

IN THE HIGH COURT OF LESOTHO

CIV/APN/64/2013

In the matter between:

**THABANG KHABO
APPLICANT**

And

**LESOTHO NATIONAL
RESPONDENT**

DEVELOPMENT CORPORATION (LNDC)

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Date of Hearing : 25 March, 2013
Date of Judgment : 8 July, 2013

Summary

*Applicant lodging an application for the court to review in terms of **rule 50(1)**, the fairness or otherwise of the respondent's failure to provide him with a full copy of the audit report upon which the disciplinary charges against him were premised - The other ground for the review sought for being the question of the neutrality of the presiding panellists due to their undisputed indirect relationship with the Chief Executive Officer of the respondent - The issue of the jurisdiction of the High Court to review the proceedings considering its unlimited jurisdiction under **sec 119 of the Constitution** read in conjunction with **sec 118 of the constitution, sec 24 of the Labour Code (Amendment) Act 2000 and sec 9 of the Labour Code (Amendment) Act 2006** - The court assigning to **sec 24 and 9** respectively, a meaning that they provide for the exclusive jurisdiction of the Labour Court over labour related issues including the determination of the rights of the employee - The case being classified as a product of a labour related dispute, existing within the spectrum of the Labour Code Order and therefore within the adjudication powers of the Labour Court - The finding that though the applicant is asking for a review of the proceedings, he is actually simply complaining about the violation of*

his fair trial rights - The applicant consequently free to file an application before the Labour Court which is the court of competent jurisdiction to intervene accordingly - The dismissal of the application due to the lack of jurisdiction by the High Court to hear the labour related case - A comment on the unorthodox and counter progress dimensions in the case.

CITED CASES

R v Steyn 1954 (1) SA 324, Alice Molikoe v Lerotholi Polytechnic CIV/388/05, Motaung V NUL CIV/APN/182/06. Lepoqo Seoehla Molapo v Director of Public Prosecutions 1997 (8) BCLR SA 1154, Eskom v NUMSA Obo GALADA 2007 BALR 812 (IMMISA). Vice Chancellor of NUL and Another V Professor Lana (10/2002) [2002] LSCA 17 (11 October 2002), Motaung v National University of Lesotho and Others (CIV/APN/182/06

STATUTES AND SUBSIDIARY LEGISLATION

The Labour Code Order 1992, Labour Code (Amendment) Act 2000, the High Court Act 1978, the Constitution of Lesotho, the Labour Code (amendment) Act 2006 and the High Court Rules 1980.

MAKARA A.J

[1] This motion proceedings originated from an urgent application which the applicant brought before court on the 13th of February 2013 asking it to direct The respondent in *rule nisi* terms to *omne ante* provide the applicant with the copy of the audit report of the respondent, reference to which is made in “TK1” to the founding affidavit; for the recusal of Thato Kao and Seymour Kikine from the disciplinary hearing panel constituted by the respondent against the applicant; for the respondent to be compelled to adhere to its disciplinary procedure as per paragraph 5.2 of the procedure; for prayer 1 to operate as an absolute order forthwith; and that pending these orders the

contemplated disciplinary proceedings be stayed with immediate effect.

[2] A foundation of the applicant's case is that the respondent has instituted disciplinary proceedings against him without having provided him with the forensic report which had been executed by The Nexus Forensic Auditors which has been referred to in the affidavit. His basic argument in this regard, was that the report constitutes the respondent's basis of the disciplinary charges preferred against him and, therefore, that he should have been provided with its copy for him to prepare his defence against the charges. He maintained that the respondent's failure to do so represented a transgression against his procedural right to a fair hearing.

[3] The applicant developed his procedural right based complain by contending that the respondent has further violated his due process right to a fair trial by establishing a disciplinary panel constituting *inter alia* of Mr Thato Kao and Mr Seymour Kikine. His protestation was that it has emerged to be common cause that the two have family ties with the former Prime Minister Dr P Mosisili whose son is the closest friend of the Chief Executive Officer of the respondent. In the mist of this relationship, he expressed an apprehension that the two panellists cannot in the eyes of a reasonable minded man be perceived to maintain impartiality in the proceedings.

