

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/269/18

In the matter between

MBHELE HOOHLO

APPLICANT

And

LESOTHO ELECTRICITY COOPERATION

RESPONDENT

JUDGEMENT

Coram: BANYANE AJ

Heard: 21/11/2019

Delivered: 03/03/2020

Summary

Jurisdiction – of the High Court in terms of section 119 - Establishment of the Labour Court and DDPR under the Labour Code (as amended) for settlement and resolution of Labour disputes - Whether a claim for terminal benefits classified as a dispute of right adjudicable through arbitration in terms of the Act can be heard in the High Court by virtue of its unlimited Jurisdiction - matter within jurisdiction of the DDPR.

Belated application for leave in terms of section 6 of the High Court Act- This provision cannot be invoked to subvert mechanisms specified in the Labour Code for settlement of trade disputes – Application dismissed.

ANNOTATIONS

Cited cases

GGM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others LAC (1995-99)791

Security Lesotho (Pty) Ltd v Lebohang Moepa & Others CC No. 12 of 2014

Attorney General v Kao LAC (2000-2004) 656

Tlali v Attorney General LAC (2000-2004) 510

Vice Chancellor of NUL v Lana LAC (2000-2004) 527

Lesotho Revenue Authority & Others v Dichaba & Others C of A (C(V) No.21 of 2018

Mokhali Shale v Mamphela Shale & 3 Others C of A (CIV) No.35 of 2019

Lesotho Highlands Development Authority v Mohlolo & Others LAC (CIV) 07/09

Mosuoeteane v Ministry of Finance and 1 CIV/T/735/2010

Matau Futho Letsatsi v P.S Ministry of Gender & Others CIV/APN/93/2014

Khalapa v Commissioner of Police LAC 2000-2004

Tseliso Makhaphela v LAA CIV/APN/189/2016

Executive council of the full gospel church of God in Southern Africa & Another v Ntsau & Others CIV/APN/14/2006

Statutes

The Constitution of Lesotho 1993

The High Court Act of 1978

The Labour Code Order No.24 of 1992

Labour Code (Amendment) Act, 3 of 2000

Interpretation Act No.19 of 1977

Introduction

[1] The applicant served the 1st respondent as its managing Director from the 1st November 2012 until his contract lapsed on 25th November 2017. He instituted this application in August 2018 seeking an order that the respondent should release payment of his terminal benefits with immediate effect which he alleges he has been demanding from the date of termination of his employment contract. These claimed Benefits comprise severance payment, outstanding Leave days and gratuity.

The jurisdictional challenge

[2] The application is opposed by the respondent. In its answering affidavit, two points in *limine* have been raised; namely; lack of jurisdiction and *lis pendens*.

[3] It is pertinent to state at the onset that when this application was first placed before me in May 2019, an urgent application seeking; a) condonation for bringing these proceedings without Leave, b) leave to bring these proceedings before this Court, was moved. In view of the point of Law of lack of jurisdiction raised in the answering affidavit to the main application, I declined to entertain the application without notice to the respondent. After service of the application on the respondent, a "notice to

raise points of Law” was filed, but no answering affidavit was filed on behalf of the respondent.

[4] A date was subsequently appointed for arguments on both the Jurisdictional challenge and application for leave after written submissions were filed by both parties.

Submissions and analyses

[5] Counsel for respondent, Advocate Phafane Kc argued that the applicant’s claim for terminal benefits broken down to severance payment, gratuity and leave days, is a claim arising out of an employment contract between the parties and that these matters are provided for under the Labour Code 1992 as amended . Relying on sections 24(1) & (2), 25(1) (b), 226(2) (b) (ii) and 226(2)(c) of the Labour Code as amended, he submitted that the Labour Court has exclusive jurisdiction to resolve labour disputes including application or interpretation of any provisions of the Labour Code and that disputes of rights pertaining to breach of contract of employment, disputes concerning underpayment of any monies due under the provisions of the Act shall be resolved by arbitration as contemplated under section 226(2) and 227. He submitted that matters falling under the jurisdiction of the Labour Court and Labour Tribunal should not be adjudicated in the High Court. An array of authorities dealing with jurisdiction were cited by Counsel. These include, ***GGM Industrial(Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others LAC (1995-99)791, Attorney General v Kao LAC (2000-2004) 656, Tlali v Attorney General LAC (2000-2004) 510, Vice Chancellor of NUL v Lana LAC (2000-2004) 527, Lesotho Revenue Authority & Others v Dichaba & Others C of A(CIV) No.21 of 2018.***

