

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/316/2021

In the matter between:

TSOKOLO FRANZ KOMPI & OTHERS

APPLICANTS

And

GOVERNMENT OF LESOTHO & OTHERS

RESPONDENTS

JUDGMENT

Neutral Citation: *Kompi & Others vs Government of Lesotho & Others* [2022] LSHC 38 (10 March 2022)

Coram : His Honour Justice Keketso L. Moahloli

Dates heard : 9 September 2021

Delivered (orally) : 15 September 2021

Written reasons : 10 March 2022

SUMMARY

Practice and procedure – Review of employment-related decisions and actions of the government as employer of a public officer – Such disputes fall outside the High Court’s review jurisdiction – The entry point is the fora created by the Public Service Act, i.e. the public officers’ dispute settlement regime.

ANNOTATIONS

CASES

1. *Ace Capital Re Overseas Ltd v Central United Life Ins Co*, U.S. 2nd Circuit Court of Appeals 10/18/02 01-9449
2. *Ashville Investments Ltd v Elmer Construction Ltd* [1989] QB 488
3. *Capital Trust Investment Ltd v Radio Design AB and Others* [2002]2 All ER 159 (CA)
4. *Chirwa v Transnet Ltd* 2008(4) SA 367(CC)
5. *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC)
6. *Harbour Assurance Co (United Kingdom) Ltd v Kansa General International Insurance Co. Ltd* [1993] QB 701
7. *Hartford Accident & Indemnity Co v Swiss Reinsurance America Corp*, U.S. 2nd Circuit Court of Appeals 246 F.3d 219 (2001)
8. *Home Affairs Ex Workers & Others v PS Ministry of Home Affairs & Others* [2021] LSCA 7 (14 May 2021)
9. *Hoohlo v Lesotho Electricity Company (Pty) Ltd* [2020] LSCA 20 (30 October 2020);
10. *Louis Dreyfus Negoce SA v Blystad Shipping & Trading Inc*, U.S. 2nd Circuit Court of Appeals 06/07/01 00-7382, CLOUT case 710
11. *Lesotho Revenue Authority v Dichaba & Others* [2019] LSCA 29 (1 February 2019)
12. *Mokotjo v Kennedy & Others* [2021] LSCA 10 (14 May 2021)
13. *Onex Corp v Ball Corp Canada*, Ontario Court of Justice, General Division 24 January 1994, CLOUT case 69
14. *PS Ministry of Labour and Employment & Others v Nthoateng Russel, C of A (CIV)* 27/2021 (12 November 2021)

STATUTES

1. *Basic Conditions of Employment for Public Officers* [Legal Notice No.32 of 2011]
2. *Codes of Good Practice for Public Officers* 2008 [Legal Notice No. 194 of 2008]
3. *Constitution of Lesotho* 1993
4. *Public Service Act No.1* of 2005
5. *Public Service (Amendment) Act No.3* of 2007
6. *Public Service Regulations* 2008 [Legal Notice No. 78 of 2008]

BOOKS

- P. Ramsden, The Law of Arbitration (Juta 2009)*

MOAHLOLI J

- [1] This is an opposed application brought on an urgent basis. Applicants seek the reliefs set out at pages 5 to 8 of the record.
- [2] Respondents raised several preliminary points of law, including lack of jurisdiction. The parties' counsel made oral and written submissions in respect of these.

LACK OF JURISDICTION

- [3] Respondents submit that this matter is not properly before me because, firstly, the arbitration clause in the applicants' contracts of employment mandates that "any claim or dispute relating to the interpretation or execution of [the contracts] which cannot be settled amicably shall be settled by binding arbitration according to the provisions of the **Public Service Act 2005** as amended." And, secondly, because "the cause of action is one ordinarily within the remit and jurisdiction of the Labour Court or the Labour Appeal Court".

The Arbitration Clause

- [4] In answer to the first contention, Applicants contend that the arbitration clause has no application to their case before this court because their claim is not about nor related to "interpretation or execution" of their contracts of employment. Rather it is about review of the administrative decision purporting to terminate such contracts and a declaration that such contracts are still extant until 2024.

[5] I do not agree. Firstly, it is trite law that when expansive language is used in an arbitration clause, it is intended that all issues that touch matters within the main agreement be arbitrated¹. In *casu*, the phrasing in the arbitration clause “any claim or dispute relating to the interpretation or execution of this Agreement”, must be deemed broad enough to include all issues that touch matters within the main agreement, such as tenure of employment (clause 3), termination of contract (clause 14) and “all policies, procedures, directives and Public Service Act” (clause 16.4). Secondly, the expression “any claim or dispute relating to the interpretation or execution of this agreement” is in my assessment broad enough to cover disputes regarding contract termination.² And, “in relation to the construction of the agreement” was deemed wide enough to provide for the arbitrator to rectify the agreement.³