[4] The facts which had in a nutshell precipitated the disciplinary proceedings and the establishment of the disciplinary panel and ultimately the application before this court; are that on the 13th of February 2012, some heads of the divisions of the respondent including the applicant had received letters directing them to proceed on special leave pending investigations against them by the Nexus Forensic Auditors. This was pursuant to the decision by the board of the respondent that there be mounted a management forensic audit of the corporation scheduled to commence on the 13th February 2012. The resolution and the investigative processes were sequel to the allegations that the concerned heads of divisions, had taken certain decisions which were inconsistent with the rules of the respondent. Notwithstanding the compliance of the heads to go on leave as directed, the investigation report took a long time to be produced. As a result, some heads including the applicant were recalled from their leave to reassume their duties in their respective departments.

[5] It is not in dispute that on the 9th November 2012 following the applicant's resumption of his duties, he received a notice of a disciplinary hearing which was set down for the 19th November to the 7th December 2012. The session was to be chaired by Mr Seymour Kikine and that its initiator will be Mr Werner Steyn, Mr Francois and Mr Pieter Roux. The court adopts the applicant's synopsis of the content of the charges levelled against him. He

accurately interpreted it to be accusing him of having failed to make the necessary interventions befitting his office, failing to exercise due care over credit control, failing to obey fair and reasonable instructions and failing to act in the best interest of the respondent.

[6] The common impression presented before the court is that the applicant had on the day of the hearing objected to the composition of the presiding panel. He specifically applied for the recusal of Mr Thato Kao and Mr Seymour Kikine due to his suspicion that the already stated relational equation and the consequent fear that the two panellists would not on that account, be seen to be impartial in the proceedings. His application was dismissed by the panel. The dismissal for the application for recusal coupled with the argument that the applicant's complain that the respondent had not furnished him with the complete Nexus forensic report, triggered his decision to bring the original application before the court. The essence of the reason for his urgent recourse for intervention by this court is that the respondent was committed to the decision to violate his procedural rights in the disciplinary proceedings.

[7] On the 13th February 2013, Mrs Kotelo who appeared for the applicant motivated the application which had been filed as an urgent matter on the same day and accordingly asked the court to grant the order sought therein as prayed. The court whilst

appreciative of the urgency of the intervention, directed that it would be in the interest of justice if both parties would appear before the court later in the afternoon. The idea was to afford the counsel featuring for the parties an opportunity to device in collaboration with the court, the logistics towards the earliest hearing of the case.

[8] The court in leading the counsel to draw a road map which would facilitate for a speedier conclusion of the case, drew it to their attention that it appears *ex facie* the paper before it that the key issue in the matter centred around the question concerning whether or not the respondent had furnished the applicant with the full Nexus audit report. It then suggested to the respondent's counsel that it could, perhaps, be strategic for the progress of the disciplinary proceedings if he would provide the applicant with the whole report rather than with its excerpts. The understanding was that this issue would be simply and expeditiously resolved in that approach. Resultantly, the remaining issue for determination would be the one concerning the recusal issue. Adv Lekokoto for the respondent responded that the respondent has already furnished the applicant with the relevant parts of the report for him to prepare for his defence and, therefore, that there was no further need for him to provide the applicant with the whole document. He instead on that first occasion took the opportunity to caution the court that it did not have jurisdiction to preside over the issues since they are intrinsically questions of a Labour

dispute and, therefore, by operation of law within the exclusive remit of the Labour Court.

[9] It was in the circumstances, directed that the respective counsel should complete the exchange of papers and that the process should be concluded by the second week of March. The idea was to allow the counsel sufficient time for their completion of the exchanges within the time limits provided for in the rules of the court. It should here be realised that the court had not made any specific order for the staying of the contemplated disciplinary action against the applicant. The antecedent understanding was that the parties would at all material times be appreciative of the fact that the holding of the proceedings remained subject to the final determination of the application by the court. This appeared to have been so within the mist of the directive that the parties should in preparation of the hearing of the application exchange their papers.

[10] Notwithstanding the developments and the understanding which should have prevailed between the parties on the 13th February 2013, the applicant's counsel had on the 15th February 2013, brought the second urgent application before the court for it to issue an order restraining the respondent from proceeding with the disciplinary case against the applicant. The move was according to the applicant's founding affidavit, in consequence of a letter addressed to the applicant that morning

informing him that the disciplinary hearing would proceed on the 18th to the 20th February 2013. A copy of the correspondence was annexed to the affidavit as LNDC 2. The applicant complained in his affidavit that the dates scheduled for the hearing had been unilaterally selected by the respondent in total disregard of the fact that the conduct of the planned disciplinary action was already *sub-judice* and that his right to legal representation would not be taken into account since his lawyer would be would be appearing before the High Court during those days. He maintained that this was indicative that the applicant was dedicated to the violation of his rights to a fair hearing and that the respondent was on a witch hunt campaign against him.

