IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 1/2008

In the matter between:

THE MINISTER OF LABOUR AND EMPLOYMENT	**First Appellant**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**Second Appellant**
THE ATTORNEY-GENERAL	**Third Appellant**
And	
'MUSO ELIAS TS'EUOA	**Respondent**

JUDGMENT

31 March, 11 April 2008

Sections 12(8) and 19 of the Constitution of Lesotho - right to fair determination of civil disputes and right to equality and equal protection of the law — access to Court of Appeal and rule of law - whether final and exclusive jurisdiction of Labour Appeal Court in terms of s.38A (4) of Labour Code (Amendment) Act, 3 of 2000, unconstitutional.

Coram:
Steyn, P
Grosskopf, JA
Smalberger, JA
Melunsky, JA
Gauntlett, JA.

Gauntlett, JA:

[1] The issue in this appeal is whether, measured against the Constitution, s.38A(4) of the Labour Code (Amendment) Act, 3 of 2000, validly provides for the

Labour Appeal Court to be the final and exclusive court of appeal in certain, but not all, labour matters. The court *a quo,* being the High Court sitting as a constitutional court in terms of s.22 of the Constitution (per Majara J, Monapathi and Mofolo, JJ concurring) held this provision to be unconstitutional. Against its order to this effect the Minister of Labour and Employment, the Speaker of the National Assembly and the Attorney-General now appeal.

[2] The respondent is a former employee of a commercial enterprise (cited as a party in the proceedings below). Previously he sought this court's leave to appeal from the Labour Appeal Court (which had dismissed his application to review an award made against him by the Directorate of Dispute Prevention and Resolution) to this court. That application was dismissed by this court (under case No. C of A (CIV) 27 of 2004), on the basis that s. 38A(4) of Act 3 of 2000 permits no such appeal, and any challenge to that provision would have to be made in the first instance to the High Court and not (as the respondent had sought to do) directly to this court. Hence his challenge before the High Court, now on appeal to this court.

[3] In 1992 Lesotho's then Military Council "enacted" - perhaps more appropriately, decreed - Labour Code Order, 1992. This established the Labour Court. Its members were appointed by the responsible minister of state, drawn from the Public Service. It had a final and exclusive jurisdiction in labour matters. This court subsequently held it not to be a court of law, because it considered that as it was then constituted it lacked the essential attributes of the latter (see **Attorney-General v Lesotho Teachers Trade**

Union LAC (1995-1999) 119 at 132).

[4] Act 3 of 2000 effected a number of amendments to the Labour Code. Important for present purposes are s.38 (which introduced a Labour Appeal Court, comprising a High Court judge, nominated by the Chief Justice, and two assessors chosen by him from designated panels), and s.38 A. The latter reads:

> "38A **Jurisdiction of Labour Appeal Court**
>
> (1) The Labour Appeal Court has exclusive jurisdiction-
>
> a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court;
>
> b) to hear and determine all reviews-
>
> (i) from judgments of the Labour Court;
>
> (ii) from arbitration awards issued in terms of this Act; and
>
> (iii) of any administrative action taken in the performance of any function in terms of this Act or any other labour law.
>
> c) Notwithstanding the provisions of any other law, the Labour Appeal Court may hear any appeal or review from a decision of any Subordinate Court concerning an offence under this Code and any other labour law.
>
> d) Notwithstanding the provisions of subsection (1), the judge of the Labour Appeal Court may direct that any matter before the Labour Court or a matter referred to the Directorate for arbitration in terms of section 227 be heard by the Labour Appeal Court sitting as a court of first instance.
>
> e) Subject to the Constitution of Lesotho, no appeal lies against any decision, judgment or order given by the Labour Appeal Court".

[5] The court *a quo* in its carefully considered judgment stressed the well-established approach to the interpretation of provisions in a justiciable Bill of Rights, such as that of Lesotho. These, it said, as a general approach are to be generously construed. It concluded that by

> "barring the [respondent] and other similarly circumstanced litigants from accessing the Court of Appeal as opposed to all other litigants across the legal spectrum, section 38A(4) treats him unfairly and derogates from the provisions of s.4(l)(h) of the Constitution, thus rendering it [s.38A (4)] inconsistent with the latter provision".

