IN THE HIGH COURT OF LESOTHO

HELD AT MASERU CIV/APN/437/2020

In the matter between:

MOHATO SELEKE **APPLICANT**

AND

THE MINISTER OF TRADE & INDUSTRY **1ST RESPONDENT**
P.S. MINISTRY OF TRADE & INDUSTRY **2ND RESPONDENT**
THE ATTORNEY GENERAL **3RD RESPONDENT**
THE BOARD OF DIRECTORS – LNDC **4TH RESPONDENT**
LESOTHO NATIONAL DEVELOPMENT CORPORATION **5TH RESPONDENT**

Neutral Citation: Mohato Seleke v The Minister of Trade & Industry and 4 others CIV/APN/437/2020 [2021] LSHC 96

JUDGMENT

Coram : Hon. Mr. Justice E.F.M. Makara
Dates of Hearing : 11 December 2020
Date of Judgment : 16 August 2021

SUMMARY

The Applicant invoked the review powers of this Court asking it to declare the decision of the Minister in which he declined to renew his contract as the CEO of the 5th Respondent to be unlawful for being in conflict with Section 9B of the LNDC Act. He reasoned that the section compelled the Minister to follow the recommendation of the Board for the renewal of the contract. A controversy ensued between the parties on the jurisdiction of the Court over the matter. The Court held that the legislative exclusivity of jurisdiction of the labour courts over labour related matters, cannot exclude its inherent unlimited competency to review the decision and that its administrative nature also gave it the jurisdiction.

ANNOTATIONS

CITED CASES

1. **Thabang Khabo v LNDC** CIV/ APN/64/2013
2. **Hoohlo v Lesotho Electricity Company** C of A (CIV) 09/20) [2020] LSCA 23
3. G**ertrude Moliea v Abia Ncholu and Lesotho Evangelical Church** 1971-1973 LLR 14
4. **Lenka Mapiloko v Fragmar (Proprietary) Limited** C of A (CIV) No. 42/2017
5. **Hippo Transport v Commissioner Of Customs & Excise**(C of A (CIV) 06 of 2017) [2018] LSCA 5
6. **Derrick Dube v Ezulwini Municipality** CASE NO.91/2016; [2018] SZSC 49
7. **Mgijima v Eastern Cape A.T.U. and Another** CASE NO.91/2016; [2018] SZSC 49
8. **Khabang Martha Sello v Commissioner of Police and Another**1980] LSHC 80
9. **Mohatla v Commissioner of Police and Others**
10. **Gentiruco Ag v Firestone Sa (Pty) Ltd**1972(1) SA
11. **The National University of Lesotho v Motlatsi Thabane** C of A (CIV) 67/2019

STATUTES & SUBSIDIARY LEGISLATION

1. High Court Act No.5 of 1978
2. Lesotho National Development Amendment Act No. 7of 2000
3. The Patents Act1952
4. Subordinate Court Act No. 6 of 1988
5. The Labour Code No. 3 of 2000
6. LNDC Order No. 14 of 1990

MAKARA J.

Introduction

[1] The Applicant initiated these motion proceedings for the Court to review the lawfulness of the declination by the 1st Respondent who is the Minister to renew the appointment of the Applicant as the Chief Executive Officer (CEO) of the Lesotho National Development Cooperation (LNDC) cited herein as the 5th Respondent.

[2] The foundation of his case is that the decision is contrary to Section 9B of the LNDC Amendment Act[1] 2000. It is precisely upon this ground that he seeks for a declaration that the decision is consequently null and void. To illustrate the point, he pointed out that the Minister made the decision against the advice of the LNDC Board of Directors that his contract be renewed. He submits that the Amendment was introduced to revolutionize the original configuration of the law which subjected the renewal of the CEO under the discretionary determination of the Minister. The interpretation he assigns to the amendment is that it has taken away that power away from the Minister by requiring him to make the decision in accordance with the advice of the Board.

[3] It should suffice to be recorded that the Respondents have opposed the application and in the same strength raised a point of law that this Court has no jurisdiction to preside over the matter. To make the determination of the question easier for the Court, the parties reached a compromise for them to dispense with the exchange of polemics on the correctness or otherwise in the manner in which the jurisdictional issue was introduced. So, the Court simply considered the matter on the understanding that the papers placed before it suffice to serve as a basis upon which this preliminarily raised legal point could be contested for its ruling.

[1] Lesotho National Development Amendment Act No 7 of 2000

[4] The matter has from the onset been presented with precision and an easy manner for the quickness of its disposal. Expectantly, the draft ruling was made shortly thereafter. Unfortunately, this work together with other judgments became 'corrupted' by virus and in the process of endeavours by the IT personnel to recover them, they were partially recovered but suddenly disappeared from the computer screen. The IT unit attributed the problem to the collapse of the software due to the old age of the computer itself. In the meanwhile, while further attempts were mounted towards their recovery, the Court had to attend a series of high profile constitutional cases. The Counsel concerned were in the process appraised about the predicament which in any event, everyone who functions within the judiciary should be aware of the prevailing insurmountable logistical challenges.

Material Common Cause Facts

[5] It emerges from the papers before the court and the consensus between the counsel that the case is predicated against the backdrop that the Applicant has at all material times since 1st December 2017 been appointed for a three-year contract as the CEO of LNDC. The engagement was scheduled to end on the 30th November 2020 subject to its optional renewal for another three-year tour.

[6] A development of significance is that on the 18th August 2020, the Applicant anticipated the expiry date of the employment

contract, by submitting to the Board his application for a renewal of his contract for a further term. Subsequently, the Board in exercising the powers entrusted upon it under the said Amendment Act, decided to recommend to the 1st Respondent that the contract of the Applicant be renewed for further three years. Notwithstanding the advice, the Minister decided otherwise by refusing to renew the contract of the Applicant.

[7] In precise terms, the Applicant rushed for protection underneath the reviewing powers of this Court upon a lamentation that the Minister had no legal authority to make the decision which is not in accordance with the recommendation of the Board. He submits that this was made unlawfully in that it is tainted with irrationality and unreasonableness and, so, subject to the reviewing powers of this Court.

A Challenge Over the Jurisdiction of the Court to Hear the Matter

[8] At the commencement of the hearing, the Respondents raised a point of law on the jurisdiction of this Court to hear the matter. In motivating the point, they submitted that the case falls within the parameters of the Labour Code[2] and that as such, this Court is rendered incompetent to enforce the Code. In support of this proposition, they hastily referred the Court to Section 2 of the Labour Code. This was done with specific reference to the wording therein that the Code shall apply to any employment, *inter alia*, by

[2] The Labour Code No. 3 of 2000

or under any public authority. The approach is, understandably, adopted in recognition that LNDC is a Public Authority constituted in terms of the LNDC Order[3] as amended. To elucidate the legal position, they alerted the Court that Section 2(2) (a) and (b) which creates exceptions to the application of the Code, do not encompass public authorities. The point was made to clearly demonstrate that the Code is applicable over issues of employment within the LNDC as a public institution and that the matter under consideration is one such typical instance. In the same logic, the overarching projection is simply that in the circumstances, this Court lacks jurisdiction over the application and it should accordingly decline to entertain it.

