

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.41/2021

In the matter between:

THE MINISTRY OF TRADE AND INDUSTRY	1ST APPELLANT
THE PRINCIPAL SECRETARY, MINISTRY OF TRADE AND INDUSTRY	2ND APPELLANT
THE ATTORNEY GENERAL	3RD APPELLANT
THE BOARD OF DIRECTORS-LESOTHO NATIONAL DEVELOPMENT CORPORATION	4TH APPELLANT
LESOTHO NATIONAL DEVELOPMENT CORPORATION	5TH APPELLANT

AND

MOHATO SELEKE

RESPONDENT

CORAM: K E MOSITO P
N T MTSHIYA AJA
J WESTHUIZEN AJA

HEARD: 11 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY

Administrative law - Jurisdiction -Review of administrative act - Application for review of a decision of the Minister of Trade and Industry not to renew the contract of the Chief Executive Officer of the Lesotho National Development Corporation

JUDGMENT

K E MOSITO P

BACKGROUND

[1] On 1 December 2020 the respondent herein filed an application in the High Court for certain relief, the nature of which will be detailed later. The Appellants opposed the application on the ground that the High Court did not have jurisdiction to hear the matter. This was done by means of a notice in terms of Rule 8 (10) (c) of the High Court Rules 1980. There was therefore, no answering affidavit dealing with the merits of the application or the factual allegations contained in the founding affidavit filed by the Respondent. The application came before Makara J. The learned judge ruled against the Appellants on the jurisdictional point. Appellants thereupon noted an appeal to this Court against the trial judge's dismissal of the application on the preliminary point of jurisdiction.

[2] The application was opposed by the present appellants. The matter served before the High Court (Makara J) on 11 December 2020. On 16 August 2021, the learned judge handed down judgment on the issue of jurisdiction which had been raised by the present appellants. The ruling runs as follows:

1. The Court resolves that the limitations imposed by the Code on its jurisdiction, has the effect of delaying the exercise of its inherent jurisdiction under the strictly deserving circumstances since it can never under a democratic constitutional rule, be totally removed from it. This notwithstanding, the word of the Court of Appeal on the subject-matter remains prevailing.
2. The determination that the decision of the Minister on the renewal of the contract of the Applicant, is administrative and not labour related or in pursuit of any labour law objectives, renders this Court to naturally command jurisdiction to review its lawfulness.
3. At this stage, there is no order made on costs.

[3] Dissatisfied with the above decision the Appellants approached this Court on appeal. They have raised two grounds of appeal against the said decision. Firstly, they complained that, '[t]he court erred and misdirected itself in assuming jurisdiction in respect of a labour matter which falls within the exclusive jurisdiction of the Labour Courts and/or Labour tribunals.' They also protested that, '[t]he court erred in not declining jurisdiction and purporting to exercise what it calls inherent unlimited jurisdiction.'

Parties

[4] The first appellant is the Minister of Trade and Industry (hereinafter referred to as the Minister), cited in his capacity as the authority responsible for appointing the CEO of the Lesotho National Development Corporation (hereinafter referred to as the LNDC) in terms of the LNDC Order, 1990 (as amended). The second to the fifth appellants are the Principal Secretary of the Ministry of Trade and Industry, the Attorney General, the Board of Directors of the Lesotho National Development Corporation and, the Lesotho National Development Corporation (LNDC) itself, respectively. The respondent is Mr Mohato Seleke who was the applicant in the court a quo.

[5] The respondent was appointed the CEO of the LNDC on 1 December 2017. As will appear later in this judgment, the dispute between the parties emanates from this contract. I will revert to this issue later on in this judgment.

Facts

[6] The facts giving rise to the present dispute are not contentious. They are that, the respondent was appointed the Chief Executive Officer (CEO) of the LNDC following a rigorous recruitment process and on the advice of the Board, by the first appellant, effective from the first day of December, 2017 and for a term of 3 years.

[7] Clause 6.1 of the contract provides that the performance of the CEO will be assessed and evaluated by the Board at least annually. In terms of clause 6.3 of the contract, the Board set a number of targets to measure the respondent's performance during his tenure. He deposes that the Board did assess and evaluate his performance in line with the measurements criteria above.

[8] On 18 August 2020, the respondent submitted an application to the Board to have his contract, which was due to expire on 30 November 2020, renewed. The Board considered the application and resolved to recommend to the Minister that the contract be renewed for a further period of three years. The Minister was accordingly so advised. The respondent continued with his work without a word from the Minister regarding the renewal of his contract. On the last day of duty, being 30 November 2020, he

received a decision of the Minister informing the respondent that the Minister had decided not to accept the renewal of his contract. It follows therefore that The respondent's contract ended on 30 November 2020. It is on the basis of these facts that the respondent approached the High Court to say that his contract ought to have been renewed.