[6] Furthermore in *casu*, as the arbitration clause under scrutiny seeks to enable statutory arbitration in terms of the Public Service Act, it must be construed according to the principle of *in favoram validatis*. According to this principle, doubts about the intended scope of an arbitration clause are to be resolved with a view to preserve its validity. In this instance, to uphold the intention of the legislature to have public service disputes decided initially by alternative dispute resolution and not by the courts. It is reasonable to presume that the legislature wanted to create a one-stop system whereby all the parties’ claims were to be dealt with through ADR followed by adjudication. This court should be very slow to attribute to the legislature an

¹ Louis Dreyfus Negoce SA v Blystad Shipping & Trading Inc, U.S. 2nd Circuit Court of Appeals 06/07/01 00-7382, CLOUT case 710

² Ace Capital Re Overseas Ltd v Central United Life Ins Co; Hartford Accident & Indemnity Co v Swiss Reinsurance America Corp

³ Onex Corp v Ball Corp Canada

intention that there should in any foreseeable eventuality be two sets of proceedings (court and ADR).⁴

Dedicated Dispute Resolution Scheme for Public Officers

[7] With regard to Respondents' second point *in limine*, the legislature seems to have created a specialist scheme for dealing with public service labour disputes, in which one of the parties is a public officer. The settlement of such disputes is regulated by Part III of the Public Service Act No.1 of 2005⁵ ("the PSA"), read together with the Public Service Regulations 2008 ("the Regulations") and the Codes of Good Practice for Public Officers 2008 ("the CGP"). The key provisions of these statutes set up the following scheme for settlement of disputes concerning public officers:

7.1 A public officer is defined in section 4 of the PSA as having the same meaning assigned to it in the Constitution of Lesotho. And according to section 154 (1) of the Constitution, 'public officer' means a person holding or acting in any office of emolument in the service of the King in respect of the government of Lesotho.⁶

Grievances:

7.2 A public officer who has a workplace grievance⁷ may raise it informally with his/her immediate supervisor. If the grievance is not resolved satisfactorily the public officer may formally refer it to the

⁴ Ashville Investments Ltd v Elmer Construction Ltd; Harbour Assurance Co (United Kingdom) Ltd v Kansa General International Insurance; Capital Trust Investment Ltd v Radio Design AB and Others

⁵ as amended by the Public Service (Amendment) Act No. 3 of 2007

⁶ as qualified by sections 154(3) and (4)

⁷ i.e. "a feeling of dissatisfaction or injustice which a public officer encounters in the work place and is formally brought to the attention of the employer" [Section 4 of the PSA]

head of section or department. If still dissatisfied with the decision reached at the hearing the aggrieved officer has the right to appeal to the Head of Department. If the officer is not satisfied with the decision of the appeal hearing he/she may escalate the matter to the Conciliation Board or arbitration, depending on the nature of the dispute. Disputes of interest are conciliated by a Conciliation Board, whereas disputes of right may be resolved by arbitration.⁸

7.3 The decision of the Conciliation Board is not binding on the parties.⁹ A dispute may only be arbitrated where the parties have voluntarily agreed to refer their dispute to arbitration or where the dispute involves essential services and the parties have not agreed not to resort to arbitration.¹⁰ The decision of the arbitration shall be final and binding on the parties.¹¹

7.4 Where either party is not satisfied with a decision of the Conciliation Board, it may appeal to the Public Service Tribunal.¹² And a party who is dissatisfied with a decision of the Tribunal may appeal to the Labour Court.¹³

Disciplinary Action:

⁸ Section 15(1) (a) (ii) of the PSA read with Part II, Division 2 of the CGP. A dispute of right means a dispute arising from a breach or contravention of law, contract of employment or collective agreement [section 4 of the PSA]

⁹ Section 17(4) of the PSA

¹⁰ Section 18(1) - (3) of the PSA

¹¹ Section 18(4) of the PSA

¹² Section 20(2) of the PSA

¹³ Section 20(11) of the PSA

- 7.5 In terms of Part I, item 5 of the CGP, “a public officer who fails to comply with a standard of conduct in [the Code of Conduct] shall be subjected to disciplinary action¹⁴ in accordance with the provisions of the Disciplinary Code [set out] in Part II.”
- 7.6 Where an officer commits a misconduct of a minor nature or for the first time, his/her immediate supervisor may give him/her a verbal warning.¹⁵ If the supervisor considers a misconduct to be of a serious nature or a repeated misconduct, the officer shall be issued with a written warning.¹⁶ If a public officer commits a misconduct after being issued with a written warning, or commits a misconduct that warrants a disciplinary inquiry, the officer shall be subjected to a disciplinary inquiry. If found guilty he/she shall be given a sanction which is considered reasonable in the circumstances including dismissal.¹⁷ If the officer is dissatisfied with the decision, he/she may appeal to the Head of Department¹⁸. If the officer is not satisfied with the decision of the appeal hearing, he/she may declare a dispute and refer the matter to the conciliation Board. If it is a dispute of interest.¹⁹ The Conciliation Board shall after hearing the dispute, issue a certificate as to whether the matter has been resolved or not. If it remains unresolved, a party shall refer the matter for arbitration or to the Public Service Tribunal for a determination.²⁰ The decision of

¹⁴ i.e. “a formal or informal action taken by management against a public officer who fails to conform with the rules and regulations governing public officers or has committed any other misconduct.”