[9] In a further endeavour to show that the organization is not exempted from the application of the Code over employment disputes, the Respondents explained that the Minister in refusing to renew the contract of the Applicant acted in terms of Section 68 of the Code that defines dismissal to include failure to renew a fixed term contract where such contract provided for a possibility of a renewal.

[10] Very interestingly and relevantly pertinent, the Respondents referred the Court to the decision it made in **Thabang Khabo v LNDC[4].** This was *inter alia* inspired by the number of established precedence on the principle that the High Court does not have

[3] LNDC Order No. 14 of 1990
[4] CIV/ APN/64/2013

jurisdiction to hear cases on dismissals arising from the contract of employment and the applicable law. I incidentally made that decision primarily on the basis of the representations made and my comprehension of the applicable jurisprudence at the time.

[11] The Respondents cautioned against the comprehension that Section 9(B)(1) of the LNDC Act is enacted for the benefit including creation of rights of the relevant employees in particular the CEO. In their analysis, its purpose is simply to regulate the relationship between the Board and the Minister in the recruitment and termination process.

[12] On a rather lighter and sarcastic note, the Respondents suggested that the Applicant could perhaps obtain justice from Labour Appeal Court through Section 38A (1) (b)(iii) of the Code. The Court in that regard conjectured that this was suggestive that he could access a remedy through the review avenue which the provision assigns to that appellate court.

The Counter Representations on the Jurisdictional Point Raised

[13] At the onset, it must be acknowledged that the Applicant reacted to the submissions advanced by the Respondents in a more profound manner than perhaps had been the situation in the previous cases over the subject matter. This presented a challenge for the Court to address the intricate jurisprudence that he relied upon to persuade it to guard against the propensity of a superficial

thinking about the reviewing powers of the High Court. He warned that the courts have unfortunately assumed a trend whereby whenever they come across a case with some labour related character, almost automatically resolve that the legislature has through the scheme of the 1992 Labour Code ousted the jurisdiction of the High Court in such matters. On a rhetoric note, he likened that to the conditioned behaviour of the dogs of a Russian behavioural psychologist Ivan Petrovich Pavlov who would salivate once they hear a bell ringing since whenever that occurred, they would be given food.

[14] The epicentre of the counter submissions made for the Applicant was that the Court should acknowledge the jurisprudential fact that its power of review is inherent in every superior court and, cannot, therefore, be legislatively taken away from it. The understanding created is that the reviewing power of this Court constitutes its inseparable integral essentiality and that without it, it ceases being a High Court or a King's Court. This is suggestive that a court of a superior stature must *inter alia* command the authority to review the decisions of the inferior courts, tribunals, administrative bodies exercising *quasi-judicial* functions etc.

[15] It is conjectured from the jurisprudential submissions made for the Applicant that there is an implication that presently there is a crisis authored by both the High Court and the Court of Appeal in misconstruing the jurisdictional effect of Section 25 of the

Labour Code (Amendment) Act 2000. He seemingly attributes this to the limitations in the form and content of the representations made to the courts by the involved counsel. This was related to the question of the delimitation of the provision on the exclusivity of the jurisdiction of the labour courts *viz a viz* the reviewing powers of the High Court. To illustrate the point that the courts were insufficiently assisted hence they invariably simply adhered to the long established interpretation, he referred the Court to the Court of Appeal decision in **Hoohlo v Lesotho Electricity Company**[5]**.** The material importation against which the Applicant complains, is the interpretation to the effect that the scheme of the Code is to totally exclude the jurisdiction of the High Court from hearing labour employment related cases without any exception.

[16] It would, perhaps, suffice to be stated in a synopsis version that the counsel for the Applicant advanced a deeply researched presentation seeking to dissuade the Court from thinking along the reiteration of the interpretation of the scheme of the 1992 Labour Code as affirmed in the Hoohlo decision (Supra). In essence, he adamantly and consistently maintains that the Scheme cannot be interpreted to have excluded the jurisdiction of the superior courts from exercising the reviewing powers over the inferior courts and other already stated entities.

[5] (C of A (CIV) 09/20) [2020] LSCA 23 (30 October 2020)

[17] The Applicant has forensically analysed the jurisdiction that the Scheme assigns to the labour system in its entirety and synthesizes that it runs short of excluding the powers from the superior courts. To reinforce the view, he contends that Parliament has not throughout the legislation, expressly inscribed so and ascribes the interpretation to a misdirected intellectual supposition which even defies logic. Interestingly, he directly challenges the correctness in the logic that the creation of specialized courts for the hearing of labour related disputes justifies a conclusion that Parliament has excluded the High Court from exercising its inherent power of review.

[18] The criticism was expressed from a strong statement that the Court of Appeal has, in attempting to provide guidance, employed deductive reasoning from the general theory of jurisdiction of expertise tribunals and policy underpinnings thereof to the particular. He then complains that resultantly, it concluded that Labour Courts' jurisdiction which is exclusive ousts the High Court from determining any labour related or industrial relation matter. In his closer analysis, he protested that the Court of Appeal's decisions lacks clarity, principles, conceptual and theoretical foundations that are mired in a number of incorrect legal and logical suppositions and propositions.

[19] To justify the censure, it was submitted that the rather "**alchemical process**" reasoning culminated in an incorrect thesis that:

1. The creation of specialist courts necessarily or invariably leads to the exclusion or is intended to exclude jurisdiction of ordinary courts;
2. The "Jurisdiction" of a court is synonymous with the "power" of the court;
3. Subject-matter jurisdiction of the Labour Courts thus characterised by this the High Court's jurisdiction is thus ousted on such matters or disputes as characterised, without a clear analysis of what subject-matter lies within the Labour Courts and without the other courts' jurisdiction.

[20] The counsel for the Applicant synthesized the criticism of the obtaining precedence on the exclusivity of the jurisdiction of the labour courts has misinterpreted the relevant provisions of the labour law to simultaneously extend their jurisdiction beyond the powers with which they are already ordained. It should for ease of reference be recalled that the proposition was made *inter alia* in the light of a similar construction in the Hoohlo case (supra). On this note, he maintains that any provision declaring the jurisdiction of the Labour Court to be exclusive, must be interpreted to mean the specifically ordained jurisdiction, as indicated above, cannot be exercised by any other court.