As regards the appellants' justification for section 38A (4) as designed to ensure simplicity and expedition, the respondent pointed to the fact that this is hardly convincing, given the reality that the denial of access to this court does not apply to all labour litigants; that most litigants in other areas of law also seek simplicity and expedition. He contends that in the circumstances the exclusion of access to this court by some labour litigants but not others not only trenches upon s.4(l)(h) read with s.l2(8) of the Constitution but also upon s.4(l)(o) read with s. 19. The court *a quo* upheld both contentions. It however ultimately - its judgment is rather equivocal in this respect - rejected a third ground of attack, namely that s.38A (4) of Act 3 of 2000 constitutes discrimination too, within the contemplation of s.4(l) (n) and s.18 of the Constitution.

The relevant provisions of the Constitution read:

Fundamental human rights and freedoms

4.(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following-

(h) the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations;

(o) the right to equality before the law and the equal protection of the law; and

Right to fair trial, etc.

s.12 .....

(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time.

Right to equality before the law and the equal protection of the law

19. Every person shall be entitled to equality before the law and to the equal protection of the law".

[7] In his able argument before us, Mr Mohau abandoned reliance on the third ground of attack directed at s.38A(4) of Act 3 of 2000, namely that of discrimination, within the meaning of s.4(l)(n) and s.18. In my view, this concession was wisely made. Mr Mohau stressed however that he relied on the contention that, apart from the infringements of the explicit Bill of Rights provisions relating to a fair trial and equal protection of the law, the rule of law itself was abrogated by a provision like s.38A(4). This was, he said, because it prevented a person in the position of the respondent from accessing the judicial resources of this court and more broadly, raised the real prospect of conflicting precedents as between the Labour Appeal Court and this court on either identical or substantially the same legal questions arising in labour matters, with legal uncertainty on important matters as the likely result.

The essential facts of the matter in my view are these. In Lesotho a two-stream labour law dispensation has evolved. Employees who are not public officers (as defined) are regulated by the Labour Code (as amended). Their disputes, broadly stated, must progress through the Directorate, Labour Court and Labour Appeal Court. Public officers -a substantial part of the Lesotho workforce in formal employment -are however in significant respects exempted by the Labour Code Exemption Order, 1995 LLN22/1995 (made in terms of s.2(2)(b) of the Labour Code) from the Labour Code. The net effect is that public officers aggrieved by decisions of their employer or tribunals within the public service may resort to the

High Court and thereafter (in appropriate matters, with leave) this court. No such complete bifurcation exists in, for instance, either the United Kingdom or South Africa, as Mr Mohau demonstrated. Thus in Lesotho non-public officers have access to a labour court, as opposed to the High Court, and thence to the Labour Appeal Court, comprising only one judge and two lay assessors. Its decisions are by majority, where the issue is factual (s.38(8) of Act 3 of 2000). The composition of the panel membership for assessors is, as already noted, determined by the employer and employee memberships of the Industrial Relations Committee. On legal matters, only the mind of one judge is brought to bear - despite the fact that it has final and exclusive jurisdiction. This attempt to distinguish between legal and factual issues is, it may be noted, notoriously problematical (cf. Magmoed v Janse van Rensburg 1993 (1) SA 777 (A)) and has understandably been abandoned in South African labour legislation. In certain circumstances (which however do not apply in the present case) the Labour Appeal Court moreover may even sit at first and final instance.

In contrast, the membership of this court is determined by a constitutional body, the Judicial Service Commission (s. 124(2) of the Constitution). Only legally qualified persons may be appointed as judges (s. 124(3)). Where the High Court hears reviews of employer or tribunal decisions regarding public officers, an appeal lies of right to this court in defined circumstances, where the Bill of Rights is invoked and otherwise where leave to appeal is granted (s.129). This court sits in benches of three or five judges, in the discretion of the President, regard being had to the importance or complexity of the issues (s.129 (3)). Its status is expressly that of a superior court of record (s.123 (4)).

