

IN THE LABOUR COURT OF APPEAL

HELD AT MASERU

In the matter between:-

BOKANG VINCENT LELIMO

APPELLANT

And

**PRESIDENT OF LABOUR COURT
TEACHING SERVICE COMMISSION
SEMONKONG HIGH SCHOOL
TEACHING SERVICE DEPARTMENT
PRINCIPAL SECRETARY
MINISTRY OF EDUCATION
ATTORNEY GENERAL**

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT

JUDGMENT

CORAM : THE HON. MR JUSTICE S.N. PEETE

PANELLISTS: Mr. Twala and Mrs. Thakalekoala

DATE : 10TH NOVEMBER, 2006

1. This is an appeal against the decision of the President of the Labour Court declining to enforce the award by the Directorate of Dispute Prevention and Resolution in Referral A0941/03 upon the

main reason that the applicant was a public officer and thus fell under the ambit of Legal Notice 22 of 1995.

2. In his letter dated 16th April 2004 the President of the Labour Court addressed himself thus to the applicant:-

“16th April 2004

REF.: LC/ENF/115/04

*Mr Bokang Lelimo
P.O. Box 8970
MASERU
100*

Dear Sir,

RE: YOURSELF V. TSC & TSD: LC/ENF/115/04

We refer to your application for enforcement of a DDPR award in terms of Section 34 of the Labour Code Order 1992. We regret to advise you that the said award is not enforceable by this court in its present form for the following reasons:

- 1. The Attorney General as the representative of all government departments in legal proceedings in terms of Government Proceeding and Contracts Act 1965 is not a party to the referral. Accordingly the award against the respondents who are governmental institutions is irregular and of no effect.*
- 2. In terms of Section 225 (5) an award issued by an arbitrator is enforceable as if it was an award of the Labour Court. It follows that for purposes of enforcement DDPR awards became Labour Court awards. They cannot therefore contradict Labour Court decisions on a similar issue.*

3. *The decision of this court in the case of Alrika Maliehe v Mapholaneng Parish (LC55/97) was that teachers whose emoluments are paid out of public funds are in terms of the Constitution of Lesotho public officers. Legal Notice No.22 of 1995 made by the Minister of Labour under section 2 (b) of the Code as amended exempted public officers from the jurisdiction of the Labour Court and the Labour Appeal Court. There is no way in which this court can entertain cases of enforcement involving public officers as long as they remain exempt by Government decree from its jurisdiction.*
4. *To the extent that the DDPR came to a finding that contradicts the decision of this court on whether teachers in the position such as yours are public officers or not, that decision is void and it will remain so until that of this court is varied if a higher court deems it fit to do so. Such an award cannot therefore be enforced by this court as to do so would be to contradict itself.*
5. *I entirely share the dilemma of members of the teaching service regarding the forum to redress their complaints. But this in my humble view is a matter that requires higher judicial intervention or an executive rescission of Legal Notice No.22 of 1995.*

Kindly treat these observations as constituting a review as of course and consequent variation and correction of the DDPR awards you seek to enforce.

Yours sincerely,

L.A. LETHOBANE
PRESIDENT OF THE LABOUR COURT”

3. The President's reasons dated 4/7/06 "declining to enforce DDPR Award A0941/03 had been couched thus:

**“REASONS FOR DECLINING TO ENFORCE
DDPR AWARD IN REFERRAL A0941/03**

1. On Tuesday 4th July 2006, I was served with the Order of the Labour Appeal Court dated 9th ultimo under Labour Appeal Court Application No.04/05. The order requested and directed the President of the Labour Court to:

“furnish his full reasons for declining to enforce the DDPR Award in referral No.A0941/03 in a form of final order or judgment in order that this court may properly be seized with the matter .”
2. Even though award No.0941 has been filed in file No.LC/ENF/115/04, the file itself is in respect of enforcement application for award No.A1505/03 dated 24th February 2004. In that referral the applicant had referred a case against the Teaching Service Commission and the Teaching Service Department.
3. The application for the enforcement of the order that applicant be paid M12,892.85 was duly made by the applicant on the 29th March 2004.
4. The court called on the respondents by letter dated 30th March 2004 to appear before the President/Deputy President on Monday 7th June 2004 to explain why they failed to comply with the award in referral case No.A1505/03.
5. On the 7th June a representative of the Attorney General Mr. Sekati and a representative of the Teaching Service Commission Mr. Xana appeared before Khabo D.P. This is what they are recorded on the court file to have given as reason for failure to comply:

“07/06/04

“Messrs Sekati (Law Office) and Xana before court per court’s summons in terms of section 34. They maintain as the Teaching Service Commission they are not able to abide by the award as they are not the paymasters, the latter being the Teaching Service Department. It therefore turns out that this award has enforcement problems.”

