

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 05/2020

In the matter between

MBELE HOOHLO

APPELLANT

and

LESOTHO ELECTRICITY COMPANY (PTY) LTD

RESPONDENT

CORAM:

MOSITO P

VAN DER WESTHUIZEN AJA

MTSHIYA AJA

HEARD:

12 OCTOBER 2020

DELIVERED:

30 OCTOBER 2020

Summary

The Labour Court has exclusive jurisdiction in labour matters. A claim for the repayment of money, which the appellant received as a result of his allegedly unlawful increase of his salary as managing director of the respondent, should have been brought in the Labour Court and not in the High Court sitting as the Commercial Court. The same applies to the appellant's counter-claim. The High Court

correctly found that it lacked jurisdiction regarding the counter-claim. The main claim is referred to the Labour Court. The High Court correctly found that the appellant's joinder of four parties in the counter-claim was irregular. No order is made as to costs.

JUDGMENT

VAN DER WESTHUIZEN AJA

Introduction

[1] The appellant (Mr Mbhele Hoohlo) appeals against a judgment by the late Molete J in the Commercial Court as a division of the High Court. The judgment concerned a counter-claim (or claim in reconvention) he instituted against the respondent (the Lesotho Electricity Company, Pty Ltd – LEC). The respondent opposes the appeal.

[2] This legal tussle is also the subject of another and separate appeal before this Court, namely *CIV 09/2020*. In his judgment (in which I concur) in that matter Damaseb AJA states that the appellant and the respondent “are engaged in a war of attrition in the courts and tribunals of the Kingdom (of Lesotho)”.

[3] In appeal *09/2020* the litigation started with Mr Hoohlo approaching the High Court on notice of motion, seeking an order for the payment of his pension benefits by LEC. In this matter LEC sued him for the money he had allegedly overpaid himself while he

was the managing director of LEC; and he instituted a counter-claim regarding the benefits. At issue in both appeals are the appellant's unpaid benefits; and the jurisdiction of the High Court *vis a vis* the Labour Court.

[4] It seems to be common cause between the parties that the appellant on 26 February 2020 instituted the same claim for his benefits in the Labour Court in *LC/APN/08/2020*.

Factual background

[5] As the managing director of LEC, the appellant allegedly unlawfully increased his own salary by way of unauthorized increments. He was suspended following criminal charges against him and proceedings at the Labour Dispute Process under sections 226 and 227 of the Labour Code Order 1992. While he was on suspension, the time period of his contract expired. The contract was not renewed.

[6] On 20 July 2018 the respondent instituted action against the appellant in the High Court, sitting as the Commercial Court, for payment of M 2,500,800.00, which he allegedly owed LEC, being the amount to which he had overpaid himself while working for the company; plus interest; and costs. In his plea Mr Hoohlo denied that his salary increase was unauthorized. According to him, it was authorized by the shareholder's representative, the former Minister of Energy and Meteorology.

Commented [j1]:

[7] The appellant also instituted a counter-claim, in which he asked for (a) leave to join four parties (the Board of LEC and its members) as defendants-in-reconvention; (b) condonation for bringing a claim for unfair dismissal out of time; (c) payment of M 52,486,320.00 being benefits allegedly owed to him by LEC; (c) interest; and (d) costs.

[8] Both parties raised special pleas. The appellant's dealt with the alleged lack of a cause of action as well as vagueness of the summons; and the alleged lack of locus standi of LEC. LEC's were based on the alleged lack of jurisdiction of the court to hear Mr Hoohlo's counter-claim and misjoinder of the further four parties, without first having sought and obtained the leave of court. The special pleas were considered by the High Court on 11 June 2019. On 12 December 2019 that court dismissed Mr Hoohlo's points of law, as well as his counter-claim as a whole. It upheld LEC's points of law. On 6 February 2020 Mr Hoohlo appealed against this decision of Molete J.

Issues

[9] The issues to be decided are:

- (a) Should condonation for the late filing of the appeal be granted?
- (b) Did the High Court have jurisdiction?
- (c) Was the joinder of four parties by the appellant irregular?
- (d) Given developments during the hearing of oral argument, what is the appropriate remedy to be ordered by this Court?

(d) Costs

Condonation

[10] The appeal was about two weeks out of time. The appellant's application for condonation is not opposed. No serious inconvenience for the respondent or this Court resulted from the lateness. Condonation was granted.

Jurisdiction

Counter-claim

[11] According to the respondent, Molete J correctly found that the appellant's counter-claim should have been brought in the Labour Court and that the High Court lacked jurisdiction. Counsel for LEC set out the legislative framework, including sections 24 and 226 of the Labour Court (Amendment) Act of 2000.

[12] The counter-claim for almost M 52 and a half million, includes compensation for unlawful suspension, unfair disciplinary processes; the loss of future benefits; unfair labour practices; and unfair dismissal; as well as compensation for humiliation and medical expenses. The bulk of these are clearly labour matters.

[13] Counsel for the respondent also referred to case law concerning the exclusive jurisdiction of the Labour Court over matters like these. He submitted that the claim for damages based on medical expenses and humiliation, as well as similar issues, in

any event fell within the jurisdiction of the High Court and not the Commercial Court.

