IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO.21/2018

In the matter between:

THE LESOTHO REVENUE AUTHORITY **1ST APPELLANT**

THE LESOTHO REVENUE AUTHORITY BOARD **2ND APPELLANT**

COMMISSIONER GENERAL OF THE LESOTHO REVENUE AUTHORITY **3ND APPELLANT**

And

MOUTLOATSI DICHABA **1ST RESPONDENT**

IDIA PENANE **2ND RESPONDENT**

REALEBOHA MATHABA **3RD RESPONDENT**

MANGANGOLE TSIKINYANE **4TH RESPONDENT**

SETH MACHELI **5TH RESPONDENT**

CORAM : DR. K. E. MOSITO P.
M. MAHASE ACJ
DR P. MUSONDA AJA

HEARD : 17 January 2019

DELIVERED : 01February 2019

SUMMARY

Labour law - Labour Code 1992 - Labour Code (Amendment) Act 2000 - Jurisdiction – High Court does not have jurisdiction to consider applications to uplift suspension - Labour Court does have jurisdiction to consider applications to uplift suspension – issue is whether it is competent for the Labour Court to do so – exceptional and compelling reasons required

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This is an appeal against the judgment of the High Court (**Mokhesi AJ**) on 1 December 2016. The respondents were all employees of the Lesotho Revenue Authority.They brought an urgent application in the High Court in terms of which they sought an order in the following terms:

> *(a) The Applicants shall not be reinstated to work in their respective positions with immediate effect.*

(b) The suspension of the Applicants of the 7th March 2018 shall not be declared unlawful, invalid and null and void with no force or effect.
(c) The respondent shall not be ordered to publicise the reinstatement of the Applicants through all media outlets they used to publicise the suspension.
(d) Costs of suit.
(e) Further and/or alternative relief.

[2] The application was vigorously opposed by the Appellants. The Appellants attack against the application was three-pronged. They raised two points in *limine* in their Answering affidavits, namely that: (a), the High Court had no jurisdiction to entertain the matter as the matter falls within the jurisdiction of the labour tribunals (the Directorate of Dispute Prevention and Resolution; the Labour Court and the Labour Appeal Court); (b), that the nature of the reliefs sought as well as (c), the merits.

THE ISSUE

[3] Stripped to the bone, the issues arising are whether (a), the High Court had no jurisdiction to entertain the matter;(b), whether regard being had to the nature of the reliefs sought, the application was sustainable; and (c), whether regard being had to the merits, the application was sustainable.

THE FACTS

[4] In order to appreciate the issues involved in this appeal it is necessary to set out, albeit briefly, the material sequence of events that led to the present dispute. On 7 March 2018, the respondent suspended the appellants from its employ with immediate effect.The suspension is apparently based on some allegations involving relating to the engagement of a prosecutor using the LRA

funds as well as other complaints by the staff of the Lesotho Revenue Authority.

THE LAW ON SUSPENSION OF EMPLOYEES

(a) Nature of suspension

[5] There exists a practice of suspending employees pending an investigation into serious misconduct and the institution of formal disciplinary proceedings in labour and employment law. These suspensions are usually effected on the basis of full pay and benefits. Paid suspensions are usually initiated by employers to facilitate their investigations and to reflect the seriousness of allegations. For the most part, they are initiated unilaterally by an employer before it investigates an allegation that has come to its attention. In advance of considering the issue whether the High Court had jurisdiction to entertain the application relating to suspension of the present respondents as their employees, I consider it apposite, to consider the conceptual nature of suspension of employees at the workplace.

[6] It is generally accepted that there are two types of employment-related suspensions. The first is called a "preventative" or "administrative" suspension which refers to the practice of barring an employee from entering the workplace to ensure that he or she does not interfere with the investigation of disciplinary action.The second type of suspension is called a "punitive" or "disciplinary" suspension, which refers to the practice of suspending an employee as a disciplinary action, which would constitute a sanction after the disciplinary hearing. In the first

instance it implies that the employee will be suspended on full remuneration and in the second instance it implies that, the employee would be suspended without remuneration.