ISSUES FOR DETERMINATION

[9] It is evident from this short recital of the history of the dispute that the present appeal is on whether the court a quo erred in holding that it had jurisdiction in the matter.

THE LAW

Statutory position

[10] The appropriate repository of power as far as the appointment of a Chief Executive of the Lesotho National Development Corporation is the Minister of Trade and Industry. This is clear from section 2 of the Lesotho National Development Corporation Act No. 13 of 1990. The Lesotho National Development Corporation (LNDC) has a Board of Directors which manages and controls the affairs of the LNDC. Such powers and duties of the Board are exercised under section 8 of the Act.

[11] The LNDC Act, 1990 was amended in 2000 the appointment of the CEO of the LNDC is done by the Minister pursuant to the

recommendation and advice of the Board in terms of section 9B (1) of the LNDC (Amendment) Act, 2000. In terms of the LNDC (Amendment Act, 2000), the Minister is the appointing authority in terms of the Section. He also has power to dismiss the CEO in terms of Section 9B (1) of the same Act, again acting on the advice of the Board.

[12] The LNDC Act (as Amended) has to be read with the Labour Code Act 1992 (as Amended). This means that when the contract of employment of the CEO comes to an end, by reason of its being a fixed term contract, then the Labour Code Act finds application. Thus, where a fixed term contract of the CEO (which provides for renewal) provides for renewal, it may be renewed or else it expires by effluxion of time. It follows again that the Minister may or may not renew the contract on the basis of a recommendation of the Board. The question worth commenting on at this stage, it whether, when renewing or declining to renew such a contract the Minister is exercising an employer's power or an administrative power. This is a matter of characterisation predicated on the nature of the function undertaken by the Minister. Put differently, it is a matter of determining the nature of the cause of action.

Jurisdiction

[13] It is trite law that, a court must have jurisdiction to enter a valid, enforceable judgment. Where jurisdiction is lacking, litigants, through various procedural mechanisms, may retroactively challenge the validity of a judgment. In the context of Lesotho, the

constitutional provision of section 119 (1) which established the High Court 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 jurisdictions and powers as may be conferred on it by this Constitution or by or under any other law." (My underlining)

[14] As this Court pointed out in *CGM Industrial (Pty) Limited v Lesotho Clothing and Allied Workers Union and Others*,¹ this section must be read together with section 118 of the Constitution. Thus construed, this Court held that, the original jurisdiction vested in the High Court in terms of section 119, does not detract from the exclusive jurisdiction conferred by Parliament, in terms of the Constitution, on the Labour Court (and I erred, on the Labour Appeal Court as well) established in terms of the Code. That is precisely what the legislature sought to achieve by the enactment of the Code. Its power to do so emanates from section 118(1) of the Constitution. That the Labour Court (and I erred, on the Labour Appeal Court as well) which was so established, was intended to function in terms of the legislation by which it was established, is recognised in section 118(2) of the Constitution.

[15] On the basis of the above provisions, it is without doubt that the High Court has powers of review of proceedings emanating from officers exercising public administrative functions under any law. This will in turn beg the question, does the Minister fall within the

¹ *CGM Industrial (Pty) Limited v Lesotho Clothing and Allied Workers Union and Others* (C of A CIV/10/99),

definition of officer exercising public administrative functions under any law? For completeness, it is important for the present purposes, to mention the Labour Appeal Court.

[16] The Labour Appeal Court was established by the Labour Code (Amendment) Act of 2000 (hereinafter referred to as the Amendment) under its section 38 (1) which provides that there shall be a Labour Appeal Court. Section 38A of the Amendment in turn provides that the Labour Appeal Court shall have exclusive jurisdiction. Over and above this, subsection (2) provides, notwithstanding the provisions of any other law, the Labour Appeal Court may hear any appeal or review from a decision of any subordinate Court concerning an offence under this Code and any other labour law.

[17] Section 38A(1)(b)(iii) of the Amendment provides that, the Labour Appeal Court has exclusive jurisdiction to hear and determine all reviews of any administrative action taken in the performance of any function in terms of this Act or any other labour law. In *CGM Industrial (Pty) Limited v Lesotho Clothing and Allied Workers Union and Others* (supra), this Court interpreted the words "any other law" to relate to the law by which the court or tribunal in question (in the present case, the Labour Court), was established. In my opinion therefore, the words "any other labour law" should be interpreted similarly to mean the labour law which the Labour Appeal Court, was established to administer (e.g., the Public Service (Amendment) Act, 2007; Children's Protection and Welfare Act, 2011, etc.

