

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/273/2017

In the matter between:

CHAKA NKOFO

PLAINTIFF

AND

LESOTHO NATIONAL

DEVELOPMENT CORPORATION

DEFENDANT

Neutral Citation: Chaka Nkofo v Lesotho National Development Corporation
(CIV/T/273/2017) [2021] LSHC 91 (10 August 2021)

JUDGMENT

CORAM: HON. J.T.M. MOILOA

DATE OF HEARING: 4 JUNE 2019

DATE OF JUDGMENT: 10 AUGUST 2021

ANNOTATIONS

Cases

1. Federation of Organisations of the Disabled (LNFOD v Mojalefa Lobhin Mabula LC/REV/08/10
2. Mbhele Hoohlo v LEC C of A (CIV) NO. 05/2020 and C of A (CIV) NO. 09/2020
3. ‘Malena Lebone Mofoka v Ministry of Law and 5 others C of A (CIV) NO. 60/2016
4. MEC for Finance (KZN) and Another v Dorkin and Another [2007] ZALAC 34

The Claim

[1] Plaintiff claims the following from Defendant:

(a) Reinstatement of the Plaintiff to his position as Property Maintenance Officer within the LNDC without loss of benefits in terms of the contract between the corporation and Applicant (sic).

(b) Payment of Plaintiff's salary from 06th August 2014 to date.

(c) Reinstatement of all benefits due to the Plaintiff from August 2014 to date.

(d) Payment of interest at the rate of 18.26% per annum.

(e) Alternatively cancellation of the contract between the parties and payment of damages to the applicant (sic) in the amount of M20, 122million.

(f) Such further and/or alternative relief.

(g) Costs of suit.

[2] As is typical with disputes emanating from employer- employee relations, in this action we are invited to interrogate the issue of this court's jurisdiction as opposed to that of the Labour Court. Plaintiff alleges that he and the Defendant entered into a contract, not a contract of employment but a settlement contract, which Defendant has failed and /or neglected to fulfil despite demand. How this contract came into being according to Plaintiff, is that Defendant had unlawfully dismissed Plaintiff from Defendant's employ on the 6th August 2014. Plaintiff goes on to say that he challenged his "unlawful dismissal" and that the proceedings were *followed by a resultant appeal to the decision of the High Court of Lesotho* (emphasis my own). I observe here that, we are not told by Defendant when the proceedings were launched, before which forum and exactly what the outcome was. Also, "an appeal to the decision of the High Court" suggests that the High Court was the court of first instance and an appeal was noted

against its decision. How the High Court could have presided over an unfair dismissal case is beyond my comprehension.

The Settlement Contract

- [3] Plaintiff alleges further that the terms of the settlement contract were *inter alia* that Plaintiff would withdraw all such litigation he may have instituted against Defendant. Plaintiff would also retract from any further litigation against Defendant in relation to the **employment contract**. In Plaintiff's own words there existed an employment contract between him and Defendant Corporation although his case is founded on a settlement contract and not an employment contract.

On the part of Defendant, Plaintiff says it was a term of the contract that Defendant would reinstate Plaintiff to his position of Property Maintenance Officer and consider him for the position of Head of Property. Whether there was a vacancy for that position is not part of the present enquiry. Plaintiff says he kept to his end of the deal and withdrew the matter in C OF A (CIV) NO 27/2014 and indeed at page 35 of the record there is evidence that C OF A (CIV) NO 27/2014 was withdrawn by Plaintiff/Appellant and he tendered costs. According to Defendant, Plaintiff withdrew the matter voluntarily. Plaintiff also alleges that in the fulfilment of the settlement contract he desisted from bringing the dispute of unfair dismissal before the DDPR, so Plaintiff is not oblivious to the fact that the DDPR has jurisdiction over unfair dismissal cases. My mind is still not at ease as to where then Plaintiff initially lodged his complaint, which proceedings were followed by an "appeal to the decision of High Court." To close off, Plaintiff says that Defendant Corporation, however, has not complied with the terms of the contract despite demand, hence present action proceedings.

Request for further particulars

- [4] Unsurprisingly, Defendant filed a request for further particulars on a number of issues but I will limit my focus to that of the nature of the contract. If in writing Plaintiff was requested to provide a copy of the contract. In furnishing the further particulars Plaintiff clarified that the contract was concluded orally in Maseru on or about 21st October 2014. I note that in his declaration Plaintiff says that he was dismissed on the 6th August 2014. He also says that the dismissal was followed by legal proceedings as well as an appeal to the decision of the High Court of Lesotho. Now, Plaintiff is telling the court and Defendant that the “verbal settlement contract” was concluded on or about 21st October 2014, which is some two (2) months from the date of the dismissal. Unless there are some discrepancies in the calculation of time on the part of Plaintiff, it seems a lot happened in a very short space of time.