[21] In the final analysis, the counsel submitted that the question of the lawfulness of the decision by the Minister in which he refused to uphold the recommendation of the Board as he is enjoined by the law, constitutes a subject of review by this Court under its unlimited jurisdiction. Seemingly, whilst admitting that the decision was made within the employment environment, he nevertheless, maintains that it is essentially an administrative one

and not a labour matter and, therefore, a subject of a review by this Court.

Decision

[22] The determination of justice in this case, should primarily present the answer as to whether the Code as amended, totally excludes the jurisdiction of the High Court from reviewing the lawfulness of the decision of the Minister. This should be complemented with a corresponding response to the controversy on whether the nature of the decision concerns employment and, therefore, appreciably renders the matter to be adjudicated upon by the labour courts as prescribed in the Code.

[23] To resolve the identified issues, it becomes necessary to shortly navigate through the history and resultant dynamisms in the codification of labour law in the Kingdom and the jurisprudential challenges therefrom. In the process, there would be reference to the pertinent constitutional and legislative provisions.

The History and the Labour Courts Statutory Developments

[24] 'In the beginning' in the Kingdom, the High Court had throughout the ages prior and after independence freely exercised its inherent and unlimited jurisdiction to review the proceedings

over labour and industrial relations matters both in the public sector and private sector[6].

[25] In the mist of the explained jurisdictional scenario, Parliament revolutionized that *status quo ante* through the enactment of the Labour Code Order 1992[7] (as amended). It would simply be abbreviated as the Code. The legislation introduced codification of the labour regimen of the then applicable statutory and the common law. It complemented that by creating the Labour Courts[8] with power, authority and civil jurisdiction over the prescribed labour matters[9]. Section 25 of the Code, features as the initial provision of significance for the comprehension of the successive laws and jurisprudential dynamics that developed. It prescribed that:

> The civil jurisdiction of the Labour Court shall be exclusive as regards any matter provided under the Code, including but not limited to trade disputes and no ordinary or subordinate court shall exercise its civil jurisdiction in regard to any matter provided for under the Code.

[26] The Section was subsequently in 2000, amended to resolve the jurisdictional uncertainties between the ordinary courts and the labour courts. This time, it prescribed:

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

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[6] Gertrude Moliea v Abia Ncholu and Lesotho Evangelical Church 1971-1973 LLR 14, 17-21
[7] No. 24 of 1992
[8] Section 22
[9] Section 24

> under the Code – (a) subject to the Constitution and section 38A; and (b) notwithstanding section 6 of the High Court Act 1978.

[27] Section 38A (4) of the Labour Code Amendment Act No.3 of 2000, created the Labour Appeal Court as a final and exclusive Court of Appeal in certain, but not all, labour matters. The impression is that a litigant who is dissatisfied with the decision of this court can resort to the Court of Appeal of the land by way of an appeal and under exceptional circumstances seek for the reviewing of the proceedings.

[28] Having established the Labour Court of Appeal, the Legislature enacted Section 38A (1) of the Act to assign it the jurisdiction. This proceeds from the key provision that the Labour Appeal Court has exclusive jurisdiction to:

> (a) Hear and determine all appeals against the final judgments and the final orders of the Labour Court;
> (b) Hear and determine all reviews –
> (i) From judgments of the Labour Court;
> (ii) From arbitration awards issued in terms of the Act; and of **any administrative action taken in the performance of any function in terms of this Act or any other labour law.**

The Impact of the Code on the Unlimited Original Jurisdiction of the High Court

[29] The sequence in the analysis and the submissions made for the Applicant on the relevant provisions of the Code, tasks the Court to initially determine the jurisprudential correctness of the proposition that they do not expressly or even by necessary

implication exclude the unlimited jurisdiction of the High Court. The submission was made with reference to a plethora of common law interpretations on the same subject and to the applicable provisions in our Constitution. Notwithstanding the novelty, insightfulness and the richness in the jurisprudence upon which the submissions were anchored, judicial prudence dictates that it should, for now be acknowledged that the Court of Appeal has comprehensively resolved the question. This was pronounced in **Hoohlo v Lesotho Electricity Company (supra)** in these terms:

> I see no reason to override the long line of cases in which this court has held that the High Court has no jurisdiction even under Section 6 of the High Court Act to entertain labour disputes[10].

[30] It appears intriguing that despite the said long line of cases in which the Apex Court has repetitively determined that the High Court has no jurisdiction to even under Section 6 entertain labour disputes, lawyers repetitively bring cases in which they, in essence, resuscitate a debate on the same resolved question. In that endeavour, they, as it is the case here, appear to enthusiastically rely upon some case law interpretations and legal literature previously applied in comparatively similar scenarios. It was evidently the same encounter in the Hoohlo matter. The resilience seems to be inspired by a conviction that the applicable provisions in the Scheme of the Code, do not contemplate absolute exclusion of the jurisdiction of the High Court to review labour matters.

[10] Para 4.2

[31] In the understanding of the Court, the novel polemics introduced for the Applicant in this case is two levelled. The first is the contestation that there is no express provision throughout the Code, that the Legislature intends to **absolutely** exclude the reviewing authority of the High Court over labour matters and that this is a legal pre-requisite for such interpretative construction. The second reasoning is that in any event, the lawmaker would not have the constitutional powers to do so. Strikingly and interestingly, the counsel for the Applicant hastily cautioned the Court that the exposition is made despite full awareness of the provision under Section 127 of the Constitution that provides:

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

[32] Tellingly, from the above provision, the Constitution has empowered Parliament to create subordinate courts or tribunals and assign to any such forum jurisdictional powers **subject to the Constitution itself.** The limitation should primarily be considered against the backdrop that the Constitution has through the instrumentality of its Section 119 (1) constitutionalized the trite inherent common law power of review which is unique to the King's Court. To elucidate the position, the Section dictates:

> 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 court, court- martial, tribunal, board or officer exercising judicial, *quasi-judicial* or public administrative functions **under any law** and such jurisdiction and powers as may be conferred on it by this constitution or by or **under any law.** (Court's Highlight)

[33] The constitutional provision on the unlimited authority of the Court to review the acts of the listed entities, is further reiterated verbatim under Section 2 of the High Court Act[11]

[34] Obviously, by operation of the cannons of interpretation, Sections 127 and 119 (1) of the Constitution referred to above in *extenso*, should be read in harmony. Section 2 of the High Court Act should also be conceived to be intended towards the implementation of Section 119(1) since it simply mimics it. Resultantly, the message would be that the creation of the ordinary courts, specialized ones or tribunals under Section 127 including their jurisdictions respectively, would have to be in accordance with the letter and spirit of the Constitution. This denotes a possibility that the constitutive legislation of any one of the envisaged establishments could be *intra* or *ultra vires* the Constitution in one way or the other. This could even pertain to the jurisdiction assigned to any such entities including the labour courts.

