursing assistants employed by Scott Hospital, the applicant in this matter. The other last three are the members of the Labour Court who presided over and decided upon this case. These nursing assistants were stationed at SCOTT HOSPITAL, MORIJA at that material time. It would appear

that attempts, made by the Hospital authorities and/or Management to establish the nursing assistant's grievances, if any, were in vain. Attempts to get them back to work also failed. Eventually, on 13th February, 1995 those who persisted with their strike action were summarily dismissed.

This dismissal, was successfully challenged, by these nursing assistants, at the Labour Court sitting in Maseru on 26th April, 1995. In its judgment, the Labour Court declared as null and void and of no legal force and effect the purported dismissal of these nursing assistants and ordered the applicant to pay them their salaries for the months of February and March 1995. In his first contention, in his founding affidavit for review, the applicant averred that the Labour Court lack Jurisdiction to grant the type of relief sought by and granted by it to the nursing assistants. This attack is directed at the competency of the Labour Court first of all to have entertained the matter and in the second place to have awarded the type of relief it has awarded to these nursing assistants.

This Labour Court is a creature of statute. It was established by Section 22 (1) of Order No.24 of 1992 commonly called Labour Code Order 1992. The Section provides as follows:

"22 (1) There is hereby established the Labour Court..."

Being the creature of statute the Labour Court must operate within the confines of the statute law. Its powers and authority are prescribed by the statute law. In terms of Section 24 (1) Labour Court shall have the power, authority and civil

jurisdiction. There is no dispute that this matter between Scott Hospital and its Nursing Assistants requires the application of civil jurisdiction. The termination of employment on the one hand may appear as a breach of the terms of the contract of employment from the point of view of the employee. On the other hand it may also appear as enforcement of the rights of the employer from the employer's point of view. The determination by the Labour Court of dispute arising out of the termination of the contract of employment must surely fall within the scope of the jurisdiction of the Labour Court. See Section 24 (f) Order No.24 of 1992. The Labour Court has, "exclusive civil jurisdiction as regards any matter provided for under the code". See Section 25 Labour Order 1992.

This applicant is particularly very unhappy with the decision reached by the Labour Court in this matter. Hence this application to have that judgment reviewed corrected and set aside. Particularly when there is no other way, because no Appeal lies against the decisions of the Labour Court, see Section 38 (1) Labour code.

- (1) On what grounds then is this Court entitled to take the type of action requested of it by this applicant?

AND/OR

- (2) Does the High Court have authority to review Labour Court's judgment?

The High Court Act No.5 of 1978 Section 7 (1) give the High

Court full power of review. It provides as follows:

"The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice in Lesotho, and if necessary to set aside or correct the same"

The Constitution of Lesotho in Section 113 (1) makes the list of Courts in Lesotho. The Subordinate Courts Order No.9 of 1988 describes the Subordinate Courts as those Courts constituted in terms of Section 3 (1) and presided over by Magistrates. Section 4 Subordinate Court Order No.9 of 1988. The Labour Court is presided over by the president. Mr. Sello and Mr. Mosito have no problems treating Labour Court as a Subordinate Court or a tribunal exercising a judicial function established in accordance with the provisions of Section 113 (1) of the Constitution of Lesotho. Section 154 (1) (ii) Constitution of Lesotho lists what is not "Subordinate Court". Subordinate Courts constituted in terms of Section 3 (1) Subordinate Court Order No.9 of 1988 and Labour Court constituted in terms of Section 22 (1) Labour Code Order No. of 1993 are omitted in the list. By inference the Labour Court must also be regarded as Subordinate Court.

It is now established that the High Court has power to review the cases decided by the Labour Court. In terms of Rule 50. High Court Rules Legal Notice No.9 of 1980, the application to review the decision of the Labour Court, was made on Notice of Motion addressed to all respondents to show cause why the

decision of the Labour Court delivered on 26th April 1995 in a case referred to as LC 45/95 shall not be reviewed, corrected and set aside. The Notice of Motion also called upon the 28th, 29th and 30th respondents, who are; the president and two members, of the Labour Court respectively. They presided over the proceedings in the Labour Court. They were to cause to be dispatched to the Registrar of the High Court the record of the proceedings sought to be reviewed.

There is no record of proceedings as such to be reviewed. It is only the Order of the Court and its judgment - (items numbers 6 and 7 on the index of the present proceedings at pages 49, and 50. It is only the decision of the Labour Court which is the subject of this review. It is Mr. Mosito's contention that this Court is not entitled to question the decision of the Labour Court. It is entitled only to question the procedure, the method and/or the route taken by the Labour Court to reach the conclusion it arrived at in this matter. Mr. Mosito, adopting the style and words used by C J INNES in *Johannesburg Consolidated Investments Co. v Johannesburg Town Council* 1903 T S 111; defined review as: "the process by which, apart from appeal, the proceedings of Interior Courts of Justice..... are brought before the Supreme Court (in this case High Court) in respect of grave irregularities or illegalities occurring during the course of such proceedings". Further support of his submission is found in the judgment of Lord Brightman in the case of *Chief Constable of the North Wales Police v Evans* (1982) 3 ALL E.R. 141 at page 155. "Judicial review, as the words imply,

is not an appeal from a decision, but a review of the manner in which the decision was made". (My underlining).

