CIV/APN/361/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

SOLOMON MASIU	APPLICANT
AND	
LESOTHO AGRICULTURAL DEV. BANK	RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 18th day of May, 1998

On the 19th September, 1997, applicant brought an application for:

(a) An order declaring the purported dismissal unlawful, unlawful and therefore invalid and *void ab initio*.

(b) An order directing respondents to restore the status *quo ante* by reinstating applicant to his substantive post at the

/....

respondent bank.

(c) An order directing respondent to pay costs of this application.

Applicant was a branch manager at Thaba Tseka in a branch of respondent. He was, according to the letter dated 17th February, 1993, summarily dismissed following a Board resolution of the 2nd February, 1993, at its 35th meeting.

The respondent raised the preliminary objections of prescription and want of jurisdiction before merits could be gone into.

There was no question of prescription but the question of undue delay remained very disturbing.

It was on jurisdiction that arguments had to be addressed before merits could be dealt with. The reason being that a special tribunal the Labour Court had been established to deal with questions of master and servant. In particular this tribunal was established *inter alia* to deal with dismissals from employment. Since this involved dismissal and there was a Labour Court, the question was whether this Court should entertain this

matter.

Section 24(1)(i) of the *Labour Code* provides:

> (1) The Court shall have the power, authority and civil jurisdiction—
>
> (i) to determine whether an unfair dismissal has occurred and, if so, to award appropriate relief.

The Labour Court is a special tribunal not a court of law in the traditional sense. See *Morali v President of Industrial Court and Others* 1987(1) SA 130. In fact the labour Court does not function as a court of law even though it discharges a judicial function. See *Kloof Gold Mining Co. v National Mine Workers Union* 1987(1) SA 598 at pages 605 J to 606A.

It will be noted that the term "unfair dismissal" over which the Labour Court has jurisdiction is not defined. In *Slagment (Pty) Ltd. v Building Construction and Allied Workers Union & Ors.* 1955(1) SA 742, it will be observed that summary dismissal can be an unfair labour practice where an employer fails to hold the *audi alteram partem* principle. In Section 66(2) of the *Labour Code more is* said about unfair

dismissal:-

> "...dismissal will be unfair unless... The employer can...show that he or she acted reasonably...in terminating employment."

This wording is broad enough to cover unlawful dismissal.

There is a possible interpretation that the Labour Court has a broader jurisdiction than the court in that it is not limited to questions of law as such. But it is specifically intended for dealing with issues of equity and fairness in matters under its jurisdiction. Further more in dealing with matters under its jurisdiction equitably it takes cognisance to lawfulness of conduct complained of. Lawfulness as such therefore should in itself not bar it from exercising its jurisdiction. See the case *In re Isaacs v Bloch* 1990(4) SA 597 at page 601 H.

Section 66 of the *Labour Code* is directly linked with Section 24(1)(i) of *Labour Code* on "unfair dismissal". Consequently Section 66 has to be read along with Section 24(1)(i) in order to determine whether this court has jurisdiction or not.

The relevant portions of Section 66 of the *Labour Code* that are under consideration are the following:

(1) An employee shall not be dismissed, whether adequate notice

is given or not, unless there is a valid reason for termination of employment.

(2) Any other dismissal will be unfair unless, having regard to circumstances the employer can sustain the burden of proof to show he has acted reasonably in treating it as the reason for terminating employment.

(3) Where the employee is dismissed for reasons connected with the capacity to do the work the employee is employed to do or for reasons connected with conduct at the work place, the employer shall be entitled to have an opportunity at the time of dismissal to defend himself against the allegations made.

It seems to me that unfair dismissal could well cover any ground of dismissal that is not specifically spelled out in Section 66. Indeed what applicant was summarily dismissed for also covers the work place. If it does not, it is covered under Section 66(2). The Labour Court in my view has jurisdiction in the matter before me. This does not in any way affect this court's powers of judicial review.

Among the powers of judicial review that this court has, is to see

that all people, administrators and tribunals observe the principles of natural justice. Among these is the *audi alteram partem* principle. The Labour Code had given all employees a right to a hearing before dismissal. In other words as I see it, summary dismissal is a denial of the *audi alteram partem* principle unless it is preceded by a hearing.

In the case of *A Makhutla v Lesotho Agricultural Bank,* C of A (CIV) No.1 of 1995 (unreported), the High Court had declined to exercise its review jurisdiction in the mistaken belief that it has no jurisdiction. In the case before me, applicant did not go to the Labour Court and pass to this court on review. This case of *Makhutla* is not in point. The High Court has jurisdiction where a tribunal has acted irregularly or illegally by not exercising a jurisdiction it has or exceeding its jurisdiction.