[10] Equality in constitutional law, this court has noted before, is to be tested on a substantive and not a formal basis **(Molefe Ts'epe v Independent Electoral Commission C of A (Civ) 11/05 (30 June 2005)** paragraphs [14] and [15]; see too **Road Transport Board v Northern Venture Association C of A (Civ) 10/05 (20 April 2005)** paragraphs [14] and [15]). Merely because one legal regime differs from another is not to say that it is unequal. Here the substantive inquiry is directed at the narrower question: does the different regime created by s.38**A** (4) constitute equal protection of the law for those employees who are not public officers? In my view, manifestly and materially not, given the features I have contrasted above.

I accordingly conclude that s.38A (4) of Act 3 of 2000 constitutes an infringement of s.4(l) (o) read with s.19 of the Constitution.

That however does not end the constitutional inquiry. An infringement of a protected right does not itself have unconstitutionality as a result: the inroad may be justified, in the sense explained in our earlier decisions (see especially **Attorney-General of Lesotho v 'Mopa** LAC (2000 - 2004) 427 at 439F - 438G; 2002 (8) BCLR 645 (LAC) at 654 H - 655F).

The cursory opposing affidavit filed by the Minister of Labour offers no factual material in justification for treating private sector employees in such a materially different and inferior way to public sector employees, let alone other litigants. The Minister merely advances a series of denials, and the general contention that

> "[t]he *intention of the legislature in enacting s. 38A(4) was to expedite and simplify the finalization of labour disputes. "*

It is doubtful whether the evidence of the Minister is admissible as to Parliament's

intention **(Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** 1986 (2) SA 555 (A) at 562C - 563A; **Pepper (Inspector of Taxes) v Hart** [1993] 1 All **ER** 42 **(HL); S v Makwanyane** 1995(3) SA 391 (CC) at 405B). But if it is assumed in favour of the appellants that such an intent is to be inferred from the statutory provisions themselves, it is not apparent why that consideration should set private sector employees apart from public sector employees, or for that matter, labour litigants from all other classes of litigants. All, surely, wish to achieve access to the best available resources, and as simply, swiftly and cheaply as may reasonably be achieved.

A further difficulty is that even had the appellants identified considerations of expertise and simplicity unique to private sector employees, it is not apparent to me that the regime which s.38A (4) creates meets the broad test for justification: it has not been shown to be reasonably and demonstrably justified in a free and democratic society (see **'Mopa v Attorney-General** supra ibid). There is nothing *ex facie* s.38 and s.38A which indicates that, and the Minister's affidavit is wholly silent as regards proportionality and the least invasive means available to attain such an end.

I accordingly hold that the appellants have not justified the infringement of s.4(l) (o) read with s.19 of the Constitution to which s.38A(4) of Act 3 of 2000 gives rise, and that on this basis, the impugned provision is unconstitutional.

This conclusion makes it unnecessary to consider the second attack, based on s.4(l) (h) read with s.l2(8) of the Constitution, invoking the right to a fair determination

of civil disputes. Neither the respondent's affidavit nor that filed for the appellants to my mind adequately engages with factual issues in this regard. I would leave open the question as to whether or to what extent the right to a fair determination of civil disputes entails the right to an appeal and if so, whether the curial regime created by the Labour Code read with Act 3 of 2000 is such as could properly be characterized as "unfair" within the meaning of s.4(l)(h) read with s.12(8).

