LAC (CIV) 07/2009

LC/12/2008

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY APPELLANT

AND

MANTSANE MOHLOLO 1ST RESPONDENT

MAMPENYANE THABO 2ND RESPONDENT

THABISO LETUKA 3RD RESPONDENT

CHOPO SEILANE 4TH RESPONDENT

MPATI MAHLOANE 5TH RESPONDENT

EMILE MAKHALANYANE 6TH RESPONDENT

MOEA RAMOKOATSI (Claim withdrawn) 7TH RESPONDENT

MARTIN BOROTHO 8TH RESPONDENT

SEKILIBA NTSELI 9TH RESPONDENT

MALEFANE LEBINA 10TH RESPONDENT

KATLEHO POULA 11TH RESPONDENT

CORAM: THE HONOURABLE DR K.E. MOSITO AJ.

ASSESSORS: Mr L. MOTHEPU

Mr J. TAU

Heard on: 21ST JANUARY 2010

Delivered on: 28TH JANUARY 2010

SUMMARY

Appeal from the Labour Court – Respondents having been retrenched – Respondents having commenced proceedings in the Labour Court without first going through the DDPR – Whether retrenchment cases that fall within the jurisdiction of the Labour Court should necessarily first go through the DDPR for the latter to settle them- Court holding that retrenchment cases must first be conciliated before adjudicated by the Labour Court – Court upholding the appeal on the Labour Court's lack of jurisdiction where a matter falling with the jurisdiction of the Labour Court not previously conciliated. – Appeal upheld with costs.

JUDGEMENT

MOSITO AJ

1. INTRODUCTION

1.1 This is an appeal against the decision of the Labour Court. Two issues only arise for determination in this appeal. The first issue is whether the Court *a quo* was correct in dismissing the Appellant`s point *in limine* that the Respondents were obliged to proceed first in the Directorate of Dispute Prevention and Resolution (DDPR) before they were entitled to bring their claim in the Labour Court. The second issue is whether the Court *a quo* misdirected itself in

granting the Respondents' condonation application. If the jurisdictional question is answered in favour of the appellant, there would be no need for the second issue to be determined as it would be clear that the Labour Court lacked jurisdiction even to consider the condonation application. I turn now to consider the question of the jurisdiction of the Labour Court.

2. Jurisdiction of the Labour Court

2.1 The first ground of appeal and which the appellant had raised *in limine* in the Court *a quo*, related to the jurisdiction of the Labour Court to entertain the matter. The question of jurisdiction as raised in the present case is that, the Labour Court had no jurisdiction to entertain the case of the respondents in the manner it did in as much as the case had not been referred to the Directorate of Dispute Prevention and Resolution (DDPR) for conciliation before it was referred to the Labour Court for adjudication.

2.2 The Labour Court was first established by the **Labour Code Order No.24 of 1992**. It was given the power, authority and civil jurisdiction to adjudicate over labour disputes under the Code. Section 25 of the Code provided that the jurisdiction of the Labour Court shall be exclusive as regards any matter provided for under the Code, including but not limited to trade disputes. It further provided that, no ordinary or subordinate court shall exercise its civil jurisdiction in regard to any matter provided for under the Code. Section 26 of the Code provided that, the jurisdiction vested in the Labour Court shall not limit the jurisdiction of any other court exercising criminal jurisdiction in connection with the prosecution of an offence under the Code. This establishment of the Labour Court as well as the power, authority and civil jurisdiction given to it, marked the beginning of a tag-of-war between the

High Court and the Labour Court over the extent of jurisdictional powers of the two courts in respect of Labour matters. This led to a number of conflicting decisions by the High Court on whether or not the unlimited jurisdiction powers of the High Court were not being interfered with. This also resulted in decisions being made by the Court of Appeal of Lesotho in the past that, interference with the "unlimited original jurisdiction" of the High Court, as provided for in section 119 (1) of the Constitution, can only be effected by express provisions and that labour law provisions which purport to limit the jurisdiction of the High Court will be strictly construed. (See ***A. Makhutla v Lesotho Agricultural Development Bank 1995-1996 LLR-LB 191*** at 194; ***Attorney General v Lesotho Teachers Trade Union and Others 1995-1996 LLR-LB 345*** at 359-360). Later on, the Court of Appeal held in ***CGM Industrial (PTY)(LTD) v Lesotho Clothing and Allied Workers Union and Others LAC(1995-1999)791*** that section 119 (1) of the Constitution cannot be interpreted in isolation and that it must be construed in the light of the Constitution as a whole, but particularly in the light of section 118. It held that the original jurisdiction vested in the High Court in terms of section 119, does not detract from the exclusive jurisdiction conferred by Parliament, in terms of the Constitution, on the Labour Court established in terms of the Code. Notwithstanding the aforegoing decisions, some few cases still show up in the High Court advancing the same arguments, but are nowadays being shown the door out of the High Court with relative ease, as it is now established that it is the Labour Court and not the High Court which has to exercise such jurisdiction. (See for example, ***Vice Chancellor of NUL and Another v Lana LAC (2000 -2004)527*** at 532).