[35] Just for over-emphasis sake, it is deserving to repeat that the constitutional authority of the Legislature under Section 127, is acknowledged. It obviously *inter alia* accommodates power to create specialized courts to address specific challenges or exigencies. In the context of the creation of the labour courts

[11] Act No.5 of 1978

regimen in terms of the Code, the background purpose would be for them to facilitate for the convenience, ease access to justice and expediency in resolving labour controversies. This is self-explanatory from the perspective of the relatively simplified applicable procedures and even the composition of the presiding panel which includes lay officials who have jurisdiction to decide on factual issues. Nevertheless, as it is enjoined under Section 127, the quest for convenience and expediency should not in any manner whatsoever, compromise the requisite constitutional imperatives.

[36] With all humility under the existing precedence, it appears that there is merit in the proposition made for the Applicant that the exclusiveness of the jurisdiction of the labour courts, does not denote the extension of their jurisdiction. The same applies to the view that it automatically terminates the already ordained jurisdiction over other courts in particular the High Court in the instant case.

[37] The Court founds that the legal literature and the common law precedence to which it was referred in motivation of the case of the Applicant on jurisdiction, constitutes a meaningful guidance. It begins with a meticulous distinction of *jurisdiction* in contrast to *power* as distinct concepts. In this regard, it unfolded that *jurisdiction* is a substantive authority vested in court and

confined to the subject-matter assigned to it. This could be authored by the Constitution, constitutive Act[12] or be inherent.

[38] On the other hand, and to complement the contrasting picture, the powers of a court are incidental and ancillary to the substantive ones and enable the court to give effect to its substantive authority. In precise terms, the exercise of the power by the court simply facilitates for the implementation of its jurisdictional authority.

[39] The jurisprudence on the visualization of *inherence of jurisdiction* is both logically and comprehensively explained by I H Jacobs[13] through this expose:

> Inherent jurisdiction is the: residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. Superior courts owe their existence not to statute but instead to the exercise of the Royal prerogative. Originally, the entirety of the English superior courts' jurisdiction was inherent in that it had no statutory basis. Inherent jurisdiction is classified into three categories:
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> (a) Control over process (e.g. contempt of court);
> (b) Control over persons (e.g. a court's judicial review jurisdiction); and,
> (c) Control over inferior courts and tribunals.

[40] And most intricately appealing, pontificates further that:

> Such a power is intrinsic in a superior court; **it is its very life-blood, its very essence, its immanent attribute.** Without such a power, the

[12] for, example, Act 2000
[13] "The Court's Inherent Jurisdiction" (1970) 23 *CLP* 23,

> court would have form but would lack substance. The jurisdiction which is **inherent in a superior court of law is that which enables it to fulfil itself as a court of law.**[14] (Court' s Highlight)

[41] Another version of i*nherent jurisdiction* is that it is a self-generating intrinsic source of power.[15] Thus, so far, it consistently emerges that the phenomena is self-explanatory that the reviewing authority of the High Court constitutes its essence and that this is an inseparable integral essentiality of this level of judicature. On a rhetoric note but emphatic on the point, it is an enigma analogous to the essentiality of sexual potency of a bull to fertilize a cow for it to be recognized as such. The minute it becomes castrated, it seizes being a bull and becomes an ox. Resultantly, it gradually becomes characteristically docile and only good for pulling the plough. It even loses its sacred stature and 'holiness' to be used at the commencing ceremony towards the subsequent processes transacted in the mountain for the initiation of boys.

[42] A foundational role of the High Court in a constitutional democracy as it is the case in the Kingdom, is to provide checks and balances against excesses by the other Arms of Government. In the case of Parliament, this is done through the censuring of legislation to ascertain its consistency with the Constitution by virtue of its s*uprema lex* status. It executes the same intervention over the policies of the Executive, the host of sub delegated

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[14] I.H. Jacob, op cit. p27

[15] W H Charles "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33 *Dalhousie Law Journal* 63, 64.

legislation and *quasi-judicial decisions.* This is all exercisable through the instrumentality of the constitutionally ordained power of review supported with the principles of Administrative law as developed from time to time by the common law.

[43] To this end, the logically consequent inquiry should be premised on whether the Constitutional scheme contemplates that Parliament could legislatively **totally exclude the High Court from exercising its constitutionalized and recognizably inherent power of review in any specified area.** This should be determined with reference to the traversed constitutional, statutory and legal literature on the genesis of the reviewing powers of the High Court, its value and role under a constitutional democracy and the developed principles which have stood the test of times.

Principles of Interpretation on the Legislative Exclusion of the Reviewing Powers by the High Court

[44] The subject would simply be explored against the recognition that the Code does not anywhere in its provisions expressly remove the reviewing authority of the High Court that is expressly entrusted upon it without any reservation under Section 119(1) of the Constitution read together with Section 2 of the High court Act. All the decisions, in particular the one in the Hoohlo case (supra), culminated from the interpretative conjecture. The logic behind is simply that the creation of the labour courts by the Code as sanctioned in the said Section 127 and entrusting the Labour

Appeal Court with the reviewing authority reveals the intention of Parliament to totally exclude the function from this Court.

[45] The remaining question though would be on the competency of Parliament to **totally** excludes the jurisdiction of the High from reviewing labour related matters. The answer is obtainable from the relevant provisions in the Code that should correspondingly be interfaced with the relevant provisions in the Constitution. It should, in this regard, be realized that the original Section 25 in the 2000 Labour Code was deleted and substituted with its new version that reads:

> '(1) 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-
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> (a) **subject to the Constitution and section 38A;** and
>
> (b) notwithstanding section 6 of the High Court Act No. 5 of 1978.

[46] It is clear that (1) (a) seeks to maintain the supremacy of the Constitution by directing that the exclusivity of the jurisdiction of the Labour Court is subject to its provisions. This is self-explanatory that the interpretation that the subsection excludes the jurisdiction of the High Court from exercising its review powers would be contrary to Section 119 (1) of the Constitution. If that would be correct, it would mean that the exclusivity provision is *ultra vires* the Constitution and, therefore, to that extend void and unenforceable.

[47] The wording that, "and no court shall exercise its civil jurisdiction in respect of any matter provided for under the Code", should not be comprehended to include the High Court. There must always be a particular attention to be paid to the fact that the Constitution gives this Court **original and unlimited** competency to review all civil and criminal cases. This is not circumventable through Section 127 since it equally directs that the creation of the subordinate courts, Court-Martial, tribunals etc. shall be in accordance with the Constitution. Appreciably, this would apply even to the jurisdiction assigned to any one of them irrespective of whatever constitutive enactment and for the specific purpose of this case, the Labour Code 2000.

