IN THE HIGH COURT OF LESOTHO

CIV/APN/498/2013

In the matter between:

MAKHOBOTLELA NKUEBE **APPLICANT**

And

METROPOLITAN LESOTHO STAFF RETIREMENT FUND **1ST RESPONDENT**
THE BOARD OF TRUSTEES (METROPOLITAN LESOTHO STAFF RETIREMENT FUND) **2NDRESPONDENT**
CHAIRPERSON (BOARD OF TRUSTEES – METROPOLITAN LESOTHO STAFF RETIREMENT FUND) **3RDRESPONDENT**
METROPOLITAN LESOTHO LIMITED **4THRESPONDENT**

JUDGMENT

Coram : Honourable Mr. Justice E.F.M. Makara
Dates of Hearing : 27 May, 2014
Date of Judgment : 13 August, 2014

Summary

Application for the restoration of the Income Continuation Benefit (ICB). The benefit having been initiated by the 4th Respondent as the Applicant's employer – The 4th Respondent having terminated the ICB enjoyed by the Applicant at the material times – The ICB contract providing for an arbitration where there is a dispute between the parties – The ICB nevertheless, being an independent entity – The Respondents challenging the jurisdiction of the Court on the reasoning that the dispute was labour related and therefore, suited for the Labour Court – The Court finding that the point of divergence is not under employer-employee relationship but over an insurance contract.

Held:

1. The parties are directed to submit themselves before the arbitration as it is contemplated under Rule B 1.6 of the 1st Respondent's rules to which the Applicant has subscribed and is a party to them.
2. The Court has jurisdiction over the matter and the jurisdictional issue is dismissed with costs.

CITED CASES

Tseuoa v Labour Appeal Court & Others LAC (2005-2006) 248,
CGM Industrial (Pty) Ltd v LECAWU and Others LAC (1995-1999)791,
Attorney General and Others V Kao (2000-2004) LAC
Qoaling Highlanders v Lesotho Sports Council & Anor (CIV/APN/92/79)
Turner v Jockey Club of South Africa 1974 (3) A.D

STATUTES & SUSIDIARY LEGISLATION

Labour Code Act 1992.

MAKARA J

Introduction

[1] The applicant has through an urgent application approached this Court seeking for its issuance of an order in terms of which it in the main orders:

1. The respondents to restore the Income Continuation Benefit (ICB) together with all the benefits dependent thereon which the applicant has been receiving pending finalisation of this case;
2. The second and third respondents to submit to arbitration proceedings in terms of the rules of the 1st respondent;

In the alternative,

3. The arbitration contemplated in the rules be set aside so as to entitle the Court to determine the dispute between the parties;
4. The respondents be ordered to continue to remunerate the applicant in line with the ICB scheme together with all the benefits dependant thereon;
5. The respondents be ordered to pay all outstanding monies that were not paid as a result of terminating the applicant's entitlement to the ICB;

The respondents reacted to the application by filing their intention to oppose and subsequently the opposing affidavits. Consequently, the matter was scheduled for hearing on the 27th May 2014.

Common Cause Background

[2] The applicant was at all material times an employee of the 4th respondent and in that relationship a member of its Metropolitan Lesotho Staff Retirement Fund. During his membership he suffered a stroke on the 16th march 2011. This led to his extended sick leave out of the service of his employer. Resultantly, his employer referred him to the retirement fund administrators for his placement on the Income Continuation Benefit (ICB). This is an insurance scheme which is an alternative source of a continued monthly remuneration of the employee of the 4th Respondent in the event of an ailment or incapacitation so that such a person could continue to receive a salary as if he was still under his normal employment. The Applicant had in consequence of the stroke and its incidental complications benefited from the ICB. This obtained for over a year until he was informed by the human resource manager that the benefit would be terminated.

[3] The applicant reacted to the termination of his ICB monthly payment by asking the respondents to reinstate it on the basis that the decision violated the contractual insurance arrangement which he has concluded with them since his health condition had not satisfactorily improved. The respondents maintained their decision. In the circumstances, he addressed a letter to the 1st to the 3rd respondents asking them to declare a dispute with him and, thereby facilitate for

the reference of the matter to *arbitration* in terms of Rule B 1.6 of the Retirement Fund. The trio refused to submit to the process.