[11] The court in recognition of the disturbing developments in the case advanced the hearing date from the 25th March 2013 to the 25th February 2013. Mrs Kotelo alerted the court that even though it was advancing the hearing date in response to the immerging exigencies, the respondent's counsel had not up to that day filed his responsive papers. The respondent was as a result, ordered to have filed his papers by the 18th February 2013 at the latest. The applicant was, correspondingly, directed to have filed his replying affidavit by the 25th February 2013. It was finally and in the clearest terms ordered that the disciplinary proceedings should be held in abeyance pending the conclusion of the application before the court.

[12] On the 21st February 2013, the applicant filed an application for leave to amend the notice of motion such that the prayers in the original application shall at the end, include a prayer calling upon the respondent to *inter alia* show cause why the said disciplinary proceedings shall not be reviewed and set aside. The *brevitus causa* of the facts averred in his founding affidavit in support of the amendment sought for was that he incorporates the facts as alleged in the notice of motion and founding affidavit and annexed thereto as “KT1” and “KT2”. The affidavit in essence reiterated his original complaint that the resilience of the respondent in refusing to avail him the full Nexus Forensic Report, deprived him of his right to prepare for his defence and that the relationship between the two panellists and the Chief Executive Officer, introduces a founded scepticism towards their impartiality in the hearing. On the 25th February 2013, which was the date for the hearing of the arguments between the counsels, the applicant’s lawyer motivated the application for amendment and her counterpart did not oppose it. The application was, accordingly, granted as prayed.

[13] In the comprehension of this court, the applicant’s case is characteristically constitutionally based. This is traceable from the fact that he is before court asking it to find that his constitutional procedural rights have been compromised by the respondent. The interpretation is rooted in the fact that the applicant has charged that the respondent has not provided him

with the complete version of the report which constitutes the basis of the disciplinary charges preferred against him and that there is a reasonable likely hood that the two panellists will be biased against him in the trial.

[14] At the commencement of the hearing on the 25th February 2013, Adv Lekokoto raised a jurisdictional point *in limine*. He vehemently reiterated the point which he had earlier raised that the court did not have jurisdiction to hear the case or to review it since it was based upon the inherently labour related issues. He hastily advised the court that cases of this nature should be scheduled for hearing before the Labour Court. The counsel explained to the court that the Labour Court has legislatively been exclusively dedicated to administer justice in all labour related cases including specifically the reviewing of the proceedings conducted by disciplinary tribunals.

[15] The counsel in supporting his assertion that the court has no jurisdiction over the matter referred the court to the apposite statutory provisions and case law in which the subject has been thoroughly traversed and the decisions made thereon. He primarily made reference to **sec 9 of the Labour Code Order 1992** which he proposed that it be read in conjunction with **sec 8 of the Labour code (Amendment) Act 2000**. He submitted that the sections are clearly elucidative of the exclusivity of the jurisdiction and powers of the Labour Court in the hearing of labour or industrial related disputes. On case law precedence, he

relied upon the several High court decisions in which the sections in consideration were analysed and applied to the analogously materially similar facts and questions. These cases which all appear to enunciate the current jurisprudence on the subject were **Alice Molikoe v Lerotholi Polytechnic CIV/388/05, Motaung V The National University of Lesotho (NUL) CIV/APN/182/06**. In concluding his addresses on the point of jurisdiction, he drew it to the attention of the court that the applicant should have not brought this case before the High Court without having applied for leave of a judge in chambers in terms of **sec 6 of the High Court Act 1978**, to grant a dispensation for it to be heard in this court. He reasoned so upon the basis that court was being seized with a litigation which by operation of law should have been lodged before the Labour Court. The section provides that:

No civil cause or action within the jurisdiction of the subordinate court shall be instituted or removed into the High Court save by an order of a judge of the High Court acting *mero mutu* or with leave of the judge upon the application made to him in chambers and after notice to the other party.

[16] The perception derived from the counsel's **sec 6** based proposition of the law is that he conceptualises the Labour Court to be one of the subordinate courts under the High Court. The picture which he has effectively projected is that the application has been filed contrary to the already stated substantive law provisions in the Labour Code and to the procedure prescribed under the section.