[7] In general, suspending an employee is permissible if all express and implied terms in the employment relationship are followed satisfactorily. Suspension may thus be applied in the form of a "cautionary suspension" pending a disciplinary hearing or suspension as a disciplinary action and the distinction between the two could be determined by the intention of the employer applying the suspension. Should the suspension be intended to assist the employer in any manner during an investigation and not to punish the employee, it would be considered as to be a suspension as a holding operation.[1]

[8] In ***Moqhali v Lesotho Telecommunications Corporation***[2]Kheola J considered suspension in the work place. He pointed out that, in **Administrative Law by Wade, 6th edition at page 565-6** the learned author says, suspension from office as opposed to dismissal may be nearly as serious a matter for the employee, but the Courts have wavered between two different views. One is that the employer needs a summary power to suspend without hearing or other formality as a holding operation, pending inquiries into suspicions or allegations. The other is that suspension is merely expulsion *pro tanto.* Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office.

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[1]Conradie& Deacon 2009 34(1) Journal for Juridical Science 2009.

[2]Moqhali v Lesotho Telecommunications Corporation (CIV\APN\247\93) (NULL) [1993] LSHC 56 (06 October 1993).

[9] KheolaJ further pointed out that in ***Lewis v. Heffer and others***[3] Lord Denning, M.R. said:

> "Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: see Furnell v. Whangarei High Schools Board.
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> In a separate concurring judgment Lane L.J. said (at 368h-j) that where suspension was an administrative action and had to be effected immediately, pending investigation, it was not only impossible to hear the subject but natural justice will seldom if ever at that stage demand that theinvestigation should ... hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially and the greater the importance of observing the maxim,*audialterampartem."*

[10] In ***Mhlauli v. Minister of Department of Home Affairs and others***[4] it was held that the *audialterampartem* principle was applicable when a statute empowered a public official or body to

[3]Lewis v. Heffer and others (1978) 3 All E.R.354 (C.A.) at p. 364 C-E.

[4]Mhlauli v. Minister of Department of Home Affairs and others 1992 (3) S.A. 635.

give a decision prejudicially affecting an individual in his liberty or property or existing rights, unless the statute expressly or by implication indicated to the contrary.It was further held that suspension unquestionably constituted a serious disruption of one employee's rights: the social and personal implications of being barred from working and of being seen to have been so barred, and being deprived of pay, were substantial. Accordingly, that the applicant had been entitled to a hearing prior to his suspension.

[11] In ***Muller and others v. Chairman, Minister's Council, House of Representatives, and others***[5], it was held that it was not the intention of the Legislature in S. 20 (2) of the Act to deny a hearing to a public officer prior to or, in extremecases, immediately after his suspension without pay pending the hearing of disciplinary charges against him. The same necessarily applies to the absence of any reference to a hearing, or to the denial of a hearing, in Reg. A25.1. According, such a suspension, if imposed without giving the public officer a hearing, is invalid.

It is important to expressly allow for an unpaid suspension in an employment contract or policy should an employer wish to exercise this tool instead of terminating the employee and the suspension must be in the interest of the business. It is well-established and recognised by the courts that an employer can, in certain circumstances, suspend an employee.

[12] As long as the employer has not finished looking into the allegations hanging over the employee, any measures taken against the said employee cannot be deemed disciplinary, as the allegations have not been supported in any substantial way. Any

[5]Muller and others v. Chairman, Minister's Council, House of Representatives, and others 1992 (2) S.A. 508.

suspension imposed on an employee at such a stage in the processis considered a preventive and therefore administrative suspension, which as a rule does not incur a suspension salary. Thus, an employee who ceases to receive his remuneration following such an administrative suspension could claim damages against his employer for that loss of income.

[13] A preventive or administrative suspension cannot entail a loss of remuneration. Once the employer's investigations are complete or once the competent authorities have rendered their decision, the employer must then consider whether the gravity of the employee's actions justify any other disciplinary action. It should be noted that during an administrative suspension, the employer is under no obligations to conduct his own investigations regarding any criminal charges brought against his employee for actions outside of work. However, the employer has the obligation to permit his employee to give his own versions of the facts, if the employee so desires.

[14] Conceptually,the employer must have the authority to withhold work from the employee. What this means is that, in suspending an employee, the employer effectively refuses to provide him or her with work. I agree with the judgment of the Supreme Court of Canadian ***Potter v. New Brunswick Legal Aid Services Commission***[6]that, even if the exceptions under which an employer would be required to provide an employee with work do not apply, the employer does not have an unfettered discretion to withhold work.

[6]*Potter v. New Brunswick Legal Aid Services Commission, [2015] 1 SCR 500 at para 82.*

[15] To the extent that the proposition that the employer's discretion is absolute was ever valid, it has been overtaken by modern developments in employment law. Although employers do not generally have a duty to provide work (with certain well-established exceptions, including employees who work on commission); this does not mean that an employer can withhold work from the employee by way of an administrative suspension without justification or in bad faith.