[18] Subject-matter jurisdiction is the requirement that a given court have power to hear the specific kind of claim that is brought to that court. While litigating parties may waive personal jurisdiction, they cannot waive subject-matter jurisdiction. The requirement that a court have subject-matter jurisdiction means that the court can only assume power over a claim which it is authorized to hear under the laws of the jurisdiction. The High Court has a constitutional and an inherent power to issue review orders unless expressly forbidden to do so, by the words of the law. Review available in case of non—performance or wrong performance of statutory duty or power, where duty/power essentially decision—making one and body or person concerned made decision.

Cause of action

[19] Cause of action was defined by Lord Esher, MR in to be ‘every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved’.² As Gardiner, JP once ‘[a] cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed’.³ Where a person was injured but only later developed, as a result of the injury, paralysis agitatus it

² Read v Brown 22 QBD 131.

³ Gardiner, JP, adopting s 64 of Halsbury, xix, in Coetzee v SAR&H 1933 CPD 570. See G North & son v Brewer & Son 1941 NPD 74; Beaven v Carelse 1939 CPD 323; Abrahamse & Sons v SAR&H 1933 CPD 626; McKenzie v Farmers’ Co-op Meat Industries Ltd 1922 AD 16; Huletts v SAR&H 1945 NPD 413 16.

was held, that the cause of action arose when the disease manifested itself.⁴

[20] It follows therefore that, there are two components to a cause of action in law. First, there must be a set of facts sufficient to justify suing. The second component is the legal theory (such as the rule of law) upon which a party brings a suit. Thus, to pursue a cause of action, a party pleads or alleges facts in the pleading that initiates a lawsuit (such as a summons, particulars of claim, affidavit, or a petition). A cause of action generally encompasses both the legal theory (the legal wrong a party claims to have suffered) and the remedy (the relief a court is asked to grant). Often the facts or circumstances that entitle a person to seek judicial relief may create multiple causes of action. There are a number of specific causes of action, including: contract-based actions; statutory causes of action; delicts such as assault, battery, invasion of privacy, fraud, slander, negligence, intentional infliction of emotional distress; and suits in equity such as unjust enrichment and quantum meruit.

DETERMINATION OF THE APPEAL

[21] I turn now to the appeal. The starting point should be the pleadings. In the Notice of Motion the applicant asked the High Court to order the Minister to dispatch to the Registrar of the High Court, within three (3) days, all documents and records (including correspondence, memoranda, advices, evaluations and reports) which informed his decision not to renew the contract of employment of the Applicant herein. The applicant

⁴ Swanepoel SAR&H1937 OPD 267.

further asked the Court to interdict the Board from recommending to the Minister, the appointment of any person to the position of the CEO of the LNDC pending finalisation of the application. He also asked that the Minister be interdicted from appointing any person whomsoever to the position of the CEO of the LNDC pending finalisation of this matter.

[22] He went further to ask that the Minister's decision contained in a letter dated 26th October 2020 and received by the Applicant on the 27th November 2020 to the effect that the Applicant's appointment as the CEO of the LNDC is not renewed be reviewed and set aside. He further asked the court to declare that the Minister's decision not to renew the Applicant's contract of employment contrary to the advice of the 4th Respondent is ultra vires the provisions of section 9B 91) of the LNDC (Amendment Act, 2000 and therefore null and void and of no force or effect. The Respondent further asked the court to declare that the Board's advice to the Minister is binding. Penultimately, He prayed for an order directing the Minister to appoint him as the CEO of the LNDC in accordance with the advice of the Board. He lastly asked for costs from the Minister, on attorney and own client's scale.

[23] The Respondent based his prayers for the reliefs on a number of grounds of review. As pleaded, the said grounds were: (a), legitimate expectation; (b), irrationality; (b), malice and bad faith; (c), illegality; unreasonableness and; (e), arbitrariness. I observe that although all these grounds were factually canvassed in the founding affidavit, the Appellants decided not to meet them factually.

[24] The Appellants contented themselves with filing a notice in terms of Rule 8(10)(c) of the High Court Rules 1980, objecting to the jurisdiction of the High Court to be seized with the application for review. The point of jurisdiction on which the judge a quo

dismissed the Appellants' opposition is the crux of this appeal. In its opposition to the Appellant's application, the Appellants did not file an answering affidavit. Instead, they filed a notice purportedly in terms of Rule 8(10) (c) of the High Court Rules 1980. That Rule provides as follows:

- (10) Any person opposing the grant of any order sought in the applicant's notice of motion shall:
- (a) Within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents. ...
 - g) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and
 - h) If he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.

