LAC/APN/11A/2002

IN THE LABOUR APPEAL COURT OF LESOTHO

Held at Maseru

In the matter between:

TSEBO MONYAKO APPLICANT

AND

LESOTHO TOURIST BOARD 1ST RESPONDENT

BOARD OF DIRECTORS 2ND RESPONDENT

THE LABOUR COURT PRESIDENT

(MR. LETHOBANE) 3RD RESPONDENT

CORAM: HON. MR. **ACTING JUSTICE** K. E. MOSITO

PANELISTS: MR. L. O MATELA
MR. R. L MOTHEPU

HEARD: 24 July 2006

DELIVERED: 28 July 2006

SUMMARY

Review Application – applicant not having complied with Rule 15 of Labour Appeal Court Rules- respondents having consequently not filed answering affidavit- effect thereon- Court exercising its discretion in terms of Rule 19 – parties ordered to file proper papers- matter postponed to a later date.

JUDGEMENT:

1. This is an application for an order in the following terms:

> "1. *Reviewing, correcting and / or setting aside the judgement in LC.100/2000 in the matter of TS'EPO RAPOU & 3 OTHERS vs. LESOTHO TOURIST BOARD & ONE, on grounds of impropriety, irregularity and / or illegality;*
>
> *2. Granting applicant order prayed for in the Originating Application.*
>
> *3. Granting applicant such further and / or alternative relief*."

2. This application arises out of a decision of the Labour Court in which TS'EPO RAPOU, TSEBO MONYAKO, 'MAMOTHAE MASHOLUNGU & MOKOENYA CHELE, first fourth applicant respectively, had instituted proceedings in the Labour Court in LC.100/2000, against the present first and second respondents.

3. In the Labour Court Application, the said three applicants prayed for an order in the following terms:

"*1. that the respondents be ordered to pay the salaries of the applicants together with yearly increments till they attain the retirement age of sixty (60 years).*

2. That the respondents be ordered to pay up the insurance premiums of the applicants in terms of the Personnel Regulations up to the applicants' retirement age of sixty (60) years.

***ALTERNATIVELY TO PRAYERS 1 AND 2 ABOVE**:*

That the severance pay be calculated up to the period of the applicants' retirement age of sixty (60) years.

3. That the provisions of Section 79(6) of the Code be made an Order of this [Labour Court] Court.

4. *That the first respondent be declared liable under section 69 (4) & (5) of Code.*

5. That the respondents be ordered to pay costs.

6. That the applicants be granted such further and / or alternative relief."

4. I must pause at this stage and observe that, I deliberately reproduced the prayers in both applications, as I felt that they do not appear to me to be a typical example of elegance in their drafting.

5. Be that as it may, it is appropriate to mention at this stage that, the Labour Court application was opposed by means of an Answer to the originating application. (More about this later) the said Answer is signed by one Van Zyl's incorporated, attorney of the respondents.

6. The Labour Court heard the said application on the 2nd and 3rd days of April, 2002. On the 24th day of April 2002, the said Court handed down its judgement in the matter, dismissing the application with costs.

7. On the 11th day of November 2002, the present applicant, TSEBO MONYAKO filed an application for review in terms as outlined in paragraph 1 of this judgement.

8. In paragraph 6 of his founding affidavit filed in support of his application for review, the applicant argues that the decision of the third respondent herein has been "discredited (sic) by procedural irregularities, improprieties and illegalities along the following:-

8.1 Third Respondent erred in finding that operational requirement existed which justified termination of applicant from his employ;

8.2 It was improper of Third Respondent to conclude that the said operational requirements call for the dismissal of applicant;

8.3 Third Respondent disregarded Applicant's contention that he was treated unfairly and discriminated because some other employees were retained beyond the 31st July 2002.

8.4 Third Respondent misdirected himself in dismissing Applicant's contention that his contract was of a fixed term so he should have been paid his benefits up to the end of a fixed term namely a retirement age."