F. Khabo 07/06/04”

6. It has to be recorded that the award specifically ordered “the Teaching Service Commissionto pay applicant an amount of M12, 892.85 as payment for the unlawfully deducted amounts from his salaries as detailed above.”
7. It appears that the order of Khabo DP of the 7th June was in a way an endorsement of a letter that the President had written to the applicant on the 16th April 2004. The letter written even before the date that the respondents were called to appear and explain their default, because colleague of the applicant a Mr. Mokobocho, had already had a similar enforcement application thrown out for want of jurisdiction.
8. The letter specifically mentioned in the last paragraph that its contents constituted “a review as of course and consequent variation and correction of the DDPR awards you seek to enforce.”
9. Even though referral No.0941/03 never came up for enforcement separately it was duly filed in the enforcement file for referral No.A1505/03 on or around the 14th April 2004. This is evidenced by DDPR date stamp which shows that the applicant was issued with a certificate of service of the award in the referral No.A0941/03 on the 14th April 2003.

In the normal course the applicant would have filed the certificate together with the award being sought to be enforced on the same day or a few days thereafter.

The fact that I wrote the letter in which I pronounced a review of the awards as of course on the 16th April and the fact that I refer to “awards” and not an “award” in that letter in that is a further confirmation that I was aware of both awards and the decision to review and vary them as therein stated refers to both of them i.e. referral No. is A0941/03 and No.A1505/03.

10. If for some reason there is doubt whether the reasons contained in my letter of 16th April 2004 also apply to the award in referral No.0941/03, I can only say that I stand firmly by those reasons and would apply them with equal force to the reinstatement award. The award in that referral therefore stands reviewed as of course by this court in the same way as the award in referral No. A1505/03 for the reasons outlined in my letter of 16th April 2004.

I accordingly annex to these reasons the said letter that I wrote to applicant on the 16th April 2004 ostensibly in respect of referral No.A1505/03, which however, the concluding paragraph shows that the intention was that it should apply to referral No.A0941/03 as well.

THUS DONE AT MASERU THIS 4TH DAY OF JULY 2006

L.A. LETHOBANE
PRESIDENT”

4. The appellant’s grounds of appeal read as follows:

“BE PLEASED TO TAKE NOTICE that Appellant having noted appeal against the whole of the judgment and decision of the President of the Labour Court of Lesotho files his grounds of appeal as follows:-

1. *The President of the Court aquo erred in law and in fact, and misdirected itself in that the Labour Court aquo refused to enforce the award, judgment and decision of the Directorate of Dispute Prevention and Resolution (DDPR) of Lesotho despite being empowered and enjoined to do so;*

2. *The Court aquo erred in law and misdirected itself in deciding that the award was unenforceable on the grounds that the Attorney General was not cited even though the matter was not heard de novo before the Honourable Court and it was incumbent upon the 1st and 2nd Respondents to involve any party including the Attorney General in the enforcement (Paragraph 1 of the letter);*
3. *The Court aquo erred in law and misdirected itself in deciding that Appellant is a public servant and thus precluded in terms of Section 2 (b) of the Labour Code No.24 of 1992 as amended by Legal Notice No.22 of 1995 (Para 3 of the letter);*
4. *The Court aquo erred in law and misdirected itself in deciding that Legal Notice No.22 of 1995 is applicable to Appellant's contract of service when the said instrument was passed after the said contract was entered into between Appellant and 2nd Respondent, the Teaching Service Commission, and by extension the Government, prior to the amendment (Para 4 and 5 of the letter);*
5. *The Court aquo erred in law and misdirected itself in not deciding that Legal Notice No.22 of 1995 was unconstitutional and contrary to Section 137 (3) (f) of the Constitution of the Kingdom of Lesotho, and therefore null void ab initio to the extent that such amendment refers to teachers;*
6. *The Court aquo erred in law and misdirected itself into deciding that null and void ab initio and ultra vires the powers of the Minister in that the amendment purports and has the effect of amending Section 2(1) of the Labour Code No.24 of 1992;*
7. *The Court aquo erred in law and misdirected itself in not deciding that null and void ab initio and ultra vires the powers of the Minister in that the amendment purports to declare all public officers, as excluded from the*

provisions of the Labour Code No.24 of 1992 as amended;

8. *The Court aquo erred in law and misdirected itself in failing to inquire as to whether the exemption of the Minister couched in amendment No.22 of 1995 was applicable to Appellant, when such inquiry would have revealed that the exemption was incompatible with I.L.O Convention No.98, and therefore in contra to Section 2 (3) of the Labour Code, No.24 of 1992.”*

The Law

5. The Labour Court has ever since 1992 been vested with executive powers to enforce the awards of the court under the 1992 Labour Code. See section 34 which reads thus:-

“34. Where the Court has given judgment against a party to pay any sum under a contract of employment or under the provisions of the Code and the party fails to make any such payment within the time specified in such judgment, the President of the Court may, on the application of a party or a labour officer acting on behalf of any person to whom such sums are due, summon such party to appear before the President of the court to answer why payment has not been made.

