

IN THE HIGH COURT OF LESOTHO

Held in Maseru

CIV/APN/66/2018

In the matter between:

LIETSISO MOTHALA AND 77 OTHERS

APPLICANTS

And

DIRECTOR GENERAL OF THE

NATIONAL SECURITY SERVICES

1ST RESPONDENT

MINISTER OF DEFENCE

2ND RESPONDENT

PUBLIC SERVICE COMMISSION

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

Neutral Citation: Mothala & Others vs Director General of the National Security Services & Others [2022] LSHC181 Civ (12 August, 2022)

Coram : His Honour Justice Keketso L. Moahloli

Dates heard : 7 November 2020; 18, 22 & 25 March 2021

Date delivered : 12 August 2022

SUMMARY

ANNOTATIONS

Cases

Attorney-General and Others v Kao, LAC (2000-2004) 656

Home Affairs Ex-workers and Others v Principal Secretary Ministry of Home Affairs and Others, C of A (CIV) No.8/2021 (14 May 2021)

Hoohlo v Lesotho Electricity Company (Pty) Ltd, C of A (CIV) No. 9/2020 (30 October 2020)

Kompi and Others v Government of the Kingdom of Lesotho, C of A (CIV) No.35/2021 (13 May 2022)

Lesotho Revenue Authority and Others v Dichaba and Others, C of A (CIV) No. 21/2018 (1 February 2019)

Mokotjo v Kennedy and Others, C of A (CIV) No. 19/2020 (14 May 2021)

Principal Secretary Higher Education and Others v Metsing, C of A (CIV) No.13/2021 (13 May 2022)

Principal Secretary Ministry of Labour and Employment and Others v Russell, C of A (CIV) No.27/2021 (12 November 2021)

Statutes

Labour Code Act 1992

Public Service Act 2005

- [1] The applicants are erstwhile members of the National Security Service (NSS). They were appointed as Intelligence Officer Four (I.O.4) in December 2016. They were discharged from service per letters from the Director General NSS (the DG), with effect from 1 January 2018 for some, and 1 February 2018 for others.
- [2] Applicants subsequently approached this Court on motion seeking: the review and setting aside of the decision to terminate their appointments; a declarator that such termination was null and void; their reinstatement in their former positions in the NSS; an order directing the NSS to pay them arrear salaries from the purported date of termination to their date of reinstatement; and costs of the application.
- [3] The application was initially heard and decided in the applicants' favour on 21 May 2019. The NSS applied to the Court of Appeal which on 1 November 2020 allowed the appeal; set aside the orders of the court *a quo*; and remitted the matter for re-hearing before a different judge.
- [4] At the hearing *de novo*, before me, the matter was argued to conclusion on the merits. And judgment was reserved. I have very serious reservations about whether or not this Court is the right forum to deal with a dispute relating to the dismissal of this particular class of employees. This because it is trite law that if a labour matter is referred to and determined by an incorrect forum such determination or outcome is a nullity. In other words, before delving into the merits, I consider it imperative to decide whether this court is entitled to assume jurisdiction in respect of a labour matter between the NSS and its erstwhile members or

whether the dispute falls within the exclusive jurisdiction of the Labour Courts and/or Labour Tribunals. This because it is trite law that the power of the High Court may be limited by legislation which assigns certain types of matters to other courts.

[5] In terms of section 24(1), read together with section 226(1)(c)(i) of the Labour Code Act 1992, the Labour Court has exclusive jurisdiction to adjudicate unfair dismissal disputes if the reason for the dismissal is related to the operational requirements of the employer. And the Directorate of Dispute Prevention and Resolution (DDPR) has jurisdiction to resolve by arbitration all disputes concerning unfair dismissal for any reason other than a reason referred to in section 226(1)(c) of the Labour Code. This means that the High Court does not have concurrent jurisdiction to handle matters which have been expressly and specifically designated for determination by the Labour Courts or the DDPR.

[6] It could be argued that the above provisions of the Code for the resolution of unfair dismissal disputes are not available to members of the NSS by virtue of their being public officers, who in terms of section 2(2) (b) of the Code are excluded from its scope of application except in relation to appeals and reviews to the Labour Court. In my view this argument is unsustainable because from a close reading of the NSS Act it does not seem that such members are public officers. Only the office of the Director General in terms of section 6 of that Act is classified as an office in the public service. There is no similar provision in respect of members of the NSS. So members of the NSS do fall within the scope of application of the Labour Code and are subject to its dispute resolution regime.

[7] Similarly it cannot be claimed that members of the NSS are excluded from the scope of application of the Labour Code in a similar manner as members of the Lesotho Defence Force and Lesotho Mounted Police Service are, as they are not members of “any other disciplined force” as envisaged in section 2(2) of the Code. They are ordinary employees who are covered by the Labour Code.

[8] There is a plethora of judgments of our apex court in which it was decided unequivocally that the High Court lacks jurisdiction in all labour matters provided for under the Labour Code [see for example; *Mokotjo v Kennedy and Others*; *Vice Chancellor of the National University of Lesotho and Another v Lana*; *Hoohlo v Lesotho Electricity Company*; *CGM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others*] or under other legislation such as the *Public Service Act 2005* [see for example: *PS Ministry of Labour and Employment and Others v Russell*; *Kompi and Others v Government of the Kingdom of Lesotho*; *Principal Secretary Higher Education and Other v Metsing*].

[9] Furthermore, the apex court has unequivocally held that failure by a litigant to raise the defence of lack of jurisdiction of the court concerned does not have the effect of conferring such jurisdiction where none exists. And the question of lack of jurisdiction may even be raised by the court *mero motu*. [*Attorney General and Others v Kao at para 12-18*].

[10] For the above reasons this application falls to be dismissed on account of lack of jurisdiction.

KEKESO L. MOAHLOLI

JUDGE

Appearances:

For Applicants : Advocate M.E. Teele KC

For Respondents : Attorney M.S. Rasekoi