3. Jurisdiction of the Directorate of Dispute Prevention and Resolution (DDPR).

3.1 On the 25th day of April 2000, the **Labour Code (Amendment) Act NO.3 of 2000** came into operation. It *inter alia*, introduced the Directorate of Dispute Prevention and Resolution (DDPR). The DDPR is a semi-autonomous labour tribunal, established in terms of section 46B of the **Labour Code (Amendment) Act, 2000** (the Act). In terms of this establishing Act, the DDPR has the statutory function to attempt to prevent trade (labour) disputes from arising or escalating; to resolve trade disputes through conciliation and arbitration; to advise employers, employers' organizations, employees and trade unions on the prevention and resolution of trade disputes; and to compile and publish information about of its activities, statistics on dispute prevention and resolution and significant arbitration awards. It is a juristic person.

4. Consideration of the submissions by the parties

4.1 As mentioned above, the question to be decided is whether the Court *a quo* was correct in dismissing the Appellant`s point *in limine* that the Respondents were obliged to proceed first in the Directorate of Dispute Prevention and Resolution (DDPR) before they were entitled to bring their claim in the Labour Court. The learned Counsel for the Appellant, Advocate HHT Woker, submitted that, on the Respondents' version the dispute in this matter arose out of a retrenchment situation and this being so, it is a dispute of right as contemplated in Division B of the ***Labour Code (Amendment) Act 2000***. The reason for this, so the argument went, is the Respondents rely on their alleged unfair dismissal where the reason for the dismissal is related

to the operational requirements of the employer. This being so, the matter is one that admittedly falls within the exclusive jurisdiction of the Labour Court to resolve. Advocate B Sekonyela for the respondent agreed with this submission. This Court also agrees with this submission.

4.2 Advocate HHT Woker further contended that, while the Labour Court may have exclusive jurisdiction to "***resolve"*** a dispute of this nature, the fact remains that the settlement of all disputes of right that relate to "***unfair dismissals"*** – which include retrenchments – are first to be referred in writing to the DDPR. Moreover, they have to be referred to the DDPR within six months of the date of dismissal. He relied for this contention on the heading to section 227 of the ***Labour Code (Amendment) Act 2000*** make this clear. It provides for the ***"Settlement of Dispute of Right'***. He argued that this is distinct from the subject-matter of Section 226 which identifies the different types of 'dispute of right' and who has the power to finally "resolve" them, i.e. finally decide them, while section 227 deals with the procedures to be followed in order to get to the point where the dispute can be *resolved*.

4.3 Advocate Sekonyela holds a different view. In the first place he correctly appreciates that the issue is whether the Labour Court had the necessary jurisdiction to hear the matter without first been sent to conciliation in the DDPR. His submission is that section 226 of the Labour Code Amendment Act provides that the Labour Court has "**exclusive jurisdiction to resolve"** the following disputes:

> "…….c) an unfair dismissal if the reason of the dismissal is……

> (iii)…rated to the operational requirements of the employer."

4.4 He further submitted that all the matters under section 226 (1) © are not subject to the arbitration in the DDPR at all. He contends that this is confirmed by section 226 (2) which lists all the matters which even though they are a subject to exclusive jurisdiction of the Labour Court, they may be subject to arbitration in the DDPR. He further submits that, section 226(2) (d) buttresses the issues even further by providing that among those matters which may be subject to arbitration and conciliation by the DDPR the matters under section 226(1) © are excluded from such arbitration inasmuch as it provides that the following disputes of right shall be resolved by arbitration –

> (a) ……..
> (b) ……..
> (c) ……..
> (d) An unfair dismissal for any reason **other than a reason referred to in section (1)(c)** .

