IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/118/2014**

In the Matter Between:-

'MALISEMA MAKHASANE	**APPLICANT**
AND	
MAPHASA MOKHOCHANE	**1ST RESPONDENT**
INDEPENDENCE ELECTORAL COMMISSION (IEC)	**2ND RESPONDENT**
DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

CORAM	**:**	**MOKHESI J**
DATE OF HEARING	**:**	**25TH SEPTEMBER 2019**
DATE OF JUDGMENT	**:**	**14TH NOVEMBER 2019**

CASE SUMMARY: *Civil Practice –Applicant launching an application for declaration that when she was dismissed as Independent Electoral Commission's employee she had already resigned – the 1st and 2nd respondent raising a point in limine that this court does not have jurisdiction to deal with this matter as it falls within the jurisdiction of the Labour Court – point in limine upheld.*

Held: Further that the policy consideration of creating a specialized labour dispute resolution channels have to be respected and not undermined by bringing matters which fall within the Labour Court in the High Court.

Held: Further that even though the applicant has sought a declarator which the High Court in terms of the High Court Act, of 1978, is empowered to entertain, the court exercised its discretion to refuse to deal with the declarators as the prayers sought can competently be dealt with by the Labour Court.

ANNOTATIONS:

***STATUTES*:** *Labour Code Order 1992*

Constitution Act No. 7 of 1997

National Assembly Electoral Act No. 14 of 2011

High Court Act 1978

CASES *: Lesotho Revenue Authority and Others v Moutloatsi Dichaba and Others C of A (CIV) No. 21/2018*

Cordiant Trading CC v Daimler Chrysler Financial Services 237/2004 (30th May 2005 (unreported)

Per Mokhesi J

[1] ***INTRODUCTION***

The applicant had approached this Court seeking certain declaratory orders couched in the following terms:

> 1. Declaring that the Applicant's letter of resignation accompanied by a month's notice to the Independent Electoral Commission (IEC), terminating employment contract and relationship between Applicant and 2nd Respondent, prior to the institution of the envisaged disciplinary hearing action against Applicant, was properly tendered and served upon the 2nd Respondent.
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> 2. Declaring that the Applicant's letter of resignation, terminating employment contract, was the Applicant's unilateral act requiring no acceptance from 1st Respondent, and declaring non-acceptance of the Applicant's resignation and the accompanying notice, prior to the institution of the envisaged disciplinary hearing action against the Applicant by the 1st and 2nd Respondents, was tantamount to forced labour.
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> 3. Declaring that Applicant's resignation as a Government employee or Public Servant, before she was formally charged, warranted Applicant not to attend to 1st and 2nd Respondent planned disciplinary hearing proceedings that were subsequently held, and applicant was found guilty as allegedly charged in her absence, be declared null and void with no legal force and effect.
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> 4. Directing the 1st and 2nd Respondents to pay all Applicant's terminal benefits, including the Government's Contribution Pension Fund, for service rendered over the years as a Public Servant up to the end of her employment.

[2] ***Factual Background***

The applicant was employed as a Public Servant on a permanent and pensionable basis as an Executive Secretary at the Independent Electoral

Commission (IEC). Sometime in 2014 certain allegations of fraud involving the applicant surfaced. It was alleged that the IEC was defrauded of an amount of M4 403 286.67 from its account held with the Standard Lesotho Bank. Consequent to this discovery, the applicant was served with a 'show cause letter' in terms of which she was requested to provide reasons why she should not be suspended while the investigations into her alleged fraudulent activities were being carried on. She was requested to give her response on or before the 29th January 2014. Faced with these serious allegations, the applicant, on the 27th January 2014, penned a letter in terms of which she notified the 1st respondent of her resignation. In that letter she indicated that she would be serving a statutory one month's notice effective from the 28th January 2014.

[3] Upon receipt of the Notice of resignation, the 1st respondent, on the 29th January 2014, authored a letter in terms of which he notified the applicant that her intention to resign "has not been accepted and as such my letter to you dated 24th January 2014 still stand." In short the 1st respondent purported to reject the applicant's notice of resignation.