¹⁵ Part III, Division 2, Item 6 of the CGP

¹⁶ Part III, Division 2, Item 7 of the CGP

¹⁷ Part III, Division 2, Item 8 of the CGP

¹⁸ Part III, Division 2, Item 9(1) – (5)

¹⁹ Ibid, Item 9(6) & (7) r/w Part V of CGP, Item 2 & 3(1) A dispute of interest means “a dispute over employment matters to which a public officer or employer does not have an established right”.

²⁰ Part V of CGP, Item 3(1) (e)

the arbitration shall be final and binding,²¹ whereas a party who is dissatisfied with a decision of the Tribunal may appeal to the Labour Court.²²

7.7 Even though the arbitration decision is said to be final and binding, it could still be reviewed by the High Court in terms of section 119(1) of the Constitution. And appeal decisions of the Labour Court are in terms of section 38A(1)(a) and (b)(i) of the Labour Code Act still amenable to further appeal or review by the Labour Appeal Court. Therefore, in appropriate circumstances, they may be taken on appeal to the Court of Appeal.

[8] Our Court of Appeal has, in the recently decided instructive case of **PS Ministry of Labour and Employment & Others v Nthoateng Russel**²³, had occasion to evaluate and pronounce on the above public officers' dispute resolution regime. It came to the conclusion that "if an employee in the public service is dissatisfied with the outcome of a disciplinary process or entertain a grievance, he or she must appeal to the Tribunal. A party wishing to challenge the funding of the Tribunal must approach the Labour Court. Under the Public Service Act 2005 (as amended the legislature has not granted the High Court jurisdiction over such a dispute."²⁴ [Emphasis added]. The court was of the view that where such a dispute is brought directly to the High Court, it ought to *mero motu* decline jurisdiction²⁵. The court also endorsed the approach adopted in **Director of Public**

²¹ Section 18(4) of the PSA

²² Section 20(11) of the PSA

²³ C of A (CIV) 27/2021

²⁴ at para [23]

²⁵ At para [28]

Prosecutions v Ramoepana,²⁶ that ‘a lack of jurisdiction is terminative of proceedings before any court or brings them to amend entirely.’

[9] In *casu*, the applicants are *inter alia*, seeking the following substantive reliefs:

- that the decision of the 3rd Respondent purporting to terminate the Applicants’ contracts of employment be reviewed...[Prayer 2.7]
- that the Applicants’ contracts of employment be declared to have in law been [tacitly] renewed in July/August 2021 for a further period of three years on the same terms and conditions, by their Employers having continued to suffer the Applicants to continue to perform their normal functions and responsibilities of their posts, beyond the contracts’ respective termination dates [Prayer 2.8.]
- That 3rd Respondents termination of Applicants’ contracts of employment be declared unlawful [Prayer 2.9]

[10] In my view all these claims are workplace grievances as contemplated by the PSA, which the Applicants ought to have processed through the public officers’ dispute resolution mechanisms set out above. This is precisely what our apex court prescribed in **PS Ministry of Labour v Russell**. The

²⁶ [2021] LSCA 25 (14 May 2021)

court has deprecated the type of forum shopping the Applicants are wanting us to allow, in judgments such as **Mokotjo v Kennedy & Others [2021] LSCA** (14 May 2021); **Home Affairs Ex Employees & Others v PS Ministry of Home Affairs & Others [2021]LSCA** (14 May 2021); **Hoohlo v Lesotho Electricity Company (Pty) Ltd [2020] LSCA** (30 October 2020); **Lesotho Revenue Authority v Dichaba & Others [2019] LSCA** (1 February 2019).

[11] Notwithstanding the appellants’ careful framing of their case in administrative law, it is a quintessential labour-related issue over which the *fora* created by the PSA for the settlement of disputes have exclusive jurisdiction. To hold otherwise would undermine the public officers’ dispute resolution regime and encourage undesirable forum shopping and the development of a dual system of law.²⁷

[12] For these reasons I, on 15 September 2021 handed down the following order:

- “1. The matter is dismissed for want of jurisdiction.
- 2. Each party to bear its own costs.”

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KEKETSO L. MOAHLOLI
JUDGE

Representation:

²⁷ Chirwa v Transnet Ltd 2008(4) SA 367(CC) at para 65. Cf with Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC) at para 69

Adv S.T. Maqaqachane for the Applicants
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