

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

C OF A (CIV) 43B/2021

In the matter between:

TSOKOLO FRANZ KOMPI	1ST APPELLANT
MPHO SILVIA MOHLOAI	2ND
APPELLANT	
MAKHAUHELO SUZAN LEISANYANE	3RD
APPELLANT	
MABATLOKOA LETSATSI	4TH
APPELLANT	
MAPOSSA POSSA	5TH
APPELLANT	
CHOBOKOANE SEHLOMENG	6TH
APPELLANT	
MATHAPELO LEBINA	7TH
APPELLANT	
MAKORI POSHOLI	8TH
APPELLANT	
MATHAPELO LEFENYA	9TH
APPELLANT	
MATHSETSO RAMORUTI	10TH
APPELLANT	
PASEKA MOAHLOLI	11TH
APPELLANT	
MAMPHO MOEKO	12TH
APPELLANT	

MOTHETHI SEHLAHLA **13TH**
APPELLANT

and

GOVERNMENT OF THE KINGDOM OF LESOTHO **1ST**
RESPONDENT

MINISTRY OF FINANCE **2ND**
RESPONDENT

P.S. MINISTRY OF FINANCE **3RD**
RESPONDENT

P.S. MINISTRY OF SOCIAL DEVELOPMENT **4TH**
RESPONDENT

MINISTRY OF SOCIAL DEVELOPMENT **5TH**
RESPONDENT

PUBLIC SERVICE COMMISSION **6TH**
RESPONDENT

MINISTRY OF PUBLIC SERVICE **7TH**
RESPONDENT

THE ATTORNEY GENERAL **8TH**
RESPONDENT

CORAM: KE MOSITO P
PT DAMASEB AJA
MH CHINHENGO AJA

HEARD: 19 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY:

The appellants who were appointed on contract in the Lesotho public service in terms of a written contract agreed to refer any dispute arising from the implementation or execution of the employment contract to binding arbitration in terms of the provisions of the Public Service Act 2005 as amended. When the Crown determined that the contracts had terminated, they approached the High Court to seek declaratory and review relief instead of asking the court under s 4 of the Arbitration Act 12 of 1980

to not bind them to the arbitration agreement. The High Court declined jurisdiction because the appellants were bound by the agreement to refer the dispute to arbitration. Appeal against the High Court's judgment dismissed, with costs.

JUDGMENT

PT DAMASEB, AJA:

Introduction

[1] The issue to be decided in this appeal is whether the High Court was correct to decline jurisdiction when approached by the appellants (applicants *a quo*) for public law remedies of a declarator and review. The applicants were appointed as public servants on contract and had, in writing, agreed with the Government of Lesotho (GoL), to refer to 'binding arbitration' disputes arising from the interpretation or execution of their contracts, in the event of disputes with the GoL not being amicably resolved.

[2] In *PS Ministry of Labour and Employment and others v Russel*¹ this court authoritatively laid down that a public servant who has a grievance at the workplace must exhaust internal remedies provided for under the Public Service Act 2005 (PSA 2005) as amended. In *Russel*, after discussing the legislative scheme governing the public service, we said at para [23]:

'Thus, if an employee in the public service is dissatisfied with the outcome of a disciplinary process or entertains a grievance, he or she

¹ C of A (CIV) 27/2021 (14 May 2021).

must appeal to the Tribunal. A party wishing to challenge the finding of the Tribunal must approach the Labour Court. Under the Public Service Act 2005 (as amended) the legislature has not granted the High Court jurisdiction over such a dispute'

[3] Clause 13 of the contracts signed by the applicants' states:

'It is specifically recorded that any claim or dispute relating to the interpretation or execution of this Agreement which cannot be settled amicably shall be settled by binding arbitration according to the provisions of the Public Service Act 2005 as amended'.

Common cause facts

[4] The appeal falls to be determined on undisputed or common cause facts. The issue to be decided is strictly one of law and it is unnecessary to traverse the facts in any detail. I will sketch only a brief factual background to set the stage for the discussion of the real dispute between the parties.

[5] The applicants were all appointed on contract in the Ministry of Finance as Pension Officers. Contract appointments in the Lesotho public service are permitted by s 7(1)(b) of the PSA 2005.

[6] According to the definitions section in the PSA 2005, a public officer is accorded the meaning assigned to it in the Constitution of Lesotho. In terms s 154 of the Constitution -

"public officer" means a person holding or acting in any public office'.