4.5 The Learned Counsel further submitted that this leaves no doubt at all that those issues of operational requirements are not subject to arbitration at all. He further submitted that even assuming without conceding that these disputes are subject to conciliation by the DDPR, section 227 is not peremptory. It provides that "Any party to a dispute of right **may** in writing, refer the dispute to the Directorate." He submitted that section 227 (5) refers to disputes under section 226(2) which are disputes which may be adjudicated by the Labour Court. He contends that this section has to be read with section 226 (3) which provides that:

> "Notwithstanding the provisions of this section, the Director may refer a dispute contemplated in a section (2) to the Labour Court for determination if the Director is of the opinion that the dispute may also concern matters which fall within the jurisdiction of the Court".

4.6 Under the circumstances, the Learned Counsel submitted that: (a) the respondents did not have to exhaust the conciliation process in the DDPR prior to their lodging their application in the Labour Court. (b)The Labour Court correctly held that section 227 (5) only applies to matters which are filed in the DDPR. He further contends that the Labour Court did not err in holding that it had jurisdiction to hear the condonation application and granting such condonation to the respondents. For this contention, the learned Counsel relied on ***Ramabanta & 3 others vs Likhoele Dry Cleaners LC 40/03***, **James Putsoane vs Frasers Lesotho LTD LC 117/00**.

4.7 At the commencement of the proceedings before the Labour Court, respondent's Counsel raised a point *in limine* to the effect that the Labour Court lacks jurisdiction to hear this application as the dispute in issue has not been preceded by conciliation as envisaged by subsection 227 (5) of the Labour Code (Amendment) Act, 2000 (the Act).

4.8 It is worth noting at this juncture that retrenchment falls within the scope of dismissals that have been exclusively reserved for determination by the Labour Court in terms of section 226(1) © (iii) of the Act, it being a dismissal related to the operational requirements of the employer. In order

to appreciate respondent's Counsel's argument, it would be fitting to quote section 227 (5) in extensor. The section reads:

> *If the dispute is one that should be resolved by adjudication by the Labour Court, the Director shall appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court.(underlining added)*

4.9 He underscored the use of the word "shall" used in the subsection and inferred that since it has an imperative implication in terms of section 14 of the **Interpretation Act, 1977**, it enjoins the applicant to have recourse to the conciliation process before having the matter resolved by adjudication by the Labour Court.

4.10 Read in isolation, section 227 (5) does depict the meaning advanced by respondent's counsel, *viz*. that the mediation process has to be exhausted before any matter can be brought before the Labour Court for determination. On the face of it, the subsection is couched in clear and unequivocal terms. However, read in conjunction with the rest of the subsection under the same subheading, it drives one to a different conclusion. The current construction does not seem to carry the interpretation anticipated by respondent's counsel

5. In order to address this disagreement, I turn now to consider the provisions of sections 226 and 227 of the ***Labour Code (Amendment) Act 2000.*** Section 226 of the Act provides as follows:

> **Division B: Disputes of right**
>
> **226 Dispute of right**
>
> (1) The Labour Court has the exclusive jurisdiction to resolve the following disputes:
>
> (a) subject to subsection (2), the application or interpretation of any

provision of the Labour Code or any other labour law;

(b) an unfair labour practice;

(c) an unfair dismissal if the reason for the dismissal is –

(i) for participation in a stride;

(ii) as a consequence of a lockout; or

(iii) <u>related to the operational requirement of the employer</u>.

(2) The following disputes of right shall be resolved by arbitration –

(a) a dispute referred by agreement;

(b) a dispute concerning the application or interpretation of

(i) a collective agreement;

(ii) a breach of a contract of employment;

(iii) a wages order contemplated in section 51;

(c) a dispute concerning the underpayment of any monies due under the provisions of the Act;

(d) an unfair dismissal for any reason other than a reason referred to in subsection (1)©.

(3) Notwithstanding the provisions of this section, the Director may refer a dispute contemplated in subsection (2) to the Labour Court for determination if the Director is of the opinion that the dispute may also concern matters that fall within the jurisdiction of the Court. *(Underlining is mine for emphasis)*

6. Section 227 also has application to the resolution of the present point. It provides as follows:

> **227. Settlement of disputes of right**
>
> (1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate –
>
> (a) if the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal;
>
> (b) in respect of all other disputes, within 3 years of the dispute arising.
>
> (2) Notwithstanding subsection (1), the Director may, on application, condone a late referral on good cause shown.
>
> (3) The party who refers the dispute shall satisfy the Director that a copy of the referral has been served on all the other parties to the dispute.
>
> (4) If the dispute is one that should be resolved by arbitration, the Director shall appoint an arbitrator to attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.
>
> (5) If the dispute is one that should be resolved by adjudication in the Labour Court, the Director shall appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court.
>
> (6) If the dispute is resolved –
>
> (a) the conciliator or arbitrator shall issue a report; and

(b) the settlement shall be reduced to writing and signed by the parties to the dispute.