[4] On the 31st January, 2014, probably nudged into action by the 1st respondent's purported rejection of her 'notice of resignation', the applicant's legal representatives M.T. Matsau & Co. wrote to the 1st respondent in terms of which they sought to clarify the legal position regarding her notice of resignation. The said letter (in relevant parts) said:

> "If the IEC was to refer to our client's letter dated 27th January, 2014, the IEC will find that indeed she has served upon the IEC a month's notice. She indicated in the letter that the notice period was to start running from the 28th January, 2014.
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> The IEC seems to be of the understanding that the termination is with immediate effect and it is not. The notice period runs until the 28th February, 2014. The intention to terminate the contractual relationship is clear and unambiguous.

Our client has already terminated the employment contract so there is no need for her to give reasons why she should not be suspended. It is unnecessary to require her to advance such reasons because she has already terminated the relationship. Whether the IEC accepts her resignation or not is immaterial as the contract has been terminated and the IEC is not required to consent.

Besides, the IEC has acknowledged that her letter of the 27th instant indicates a clear intention to terminate the contract. This being the case the IEC cannot force Mrs. Makhasane to stay in the employment relationship against her will. She has a right to tender her resignation at any time…"

[5] On the 04th February 2014 following the applicant's non-response to the 'show cause letter', the applicant was invited to a disciplinary hearing. This invitation was made on the 18th February 2014. The applicant was accordingly served with the Notice of charges which had been preferred against her. Unrelenting in her resolve not to subject herself to a disciplinary process, on the 21st February, 2014, her attorneys wrote to the 1st respondent advising him that she would not attend the disciplinary hearing as the applicant had resigned from post.

[7] The disciplinary hearing was scheduled to proceed on the 25th February, 2014. On this date the disciplinary hearing proceeded in the absence of the applicant. Consequently, on the 28th February, 2014 a letter dismissing the applicant was issued.

[8] This application is opposed. In his answering affidavit the 1st respondent raised two points in *limine*, and pleaded over on the merits. The points in *limine* were (a) High Court's lack of jurisdiction to hear this matter; the argument being that the appropriate fora to adjudicate this matter are the Public Service Tribunal and other labour dispute resolution channels in terms of the ***Labour Code Order 1992***: (b) misjoinder of the 3rd and 4th respondents.

[9] In reply, the applicant raised a point in *limine, viz*, lack of authority on the part of the 1st respondent to represent the 2nd respondent.

[10] ***Issues for determination***

(a) Points in *limine* raised by the parties viz, jurisdiction, misjoinder and authority to represent.

(b) Whether at the time the applicant was dismissed, she was still employed by the 2nd respondent.

[11] ***Jurisdiction***

It is the 1st respondent's argument that the matter, involving as it does, the Independent Electoral Commission is only justiciable through the dispute resolution channels which are provided for in the ***Labour Code Order 1992***. The IEC is a creature of section 66 of the Constitution as amended by the Second Amendment to the Constitution**,** in terms of ***Constitution (Second Amendment) Act No. 7 of 1997***. One of the main purposes of this amendment was to detach the IEC from the Executive influence and bestow on it full institutional independence backed by legislative guarantees. And one of the mechanisms utilized to institutionally wane the IEC from the perceived Executive influence was to give it power to appoint and to dismiss its employees, operating outside of the Public Service. As a clear pointer that employees of the IEC are not public officers but employees of the IEC, a transitional arrangement in terms of which upon the coming into operation of the ***National Assembly Electoral Act No.14 of 2011*** the said employees were to choose whether or not become employees of the IEC or to remain in the Public Service, was provided for in the Act. This transitional arrangement was provided for under section 149 of the same **Ac**t. It provides:

> '149(1) Subject to subsection (2), a person who, immediately before the coming into operation of this Act, was employed in the Public

> Service and serving under the Commission, shall be regarded as an employee of the Commission with all benefits acquired or accumulated.
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> (2) A person who intends to remain with the Public Service shall notify the Commission within a period of 6 months of the coming into operation of this Act for redeployment into the Public Service, in consultation with the Ministry of Public Service."

