LAC/REV/03/07

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

THATO PUTSOA APPLICANT

AND

STANDARD LESOTHO BANK RESPONDENT

CORAM: THE HONOURABLE MR. ACTING JUSTICE K.E.MOSITO

ASSESSORS: MR. J. TAU

MR. D. TWALA

HEARD: 23 October 2007+

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DELIVERED: 29 October 2007

SUMMARY

Review of an erstwhile employer's decision to institute disciplinary action against and to blacklist an erstwhile employee - Application under Section 38A (b) (iii) of the Labour Code (Amendment Act No.3 of 2000.
Administrative action – Meaning of - Decision to institute disciplinary action against and to blacklist an erstwhile employee not constituting administrative action.
Jurisdiction - the Labour Appeal Court having no jurisdiction to entertain application – Application dismissed with costs for want of jurisdiction.

JUDGEMENT

Mosito AJ:

1. The facts leading to the institution of this application are not in dispute. They are that the Applicant was employed by the Respondent as from the 5th day of January 2000. On the 5th day of January 2006,

the Applicant wrote a letter resigning from the employ of the Respondent. Upon receipt of the said letter, Respondent wrote back to Applicant and informed her that it did not accept the Applicant's resignation. The Applicant then brought the present application seeking an order couched in the following terms:

a) Decision of the Respondent to hold disciplinary proceedings against the Applicant shall not be reviewed, corrected and set side.
b) The Respondent's decision to dismiss Applicant shall not be reviewed, corrected and set aside.
c) The Respondent shall not cancel or cause to be cancelled Applicant's name from Banking Council's Register of Employees Dismissed (RED)
d) The Respondent shall not pay costs of this Application.
e) Applicant shall not be granted further and alternative relief.

2. This application raises four main issues. The issues are, firstly, whether this Court has jurisdiction to entertain this application. Secondly, whether an employer is entitled in law to reject an employee's unilateral resignation. Thirdly, whether it is competent for an employee to convert his or her untaken leave days into notice for purposes of his immediate resignation from employment.Put differently, is it permissible in law for an employee say to his or her employer that he or she has a number of days for leave which he or she did not take, and that he or she would like the employer to take those days in lieu of notice?
3. Fourthly, whether it is tenable in employment law for an employee to resign from his employment when there is an impending disciplinary inquiry against him or her, and if so, what the effect of such resignation is

4. It is apparent that the question of jurisdiction must be determined first. The other issues will be considered once the Court has determined whether it has jurisdiction or not. If this Court holds that it has no jurisdiction to entertain this application, then the other issues will not be considered.
5. The Respondent took a point in *limine* as to the jurisdiction of this Court contending that the issues raised herein fall outside the jurisdiction of this Court. Mr Ntaote for Respondent initially adopted an approach that, the Respondent's decision to institute disciplinary proceedings, including the disciplinary hearing itself, do not constitute administrative actions and, accordingly cannot be reviewed by this Court. He later shifted a little, and argued that the decision to institute disciplinary proceedings, did amount to administrative action, while the actual institution of the disciplinary proceedings itself, as well as the undertaking of the proceedings themselves amounted to an exercise of a quasi-judicial function. He sought to draw a distinction between quasi-judicial, administrative, and judicial decisions, contending that, the Court has no jurisdiction to review the disciplinary proceedings because they were quasi-judicial, not administrative. He contended that this Court has no jurisdiction to review a quasi-judicial decision under the said section.
6. Mr. Sekonyela for Applicant submitted that, an administrative action can be taken by a natural or juristic person. He submitted that the Respondent, which is a private company incorporated in terms of the Companies Act 1967 can carry out an administrative action. He contended that the Respondent's decision to institute disciplinary proceedings, including the disciplinary hearing itself, constituted

administrative actions and, are accordingly, reviewable by this Court. He contended that, since the decision to institute the disciplinary proceedings involved the implementation of a piece of legislation (the Labour Code Order 1992), it was an administrative action. This, he said, applied equally to the disciplinary proceedings itself. The Applicant in her papers contended that this Court has jurisdiction to entertain this application in as much as this Court has jurisdiction to review "any administrative action taken in the performance of any function in terms of this Act or any other labour law."

7. The first question is, what can this Court make of the distinction made by Mr. Ntaote between judicial, quasi-judicial and purely administrative functions? We do not intend to decide whether the distinction between the classifications has been obliterated or not. We only observe *en passent,* that, the distinction made between judicial, quasi-judicial and purely administrative functions of the State administration under the common law, found its historical origins in the need to make the English common-law writs of *certiorari* and prohibition applicable to acts categorised as quasi-judicial (See **Wiechers Administrative Law (1985)** at 122 and 218).