[7] Upon their appointment, therefore, the applicants became public servants and are covered by the rule in *Russet*.

[8] The applicants were appointed on two-year contracts which were renewed from time to time. At some stage, there arose a dispute about the extension of the contracts and they approached the High Court and obtained a court order extending the contracts for 3 years from July/August 2018 until July/August 2021.

[9] During 2021, a decision was taken by the Cabinet of the GoL to transfer the Pension Unit to the Ministry of Social Development. In addition to the applicants who were contract employees, there were also permanent employees in the Pension Unit who were to be transferred from the Ministry of Finance to the Ministry of Social Development.

[10] In August 2021, the applicants were handed letters by the 3rd respondent, dated 12 July 2021, reminding them that their contracts were coming to an end and also informing them that they would be put on new contracts from 01-31 August 2021, pending the finalisation of the transfer of the Pensions Unit. Towards the end of August 2021, the applicants were asked to complete an application form to be considered for permanent appointment in the public service.

[11] Although each applicant received an individual letter, the content of the letters was generic and each stated:

'The above subject matter refers.

You will recall that your contract is coming to an end on . . . as per CIV/APN/12/2019 dated 25/01/2018. To that effect, you will be engaged on another contract from . . . up to 31/08/2021, pending finalization of the OAP transfer from the Ministry of Finance to Ministry of Social Development.'

[12] The letters purported to unilaterally engage the applicants on new contracts without them consenting to the terms and conditions thereof. In the founding affidavit deposed to by one of their number, the applicants assert that the 3rd respondent could not in law unilaterally and without their participation, knowledge and consent have engaged them on another contract, and thus the purported contracts are null and void.

[13] The applicants refused to complete the application form. Their attitude was that because of the Cabinet decision transferring the Pension Unit and the employees in it (both permanent and contract) to the Ministry of Social Development, their contracts were extended *ex lege* for another term of two years. They therefore did not need to complete the application form.

[14] The two principal secretaries of Finance and Social Development did not agree. Their stance was that the contracts had terminated by effluxion of time and that since the applicants opted not to fill in the application forms for consideration for permanent appointment, they had lost the right to report for

work. Instructions were given by the principal secretaries to have them denied physical access to government offices.

[15] On 1 September 2021, the applicants were refused entry to their respective offices at the Ministry of Finance, as well as at the Ministry of Social Development. According to the applicants, they were entitled to carry on with their duties, responsibilities, and functions as Assistant Pension Accountants and Pension Accountants under the 'ex lege' renewed contracts.

[16] Aggrieved, the applicants approached the High Court seeking a declarator and a review and setting aside of the GoL decisions. They asked the court to declare:

- a. That they were entitled to discharge and perform their functions, duties, and responsibilities in the positions they held, so as to fulfil their dignity, self-worth and to earn their salaries. That they had clear non-material rights associated with the performance of their duties, as well as contractual rights under the renewed contracts, and these rights were being wrongfully and unlawfully violated by the decision and conduct of the GoL officials.
- b. That the non-material rights associated with the performance of their functions and duties in the positions they held, could not be compensated by any award of damages or monetary equivalence, and thus there was no other reasonable alternative and adequate remedy than the interim interdict.
- c. That the balance of convenience favoured their return to work, as they were experienced and steeped into the work environment of the positions they held, and to continue performing their duties and responsibilities as opposed to await the appointment of new employees. Finally, that such an appointment process could take in excess of 6months, and this would result in delays in payment of

pensions, which would be prejudicial and cause grave injustice to pensioners; whilst the respondents would suffer no prejudice should the interim interdict granted. The appellants further sought a declarator that the purported termination of their contracts was wrongful, unlawful, and irregular and it stood to be reviewed, set aside, and corrected, as:

- d. That the decision was contrary to the cabinet decision, and that as long as the cabinet decision stood the respondents could not make any decision contrary to it.
- e. That the decision to terminate their contracts was made when their contracts had already been renewed and extended by operation of law for a further period of 3 years;
- f. That they had a legitimate expectation that their contracts would be renewed and extended.

[17] Alternatively, the applicants sought damages equivalent to their monthly salaries and gratuity, for the period of 3 years until July/August 2024, being the period of extension of their contracts.

Founding affidavit

[18] The first applicant (Mr Tsokolo Kompi) deposed to the founding affidavit on behalf of himself and all the applicants in support of the relief sought. The other applicants filed a combined confirmatory affidavit. The deponent alleged that, being public officers on contract appointment, they were not subject to the jurisdiction of the Labour Court in terms of the PSA 2005. (This assertion is obviously incorrect).