In the case of *Attorney General v Lesotho Teachers Trade Union & Another* C of A (CIV) No.29 of 1995 proceedings had been directly instituted in the High Court as in this case. Steyn JA was disturbed by the broad jurisdiction that the Act seemed to have been conferred by implication on the Labour Court. Consequently he said:-

> "The words "a matter provided for under the Code" are of general import, are not limited in any way and are very wide in meaning. The fact that "exclusive" jurisdiction is conferred and "ordinary or

> subordinate courts" (whatever meaning is to be attributed to these words) are not permitted to exercise civil jurisdiction, is but another indication of the need to limit the meaning ascribed to the words in question."

Steyn JA then noted that when it comes to the jurisdiction of the High Court which is a court established by the *Constitution* there has to be an express provision excluding its jurisdiction and cited Browde JA words in *Makhutla v Lesotho Agricultural Development Bank (supra)* with approval.

The facts in *Attorney General v Lesotho Teachers Trade Union & Another (supra)* were entirely different, this court was declining jurisdiction to restrain acts that were clearly unlawful although they were not covered by Section 24 of the *Labour Code* merely because they were labour related. While this court should not accept the term "ordinary or subordinate court" to exclude its jurisdiction (because for this to be so the statute has to be express) it should not allow the matter that could conveniently be settled in tribunals and subordinate courts to be brought before it.

In particular in respect of the Labour Court Steyn JA in *Attorney General v Lesotho Teachers Trade Union & Another* said:

"In essence the Labour Court is a court of equity enjoined to keep the scales of justice in balance as between the conflicting demands of employer and employee... Therefore great care must be taken to ensure that the ambit of its jurisdiction is not extended to matters which are not compatible with the purpose for which it was not created... It must be stressed that our courts should be astute to ensure that the powers of the Labour Court to adjudicate are strictly confined to matters that are trade disputes *stricto censu,* or matters strictly identifiable as issues contemplated by the legislature as defined by Section 24."

I have already said "unfair dismissal" is covered by Section 24(1)(i). It seems to me that the Labour Court has jurisdiction where a person is dismissed summarily. I have already said the *audi alteram partem* rule has been made into a right for all workers or employees. Where this right is violated, the Labour Court has jurisdiction. It is classified an unfair dismissal within the meaning of Section 66(2) of the *Labour Code*. Therefore it is an "issue contemplated by the legislature as defined by Section 24".

It seems to me that in dealing with unlawful dismissal, the Labour Court in providing redress and in dealing with this issue it exercises a broader jurisdiction than simply the issue of dismissal as such. It deals with fairness in its equitable sense as well.

Could it be that applicant brought the case before me because he had delayed so much that he considered his claim to be time-barred in

terms of Section 70(1) of the *Labour Code*? I do not think applicant's claim is time barred because dismissal without a hearing cannot be part of any contract. The reason being that a contract cannot be valid insofar as it violates the provisions of the *Labour Code*. Even assuming a delay of six months was relevant, Section 70(2) of the *Labour Code* empowers the Labour Court to allow presentation of the matter if "the interests of justice so demand". This is therefore a matter for the Labour Court. It is not time barred.

As this is a question of illegality and I am of the view that illegality is a matter in which the jurisdiction of this court can never be excluded, I will go into the merits of this case. I must emphasise that where an inferior court has jurisdiction this court has a discretion whether to hear such matters. See Section 118(1)(d) of the *Constitution* which includes tribunals within the term "court".

On the facts before me there can be no doubt applicant was not given a hearing. A suspension without pay that was preceded by an interview with the personnel manager was not a hearing in my view.

As Mahomed JA observed in *K. Koatsa v National University of Lesotho* 1991-1992 *Lesotho Law Reports and Bulletin* 163 at page 169"

> "A private employer exercising a right to terminate a pure master and servant contract is not obliged to act fairly... He can act arbitrarily or capriciously. The position of an employer performing a public function is not the same. The official or officials of a public body...cannot act capriciously, arbitrarily or unfairly. In particular, if the real reason for giving an employee notice of termination, is some perceived misconduct or wrong committed by the employee, the employee should be given a fair opportunity to be heard on the matter, especially where it appears from the circumstances that the employee has a "legitimate expectation" that he would remain in employment permanently in the ordinary course of events."

It will be seen that in terms of Section 66(1) read along with (3) of the *Labour Code* 1992 "an employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment" In the light of the aforegoing even a private employer can no more "act capriciously, arbitrarily or unfairly". Respondent, the Lesotho Agricultural Development Bank, is a public body which is in fact State-owned. It was therefore always obliged to follow the *audi alteram* principle. There can be no doubt it acted illegally towards applicant.

Applicant is asking for a declaration that his dismissal is invalid therefore void *ab initio* so that he can be reinstated to his substantive post at the bank. It is as if a contract employment is akin to a marriage. We all know it is not. I am not sure the term void can ever apply in relations between master and servant. The word void is often used in a manner

that connotes voidable. See *Estate Phillips v Commissioner For Inland Revenue* 1942 AD 35 at page 51. If a contract is voidable, it often means it can be set aside at the instance of the innocent party in certain circumstances. It also means the court might have a discretion in the matter on equitable grounds. According to Wille and Millin *Mercantile Law of South Africa* 17th Edition at page 77:

> "It is conventional to describe as void any contract which a court of law will refuse to enforce... Examples of this class are, unlawful or immoral agreements, those contrary to public policy, and those which are wanting in some essential legal formality."