8. In the case of **Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd 1953 (3) SA 1 (A)** Schreiner JA stated at 11A - C:

> 'The classification of discretions and functions under the headings of "administrative", "quasi -judicial" and "judicial" has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, and even some disagreement as to the usefulness of the classification when achieved. I do not propose to enter into these interesting questions to a greater extent than is necessary for the decision of this case; one must be careful not to elevate what may be no more than a convenient classification into a source of

> legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.'

6. In a dissenting judgment delivered in the case of **South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 (A)**, Williamson JA said of this classification (at 278C - D):

> 'I, however, fear the rigidity which such classification and labelling may induce. I appreciate the value, in its proper sphere, of a scientific analysis and subdivision under proper nomenclature of the applications in practice of a legal principle. I think, however, it is possible that, in the case of the basic principle of "fair play" under consideration, an undue limitation may be placed upon its scope by an attempt to define its applicability entirely by means of type or class tests. The essential feature in each instance is, I think the true meaning and effect, in the surrounding circumstances, of the enabling statutory provision.'

9. Indeed one of the difficulties in applying this classification is to determine precisely what is meant by the terms 'quasi-judicial' and 'purely administrative' (see the discussion of this issue in **Baxter Administrative Law at 344 - 8, 575 - 6**). In the ***Defence and Aid*** case *supra,* Botha JA, delivering the majority judgment, said (at 270B - D):

> 'It is quite clear from a long series of cases in this Court... that, apart from other possible requirements, the incorporation of the maxim audi alteram partem can only be implied where a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual or, what amounts to the same thing, where a statute empowers a public official to exercise, in relation to the property or liberty of an individual, quasi-judicial functions.'

10. However, as Corbett CJ pointed out in **Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A)** at 763:

> this dictum [Botha JA in the ***Defence and Aid*** case quoted above], appears to define 'quasi-judicial' in terms of the effect which the decision has upon the individual concerned. On this basis a classification as quasi-judicial adds nothing to the process of reasoning: the Court could just as well eliminate this step and proceed straight to the question as to whether the decision does

> prejudicially affect the individual concerned. As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include also his legitimate expectations. In short, I do not think that the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the Court.

11. As indicated above, we do not intend to decide the issue of the classifications because it was raised within the context of determining whether or not certain of the decisions and actions of the Respondent constituted an *administrative action*. It is to this cardinal issue that we should first turn.

12. Section 38A (b) (iii) of the **Labour Code (Amendment) Act No.3 of 2000**, lays down as a requisite jurisdictional fact for success on judicial review by this Court that, an impeached conduct must constitute *administrative action*. The term "administrative action" has however, not been defined in the Act. Furthermore, the Courts in Lesotho have not yet defined this term, appearing in our Labour Code (Amendment) Act 2000. We emphasise the words 'administrative action' above, because they emphasise the very first question to be asked and answered in any review proceedings under the section. The question that would have to be asked is, what is an *administrative act* which is sought to be reviewed and set aside? (See **Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others 2003 (1) SA 373 (SCA) p382**). This question must however be preceded by another question: what is an "administrative action" for the purpose of justiciability?

13. An administrative action is a phenomenon of administrative law. Administrative law, which occupies a special place in our

jurisprudence, is an incident of the separation of powers under which Courts regulate and control the exercise of public power by the other branches of government - **Pharmaceutical Manufacturers Association of SA and Others: In re Ex parte President of the RSA and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) at paras [45], [51], [79] and [85].** The question relevant to Section 38A (b) (iii) of the **Labour Code (Amendment) Act No.3 of 2000**, is therefore, not whether the action is performed by a member of the executive arm of government, but whether the task itself is administrative or not. The answer is to be found by an analysis of the nature of the power being exercised - **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) at para [141].** What has to be taken into consideration is, *inter alia*, the source of the power exercised, as well as the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is being considered or sought to be implemented.

14. It is true that in appropriate circumstances, a decision to institute disciplinary proceedings against an employee may be regarded as an administrative action. For example, in **Despatch High School v Head, Department of Education, Eastern Cape, and Others 2003 (1) SA 246 (CkH)** at p253 Ebrahim J:

> There is no doubt that, in taking the decision to institute disciplinary proceedings against the third respondent, the first respondent was 'performing a public function in terms of an empowering provision' and consequently carrying out an administrative act. It follows, furthermore,

> that the decision is not beyond the purview of review proceedings. Whether grounds exist which would justify that it be reviewed and set aside is, of course, another matter entirely. Accordingly, I find that there is no merit in this defence and it follows that it must fail. I turn now to the merits of the matter.