Point of law: Jurisdiction.

- [5] Defendant outright denies the existence of the settlement contract. The Corporation denies that it entered into any agreement with Plaintiff in October 2014 or at any time thereafter, instead says that Plaintiff was dismissed following a proper disciplinary hearing. This court has not had the chance to interrogate the question whether or not there exists a settlement contract between the parties. This is due to the fact that Defendant has raised a question of law of jurisdiction in the matter. What remains as a fact is that Plaintiff was dismissed from the employ of Defendant *albeit* unlawfully and Plaintiff wants to be reinstated to his position, save to say that his basis for claiming the reinstatement is a “settlement contract”. Back to the point of jurisdiction. According to

Defendant, this court does not have jurisdiction to entertain the relief sought by Plaintiff, that such powers fall within the Labour Court in terms of section 24 of the Labour Code Order 1992 (as amended). Indeed section 24 generally provides for jurisdiction and powers of the Labour Court to be in respect of all matters that elsewhere in terms of the Act or in terms of any other labour law are to be determined by the Labour Court. One such power is to rescind any contract of employment and make such consequential orders as may be just in the circumstances.

- [6] Plaintiff referred the Court to the decision in **Lesotho Federation of Organisations of the Disabled (LNFOD) v Mojalefa Lobhin Mabula LC/REV/08/10** to support his case. I differentiate that case on the facts from the present matter because in that case the existence of the settlement contract was not in issue. In that case the decision of the Court was that a settlement agreement is an extra judicial function compromise to be treated as an ordinary contract to be enforceable in ordinary courts of law and that the settlement should be recognised as a termination of the issues on the merits. *In casu* on the other hand not only is the settlement contract disputed but the merits have not yet been interrogated, namely the lawfulness or otherwise of Plaintiff's dismissal *alias* Plaintiff's reinstatement to his position as Property Maintenance Officer within the Defendant's employment structures without loss of benefits. Section 226 (2) (b) (ii) of the Code as amended gives the Labour Court jurisdiction over disputes concerning breach of contract of employment. In my view, that really is the core of Plaintiff's legal battle. Plaintiff's complaint is essentially and inherently a labour dispute because what really he wants is his position back. The same Labour Court is given power to decide on unfair dismissal. Both issues are yet to be decided since Plaintiff in his own

pleadings says he withdrew legal proceedings which he had initiated in that regard. Are we the proper court?

- [7] The Court of Appeal has elegantly answered this question of jurisdiction in **Mbhele Hoohlo v LEC C of A (CIV) 05/2020 and Mbhele Hoohlo v LEC C of A (CIV) 09/2020**. The Court has said that the Labour Court is a specialised court created by statute. Like similar specialised courts, it was created in order to deal with matters within the ambit of its mandate. There is a reason for the creation of specialised courts... The Court also stated that “in a long line of cases both before and after 2000, this Court reiterated that the scheme of the 1992 Labour Code has had the effect of ousting the jurisdiction of the High Court in matters such as the present involving disputes arising out of contracts of employment”. I have no better way of putting it than the Court of Appeal has. Plaintiff’s case squarely remains one of an employer employee relations having gone sour. The exercise would be different if indeed we were to enquire into a settlement agreement but that is not the case. There remains to be determined the unfair dismissal and reinstatement of Plaintiff. I question his ingenuity in designating his claim a “settlement contract” while not in the position to produce one. The point of law is upheld. The Labour Court is the appropriate forum to determine the relief sought by Plaintiff.

Costs

- [8] Plaintiff also asks for costs of suit. It is a long-standing principle of our legal system that costs follow the event. However, the rule is not cast in stone predominantly in labour matters. In ‘**Malena Lebone-Mofoka v Minister of Law and 5 others C OF A (CIV) NO 60/2016** the Court of Appeal quoted with approval what was said by Zondo JP in **MEC for Finance (KZN) and Another v Dorkin NO and Another [2007] ZALAC**

34 that: “the norm ought to be that costs orders are not made unless those requirements (of law and fairness) are met. In making decisions on cost orders this court should seek to strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer organisations from approaching the Labour Court and this court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and to this court frivolous cases that should not be brought to court. This is a balance that is not always easy to strike, but if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.....” On the basis of the foregoing and having not found any frivolity in Plaintiff’s case except for choosing the wrong forum there is no order as to costs.

The order of this court is thus:

1. The point of law of jurisdiction is upheld and the matter is referred to the Labour Court for determination.
2. There is no order as to costs.

J. T. M. MOILOA
JUDGE

FOR THE APPLICANT:

ADV. N. G. HLAELE

FOR THE RESPONDENT:

ADV. Q. LETSIKA