[6] Counsel for the applicant, Advocate Rasekoai relied on the other hand on section 119(1) and 22 of the constitution to contend that the High Court by virtue of its unlimited jurisdiction, has power to determine this dispute, in terms of which the applicant seeks to assert his Right to terminal Benefits. It was argued that the proposition that section 25(1) of the Labour Code (as amended) ousts the Jurisdiction of the High court is flawed. The following passage from the case of ***Makhutla v Lesotho Agricultural Bank C of A (CIV) 1 Of 1995*** was relied on:

'Interference with the High Court's Jurisdiction can only be effected by expressed provisions or by necessary implication...'

[7] It was submitted further that the parties have been before the High Court with similar matters and the Court has already exercised its unlimited and residual powers over these matters. The cases of ***Mbele Hoohlo v LEC CIV/APN/07/2017, CIV/APN/253/2017 and Tseliso Makhaphela v LAA CIV/APN/189/2016*** were cited to support this contention. The cases of ***Mosuoete Moteane v Ministry of Finance and 1 CIV/T/735/2010 and Matau Futho - Letsatsi v P.S Ministry of Gender & Others CIV/APN/93/2014*** were also cited to support the contention that the High Court has already decided that it has jurisdiction to hear disputes over unlawful withholding of an employee's terminal benefits.

[8] It was also argued that the applicant's claim for release of his terminal benefits is not envisaged under section 226 of the labour Code.

Issues for determination

[9] The issues that fall for determination are the following;

- a) Whether, by the establishment of the Labour Court and Directorate of Dispute Prevention and Resolution (DDPR) in terms of the Labour Code, Parliament has restricted or excluded the exercise of the High Court's unlimited Jurisdiction conferred by virtue of section 119 of the constitution, in Labour disputes.
- b) Whether the nature of the applicant's claim falls within the exclusive jurisdiction of the Labour Court in terms of section 226 of the Labour Code (amendment) Act of 2000 or the DDPR.
- c) And lastly whether section 6 of the High Court Act 1978 may be invoked to institute a Labour dispute in the High Court.

[10] For the determination of the identified issues, I propose to quote the relevant constitutional clause, the provisions of the Labour Code and their interpretation through caselaw.

Section 119 (1) of the Constitution provides:

[11] 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.

[12] It is useful to read section 119 with section 127 of the Constitution which empowers parliament to establish inferior courts, Court Martials and tribunals and confer jurisdiction on same. It reads;

"Parliament may establish courts subordinate to the High Court, court tribunals and any such court or tribunal, subject to the provisions of this constitution, have such jurisdiction and powers as may be conferred on it by or under any Law"

[13] The Labour Court was established by the **Labour Code Order No.24 of 1992**. Under section 25(1), this Court is clothed with civil jurisdiction, to the exclusion of ordinary and subordinate Courts to adjudicate over any matter provided for under the Code including Labour (trade) disputes. Section 26 of the Code provided that, the jurisdiction vested in the Labour Court shall not limit the jurisdiction of any other court exercising criminal jurisdiction in connection with the prosecution of an offence under the Code.