[48] The Court is mindful that the **originality** of the jurisdiction of the High Court is suggestive that in the context of Section 25 (1), there is a concurrency of jurisdictions between the High Court and the Labour Court. The concurrence of jurisdiction between the High Court and the subordinate courts is not a strange phenomena in this jurisdiction. This was acknowledged in **Lenka Mapiloko v Fragmar (Proprietary) Limited**[16]**.** This emanated from the contract in which the parties purporting to act in accordance with Section 28 of the Subordinate Court Act[17] submitted to jurisdiction of the Magistrate Court and excluded that of the High Court from hearing possible dispute arising from it. The Apex Court ruled that the parties cannot exclude the jurisdiction of the

[16] C of A (CIV) No. 42/2017
[17] No. 6 of 1988

High Court over the matter. It simultaneously admitted that in the circumstances, there was concurrency of jurisdiction between the Subordinate Court meaning the Magistrate Court as opposed to the subordinate courts. To demonstrate the practicability of that, it directed that normally such cases should first be heard in the lower court.

[49] There is a catalogue of a list of decisions on the interpretation of the effect of a statute on the unlimited jurisdiction of the High Court regarding its review powers. The Court finds it strategic to commence with the interpretative direction detailed by the Court of Appeal in **Hippo Transport v Commissioner Of Customs & Excise**[18] that:

> The inherent jurisdiction of the High Court can only be **excluded by clear statutory** wording and that exclusion of the inherent jurisdiction will not be inferred where the statute is silent.[19] The same principle was reiterated by the eSwatini's Supreme Court held in **Derrick Dube v Ezulwini Municipality:**[20] This is maintained through the presumptuous principle that Parliament did not intent excluding the jurisdiction of the court unless it has expressly or by necessary implication indicated otherwise. The case of **Mgijima v Eastern Cape A.T.U. and Another**[21] is precisely and almost exhaustively relevant for guidance in the present case. The question here concerned whether the Schedule expressly or impliedly excluded the jurisdiction of the High Court. Van Zyl J explained:
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> > The question whether the jurisdiction of the High Court has been ousted and conferred to some other tribunal or court must be determined in the context of the presumption against legislative interference with the jurisdiction of the High Court. It is a well-recognised rule of statutory interpretation that the curtailment of the

[18] (C of A (CIV) 06 of 2017) [2018] LSCA 5 (07 December 2018)

[19] Zaoui V Attorney-General, Op Cit**,**

[20] CASE NO.91/2016; [2018] SZSC 49 (30th November, 2018)..

[21] 2000 (2) SA 291).

> powers of a court of law will not be presumed in the absence of an express provision or a necessary provision to the contrary therein. In each case where this arises, the court will therefore closely examine any provision which appears to curtail or oust its jurisdiction[22].

[50] The case law and literature referred to on the subject calls for the paying of tribute to the jurisprudence developed by the late Mofokeng J on the reviewing powers of the High Court. This is in recognition of the fact that it has bequeathed a legacy for the appreciation of the wisdom and indispensability of the exercise of the *original unlimited jurisdiction* of the High Court. His leading judgment to reminiscence about, is **Khabang Martha Sello v Commissioner of Police and Another[23].** It was a *habeas corpus* application resulting from the perpetual detention of the detainee on whose behalf it was brought before the High Court. The detention was done pursuant to Section 12(3) of the Internal Security (General) Act[24] which authorized the Commissioner to detain a person whom he suspects to be committing subversive acts for interrogation until such a detainee gives him satisfactory answers. The maximum period of the confinement was 60 days. Sub Section (4) provided in express terms that:

> No Court shall have jurisdiction to order the release from custody of any person so detained, but the Minister may at any time direct that such person be released from custody.

[22] 2000 (2) SA 291 (Tk) @ 296 E-H
[23] Decisions of the Court of Appeal and the High Court 1980 (1) @ 158
[24] Act No. 24 of 1974

[51] There were further provisions that no person shall, except with the consent of the Minister or the Commissioner, have access to any person detained under (3) with a proviso that such a person shall be visited in private by a Magistrate of the 1st class powers. No mention was made about the role of the Magistrate. What is material for the purpose of the case at hand, is that at that time the constitution was suspended pending the enactment of the one which according to the Prime Minister would be suitable to the Basotho as opposed to the suspended Westminster model. The country was under a state of emergency. Notwithstanding the stated express provision that excluded the jurisdiction of the courts including the High Court, Mofokeng J determined that the court still retains the power to review the matter by inquiring into the lawfulness of the detention.

[52] Interestingly, the late Judge in the same case, used the *inherent jurisdiction* power, by circumventing the provisions barring private visitations to the detainee and appreciably rendering evidence from those who may happen to see her predicament, inadmissible. He, nonetheless, pro-actively accepted the evidence from the doctor who examined the detainee after developing health complications during the interrogation and even ordered the Magistrate to submit the report after seeing her. His reasoning was that these were material to the investigatory inquiry by the court. It is clear that the Judge placed emphasis on the *inherence of the reviewing authority of the court over the express wording in the enactment.* The focus was evidently on the rights of

the detainee. In those compelling circumstances, he found it justifiable to avoid a pronouncement that Parliament has expressively or impliedly spoken and so be it.

[53] In the circumstances, the approach adopted by the Judge is demonstrative of the entrenchment and the inseparability of the review process from the jurisdiction of the High Court and the strictness of the interpretation applied against its exclusion. The judgment was subsequently approved by Mahomed JA in **Mohatla v Commissioner of Police and Others**[25] who hailed it as a through and lucid judgment[26].

[54] It should in the mist of the conflicting views on the subject, be boldly inscribed without any equivocality in this judgment, that the High Court has a concurrent jurisdiction with the subordinate courts. A living testimony is in several cases where due to the factual and legal complications, this Court allowed a dispensation for the divorce proceedings involving the parties married customarily, to be heard by it despite the recognition that the matter falls within the jurisdiction of the Local Court. The indulgence is sought for through Section 6 of the High Court Act which explains the wisdom and vision therein. In fact, it is a transcendence of the previous provisions in the successive

[25](C. of A. (CIV) No. 6 of 1983) [1985] LSCA 18
[26] Para G

historical similar enactments since the colonial times[27]. It instructs:

> No civil cause or action within the jurisdiction of a Subordinate Court shall be instituted in or removed into the High Court, save with the leave of a Judge upon application made to him in Chambers, and after notice to the other party.

[55] The section rhymes with the main principle that every citizen has a right of audience before the King's Court. This notwithstanding, the section just like its predecessors, provides for a gate keeping and controlling mechanism to protect this Court from being unnecessarily burdened with case including those that are trivial and simple to expeditiously resolve. It is for the same reason that Section 118(c) creates the subordinate courts and Court- Martial while (d) sanctions the legislative creation of tribunals exercising judicial function. This is basically reiterated under Section 127 of the Constitution.

