

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
9/2020**

**C OF A (CIV) NO.:**

**CIV/APN/269/2018**

In the matter between:

**MBELE HOOHLO  
APPELLANT**

**AND**

**LESOTHO ELECTRICITY COMPANY  
(PTY) LTD  
RESPONDENT**

**CORAM:** DR MOSITO P  
DAMASEB AJA  
DR VAN DER WESTHUIZEN AJA

**HEARD:** 14 OCTOBER 2020

**DELIVERED:** 30 OCTOBER 2020

**SUMMARY**

*Whether s 6 of the High Court Act 5 of 1978 grants the High Court jurisdiction in respect of labour-related disputes when*

*regard is had to the jurisdiction provisions of the Labour Code Order 1992 (as amended).*

*Held that the Labour Code Order ousts the jurisdiction of the High Court in respect of labour-related disputes.*

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## **JUDGEMENT**

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### **P T DAMASEB AJA**

#### **Introduction**

[1] The appellant (Mr Hoohlo) and the respondent (LEC) are engaged in a war of attrition in the courts and tribunals of the Kingdom. The present is one of two appeals<sup>1</sup> pending between the parties before this court in two separate appeals during this session where the parties are fighting over the same subject matter. At issue are Mr Hoohlo's unpaid pension benefits and LEC's refusal to pay him as will soon become apparent.

[2] Mr. Hoohlo is the former managing director of LEC. His contract of employment terminated by effluxion of time on 25 November 2017 and it was not renewed.

[3] The employment relationship between the parties ended while Mr Hoohlo was on suspension following:

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<sup>1</sup> The other is Civ 05 of 2020.

- (a) criminal charges laid by LEC against him;
- (b) a civil suit instituted against him for the recovery of moneys he allegedly defrauded LEC of (and against which he brought a counterclaim); and
- (c) proceedings pending at the labour dispute resolution process under ss 226 and 227 of the Labour Code Order 1992 (the Labour 1992 Code)-Mr Hoohlo having instituted a complaint of unfair labour practice against LEC.

[4] Whilst the above matters remained pending, Mr Hoohlo approached the High Court on notice of motion and on urgent basis, seeking an order for the payment of his terminal benefits against LEC.

[5] Mr Hoohlo brought those proceedings purportedly in terms of s 6 of the High Court Act 5 of 1978 (the High Court Act) which states:

*"No civil cause or action within the jurisdiction of a subordinate court shall be*

*instituted in or removed into the High Court save by a Judge of the High Court acting on his own motion; or with leave of a Judge upon application made to him in chambers and after notice to the other party." (My underlining for emphasis)*

## **The pleadings**

[6] In the notice of motion Mr Hoohlo, amongst others, sought an order directing LEC to release payment of his terminal benefits with immediate effect, with costs.

## **The High Court**

[7] The matter came before Banyana AJA. The learned judge *quo* held that the High Court lacked jurisdiction as the matter fell within the purview of the 1992 Labour Code. That conclusion by the High Court is not challenged on appeal.

[8] As will become clearer below, under the 1992 Labour Code, the Labour Court has exclusive jurisdiction to resolve labour disputes, including the application or interpretation of any provision of the Code or any other labour law as well as all matters arising out of an employment relationship between an employer and an employee and that all disputes of rights pertaining to '*a breach of contract of employment ...a dispute*

*concerning the underpayment of any moneys due under the provisions of this Act shall be resolved by arbitration.'*<sup>2</sup>

[9] Arbitration envisaged by s 226(2) of the 1992 Labour Code is performed by the Directorate of Dispute Prevention and Resolution (DDPR) in terms of s 227 of the Code.

[10] Banyana AJA also dealt with what Mr. Rasekoai for Mr Hoohlo on appeal insists is the real issue that the court *a quo* was called upon to decide: To grant Mr. Hoohlo leave to approach the High Court in terms of s 6 of the High Court Act.

[11] The court *a quo* held that it was improper for Mr Hoohlo to bring proceedings under s 6 in the manner he did. He ought first to have obtained leave before launching the proceedings in the High Court under s 6. In this case, he made a direct approach to the High Court and only sought leave while the matter was already pending in the High Court.

## **The issue**

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<sup>2</sup> See ss 226(1)(a) and 226 (2)(b)(ii) and 226 (2)(c).