9. Along with the filing of the said application for review before this count was filed an application for condonation by the present applicant. Condonation was duly granted by my brother Peete J on the 3rd April 2006.

10. On the 2nd day of December 2002, the Attorney General and Ministry of Tourism filed an application to intervene as respondents. Along with that application for intervention, they filed an Answering Affidavit. My sense is that the said Answering Affidavit was filed in anticipation of an order permitting the Attorney General and the Ministry to intervene. On 3rd April 2006, the Attorney General withdrew as Attorney of record from the intervention application. The said application remained pending without anybody to move it.

11. When the matter was placed before me on the 21st day of July 2006, I became aware of the situation outlined in paragraph 10 above, and directed the Registrar of this Court to communicate with Mr. M. Mapetla for the Attorney General to file heads of argument in the matter in preparation for the hearing of the intervention and review applications. The Registrar reported that Mr. Mapetla had told her that his office no longer had anything to do with the matter as it had withdrawn. Indeed, there was no appearance for either the Attorney General or the Ministry of Tourism when the matter was heard on the 24th day of July 2006. The application for intervention was therefore not prosecuted or moved. When the review application was heard on the 24th day of July 2006, the question of the fate of the intervention application became an issue. In the absence of an appearance for the intending intervening Applicants, the application for intervention had to be struck off the roll for want of prosecution.

12. Turning next to the respondents before this Court, it apparently came as a surprise to both counsel, at the hearing of the review application when the Court enquired as to whether or not the present review application was opposed regard being had to the fact that no answering papers had been filed by and on behalf of the present respondents in the review application. Both Counsel indicated that they were not aware of that no opposing papers had been filled on behalf of the present respondents.

13. When the Court asked both Counsel what the position should be now that it was clear that no opposing affidavit had been filed on

behalf of the respondents, Mr. Ntlhoki, Counsel for the Applicants contended that it meant that the review application is unopposed. He contended therefore that this being the case, applicants were entitled to have the order granted as prayed. Mr. Molete, Counsel for the first and second respondents, contended that, when the Attorney General filed the answering affidavit of Tebello Metsing, the intention was that, the answering affidavit be used in opposition to the present review application. When asked whether the respondents were entitled to rely on the answering affidavit of Tebello Metsing notwithstanding that it was apparently not filed on behalf of the present respondents, but for the intervening respondents, Mr. Molete contended that it was open to the present respondents to avail themselves of the defences raised in the affidavit of Tebello Metsing.

14. Apart from the above-mentioned contentions on behalf of the respondents, no explanation was provided by the respondents as to why no answering affidavits were filed. Mr. Molete informed the Court that, he had been of the view that all that had to be addressed was the issue as to whether, regard being had to the judgement of the Labour Court, and the so-called grounds of review relied upon by the Applicant, the judgement of the Labour Court could be interfered with. That may well be so, but this does not seem to address the issue as to why the respondents did not file an answering affidavit to the review application of the Applicant.

15. The Court should attach significance to the fact that the respondents have not filed any answering affidavits in this matter. Consequently,

the applicant's averments in his founding affidavit before this Court have remained unchallenged. **(C.f. ROMA boys FC. & others v Lesotho football Association & others 1995 – 1996 LLR – LB 456 (CA) at 462; see also Theko v Commissioner of Police and another 1991 – 1992 LLR – LB 239 AT 342**. The issue in our view must in such circumstance, be resolved on the basis of the acceptance of the unchallenged evidence of the applicant before this Court. This is because the affidavit made by the applicant constitutes and contains not only his allegations but also his evidence and if not controverted or explained; it will usually be accepted by the Court. In other words, the affidavit itself constitutes proof and no further proof is necessary **(see Chobokoane v Solicitor – General LAC (1985 – 89) 64 - 65)**.

