

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO 19/2020

In the matter between:

TSE'PO MOKOTJO

APPELLANT

AND

**MILES KENNEDY
RESPONDENT**

1ST

CHAIRMAN OF THE BOARD

MOTHAE DIAMONDS (PTY) LTD

2ND RESPONDENT

THE BOARD OF DIRECTORS,

MOTHAE DIAMONDS (PTY) LTD

3RD RESPONDENT

MOTHAE DIAMONDS (PTY) LTD

4TH RESPONDENT

CORAM: P.T DAMASEB, AJA
M. CHINHENGO, AJA
N.T MTSHIYA, AJA

HEARD: 20 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

Jurisdiction of the High Court in Labour matters; Labour court has exclusive jurisdiction in labour matters- High Court correctly found that it lacked jurisdiction.

JUDGMENT

N.T MTSHIYA

CONDONATION

[1] At the commencement of the hearing of this appeal parties noted that there had been an application for condonation for late filing of the appellants hard copies of heads of argument. No arguments arose on the issue and the parties agreed that the court should proceed to deal with the merits of the appeal.

INTRODUCTION

[2] The appellant appeals against the judgement of Justice Moahloli handed down in the High Court on 12 June 2020. The Honourable Judge dismissed the appellant's application on the basis that the High Court lacked jurisdiction to deal with the matter.

FACTUAL BACKGROUND

[3] The appellant was in the employ of Mothae Diamonds (Pty) Ltd as a Support Service Manager since September 2018. In July 2019, there were changes made to his job description through the removal of some of his co-responsibilities. The appellant then lodged grievances with the Board of Directors of the 2nd respondent against his supervisor. The chairman of the 2nd respondent's Board of Directors wrote to the appellant directing him to abandon his grievances, failing which he would stand dismissed for incompatibility. The appellant did not heed the directive and was, on 23 October 2019, dismissed for incompatibility.

[4] On 12 December 2019 the appellant approached the High Court on notice of motion seeking, amongst other reliefs, reinstatement. The appellant prayed for a review of the termination of his employment and the setting aside of same on the basis that it was wrongful, irregular, illegal and unlawful. In the alternative the appellant sought compensation in the sum of M27.216.000.00.

The appellant also placed a similar claim before the Directorate on Dispute Prevention and Resolution (DDPR) at Maputsoe.

[5] As already stated, on 12 June 2020, the High Court dismissed the appellants application stating:

“After careful consideration of the arguments presented and the authorities, the court comes to the conclusion that the points in limine relating to lack of jurisdiction and the inappropriateness of review proceedings are upheld. As a result, the application is dismissed with costs”

[6] On 30 June 2020 the appellant appealed the decision of the High Court. The grounds of appeal are summarized in the appellant’s heads of argument as follows:

“2.2 First, the court a quo misdirected itself to hold that it did not have jurisdiction to entertain the matter.

2.3 Second, the court a quo misdirected itself to hold that the judicial review proceedings were inappropriate”.

I want to quickly point out that my view is that, once the court had ruled that it had no jurisdiction over the matter it was not necessary to make any further pronouncements. It should be left to the court with jurisdiction to make further rulings on the matter.

ISSUES FOR DETERMINATION

[7] In the appellant's heads of argument, the issues are summarized as follows:

1. Whether the court a quo was correct in holding as it did that it lacked jurisdiction to determine the matter.
2. Whether the 2nd respondent, a mining company, is amenable to judicial review jurisdiction of the High Court, and if so, whether the review proceedings were appropriate in the present case.

1. I shall adopt and deal with the issues as summarized, but
2. still adhering to the view that the second ground of appeal should be an issue to be decided by the court that has jurisdiction over the labour matter.

APPELLANTS CASE

[8] In the main, the appellant's case is summarized in the heads of argument as follows:

"5.2 The High Court has jurisdiction to entertain and determine judicial review proceedings, particularly as pleaded by the applicant. Neither the Labour Court, the Labour Appeal Court nor the Directorate on Dispute Prevention and Resolution (DDPR), within the terms of the Labour Code 1992 as amended have the authority to determine and dispose of the cause of action as pleaded by the applicant.