[17] The applicant's counsel reacting to the points raised *in limine* primarily founded her response upon **Rule 50(1) of the rules of this court**. The rule in paraphrased terms provides for the reviewing machinery in which the High Court may review the proceedings from the subordinate courts and administrative tribunals which have the authority to exercise *quasi judicial* powers. The impression she gave was that the applicant has basically approached the court through that rule.

[18] On the question of whether or not the court has jurisdiction, the applicant's counsel strongly counter argued that the court has the jurisdiction to preside over the matter. In this connection, the counsel relied upon **sec 119 (1) of the Constitution** to demonstrate that the jurisdiction of this court transcends through *inter alia* the examining the proceedings of the administrative tribunals to guard against procedurally unfair trials and the consequences thereof. The section provides:

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

[19] The counsel highlighted it before the court that it was being seized with review proceedings pertaining to the respondent's infringement of the applicant's procedural rights and thereby denying him his constitutional fair trial rights. She attributed this to the respondent's refusal to avail him with the

full auditor's report so that he could formulate his defence thereon and the refusal of the two panellists to recuse themselves from presiding over the matter despite the indicated likelihood of bias on their part. Here, she drew it to the special attention of the court that the respondent have not in their papers, controverted the applicant's averment to that effect.

[20] She illustrated her concern that the respondent's withholding of the full report militated against his right to study the audit report in order to design his defence strategy by relying upon the celebrated constitutional case of **Lepoqo Seoechla Molapo v Director of Public Prosecutions 1997 (8) BCLR SA 1154**. Her position was that the issue and the decision made in that case are analogous to the ones involved in the instant case. In the **Molapo** case, the court was confronted with a challenge to interpret the parameters of the fair trial rights under **sec 12 (1) and (2) of the Constitution** regarding the question of whether or not the police had in refusing to provide the accused with the investigation docket violated his procedural right under the section. Ramolibeli J (as then was), ruled that the contents of the police docket were essential for the accused to prepare for his defence and that the police refusal to furnish him with the docket amounted to a violation of his due process rights under the section. In arriving at the decision, the learned judge declined to follow the decision made in **R v Steyn 1954 (1) SA 324 (A)** where it had been held that

the contents in a police docket were privileged and, therefore, not available to the accused for the preparation of his defence.

[21] Adv Lekokoto had stated that the applicant's accusation regarding the question of furnishing him with the full contents of the documents, by counter accusing him for not having made a material disclosure to the court on that point. He then specifically blamed the applicant for not telling the court that he has been given the excerpts of the report. According to him, that sufficed since it was embrative of all its essential parts upon which the applicant could prepare for his defence against the disciplinarily charges. On that strength, he explained that the report contains some details which would render it detrimental to the respondent as an organisation to avail them to him. He, in particular, warned that there may be instances therein where some individuals may have made adverse revelations against the concerned heads of the sections. The respondent sought to maintain this legal view point with reference to the decision in **Eskom v NUMSA Obo GALADA 2007 BALR 812 (IMMISA)**. Here it had been ruled that an employee has no right to document in its entirety but should be given all such evidence which is intended to be used against him in the proceedings.

[22] The impression portrayed by the respondent's counsel regarding the right of the applicant to have access to the audit report, is that the right must be recognised in relative terms. This

is introduced by his argument that its contents should be censored in such a way that the applicant would be supplied with the parts which would be relevant to the charges and, therefore, pertinent to his potential defence. He canvassed the idea that the respondent is, in the circumstances, qualified to determine the parts of the report which should be availed to the applicant for him to device whatever defence road map. It would seem that he wasn't considering the significance of the context of the report.

[23] At the end of the deliberations between the counsel, the court adjourned the proceedings on a firm undertaking that given the urgency to have the disturbing relational *impasse* between the parties and its potential adverse effect on the operations of the respondent, the judgement would, within the already tight schedule for other judgements to be written, be delivered within two weeks. The intention was to accord it a preferential attention over the other already pending cases in which the court had deservedly been approached on urgent basis. A week later as the court had just started writing the judgement and naturally reading through the many papers filed; it accidentally came to its sudden discovery that the applicant had on the 4th March 2013 filed a notice of withdrawal with the Registrar of this court and served its copy upon the respondent. It surprisingly realized that the respondent has not opposed it. The notification had brought it to the attention of the Registrar and respondent that the original application dated the 22nd February 2013, was being withdrawn from the roll of the High Court for it to

