

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/0120/2022

In the matter between:

LESOTHO COMMUNICATIONS AUTHORITY

APPLICANT

And

MAMARAME MATELA

1ST RESPONDENT

OFFICER COMMANDING MASERU CENTRAL

2ND RESPONDENT

CHARGE OFFICE

COMMISSIONER OF POLICE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGEMENT

Neutral citation: Lesotho Communications Authority v ‘Mamarama Matela & 3 Ors (No.2) LSHC 167 CIV (15 August 2022).

CORAM: T.J. MOKOKO

HEARD: 12 JULY 2022

DELIVERED: 15 AUGUST 2022

SUMMARY

Whether claim for spoliation, arising out of employment relationship, amounts to labour dispute – Section 226(2)(b)(i) of Labour (Amendment) Act – Whether permissible for a party to argue un-pleaded point.

ANNOTATIONS

Cases

1. *Attorney General and Others v Tekateka and Others* 2000 – 2004 LAC 418 at 424.
2. *Frasers Lesotho Ltd v Hata-Butle (Pty)Ltd* 1995 – 1999 Lac 689
3. *Imprefed (Proprietary) Ltd v National Transport Commission* 1993(3) S.A. 94 (A)
4. *Jones v MBNA International Bank Ltd* [2000] EWCA CIV 314
5. *Kalma and Others v African Minerals Ltd and Others* [2020] EWCA CIV 144
6. *Kali v Incorporated General Insurance Ltd* 1976 S.A. 179 (D)
7. *Liboti v Liboti C of A* (CIV) 66/19 [2020] LSCA 1 [29 May 2020]
8. *National Olympic Committee and Others v Morolong* 2000 – 2004 LAC 449
9. *Sekhonyana and Another v Standard Bank of Lesotho Ltd* 2000 – 2004 LAC 197
10. *Theko and Others v Morojele and Others* 2000 - 2004 LAC 302

Statues

1. *Labour Code (Amendment) Act, 2000*
2. *High Court Act*

Books

1. *Principle of Pleading and Practice in Civil Actions in the High Court of Justice”* (22nd edition 113)

Introduction

[1] On or around the 8th April 2022, applicant herein approached this Court on urgent basis. A *rule nisi* was issued calling the respondents to show cause if any; why

- a) The deputy sheriff shall not be authorised and directed to attach, remove and place the following items in the possession and custody of the applicant, pending finalisation of this application.
 - i. A vehicle bearing registration letters and numbers A 798 BBN, being a Range Rover Sport Utility.
 - ii. An iPhone 12.
 - iii. A Dell Inspiron laptop with spare laptop adopter.
 - iv. 12-inch iPad Pro.
 - v. Philips recording device/audio recorder.
 - vi. LCA Uniform.
 - vii. LCA office keys.
 - viii. LCA Credit Card.
 - ix. LCA Identification Card.
 - x. Board minutes and resolutions and other documents of confidentiality nature.

Background

[2] On the 12th April 2022, the deputy sheriff proceeded to the residence of the 1st respondent to remove items appearing in the notice of motion. The 1st respondent released the following items to the deputy sheriff; LCA Uniform, LCA Identification Card, iPhone 12 and the vehicle bearing registration number A 798 BBN. While the following items were not released to the deputy sheriff; Dell laptop, LCA office keys, LCA Credit Card, Philips recording device, 12-inch iPad, as the respondent claimed that these items were not in her possession.

[3] The 1st respondent in opposition of this matter has raised the following points in *limine*;

- b) Lack of Jurisdiction.
- c) Material dispute of Fact.
- d) Lack of urgency.

However, on the hearing of the matter, Counsel for the 1st respondent argued the point of lack of jurisdiction only.

[4] The 1st respondent pleaded that¹ this Court does not have jurisdiction to hear this matter, because the subject matter of this application is a *litany* of property where the rights and objections of each party arise out of an employment contract. That this is a labour dispute. As per **section 226(2)(b)(ii) of the Labour Code (Amendment) Act, 2000**, a dispute of right shall be resolved by arbitration where it involves a breach of contract of employment. Resultantly, the High Court has no jurisdiction as this matter ought to have been referred to the Directorate of Dispute Prevention and Resolution (DDPR). That applicant wants this Court to enforce its rights which arise as a result of a contract of employment, yet applicant has not counter performed, and is thus breach of contract.

[5] In its replying affidavit, applicant replied that, the fact that the 1st respondent is the former employee does not deprive this Court of its jurisdiction. That fact by itself does not make this matter a labour dispute as suggested by the 1st respondent.

