

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) No. 8/2021
CONST CASE NO.19/2011**

In the matter of:

HOME AFFAIRS EX WORKERS	1ST APPELLANT
LIMPHO SISINYI	2ND APPELLANT
MATSALI LINTSA APPELLANT	3RD
MOLEBOHENG RAMABELE	4TH APPELLANT
NTS'UOA MOHALE	5TH APPELLANT
MOLIEHI MOTLOMOTLO	6TH APPELLANT
LIMPHO THEKO & 172 OTHERS	7TH APPELLANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF HOME AFFAIRS (MR TUMELO RABOLETSI)	1ST RESPONDENT
THE MINISTER OF LABOUR AND EMPLOYMENT (HON. MIN. KEKETSO RANTS'O	2ND RESPONDENT
THE MINISTER OF FINANCE (HON. MIN. THABO SOFONEA)	3RD RESPONDENT
THE MINISTER OF PUBLIC SERVICE (HON. MIN. SEMANO SEKATLE)	4TH RESPONDENT
THE ATTORNEY GENERAL	5TH RESPONDENT

CORAM: DR K.E. MOSITO P,
P.T.DAMASEB AJA

DR P.MUSONDA AJA
H.M. CHINHENGO AJA
DR J. VAN DER WESTHUIZEN AJA

HEARD: 12 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

High Court- labour and constitutional jurisdiction- claim for renewal of fixed term contracts or alternatively, declarator that failure to renew contracts violates rights to property in the form of salary - fixed term contracts having expired automatically - clauses in contracts stipulating that resolution of disputes thereof to be made in accordance with the Labour Code - Appeal dismissed on account of jurisdiction.

JUDGMENT

K.E. MOSITO P

Background and litigation history

[1] The appellants appeal from a decision of the High Court, *inter alia*, declining jurisdiction to hear and determine their claims for renewal and non-renewal of their contracts of employment with the government of Lesotho. On 1 December, 2020, the appellants (ex-employees) brought a constitutional motion in terms of Rule 8 (22) of the High Court Rules 1980 alleging that it was urgent in that, failure by the Principal Secretary to renew their contracts constitutes a violation of their “fundamental right (sic) in the property i.e. salary/terminal benefits which (sic) an indivisible right to livelihood”. They also alleged that the failure to renew the contracts violated their legitimate expectation to be hired on

permanent terms and also constitutes an unfair dismissal. Their prayers were framed as follows:

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(a) An order dispensing with the Rules of Court relating to service and time frames in relation thereto on account of urgency hereof, and/or;

(b) This Honourable Court to issue directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure as to promote expeditious and cheap hearing of the matter.

(c) A declarator that the Respondents' failure to renew Applicants' employment contract in the facts and circumstances of this case amounts to "unfair dismissal."

(d) That all Applicants be "instated" to their erstwhile employment positions, on the same and/or less favourable employment terms, forthwith.

(e) That the Respondents be "interdicted" from employing any person/s to the erstwhile positions of the Applicants And/or that the persons so employed to the erstwhile positions of the Applicants be substituted with the Applicants.

(f) A declaratory that section 5 of the Government Proceedings and Contracts Act No.4 of 1965 is unconstitutional for violation and/or imposing a threat of violation to the private judgment creditor's right to "appropriate and effective remedy "to protect and enforce judgment sounding in money.

(g) That "structural interdict" be issued aimed at the Courts' exercise of supervisory jurisdiction following the issuance of the order sought herein in order to monitor and ensure compliance herewith whether by: parties' reporting back to Court on extent of compliance, arrest and/or imprisonment, attachment/execution of property and/or in any manner whatsoever until remedies to be granted herein are fulfilled.

ALTERNATIVELY:

(h) That Applicants be paid Constitutional Damages (all salaries plus benefits) Applicants were to be entitled to the period of three (3) years, but for the Respondents' unlawful conduct.

ALTERNATIVELY:

7(i) That Respondents be directed to pay Applicants' terminal benefits at the gratuity and not severance pay rate inclusive of the 3% and 5% increments paid to Public Servants in 2017 and 2020 plus Mountain or Hardship Allowance.(j) That Applicants be granted further and/or alternative "appropriate

and effective relief”.(k)That Respondents should jointly and/or severally pay costs of this Application.

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That prayers 1 (a), (b) and (e) operate with immediate effect as interim reliefs.

[2] The application was opposed by the respondents. The matter was heard on 9 December, 2020. Judgment was handed down on 11 February, 2021. The application was dismissed with costs. In disposing of the matter, the court pointed out that:

[24] This application ought not to have been brought before this Court, let alone on an urgent basis. It is without merit and falls to be dismissed as we hereby do. The applicants will have to pay their own costs.

[3] Dissatisfied with the decision of the High Court, the appellants approached this court on appeal. Stripped to its bare minimum, the appellant’s case on appeal is that the court a quo erred in declining jurisdiction in the matter. We shall revert to this matter later on in this judgment.

The Parties

[4] The appellants describe themselves as “a group of persons who are ex-employees of the government of Lesotho under the Ministry of Home Affairs”. They were employed on fixed-term contracts of three years in October/November, 2017. The said contracts automatically expired in September/November 2020. The respondents are all government functionaries. They have been cited in their respective capacities as such.