[14] *Section 25(1)* was amended by *section 9* of the **Labour Code Amendment Act No 3 of 2000**. It elucidates the exclusivity of the Labour court over matters provided for under the code. It reads;

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

- a) subject to the constitution and section 38(A); and*
- b) Notwithstanding section 6 of the High Court Act of 1978*

14.1 This provision should be read with section 226 of the amendment Act.

[15] The constitutional Court recently held in ***security Lesotho (Pty) Ltd v Lebohang Moepa & Others CC No. 12 of 2014*** that the Labour Court is a Court of Law and not a quasi – judicial tribunal (as stated in earlier decisions such as ***GGM V LECAWU & Others 1999-2000 LLR-LB 6***) clothed with exclusive civil jurisdiction over disputes stated in section 226 of the Act.

[16] By this Act, the Labour Appeal Court was established under section 38 A and The Directorate of Dispute prevention and Resolution under section 46 B.

The Directorate of Dispute Prevention Resolution

[17] Section 46 B (1)-(4) establishes a directorate of Dispute prevention and Resolution (DDPR), a semi-autonomous Labour tribunal whose functions include prevention and resolution of trade disputes through conciliation and arbitration. ***Lesotho Highlands Development Authority V Mohlolo LAC (CIV) No.7 of 2009***

[18] These quoted provisions have in a number of cases, as I will demonstrate below, been discussed. The question of jurisdiction of the High Court vis-à-vis labour disputes cannot therefore be regarded as a vexed question anymore. It is now convenient to consider the judgements relied on by both counsel.

[19] In ***Attorney General V Kao***, the applicant therein had sought amongst others, payment of his terminal benefits. An argument was raised

that the High Court has concurrent jurisdiction with the Labour court. In rejecting the argument, Ramodibeli JA (as he then was) stated that;

"If the legislature had intended the High Court to enjoy concurrent jurisdiction with the Labour Court, it would have said so expressly or by necessary implication. The words exclusive and concurrent are poles apart. One excludes the other"

[20] In ***Tlali V Attorney General LAC (2000-2004) 511***, the Court of appeal *mero muto* raised the question whether the High Court has jurisdiction to determine disputes arising out of contracts of employment. The dispute in that case was about dismissal in the context of the ending of a fixed-term contract. The Court held that by virtue of the exclusivity of the Labour Court jurisdiction as provided for under the Code, the High had no jurisdiction to hear the matter.

[21] Similarly in ***Vice Chancellor of the National University of Lesotho and Another v Lana 2000-2004 LAC 527***, the Court dismissed an argument that the High Court has concurrent jurisdiction with the Labour Court over labour matters. An argument had been raised that the labour code did not oust the jurisdiction of the High Court conferred by section 119 read with section 2 of the High Court Act of 1978 and that the High Court at least had concurrent jurisdiction to deal with the application. The High Court had relied on section 119 to conclude that it had Jurisdiction to hear the matter/dispute which also related to non-renewal of a fixed term contract of employment.

21.1 An instructive quotation from the case of ***GGM industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others LAC (1995-99)791*** was relied on. It is as follows;

"section 119 of the constitution should not be interpreted in isolation but must be construed in the light of the constitution as a whole, but particularly in the light of section 118; thus construed, 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 in terms of the code".

21.2 In **Lesotho Revenue Authority v Dichaba & Others C of A (CIV) No.21 of 2018** emphasised that the Labour Court and Labour Appeal Court are specialist Courts in Labour matters.

[22] The phrase "unlimited" on which applicant place emphasis was interpreted in the case of **Letsie v Maseru City Council**, Majara CJ had this to say;

"It is critical that as a final court in the Kingdom, we push back against the notion that the "unlimited jurisdiction" contained in section 2(1) (a) of the High Court Act 1978 as read with section 119 of the constitution, means limitless. The Zambian Supreme Court in Zambia National Holdings Limited and United National Independence Party (UNIP) v Attorney General when interpreting article 94 of the Constitution, which is similarly worded like our section 119 said;

Although article 94 of the constitution gives the High Court unlimited jurisdiction, that Court is bound by all the Laws which govern the exercise of Jurisdiction of the High Court"

[23] In addition, the Court of Appeal in the case of **Mokhali Shale v Mamphole Shale & 3 Others C of A (CIV) No.35 of 2019** stated that

unlimited jurisdiction does not mean limitless. At paragraph 11 of the judgment the following remarks were made;

"When a statute creates and grants jurisdiction to a specialist Court, the High Court's jurisdiction is ousted notwithstanding its unlimited jurisdiction."