[25] Advocate Teele KC for the Appellants argued before us that, the application before the High Court was improperly before the court a quo, it being a pure labour/employment matter not cognisable in the High Court. Advocate Maqakachane had a different view on this point. His argument was in essence that, while the set of facts constituting the cause of action before the High Court could be located within the labour/employment legal sphere, the legal theories (namely: (a), legitimate expectation; (b), irrationality; (b), malice and bad faith; (c), illegality; (d), gross unreasonableness and; (e), arbitrariness) giving rise to the cause of action belong to an administrative law sphere.

[26] Apparently, Advocate Teele's argument is based on a holistic assessment of whether the dispute was located "within the compass of labour law" instead of determining whether the specific causes of action relied on by the Respondent falls within the jurisdiction of the High Court or the Labour Court (or both). As this Court held in *Matela v Lesotho Communications Authority and others*⁵, it is one thing to emphasise the expertise of the LC and LAC and to defend their turf against forum shopping by litigants who believe that they might get a better deal from another court; but it is quite another thing to summarily make an appeal court a court of first instance.

[27] Indeed, where legislation mandates it, or where a litigant asserts a right under the Labour Code or relies on a cause of action based on a breach of an obligation contained in the Labour Code, then, the specialist courts and tribunals established under that Act, will have jurisdiction thereunder. Thus, disputes that fall within the exclusive jurisdiction of the Labour Court or Labour Appeal Court, are justiciable in those courts and/or tribunals. The corollary of a litigant's reliance on a Labour Code right is, of course, reliance on a Labour Code Act remedy.

[28] In *casu*, I am mindful of the provisions of section 4(d) of the Labour Code Act 1992. The section provides that, where, under the provisions of any other legislation, a person may have a remedy as provided for in that legislation, that remedy shall be in addition to and not in place of any remedy provided for by the Code. This

⁵ *Matela v Lesotho Communications Authority and others* C OF A(CIV) 35/2021.

section has no application to this case because, both the Lesotho National Development Corporation Act and the Labour Code Act do not make provision for a remedy for a situation such as the present. The remedies as pleaded are available at administrative law.

[29] I am in agreement with the decision of the judge a quo for rejecting the Appellants' objection to the jurisdiction of the High Court to entertain the application. There can be no doubt that if the decision of the Minister in this case is an administrative act, then it is subject to review. The question should therefore be whether it is an administrative act for the purpose of justiciability. There is no well-ordered, prêt-à-porter definition in our case law, for common-law review, the non-performance or wrong performance of a statutory duty or power; where the duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available.

[30] Advocate Maqakachane referred us to the decision of the Constitutional Court of South Africa in *Baloyi v Public Protector and Others*⁶, in which it was held that, it is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action. When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the court's competence to hear the matter.

⁶ *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC).

[31] I respectfully associate myself with the above remarks and adopt them herein. Consistent therewith, I hold that, while considering whether the High Court had jurisdiction to hear a pleaded cause of action review on the basis of (a), legitimate expectation; (b), irrationality; (b), malice and bad faith; (c), illegality; unreasonableness and; (e), arbitrariness, this Court should not consider the validity of the pleaded cause of action. I can only observe that although all these grounds were factually canvassed in the founding affidavit, the Appellants decided not to meet them issuably and factually.

[32] A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality requires that the exercise of public power should not be arbitrary, irrational, irregular, illegal, biased, etc. The decision by the Minister to renew or not to renew involved the exercise of a public power. That power was not derived from the power to contract; it was a statutory power to renew or not to renew. That power, was not deprived of its intrinsic jural character simply because a founding fact is located in the contract. Since we are here seized with the issue of jurisdiction, it not significant in my view that at the time of the court action the respondent's contract had expired.

DISPOSAL

[33] Essentially the High Court correctly determined that the Minister's conduct was a reviewable act under the broad review powers of the High Court as it amounted to an administrative act.

That act or decision was not performed in terms of the Labour Code, or any other labour law, as required by section 38A(1)(b)(iii). It was performed in terms of the Lesotho National Development Corporation Act. The latter Act empowered the Minister to appoint and renew or extend the contract. The question which we had to determine was whether the High Court had jurisdiction to entertain the review application. The answer is in the affirmative. It will be clear from our foregoing reasoning that the appeal must fail.

[34] There remains the question as to what order should be made. The Respondent was entitled to an order for the dismissal of the preliminary objection to jurisdiction in the court a quo. The objection which the parties originally came to Court to debate, was that based on the objection to jurisdiction, which rightly failed. In the circumstances, I am of the opinion that Respondent is entitled to an order of costs both in the High Court and in this appeal.

THE ORDER

[35] The appeal is dismissed with costs.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



**N T MTSHIYA
ACTING JUSTICE OF APPEAL**

I agree:



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

FOR APPELLANTS: ADV M TEELE KC

FOR RESPONDENT: ADV T MAQAKACHANE