LAC/CIV/A/5/2002

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between

QUEEN KOMANE 1ST APPELLANT

ELIZABERTH MANAKO 2ND APPELLANT

AND

CITY EXPRESS STORES (PTY) LTD RESPONDENT

CORAM: Honourable Mr Acting Justice K. E. Mosito

ASSESSORS: Mr. Twala

Mr. Tau

DATE: Heard on 23rd October 2006

Delivered on 2nd November 2006

SUMMARY

Practice – Labour Court pleadings - Originating Application doubles up as both a summons and declaration, and a notice of motion and founding affidavit respondent, not filing an Answer to Appellants' Originating Application - Answer serves the same purpose as does a plea in trial action or an answering (or opposing) affidavit in motion procedure – Respondent failing to file Answer – effect thereof -Labour Court proceedings not civil proceedings, but proceedings sui generis.

Disciplinary proceedings involving an employee who is a domicile of Lesotho and employed exclusively in Lesotho held outside Lesotho - an employee afforded protection by the Legislature. – Such proceedings unlawful on grounds of public policy.

A legal practitioner appearing in the Labour Court where the other party not represented by a legal practitioner – Such practice unlawful.

JUDGEMENT

1. This appeal was filed in this Court on the 5th day of July 2002. It is not clear why it is only now that it is being heard. This Court is not pleased with this unforgivable trend of events
2. This appeal arose out of an application launched by the Appellants in the Labour Court for an order in the following terms:

    (a) That the "hearings" conducted on the 26 September 2000 was procedurally unfair and the decision reached therein be declared null and void as it was conducted out outside Lesotho.
    (b) That the act of taking the workers outside Lesotho is contrary to the provisions of the Lesotho Laws especially Labour Code.
    (c) Payment of salary up to date of judgment.
    (d) Further and/or alternative relief.

3. The respondent in the Labour Court did not file an answer but an authority to represent as contemplated by the Rules of the Labour Court. The Labour Court allowed the respondent to be represented by

an attorney and to argue the matter. The Court consequently dismissed the application with costs on the 28th day of March 2002.

4. The present Appellants then noted an appeal complaining about the decision of the Labour Court, both on the merits and procedure. It is now appropriate at this stage to turn unto the grounds of appeal relied upon by the Appellants and consider them *seriatim*.

5. The first complaint is that the Labour Court allowed the 1st Respondent's attorney (this respondent should in essence, in our view, be the only respondent herein), to proceed with the case without having filed an Authority to Represent the said respondent, and without filing an Answer to Appellants' *Originating Application* in terms of Rule 5 and 26 of the Labour Court Rules 1994 respectively. This point was in fact taken first before the Labour Court. It is however not correct that the Respondent had not filed an Authority to represent. It had in fact been filed on the 25th day of April 2001.In that regard, the issue as to the filing of the Authority to Represent was correctly rejected by the Labour Court. It was however common cause that the *Answer* had not been filed.

6. Although Labour Court proceedings have been held not to be a *civil cause* or civil *action*. (See for example, **Attorney General v Lesotho Teacher's Trade Union and Others (1995-1999) 119 at 133**), the o*riginating Application* in the Labour Court is the equivalent of a *summons* and *declaration* in trial action, or *notice of motion* and *founding affidavit* in motion procedure, while the *Answer* is the equivalent of a *plea* in trial action or an *answering (or opposing) affidavit* in motion procedure. The Originating *Application* in fact doubles up as both a summons and *declaration,* and a *notice of motion*

and *founding affidavit.* At the hearing, a party is entitled either to proceed on the basis of the *Originating Application* as if it were the case of motion proceedings or opt for the route of trial action, hence the view that, the Labour Court proceedings are not civil proceedings, but proceedings *sui generis.*

7. The above distinctions notwithstanding, a respondent who intends to oppose an Originating Application in the Labour Court, is required to file an *Answer* in terms of Rule 5 of the Labour Court Rules 1994. The Answer serves the same purpose as does a plea in trial action or an *answering (or opposing) affidavit* in motion procedure, namely, to make the case of the Respondent known to the Applicant so as to avoid taking the latter by surprise. The Originating Application and Answer in the Labour Court are pleadings, by definition of their purpose. 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 in litigation. (See **Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.**) This fundamental principle is similarly stressed in **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice** 22nd ed at 113:by pointing out that, 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 before Court. (See also **Imprefed (PTY) LTD v National Transport Commission 1993 (3) SA 94 (A) at 107**).

8. Rule 5 of the Labour Court's Rules 1994 provides that:

> *A respondent may within fourteen days of receipt by him of a copy of the originating application, enter an appearance to the proceedings by means of presenting, or delivering by registered post, to the Registrar and to the applicant an answer to the originating application which shall be in writing in or substantially in accordance with Form L C2 contained in Part A of the Schedule and which* ***shall set out the grounds on which the respondent intends to oppose the application.*** (Emphasis added).