[56] The philosophy behind Section 6 is deeply thoughtful and perceptive since it institutionalizes a system that balances the right of citizen to be heard by the High Court and its unlimited jurisdiction with the exigency of each case. This seeks to provide an avenue for the unpredictable complications warranting immediate resolution by the superior courts. The unlimited jurisdiction of the High Court should *inter alia* be appreciated in

[27] Act No. 4 of 1967

the context of a **reserved** or **delayed** exercise of power. In the scheme of the section, the determination on the forum to intervene in the matter which a litigant applies that it be heard by the High Court is subjected under the judicial discretion of a judge before whom the application is made. The Section even allows the Judge to *mero muto* decline the jurisdiction. This is done on several occasions.

[57] Admittedly, Parliament may, perhaps, inadvertently legislatively dispensed with the procedure under Section 6 as it is definitely the case in the matter since it has expressly stated so. Admittedly further that it has entrusted the power to review labour matters upon the labour courts, the question would still be whether by so doing, it has inferentially excluded the constitutionalized common law *inherent jurisdiction* of the High Court.

[58] The concept of *reserved* or *delayed* jurisdiction of the High Court which originates from its *unlimited jurisdiction* and concomitantly *concurrent* jurisdiction with the subordinate courts anchors the constitutional status and authority of the High Court. It does not and it has never caused the Court to be overwhelmed with cases. Instead, the subordinate courts continue to be so overwhelmed. This is attributable to the reality that they are, in all respects, easily accessible in comparison to the High Court.

[59] It must also be realized that the *unlimited jurisdiction* phenomena does not dispense with the jurisdiction assigned to the subordinate courts, specialized courts and tribunals by usurping their powers. Thus, notwithstanding the notion, each court continues to execute its constitutive mandate. This explains why there are fewer and easily manageable applications where the Section 6 indulgence is sought for and, it is in the exceptional cases that the High Court grants it. The latest controversies with the labour related jurisdictional issues would be settled once the fundamental question on the meaning of the *unlimited jurisdiction of the High Court, its philosophical purpose and parameters are satisfactorily resolved.*

[60] In the circumstances, the remaining fundamental question is whether Parliament itself has a constitutional authority to **completely** oust the jurisdiction of the superior courts over any sphere of life for the sake of expediency irrespective of what is at stake including the Chapter II rights. The answer would primarily require a profound thinking on the meaning and significance of the provision in Section 119 (1) that the High Court has **original unlimited jurisdiction to review civil and criminal cases** and exercise the same powers over the rest of the listed establishments. The conceptualization of originality of power explains its inherence and inseparability. The unlimitedness of jurisdiction simply means that it cannot be absolutely limited. It has already been repetitively warned that even Section 127 obliges Parliament to establish courts subordinate to the High Court and other entities subject to

the provisions in the Constitution. Consequently, it is incomprehensible that the Legislature can totally limit or remove the review powers from the High Court. At best, it can only redefine them within the confines of the Constitution.

[61] The originality and unlimitedness of the jurisdiction should elementarily be understood against the historical backdrop that the High Court is the King's Court - hence its judges are referred to as their Lordships to signify that they administer justice on behalf of the King. This is elaborated by the presence of an imposing picture of the King behind the seat of every Judge. Resultantly, every subject within the realm, had a right to ventilate his grievance before a court of that stature. Thus, the jurisdiction of the High Court ranges from a contestation over a penny up to millions of pounds. The reality is that the penny that could be the subject matter of the litigation, may occasion seriously complex issues and it may in the course of the deliberations, occur that it commands value implications to the tune of millions and millions of English pounds.

[62] Subsequently, reality dictated that judicial power should be devolved to the subordinate courts throughout the Kingdom and be assigned what could be described as *delegated jurisdiction* to attend to the specified cases. This is explainable from the fact that King's Court retained its original and unlimited jurisdiction over such matters by continuing to superintend over the decisions of the subordinate courts. Section 127 is not an avenue through

which the High Court can be totally and permanently deprived of its constitutionally engrained original unlimited jurisdiction of review.

[63] Section 119 (1) and 127 of the Constitution should be cautiously read together in order to appreciate their consequent effect. The starting point should be the acknowledgement of the originality and the unlimited powers that the former section entrusts upon the High Court. Secondly, it should be realized that the latter section obliges Parliament to legislatively create the contemplated judicial and quasi-judicial institutions under Section 127 in accordance with the Constitution. The understanding should, therefore, be that Parliament created the labour courts through the Code, well mindful of that constitutional pre-requisite. The same applies in particular over its Section 38A empowerment of the Labour Court of Appeal to exercise original and exclusive jurisdiction of review over the labour related cases.

[64] It remains a fact that in the stated legislative developments, Parliament did not say anything about the constitutional authorship of originality and the unlimited review powers of the High Court. If Parliament intended to totally exclude this authority from the High Court through the instrumentality of Section 127, it should have expressively provided so therein and, thereby, indicate extend of the curtailment. This is justified by the realization that this would deprive the High Court of its foundational role in a democratic constitutional rule to use the

constitutionalized traditional authority for checks against excesses by the Parliament or the Executive.

[65] In all fairness, the words, "*unlimited jurisdiction"* used in Section 119 (1) of the Constitution simply means that its ordained power of review is as described *unlimited* or *limitless* and there are many other words meaning the same thing. So there would be no need to concentrate on the differences between semantics. The challenge is, however, that the words should be comprehended within the context of the explained *originality* of that *infinite* authority that is constitutionally entrusted upon the High Court. This, justifies a humbly made interpretative conclusion that Parliament empowered the Labour Appeal Court to exclusively exercise review powers over the labour related matters save that the High Court would, under compelling circumstances, continue to retain its *original unlimited jurisdiction* over the same.

[66] The stated legislative developments, in particular, the creation of the Labour Appeal Court and the exclusivity of its review powers, cannot from the constitutional perspective, be interpreted to have totally excluded the *inherent unlimited reviewing authority of the High Court* even concerning labour cases. Instead, the measures simply *delay* the exercise of its *reserved* power since it remains constitutionally inconceivable that this intrinsically indispensable characteristic of a democratic constitution can ever be absolutely transferred to the Labour Appeal Court. The latter as it has been explained, is within the

context of Section 118 a subordinate court. This remains true irrespective of its specialized character. Otherwise, it would mean that all the specialized tribunals and commissions presided over by individual judges are the branches of the High Court[28]. Incidentally, their decisions are reviewable by this Court.

[67] The rationale behind the *delaying* or *reserving* of the *inherent jurisdiction* of the High Court, is firstly to acknowledge its unlimited jurisdiction and to allow the subordinate courts, tribunals, commissions etc. to exercise their primary jurisdiction. Secondly, the idea is to allow the High Court to subsequently intervene by invoking its *delayed* or *reserved* review powers strictly under the deserving circumstances.