[6] Applicant pleaded that the provisions of **section 226(2)(b)(ii)** are invoked whenever a dispute of right, i.e. a dispute concerning the rights and objections

¹ Paragraph 5.1 of the Opposing Affidavit

of an employer and an employee in relation to an employment contract, collective agreement or under Labour Code are implicated.

[7] Applicant pleaded further that the provisions of **section 226(2)(b)(ii)** apply in certain defined circumstances as fully outlined therein. That arbitration is invoked when a dispute has been referred by agreement by the parties. That arbitration is invoked if dispute between the parties concerns the application or interpretation of a collective agreement, a breach of a contract of employment or a wages order contemplated under the provisions of **section 51 of the Labour Code**.

[8] That this matter involves a dispute between the applicant and the 1st respondent, in circumstances where the 1st respondent was not entitled to retain possession of its property. It is a matter that is not covered by the provisions of the Labour Code. That in terms of **section 6 of the High Court Act**, the Court in terms of **section 119 of the Constitution** has unlimited jurisdiction to deal with any matter within the area of its jurisdiction.

[9] Before dealing with the issue for determination, it is apposite to mention that, during oral arguments Counsel for the 1st respondent pleaded for the first time, that this Court does not have jurisdiction, because the provisions of **section 24(2) (a) of the Amendment Act, read with section 25**, exclude such jurisdiction, and places it exclusively on the Labour Court. The 1st respondent submitted that the nature of the dispute between the parties is labour related. It was submitted further that **section 228(1) of the (Amendment) Act** is applicable in that during the arbitration the parties are free to approach the Labour Court for review.

Issue for Determination – Lack of Jurisdiction

[10] The issue for determination is whether this Court has no jurisdiction to hear this matter. The 1st respondent pleaded that this Court does not have jurisdiction to hear this matter, as it is a labour dispute. That in terms of **section 226(2)(b) (ii) of the Labour Code (Amendment) Act, 2000**, a dispute of right shall be resolved by arbitration, where it involves a breach of a contract of employment. Resultantly, the High Court has no jurisdiction as this matter ought to have been referred to the Directorate of Dispute Prevention and Resolution (DDPR).

[11] **Section 226(2) (b) (ii) of the Labour Code (Amendment) Act 2000**, provides for disputes of rights. **Section 226(2)(b)(ii) of the Amendment Act**, provides that:

“The following disputes of right shall be resolved by arbitration –

(a)...

(b) a dispute concerning the application or interpretation of -

(i)...

(ii) a breach of a contract of employment.

[12] There is no doubt in my mind that section **226 (2) (b) (ii) of the Labour Code (Amendment) Act 2000**, simply provides that all disputes of rights concerning the application or interpretation of a breach of contract of employment shall be resolved by arbitration.

[13] In order to answer the question as to whether the point of lack of jurisdiction is properly taken, this Court has to ascertain first the relief that applicant is seeking before this Court.

[14] It is a matter of common cause that the 1st respondent is the former Chief Executive Officer of the applicant. She was appointed on the 1st April 2019, for

a period of three (3) years. Her employment contract was terminated by operation of law on the 31st March 2022. On the 29th March 2022, applicant wrote to the 1st respondent, reminding her that upon expiration of her employment with applicant, the first respondent must return all the property by the 31st March 2022. There was a lot of correspondence between applicant and the 1st respondent on this subject and at the end of the day, the 1st respondent did not return the items claimed by the applicant.

[15] As a result of failure on the part of the 1st respondent to return the demanded items, applicant then approached this Court on urgent basis, praying that the deputy sheriff should be directed to attach, remove and place the items listed in the notice of motion, in the possession and custody of the applicant, and that it be declared that the 1st respondent is not entitled to possess the items set out in the notice of motion.

[16] It appears from the relief sought by the applicant, that all that applicant wanted was to be restored in the possession of all the items that had been placed in the possession of the 1st respondent, during the existence of the employment contract between the parties. Now that her employment contract had expired and the 1st respondent had failed to return those items to applicant, then applicant sought to be restored in the possession of all the items tabulated in the notice of motion. This is clearly a matter of *mandament van spolie*, and nothing else.