Factual Matrix

[5] On 24 October, 2020, their attorneys wrote to the Principal Secretary of the Ministry of Home Affairs to say:

“(2)... Clients informed us that the fixed terms (sic) had come and/would come to an end on 30th September and 1st November, 2020. That their contracts were and/or are not renewed. That they had a legitimate expectation to have their contracts renewed since:(i)their respective contract (sic) as duly supplemented and complemented by statutes and common law give a possibility of renewal;(ii)they performed well, they have experience and they are duly qualified for the positions they have been holding;(iii)the legitimate acting period and/or the probation period had long expired, hence they ought to have been employed by the government of Lesotho on permanent basis.

(3)As a corollary, the government’s failure to employ them by failure to renew their contracts and/or otherwise amounted in law to an unfair dismissal. Consequently, they are entitled to be employed on permanent basis on old terms and/or less favourable terms. And/or they be entitled to be reinstated to their initial positions. Alternatively, they are entitled to their terminal benefits calculable at gratuity and not the severance rate since there (sic) are public servants.”

[6] On 1 December, 2020, these “ex-employees” brought a constitutional motion in the High Court exercising constitutional jurisdiction. They alleged that the case was urgent in that, failure by the Principal Secretary to renew their contracts constitutes a violation of their “fundamental right (sic) in the property i.e. salary/terminal benefits which (sic) an indivisible right to livelihood”. They also alleged that the failure to renew their contracts violated their legitimate expectation to be hired on permanent terms and also constitutes an unfair dismissal.

The issue

[5] There are a number of grounds of appeal relied on in this appeal. However, the key to the consideration of all aspects of

the appeal is the issue of jurisdiction. Thus, in this appeal, the crisp question for decision is whether the High Court erred in declining jurisdiction in the matter. Once it is found that the court was correct in declining jurisdiction that should be the end of the appeal.

The law

[6] As Smalberger, JA pointed out in the *Chief Justice and Others v The Law Society of Lesotho*¹ that, in terms of section 119 (1) of the Constitution of Lesotho, the High Court has unlimited original jurisdiction to hear and determine any civil and criminal proceedings (what may be termed its “ordinary jurisdiction”). In addition it has “such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.” In this respect section 22 (2) of the Constitution confers original jurisdiction on the High Court to hear and determine any application made by any person who alleges a contravention, or a likely contravention in relation to him, of the provisions of sections 4 to 21 inclusive of the Constitution. This, the learned justice of Appeal, preferred to refer to as its “constitutional jurisdiction”. The Court went on to point out that, while it is correct to say that Lesotho has no specially designated Constitutional Court, it appears to be generally accepted that when the High Court exercises its constitutional jurisdiction it sits as a Constitutional Court.²

¹ the Chief Justice and Others v The Law Society of Lesotho C OF A (CIV) NO. 59/2011 para

² Mohau Makamane v Ministry of Communications Science and Technology C of A (CIV) No.27/2011 (unreported) para 1.

[7] Section 24(1) of the Labour Code (Amendment) Act³ 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.’

[8] In addition, section 25 of the Labour Code (Amendment) Act, provide 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.

[9] It follows therefore that, it is the Labour Court which has the jurisdiction to hear labour matters. Furthermore, section 24 gives the Labour Court sufficient authority to perform an oversight function over the dispute resolution mechanism created under sections 226 and 227 of the *Labour Code (Amendment) Act*.

Consideration of the appeal

[10] The question for decision in this appeal, is whether the High Court exercising constitutional jurisdiction, was obliged to assume jurisdiction in the matter before it. We have come to the conclusion, for the reasons given below, that the appeal

³ Labour Code (Amendment) Act 2000.

should fail. The starting point for the enquiry should have been the proper characterisation of the dispute. Properly characterised, this was a labour matter concerned with the renewal or non-renewal of the contracts of employment of the appellants. The proper forum for their case was the Labour Court. Should a constitutional matter arise in the Labour Court proceedings, it would have been within their powers to request that such a matter be referred to the High Court for determination.

[12] The second issue is whether the High Court has concurrent jurisdiction with the Labour Court in respect of labour matters. In light of the discussions in the previous section, the answer is bound to be in the negative. The reason for such an answer is that, unless otherwise provided, the Labour Court has exclusive jurisdiction over all matters contained in the Labour Code.

[13] In *Hoohlo v Lesotho Electricity Company*,⁴ this Court (per Damaseb AJA) did, after considering both the pre-2000 and post-2000 labour legislative framework as well as judicial authorities, remark that:

[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.

[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

⁴ *Hoohlo v Lesotho Electricity Company C of A (CIV) 09/20*.

High Court Act read with s 119 of the Constitution does not mean 'limitless'.

[14] The effect of section 25(1) of the Labour Code (Amendment) Act is therefore to divest the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Code provides otherwise. The grounds of appeal must fall off because they are all based on the contention either that the High Court had jurisdiction or that it ought to have assumed jurisdiction.

Disposal

[15] As appears above, when the matter came before the High Court, it declined to assume jurisdiction. It did so principally on the basis that, this is a labour matter and it fell to be determined by the Labour Court. It went on to hold that:

The matter was, therefore, wrongly enrolled in this Court to exercise its constitutional jurisdiction. For this reason alone, the application falls to be dismissed: Chief Justice and Others v. Law Society of Lesotho LAC (2011-2012) 255.

[16] The High Court having held that, the matter was wrongly enrolled in the High Court, it was not proper for it to proceed to determine the merits. The application fell to be dismissed on account of jurisdiction. This appeal should fail.

Order

[17] In the result, the following order is made:

- (a) The appeal is dismissed with costs.



DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



P. T. DAMASED
ACTING JUSTICE OF APPEAL

I agree:



DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:



M.H.CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



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

FOR THE APPELLANTS: ADV. F. SEHAPI

FOR THE ACCUSED: ADV M. SEKATI