[68] The said reserved powers could, for instance, be invoked by the Court where it is brought to its attention that despite a *prima facie* impression that the relationship is that of an employer and employee but deeply, it is that of a master and a slave. I take judicial notice of several such human trafficking cases that I presided ovas then Chief Magistrate. The complexities involved warranted the intervention by the High Court. There are also labour issues which originate from the abuse of power and authority by some State officials with underlying human rights implications. The examples are given the ever developed constitutional principles conceptually endless. It is appropriate

[28] To mention few of such Tax tribunal and Court Martial Appeal Court

to buttress the position that this Court is intrinsically qualified to exercise its Section 119 (1) powers over civil and criminal matters independent of Section 6.

[69] The indispensability of the review supervisory role of the superior courts together with the wisdom in a presumption against the restriction of those powers, is well articulated by Wade and Forsyth[29] who pontificated that:

> … it must be stressed that there is a presumption against any restriction of the supervisory powers of the court. Denning LJ said in one case: I find it very well-settled that the remedy of certiorari is never to be taken away by any statute **except by the most clear and explicit words**.[30]

[70] In the instant case, it is clear that there is no written statement anywhere in the Code that the Section 119 (1) review authority of the High Court is removed and assigned to the Labour Appeal Court let alone this being explicitly expressed. The interpretative conclusion to that effect, is simply deductible from the creation of the labour courts and assigning of reviewing powers to the LAC in terms of Section 38A of the Code.

[71] This Court finds it irresistible to express a fear that in the socio-political realities in the developing world, the political masters could easily exploit the said interpretation to circumvent

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[29] Wade & Forsyth ***Administrative Law***, 10th ed (2009) pp610-611
[30] Ibid. Wood & Allied Workers Union v Pienaar No 1993 (4) SA 621 (AD) at 635A-B

the checks and balances foundational role of the Judiciary or simply undermine it. This poses a serious challenge for the Judiciary to pro-actively dutifully preserve its role by guarding against possible creations of 'user-friendly' tribunals or commissions also presided over by 'user-friendly' loyal officials and then assign them reviewing powers over some matters of interest at the time. The decisions of the Court- Martial could, for instance, be legislatively assigned to the Court-Martial Appeal Court. There could further be creations of Tribunals or Commissions to review the decisions concerning dismissals of public servants and the one which would exercise the same power over the decisions on the awarding of Government tenders.

[72] A good example would be in **Gentiruco AG v Firestone SA (Pty) Ltd**[31]**.** Here, the Patents Act[32] was used to establish the Patents Court presided over by the Commissioner and assigned it the reviewing jurisdiction over the decisions relating to matters on patents. The court adopted a strict interpretation to maintain its supervisory function. A compromise on that may sacrifice the *basic doctrine law* which is *sine qua non* for a healthy constitutional democracy. It would almost irreparably be compromised and, it would be a sad moment for the Kingdom.

[73] It appears that it is of key importance for the status of the Labour Appeal Court to be interpretationally ascertained in order

[31] 1972(1) SA 589 (A)
[32] No.37 of 1952

to appreciate its jurisdictional powers of review and their parameters within the context of those entrusted over the High Court under Section 119 (1) of the Constitution read with Section 2 of the High Court Act. The genesis of the High Court is in Section 118 (1) (b) of the Constitution while that of the labour courts is in Sub Section (1) (c) which establishes subordinate courts. The creation of the labour courts was initiated through Section 127 that laid a foundation for the establishment of the labour courts through the Code as their constitutive enactment respectively and assigned jurisdiction to each of them.

[74] It is clear from the configuration of Section 118 (1) that none of the labour courts is a High Court or its branch since this level of Judicature is created under (1) (b) of the Constitution. This does not, however, bar Parliament from legislatively creating in expressive terms, a specialized branch of the High Court. To attest to this, Parliament created the Land Court as a specialized court for the hearing of the appeals from the District Land Courts and to exercise original jurisdiction in some deserving cases. It then provided in clear terms under Section 74 of the Land Act[33] that the Land Court shall be a branch of the High Court.

[75] There is no provision in the Code which pronounces that the Labour Appeal Court is a branch of the High Court. This would qualify it to exercise the Section 119 (1) review powers in equal

[33] Act No.8 of 2010

terms with the main branch of the High Court. The only difference would be that it would, for the purpose of its specialization, confine its reviews over the labour related cases. Thus, the Labour Appeal Court is by operation of Section 118 (1) (c), from which it constitutionally originates, a subordinate court and not a High Court. This is reinforced by the fact that even its creating provision in the Code, does not expressively make it a branch of the High Court.

[76] The Section 38 (3) (a) provision that the Labour Appeal Court shall be presided over by a Puisne Judge of the High Court, would not justify a conclusion that this *per se*, makes it the High Court. It would make sense to highlight the rather *sui generis* aspect that the Judge sits with two laypersons who make decisions on the facts. The accuracy in the analysis is supported by the existence of several judicial and quasi-judicial establishments that are presided over by a Judge without being accorded the status of the High Court. Good examples would be the Court-Martial Appeal Court[34] which is presided over by a High Court Judge. It, nevertheless, remains the appellate division of the Court-Martial and its decisions are subject to the review by the High Court. The same applies to the Tax Appeal Court.

[77] So, the subordinate status of the Labour Appeal Court renders it to have a concurrent review jurisdiction with the High

[34] Created under Section 146 of the First Amendment to the Constitution 1996

Court. This is by operation of the inextinguishable powers of the High Court under Section 119 (1). The Court of Appeal has in **Lenka Mapiloko v Fragmar (Proprietary) Limited** (supra) provided the *modus operandi* on how the concurrent jurisdictions between the subordinate courts and the High Court are respectively approached. This would only be appreciated and relatively easily practicable if the appearance of some myth that the Labour Appeal Court is a branch of the High Court or its equivalence, is exploded.

[78] It would be a blessing for the courts to develop the law in response to the realities of Lesotho within the context of the ever changing political balances and fortunes. Emphasis should be on the constitutive legislation pertaining to the labour courts and a search for the harmonisation of the jurisdiction assigned to each of them with that of the superior courts within the parameters of the Constitution. It could be a recipe for a disaster if a coping and pasting approach is made from the jurisprudence abroad. There must be conscientious attention given to the uniqueness of our socio-political realities.

Analysis of the Decision of the Minister for the Decision on Jurisdiction.

[79] At the onset and for the purpose of the avoidance of uncertainty, it must be straightened out that the Court is mindful that at the moment the inquiry is solely restricted to the question

on the jurisdiction of this Court over the matter. So, there will be no determination concerning the lawfulness or otherwise of the refusal of the Minister to renew the contract of the Applicant.