[4] The Retirement Fund is a *universitas* in that it is distinctly separate from the 4th Respondent. The authorship of this status is Rule B 1.1 of the Retirement Fund. It has to be highlighted that the ICB exists side by side with it though the parties share a divergence of views on their relationship.

[5] It has transpired that the parties are by default in harmony that the question of the administration of the ICB by the 2nd Respondent presents a key controversy. The determination hereof will present a revelation on the relevancy or otherwise of the 2nd Respondent in these proceedings. A practical significance of the resolution over the issue will, ultimately, project the nature of the dispute before the Court and therefore the proper forum for its immediate adjudication according to the applicable rules.

Issues

[6] At the commencement of the hearing, Adv Woker for the respondents raised a legal point *in limine* in which he contested the jurisdiction of the Court over the matter. His position being that this case falls within the jurisdiction of the Labour Court since it concerns a labour dispute between the Applicant and 4th Respondent who is the employer of the Applicant. A dimensional dispute hereof hinges on the question of whether the matter should be rescheduled for hearing at the arbitration forum as a Court of first instance. This has incidentally led to a question

on the competency or otherwise of this Court to circumvent the arbitration procedure and traverse the merits of this case.

Arguments Advanced For the Parties

[7] The jurisdiction of this Court was challenged primarily on the reasoning that the case was intrinsically on a labour matter in that it had to do with an employer –employee contractual relationship which is governed under the **Labour Code Act 1992.** There was emphasis laid on the point that the dispute was on the question of a continued remuneration of the employee through a provisional or an emergency insurance source which has admittedly been established and funded by the 4th Respondent for its employees. The argument was supported with a specific reference to **S 25** of the Code (as amended) which provides that:

> The jurisdiction of the Labour Court is exclusive and no Court shall exercise its civil jurisdiction in respect of any matter provided for under the code.

[8] To illustrate the jurisdictional point, there was a further specific reference to **S 24 (2)(a)** and **24 (2)(h)** of the **Labour Code Act of 1992** (as amended) which details the parameters of the juridical powers of the Labour Court over the labour related disputes. In conclusion, he brought to the attention of the Court a catalogue of case law jurisprudence propounded in **Tseuoa v Labour Appeal Court & Others LAC (2005-2006) 248, CGM Industrial (Pty) Ltd v LECAWU and Others LAC(1995-1999)791, Attorney General and Others V Kao (2000-2004) LAC 656 at 664C, Bofihla Makhalane v Letseng Diamonds (Pty) Limited C of A (CIV) 14/2010.** The decisions therein are in essence, a reaffirmation of the statutory position that the Labour Court commands an exclusive jurisdiction over all the labour related disputes and that the High Court does not have an original jurisdiction over such matters.

[9] The above narrated law was applied to the case before the Court through the explanation that this Court was being seized with the issue concerning the ICB which was described as being a fiscal facility which has been designed by the 4th Respondent as the employer to benefit only its employees including the Applicant himself. The impression was that the Court should despite the dynamics surrounding the case, recognise that it in essence remains a labour dispute and therefore, by the dictates of the law exclusively a matter for the Labour Court.

[10] It is clear, however, that according to the Applicant the Court is not being seized with labour related matter. His position is that the court of first instance should have been the arbitration intervention in terms of the rules of the 1st Respondent. In the alternative, he urged the Court to discretionarily dispense with the arbitration and resolve the case itself.

[11] In an endeavour to persuade the Court otherwise, Adv Rafoneke for the Applicant premised his counter reaction to the point *in limine* on the jurisdictional competency of this Court by stating that it is not seized with a labour matter but rather with a distinctly insurance contract one. He then drew a distinction between the applicant's salary and the ICB payments by cautioning that the former is a remuneration which an employer pays to the employee at the end of the stipulated intervals of time. He contrasted this with the ICB payment in that it is not a direct periodic payment resulting from the employer-employee relationship but is on the contrary an incidental periodic payment which is directly traceable from a provisional source of income. The Counsel telescoped the ICB as semi-independent

Insurance Scheme which is inter related with the Retirement Fund, governed by its own rules and registered as such. This he maintained obtains despite the fact that the 4th Respondent is the employer of the Applicant and that it underwrites the Scheme.