[17] Be that as it may, the 1st respondent contents that, this Court does not have jurisdiction on the ground that it has been ousted by the provisions of **section 226(2) (b) (ii) of the Labour Code (Amendment) Act, 2000**, therefore the matter ought to have been referred to the DDPR. It is the 1st respondent's submission that applicant wants to enforce its rights which arise from the

contract of employment. On the other hand, it is the applicant's case that the 1st respondent was not entitled to be in possession of the items tabulated in the notice of motion, upon expiry of the employment contract. Applicant submitted further that, it does not seek to enforce a contract of employment or any right that might rise there from, in as much as the contract was dead.

The Law

[18] In the case of *Director of Public Prosecution v Ramoepana*,² *Dr. K.E. Mosito P.* had this to say³:

“[42] Jurisdiction is fundamental to all proceedings in a court of law. The choice of a proper Court in which to proceed is an important element of jurisdiction as it requires the litigant to determine the Court within whose competency the matter lies. If a matter is wrongly brought before Court, that Court will, upon objection or *mero motu*, decline jurisdiction. And by jurisdiction in this context, we mean the power to hear and determine an issue brought before it”.

[19] The Court of Appeal in the same case stated as thus⁴:

“[43] It is trite that the power and competence of any Court is not unlimited. There will always be same limitations on the jurisdiction of every Court imposed either by statute or by the common law. In every case therefore the Court before which an objection to jurisdiction has been raised has an unshakeably duty to determine that objection first and pronounce itself on the limitations to jurisdiction upon which the objection is based. If a Court has no jurisdiction to hear and determine a matter, that Court simply cannot make any order in the matter other than

² C of A (CIV) 49/2020 {2021} LSCA 25 (14 May 2022)

³ Page 39

⁴ Page 40

an order declining jurisdiction and an order as to costs, may be appropriate”.

[20] It is the 1st respondent’s submission that this Court does not have jurisdiction, as it is ousted by the provisions of ***section 226(2)(b)(ii) of the Labour Code (Amendment) Act, 2000***. She contends that there is dispute of right between the parties, therefore the matter ought to be resolved by arbitration.

[21] Be that as it may, the application is simply that the 1st respondent was not entitled to be in possession of the items listed in the notice of motion, following the termination of the employment relationship between the parties. This Court finds that the applicant does not seek to enforce any right concerning the application or interpretation of a breach of contract of employment.

[22] This Court holds a considered view that the applicant herein instituted these proceedings, alleging that as the owner of the claimed assets that the 1st respondent was allowed to possess by virtue of the employment relationship, was entitled to demand to be restored into their possession, upon the termination of that employment relationship.

[23] It is on the basis of the above finding that this Court concludes that the point of lack of jurisdiction is misplaced and improperly taken, because the applicant’s claim is not a dispute concerning the application or interpretation of a breach of a contract of employment, in as much as the contract between the parties had expired on the 31st March 2022. This court finds that the claim in this matter is simply about placing the applicant into the possession of the items claimed in the notice of motion. It is for this reasons that the first respondent’s

point of lack of jurisdiction is found to be misconceived and improperly taken, therefore is dismissed.

Arguing Un-pleaded Point

[24] During the hearing of this matter, Counsel for the 1st respondent argued an unpleaded point that this Court does not have jurisdiction because the provisions of *section 24(2)(a) of Amendment Act, read with section 25 of the (Amendment) Act 2000*, excludes such jurisdiction and places it exclusively on the Labour Court, as the dispute between the parties is labour related. It was submitted further that *section 228 (1) of the Amendment Act*, is applicable in that during arbitration, the parties can approach the Labour Court for review.

[25] The other issue for determination by this Court is whether it is permissible for the 1st respondent to argue a point of law or the defence that she has not pleaded, namely arguing lack of jurisdiction in terms of section 24 and 25 of the Labour Code (Amendment) Act, which was not properly pleaded.

[26] The position of the law, where a party argues an unpleaded point was enunciated by the Court of Appeal, in the case of *Liboti v Liboti*⁵, where **Dr. K.E. Mosito P** had the following to say:

“[14] This Court has more than once, deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation. *Frasers Lesotho Ltd v Hata-Butle (Pty)Ltd*⁶. *Sekhonyana and Another v Standard Bank of Lesotho Ltd*⁷. *Theko and Others v Morojele and*

⁵ C of A (CIV) 66/19 [2020] LSCA 1 [29 May 2020] at page 5

⁶ 1995 – 1999 Lac 689

⁷ 2000 – 2004 LAC 197

*Others*⁸. *Attorney General and Others v Tekateka and Others*⁹.
*National Olympic Committee and Others v Morolong*¹⁰”.

[27] In *Kalma and Others v African Minerals Ltd and Others*¹¹, the Court of Appeal dismissed an appeal brought by unsuccessful claimants. In the judgement it was observed that the claimants were attempting to run a case that was never pleaded.