The fact that there was no record of the proceedings as such, except the Order of the Court and the judgment, Mr. Mosito persisted in his submission that this is an appeal through the back door, because the legislator deemed it fit to enact that the decisions of the Labour Court are final. The applicant is accused of circumventing the law and the intention of the legislator to shorten the process and the length of the period taken for litigation in the resolution of labour disputes. The applicant is accused of taking the matter on appeal under the guise or pretext that it is a review because there is no record of the proceedings to be reviewed. "The principles which should guide the Courts in exercising their powers of review under the common law are clearly set out by Bristowe J in a leading case *African Realty Trust v Johannesburg Municipality* 1906 TH 179 AT 182. See HERBSTEIN AND VAN WINSSEN THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA THIRD EDITION at page 754 - 755. The two learned Authors continued to enumerate the instances when the Court exercising its review powers, may interfere with the decision of the Interior or Subordinate Court.

In the first place this Court may interfere with the decision of the Labour Court, in this present case, if it is shown that the Labour Court acted outside its jurisdiction. Labour Court as a creature of statute, derives its powers and authority from the statute. Mr. Sello argued that, since the

nursing assistants have been dismissed by the applicant in this matter, there is no relationship between them and their former employer. There is no longer any contract of employment, which according to the sentiments expressed by Mr. Sello, ended with the purported termination of their contracts of employment at the point when they were dismissed. They are therefore not entitled to challenge their dismissal which is the purported termination of that contract. The nursing assistants are still holding on to their contract of employment. They are holding Scott Hospital to that same contract. They went to the Labour Court to challenge its termination. In my view they did so correctly because they do not accept termination of their contract of employment. The Labour Court by declaring their dismissal as null and void and of no legal force and effect, have confirmed its existence. The terms of any contract of employment, the existence or non-existence of any such terms of any contract of employment must surely be the matter that falls for determination in the Labour Court. The Labour Court was therefore properly approached in this matter. The Labour Court was competent to deal with this disputes and to resolve them. See Section 24 and 25 (f).

The applicant continued to attack the manner in which the respondents asked the Labour Court to make a finding on the validity of letters of dismissal. The Labour Court did make a finding that the Board of Management could not have met, and in fact did not meet because this applicant had nothing before Labour Court to prove that such meeting took place. The

allegation, that the hospital administrator was not directed as he claimed in the letters of dismissal, by the hospital Management board, was made by the respondents. It is trite law that he who alleges must prove. The respondent, claimed that proof will be produced that the Board of Management never met and therefore could have never directed the hospital administrator to write those letters of dismissal to the nursing assistants. The conclusion the Labour Court reached was; "It will be prima facie doubtful if a board actually met". The reason for this conclusion appears to be the Court's own knowledge that Management Boards of the type of this hospital Board, do not have the ability to meet within a short notice. The Labour Court is not bound by any rules of procedure and evidence. See Section 27 (2) Labour Code. The chief function of the Court is to do substantial justice between the parties before it. The main regard that must be had in the Labour Court is informality, low cost and expedition in proceedings before it. See Section 27 (3) Labour Code. The Labour Court may accept hearsay evidence if it is not bound by the rules of the Law of Evidence. It may not be held improper if in its decision Labour Court is shown to have relied on the personal knowledge of the president as it appears to have done in this case when in its reasons for judgment it appears the president of Labour Court doubted if the Board of Management of the hospital met because in his knowledge the members of such boards are many and spread out far apart to such an extent that in his opinion they could not meet within short notice. It is the respondents who alleged that the Board of Management did not meet. Paragraph (e) originating application;

page 4 of the record. It is the respondents who must prove their allegation. Respondent claimed that the proof that no such meeting of the members of the Management Board took place will be produced. Paragraph (e) originating application, page 1 - 5 as shown on the index of the proceedings at page 4. It is not enough to be doubtful if the Board actually met. The Labour Court must be completely satisfied that in no way could the hospital administrator have received the directions or instructions he claimed to have received from the Board of Management. It was not sufficient for the respondents to make an allegation that the Board of Management never met. Respondents were well aware of the need to produce proof of their allegation. That is why they were quick to promise that proof will be produced that no such meeting of the members of the Management Board took place. No such proof was produced. It was essential that it must be produced. See CLAN TRANSPORT CO. v SWIFT TRANSPORT SERVICES & OTHERS 1956 (3) SA 480.

It was irregular to make a finding that the Board of Management never met without evidence to that effect. It was irregular to support that finding on the alleged failure of the applicant herein to provide the proof that the Board did in fact meet.

The Labour Court should have called "its own attention to the matter which it was bound to consider". These are the words used by Lord GREENE, referred to by Lord REID who adopted them in the case of SMITH v EAST ALLOE RURAL DISTRICT COUNCIL 1956

2 WLR 888 at page 905. The Labour Court was bound to consider and determine if at all the Board of Management did not meet as alleged by the respondents and that the Board could not have given the directions to the Hospital administrator as he claimed. Curiously the Labour Court without any evidence found that the Board of Management never met; and consequently could not have given the Hospital administrator the directions to dismiss the nursing assistants. This was being totally unreasonable. To compound this wholly unreasonableness with gross irregularity, the Labour Court gave its reason for so finding the failure of the applicant herein to prove that such a meeting did take place.

For these reasons, the application to have the decision of the Labour Court in LC 45/95 reviewed, corrected and set aside must succeed with costs.

R.J. GUNI

JUDGE

For the Applicant : Mr. Sello

For the Respondents: Mr. Mosito