[19] He maintained that the dispute was beyond the competence and jurisdiction of the Public Service Tribunal in terms of the PSA 2005; that the application concerned the legality and lawfulness of the conduct of the GoL officials and of the Ministries that wrongfully and unlawfully contravened and violated their non-material rights associated with the performance of their functions and responsibilities under their employment contracts and the rights that flow from the contract, such as salaries until July / August 2024.

Opposition

[20] The GoL opposed the relief sought and raised two points in *limine*. Both points in *limine* objected to the jurisdiction of the High Court based on clause 13 of the contracts of employment which required the applicants to refer the dispute to 'binding arbitration'.

[21] The first point in *limine* is that the matter was not properly before the High Court as the arbitration clause in the applicants' employment contract stipulates that "any claim or dispute relating to the interpretation or execution of the contract which could not be settled amicably shall be settled by binding arbitration according to the provisions of the Public Service Act 2005." The second point in *limine* is that the cause of action is one ordinarily within the remit and jurisdiction of the Labour Court and the Labour Appeal Court.

The High Courts' approach

[22] The High Court (Moahloli J) upheld the objection to its jurisdiction and dismissed the matter for want of jurisdiction. The court held that the arbitration clause “any claim or dispute relating to interpretation or execution of the agreement”, must be given a ‘broad interpretation’ so as to include all issues that originate from within the main agreement. The court concluded that the arbitration clause was broad enough to cover disputes regarding the impugned termination.

[23] The learned judge *a quo* relied on *Russet*, where it was said:

‘. . . if an employee in the public service is dissatisfied with the outcome of a disciplinary process or entertains a grievance, he or she must appeal to the Tribunal. A party wishing to challenge the finding of the Tribunal must approach the Labour Court. Under the Public Service Act 2005 (as amended) the legislature has not granted the High Court jurisdiction over such a dispute.’

[24] The High Court therefore concluded that in *Russet* the apex court disapproved forum shopping; that the appellants’ claims are workplace grievances as contemplated by the PSA 2005, and that they ought to have prosecuted them through the public officers’ dispute resolution mechanisms under that Act.

[25] According to the judge below, although the applicants sought to carefully frame their case in administrative law terms, it was essentially a labour-related matter over which the *fora* created under the PSA 2005 for the settlement of disputes had exclusive jurisdiction; and that to hold otherwise would

undermine the public officers' dispute resolution regime, encourage forum shopping and lead to the development of a dual system of laws.

The appeal

[26] Aggrieved by the High Court's decision, the applicants appealed to this court. They contend that the court *a quo* erred and misdirected itself in holding that it did not have jurisdiction, in circumstances where:

- a. Appellants were, and the court *a quo* correctly accepted that the appellants were, public servants (civil servants)
- b. The disputes between the appellants and the respondents concerned the review of an administrative decision, a declarator and consequential relief.
- c. The dispute between the appellants and the respondents did not fall within the arbitration clause (Clause 13) of the contracts of employment, even on broad a construction.
- d. The dispute between the appellants and the GoL did not fall within the jurisdiction of the Public Service Tribunal as prescribed by section 20(3) of the PSA 2005.
- e. Assuming the dispute was subject to arbitration. the court *a quo* was bound to accept the appellants' pleadings as correct in deciding the preliminary objection of lack of jurisdiction; and could not rely on evidence by counsel for the respondent from the bar on the necessity of arbitration;
- f. Without the production of evidence to establish the required element of "agreement to arbitrate".

Submissions

[27] In the written submissions filed upon the appeal being enrolled, the applicants' counsel, advocate Maqakachane, intimated that this court is called upon to determine whether the court *a quo* was correct in dismissing the application for want of jurisdiction or whether it ought, in the unique circumstances of the case, to have invoked its inherent jurisdiction to determine the application.

[28] Advocate Maqakachane argued that the principles crucial to determining the jurisdictional issue was that a single set of facts were capable of generating more than one cause of action and that two rights could be asserted from the same set of facts. It was further submitted that the applicants had a constitutionally guaranteed right of access to court, to adequate and effective judicial remedies for infringement of their rights and interests and to equal protection of the law.