[12] In the stated background, it was submitted on behalf of the Applicant, that this Court commanded the jurisdiction to hear the matter since it did not fall within the employer-employee parameters and, therefore, not suited for the Labour Court.

[13] It was further in pursuit of the prayer for the 2nd and 3rd Respondents to be directed to submit to *arbitration* in accordance with the rules of the 1st Respondent argued that the Court has a judicial discretion to set aside that internal dispute resolution intervention and deal with the merits of the matter itself. In support of this proposition he urged the Court to adopt the English approach in **Davies v South British Insurance Co. (1885) 3 SC 416**. According to the Counsel, the essence of the decision therein was that the right of arbitration which has been waived cannot be insisted and acted upon in that where one party has declined to go into the arbitration proceedings, the other party is entitled to approach the courts to obtain the relief which would otherwise be the subject of the arbitration proceedings. To further reinforce the point, he sited a decision in **Parekh v Shah Jehan Ginemas (pty) Ltd & ors 1980 (1) SA 301 @ 305** where Didcott J held:

> .....If either party takes arbitrable disputes straight to court, and the other does not protest, the litigation follows its normal course, without pause. To check it, the objector must actively request a stay of proceedings. Not even that interruption is decisive. The court has a discretion whether to call a halt for arbitration or to tackle the dispute itself.... throughout its jurisdiction.

The Findings and the Decision

[14] It emerges from Rule B1.1 that the 1st Respondent is a separate body cooperate with a legal *persona* status distinct from its members and it can in that capacity sue or be sued in its own name. The 2nd Respondent has been entrusted with its administration and to institute legal proceedings on its behalf. Given the independent legal standing of the 1st Respondent and the management of its affairs by the 2nd Respondent, a clear distinction has to be drawn between them and the 4th Respondent. In that consideration, it should be acknowledged that the Applicant has brought a trial against the 1st and 2nd Respondents by virtue of their respectively stated capacities. The Applicant's cause of action is simply his lamentation that the 2nd Respondent has unlawfully breached the **insurance contract** concluded between himself, the 1st and the 4th Respondent respectively. He has never in any manner, whatsoever, throughout his papers founded his case on the ground that the respondents have breached any of the terms of the employer-employee contract between him and the 4th Respondent. The corresponding fact is that he is undisputedly the employee of the 4th Respondent and not the 1st Respondent.

[15] The Court has attached significance to the manner in which the Applicant has lined up the respondents and described each of them. This when considered within the context of the merits of his case, presents a picture that he has **principally brought the application against the 1st and the 2nd Respondents** respectively**.** The 3rd Respondent has been featured in his capacity as the chairman of the 2nd Respondent. The indispensability of the 4th is simply traceable from its position as the employer of

the Applicant and the founder as well as the underwriter of the 1st Respondent. The strategy has been to ascertain the sufficiency of the citation, to avoid the Application being attacked for a *non joinder* of any relevant party and give a comprehensive scenario of the case for the appreciation of the logicality of the order prayed for.

[16] In addressing the foundational controversy concerning the 2nd Respondent's qualification as the administrator of the ICB, the Court realises that *ex facie* the Retirement Fund Rules read in conjunction with their ICB counterpart, there is no clear prescription about the powers of the 1st Respondent to administer ICB. This notwithstanding, it further realises that the subject should be judicially resolved through the interpretation approach. In that task, Rule B 1.3.3 sheds light on the interrelationship of the 1st Respondent and the ICB. The Rule details in part:

> B 1.3.....The Board of Trustees is empowered to manage and control the FUND in accordance with this Rule in order to realise the objectives of the FUND and, without in anyway detracting from the general intent of this Rule, possesses the following powers and duties:
>
> B 1.3.1.....
>
> B 1.3.2.....
>
> B1.3.3 **to effect the relevant group insurance POLICIES for the purposes of insuring the benefits described in these RULES (if necessary);**