[80] It should be recalled that this task is premised upon the common cause narrative that the Minister responsible declined to uphold the recommendation forwarded to him that the contract of the Applicant as the CEO of LNDC, be renewed for another 3-year tour. Consequently, the Applicant sought for a reviewing order through which, in the main, it determines that the decision of the Minister is unlawful for being *ultra vires* the operational Section 9B of the *LNDC* (Amendment) Act 2000. The question would, however, be addressed after the jurisdictional one is resolved.

[81] The relevant mainstay for the point of law raised for the Respondent is that the impugned decision of the Minister is sanctioned by the labour employment related relationship which the Applicant has with the LNDC. The decision of the Minister was described as a fulfilment of the last process in the consideration of the contractual employment of the CEO of the organization. It is on those grounds that he maintains that this Court lacks the jurisdiction over the subject matter since by virtue of the Code and the decisions of the superior courts, such matters are triable before the labour courts.

[82] As already stated, at the commencement of the hearing, the counsel for the parties advised the Court that they have an irreconcilable disagreement on the jurisdiction of the Court to hear the matter and that this should be resolved first. It was made very clear that in the meanwhile, the hearing of the merits would be held in abeyance.

[83] In a nutshell, the central point of divergence over the question of the jurisdiction of this Court concerns whether the decision of the Minister is labour related in which case, the Court would not have jurisdiction to entertain it. This then occasioned a dimension as to whether the Code actually totally excludes the jurisdiction of the High Court in the labour related cases and if Parliament could do so in the face of Section 119 of the Constitution and the inherence of the reviewing powers by the High Court.

[84] In this scenario, the Court found it logical and convenient to address both inseparable aspects in *seriatim* towards its ruling on both terrains of the polemics. This is for the sake of its logical comprehensiveness.

[85] It is clear that the Applicant is an employee of the LNDC and that his employer is not one of the employment organizations which are exempted from the application of the Code. Appreciably, therefore, the legislation is generally applicable over its employees. Nevertheless, the engagement of each employee must be

meticulously analysed in its own merits. This is attributable to the differences in the status, nature of the employment, its source and the job description.

[86] In the present case, the employment of the Applicant is contractual in terms of Section 9B of the *LNDC* (Amendment) Act 2000 that provides:

> 1. The Minister shall, on the advice of the Board appoint a Chief Executive Officer.
> 2. The Chief Executive Officer shall be accountable to the Board of Directors.
> 3. The Chief Executive Officer shall be responsible for the day to day management of the Corporation's activities.
> 4. If for any reason, the Chief Executive Officer is absent from office for a period not exceeding three months, the Chairman shall, acting on the advice of the Chief Executive, appoint a person to act on his behalf.
> 5. If the Chief Executive Officer is absent from office for a period exceeding three months, the chairman shall, acting on the advice of the Board, decide on the appropriate person to act on behalf of the Chief Executive Officer.
> 6. The Minister may, acting on the advice of the Board, terminate the appointment of the Chief Executive Officer.

[87] It transpires from the pleadings and the Heads of Arguments respectively, that the Applicant was contractually appointed a CEO of the LNDC in terms of the enactment referred to above. This *per se,* provides a clear answer that his office is, in the main, save where it is legislatively provided otherwise, governed by the

constitutive legislation of the LNDC[35]. It cannot in the absence of any provision indicating otherwise, be inferred that the Labour Code is the operative legislation. In any event, it is not contemplatable that the Code could be applicable over the office of the CEO of the parastatal standing of the LNDC. This is in recognition of the high positioned leadership stature of its CEO, its corresponding powers and responsibilities. Thus, a CEO is described as follows:

> A chief executive officer (CEO) is the highest-ranking executive in a company, whose primary responsibilities include making major corporate decisions, managing the overall operations and resources of a company, acting as the main point of communication between the board of directors (the board) and corporate operations and being the public face of the company. A CEO is elected by the board and its shareholders[36].

[88] The message from the stated definition is straightforwardly that the nature of the employment of the Applicant and the content of his assignment, is almost totally irreconcilable with a labour related task. There could be those within his establishment whose job description could be associated with labour connected roles and upon whom the Code would apply. Resultantly, the Court finds no justifiable legal basis to classify him in that category.

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[35] The Lesotho National Development Act No. 20 of 1967 (As Amended)
[36] http://www.investopedia.com

[89] The Court found that its determination should be founded on whether the decision of the Minister is labour related and, so, by operation of the Code reviewable within the labour courts or is administrative and, therefore, reviewable by this Court since it would not fall under the Code. In this challenge, it found guidance from the decision in the case of **The National University of Lesotho v Motlatsi Thabane**[37]**.** In this case, the court classified the decision of the Appellant to reserve the applications for the vacant position of Pro Vice-chancellor to the internal candidates contrary to the injunction order made by the Labour Appeal Court (LAC) to be administrative and not labour related. The determination culminated into a ruling that consequently, the Code was not applicable and, therefore, that the LAC had no jurisdiction over it.

[90] The Court of Appeal went further in the University case (supra) to state the conditions under which the administrative decision would be labour related and, so qualify for a review by the Labour Court to be:

(a) It must be administrative;

(b) Taken in the performance of a duty;

(c) In terms of a Labour Code or other labour laws.

[37] C of A (CIV) 67/2019

[91] It emerges from the criterion established in the same University case that the decision of the Minister was for the reasons already identified, in pursuit of the obligation for the institution to appoint a Pro Vice Chancellor. The axiomatic revelation is that the act was not done in relation to a labour assignment or under the Labour Code. Instead, it was characteristically administrative.

[92] The ruling will, against the background of the representations made between the parties, firstly speak to the question concerning the unlimited and inherent jurisdiction of the Court in the circumstances of this case. The next would be on the nature of the decision of the Minister for the determination of whether it qualifies for a review by this Court or the LAC.

In the premises, the ruling stands thus in seriatim:

1. The Court resolves that the limitations imposed by the Code on its jurisdiction, has the effect of a delaying the exercise of its inherent jurisdiction under the strictly deserving circumstances since it can never under a democratic constitutional rule, be **totally** removed from it. This notwithstanding, the word of the Court of Appeal on the subject-matter remains prevailing.
2. The determination that the decision of the Minister on the renewal of the contract of the Applicant, is administrative and not labour related or in pursuit of any labour law objectives,

renders this Court to naturally command jurisdiction to review its lawfulness.

3. At this stage, there is no order made on costs.

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E.F.M. Makara
JUDGE

For Applicant : Adv. Maqakachane instructed by Messrs Poopa Consulting Attorneys

For Respondent : Adv. Teele instructed by T. Matooane & Co.