be enrolled in the roll of the Constitutional Court. The withdrawal was accompanied with an urgent application made in terms of **Article 8 (2) of the Constitution**. The discovery of the notice of withdrawal and its corresponding constitutional based notice of motion brought about a sudden uncertainty about any rational for the court to continue working on the judgement. The understanding which dominated its thinking was that the parties have decided to take the matter to Constitutional Court and that they would subsequently formally withdraw the case before court. This made sense particularly that the constitutional case was premised upon the materially similar facts and basically asking for the same relief. Thus, the writing of the judgement in the matter was, consequently, put aside and the court's concentration was diverted to the writing of judgements concerning the cases which had, in any event, preceded the one in consideration.

[24] Notwithstanding the court decision to stop writing the judgement and turn its attention to the other judgements in other urgent cases, it *mero mutu* after some time summoned the counsel before it to ascertain the situation. The applicant's counsel explained that the constitutional case application had inadvertently been wrongly filed in the same file and made to bear the same number. She asked the court to ignore the withdrawal and proceed on with the judgement and apologised for the inconvenience. The respondent's counsel subscribed to the tendered solution. The court in emphatic terms explained it to the

counsel that they will have to appreciate the fact that it was now concentrating on writing the judgments which were already scheduled for their delivery on the specified dates and, therefore, that the writing of this particular judgement would be done afterwards. It also undertook to expedite the process and directed the parties to be patient due to the inconvenience caused to the court.

[25] The paradox in this case is that even though the court had clarified its position regarding its tight schedule and the planned time for the judgement to be written and the fact that there was an interim order restraining the respondent from proceeding with the disciplinary measures against the applicant, the respondent unilaterally re-summoned the applicant to appear before its disciplinary panel in relation to the same charges. This occasioned the applicant to file a third application. It was an application for contempt of court. The respondent's counsel apologised to the court and to the other party for the unlawful and contemptuous measure it had taken. The court despite its strong indignation against the contemptuous attitude demonstrated by the respondent recognised their apology as a way of purging the contempt. It accordingly accepted it and awarded the applicant the cost of the application. The court somehow felt that the respondent's otherwise clearly unlawful act, could have been triggered by the work related pressures and hence its readiness to apologise for the wrong. The court seized

the opportunity to appeal to the parties to exercise restraint since it was now writing a constitutional judgement which was the last assignment before it could re address its mind to their case. The counsel in the clearest terms welcomed the indicated road map.

[24] Another phenomenon on the side of the respondent is that some short while after the hearing of the contempt proceedings in which it was the culprit and the final understanding which had at the end prevailed, the respondent wrote a letter of protestation about the delay to have the judgement delivered. Its form and content bothered on contempt if not contemptuous since it lacked *bona fides* and in an unorthodox manner dangerously ventured to place the court under some undue pressure. The court summoned the parties before it to articulate its negative interpretation of the letter and about the potential judicial instruments to be invoked in such challenges. The applicant's counsel responded that the correspondence lacked sound basis considering the understanding shared by all at the conclusion of the contempt proceedings and the apology which the respondent had tendered before the court by having acted contrary to its interim order. The Chief Executive Officer of the respondent who had himself signed the document, apologised for whatever wrong implications could have been radiated by the letter. It transpires from its authorship that it had been drafted for him by a legal mind which had, however, misled him on the true legal based facts which had

obstructed the court to have delivered the judgement within two weeks as it had originally been planned. He actually didn't deny it that the document had been prepared for him by a lawyer and that all he did was to authenticate it with his signature believing it to be correct in both form and content. This was reinforced by his readiness to register his unequivocal apology to the court and to humbly plead for a constructive way forward. He portrayed the impression that he was genuine and constructive. The court welcomed the gesture. In passing the court expresses its abhorrence towards a lawyer who advises his or her client to directly or otherwise employ *extra curricular* means of beclouding its judgement. This could signal a passionate pursuit for some ulterior motive rather than justice.

[25] The Acting Registrar of the High Court who was present inside the chambers throughout the deliberations was after their conclusion directed to write a letter in which the record would be straightened. He accordingly did so.

[26] In the foregoing developments, the key determinative issue to be addressed remains whether or not the court has a jurisdiction to:

1. Operate its reviewing machinery under **Rule 50 (1) of its Rules** to examine the procedural correctness in the respondent's decision not to furnish the applicant with the auditor's report so that he

could use it to prepare for his defence against the disciplinary charges founded upon that document;

2. Use the same **Rule 50 (1)** powers to do likewise in relation to the respondent's Disciplinary Panel's ruling against the application for the recusal of its two members whose impartiality he had brought into question on the basis of a somehow explained relationship between themselves and the Chief Executive of the respondent.