Further at para 37, it was stated,

"the context in which unlimited jurisdiction of the High Court should be understood is that the High Court should not be compared with inferior courts and other tribunals which as creatures of statutes have only so much competence as specifically granted under the empowering statute. That does not mean that by specific legislation the High Court's jurisdiction may not be excluded and conferred on another forum"

[24] These principles, although stated vis-s'-vis exclusive jurisdiction of the Land Courts, are equally applicable to the inquiry at hand.

[25] From these authorities, it becomes clear in my view, that there is now certainty in the Law as regards the exclusivity of Civil Jurisdiction of the Labour Court over matters provided for under the code. What remains unaltered by the Act is the criminal jurisdiction of ordinary courts for prosecution of offences created under the code.

[26] Counsel for applicant sought to rely on some decisions of the High on interpretation of section 119, on the strength of which he submitted that the High Court, by virtue of its unlimited Jurisdiction entrenched under section 119, is competent to hear and determine this claim. To mention

but a few, ***Makhaphela V LAA CIV/APN/189/2016. Moteane, Futho-Letsatsi and Makhutla.***

[27] All these do not however advance the applicant's case. In *Makhaphela*, the Court did not base its decision nor analyse the Court of Appeal Decisions discussed above. *Makhutla* was decided prior to the 2000 amendment Act which, as discussed above, ousted Jurisdiction of all Courts on matters squarely falling within the Labour Court. Both *Moteane* and *Futho Letsatsi* do not also lend support nor advance the applicant's case in relation to the jurisdictional challenge for the reason that, in *Moteane*, the Court dealt with terminal benefits in the public service and in *Futho Letsatsi*, the Court dealt with suspension of the applicant, also an employee in the public service. In the instant case, we are not dealing with provisions of the Public Service Act but the Labour Code.

[28] Indeed, counsel for applicant correctly observed that there are conflicting decisions of the High Court on this issue, however, as shown above, the decisions of the Court of Appeal are instructive. The Court of Appeal resolved any uncertainty created by the conflicting judgements of the High Court on the interpretation of the impugned sections. *Mosito AJ* (as he then was) in ***LHDA v Mohlolo*** (supra) captured the position neatly as follows;

"The establishment of the Labour Court as well as the power, authority and civil jurisdiction given to it, marked the beginning of a tag-of-war between the High Court and the Labour Court over the extent of jurisdictional powers of the two Courts in respect of Labour matters. This led to a number of conflicting decisions by the High Court on whether or not the unlimited jurisdiction powers of the High Court were not being interfered with".

[29] Having considered the authorities referred to by both Counsel, I turn now to the second issue, whether the nature of the applicant's claim falls within the exclusive jurisdiction of the Labour Court in terms of section 226 of the Labour Code (amendment) Act of 2000 or the DDPR.

The nature of the dispute before court

[30] The applicant claims terminal benefits which comprise severance payment, gratuity and outstanding leave days. The question that arises is whether these are provided for under the code. If the answer be in the affirmative, whether this Court is empowered to deal with same.

[31] The term Terminal benefits, as I understand it, is subject to various meanings but its essence is a terminal benefit accrues to an employee when the contract of employment comes to an end, be it through expiration of a fixed term contract, resignation or dismissal. The accrual as I read through the provisions of the Labour Code is dependent on how the contract of employment has terminated. Severance pay is an obvious example in terms of section 79 of the Labour Code. Others such as accrued leave days, gratuity and provident fund accrue immediately when the contract is terminated by either party. It is therefore crucial to determine whether the terminal benefits claimed by the applicant fall for determination before this Court.