[29] Counsel added that it would be unconstitutional to deny an applicant enforcement of his or her distinct and separate claims or causes of action. On this approach, a litigant has a constitutional right to enforce all such separate causes of action or rights and to obtain remedies in any court in which claims based on those causes of action can be instituted, whether simultaneously or sequentially. The argument went that if a specific claim is enforceable in a particular court, an applicant is entitled to bring it before that court.

[30] It is further submitted that, whether a court has jurisdiction to consider a particular claim will depend on the nature of the

right that the party seeks to enforce; and not on whether the claim is good or bad in law. According to advocate Maqakachane, jurisdiction should be determined on the basis of the claim as pleaded by the applicant and not on the substantive merits of the case.

[31] Where jurisdiction is challenged *in limine*, the applicants' pleadings should be determinative of the issue, as they contain the legal basis of the claim on which the applicant has elected to invoke the court's competence.

[32] It was further submitted that the High Court's inherent power, as a superior court of record, in terms of s 119(3) of the Constitution, to prevent the abuse of power or to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between parties, has not been ousted by the PSA 2005. In addition, notwithstanding the decision in *Russel*, the High Court's intrinsic authority to prevent abuse of power and oppression of the applicants by state functionaries continues and has not been ousted.

[33] According to advocate Maqakachane, the Public Service Tribunal, being a creature of statute, can only exercise authority and remedial power expressly conferred upon it by the PSA 2005 and that it has no express or implied power to grant a declarator and review.

[34] Applicants' counsel submitted that the applicants' pleaded cause of action concerned the legality and lawfulness of the

exercise of administrative power by the 3rd and 4th respondents, contrary to the Cabinet's decision. It was contended that the applicants elected to enforce administrative law claims and remedies, rather than to invoke the public sector 'employer-employee' grievance machinery; and that the court *a quo* was alive to this yet went on to mischaracterize their claim as a 'quintessentially labour related issue' - thus denying them their constitutionally guaranteed right to assert those rights in the High Court.

[35] Counsel added that there were exceptional circumstances that would allow the court *a quo* to invoke its inherent jurisdiction and to have entertained their application, without them having to exhaust internal remedies. These circumstances are that 3rd and 4th respondents were determined to abuse their administrative powers by going against the Cabinet's decision, to physically bar the applicants from entering their places of work and to illegally repudiate the applicants' contracts of employment. Counsel argued that it was consequently practically impossible for them, in the circumstances, to use the PSA 2005 grievance procedure, as their supervisors to whom they had to take the first grievance step had been instructed not to allow them access to the premises.

[36] According to counsel for the appellants, the matter was extremely urgent as the principal secretary of the Ministry of Social Development had expressed the intention to proceed to recruit new personnel to take up their positions. Therefore, the necessity of access to court to ventilate rights and or interests

and the need for an effective judicial remedy to have their rights protected contributed to the urgency.

[37] It is further submitted that the public law remedies sought by the applicants were the only effective remedial recourse available to them, and the High Court ought to have exercised its inherent jurisdiction and entertained the applicants' case.

[38] On behalf of the GoL, advocate Thakalekoala submitted that the High Court's judgment could not be faulted because, although the applicants sought to carefully draft their application to bypass a jurisdictional challenge, their complaint fell for resolution in a forum other than the High Court.

[39] Respondents' counsel further submitted that a court is entitled to satisfy itself that it has jurisdiction before it can deal with a matter, and that even where parties have agreed to the court's jurisdiction, the court is not bound by such agreement and can *mero motu* raise the issue of jurisdiction.

[40] The Crown supports the judgment of the High Court as it reinforces this court's decision in *Russel* which, counsel submitted, had settled the law on the dispute resolution mechanism in respect of public servants. It is in the interest of justice and the rule of law for there to be predictability and certainty in the law. According to counsel for the Crown, no case has been made by the applicants for the court to deviate from *Russel*.

Issues on appeal

[41] This court is called upon to decide (i) whether the arbitration clause of the employment contract bound the applicants even after termination of the employment contract and (ii) whether the rights the applicants sought to enforce fell for determination in a forum other than the High Court?

Discussion

[42] In the first place, advocate Maqakachane criticises the Crown for not having led evidence in support of the point *in limine*. That complaint has no merit. The applicants went to court on notice of motion and as part of their case made reference to the contracts of employment which incorporate clause 13 which is the arbitration clause. From the applicants' own papers, it is apparent that they are public servants. The point *in limine* relies on those two jurisdictional facts and it was therefore properly taken. Secondly, a critical departure point of the applicants' case was that the public service grievance machinery did not apply to them because they are not public servants. That position too is indefensible.