It is also not necessary to address at length Mr Mohau's invocation of the rule of law, given the conclusion that his argument on the first ground must be upheld. I would however say this : he is undoubtedly correct to contend that the rule of law is fundamental to the notion of constitutional democracy established through s.l(l) and 2 of the Constitution, and that fundamental in turn to the rule of law is access to courts. In the exposition of the United Kingdom's leading public law authors,

> ".....[T]he role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice".
> De Smith's Judicial Review (6th ed 2007 by H. Woolf, J.Jowell and A. le Sueur) at para 4-015:

International courts have repeatedly held that the right of individuals to have access to the courts to vindicate their rights is an essential component part of the rule of law. See e.g. the judgment of the European Court of Human Rights in Golder v UK (1995) 1 EHRR 524. See too volume 8(2) of Halsbury's Laws of England (1996) under the title, Human Rights and Freedoms, at para. 119 which lists "The Right to the Protection of the Law". It states unequivocally that "For the enforcement of his civil rights an individual is entitled to unimpeded access to the courts" (unimpeded of course does not mean unregulated).

That however the effect of s.38A(4) goes so far as to breach the rule of law is not apparent to me.

[18] A final aspect relating to the constitutionality of the Labour Appeal Court requires to be addressed. During the deliberations of this court after it had heard argument in the present matter, the question arose whether the outcome of the appeal might be affected by s.127 of the Constitution. More narrowly stated, the concern was whether Parliament had had the power to create the Labour Appeal Court through Act 3 of 2000. If it did not, the issues in this appeal would be moot. As this inquiry was also potentially relevant to another appeal due to be heard this session (in the matter of Teaching Service Commission v Learned Judge of the Labour Appeal Court, C of A (CIV) 21/07), the court arranged to hear argument from counsel in both matters at an additional hearing on that specific question.

[19] The question posed to counsel in both matters was this:

"The Court of Appeal wishes to be addressed as to whether:

f) The Labour Appeal Court is a court subordinate to the High Court, and if not,

g) Parliament had the power (in terms of s.127 read with s. 118 (1) of the Constitution) to create such a court".

S. 127 (in part 4 of chapter XI of the Constitution) provides:

"127. Parliament may establish courts subordinate to the High Court, courts-martial and tribunals and any such court or tribunals shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by or under any law".

S.l18(1) and (2) (in part 1 of the same chapter) state:

"118. (1) The judicial power shall be vested in the courts of Lesotho which shall consist of-

h) a Court of Appeal;

i) a High Court;

j) Subordinate Courts and Courts-martial;

k) Such tribunals exercising a judicial function as may be established by Parliament.

l) The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law.

m) The Government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to the Constitution and any other law".

It is apparent both from this provision and others (see ss.l19 (1) and (3) and 128 (1) and (2) that the term "courts" (which is not the subject of formal definition elsewhere in the Constitution, other than in s.24(l): that definition however is expressly limited to chapter II) is used in two senses. In the first place, it is used as a generic term for all five adjudicative categories listed in s. 118 (l)(a) to (d) : collectively these constitute *"the courts of Lesotho"* for the purposes of s. 118(1) and - importantly - the protective provisions of (2) and (3). In the second place, *"courts"* is however simultaneously used in a narrower sense, to denote those bodies which include this court, the High Court and subordinate courts, in contradistinction to courts-martial and tribunals. That appears from ss. 118(1), 119(1) and (3), 123(4), and 133 (3)(b), (c) and (d), (4) and (5), and the definition of "subordinate court" in s. 154(1).

The Labour Appeal Court is not of course included by name in s. 118 (the enactment of which antedates both the Labour Code and Act 3 of 2000). Nor, patently, is it capable of falling under the designation, "courts-martial" (as to the ambit of which see the Full Court's analysis in **Sekoati v President of the Court-Martial** (1995 - 99) LAC 812). To have been validly constituted by Parliament in 2000 pursuant to s.127 of the Constitution, it must thus be capable of being categorised as either a "court subordinate to the High Court" or as a "tribunal".