9. As outlined above, the purpose of this Rule is the same as that served opposing papers in the High Court or Subordinate Court. This purpose was aptly summarized as follows in **Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd LAC (1995-1999)698 of 702 A-D:**

> *It has been stated often enough that the requirement of a rule in terms such as these is to enable each side to come to trial prepared to meet the case of the other (see Benson and Simpson v Robinson 1917 WLD 126), and to enable the court to isolate the issue it is to adjudicate upon (Robinson v Randfontein Estates Gold Mining Co. Ltd 1925 AD 173 at 198). The cause of action or defence must appear clearly from the factual allegations made (Dun and Bradstreet (Pty) Ltd v South African Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 224). It is wrong to direct the attention of the other party to one issue and then attempt to canvass another (Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107-108). This respondent was permitted to do, and at great length, in the Court below".*

10. The respondent could not therefore be properly permitted to defend his case without an Answer. To allow him to do so, would amount to allowing it to carry out a trial by ambush. This is not acceptable.

11. The next complaint is that the Labour Court erred in rejecting the application for default judgement which had been filed in terms of Rule 14 of the Labour Court Rules. The Labour Court was not obliged

to decide in favour of Applicant merely because there was no Answer filed. It indeed correctly went ahead to determine the validity of the claim of Appellant. The only other issue is whether its decision was correct in law. It is to this issue that we now turn.

12. The issue is whether the Labour Court was correct in allowing the respondent to be represented by an attorney when the other side was not represented before it. Mr Putsoane for the Appellants contends that this was unfair. His attention was drawn to the terms of section 28(1)(b) of the Labour Code Order 1992. Mrs Kotelo immediately, and in a highly appropriate manner conceded that this was irregular. We agree with both learned Counsel on this point.

13. Section 28(1)(b) of the Labour Code Order 1992 provides as follows:

> *1) At any hearing before the Court, any party may appear in person or be represented*
>
> > *(a) by an officer or an employee of a trade union or of an employers' organisation;*
> >
> > *(b) by a legal practitioner, but only when all parties, other than the Government, are represented by legal practitioners.*(emphasis added)

14. In the present case, the Labour Court proceeded to hear a matter in which the respondents were represented by a legal practitioner, while the Appellants were not represented by a legal practitioner. This was procedurally irregular, and in stark violation of the aforementioned section. There is a practice now prevalent in that Court whereby this

section is being violated day in day out. It is illegal to allow this practice and it must stop.

15. The policy considerations behind sections such as these are, not only to ensure that there is a fair trial in the sense of there being equality of arms, but also, to render the proceedings of the Labour Court less expensive, more expeditious, less technical, more accessible, non-legalistic, more prompt and timeous, fair and equitable, more transparent etc. These principles sit at the heart of an efficient labour dispute resolution system. In our view, the Labour Court has to help in upholding this desirable in the interests of justice.

16. A similar provision is also found in section 228A of the Labour Code (Amendment) Act No. 3 of 2000 in relation to proceedings of the Directorate of Dispute Prevention and Resolution. It provides that:

> (1) In any proceedings under this Part, a party to the dispute may appear in person or be represented only by –
>
> a co-employee;
>
> (a) a labour officer, in the circumstances contemplated in section 16(b);
>
> (b) a member, an officer of a registered trade union or employers' organization; or
>
> (c) if the party to the dispute is a juristic person, by a director, officer or employee.
>
> (1) Notwithstanding subsection (1), a party to a dispute contemplated in section 226(2) may be represented by a legal practitioner if –
>
> (a) the parties agree; or
>
> (b) the arbitrator concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
>
> (i) the nature of the questions of law raised by the dispute;
>
> (ii) the complexity of the dispute; and

the comparative ability of the opposing party or representatives to deal with the arbitration of the dispute.

17. The importance of these sections is one that cannot be overemphasised. Both the Labour Court and the DDPR are obliged to give effect to these provisions in the interests of the efficient labour dispute resolution in this Country.

18. Another ground of appeal before us is that, the Labour Court erred in not holding that it is illegal for disciplinary proceedings involving employees who are Basotho citizens to be convened and conducted outside the Kingdom when such employees were employed in Lesotho, and their employing companies or persons have their businesses in Lesotho.

19. The learned counsel for the Appellants was unable to refer us to any statute or authority for this proposition. When this proposition first reached our ears, it sounded like wind rattling in the reeds, and we felt like just dismissing outright. We may mention at this stage that the Labour Court dismissed this argument as outrageous. No authority or justification was given by the Labour Court for its decision to dismiss this point. What then are the arguments for this proposition? It is largely being attacked on public policy grounds. The contention is that, it is against public policy to allow this practice to continue, because, it involves employees in unnecessary economic pressures and exposes them to the application of foreign laws contrary to Lesotho's legislation, as they even have to pay money in order to go to South Africa to attend disciplinary cases there arising out of contractual infractions and misconducts that arise in Lesotho, and yet,

multinational corporations conduct disciplinary hearings in South Africa.