5.3 Mothae, notwithstanding that it is a private company, is amenable to the judicial review jurisdiction of the High Court and consequently the judicial proceedings were appropriate. The court a quo erred and misdirected itself in holding otherwise".

[9] In addition to the above, the appellant also submitted that the legislature had not comprehensively dealt with the issue of

whether or not the Labour Court alone had all the necessary powers to deal with labour related matters and to the extent of ousting the inherent jurisdiction of the High Court.

RESPONDENTS' CASE

[10] On the issue of jurisdiction, upon citing a number of case authorities, mainly from this Court, the respondents, in part, argued that:

“9.....the court a quo correctly found that the High Court lacked jurisdiction.

10. It is the appellant’s own contention that the very cause that brought about the need for him to have to come to Court was because he was dismissed by Mothae. At the very least, his complaint arises out of a “**trade dispute**” or a “**Labour [-related] dispute**” as dealt with in the most recent Lesotho Appeal Court judgments cited below.

11. That the High Court lacks jurisdiction in dismissal-type disputes is NOT res nova.”

THE LAW

[11] The High Court, which was approached by the appellant in casu, derives its authority from section 119 (1) of the Constitution of Lesotho. That section provides as follows:

“There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may

be conferred on it by this Constitution or by or under any other law”.

The Constitution also informs on where judicial power in the Kingdom lies. The Labour Court, which is conferred with judicial power, is created under section 118 (1) of the constitution where it is provided as follows:

“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 Court-martial;
- d. such tribunals exercising a judicial function as may be established by Parliament.”

Under 1 (d) above, the legislature deemed it necessary to establish a specialist tribunal in the form of the Labour Court to deal with all labour matters and hence the exclusive jurisdiction that is granted to that court.

In C OF A (CIV) NO.10/2002: Vice Chancellor & Another Vs Professor Alan Femi Lana, it was noted that:

“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”.

[12] In order to clearly spell out the exclusive jurisdiction of the Labour Court, s 24 (1) of the Labour Code (Amendment) Act

2000 repealed the old s 24 and replaced it with a new s 24(1) which now provides as follows:

“7. 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.”

Furthermore section 25 of the Labour Code (Amendment) Act, states that:

“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.” (My own underlining for emphasis)

The High Court cannot ignore the above provisions of the law and hence its decision to decline jurisdiction in labour matters.

[13] Sections 66 and 68 of the Labour Code Order, 1992 deal with dismissals of employees and the definition of “dismissal” respectively. Section 68 defines dismissal as follows:

“For the purposes of section 66 “dismissal” shall include-
a. Termination of employment on the initiative of the employer;
b.
c.”

In casu the appellant’s employment was terminated for incompatibility at the initiative of the employer.

DETERMINATION ON THE ISSUE OF JURISDICTION

[14] This court has, in a number of similar cases brought before it, already decided that the Labour Court has exclusive jurisdiction in labour matters. The court has also ruled that the jurisdiction of the High Court in labour disputes is ousted.

[15] In view of the continued arguments relating to the jurisdiction of the Labour Court in labour disputes and also in the hope that finality maybe reached, I find myself compelled to quote extensively from **Mbele Hoohlo Vs Lesotho Electricity Company C OF A (CIV) NO: 9/2020**, where this court, per Damaseb, AJA, said:

“[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". (My own underlining for emphasis).

[16] In *Hoohlo, supra*, the court, relying on **CGM Industrial (Pty) Limited Vs Lesotho Clothing And Allied Workers Union & Others C OF A (CIV) 10/99**, went further to say:

"[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'".

To me, the above pronouncements by this court point to the direction that this court should take in this case. There is nothing new raised in this appeal that dictates a need for departure from the past decisions of this court on the issue. To that end I find no merit in the appeal.

[17] Given the definition of dismissal under section 68 of the Labour Code Order, 1992, there can be no doubt, in my view, that this is a labour matter or dispute. The appellant is merely

fighting for reinstatement. It is not disputed that the appellant's contract of employment was terminated for incompatibility. Furthermore, in the contract of employment dated 1 September 2018 the appellant agreed that the "the terms and conditions of the aforesaid contract are regulated by the Labour Code as amended, Mothae Diamonds Human Resources Policies and Procedures manual and or any applicable Labour Laws....the aforesaid contract of employment may be terminated under the following circumstances ... for operational reasons...incapacity/incompatibility".