16. Mr. Molete for the respondents contended that, even though the respondents have not filed any opposing papers themselves, the Court should have regard to the answering affidavit of Tebello Metsing. He argued that the defence that is raised therein was the defence of the first and second respondents. He submitted that even though the application for intervention was ultimately not moved, the answering affidavit which the Applicants in the intervention application had filed (in anticipation of the intervention application being granted) can be relied upon by his clients, the present respondents as it was intended to be filed in their defence. He contended that this is so regard being had to the relationship that the first and second respondents had with government. He was however unable to advance an authority for this proposition. In all fairness to

Mr. Molete, he conceded that if it could be found that the first respondent was a body corporate, then the above contention would not stand.

17. In terms of Section 3 of Lesotho Tourist Board Act No. 12 of 1983.

> *"There is established the Lesotho Tourist Board which shall, in that name, be a body corporate with perpetual succession and a common seal, capable of being sued in its corporate name, and with power to do and suffer all such other acts and things as bodies corporate may lawfully do and suffer."*

18. It is against the above background clear that the Lesotho Tourist Board was a body corporate capable of suing and of being sued in its own name. It does not come as a surprise therefore that in terms of Section 22 of the Tourism Act No. 4 of 2002, all assets and liabilities of the Lesotho Tourist Board are to vest in the Lesotho Tourism Development Corporation upon the commencement of the Tourism Act of 2002.

19. It follows therefore that unless the Lesotho Tourist Board did decide that Tebello Metsing deposes to an answering affidavit on its behalf, he cannot in law therefore depose to such an affidavit. Because the first respondent, or its successor is an artificial person it can only form an opinion resolving that it be represented by Mr. Tebello Metsing through an organ of itself constituted and authorized to do so. This organ is the Board of Directors of the Corporation. There is no

suggestion in the present case that the said Mr. Tebello Metsing was ever empowered to depose to the answering affidavit on behalf of the Lesotho Tourist Board. There is also no such evidence on the papers before this Court. If the Board had in fact so resolved, the simplest way of proving it would have been to prove the minutes of the meeting at which such a resolution was taken or recorded or, in the absence of such minutes, a person present at the meeting could have deposed to that fact **(see Nqojane v National University of Lesotho LAC (1985 – 1989) 369 at 383**. In the absence of all this, to accept that the said Principal Secretary intended to depose to the affidavit on behalf of the present respondents would be to enter into a dangerous terrain of baseless speculation. We consequently conclude that there is no basis for inferring the existence of the intention to depose to the affidavit on behalf of the first and the second respondents. We also consequently conclude that the application before us is not opposed.

20. However, this is not the end of the matter, as we now have to consider whether the Applicant is entitled to be granted the order sought in the notice of motion before this Court.

21. At the commencement of the hearing of this application, the Applicant's Counsel Mr. Ntlhoki, informed the court that he intended not to address the Court on the basis of the pleadings, that is, the notice of motion and its affidavits. He informed the Court that he intended to argue only what he termed "two points of law," namely justification of the Labour Court, and the defectiveness of the Answer filed in the Labour Court. The Court questioned him on the propriety

or otherwise, of abandoning his pleadings in favour of the so called, "points of law" taken from the bar.

22. The learned Counsel for Applicant insisted that he was entitled to adopt that position, and consequently forged ahead along that route. He insisted that, that was a correct route to tour and abandoned the pleadings despite numerous attempts by the Court suggesting to him that the route he intended to adopt was a precarious one. The learned Counsel referred the Court to the cases of **Lesetla v Matsoso C of A (CIV) No.27 of 2001; Tlali v Attorney General (NO) C of A (CIV) No.9 of 2002 at p.4; Attorney General & Ors v Kao C of A (CIV) No.26 of 2002 at p.7-10, as well as the case of Malebo v Attorney General C of A (CIV) No.5 of 2002**. The learned Counsel argued that he was entitled to take a point of law at anytime including for the first time on appeal.