If such party fails to satisfy the President of the Court that the failure to make payment was due to no fault on his or her part, the President of the Court may order the party’s detention in prison until the payments mentioned in the order are made or for a period of six months, whichever be the shorter period. The person entitled to enforce the judgment shall not be responsible for the expenses of such detention.”

6. Section 144 of the Constitution of Lesotho reads thus:-

“Teaching Service

144. (1) *There shall be a Teaching Service, the functions of which shall be as prescribed by an Act of Parliament.*

(2) *There shall be a Teaching Service Commission, the composition, powers, duties and procedure of which shall be prescribed by an Act of Parliament.”*

7. Indeed the Education Act No.10 of 1995 establishes the Lesotho Teaching Service (Part V of the Act) and the Teaching Service Commission (Part IX) whose functions are to appoint, promote, demote, discipline, transfer and remove from office teacher *“whose salaries are paid by the Government.”*
8. Under section 154 of the Constitution generic definitions *“public office”* and *“public officer”* and *“public service”* is given as follows:-

“public office” means any office of emolument in the public service;

“public officer” means a person holding or acting in any public office;

“public service” means subjects to the provision of this section the service of the King in respect of the Government of Lesotho.”

These are indeed broad and generic definitions that need to be contextualized purposefully; generously defined “*public officer*” may exclude even the judicial officers (*section 154 (3) of the Constitution*). Any limitation must necessarily be derived from an Act of Parliament governing the particular public institution.

9. Thus we see that the Education Act 1995 established a separate *cadre* of public officers e.g. Teaching Service who are recruited, controlled, disciplined by the Teaching Service Commission separately from the public officers under the Public Service Act No.13 of 1995.
10. Under the Education Act of 1995 the Minister of Education is the responsible Minister; under the Public Service Act it is the Minister responsible for the Public Service.
11. In the Education Act 1995 no reference at all is made to a “*public officer*” but only to a “*teacher*”.
12. It cannot be disputed that even though some teachers are paid out directly out of monies provided by Parliament, they are not to be treated as public officers under the Public Service Act. Their *cadre* and regime is separate. They also have a right to join a trade union of their own choice.

13. The Minister of Labour and Employment is a responsible Minister under the Labour Code.
14. Section 2 of the Code reads in full:-

“Scope of application

- (1) *The Code shall apply to any employment in the private sector and to any employment by or under the Government, or by or under any public authority, save as provided in subsection (2). Unless otherwise specified in the Code, it shall also apply to apprentices.*
- (2) *The Code shall not apply to:-*
- (a) *any person (other than a person employed in a civil capacity) who is a member of –*
- (i) *the Royal Lesotho Defence Force;*
- (ii) *the Royal Lesotho Mounted Police; or*
- (iii) *any other disciplined force within the meaning of Chapter II of the Lesotho Independence Order of 1966;*
- (b) ***such category or class of public officer, such public authority or employee thereof as the Minister may by order specify and to the extent herein specified.***
- (3) *No exemption shall be made by the Minister under subsection (2) (b) which is incompatible with any international labour Convention which has entered into force for the Kingdom of Lesotho.” (Our emphasis)*

15. The Minister of Labour can exempt “*certain categories or classes*” of public officer, public authority or employee “*as the Minister may by order specify and to the extent therein specified*”

This well drafted subsection of the Labour Code was in fact taking into consideration the broad and generic definition of the word “*public officer*” in the Constitution and other laws.

16. Thus the Labour Code (Exemption) Order 1995 (Legal Notice 9 of 1995) was soon repealed because it lacked clarity. It just read:-

“Labour Code Order, 1992 shall not apply to a public officer”.

17. A new Labour Code (Exemption) Order 1995 (Legal Notice 22 of 1995) reads:-

“Part III, Division D and Part V of the Labour Code Order 1992 shall not apply to a public officer”.

Yet still it makes no reference to a category or class of a public officer.

18. About three matters here need mention-

(1) Part III- Division D of the Code which deals with the jurisdiction of the Labour Court and Part V of the Code which

deals with contracts of employment, termination, dismissal etc, are not to apply to Public Officers.