More recently, the Court of Appeal in ***Matsoso Ntsihlele and 127 Others v Independent Electoral Commission and Others C of A (CIV) NO.57/2019(unreported***) said the following in respect of the above section, at para.37:

> "[37] The above provisions make clear in my view that the IEC is independent from the Executive contemplated in the Constitution and , therefore, not part of 'Government' in terms of s 2(1) of the Labour Code. Its employees, once assigned to the IEC, are therefore not part of the public service to which the Public Service Act 1 of 2005 applies."

[12] The language used in this section is very clear, employees of the IEC are not public officials but employees of the IEC. It follows that any IEC labour-related disputes should not be ventilated before this court but *via* dispute resolution mechanisms created under the ***Labour Code Order 1992***. The importance of ventilating labour disputes through dedicated and specially created channels was emphasized in the ***Lesotho Revenue Authority and Others v Moutloatsi Dichaba and Others C of A (CIV) No. 21/2018 where Mosito P at paras. 23 – 24*** *said:*

> "[23] The concept of specialist courts with specialized matters is a familiar one in our judicial system. Examples of such courts include the Land Courts; Labour Court and the Labour Appeal Court and so forth. In those instances there is no doubt that the jurisdiction of the ordinary High Court has been ousted. For example, the jurisdiction conferred on the Labour Court, which is a specialist court was expressly declared to be exclusive. As was said in Mathope and Others v Soweto Council.

[24] The existence of such specialist court points to a legislative policy which recognizes and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary courts. Therefore there is, in my view, significantly less reason in the present case for examining the provisions in question or for jealously protecting against interference with the jurisdiction of the ordinary courts."

[13] Advocate Mathe, for the applicant, argued that this court has jurisdiction to deal with this matter as what the applicant is seeking is a declaration of rights. He argued that this court has jurisdiction in terms of section 2(1) (b) of the ***High Court Act 1978***. The said section provides:

> "The High Court of Lesotho shall continue to exist and shall, as herefore, be a superior Court of record and shall have
>
> (a)….
>
> (b) in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination; and
>
> (c) ……"

The enquiry in terms of this section is two-staged. The existence of a dispute is not a requirement. What is required is for the applicant be interested in "existing, future or contingent right or obligation" *(**Cordiant Trading CC v Daimler Chrysler Financial Services Case No. 237/2004 (30th May 2005) (unreported) at para. 16**.* The requirement is that there must be interested parties on whom a declarator would be binding. Once the court has determined that indeed there are interested parties on whom a declarator would be binding, it does not follow that it is then bound to grant a declarator, it must then move on to the second rung of the enquiry, being the exercise of its discretion whether or not to grant a declaratory order sought, upon examining all material placed before it. In the above ***Cordiant***

Trading CC matter, the approach was postulated as follows at para. 18 thereof:

> "[18] Put differently, the two-stage approach under the section consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

[14] It seems to me that the applicant has established that she is interested in payment of her full terminal benefits for services rendered up to the end of her employment period, and that the 1st and 2nd respondents would be bound by the declarator that the applicant is so entitled. In short the applicant has established the conditions precedent for the exercise of this Court's jurisdiction in terms of section 2 (1) of the ***High Court Act 1978***.

[15] Having determined that I have jurisdiction to issue a declaratory, I now turn to consider whether this case is a proper one for the exercise of this court's discretion to issue the declarators sought. Given what I said above that the Labour Court being a specialized court to deal with labour disputes, my considered view is that any assumption of jurisdiction on the basis of section 2(1) (b) of the ***High Court Act 1978*** would have a deleterious effect of undermining the very purpose of creating a specialized labour dispute resolution avenues. The issues whether the applicant was properly dismissed or not or whether at the time the disciplinary proceedings were held and was consequently dismissed, she was still employed by the IEC, can competently be decided by the Labour Court. I therefore exercise my discretion by refusing to issue the declarators sought, in view of the policy considerations of establishing specialized labour courts, highlighted above.

It follows therefore, that the point in *limine* regarding jurisdiction has to succeed.

[16] In the result the following order is made:

(a) The application is dismissed with costs.

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M. MOKHESI J

FOR APPLICANT : ADV. MATHE
FOR 1ST AND 2ND RESPONDENTS: ADV. MOHAU K.C