[28] In case of *Jones v MBNA International Bank Ltd*¹² (“Jones”) at [52] **May L J** had this to say;

“Civil trials are conducted on the basis that the Court decides factual and legal issues which the parties bring before the Court. Normally each party should bring before the Court the whole relevant case that he wishes to confine his claim or define to some only of the theoretical ways in which the case might be put. If he does so, the Court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge’s decision on the basis that a claim, which could have been brought before the trial judge, but was not, would not have succeeded, if it had been so brought. The justice of this as a general principle is, in my view obvious. It is not merely a matter of efficiency, expediency, and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the Court requires to know what the issues are. Upon this, depends a variety of

⁸ 2000 - 2004 LAC 302

⁹ 2000 - 2004 LAC 418 at 424

¹⁰ 2000 - 2004 LAC 449

¹¹ [2020] EWCA CIV 144

¹² [2000] EWCA CIV 314

decisions, including, by the parties, what evidence to call, how much effort and money, it is appropriate to invest the case, and generally how to conduct the case, and by the Court, what case management and administrative decision and directions to make and give, and the substantive decision in the case itself..”.

[29] In the case of *National Executive Committee of the Lesotho National Olympic Committee and Others v Morolong*¹³, Ramodibeli JA as he then was at page 12, had this to say;

“This Court has stressed more than once that it is wrong to direct the attention of the other party to one issue and then attempt to canvass another, as the respondent was allowed to do here, “see” for example, *Frasers Lesotho Limited v Hata-Butle (Pty)Ltd*¹⁴.

[30] In *Kali v Incorporated General Insurance Ltd*¹⁵: Milne J had this to say:

“...a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial, attempt to canvass another”.

[31] The Supreme Court of South Africa in the case of *Imprefed (Proprietary) Ltd v National Transport Commission*¹⁶, stated that the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.

[32] This fundamental principle is similarly stressed in the “*Principle of Pleading and Practice in Civil Actions in the High Court of Justice*¹⁷”;

¹³ C of A (CIV) No.26 of 2001 (NULL) [2002] LSHC 10 (12 April 2002)

¹⁴ 1999 - 2000 LLRELB 65 (LAC) at 68

¹⁵ 1976 S.A. 179 (D) at 182 A

¹⁶ 1993(3) S.A. 94 (A) at 107 - 108

¹⁷ 22nd edition 113

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision”.

[33] When coming to the facts of this case, it is a matter of common cause that the point of lack of jurisdiction pleaded by the 1st respondent, was founded on the provisions of **section 226 (b) (ii) of the Labour Code (Amendment) Act, 2000**, and nothing else. The result of this was that applicant replied to the point of lack of jurisdiction, in its replying affidavit.

[34] The issue that this Court has to determine is whether the 1st respondent can be allowed to raise a point that she has not pleaded. The principles enunciated in the cases referred to above, clearly show that the 1st respondent cannot be allowed to do so, simply because her conduct is tantamount to ambushing the other party, as well as the Court.

[35] It is a matter of common cause further, that the applicant came to Court to argue the point that was raised by the 1st respondent, in her pleadings. At the same time the Court is called upon to decide on the point that was raised by the 1st respondent. It is a requirement of substantial justice that parties to litigation are entitled to know where they stand. This Court holds a strong view that, the Court is also required to know what the issues are. And the pleadings will definitely disclose what the issues are.

[36] This Court must state that, the 1st respondent’s pleadings directed the attention of the applicant to the point raised in terms of **section 226(b)(ii) of the Amendment Act, 2000**. However, during the hearing of the matter, applicant’s attention was then, by surprise directed to the attention of **section 24 and 25 of the Amendment Act, 2000**. This Court therefore holds a strong view that the

1st respondent should not be permitted to do so, as that does not do substantial justice to the applicant.

[37] It is on the basis of these reasons that the 1st respondent point on lack of jurisdiction on the basis of **section 24(2) (a) and 25 of the Labour Code (Amendment) Act, 2000**, was improperly argued, as it was not pleaded, therefore is dismissed.

Order

The Court makes the following order;

1. The point in *limine* on the lack of jurisdiction is dismissed with costs.

T.J. MOKOKO
JUDGE

FOR THE APPLICANTS:	MR. LETSIKA
FOR THE 1ST RESPONDENT:	ADV. KHESUOE
FOR THE 2ND – 4TH RESPONDENTS:	UNREPRESENTED