20. It is true that problems of this nature arise everyday. In the present case, Appellants were required to attend disciplinary proceedings in Finksburg in South Africa, when their employment was in Lesotho. Their places of work are in Lesotho. They argued that, it is wrong for them to be disciplinarily tried by South African citizens who do not have work permits in Lesotho and who are employed by sister companies in South Africa. This case raises private international law issues of gothic complexity for which there is a disturbing paucity of authority in this country. The problem however has to be decided.

21. The starting point for our discussion should be the examination of the terms of the **Labour Code Order No.24 of 1992.** Section 61 of the **Labour Code Order No.24 of 1992** provides in part as follows:

> *(3) No person shall employ any employee and no employee shall be employed under any contract except in accordance with the provisions of the Code. Any contract, whether entered into before or after the commencement of the Code, which contains any term or condition less favourable to the employee than any corresponding term or condition for which provision is made by the Code, shall be construed as though the corresponding term or condition of the Code were substituted for such less favourable term or condition of service in such contract. However, nothing in the Code shall operate so as to invalidate any term or condition of any such contract which is more favourable to the employee than the corresponding term or condition of the Code.*
>
> *(4) Subject to the provisions of subsection (3), every contract of employment which is in force at the commencement of the Code and which would have been subject to the provisions of the Code had it*

> *been entered into after that date shall, in so far as it is not inconsistent with those provisions, continue in force and be deemed to have been entered into in accordance with those provisions*.

22. In **Khotle v Metropolitan Life Insurance Co.Ltd 1985-1990 LLR 161 at 164** Mr Acting Justice Levy held section 11(2) of the Employment Act 1967 which was in *pari materia* with the foregoing 61 of the Labour Code to be reflective of the public policy of Lesotho in employment contracts in that, an employee who is a domicile of Lesotho and who is employed exclusively in Lesotho is afforded protection by the Legislature. To hold that South African law applied to a contract of employment to a Lesotho domicile in such circumstances would amount to depriving the employee of the protection afforded him by the Act. Such an employee would otherwise be compelled at great personal expense to institute action in South Africa where as a foreigner he might be required to find security for the defendant's costs and would run the risk of "the possible total frustration of his action whereas the employer has its branch in Maseru where the whole dispute has arisen."We are in respectful agreement with this approach.

23. As Mr Maope K. A. correctly points out in his article, **"Private International Law in Lesotho: Recent Judicial Decisions**" **Lesotho L.J. Vol. 2 1986 No.1 at177 p.186**, the above decision is based on public policy and legislation.

24. Furthermore, section 242 of the **Labour Code Order No.24 of 1992** provides that:

> ***(****1) Where any rule of law which was applied prior to the entry into force of the Code conflicts with the application of its provisions, that rule shall not be applied in any case arising under the Code.*
>
> *(2) In any case where both the laws of Lesotho and the laws of another State could be applied in regard to the rights or entitlements of employees, their survivors or heirs, a court shall be bound to apply the laws of Lesotho*.

25. Needless to say, legislation is often a reflection of public policy. In our view, although the above provisions of section 242 deal with Courts, they reflect Lesotho's public policy stance that, its domiciles exclusively employed in the Country should not be exposed to the likely dangers of being tried disciplinarily in a foreign soil. If that practice were allowed to proceed, the institutions that are creature the Lesotho Labour Code will lack jurisdiction to entertain consequences of disciplinary proceedings held outside the Country to the prejudice of the rights of this country's such domiciles.

26.. The real problems arise where disciplinary proceedings conducted outside Lesotho result in the dismissals of employees (as *in casu*) by such tribunals sitting in South Africa purporting to apply the law of Lesotho when in some aspects, they should be applying the *lex fori* according to established principles of private international law. In private international law (or conflict of laws), the problem of identifying the governing law of contracts has been dealt with by the so-called 'proper law of the contract' doctrine, which does not always yield predictable results and is intended to reflect the intention of the parties, but which also attempts to grapple with similar problems. Our

courts apply the proper law doctrine in determining the law governing a contract (e.g. see **Transol Bunker BV v MV Andrico Unity & others; Grecian-mar Srl v MV Andrico Unity & others 1989 (4) SA 325 (A))**. The difficulty of simply using the principles of this doctrine is that it is a doctrine used to determine the private law rights of the parties to the contract which, at least in principle, it gives much weight to their intentions. When the dismissals result, the question whether the DDPR, Labour Court or this court should have jurisdiction on such matters become real problems. When considering the applicability of a statute and the jurisdiction of statutory institutions such as those, it is trite law that parties cannot confer jurisdiction on a statutory body merely because that is their wish. The jurisdiction of a statutory body remains independently determined through interpretation of its founding statute. Thus, though there may be elements of the proper law doctrine which might also be appropriate to consider in determining whether an employment relationship is governed by the Labour Code Order 1992, that doctrine cannot be taken as a starting-point or applied uncritically in trying to establish the jurisdiction of the institutions established by the Labour Code such as the Labour Court, the DDPR, the Labour Appeal Court etc.