[16] While it may be tempting to assume that suspending an employee with pay does not deprive him or her from any benefit, the law places considerable emphasis on the "sense of identity, self-worth and emotional well-being" people derive from performing work. Therefore, the employer must have a well-grounded and good-faith justification for suspending an employee and thereby effectively refusing to provide him or her with work.

Employers must ensure that the suspension is both reasonable and justified in the specific circumstances. For example, an indefinite suspension would likely be found to have been unreasonable where the employer's purposes and legitimate interests would have been equally well-served by a suspension of a fixed duration. Similarly, an administrative suspension without pay will likely be seen as unreasonable.

[17] Above all, the employer must act in good faith when imposing a suspension and have legitimate business reasons for doing so, such as shortage of work. As numerous cases, including *Potter* have made clear, suspensions motivated by dissatisfaction with an employee's performance or calculated to obtain leverage where the employer intends to terminate the

employee are not justified. When deciding whether a particular suspension is reasonable and justified, the courts may look to a myriad of factors and considerations including: the duration of the suspension and whether or not it was a suspension with pay, among others.

[18] The employer's power of disciplinary suspension is a power implicitly recognised in labour legislation the *Labour Code*. It is a punitive measure that must follow a reprehensible act perpetrated by the employee within the scope of his work. This prerogative is only one of a multitude of sanctions that can be brought against an employee according to the principle of graduation in disciplinary measures. A disciplinary suspension usually is without remuneration. This is logical, as a suspension with remuneration in such a context would not have the disciplinary impact it must have. In the case of the administrative suspension, this preventive measure is not provided by any text of law.

(b)Jurisdiction of the Courts

[19] As the South African Constitutional Court pointed out in ***Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu***,[7] jurisdiction of all courts may be traced to the Constitution which vests the judicial authority in the courts. The entire judicial system is carefully constructed in the Constitution.

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[7]***Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu****[2018] 2 BLLR 107 (CC) at para 82.*

[20] The composition and jurisdiction of the various courts are provided for in section 118 of the Constitution. It is apparent from the provisions of the Constitution that the Constitution itself does not bestow jurisdiction on specialist courts such as the Labour Court, the Labour Appeal Court and the Land Court. But some specialist courts like the Labour Court, the Labour Appeal Court and the Land Court are established in terms of legislation. Therefore the Constitution is the right place at which to commence the enquiry into whether the High Court or Labour Court had jurisdiction to entertain suspension disputes.

APPELLANT'S APPEAL

[21] The appellants' main complaint in this appeal is that, the High Court had no jurisdiction to entertain the application giving rise to this appeal. In granting the application, the learned judge in the court a quo concluded that, the jurisdictional scope of the labour tribunals is confined to section 24 of the Labour Code as (amended).In so holding, the Appellants contend that the Learned judge in the court a quo erred. On the other hand, the respondents contend that the learned judge was correct in holding as he did.

[22] They contend that, the Labour Court as a creature of statute derives its powers from the Act establishing it namely, the Labour Code Act (as amended).The jurisdiction of the Labour Court is clearly set out in section 24 of the ***Labour Code Act 1992*** was amended by the **Labour (Amendment) Act 2000**.

[23] The concept of specialist Courts dealing with specialised matters is a familiar one in our judicial system. Examples of such courts include the Land Court; Labour Court and the Labour Appeal Courtand so forth. In those instances there is no doubt that the jurisdiction

of the ordinary High Court has been ousted. For example, the jurisdiction conferred on the Labour Court, which is a specialist court was expressly declared to be exclusive. As was said in ***Mathope and Others v Soweto Council***.,[8]

[24] The existence of such specialist Courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary Courts. Therefore there is, in my view, significantly less reason in the present case for carefully examining the provisions in question or for jealously protecting against interference with the jurisdiction of the ordinary courts.

[25] It has to be borne in mind that the Labour Court and the Labour Appeal Court are specialist courts in labour matters. Section 8 of the **Labour (Amendment) Act**, provides for the jurisdiction of the Labour Court in respect of not only labour and trade disputes, but, also, the any other written law. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes which arise from employment and labour relations, such as suspension. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence.

[26] Section 3 of the **Labour Code Act 1992** provides that, "written law" means any proclamation, law, act, ordinance, order, or subsidiary legislation in force in Lesotho. The term "trade dispute" means any dispute or difference between employers or

[8]Mathope and Others v Soweto Council 1983 (4) SA 287 (W) at 291H-292A.

their organisations and employees or their organisations, or between employees and employees, connected with the employment or non-employment, or the terms of the employment, or the conditions of labour, of any person. In terms of section 3 of the **Labour (Amendment) Act**, the term "trade dispute" is amended to include an alleged dispute.