(That the phrase "subordinate to" refers only to the High Court, and not also to the ensuing words, "courts-martial and tribunals", is so for at least three reasons. The first is that that is the more natural grammatical construction of s.127. The second is that an attempt to give s.127 a purposive and sensible interpretation gives rise to the same conclusion: Parliament could not have sensibly intended the creation in Lesotho of courts (in the narrower, or proper sense, identified in paragraph [22] above) subordinate to either tribunals or courts-martial. The third is that the restriction of the description "subordinate", to the High Court is consistent with the phrasing of ss.118 (l)(c) read with (b), 119(1), 128(1), 130 and the definition of "subordinate court" in s.154 (1)).

Is the Labour Appeal Court **"subordinate"** to the High Court? In the ordinary meaning of the phrase, one court is subordinate to another if it occupies an inferior position in a hierarchy of courts - more particularly in that its decisions are in principle subject to appeal to that other court, and in that it is in turn bound by the decision of that other court. Ss.38 and 38A of Act 3 of 2000 make it clear that the Labour Appeal Court is not subordinate in either respect. Another feature of s.l18 may be noted. It recognizes the existence, in 1993, of the Court of Appeal and High Court, and entrenches these. But clearly it had to recognize, too, that other bodies exercising what s. 118 terms "judicial power" ("adjudicative power" would have been more apt) would probably be required in future. Some (like courts -martial or certain tribunals) might even be ad hoc. As regards "subordinate courts", the provision had to do both: to recognize any in existence, and provide (through s. 127) for future ones.

What however of the possible power of review which the High Court may have

over the Labour Appeal Court? Suffice it to say for the purposes of the present case that, because a functionary or public body or tribunal may be subject to judicial review does not make it "subordinate" in the usual sense. Similarly, if a court (whether in the wide or narrow senses analysed above) is subject to review by another court, that equally does not in my view of itself make it a "subordinate" court to the High Court in the sense I have sought to describe. There is no fixed hierarchy, no general progression in principle of matters from one to the other, no system of binding precedent. Thus the outcome of the decision in the Teaching Service Commission case, supra cannot affect the result here.

[26] Parliament, then, only had the power to create the Labour Appeal Court if it is a tribunal, within the contemplation of ss.118(l)(d) and 127. (A discrepancy may be noted in this regard: s.118(l)(d) contemplates the future (after 1993) creation of "tribunals exercising judicial functions", while s.127 refers simply to "tribunals". Nothing turns on this in the present matter, as the Labour Appeal Court plainly "[exercises] a judicial function". In any event, ss. 118(d) and 127 are in pari materia - to such an extent that s.127 is really redundant as regards tribunals - and must be read together with a view to avoiding conflict or inconsistency).

[27] I have already described the composition and essential functioning of the Labour Appeal Court, as this appears in particular from ss.38 and 38A of Act 3 of 2000. It is a court in the wider sense of s. 118, not the narrow sense, for the reasons set out in paragraph [9] and [23] above. It is, in my view, a tribunal discharging a judicial function within the contemplation of s. 118

(1) (d) and s.127. It follows that Parliament did have the power to establish it, and that the judgment of the court *a quo* should not be set aside on the yet more fundamental basis that the

Labour Appeal Court is a nullity (with the drastic consequences that might have).

[28] For the reasons given, the appeal must fail. The question arises however as to whether the court *a quo* was correct in the order it made. That order firstly declared s.38A (4) of Act 3 of 2000 to be unconstitutional and secondly, without qualification, "that the [respondent] has a right of appeal to the Court of Appeal of Lesotho" . In addition, the appellants were ordered to pay the respondent's costs.

[29] S.38A (4) is prefaced with the words, "Subject to the Constitution of Lesotho." The effect of such phrasing was analysed by the Full Court in Sekoati v Commander, Lesotho Defence Force supra at 825F-826C (and, to the same effect, in Chevron Engineering (Pty) Ltd v Nkambule 2003 (5) SA 206 (SCA) at 209 J - 210C). The device of making a provision which is in conflict with a Constitution "subject to" the latter, may as a matter of form save that provision from a formal declaration of unconstitutonality - but then it must be declared to be nugatory, because the substantive portion conflicts with the

Constitution and must yield to it. I believe this matter of form can be addressed in the order proposed below.