[27] The two levelled question had been introduced by the respondent's counsel at the commencement of the proceedings and accordingly responded to by the applicant's counsel. It has, throughout, retained the centrality of its significance and, therefore, standing to be answered with reference to the applicable legislative provisions and the case law.

[28] The court recognizes the position that **Rule 50(1)** provides for a procedure through which the High Court can review the decision of *inter alia* the tribunal or board provided that it was at the material time exercising quasi judicial powers. It would, nevertheless, be imperative for the court in considering the application of the rule as it has been asked for by the applicant to interface it with the applicable statutory provisions and the interpretation assigned to them in the relevant precedents. In this approach, the court would have to be mindful that a rule should be perceived as being subservient to a statutory prescription and to the common law. In the process, the facts which constitute the

basis of the litigation and the issues thereof would have to be contextually comprehended.

[29] The applicant has clearly advised the court that he is not before it seeking for a relief under the Labour Code but rather that his concern is on the respondent's transgression of his fair trial rights in that he has not been provided with the essential document to enable him to prepare for his representations at the disciplinary hearing. He has effectively projected a view that the matter falls outside the province of the Labour Law and instead belongs to the constitutional arena. It is in that understanding that his counsel sought to persuade the court to follow the decision in **Lepogo Seoezha Molapo v Director of Public Prosecutions (supra)** in which it was decided that the accused has a constitutional right to the contents of a police docket for him to prepare his defence. This was described as being in consonance with the fair trial rights under **sec 12 of the Constitution**.

[30] The present encounter between the applicant and the respondent originates from the employer-employee working relationship. It is common cause that the applicant is employed as a divisional manager of the respondent and that his employer has instituted the disciplinary charges against him accusing him of rendering a substandard service which is detrimental to the interest of his employer. This relationship is primarily governed by the contractual agreement between the two parties and

simultaneously by the **Labour Code Order 1992** as amended by the **Labour Code Amendment Act 2000 and 2006 respectively**. Thus, the determination of the issues presented before the court would have to be guided by the code and with reference to the contractual obligations between the parties and the operating rules between them. The contractual undertakings between the parties and the code, would within the milieu of the issues in question, be explored specifically with a view to identify a forum of competent jurisdiction for the applicant to ventilate his grievances and seek for a redress. The consequent determination would be whether this would be The High Court or The labour justice system. The challenge would also have to be responded to in the light of the submission by the applicant's counsel that the court is in terms of **sec 119(1) of the Constitution** entrusted with an unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of *inter alia* (for the purpose of this case) the tribunal or board exercising *quasi-judicial* functions under any law.

[31] It is at this juncture, determined that the defining provisions on the subject of the appropriate forum would be **sec 24(1) of the Labour Code (Amendment) Act 2000** read in conjunction with **sec 24(2)(a) of same**. **24(1)** provides:

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.

24(2)(a) details that:

The court shall have the power to inquire into and decide the relative rights and duties of employees and their respective organisations in relation to any matter referred to the court under the provisions of the code and to award appropriate relief in case of infringement.

The sec 24 provisions referred to in verbatim terms above, appears to be complemented by **sec 9 of the Code**. The latter, provides for the exclusivity of the jurisdiction of the Labour Court to exercise its civil jurisdiction in respect of any matter provided for under the code.

[32] The analysis of the quoted parts of **sec 24** considered in conjunction with **sec 9** and its application to the salient facts in this case and the incidental issues, culminates in the understanding that the jurisdictional question has been adequately contemplated in the section. **The labour Code Order** is designed to *inter alia* govern the contractual relationship between the employer and the employee. In the same logic, it conceptualizes disciplinary machinery within the employment environment. The applicant is, in the instant case, complaining that his due process rights have been violated before the respondent's disciplinary tribunal and that as a result, his trial is already destined to be unfair. The applicant himself has in this respect, conceded in his papers before the court that the respondent has the power to subject him to the disciplinary action. The general perception created by this factual scenario, is that the dispute before the court, has its genesis in the employer

and employee contractual working relationship and, therefore, within the general purview of **sec 24(1)**.