[43] After oral argument and during the panel's deliberation on the appeal, our research showed that an important piece of national legislation which governs this matter had not been cited by either counsel.

[44] It is a matter of grave concern that both *a quo* and on appeal, neither counsel made reference to Lesotho's Arbitration Act 12 of 1980 which remains in force and thus binding on litigants and the courts.

[45] On behalf of the applicants, a plethora of case law was cited in support of propositions of law which in no way assist the court in appreciating the import of the Arbitration Act in relation to the dispute between the parties.

[46] I find very troubling the proposition put forward on behalf of the applicants that a court is bound to adhere to a litigant's theory of a case because that is what has been pleaded and that it must disregard binding precedent and statutory prescripts which have a direct bearing on the cause of action pleaded by a litigant. That is the main criticism against the judgement of the High Court. Counsel's duty is to cite all relevant law, both statutory and common law, and, in that way, assist courts to decide cases consistent with the law in force. Failure to do that can lead to inconsistent application of the country's laws and engender loss of public confidence in the administration of justice. The point I make here will become apparent below. There is no conceivable reason why either counsel should be excused for the failure to refer the court to the Arbitration Act 1980.

[47] Therefore, out of abundance of caution, on 10 May 2022, the Court directed the Registrar to invite the parties to make submissions on s 4 of the Arbitration Act 1980. Counsel for the

applicants submitted lengthy heads of argument running to 18 pages to deal with the question posed by the Court. I will deal with those in due course.

[48] Prior to the Court's direction in respect of s 4 of the Arbitration Act, advocate Maqakachane for the applicants' main argument hinged on two strands. The first is that the exhaustion of internal remedies under the PSA 2005 does not apply because of the nature of the relief that the applicants seek. The argument goes that the applicants' grievance is against an abuse of power by officialdom which can only be remedied by means of a declarator and review - remedies which, it is submitted, are not available in terms of the internal remedies' regime created by the PSA 2005.

[49] The second strand is that if the dispute is of the nature that it fell within the ambit of the PSA 2005 internal remedies regime, there are exceptional circumstances that justified the applicants deviating therefrom and seeking declaratory and review relief in the High Court in the exercise of a superior court's constitutionally mandated function. In support of that proposition, it is submitted that the internal remedies regime under the PSA 2005 is woefully inadequate and ineffective. That regime is criticised for requiring the disaffected applicants to pursue the grievance procedure under the PSA 2005 by (a) first informally seeking an amicable resolution and if that fails (b) to seek conciliation and only if that too fails (c) to proceed to binding arbitration.

[50] The applicants' valiant effort to avoid the terms of clause 13 of the employment agreement faces an insurmountable statutory hurdle. Not only would, in the absence of clause 13 of the employment contracts, the default position require them to pursue internal remedies on the authority of *Russel*, but the parties contractually agreed to arbitration. By so agreeing, the applicants contractually bound themselves to a private remedy of arbitration instead of public law remedies of declarator and review.

[51] Lesotho's Arbitration Act 12 of 1980 states in s 4:

'4. Binding effect of arbitration agreement and power of court in relation thereto-

(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred'.

[52] Section 1 of the Arbitration Act 1980 defines an arbitration agreement as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not'.

[53] Public policy encourages respect for adherence to agreements to submit disputes to arbitration instead of recourse to courts. Therefore, there must be a very cogent and weighty reason for a party to be allowed to resile from an agreement to submit a dispute to arbitration. The onus rests on the party wishing to do so. The onus of showing good cause is not easily discharged, and the party seeking to resile from arbitration must make out a very strong case.²

[54] Contrary to the clear language of s 4 of the Arbitration Act 1980, in the present case there is no consent not to proceed to arbitration and the court has not been asked, on good cause shown, to set aside the arbitration agreement, to order that the dispute not be referred to arbitration or that the arbitration agreement cease to have effect in respect of the dispute that has arisen between the applicants and the GoL.

[55] The applicants' complaint is that they have a validly extended contract of employment which the GoL refuses to honour. The GoL's stance, on the other hand, is that the contracts of employment had terminated by effluxion of time. At common law, the fact that one party (in this case the GoL) considers a contract terminated does not bring an arbitration agreement embedded therein to an end.