[12] The issue that falls for decision in the appeal is whether in relation to the dispute between Mr Hoohlo and LEC, the High Court has jurisdiction in terms of s 6 of the High Court Act.

[13] On appeal Mr Rasekoai accepts that the dispute is subject to the adjudication machinery created by the 1992 Labour Code. Counsel maintains, however, that the High Court is not divested of jurisdiction thereby and that its jurisdiction is coterminous with the adjudication machinery created by the 1992 Labour Code.

[14] Advocate Phafane KC's contention on behalf of LEC is the direct opposite. He maintains that through the 1992 Labour Code the legislature ousted the jurisdiction of the High Court in respect of labour-related disputes. In the event that it is held that the High Court does indeed have jurisdiction, counsel submitted that the High Court was correct to find, as it did, that Mr Hoohlo should first have obtained leave from the High Court before bringing proceedings in the High Court.

[15] Mr Hoohlo approached the High Court in the manner he did primarily because he feels he will obtain speedier redress in

that court as the dispute resolution mechanism under the 1992 Labour Code is largely dysfunctional.

### **Discussion**

[16] Leave to approach the High Court under s 6 of the High Court Act has three predicates:

- (a) That the Labour Court and the adjudication machinery under the 1992 Labour Code constitute 'a subordinate court' and that the dispute falls within the competence of that machinery;
- (b) The High Court, being a court of unlimited general jurisdiction in terms of s 2(1)(a) of the High Court Act, retains residual jurisdiction to entertain the dispute in question;
- (c) There are exceptional circumstances why the High Court must entertain the matter although it is governed by the 1992 Labour Code.

[17] Section 118 of the Lesotho Constitution (the Constitution) states:

*“1. The judicial power shall be vested in the courts of Lesotho which shall consist of--*

- a. a Court of Appeal;*
- b. a High Court;*
- c. Subordinate Courts and Courts-martial;*
- d. such tribunals exercising a judicial function as may be established by Parliament.”*

[18] It becomes immediately apparent that the Constitution draws a distinction between ‘subordinate courts’ on the one hand, and ‘tribunals exercising a judicial function as may be established by Parliament.’

[19] Section 127 of the Constitution in turn empowers Parliament to:

*‘establish courts subordinate to the High Court, courts martial and tribunals, and any such court or tribunal shall, subject to the*



*provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by or under any law’.*

[20] During argument, the issue for decision became confined and turns on the proper interpretation of the jurisdiction provisions of the 1992 Labour Code.

[21] On appeal, counsel for LEC contended that the scheme of the 1992 Labour Code has the effect that in labour matters the jurisdiction of the High Court has been ousted and that no reliance can be placed on s 6 of the High Court Act to clothe the High Court with jurisdiction in such matters.

### **The scheme of the Labour Code Order**

#### *Pre-2000*

[22] Under the pre-2000 text of the 1992 Labour Code, s 24(1) stated:

*‘the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other Labour law are to be determined by the Labour Court.’*

Subsection (2) (a) of s 24 in turn stated:

*The Labour Court shall have power to inquire and decide the relative rights and duties of employees...in relation to any matter referred to the Court under the provisions of this Code and to award appropriate relief in case of infringement'.*

[23] Section 25 (1) (b) vested exclusive jurisdiction to the Labour Court in the following terms:

*The jurisdiction of the Labour Court is exclusive and no court shall exercise its civil jurisdiction in respect of any matter provided for under the Code ...notwithstanding section 6 of the High Court Act 1978.*

*Post-2000*

[24] The Labour Code (Amendment) Act 2000 repealed the old s 24 and replaced it with a new s 24(1) in the following terms:

*'Subject to the Constitution and section 38A, the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other labour law are to be determined by the Labour Court.'* (My emphasis).

The 2000 amendment also deleted the old s 25 and replaced it with a new s 25 in the following terms:

*'(1) The jurisdiction of the Labour Court is exclusive and no court shall exercise its civil jurisdiction in respect of any matter provided for under the Code-*

*(a) **subject to the Constitution and section 38A**; and*

*(b) notwithstanding section 6 of the High Court Act...13 of 1978.*

*(2) The Minister, the Labour Commissioner, the Director of Dispute Prevention and Resolution and an aggrieved party shall have the right to present a claim to the court as provided under the Code.'*

*(Emphasis supplied).*

[25] Section 38 established a Labour Appeal Court which, in terms of s 38(2), *'is the final court of appeal in respect of all judgments and orders made by the Labour Court'*.