23. The learned Counsel for the first and second respondents Mr. Molete contended that while he agreed with Mr. Ntlhoki that a point of law can be taken at anytime, including for the first time on appeal, the other party would still have to be afforded notice of such intended action. Failure to do so would amount to ambushing the other side. Mr. Ntlhoki however insisted and consequently abandoned the pleadings before Court. It is on the above basis that this application turns to be determined.

24. Our approach is that, we first have to consider whether Mr. Ntlhoki was in law entitled to adopt the procedure or route he adopted. If the

conclusion is in the affirmative, we will then go ahead to determine the merits of his "points of law."

25. There is of course some authority for the route adopted by Mr. Ntlhoki of taking a point of law from the bar without notice to the other side. This is usually taken in the nature of a point in *limine*. The Court of Appeal of Lesotho did sanction such an approach in the past in **Kutloano Building Construction v Matsoso and others LAC (1985 – 1989) 99 at pp.101 – 103**. In that case, the Court of Appeal upheld an appeal in which a respondent had taken a point in *limine* from the bar against defective notices of exception. The point was taken without notice to the defendant.

26. In motion proceedings, a party must stand or fall by his own papers. Any party is free to raise any point of law which arises out of the averments made in the affidavits not withstanding the fact that his own affidavits do not expressly refer to the points, **(see Van Runsburg v Van Runsburg andere 1963 (1) SA505 (A) at 510.** However, a legal representative cannot 'create a right' by a submission as to the legal position.

27. A point of law alleged to be such taken at the commencement of a hearing without notice and without observance of the Rules of Court is however unacceptable, because such a practice constitutes ambushing of a litigant **(see T.A.M. Industries (Pty) Ltd v ALFA Plant Hire (Pty) Ltd C of A (CIV) No. 18/2004 para 8, J. Marobane v Bateman 1918 AD 460 at 464; see Attorney General and others**

v Kao C of A (CIV) No.26 of 2002; Malebo v Attorney General C of A (CIV) No5/2003 and authorities cited at page 5 of the latter judgement and the reason at pp.6 and 7.

28. We are of the view therefore that the two points were not correctly so taken from the bar. They ought to have been raised in the papers. Their being argued from the bar would certainly prejudice the respondents.

29. Since Mr. Ntlhoki did not address the merits of the application, we cannot make a fining thereon.

30. We are also of the view that failure by the respondents to file their answering affidavits may also have been due to the fact that the applicant did not file the Notice in terms of Rule 15 of the Rules of this Court requiring that an applicant must indicate if he intends filing any other papers. It is only when he has done so that, the respondents would be able to file their opposing papers. This was not done.

31. It is consequently fair that this case be determined in the merits.

32. The best way to achieve this is by exercising a discretion as suggested by Mr. Ntlhoki (*albeit belatedly)* that the respondents be allowed to file their answering affidavits. This cannot however be achieved without giving the applicant an opportunity to file the Notice required in terms of Rule 15 (6) (b) of the Rules of this Court, or allowing applicant to file any such papers as he would like to in terms

of that Rule. When this suggestion was put to Mr. Molete by the Court, the Learned Counsel quite properly conceded that this Court has discretion to exercise in this regard. This concession was in my view properly made in line with Rule 19 (2) of the Rules of this Court.

33. I am of the view therefore that this is a proper case in which such discretion must be exercised. It is accordingly so exercised.

34. The order of this Court therefore is that:

1. This matter was clearly not ripe for hearing.

2. The applicant is to comply with the terms of Rule 15 (6) (b) of the Rules of this Court on or before the 4th day of August 2006, and respondents file their answering papers on or before the 11th day of August 2006. The applicant files his replying affidavits if any on or before the 18th day of August 2006.

3. This matter is to be heard in the merits on the 25th day of August 2006 in this Court.

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K. E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

Mr. R. L Mothepu — I agree

Mr. L.O. Matela — I agree

DATED AT MASERU THIS 28TH DAY OF JULY 2006

For the applicant: Mr. M. Ntlhoki

For the first and second respondents: Mr. L. Molete