[30] More important is the question whether the court *a quo* was correct to grant the second declaration, to the effect that the respondent and hence other private sector employees, as I have termed them, are to have an unrestricted right of appeal to this court. In my view, it erred in that regard, for two reasons. The first is that the respondent has succeeded on the basis of his claim to the equal protection of the law. Public sector employees do not have an unrestricted right of appeal in all matters from the High Court to this court. Any order seeking to undo the present inequality needs to take this into account - and not itself create a fresh imbalance.

[31] The second is that it is not immediately apparent that this court itself has the power to create a right of appeal to itself. In Ts'euoa v Labour Appeal Court, supra, in para [8] and [9]), it was noted that the court is accorded an express jurisdiction "more narrowly circumscribed than that of the Supreme Court of Appeal [and, it may be added, Constitutional Court] of South Africa" (para. [9]). How exactly the problem we have identified should be remedied is, it seems to me, properly a matter to be left in the first instance to Parliament. Parliament may either decide to end the two-stream approach to labour disputes which has evolved in Lesotho, in contrast to the unitary system, for instance, in South Africa, or it may decide to retain it - but providing in that event a substantially equal right of access to this court. (Parliament could do that by providing for a right of appeal from the Labour Appeal Court to this court, with leave, adapting the mechanism of s.17 of the Court of Appeal Act, 10 of 1978). The Legislature should be given an opportunity to address the deficiency identified in this judgment. Until it does so, it would be

> undesirable to consider whether (and if so, in what circumstances and respects) this court under the Constitution necessarily has an implied jurisdiction in a situation such as the present.

At the same time however we cannot permit an indefinite prolongation of the current situation - both as regards the present respondent and the large number of Lesotho workers similarly circumstanced. Eight years ago, this court drew attention to the evident unconstitutionality of prescription legislation in Lesotho (and further referred the matter for the urgent attention of the Attorney-General) (Khalapa v Commissioner of Police [1999 - 2000) LLR & LB 350 (CA) at 356; see too Lesotho National General Insurance Co Ltd v Nkuebe (2000 - 2004) LAC 877 at 894 B-E). We are not aware that any steps have yet been taken to remedy that problem.

As regards costs, the appellants submitted that no order of costs should have been made against them by the court *a quo,* and that (irrespective of the outcome of this appeal) no costs order on appeal should be made. It is indeed so, as Mr Viljoen for the appellants argued, that this court is in principle reluctant to make or sustain costs orders in constitutional matters where large issues of constitutional importance are at stake. But that principle relates chiefly to a policy concern to avoid stifling litigation of public importance. Conversely, costs orders may be appropriate in constitutional matters where, as here, individuals find that the vindication of their personal rights triggers complex and costly constitutional litigation (cf. The Road Transport Board v Northern Venture Association, supra at para. [16] and further authorities there considered). In these circumstances, it does

not seem to me that any basis has been shown on which we could properly interfere with the costs order made *a quo,* or refrain from following suit as regards the costs of the appeal.

[34] The order I propose is accordingly this:

"1. The order of the court *a quo* is set aside and substituted by the following:

n) S.38A (4) of the Labour Code (Amendment) Act, 3 of 2000, is declared to be in conflict with s.4(l)(o) read with s.19 of the Constitution and of no force and effect.

o) The parties are given leave, in the event of Parliament not enacting, within six months of date hereof, remedial legislation in relation to (a) above, to approach this court on the present record, supplemented by such affidavits as may be necessary, to seek such further order in terms of Rule 17(4) of the Rules of the Court of Appeal as the circumstances may require.

(c) The appellants are directed to pay the respondent's costs.

2. Save as provided in 1 above, the appeal is dismissed, with costs".

J.J. Gauntlett JA

I agree. It is so ordered

Steyn

PRESIDENT

I agree

F.H. Grosskopf JA

I agree

J.W. Smalberger JA

I agree

L.S. Melunsky JA

For the appellants :H.P. Viljoen, SC

For the respondent:K.K. Mohau