[56] The drift of authority in the Roma-Dutch tradition, U.K. and the United States of America is to the effect that an arbitration clause survives the termination of an agreement. Under English

² Compare: *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 (3) SA 748 (W) at 752-4 and authorities cited there.

law, the position was put succinctly by Lord Diplock in *Bremer Vulkan Scffbau Und Maschinenfabrik v. South India Shipping*³ as follows:

‘the arbitration clause constitutes a self-contained contract collateral or ancillary to the [underlying] contract itself’.

[57] The matter was put even more clearly by Viscount Simon in *Heyman v Darwins Ltd*⁴ as follows:

‘An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen ‘in respect of’, or ‘with regard to’, or ‘under’ the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly.’

³ *Bremer Vulkan Scffbau Und Maschinenfabrik v. South India Shipping* [1981] A.C. 980.

⁴ *Heyman v Darwins Ltd* (1942, A.E.R. 337).

[58] The position is the same in the United States of America.⁵ In *Nolde Bros., Inc v Bakery Workers Union*, 430 U.S. 243, 250 (1977),⁶ the United States Supreme Court held that an arbitration clause will apply to cases that involve facts before expiration, and after expiration, as long as the dispute in question is related to a right that was vested under the terminated contract.

[59] Closer to home, Namibia⁷ takes the same approach as does South Africa and Zimbabwe⁸. The position in South Africa is neatly summed up by Ramsden in the book *The Law of Arbitration: South African & International Arbitration*⁹:

'Where a contract is dissolved or cancelled by mutual consent, the rights and obligations of both parties to the contract are brought to an end and neither party is left with any claim against the other arising from the contract.¹⁰ Any submission to arbitration contained in the contract is generally speaking also dissolved or cancelled.¹¹ However, even in the case of consensual termination of a contract which includes an arbitration clause, the arbitration clause will still be operative in relation to disputes which arose out of or in relation to the agreement, and where both parties had intended that the arbitration clause should operate even after the agreement itself was at an end in relation to that class of dispute.¹²

⁵ For an example, see *Prima Paint Corp v Flood & Conklin Mfg Co.* 388 U.S. 395, 87 S.Ct.1801 (1967).

⁶ *Nolde Bros., Inc v Bakery Workers Union*, 430 U.S. 243, 250 (1977),

⁷ *Opuwo Town Council v Doly Investments CC* [2018] NAHCMD 389 (23 November 2018).

⁸ *Scriven Bros v Rhodesian Hides & Produce Co. Ltd & Others* 1943 AND 393 at 401.

⁹ Ramsden, P. 2009. *"The Law of Arbitration: South African & International Arbitration"*. Cape Town: Juta.

¹⁰ Ramsden (2009: p. 47).

¹¹ *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A).

¹² *Gardens Hotel (Pty) Ltd and Others v Somadel Investments (Pty) Ltd* 1981 (3) SA 911 (W).

[60] Ramsden correctly points out that an arbitration agreement is a distinct and separate contract, surviving the ending of the obligation of the parties to perform the primary obligations created by the main contract or the termination of the main contract.¹³

[61] To deal with the difficulties posed for the applicants by the Arbitration Act 1980, advocate Maqakachane, at the Court's invitation, made submissions on the Arbitration Act. The onus that rested on him was to satisfy the Court that the dispute in question fell outside the reach of the Arbitration Act 1980. Were the applicants entitled to resile from the arbitration agreement?

[62] Although in the supplementary heads of argument, advocate Maqakachane made lengthy and wide-ranging submissions I hope I am not doing him any injustice if I summarise them only briefly as best I can.

[63] Counsel places great store by s 7 of the Arbitration Act which states: *'(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering the pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.'*

¹³ Ramsden, P. 2009. *"The Law of Arbitration: South African & International Arbitration"*. Cape Town: Juta at 46.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just’.

[64] The contention advanced is that because of s7 of the Arbitration Act 1980, the applicants were not precluded from commencing proceedings in the High Court and that the GoL’s recourse lay in seeking a stay in terms of subsection (2) of s 7.

[65] Counsel argued further that the arbitration contemplated in clause 13 of the parties’ arbitration agreement makes the terms of the Arbitration Act 1980 inconsistent with the PSA 2005 and the Public Service Regulations and Codes of Good Practice 2008. That is so because s 41 of the Arbitration Act 1980 excludes the Act’s operation where it and a provision of another statute are inconsistent with each other. Counsel develops the argument in this way: The present is a ‘dispute of right’ because it concerns a breach of the contract of employment and, therefore, because clause 13 subjects it to arbitration, is covered by s 18 of the PSA 2005 which, in turn, states that a dispute of right ‘shall not be referred to arbitration unless the parties involved have agreed’.¹⁴ (My underlining).

