

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:-

TZICC CLOTHING MANUFACTURING
(PTY)LTD

APPLICANT

AND

DEPUTY PRESIDENT OF LABOUR CORT
REGINA SELLO

1ST RESPONDENT
2ND RESPONDENT

CORAM: HONOURABLE ACTING JUSTICE K.E. MOSITO
ASSESSORS: MR. O.L. MATELA

HEARD: 28 OCTOBER 2007
DELIVERED: 29 OCTOBER 2007

SUMMARY

Application for review – Labour Court having altered an award of the DDPR for enforcement - Labour Court instead altering the award form reinstatement to one for compensation – Such amounting to irregularity. Applicant ordered to comply with award of DDPR as to reinstatement. Representation of a person by a non-legal practitioner before Labour Appeal Court – No provision authorizing such Representation in the Act.

JUDGMENT

MOSITO AJ:

1. In advance of delving into the merits of this application, we need to begin by pointing to two preliminary issues that required to be dealt with first at the hearing hereof. The first issue was that, at the hearing of this matter, one Mr. Seabata Likoti, appeared before this Court, purporting to appear for the 2nd respondent. The Court then asked him whether he had a right of audience before it, regard being had to the fact that he was not a legal practitioner. Mr. Likoti informed the Court that he was a trade unionist of which 2nd respondent was a member. He informed the Court that he had been handling the matter both in the DDPR and in the Labour Court. The Court's endeavours at determining the legal basis for his audience before it proved problematic. The issue was ultimately formulated as, whether it is competent for a trade unionist who is not a legal practitioner, to appear before this Court representing a member of his trade union or employers' organization.
2. Considering the importance of the right to representation and the doctrine of fair trial, the Court directed the Registrar of this Court to write to the Law Society of Lesotho requesting it to appoint a competent and senior legal practitioner to appear *amicus curia* to address the Court on the issue on a date to be fixed. The law Society complied, and appointed a very senior and competent legal Practitioner, who also occasionally acts as a Judge of the High Court of Lesotho, Advocate M. Teele. Advocate Teele submitted a very able argument before us, and filed heads of arguments as well. We are extremely indebted to both the Law Society of Lesotho and advocate Teele for their contribution to this issue. For the sake of completeness, we should record that Advocate Makeka K.C. also approached the

presiding judge in Chambers and requested that, they should also be permitted to appear in the matter to address this issue of representation as representatives of employers' association. The Court acceded to this request, but apparently, for reasons not clear to us, Mr Makeka later had a change of heart, and wrote a letter that, they were no longer eager to appear. The trade Union involved then appointed advocate Molati to appear for the union and the 2nd respondent. Advocate Letsie also appeared for the Applicant. We will revert to the submissions made later in this judgment, but we do not have adequate words to express our indebtedness to all the Counsel that appeared in this matter.

3. The second preliminary issue that arose during the hearing of this application, was that, it came to our realization that, one of the Assessors, Mr. Makhetha, had been one of the Assessors who set with the Learned Deputy President of the Labour Court when this matter was heard before the Labour Court. It stood to reason that he could not therefore be permitted to sit on review in this matter in this Court. Confronted with this kind of dilemma, the Court postponed the matter with an order that, the matter would be heard by a differently constituted Court on a different date. The Judge presiding however removed the learned Assessor Mr. Makhetha from the proceedings on the basis that, he had been involved in decision-making of the matter in the Court *a quo*. This step was taken in terms of section 38(9) of the **Labour Code (Amendment) Act No.3 of 2000**, which provides that, no proceedings of the Labour Appeal Court are invalid simply because after the commencement of proceedings, the Court proceeds without an Assessor, because the Judge removes the Assessor from

the proceedings for good cause. The Court therefore proceeded with only one Assessor, Mr. Matela, hence the composition appearing above.

4. Turning now to the facts of this case, they are largely not in dispute. They are that, the 2nd respondent was an employee of the Applicant. She was dismissed by the employer from employment. She successfully challenged her dismissal before the DDPR, and an award reinstating was issued by the DDPR. The DDPR further awarded her reinstatement consequent upon finding her dismissal to have been unfair. The said 2nd Respondent endeavoured on several occasions to be reinstated by Applicant, all in vain. She then approached the Labour Court for enforcement of the award of the DDPR, allegedly in terms of section 228E(5) of the **Labour Code (Amendment) Act No.3 of 2000**, which provides that, an award issued by the DDPR shall be final and binding, and shall be enforceable *as if it was an order of the Labour Court*.
5. The Labour Court was therefore asked to *enforce* the said award, purportedly in terms of section 34 of the **Labour Code Order No.24 of 1992**, which provides for the enforcement of the Labour Court orders in the following terms:

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 judgement, 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. We will assume without deciding that sections 228E(5) of the **Labour Code (Amendment) Act No.3 of 2000**, and 34 of the **Labour Code Order No.24 of 1992**, confer jurisdiction upon the Labour Court to enforce awards of the DDPR. Indeed this issue was not addressed before us, and no decision may therefore, correctly be made on an issue not so addressed.
7. The said 2nd respondent therefore moved by way of contempt application before the Labour Court. The Labour Court rejected the contempt application, but, went on to alter the award of the DDPR from that of *reinstatement* to that of *compensation*, presumably in terms of section 73 of the **Labour Code Order No.24 of 1992**, which 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.

