IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU **C of A (CIV) 13/2021**

In the matter between:

PRINCIPAL SECRETARY HIGHER EDUCATION **1ST APPELLANT**

PRINCIPAL SECRETARY FINANCE **2ND APPELLANT**

ATTORNEY GENERAL **3RD APPELLANT**

AND

KOPANO METSING **RESPONDENT**

CORAM : K.E. MOSITO P

P.T. DAMASEB, AJA

M. H. CHINHENGO, AJA

HEARD : 14 APRIL 2022

DELIVERED : 13 MAY 2022

Summary

A public officer challenging a decision dismissing him by way of review in the High Court. Court of Appeal restating that such complaints must be pursued under the grievance procedure in the Public Service Act 2005.

JUDGMENT

PT Damaseb AJA:

Background

[1] The respondent is a public servant. He was dismissed from employment by the first appellant after the latter had purported to act on a recommendation to have him dismissed following a disciplinary hearing.

[2] Dissatisfied with his dismissal, the respondent approached the High Court by way of review. The High Court set aside the dismissal on the basis that it was unlawful and thus reviewable. That court also reinstated the respondent and directed the Government of Lesotho (GoL) to pay the respondent's arrear salary and benefits.

[3] The GoL appealed to this court against the judgement and order of the High Court.

The Law

[4] In *PS Ministry of Labour and Employment and Others v Russel*[1] this court authoritatively laid down that the High Court is not the appropriate forum over disputes where a public servant wishes to challenge a dismissal from employment or any other grievance arising from his or her employer's decision adverse to him or her.

[5] The court said in *Russel*:

> *'The legislative framework*
> *[19] 'Public officers' as defined in s 154(1) of the Lesotho Constitution are the single largest group of employees in the Kingdom. The rest are employees in the private sector and state-owned enterprises. In Lesotho, the principal law governing resolution of labour disputes is the Labour Code Order 1992 (the Labour Code).*
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> *…*
> *Subsequent developments*
> *[21] In 2007, the legislature enacted the Public Service Amendment Act 3 of 2007 which brought about significant changes to the labour dispute resolution regime applicable to the public service. In short, it retained the Tribunal already created in the 2005 Act and provided for appeals from decisions of the Tribunal to the Labour Court.*
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> *[22] The effect of the amended ss 20 and 30 of the Public Service can be briefly stated. The new s 30 exempts the public service from the operation of the Labour Code, except in the limited respect provided for in that provision. The exemption regime created by s 2(2) of the Labour Code is therefore irrelevant in respect of the*

[1] C of A (CIV) 27/2021 (20 October 2021) [12 November 2021].

public service. Section 30 specifically makes appeals under s 20 subject to the Labour Code because appeals thereunder lie to the Labour Court. It will be recalled that in terms of s 20(11):

> *'A party who is dissatisfied with a decision of a panel* [of the Tribunal] *may appeal to the Labour Court.'*

[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 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.

…

[26] In view of the legislative scheme created by the 2007 Amendment Act - providing for the dispute resolution regime I set out above - in particular requiring appeals against such decisions lying to the Tribunal and subsequently to the Labour Court - the exemption regime contemplated in s 2(2) of the Labour Code - in so far as it relates to the public service - has been impliedly repealed.

[27] Counsel for the respondent's reliance thereon to justify a direct approach to the High Court in circumvention of that regime is therefore misplaced. The two regimes cannot exist side by side. The 2007 amendment came 12 years after the exemption notice. The legislature enacted the 2007 Amendment Act with full knowledge of its existence. The legislature is presumed to know the existing state of the law and to legislate with such knowledge.[2] *Therefore, the exemption regime cannot be applied in a manner that is destructive of the legislature's clear intent.*

[28] The result is that the High Court had no jurisdiction over the dispute brought before it and ought, acting of its own motion, to have dismissed the case brought by the employee before it. It is trite that jurisdiction is a matter that a court may raise mero motu.

…

[35] I wish to point out that the legislature has taken great care to ensure that the Tribunal's membership infuses independence in its mandate. For example, its chairperson is a person appointed with the involvement of the Judicial Service Commission and a significant part of the membership with the involvement of the Public Service Commission.

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[2] *Hoohlo v Lesotho Electricity Company* (C of A (CIV) 09/20) [2020] LSCA 23 (30 October 2020).

> *[40] The important difference under the Public Service Act 2005 (as amended) being that the legislature has, in addition, provided for an additional safeguard of an appeal to a court of law: The Labour Court which is a division of the High Court. The legislature has therefore not denied aggrieved persons the right to seek remedies from a competent court of law.*
>
> *[41] In the final analysis, the true test is whether, by providing an alternative route for the resolution of a dispute such as the one contemplated in s 20 of the Public Service Act 2005 (as amended), an aggrieved person has been denied access to court.*
>
> *[45] It is clear, therefore, in the statutory scheme under discussion that in grievance proceedings arising in the public service in terms of s 20 of the Public Service Act, the High Court's power to test the legality of dismissal decisions has been excluded and an aggrieved party is required to have recourse to it.*

[6] It therefore follows that the respondent was not entitled to seek redress in the High Court against his dismissal. He should have exhausted the internal remedies under the Public Service Act.

[7] It must follow that the High Court should have dismissed the review application.

[8] In fairness to the appellant, the appeal had already been noted when this court decided *Russel*. That, however, does not detract from the fact that the law had been in existence and ought to have been followed. By entertaining the appeal on the basis that it preceded *Russel* will create parallel systems of law and set an indefensible a precedent for the future.

Disposal

[9] The ineluctable result is that the judgment and order of the High Court must be set aside. It is open to the respondent

to pursue his appeal remedies to the Tribunal established under the Public Service Act, if so advised.

[10] It is also necessary to make clear for avoidance of doubt that this judgment has the effect that the status *quo* prior to the judgment and order *quo* is restored. The respondent therefore remains dismissed and the High Court's order reinstating him and restoring his employment benefits has no force and effect.

[11] It was accepted by counsel for the Crown that had it been raised, the basis on which this court now determines the appeal would have been dispositive of the appeal. That disentitles the Crown of its costs, both *a quo* and on appeal. Litigants have a duty to raise points and adopt a litigation course which avoid delay and resultant costs.

Order

[12] I propose the following order:

(i) The appeal succeeds.

(ii) The judgment and order of the High Court are set aside and

replaced by the following order:

"The application is dismissed, with no order of costs"

(iii) There is no order of costs in the appeal.

P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

M.H. CHINHENGO

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV. T F CHECHELA

FOR RESPONDENT: ADV. N MAFAESA