15. As Olivier JA pointed out in **Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA)** at 864, before the introduction of the interim Constitution in South Africa, it was not necessary to define the concept of 'administrative action' with precision. By and large, the criteria have usually been that an administrative action requires a decision (and resultant action) taken in the exercise of a public power or the performance of a public function, affecting the rights, interests or legitimate expectations of others (see **Administrator, Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A) at** 33J - 36A; **Administrator, Natal and Another v Sibiya and Another 1992 (4) SA 532 (A)** at 538E - 539E). Following these, and English cases, it was held in **Toerien en 'n Ander v De Villiers NO en 'n Ander 1995 (2) SA 879 (C)** that the dismissal of a university employee by the council of the University of Stellenbosch was subject to review in terms of the administrative law.

16. If the exercise of the power involves the implementation of legislation, it would be administrative (**President of the Republic of South Africa and Others v South African Rugby Football Union and Others** (*supra* in para [143] at 67G)). We can now proceed to consider whether the Respondent's decision to institute a disciplinary action against Applicant, to dismiss Applicant and to register her name within the Banking Council's Register of Employees Dismissed (RED), amounted to 'administrative action' for the purpose of section 38(A)(b)(iii) of the Labour Code (Amendment) Act 2000. As Olivier

JA approached the matter in the Transnet's case (*supra*), we do so on the basis that, irrespective of whether the Respondent is an organ of State or a juristic person other than an organ of State, the threshold requirement is that it should be established that it should exercise a *public power* or perform a *public function*.

17. We are of the view that while it is correct that the Respondent may in law exercise an administrative action, the said Respondent is not exercising a public power, and as such not exercising a public function. In our view, the Respondent may or may not exercise a public power or public function depending on the terms of a relevant statute. The question however, is whether there is anything in either the Labour Code Order 1992 or the Labour Code Amendment Act 2000 which thrusts upon the Respondent the power to carry out the disciplinary action that it did.

18. In our view when the Respondent made a decision to institute disciplinary proceedings against the Applicant, it was not carrying out an administrative action. It was purporting to carry out an employer's managerial power of disciplining an employee, which power flows from the common law managerial powers that an employer exercises over an employee. The fact that the person on whom it purported to exercise such powers was no longer an employee, does not make the exercise of such power an administrative action. Put differently the Respondent was carrying out a purely managerial function arising out of the contract of employment between itself and the Applicant. There was no element of exercise of public power or duty or function involved in the exercise of the said power. The Respondent was not established by statute. It was established as a private company in

terms of the company's Act 1967. It was not carrying out any power imposed on it by any statute. The Labour Code does not impose upon an erstwhile employer the power to discipline an erstwhile employee. There is no any other labour law in Lesotho that imposes upon an erstwhile employer the power to discipline an erstwhile employee.

19. In our view, the Respondent could not exercise an administrative action if it neither exercised a public power, nor a public function. It was incumbent upon the present Applicant to prove that the Respondent's decision to institute disciplinary action against the Applicant, amounted to an administrative action. In our view, there is nothing on record to show that the Respondent was indeed exercising an administrative action when deciding to institute the said disciplinary action against the Applicant.

20. When the case was heard, we requested the parties to refer us to any statute in terms of which the Respondent had enlisted or caused to be enlisted her name on the Banking Council's Register of Employees Dismissed (RED). No statute was brought to our attention on the subject of the RED, in terms of which we could say Respondent was exercising a public power or function in enlisting or blacklisting Applicant on the RED. Both counsel promised to provide us with such statute later if any, but we have not had the benefit of such a statute to date. We could presumably be able to hold that Respondent was carrying out an administrative action if it blacklisted Applicant in terms of such a statute. We could examine the reviewability of such actions in terms of the following principles enunciated in **Hira and Another v Booysen and Another 1992 (4) SA 69 (A)** by Corbett CJ that:

(1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review. (See the Johannesburg Consolidated Investment case supra at 115.)

(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the Johannesburg Stock Exchange case supra at 152A-E.

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review.

(6) In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express

a decisive view. It is therefore appropriate to begin by considering what that term actually means in the said section.

21. We are of the view that the Applicant having failed to establish that Respondent was exercising an administrative action, this Court must decline jurisdiction in this matter.

22. As reflected in paragraph 2 above, this application raises very important issues, which unfortunately, due to the decision we have already reached on the preliminary issue as to jurisdiction, we cannot go into. The obvious corollary of declining jurisdiction is that the Applicant's application cannot succeed. It is accordingly dismissed with costs on account of lack of jurisdiction.

23. My Assessors agree.

K.E.Mosito

Judge of the Labour Appeal Court

For Applicant: Advocate B. Sekonyela (assisted by Adv L.C. Mokobocho)

For Respondent : Advocate N. Ntaote