[14] Counsel for the appellant admitted that the matter was currently also before the Labour Court. She submitted that the main claim should have been brought to the Labour Court instead of the Commercial Court. In response to questions from the bench as to why the appellant then approached the Commercial Court and not the Labour Court with the counter-claim, she argued that the counter-claim was based on the same set of facts and relationship as the main claim. However, in the written heads of argument she also argues that a counter-claim is an independent claim, separable from the main claim.

[15] Counsel added a somewhat astounding explanation for approaching the Commercial Court, namely that the Labour Court “was, at the time, not functional”. From the respondent’s side, the appellant’s conduct was described as “*forum shopping*”, which should not be allowed.

[16] During the course of argument, counsel for Mr Hoohlo abandoned the first ground of appeal against the judgment of Molete J, namely that he erroneously found that the court lacked jurisdiction in a labour dispute. The judgment of the court a quo on this point can indeed not be faulted.

Main claim

[17] Where does this leave LEC's main claim against Mr Hoohlo for repayment of the money he allegedly received as a result of his unauthorized increase of his own salary? Did the High Court have jurisdiction?

[18] According to the appellant, it did not. Counsel for the appellant argued that the matter should be remitted to the High Court to deal with jurisdiction. The respondent argued that the appellant did not raise the issue of jurisdiction when points of law were raised in the special pleas and therefore may not do so now, on appeal. Furthermore, counsel for the respondent argued that the High Court had not yet decided on the issue of jurisdiction, as the matter was stalled by the special pleas and the decision of that court being taken on appeal. Eventually counsel for the respondent agreed that the main claim be remitted to the court a quo to decide on jurisdiction.

[19] Like the counter-claim by Mr Hoohlo, LEC's main claim emanates from his employment by LEC. For the reasons why the High Court did not have jurisdiction to entertain the counter-claim, which should have been brought in the Labour Court, the High Court lacks jurisdiction regarding the main claim.

[20] The Labour Court is a specialized court created by statute. Like similar specialized courts, it was created in order to deal with matters within the ambit of its mandate. There is a reason for the creation of specialized courts. Litigants should not be allowed to "forum shop" – and sometimes even change direction midstream –

in order to seek out judges who may be, in their view, better qualified or more favourably disposed to their plight. Problems or perceived problems with the functioning of such a court should be dealt with through appropriate channels, which may include approaching the head of that court, or of the jurisdiction, either as a litigant or through the relevant professional bodies. Frustration may not be used to override the legislature's determination of the jurisdiction of courts.

Joinder

[21] Rule 23(3) of the High Court Rules 1980 makes it clear that a defendant who has a claim against parties other than the plaintiff may bring a counter-claim against them; but, to do so he must first file an application on notice motivating his application for leave to do so. Leave may or may not be granted. Only after leave has been granted, may the defendant proceed to institute the counter-claim against the additional parties.

[22] The appellant did not apply for and obtain leave. The appellant unilaterally joined the additional parties in the claim in reconvention. Molete J correctly found against the appellant in this regard.

Remedy

[23] As some consensus on the issue of jurisdiction grew during oral argument, counsel were requested to submit draft orders to this Court.

[24] The fact that the appellant abandoned the part of his appeal challenging the High Court's finding that it lacked jurisdiction is relevant with regard to the outcome of the appeal on this point. However, the issue has to be finalized. Thus the appeal must be dismissed.

[25] The possibility to remit the matter to the High Court on that court's jurisdiction regarding the main claim was seriously considered. The main argument in favour of remission is that the court still has to decide the issue and could be persuaded to reconsider its apparent position on the issue.

[26] The question is, however: What would remission achieve in practice? Whether or not the High Court formally found that it had jurisdiction, it did express itself on the issue. This Court has reached a conclusion that both the claim and the counter-claim belong in the Labour Court. How much scope does this leave for even another judge of the High Court to come to a different conclusion? If the High Court finds that it indeed has jurisdiction, the matter is likely to end up before this Court by way of an appeal once again. If the High Court finds that it lacks jurisdiction and that the matter belongs in the Labour Court, this Court can just as well refer it to the Labour Court now.

[27] As indicated earlier, the dispute between LEC and its former managing director has turned and still lingers in several courts and tribunals. Time and other resources should not be wasted by

relying on highly formalistic technical points. Such a waste might well be viewed by litigants and the general public as costly games enriching lawyers. Therefore the main claim is referred to the Labour Court.

[28] On the question of joinder, the appeal must fail.

Costs

[29] Counsel for the respondent insisted on a cost order against the appellant. However, even though the appellant has displayed a considerable but unhealthy appetite for litigation, the fact that this Court has to pronounce on jurisdiction regarding the main claim as well as the counter-claim is not purely because of the appellant's conduct. The respondent should have approached the Labour Court in the first place. It would be fair for each party to bear its own costs.

Order

[30] In view of the above, the following is ordered:

- (a) The appeal against the High Court's ruling that it lacked jurisdiction in the appellant's claim in reconvention is dismissed.
- (b) The respondent's claim against the appellant is referred to the Labour Court.
- (c) The appeal against the High Court's ruling on joinder is dismissed.

(d) No cost order is made.



**DR J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

I agree



**DR KE MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree



**NT MTSHIYA
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADV L M A LEPHATSA

FOR RESPONDENT: ADV S PHAFANE KC