[27] The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the Labour Code. Forum-shopping is to be discouraged. The Labour Code is the point of entry. Thus, it is obvious to me that whether or not the Labour Court has jurisdiction to deal with matters of employee suspension is not a matter which could be said to be explicitly stated by section 8 of the **Labour (Amendment) Act**. That section provides in section 24(2)(d) that the court shall have the power to inquire into and make awards and decisions in any matters relating to industrial relations, other than trade disputes, which may be referred to it. It must be borne in mind that employee suspension is a matter relating to industrial relations.Purposefuly and liberally interpreted, “industrial relations” refer to relations between management and workers in industry.

[28] In effect learned Counsel for the respondent sought to persuade the court to adopt a strict constructionist canon of interpretation. The content of Mr Shale’s submission on the meaning the court should attach to section 24 of the Labour Code

Act as amended, reminded me of the remarks of **Lord Denning M R** in the case of **Nothman v Barnet London Borough Council**[9] , when he said:

> It sounds to me like a voice of the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of words heedless of the consequences . . .

[29] This court is not prepared to adopt the strict constructionist canon of interpretation because of the manifest absurdities of such an approach, chief among which is to saddle the High Court with functions and powers which routinely and properly belong to the province of settling trade disputes a primary function of the Labour Court. The court takes the view that if parliament had intended to exclude the jurisdiction of the Labour Court to consider matters of suspension of employees from its jurisdiction; in the context of trade disputes it could have done so in clear terms. In my view, this is an appropriate case to adopt a construction which will promote the general legislative purpose. This is because it would not be appropriate to wring our hands and say, there is nothing we can do.

[30] Where a strict interpretation of statute will lead to an absurdity the judges can and should use their good sense to remedy it. Admittedly, Section 24 as of the Labour Court, as amended by section 8 of the Labour Code (Amendment) Act, is not a model of good draftsmanship as it could have been much clearer. As currently couched it is confusing and clouds the true intention

[9]Nothman v Barnet London Borough Council 1978 (1) WLR 220 (CA), at p228.

of the legislature, because although it is clear it does not intend to prejudice the general power of the court to determine or settle trade disputes it then proceeds in a manner that on a strict constructionist approach may prejudice the wide power the court has in determining or settling disputes.

[31] Alongside the rules of interpretation discussed above, there are some useful guidelines in interpretations, called presumptions. Presumptions form the material foundation of statutory interpretation and are useful in helping to determine the scope and object (purpose) of the particular provision. There are three important presumptions worthy of discussion.

[32] Firstly there is a presumption that legislation does not contain futile or meaningless provisions. This presumption forms the crux and basis of the most important principle of interpretation, i.e. that the court has to determine the purpose of the legislation and give effect to it. In the case of ***SA Medical Council v Maytham***,[10]the court held that futile legislation has to be avoided, and that an attempt should be made to promote the 'business efficacy' of a provision. This presumption relates to the reasonable and logical thought processes of the legislature. It is a presumption that the courts endeavour to uphold consistently.

[33] The second presumption is that a statute should not be so construed as to oust or restrict the jurisdiction of the courts. This is an important presumption since in our jurisprudence and constitutional scheme of things; it is the function of the courts of law to adjudicate disputes, whether of fact or law, arising between

[1010]*SA Medical Council v Maytham 1931 TPD 45.*

citizens *inter se* or between citizens and officers of the state or other administrative authorities, whenever their jurisdiction is invoked. Thus there is a presumption against interpretation of statutes that would have the effect of excluding the jurisdiction of the courts.[11]

[34] It is clear from the discussions above that a challenge concerning suspension of an employee is a matter falling within the jurisdictional preview of the Labour Court and/or the Labour Appeal Court.

COURT ORDER

[35] In the result:

(a) The appeal is allowed.

(b) The decision of the Court a quo is substituted for the order that, "the application is dismissed."

(c) There will be no order as to costs

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

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M. MAHASE ACJ
ACTING CHIEF JUSTICE

I agree:

[11] see *Inc v Registrar of companies 1964 (2) SA 765 (T) 768-9.*

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DR P. MUSONDA AJA
ACTING JUSTICE OF APPEAL

For the Applicant : Mr M. Rasekoai

For Respondents : Adv S. Shale