In the Court's interpretation of Rule B1.3.3 the **group insurance policies** referred to in the Rule, is indicative of a collection of **policies** established and or underwritten by the 4th Respondent. The ICB is in this context conceptualised as one of the said **policies.** If the intention of the 4th Respondent who has authored the rules was otherwise, it would have in the clearest terms exempted the ICB from the rest of its group **policies.** It is a further understanding of the Court that whatever apparent

ambiguity in the phraseology, should be interpreted in favour of the Applicant who has throughout maintained that the 2nd Respondent is *inter alia* the administrator of the ICB. It was incumbent upon the author of the rules to have clearly recorded that the ICB falls outside the purview of the rest of the plurality of the **policies.**

[17] The analysis that the 1st Respondent is a legal *persona* which is administered by the 2nd Respondent and that the applicant has primarily sued them in those capacities in relation to a dispute over an insurance contract, is suggestive that the Court is not dealing with a labour dispute but for over emphasis sake with an insurance case. This obtains despite the fact that the 4th Respondent who is admittedly the employer of the Applicant features behind the scenes. The Court is in this case more concerned with the substance of the **cause of action**. In its comprehension, the case under consideration is analogous to a situation where a Mercedes Dealership Company has authored an arrangement for its employees to conclude a contract with its funded Mechanical Subsidiary Company to access reduced service charges. If an employee is aggrieved that his car has not been properly serviced, he would be qualified to sue the Subsidiary Company and its administrative structures. It could also be strategic to include the main company since there would be averments on the history of the contract. Thus, the cause of action would be on a breach of a contract and not on the employer – employee labour dispute even though it would have a background connection of that relationship.

[18] The Court finds that it should in an endeavour to resolve the impasse receive guidance from the *ubi jus ibi remedium* common law principle. The thinking is

authored by the appreciation that the judicial proclivity should be to provide a person who is complaining about a transgression of his right with a remedy. To illustrate this, had the Applicant not included the 2nd Respondent in the proceedings, the Rule could conveniently be argued to include them. The end result would be that the Applicant will be led on a wild goose chase while seeking for justice. The administrative powers entrusted upon the 2nd Respondent over the group insurance **policies** of the 4th Respondent or those underwritten by it, is indicative of the relevance of Rule B 1.6 of the rules of the 1st Respondent. The rule provides that:

> If any party is aggrieved by the decision of the BOARD OF TRUSTEES (2nd Respondent), the aggrieved party may refer the matter for arbitration in terms of and in the manner set out in the Lesotho Arbitration Act of 1980 and according to the rules of the association of Arbitrators (Southern Africa) (where applicable).

[19] Notwithstanding the foreign jurisprudence relied upon by the Counsel for the Applicant in persuading the Court to discretionarily dispense with the arbitration procedure and deal with the matter itself, this Court feels more persuaded by the decision which it reached in **Qoaling Highlanders v Lesotho Sports Council & anor (CIV/APN/92/79) (unreported)** in which Rooney J citing with approval **Turner v Jockey Club of South Africa 1974 (3) A.D 659**; stated:

> Where the rules of a voluntary association provide that certain disputes and complains should come before domestic tribunals, the law courts will not interfere....the same principle applies where the domestic tribunals are provided by the legislations.

[20] The Court recognises the fact that in the instant case it had been inscribed in the rules of the 1st Respondent as the managers of the Scheme, that in the event of any dispute between the employer and the employee pertaining to the Scheme,

the parties shall submit to arbitration as an internal dispute resolution mechanism. Thus, in line with the jurisprudence espoused in **Qoaling Highlanders (supra),** the Court finds no reason, whatsoever, why the parties should not exhaust the domestic remedy provided for in the rules before seeking for its intervention. This would, in any event, provide the parties with a relatively more expedient dispute resolution system which could, if necessary, culminate in the institution of the review proceedings before this Court.

[21] In the premises, the final decision is that:

> The parties are directed to submit themselves before the arbitration as it is contemplated under Rule B 1.6 of the 1st Respondent's rules to which the Applicant has subscribed and is a party to them.
>
> The jurisdictional application fails and it is accordingly dismissed with costs against the respondents.

E.F.M. MAKARA
JUDGE

For the Applicant : Adv. M. Rafoneke Inst. T. Maieane K.E.M. Chambers

For the Respondent : Adv. H.H.T. Woker Inst. Webber Newdigate