[33] The court which is contextually envisaged under **sec 24(2)** is the Labour Court. This court is specifically under **sec 24(2) (a)**, *assigned the jurisdiction to inquire into and decide the relative rights and duties of employees*. The court in this regard, interprets the power of the Labour Court, *'to decide the relative rights of the employees'* to also visualize its authority to inquire and decide on the question of the employee's right to a fair hearing before a *quasi judicial* tribunal and for that to be seen to have been accorded to the employee. This would further be *in tandem* with the constitutional rights to a fair hearing. The term *'relative'*, represents a qualification of significance because it empowers the Labour Court to interpret the existence of a right or otherwise within a specific context in the labour relations environment. In the present case, the applicant is complaining before this court that the respondent has trampled upon his procedural rights and thereby jeopardising his right to a fair trial before the respondent's work related disciplinary tribunal. The disciplinary rules of the respondent may provide that it must comply with them when subjecting its employee under a disciplinary action. This is reinforced by the applicant's prayer for the court to order the respondent to follow its disciplinary code.

[34] The applicant's alternative reliance upon **rule 50** read in conjunction with **sec 119 (1) of the Constitution** in his endeavour to establish the jurisdiction of this court, has been sufficiently addressed by the Lesotho Court of Appeal in **Vice Chancellor of NUL and Another V Professor Lana (10/2002) [2002] LSCA 17 (11 October 2002)** where in its analysis of the section it held that:

sec 119 (1) of the Constitution cannot be interpreted in isolation and that it must be construed in the light of the constitution as a whole, but particularly in light of **sec 118**. Thus construed, the original jurisdiction vested in the High Court in terms of **sec 119**, does not detract from the exclusive jurisdiction conferred by parliament, in terms of the Constitution, on the Labour Court established in terms of the code.

[35] The fact that the legislature has pursuant to **sec 118 (1) (d) of the Constitution** established the Labour Court commands a telling that Labour Court has from its inception, been designed to dispense justice on labour related matters. This qualifies it to be recognised as a specialised court with a corresponding specialised jurisdiction. The parliament created that court well aware of the unlimited jurisdiction of the High Court in terms of **sec 119 (1)** including its review powers under **rule 50**. It in its wisdom found it necessary to create the Labour Court and to dedicate it to administer the stated specialised justice. This signifies the strategic importance of an accurate classification of a case and subsequently a choice of a proper forum. In **Motaung v National University of Lesotho and Others (CIV/APN/182/06)** Majara J having cited with approval the analysis of the Court of Appeal regarding the interfacing between **Rule 50, sec 118 and sec 119 of the**

Constitution in **Vice Chancellor of NUL V Professor Lana** (supra) further expressed a view that:

The very fact that the High Court is conferred with unlimited jurisdiction as provided for by **sec 119 of the Constitution** means that the court entertains cases that cut across all fields which factor is in itself, highly demanding. Needless to say, some of the areas are extremely technical and where the legislature has seen it fit to establish specialised courts with expertise in those fields, litigants will be guaranteed a faster and more effective service than if their cases were to be dealt with by ordinary courts.

[36] In the final analysis, the court resolutely classifies the applicant's case to fall within the Labour Law province, finds that it is governed by the **Labour Code** and, therefore, lies within the exclusive jurisdiction of the Labour Court. It is, for emphasis's sake, reiterated that the finding is attributable to the fact that the dispute is rooted in the employer and employee contractual relationship; the impugned disciplinary proceedings are sequel to the work performance based charges preferred by the respondent against the applicant.

[37] The court having classified the case, determines that the Labour Court would be the forum of competent jurisdiction to deal with the case and that **Rule 50(1)** considered in conjunction with **sec 119 (1) of the Constitution** cannot be read in isolation from **sec 118 of the Constitution, sec 24** and **sec 9 of the Labour Code (Amendment) Act 2000**. This perception receives reinforcement from the decision in **Vice Chancellor V Professor Lana** (supra) and **Motaung V NUL and Others** (supra). The common denominator in the cases referred to for guidance, is that the legislative scheme

is such that the High Court is, by operation of law, barred from relying upon **sec 119 of the Constitution** to hear cases which are exclusively within the exclusive domain of other specialised courts including the Labour Court. A dispensation could, perhaps, be granted under **sec 6 of the High Court Act** under the deserving circumstances which would have to be strictly considered to avoid a technical usurpation of the powers of the subordinate courts by the High Court.