8. The Labour Court then went on to order compensation instead of enforcing the award of the DDPR as it was before it, namely, reinstatement. We now have to consider the issues raised by the above outline of facts and occurrences in this Court. The first issue for consideration is whether it is competent for a trade unionist who is not a legal practitioner, to appear before this Court representing a member of his trade union or employers' organization. We should hasten to point out that, the issue is not about the competence of a non-legal practitioner who is representing his union or organization upon authorization by his or her union or employers' organization. The issue is about a trade unionist or officer of an employers' or employees' organization representing a member of the union or employers' organization not the union or employers' organization itself. This distinction should be made clear because, the term "officer", when used with reference to a trade union or employers' organisation, includes any member of the executive committee thereof and any officer of a branch of a trade union, but does not include a trustee or an auditor. Thus such persons can be authorized to represent their said organizations before this Court.
9. Advocates Letsie and Molati for the employers and employees respectively, contended that non-legal practitioners and trade unionists who are not legal practitioners, are not entitled to appear before this Court representing a member of their trade unions or employers' organizations. They drew a distinction between the terms of section 28 of the **Labour Code Order No.24 of 1992**, and sections 228A of the **Labour Code (Amendment) Act No.3 of 2000** on the one hand, and the fact that the legislature decided to be silent on representation

before this Court on the other. The contentions by the said two learned counsel were in effect that, section 28 of the **Labour Code Order No.24 of 1992** permits representation of parties in the Labour Court, while section 228A of the **Labour Code (Amendment) Act No.3 of 2000** permit representation of members of unions and employers organizations in the DDPR. They contended therefore that only legal practitioners are envisaged to represent their clients in the Labour Appeal Court.

10. Advocate M. Teele who appeared *amicus curiae* disagreed with advocates Letsie and Molati on this point. Advocate Teele's argument was that, the right of legal practitioners to audience in the Courts in Lesotho is conferred by section 42(1) of the **Legal Practitioners Act No.11 of 1983**. He pointed out that Rule 17 in the High Court and 49 in the Subordinate Courts reinforce the right of audience in those courts. He conceded that there is no equivalent provision in respect of the Labour Appeal Court. He however submitted that, the fact that the Labour Appeal Court was created after the enactment of Rule 17(2) of the High Court on representation of associations or corporate bodies, and that in its Rules, Rule 17(2) was not reproduced is a strong indication that a similar enactment was deliberately excluded. He submitted that the Labour Appeal Court is not the High Court sitting in a different capacity.

11. The learned counsel submitted that, the above notwithstanding, we should not lose sight of the fact that the Labour Appeal Court deals matters emanating from the Labour Court wherein section 28 of the **Labour Code Order No.24 of 1992** provides that:

“Representation of parties.

- (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.
- (2) Where the Government is a party to any proceedings before the Court, the Government may be represented by the Attorney General or by any other person appointed by the Attorney General for that purpose”

12. He submitted that quite clearly, in the structure of the labour Courts (of record as well as of appeal), the legislature has seen it fit not to insist on legal representation in all instances. The learned Counsel referred to the Court of Appeal decision in **Attorney General v Lesotho Teachers Trade Union and Others 1995 -1996 LLR 345 at 359 -60**, where the Court held that:

...the Labour Court is a court of equity enjoined to keep the scales of justice in balance between the conflicting demands of employer and employee. Disputes that come before it are not “civil proceedings provided for in either section (2) of the High Court Act or the Constitution”

13. He also referred to the fact that in terms of section 27(2) of the Labour Code Order 1992:

(2) The [Labour] Court shall not be bound by the rules of evidence in civil or criminal proceedings, and it shall be the chief function of the Court to do substantial justice between the parties before it.