- (2) The Legal Notice 22 fatally however omits to mention what category or class of public officer but only refers to the Parts of the Code that do not apply to a public officer.
 - (3) The Latin maxim *expressio unius est exclusio alterius* is often used when construing a doubtful enactment. Since teachers are not inclusively mentioned under the Legal Notice, how and why should they be included? (See **G. E. Devendish** – *Interpretation of Statutes (1992) page 85*)
19. “*Public Officer*” has no definition under the Labour Code Order 1992. Applicant does not fall under the Public Service Act 1995 at all, but under the Education Act 1995 which also has no definition of “*public officer*” nor does it categorise “*teachers*” as “*public officers*”.
 20. Resort for proper definition must then be had to the Constitution of Lesotho for guidance.
 21. For a helpful illustration, section 35 of the Public Service Act No.13 of 1995 categorically stipulates thus:-

“35. *The Labour Code 1992 shall not apply to public officers*”

and the Act gives meaning to a public officer “*the same meaning as in the Constitution*” (See section 4 of the Act)

The Education Act 1995, even though passed by the Lesotho Parliament during 1995 makes no such similar exclusion of the Code.

22. In our view it was incumbent upon the Minister of Labour in promulgating Legal Notice 22/95 to have specified category and class of public officers who are to be excluded from the application of the Labour Code 1992. What is the effect of this non-exclusion? Does it mean therefore section 4 of the Code applies to the teachers because they have not be excluded under the Legal Notice.
23. The rationale behind section 35 of the then Public Service Act 1995 was to exclude application of Part III – D and Part V of the Code because in the Public Service Act 1995 there are clear and ample provisions governing jurisdiction (*Public Service Commission*) contracts of employment, discipline, dismissal etc.
24. Similarly, the Education Act 1995 has provisions for appointments, discipline (including dismissal for misconduct). We see no good reason why a provision like section 35 of the Public Service Act 1995 was not inserted to exempt “*teacher*” from the application of Part III –D and Part V of the Labour Code 1992. The Labour Code,

in our view, law is of general application unless an exemption is made as to category and class of public officers.

25. It cannot thus be said that reference to “*public officer*” in Legal Notice No.22 of 1995 automatically includes “*teachers*” by mere fact that they are public officers whose emoluments are paid out of monies appropriated by Parliament.
26. It is recommended that Legal Notice No.22, be reviewed and amended so as to be more specific as to category and class of public officer exempted; indeed for clarity, a provision similar to the section 35 of the Public Service Act 1995 may be incorporated into the Education Act of 1995.
27. In conclusion, it must be observed that whilst the definition of “*public officer*” in the Constitution of Lesotho is general and generic, the Acts of Parliament must always use the words “*public service*” and “*public officer*” selectively. Much confusion or ambiguity can come about simply because under the Constitution of Lesotho Part IX, teaching service is also part of public service.
28. A similar paradox was faced in the recent constitutional case of **JOALE v The Right Honourable The Prime Minister Pakalitha Mosisili & 4 Others – Const/C/No.3 of 2005** at page 52 The main issue there being whether the words “*public officer*” under the Public Service Act 1999 included “*judicial officers*” in its application.

29. The issue whether Legal Notice No.22 of 1995 is *ultra vires* the enabling Act is neither here or there. The Legal Notice is clearly ambiguous and unspecific as it fails to list the category or class of public officer exempted. It cannot be assumed that “*teacher*” is included under “*public officer*” without much further ado.
30. In cases of ambiguity, the Labour Code Order 1992 dictates that resort shall be made to the Recommendation of the International Labour Organisation; we hold that Legal Notice is ambiguous in its meaning and effect.
31. **Mr. Kgoadi**, counsel of the appellant was correct in our view in submitting that Legal Notice No.22 does not possess a global application *moreso* because it was promulgated by the Minister of the Crown under section 2 (3) of the Labour Code 1992. What was his intention in promulgating the Legal Notice? Was “public officer” intended to apply across the board inclusive of all public (civil servants) including “teachers”? It is not clear at all.

A *lacuna* in the law is clearly apparent; necessary amendments therefore should be made in order that – if at all – teachers under the Education Act 1995 – should fall under the ambit of Legal Notice No.22 of 1995. Better still the Education Act 1995 must be amended to clearly exempt “*teachers*” the general application of the Labour Code 1992 as done in the Public Service Act 1995.

32. In the result therefore we come to the decision that a mention in the Legal Notice No.22 of “*public officer*” does not *per se* apply to “*teachers*”; and this will be so until appropriate amendments are made. Consequently, the Labour Court should enforce the award of the DDPR.
33. The Labour Court however has power to review the said award in the usual manner and come to a decision thereon. If it is confirmed, the respondents are at liberty to appeal to this Court for appropriate relief.

S.N. PEETE
JUDGE OF THE LABOUR APPEAL COURT

Panellist: _____ I agree

Panellist: _____ I agree

For Appellant : **Mr. Kgoadi**

For Respondents : **Mr. Lekalakala**