[32] Severance payment, as a terminal benefit is a direct right under section 79 and non-payment thereof is in itself a dispute of right contemplated under section 227 which requires conciliation and ultimately

adjudication through arbitration. Same applies to accrued leave days and gratuity.

[33] The central issue in this case is therefore not exclusivity of the jurisdiction of the Labour Court in disputes of Right in terms of section 226 as none of these claims fall thereunder but whether the High Court, acting in terms of section 119, is empowered to hear a claim categorised under the code as a dispute of right which should be resolved by the DDPR through conciliation and arbitration in terms of sections 227(4) and 227(7).

[34] To answer this, it is helpful to highlight *Section 226(2) (b) (ii) of the Act* which provides that;

"A dispute of right relating to a breach of a contract of employment shall be resolved by arbitration. In terms of subsection (3), such a dispute may also be referred to the Labour Court if the Director is of the opinion that the dispute may also concern matters that fall within the jurisdiction of the Labour Court"

[35] Section 227 sets out the procedure to be followed in the referral of a dispute to the Directorate. That procedure includes both conciliation, if unsuccessful, arbitration dealt with under section 228C.

[36] In construing these provisions, the objectives of creating Labour Courts and the tribunal must be kept in mind. *Section 15 of the Interpretation Act No.19 of 1977* provides for purposive construction of statutes. It reads;

"Every enactment shall be deemed remedial. And shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects

[37] Some objects of the Act are reflected in **LHDA V Mohlolo** (supra) where Mosito AJ (as he then was) remarked as follows;

"In amending the Code in 2000, it is clear that the Legislature intended to introduce a new mechanism for resolving labour disputes which was intended to be speedy and which was intended to avoid protracted litigation"

[38] My reading of the quoted provisions is that the intention of the legislature was to make the Labour Court an exclusive Forum vis a vis certain disputes of rights, and to prescribe those that fall for adjudication before the DDPR. These provisions should therefore be interpreted so as to protect the special status of the Labour Court and DDPR and section 119 should not be read in isolation or understood nor interpreted to mean that the High Court has jurisdiction over trade disputes, in respect of which the Legislature has prescribed machinery for their settlement and resolution.

[39] In the light of the foregoing analysis, I come to the conclusion that the High Court does not have jurisdiction to adjudicate over the applicant's claim.

[40] On the basis of this conclusion, it seems futile to deal with the second point in *limine, viz, lis pendens*. It is befitting to however address the

application for leave which in my opinion is closely connected to the jurisdictional challenge. I immediately turn to deal with same.

Application for condonation and leave

[41] I indicated earlier that an application for condonation of instituting the application without leave and leave to have the matter brought before this Court was filed by the applicant and that this was done nine months after the launching of the main application and after pleadings were closed.

[42] A useful point at which to start in considering this application for leave is that section 6 of the High Court prescribes the process of instituting matters falling within the competency of a subordinate Court in the High Court.

[43] The section contemplates two scenarios, the first being that the matter whose removal is sought would at the time of the application, have been instituted in a subordinate Court having jurisdiction. The second being, a request to institute the matter in the High Court as the first Court in which the proceedings are sought to be instituted despite the competence of a subordinate Court to hear the matter.

[44] It is apparent from the wording of the provision that an application for Leave should be filed prior to the institution of a matter before this Court.

44.1 This statement finds support in the case of ***Executive council of the full gospel church of God in Southern Africa & Another V Ntsau &***

Others CIV/APN/14/2006 where it was stated that an application for leave under section 6 (b) should be moved separately before a principal application which seeks the main relief can be brought after leave has been granted.

[45] Significantly, an application for leave is not a mere formality. An applicant has to satisfy the Court that the balance of convenience favours the removal and or institution of a matter in the High Court.