[66] Counsel sees inconsistency in ‘material respects’ between the Arbitration Act 1980 and the Code of Good Practice 2008 in

¹⁴ Public Service Act 2005, s18.

that the latter requires that a dispute of right shall be referred to arbitration by the parties in writing, in prescribed manner and by agreeing on the arbitrator. The suggestion is that there is no agreement between the parties to refer the dispute to arbitration.

[67] Counsel then makes the following bold submission:

‘Section 18 of the Public Service Act 2005 specifically do (sic) away with the obligation to refer to arbitration any dispute of right, unless parties have agreed. Consequently, if (sic) flies in the very face of section 4 (1) of the Arbitration Act 1980 which obligates settlement of disputes by arbitration. As a corollary, the High Court’s powers under section 4(2) of the Arbitration Act 1980 do not arise, and the desirability of the stay application under section 7 of the Arbitration Act is of no moment’.

[68] The alternative argument is then made, in the event that it is found that the Arbitration Act applies. It goes something like this: Clause 13 relates to a claim or dispute relating to the interpretation or execution (enforcement) of the agreement. It does not relate to the ‘existence or validity’ of the agreement. The latter are, it is said, ‘logically prior to interpretation or execution of that agreement’.

[69] It is suggested further that the consequences of giving precedence to clause 13 (by the High court declining jurisdiction) implies that parties may by private treaty oust the jurisdiction of the High Court. The submission goes that arbitration proceedings are not a bar to legal proceedings and the ‘court

continuous to have jurisdiction even on arbitrable disputes, only to exercise its discretion in the stay application’.

[70] I will now deal with the main supplementary submissions that I have just summarised.

Validity/existence of contract vs implementation or execution

[71] It was argued that the applicants’ dispute concerns the validity or extension of the agreement, not its implementation or execution. The nub of the grievance, as counsel puts it, relates to the ‘legal existence of the appellants’ employment contracts which does not fall within the ambit of arbitration agreement, clause 13’. I fail to see the difference on the facts before us. The core complaint is that the agreement was extended *ex lege*; in other words that there is an implied term in it (or to put it another way, that the contracting parties had in contemplation) that a contract which was for a fixed term was capable of extension by operation of law. How could that possibly not be a claim for ‘interpretation’ of the agreement? This argument must fail.

Agreement to refer to arbitration absent

[72] It is suggested that s18(2) of the PSA 2005 requires that parties must ‘agree’ to refer a matter to arbitration. That makes it inconsistent with s 4(1) of the Arbitration Act 1980 which says an arbitration agreement may not be terminated unless both parties consent. There are two answers to this proposition. The first is that the reference to ‘consent’ in subsection (1), is a stand-alone provision from sub-section (2) and the two should

not be conflated. Sub-section (1) recognises parties' freedom to contract. In other words, parties that have agreed to refer disputes to arbitration are entitled to agree to terminate an arbitration agreement by consensus. The provision proscribes unilateral conduct. Besides, it is not correct that there is absent an agreement to refer the dispute to arbitration. Clause 13 is the parties' agreement to refer disputes to arbitration.

The High Courts' jurisdiction cannot be ousted by private treaty

[73] Counsel cited numerous cases on the strength of which he makes the following basic propositions:

- (a) An arbitration agreement does not oust the High Courts' jurisdiction
- (b) Parties cannot by private treaty (such as an arbitration clause) oust the High Courts' jurisdiction
- (c) Where faced with an arbitration clause, the court has a discretion whether or not to itself determine the dispute or whether to order a stay pending an arbitrators' decision.
- (d) Arbitration proceedings are not a bar to legal proceedings and the court continues to have jurisdiction over an arbitrable dispute and may only exercise its discretion to order stay.
- (e) A party taken to court, where there is an arbitration clause, has the option to seek a stay of the court proceedings.
- (f) To exclude the High Court's jurisdiction, there must be clear and unequivocal language in the contract or the arbitration

clause that the validity or enforceability of the agreement is to be determined by arbitration.

[74] In the limited time available to me before due date for delivery of this judgment, I have considered the authorities cited by applicants' counsel. The following becomes clear to me from a reading of those cases in the light of Lesotho's Arbitration Act 1980 and South Africa's Arbitration Act 42 of 1965¹⁵.