14. He therefore submitted that the Labour Appeal Court simply follows the same pattern and does substantial justice between the parties as is the Labour Court, but on appeal. He consequently submitted against the foregoing background that, there is nothing wrong with non-legal practitioners appearing in the Labour Appeal Court. In the interests of simplicity and cost effectiveness of the Courts operating in the labour

- sphere. He contended that where weighty issues of law arise, the Judge may enlist the services of qualified legal practitioners to assist.
15. It is correct that legal representation is both a common law and constitutional right. (See **Attorney General v Tebelo 'Mopa C. of A.(CIV) No.3 of 2002**). There can be no quarrel that legal practitioners are entitled to represent litigants in the Courts of law of Lesotho in terms of section 42 of the **Legal Practitioners Act No.11 of 1983**.
16. However, the questions are: If the Legislature had intended that the same kind of representation as exists in the DDPR and Labour Court should obtain in the Labour Appeal Court, why did it not deem it necessary to so provide? Why did the Legislature not provide that, the Labour Appeal Court should simply follow the same pattern with regard to representation as in the Labour Court and the DDPR?
17. It is common cause that there is no provision in the Labour Code (Amendment) Act 2000 on the right to non-legal practitioner's representation in the Labour Appeal Court. In our view, Advocate Teele's submissions are reminiscent of long been pressure for departure from the orthodox approach of positivism, with its largely British roots, towards the approach of the Courts in the United States of America.
18. The advocated shift in emphasis is from interpreting and finding what the law is to 'innovative interpretation', so as to arrive at what the Court considers the law ought to be, a move from merely interpreting and applying the law to effecting Judge-made law or 'judicial legislation'. There is a plethora of academic literature on this subject. (See, for example, J Dugard **'The Judicial Process, Positivism and**

Civil Liberty' (1971) 88 SALJ at 181 et seq; **B van Niekerk 'The Warning Voice from Heidelberg - The Life and Thought of Gustav Radbruch'** (1973) 90 SALJ at 234 et seq; **B van Niekerk 'Social Engineering in the German Constitutional Court'** (1972) 89 SALJ at 298) et seq; **M M Corbett 'The Road Ahead'** (1979) 96 SALJ at 192 et seq; **C Forsyth and J Schiller 'The Judicial Process, Positivism and Civil Liberty II'** (1981) 98 SALJ at 218 et seq; **J Dugard 'Some Realism About the Judicial Process and Positivism - A Reply'** (1981) 98 SALJ at 372 et seq; **D M Davis 'Positivism and the Judicial Function'** (1985) 102 SALJ at 103 et seq; **C Hoexter 'Judicial Policy in South Africa'** (1986) 103 SALJ at 436 et seq; **M M Corbett JA 'Aspects of the Role of Policy in the Evolution of our Common Law'** (1987) 104 SALJ at 52 et seq.).

Indeed while Parliament has the capacity to have full inquiries and debate on any proposed legislation and thereafter weigh up all the options and implications against the requirements of society as a whole, a Court does not have these advantages. We find ourselves in very considerable doubt as to whether we should fill the lacuna in the law relating to representation in this Court by judicial legislation. In our view the extended interpretation urged would not be interpretation but judicial legislation - a function which is not open to this, or any other, Court. (See **Union Government v Thompson, 1919 AD 404 at p. 425** and **R v Tebetha, 1959 (2) SA 337 (AD) at p. 346**).

19. As LORD EVERSHED, M.R., once put it at p. 613, in **Boddington v Wisson, 1951 (1) K.B. 606**:

But it is not, I conceive, the function of this Court in these cases to do the work of Parliament and indulge in what is referred to as 'judicial legislation'.

20. The Court of Appeal of Lesotho's decision in **Attorney General v Lesotho Teachers Trade Union and Others** (*supra*), is of no assistance on the issue of representation in the Labour Appeal Court? That issue was not even in issue before the Court of Appeal.
21. The only issue on review on the merits before us was whether the Labour Court was correct in altering the award of the DDPR from reinstatement to compensation. Put in its proper perspective, the issue was whether the Labour Court did not fail to appreciate the nature of the issue on which it was required to form an opinion, and accordingly did not and could not have applied its mind properly to the question before it. Generally speaking, the law is settled that, 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 review. (See the **Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111 at 115.**).
22. In our view, the Labour Court was not called upon to decide whether to grant compensation or reinstatement. It was required to *enforce* reinstatement. It had no discretion to alter the award, but to enforce it as it was. Even assuming the Labour Court could properly alter such an award, there were simply no facts for holding the reinstatement was impracticable. In any event, as Advocate Letsie correctly pointed out, no party had asked for such an order before the Labour Court. It was therefore incompetent for the Labour Court to grant an order that was not asked for by any of the parties. The Court acted on speculation which it was in law entitled to do. The Labour Court

therefore acted irregularly in altering the award to one for compensation.

23. In the circumstance, we would make the following order:

- a. No person who is not a legal practitioner is entitled to represent another before this Court performing the functions of a legal practitioner, except an officer of a trade union or employers' organization or employees' organization duly authorized to represent the union or organization itself.
- b. The decision of the Labour Court altering the award of the DDPR from one for reinstatement to one for compensation is set aside.
- c. The Applicant is to comply with the award of the DDPR within thirty days hereof.
- d. Since none of the parties is to blame for the misdirection of the Labour Court, there will be no order as to costs.

24. My Assessor agrees.



K.E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For Applicant: Advocate K. Letsie

For 2nd Respondent: Advocate L.A. Molati
Appearing *Amicus Curiae*: Advocate M. E. Teele