[38] It should, for clarity's sake, be cautioned that this court is not in any manner, whatsoever, directing that the applicant could lodge a review application before the Labour Court since there is no provision which empowers it to review proceedings of the nature of the case before court. The court observes that in terms of **sec 5 of the Labour Code (Amendment) Act 2006**, the Labour Court has been entrusted with the authority to only review arbitration awards. The resultant understanding is that the applicant could straight forwardly apply to the Labour Court asking it to intervene against the acts which according to him, are the manifestations of the respondent's infringement of his procedural rights. These in specific terms are that the respondent is denying him full access to the Nexus Audit Report for the planning of his defence and for an order directing the said panellists whose impartiality he complains about, to honourably recuse themselves from presiding over the disciplinary proceedings. The application to the Labour Court would,

however, have to be incidental to the proceedings instituted in the DDPR.

[39] The court has carefully considered the applicant's advice that it should not follow the decision of Majara J in **Motaung v The National University of Lesotho (supra)** since it was according to her premised on a miscomprehension of the parameters of the High Court powers under **sec 119 of the constitution**. It has in that consideration transpired to the court that the learned Judge had effectively associated herself with the Court of Appeal analysis that the section should indispensably be read in conjunction with **sec 118 of the constitution**. It had from there come to a synthesis that in that approach, there would be a discovery that the legislature has is in accordance with the latter section, been allowed to create more courts and tribunals and to assign jurisdictional powers to each. The Labour Court was described as one such creations which notwithstanding the High Court powers under **sec 119**, has since been given an exclusive jurisdiction over the labour related disputes. The Court of Appeal had on that reasoning, held that the High Court had no jurisdiction to entertain a labour oriented matter since the Labour Court has been established for that purpose. Majara J, had however, gone further to project the rationale and the strategic significance of having specialized courts which include the Labour Court. Her contribution to the jurisprudence on the subject, has demonstrated the practical significance of utilizing the specialized

courts for efficaciousness and the development of the law. The court accordingly associates itself with her unavoidable decision to follow that of the Court of Appeal and with the extra reasoning she advanced.

[40] It is not the intention of this court to delve into the merits of the case since it has already been decided upon the legal point taken *in limine* at the instigation of the respondent. Whilst this is the position, it is found to be worthwhile to state that this is a typical case in which litigation could have been advisedly avoided in favour of the progress in the disciplinary proceedings. This could, perhaps, have long been concluded and the possible subsequent processes resorted to. The court had at the commencement of the proceedings, basing itself upon the papers before it, suggested a practical way towards a resolution of the impasse so that the internal proceedings could go ahead. The proposed way forward was that the respondent should in the light of the Court of Appeal decision in **Seoehla Molapo** (*supra*) reconsider its position concerning whether the applicant should be provided with the whole report or whether the respondent is qualified to identify the parts of it which according to him would suffice for him to plan his defence. The court had at the time realized that the copies of the report which were annexed to the applicant's affidavit were boldly thereon written "*Draft Copy*". It is not for the purpose of this comment, found necessary to state anything pertaining to the argument that some parts of the report are privileged from being accessed by the applicant.

[41] The court finds it ironic that the respondent has not contradicted the applicant's charge concerning the relationships in question and its perceived adverse impact on the applicant's fair trial rights and yet that has not simply been reciprocated to in favour of the respondent's desired progress in the disciplinary hearing. A mere fact that the allegation has not been controverted, is suggestive that a practical way forward would be to honourably dispense with the services of the duo in the current disciplinary trial and substitute them with other citizens of equal social eminence whose neutrality would be unassailable. The observation lends strong credence from the fact that the test for the determination of the likelihood of bias is a liberal one since it is founded upon the notion of the perception of an ordinary reasonable minded person. The compromise would have facilitated for the expeditious resumption of the disciplinary hearing. The emphasis and the focus should have been on the resuscitation of the internal proceedings rather than on the demonstration of the adverse and uncompromising belligerences between the parties in any court.

[42] The final result is that in the premises, the point *in limine* on the question of the jurisdiction of this court is upheld and the *rule nisi* is discharged- hence the application is dismissed for lack of the jurisdiction of the court in the matter. The applicant is directed to procedurally seek for his desired relief from a court or a forum of competent jurisdiction. The court doesn't given the

developments in this case, find it befitting to make an order on costs.

**E.F.M. MAKARA
ACTING JUDGE**

For Applicant : Adv. Chonela
For Respondent: Adv. Lekokoto