[26] In terms of s 38A(1)(a) and (b), the Labour Appeal Court has exclusive jurisdiction *'to hear and determine all appeals against the final judgements and final orders of the Labour Court'* and *'to hear and determine all reviews from judgments of the Labour Court'*. (Emphasis supplied)

[27] Significantly, ss (3) of s 38A states:

*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 s 227 be heard by the Labour Appeal Court as a court of first instance.' (My underlining)*

[28] According to ss (4) of s 38A:

*'Subject to the Constitution of Lesotho, no appeal lies against any decision, judgment or order given by the Labour Appeal Court.'*

### **Case-law**

[29] In a long line of cases both before and after 2000, this court reiterated that the scheme of the 1992 Labour Code has had the effect of ousting the jurisdiction of the High Court in matters such as the present involving disputes arising out of contracts of employment.<sup>3</sup>

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<sup>3</sup> *CGM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers' Union and Others* LAC (1995-99) 79 at 79A-D; *Attorney-General v Lesotho Teachers Trade Union* LAC (1995-99) 119 at 132A-E; *Tlali v Attorney-General* LAC (2000-2004) 510 at 512D-F; *Vice-Chancellor of the national University of Lesotho and Another v Lana* LAC (2000-2004) 527 at 532A-E – 533-534A-J; *LHDA v Mohlolo* C of A (Civ) No. 7 of 2009; *Lesotho Revenue Authority and Others v Dichaba and Others* C of A (Civ) No. 21 of 2018; *Mokhali Shale v 'Mamphele Shale and Others* C of A (Civ) No. 35 of 2019.

[30] It was recognised in **CGM** *supra* that s 119 of the Constitution was not an obstacle to Parliament conferring exclusive jurisdiction on the Labour Court in terms of the 1992 Labour Code. This court has therefore consistently held that the High Court's unlimited jurisdiction under s 2(1)(a) of the High Court Act read with s 119 of the Constitution does not mean 'limitless'.<sup>4</sup>

### **The appellant's submission on exclusive jurisdiction**

[31] Mr Rasekoai for Mr Hooloh submitted that the High Court's jurisdiction to take cognisance of labour disputes is unaffected by the 1992 Labour Code. Counsel argued that the judgments of this court holding to the contrary are not correct and should be overruled in light of the 2000 amendment to the 1992 Labour Code. According to counsel, the insertion by the 2000 Amendment Act of the words 'subject to the Constitution' in s 24 of the 1992 Labour Code reinforces the interpretation that the legislature thereby restored the primacy of the High Court in respect of labour disputes. I cannot agree!

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<sup>4</sup> *Mokhali Shale v Mamphole Shale and Others* C of A (Civ) 35 of 2019.

[32] Firstly, it is a logical fallacy to suggest that in the absence of those magic words the 1992 Labour Code was not subject to the Constitution prior to 2000. Of course, it was! It is the supreme law of the Kingdom. Secondly, if indeed that was the intent, it would have been the easiest thing to remove entirely from the Code the words 'notwithstanding s 6' which this court both prior to 2000 and thereafter consistently interpreted to oust the jurisdiction of the High Court in respect of labour disputes.

[33] Parliament is presumed to know the existing body of law, including the common law, and to legislate with the full knowledge of it. As the Supreme Court of Namibia recently reiterated in *Namibian Competition Commission v Puma Energy Namibia (Pty) Ltd*:<sup>5</sup>

*Parliament is presumed to legislate with full knowledge of the common law and when it enacts legislation, relevant common law principles, including that relating to interpretation of statutes, remain in force and operate in conjunction with a new statute in the absence of a clear indication to the contrary. As Du Plessis correctly writes:*

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<sup>5</sup> SA 67/2018 (8 September 2020) para 59.

*'Legislation must, in other words, be interpreted in the light of the common law, must as far as possible be reconciled with related precepts of the common law and must be read to be capable of co-existing with the common law in pari materia.'*<sup>6</sup>

[34] The concern about a dysfunctional labour resolution mechanism is a red herring in my view. Parliament was alive to that possibility when enacting the 1992 Labour Code with its various amendments.