[75] The first is that the statutory scheme in Namibia, South Africa and Lesotho is broadly similar. But Lesotho's Arbitration Act is distinguishable in a very significant respect. It has a provision absent in its South African counterpart: s 4. That reality cannot be ignored. The legislature is presumed not to include provisions in a statute that are meaningless. Therefore, the host of cases from the sub-region cited by counsel for the applicants were decided against the backdrop of legislation which does not have the equivalent of s 4 of Lesotho's Arbitration Act 1980.

[76] The discretion granted to the court in s 4(2) of Lesotho's Arbitration Act 1980 is in respect of a contracting party who wishes not to be bound by an arbitration agreement. The section recognises the binding nature of an arbitration agreement and sets out exceptions under which a party may resile from it. It makes plain that a contracting party must give effect to an arbitration agreement unless a court orders

¹⁵ Also applicable to Namibia as a former colony of South Africa.

otherwise. He or she may only be excused by a court and only for good cause.

[77] It goes against the letter and spirit of s 4, as counsel for the applicants effectively does in the supplementary heads of argument, to seek to make arbitration an optional remedy which a party that has agreed to refer a dispute to arbitration may ignore in favour of seeking redress in the High Court - and casting the onus on the other party to seek the remedy of stay in terms of s 7(2) of the Arbitration Act 1980.

[78] The GoL had not consented to the termination of the arbitration agreement. The agreement therefore remains binding. When dragged to court it relied on clause 13 and therefore making clear its resolve to proceed to arbitration. It pleaded that the applicants were not entitled to approach court because of clause 13. It did not acquiesce to the applicants approaching court. The fact that it could have asked for a stay of the High Court proceedings which, it bears mention, were brought on an urgent basis, did not denude the GoL the right to object in the manner it did. I see nothing in the language of ss 4 and 7, or indeed the scheme of the Arbitration Act 1980, which suggest that a party to an arbitration agreement may only resist recourse to court in breach of section 4 by relying on the remedy of stay.

Conclusion

[79] It needs to be made clear in conclusion that the legal system of a country is one indivisible whole. A law does not

cease to apply because a party considers it inconvenient. Once the jurisdictional facts which would engage it are established, a law will have effect unless a party brings itself within the exceptions it creates, if any. The party that seeks to rely on the exceptions bears the onus. It is subversive to the rule of law to maintain that a party has the right to choose which law applies to it and which not.

[80] Most of the arguments advanced by advocate Maqakachane on behalf of the applicants were settled by this court in *Rusel*. For example, it is now settled that the legislature is competent to create a dispute resolution mechanism by statute and to require those affected to make use of it instead of approaching the High Court. If a party feels *that* is unconstitutional, its duty is to approach court and to have the legislation declared unconstitutional. It is a waste of judicial resources to rehash the same argument in subsequent litigation in respect of the very same legislation which this court has given its imprimatur. Applicants' case is singularly lacking in why s 4 of the Arbitration Act 1980 does not apply to them, considering that their contracts of employment embed an arbitration agreement.

[81] All the eloquently worded submissions on behalf of the applicants summarised in this judgment could have been used as grounds upon which the applicants could ask the High Court to grant them the relief contemplated by s 4(2) of the Arbitration Act 1980. Such arguments, whatever the force with which they are advanced, do not avail in an appeal against an order of the High Court declining jurisdiction when it had not been asked to

exercise the discretion contemplated in s 4(2) of the Arbitration Act 1980.

[82] The applicants should have approached the High Court to resile from the arbitration agreement. They did not. Instead, they sought public law remedies in the High Court. The High Court which was approached on an urgent basis held that given that they had agreed to arbitrate the dispute they could not seek such relief before that court. In so doing, the High Court did not misdirect itself.

[83] Obviously because it was not cited to it, the court *a quo* placed no reliance on s 4 of the Arbitration Act 12 of 1980 in support of its judgment and order. That notwithstanding, its reasoning and order are in sync with and give effect to s 4 of that Act.

[84] The appeal must therefore be dismissed.

Costs

[85] The ordinary rule is that costs follow the result. The respondents are entitled to their costs in the appeal.

Order

[86] I propose the following order:

The appeal is dismissed, with costs.



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



KE MOSITO
PRESIDENT OF COURT OF APPEAL

I agree:



MH CHINHENGO
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS:

ADV S.T MAQAKACHANE

FOR THE RESPONDENTS:

ADV P.T.B.N THAKALEKOALA