27. The issue is complicated further by the presumption against extraterritoriality of legislation and the absence of any express indication in the Code that the presumption is not applicable. We consequently hold on the basis of public policy and legislation that, it is both unlawful and against public policy that an employee who is a domicile of Lesotho, and who is employed exclusively in Lesotho

should be disciplinarily be tried outside the country when there is still a branch of the employer in the country. To allow the practice to continue deprives such domiciles of the protection otherwise afforded to them by the Code.

1. Section 73 of the Labour Code Order No. 24 of 1992 provides that:

> *(1) If the Labour Court holds the dismissal to be unfair,* ***it shall****, if the employee* ***so wishes****, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court* ***shall*** *not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.*
> *(2) If the Court decides that it is impracticable* ***in light of the circumstances*** *for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount, as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses* (Emphasis added)

28. It is clear from the terms of section 73 above that the Labour Court and consequently this Court, has discretion to order reinstatement. In the present case, Appellants are not asking for reinstatement. They are also not asking for compensation. However the Code enjoins the Labour Court in terms of section 73 to either order reinstatement or compensation. The form of compensation that Appellants are asking for is salary.

29. At common law, where specific performance is claimed of a contract repudiated by one of the parties to it, the court has discretion whether

to order that and this applies also to a contract of employment. See **Lesotho Telecommunications Corporation v Rasekila LAC (1990-1994) 261**, see also **Lesotho Bank v Molai LAC (1995-1999) 275.**

30. It is however important to point out that the **Lesotho Bank's** case *(supra)* and Lesotho Telecommunications Corporation's case *(supra)* did not deal with section 73 of the Labour Code Order 1992. They were dealing with the common law position. The discretion that is required to be exercised in terms of section 73 (1) of the Labour Code Order 1992 has to be a judicial one taking all the facts (and not speculation) into account

31. In Prayer (c) as reflected in paragraph 1 of this judgment, appellants ask the court to order the respondent to pay their salaries. There are no facts at all set out in the papers let alone in evidence, on which the *quantum* of the Appellants' loss can be assessed as salary from dismissal to date of judgment if this was the intention. See **Lesotho bank Moloi** *(supra).*

32. Whether or not a claim by an employee for his emoluments during the period from his wrongful dismissal to the date of judgment is a claim for damages or specific performance, the answer to the inquiry is the same. The employee's earnings, if any, during that period should be taken into account since it would be inequitable for him to earn what would amount to a double salary until he is reinstated by the Court. See **Lesotho Telecommunications Corporation v Rasekila** *(supra)* at **269**. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are binding in all cases. See **National Union by Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151.**

33. The issue of the *quantum* of emoluments is one that should be enquired into by the court *a quo* either on affidavits suitably augmented if there is no dispute of fact or, if necessary, by viva voce evidence of the parties.

34. In all the foregoing circumstances, the appeal must be upheld. The following order is consequently made:

(a) The appeal is upheld with costs

(b) The order of the Labour Court is set aside and replaced with the following order:

(i) Prayers (a) and (b) of the originating application are granted.

© (i) The Respondent is ordered to pay Appellants salary from the purported date of dismissal to date.

(ii) In order to ascertain what *quantum* of such salary is payable to the Appellants the matter is sent back to the Court *aquo* for the furnishing of evidence thereon.

(iii) The Court *a quo* should be furnished with affidavits from both parties regarding emoluments (if any), which have been earned by the Appellants in the period since their dismissals.

(iv) If there is a dispute of fact which cannot be decided on affidavits, then the court *a quo* will order that *viva voce* evidence be given by the parties and will in due course make such order regarding the *quantum* of emoluments, if any,

to which the Appellants are in the opinion of the court, entitled

(d) The order outlined in paragraph (c) above must be compiled with by the parties within 30 days of this judgment in that:

(i) The Appellants must file their affidavits within 15 days of this order;

(ii) The respondent must file its affidavits (if any) within 15 days of the date on which Appellants have filed their affidavits.

(iii) The Registrar of the Labour Court is directed to place the matter on the quantification of emoluments before the Labour Court for determination within 30 days of the filling of the respondents' affidavits.

(iv) The costs of this application must be borne by the first respondent

35. My Assessors agree.

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K. E. Mosito

Judge of the Labour Appeal Court

For Appellants Mr. N. Putsoane

For Respondent Mrs. V. M. Kotelo