[35] In the first place, s 24 gives the Labour Court sufficient authority to perform an oversight function over the dispute resolution mechanism created under ss 226 and 227. Secondly, the Labour Appeal Court, which is headed by a judge of the High Court in terms of s 38A(a), has the power to do the very thing which Mr Hoohlo seeks to achieve through his reliance on s 6 of the High Court Act: Subsection (3) of s 38 empowers the Labour Appeal Court judge *'to 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.'*

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<sup>6</sup> Du Plessis *Interpretation of Statutes* at 160.

[36] Section 38(3) highlights the absurdity of the suggestion that the High Court retains residual jurisdiction in labour matters. Could Parliament have intended that two judges of the High Court, one sitting in the Labour Appeal Court and the other in the same court exercising its ordinary jurisdiction, can each have the power to intervene in the same labour dispute? Obviously not! Sight should not be lost that s 6 empowers a judge of the High Court to act *mero motu*. That makes the proposition advanced on behalf of Mr Hoohlo even more ominous because s 6 of the High Court Act is far-reaching in its scope as it empowers the High Court to act *mero motu*. It is a principle as old as the common-law that Parliament is presumed not to intent an absurd result.

[37] To hold that the Labour Court is a 'subordinate court' within the meaning of the Constitution and thus subject to the jurisdiction of the High Court in terms of s 6 would produce an even more serious anomaly and absurdity. It would mean that, besides it being subject to the review power of the Labour Appeal Court, it would also be subject to the review jurisdiction



of the High Court in terms of s 7 (1) of the High Court Act which states:

*'The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of Justice within Lesotho, and if necessary to set aside or correct the same.'* (Emphasis supplied).

[38] What becomes apparent to me from a reading of the legislative scheme created by the 1992 Labour Code is that in labour-related disputes, the legislature has ousted the jurisdiction of the High Court.

[39] That approach is consistent with sound public policy considerations. As an ominous reminder, Phafane KC pointed out the serious consequences for the Kingdom's already overstretched administration of justice if the appellant's contention were to prevail. The first is the unwholesome practice of forum shopping. The forum shopping concern and the potential resultant chaos is heightened by the fact that, on Mr Rasekoai's interpretation, a litigant would have a choice to seek remedial intervention from either a judge of the High

Court exercising that court's ordinary jurisdiction or review power, or from a judge of the same court exercising labour jurisdiction in the Labour Appeal Court. The proposition only needs to be put to be rejected!

[40] Secondly, the High Court will be inundated with applications under s 6 on the basis, as suggested here by the appellant, that the labour dispute resolution system has become dysfunctional.

[41] Thirdly, it has implications for other areas of law where the legislature has ousted the jurisdiction of the High Court such as land. The Land Act 2010 creates a Land Court as a division of the High Court with exclusive jurisdiction to deal with land disputes in Lesotho. Since that court is not a court of unlimited general jurisdiction like the High Court, it would mean that disputes pending before it can be removed to the High Court in terms of s 6 of the High Court Act. A more chaotic state of affairs is hardly imaginable.

[42] I see no reason to overrule the long line of cases in which this court has held that the High Court has no jurisdiction even under s 6 of the High Court Act to entertain labour disputes.

[43] Given that conclusion, it becomes unnecessary to consider if the High Court was correct in holding that Mr Hoohlo ought first to have obtained leave before he launched the proceedings in the High Court.

### **Costs**

[44] The High Court granted a punitive costs order against Mr. Hoohlo. Courts should be loath to grant such orders unless there are very good reasons to do so.

[45] As I mentioned at the outset of this judgment, the protagonists are engaged in protracted litigation over what is essentially a labour dispute.

[46] In labour disputes, the practice is not to order costs unless a party had been frivolous and vexatious in either prosecuting or defending a matter. Mr. Hoohlo is pursuing payment of benefits to which he is otherwise entitled, but for the claims of

fraudulent conduct which his employer has brought as a set off against his accrued benefits. In that sense, he is not pursuing a frivolous claim.

[47] It also became apparent during argument that the 2000 amendment to the 1992 Labour Code made the argument relied on by Mr Hoohlo's counsel not entirely without merit.

[48] This is therefore not a proper case for making a costs order, let alone a punitive one against a litigant.

### **Order**

[49] I propose the following order:

(a) The judgement and order of the High Court is upheld in part only and replaced with the following order:

*'The application is dismissed and there is no order as to costs'.*

(b) There is no order as to costs in the appeal.



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**PT DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**DR K E MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:



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

**For the Appellant:** Mr M.S. Rasekoai

**For the Respondent:** Adv S. Phafane KC