In master and servant where there has been unlawful dismissal, what is really involved is breach of contract. The term *void ab initio* has no place in such a contract. At the very least, the dismissal can be said to be voidable, in the sense that the dismissed servant has an option to accept the repudiation and do nothing or bring proceedings to claim either specific performance in the form of reinstatement or claim consequent damages for breach of contract from the employer.

In *Mosala Khotle v Attorney General,* C of A (CIV) No.13 of 1992 (unreported), Browde JA noted that the court is obliged to declare an unlawful dismissal as invalid or a nullity, but consequent relief is governed by other considerations. And he added:

> I think it would be unfair to make an award sought by the appellant if, for example he has been in other employment since his dismissal. This claim is properly one for damages and as we have no information whatever on the subject the issue must be decided in another forum."

The question of reinstatement in my view (following the guidance of *Mosala Khotle* above) requires evidence. In the nature of things the court should expect the respondent to contest reinstatement vigorously. Once a dispute of fact is a virtual certainty, such a matter cannot be brought by way of application. If such matter which is potentially contentious is brought by way of application, then such a court in exercising the option of dismissing such an application (in its discretion) should legitimately take the view that in such a case applicant "should have known it would be impossible for a court on motion to grant a declaration of rights". See *Abdro Investment Co. Ltd. v Minister of Interior* 1956(3) SA 345 at page 352 per Centlivres CJ.

Action proceedings are appropriate therefore, where as in this case specific performance of a contract of employment is being sought. The court in being called upon to exercise its discretion must make an informed decision. This would call for pleadings to identify and clarify issues in dispute. After pleadings, then the matter would be ventilated fully by evidence in court. It was for this reason that Browde JA in

Khotle v Attorney General took the view that relief consequent on declaration of the invalidity of an employee's dismissal should be decided by another forum.

On this question of reinstatement I am also guided by Kotzé JA in *Lesotho Bank v Maitse Moloi* C of A (CIV) No.31 of 1995 where he said:-

> "In such an event, the party wronged is obliged to decide within a reasonable time how he intends to react; accepts the repudiation and sue for damages, or sue for specific performance. What he cannot do is do nothing for an unreasonable time, and then sue for specific performance in a matter of this kind... Where the obligation of the wronged party is an ongoing one, the longer he postpones deciding on specific performance by the employer, the more one sided and inequitable his insistence becomes: it goes without saying that he himself can neither perform his obligations towards the employer whom he seeks to hold bound, as here, in time irrevocably gone by; nor gain the same position as before in the organisation that may have altered considerably in the meanwhile. ... The respondent did not give any acceptable reason for his inordinate delay."

The allegation of applicant that applicant failed to take action because of illness was challenged by respondent. Despite this strong challenge, applicant did not substantiate this bare allegation in his replying affidavit. I was therefore not persuaded that applicant was serious. He probably might be. In my view the balance of convenience favours a separate and distinct action for the claim of such further or alternate relief that is consequent on the declaration that applicant's

dismissal is invalid. I will therefore not make any order in respect of reinstatement.

This court has the power at its discretion to make a declarator Order without any consequent relief. See Section 2(1)(b) of the *High Court Act* 1978. The best remedy is to make this declaration so as to make it possible for applicant to issue summons for consequent relief, if he should so desire. The reason being that as was found in *Lesotho Bank v Maitse Moloi* (*supra*) there are obstacles for applicant to overcome, and these are:-

(a) The three years of inaction that have elapsed.

(b) Respondent has to be afforded a proper opportunity of being heard as to the effect of reinstatement in the organisation such as respondent after these three years.

(c) Whether applicant's delay in taking action might not amount to acceptance of the repudiation (unlawful as it clearly is) is also a question for determination.

(d) Whether applicant should not claim damages if he does not accept respondents repudiation of the contract through the summary dismissal which is an unlawful repudiation.

What Kotzé JA has emphasised in *Lesotho Bank v Maitse Moloi* about an applicant like this one is:

> "What he cannot do, is do nothing for an unreasonable time, and then sue for specific performance in a matter of this kind."

It remains for applicant to select his options with Kotzé JA's observation in mind when he invokes the court's discretion.

This court therefore makes the following order:

(a) It is declared that the dismissal of applicant was unlawful.

(b) applicant may if he so desires bring an action to claim consequent relief within reasonable time.

(c) On account of applicant's delay and my finding on the question of jurisdiction, I do not think applicant is entitled to costs. There will be no order as to costs.

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W.C.M. MAQUTU
JUDGE

For applicant : Mr. G.G. *Nthethe*
For respondent : Mrs. T. *Chimombe*