Added to the above, in submissions, the appellant states:

"the applicant stated that the reason for his being dismissed is because he had lodged a complaint against the General Manager of Mothae and was insisting on the grievance being determined by the Board. He went on as follows: In terms of section 66(3) of the Labour Code 1992, the Applicant could not legally be dismissed for lodging and filing a grievance against the General Manager, Mr Scheepers, to the Board of Director of the 4th Respondent, as the filing of such grievance, in peremptory terms, shall not in law constitute a valid reason for the termination of Applicant's employment."

The above is a clear admission that in bringing his grievances to the fore, the appellant is or was relying on the country's labour laws, which stand to be interpreted by the Labour Court.

[18] I am not persuaded to accept that the Labour Court, as currently constituted, has no capacity to set aside the dismissal in the event that it finds that labour law was violated. The reason for dismissal, which the Labour Court, in my view can adequately address, is given i.e incompatibility. I also hold the view that the Labour Court, a special tribunal with the necessary expertise, has the capacity to rule on whether or not it has jurisdiction to deal with a matter before it or whether or not, in the absence of jurisdiction, it should refer the matter either to the High Court or to the Labour Appeal Court.

In **C OF A (CIV) NO.10/2002: Vice Chancellor & Another Vs Professor Alan Femi Lana**, it was noted that:

“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”.

The above is in line with the court’s sentiments expressed in **Gcaba v Minister for Safety and Security [2009] ZACC 26; 2010 (1) SA 238 (CC)**. At paragraph 56, in that case, the court said: *“The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA).*

Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.”

[19] With respect to the ousting of the jurisdiction of the High Court, I agree, as submitted, that:

“The inherent jurisdiction of the High Court can only be excluded by clear statutory wording and that exclusion of the inherent jurisdiction will not be inferred where the statute is silent. This is confirmed by section 119(3) and 124 (3) of the Constitution of Lesotho”.

In *De Wet v Deetlefs* 1928 AD 286, at page 290, SOLOMON CJ said:

“It is a well-recognized rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature.”

Also in *R v Padsha* **1923 AD281**, at page **304**, **INNES CJ** said:

“It is competent for Parliament to oust the jurisdiction of the courts of law if it considers such a course advisable in the public interest. But where it takes away the right of aggrieved party to apply to the only authority which can investigate, and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is prima facie their duty, namely from investigating alleged injustice or illegality.”

However, my response to the above, is that sections 24 and 25 of the Labour Code Order, as amended, adequately address the

concerns spelt out in the above cited case authorities. The legislature has clearly expressed its intentions to give exclusive jurisdiction in labour matters to only one institution, namely the Labour Court. In the exercise of its judicial functions, the Labour Court is assisted by the Labour Appeal Court which has the final say in labour matters. In view of the clearly expressed intentions of the legislature in the sections of the Labour Code Order referred to above, the question of concurrent jurisdiction does not arise at all. It is clear that no other court is under law permitted to exercise civil jurisdiction in labour matters.

I take note of the fact that the appellant is already correctly before the DDPR with his claim.

Finally, my finding therefore, is that, since this is a labour dispute, the High Court had no jurisdiction. Accordingly, the decision of the High Court, declining jurisdiction, cannot be faulted.

I have already, under paragraph 6, taken the position that a finding that the High Court had no jurisdiction, meant the end of the matter. Accordingly, the application in that case fell to be dismissed under the issue of jurisdiction. The court was

therefore disabled from making any further rulings on the matter.

[20] In the result, I make the following order:

The appeal is dismissed with costs



N.T MTSHIYA
ACTING JUSTICE OF APPEAL

I agree



P.T DAMASEB
ACTING JUSTICE OF APPEAL

I agree



M.CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT:

S.T. MAQAKACHANE

FOR RESPONDENTS:

ADV. HHT WOKER