[46] I turn now to the reasons advanced by the applicant in motivation of this application. These appear in the founding affidavit and may be summarised as follows;

- a) Firstly, that the High Court has unlimited Jurisdiction in terms of section 119 of the Constitution
- b) Secondly that the applicant had on previous cases, approached the High Court on “similar issues” and obtained orders sought.
- c) That the Labour Court was not functioning at the time this application was launched, that cases filed were not heard, and that he was in dire need of his monies as he had no income and is a sole provider of maintenance for his minor children.

[47] In justifying urgency in the application, the major reason advanced is that a Judge of the Labour Appeal Court, had ruled in a certain case during the month of May 2019 that the High Court does not have jurisdiction to hear a labour related dispute despite earlier decisions by this Court.

[48] The reasons advanced (at para 46 above) are clearly intertwined with jurisdiction because the applicant stresses the unlimited jurisdiction of this

Court under section 119 and that in previous decisions, the Court entertained matters of this nature. This interpretation of section 119 has already been dealt with above and does not require separate discussion in this application.

[49] Counsel for respondent argued that the application seeks a) to confer Jurisdiction on the High Court where none exists, b) is sought to bypass the Labour tribunals and as such constitutes an abuse of Court process. He asked the Court to dismiss the application with punitive costs.

[50] On behalf of the applicant, it was argued on the strength of the case of ***Khalapa v Commissioner of Police LAC 2000-2004*** that a litigant cannot be barred from seeking condonation at a later stage where they might have a valid claim and that, it can be sought even where its effect is to distinguish a respondent's special defence, in that case, prescription.

[51] While it is true that the court stated in the Khalapa case that a litigant can meet an exception or special plea by an appropriate amendment, these two cases are distinguishable because in Khalapa, the Court dealt with the effect of a time barring provision on a litigant who wishes to enforce her claim . This is not the situation before this Court. The special defence we are dealing with is jurisdiction. Its effect is not to bar a litigant from asserting his rights but to do so in a proper forum.

[52] The question that arises should therefore be whether the mechanisms invented for purposes of Labour disputes resolution can be subverted or circumvented by application of section 6 of the High Court Act.

[53] Section 6 should, in my view, be read in the proper context as not conferring jurisdiction which this court does not have. It must also be interpreted in the light of section 9 of the Labour Code (as amended), which is clear that the Jurisdiction of the Labour Court shall be exclusive notwithstanding section 6 of the High Court Act; and section 226 read with 227 providing that disputes of right that do not fall within exclusive jurisdiction of the Labour Court under section 226(1) shall be resolved by arbitration. On closer scrutiny, the use of language in these sections is deliberate and not by accident. For this reason, i am of the view that section 6 finds no application in matters so specified in the Act.

[54] Even assuming leave was sought prior to the filing of the answering affidavit, the inquiry should be whether the application would be successful? In view of the analysis above, the answer should be in the negative. To grant leave would essentially confer unto the High court power to subvert the mandatory labour disputes resolution mechanisms (conciliation and arbitration) and or to totally disregard the existence of specialist forums with expertise in labour matters provided for under the Code.

[55] Even if I am wrong in my finding that section 6 can be invoked, the manner, and the stage at which the application is made as well as reasons advanced in support, namely to avert the jurisdictional issue, render the application dismissible.

Conclusion

[56] The applicant's application for condonation and late filing of leave is therefore insupportable in law. The intention of the Legislature in section 6 cannot be that a party is entitled to apply for leave as an attempt to evade clear legislative provisions on adjudication of labour disputes. I agree with respondent's counsel that this application is a clear abuse of Court process and warrants punitive costs.

In the light of above, this application ought to fail.

[57] In the result, the following order is made;

- a) The point *in limine (of lack of jurisdiction)* is upheld with costs
- b) The application for condonation and leave is dismissed with costs on attorney and client scale.

P. BANYANE
(Judge a.i)

For Applicant: Ms Lephatsa assisted by Advocate Rasekoai

For 1st Respondent: Advocate Phafane KC