(7) If a dispute contemplated in subsection (4) remains unresolved after the arbitrator has attempted to conciliate it, the arbitrator shall resolve the dispute by arbitration.

(8) If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the arbitrator may –

(a) postpone the hearing;

(b) dismiss the referral; or

(c) grant an award by default.

(9) If a dispute contemplated in subsection (5) remains unresolved after 30 days from the date of the referral –

(a) the conciliator shall issue a report that the dispute remains unresolved;

(b) any party to the dispute may make an application to the Labour Court.

(10) In the report contemplated in subsection (9) (a), the conciliator shall record any failure to attend a meeting convened by the conciliator to resolve the dispute.

(4) In determining any order of costs contemplated in section 24(1), the Labour Court shall take into account any failure to attend a conciliation meeting referred to in the report contemplated in subsection (10). *(Underlining is mine for emphasis)*

7. The learned Counsel further contended that, the Respondents failed to refer the matter to the DDPR within six months of the date of dismissal and, have

failed to apply for condonation before the DDPR for their said failure. It follows, so the argument proceeded, that none of the jurisdictional steps set out above, which were prerequisites to the Labour Court being approached, were taken by the Respondents. The effect of the Respondents' failure to do so was to divest the Labour Court of jurisdiction to deal with the matter. Accordingly, so the argument proceeded, the Labour Court *a quo* should have upheld the Appellant`s point *in limine*.

8. The learned Counsel further argued that, in terms of Section 227(5) of the **Labour Code (Amendment) Act 2000** a dispute such as this – which can only be resolved by "**adjudication**" in the Labour Court – must first be referred to or processed by an arbitrator appointed by the Director of the DDPR who must attempt to resolve the dispute by conciliation *before the matter is referred to the Labour Court*"**.** This, so the argument proceeded, must happen within 30 days of the referral, failing which the conciliator must issue a report that the dispute remains unresolved. Only then would it be permissible for a party to the dispute to make application to the Labour Court. Advocate Woker further submitted that the appellant submits that the interpretation of the relevant sections as set out above arises from the plain and ordinary meaning of the words themselves as they appear in the various subsections. Indeed we agree with him that there is no ambiguity or glaring omission in the said sections. There is no contradiction or anomaly. It may be that the Legislature could have said it more directly; but the only conclusion that arises from a reading of all the subsections taken together is that the Legislature intended that persons dismissed for operational reasons are obliged first to proceed in the DDPR within six months of the dispute arising where an attempt is to be made to resolve the matter by conciliation.

9. If conciliation fails then the Labour Court can be approached for the Labour Court to ***"resolve"*** the dispute by ***"adjudication"***. The fact that the Labour Court has exclusive jurisdiction to resolve (as opposed to conciliate) disputes arising out of dismissals for operational reasons does not give rise to any tension or contradiction. The Labour Court resolves the dispute; the DDPR attempts to settle it. The DDPR cannot adjudicate the dispute; only the Labour Court can do that.

10. Mr Woker further submitted that this interpretation is correct is also apparent from the following: (a) Previously – prior to the 2000 amendment – all referrals of disputes to the Labour Court had to be referred to the Labour Court within six months: (b), the legislation that repealed section 70 i.e the 2000 amendment, not only repealed section 70, but it also introduced a whole new mechanism for the resolution of labour disputes vis via the DDPR where reconciliation and mediation are encouraged. In other words, it was the intention of the Legislature that every attempt to settle a labour dispute must first be made before it is allowed to go to trial and to this end the Legislature created the necessary machinery to do so, namely the DDPR. In my view, by enacting the 2000 Amendment, the Legislature created a specialist forum with expertise in labour matters involving a departure from the way things had previously been done. Previously the **Labour Code Order** conferred exclusive and original jurisdiction on the Labour Court to deal with all employment disputes. There was no other forum a litigant could go to have his/her employment dispute addressed. All this was radically changed in 2000 when the Code was amended by Act 3 of 2000. The amendment introduced a whole new approach to the resolution of labour disputes. This new legislation clearly contemplated that the DDPR would be

the forum of first instance for the settlement of labour disputes. If it couldn`t settle them then it was to arbitrate them and only the most serious were reserved for adjudication in the Labour Court. These are the disputes referred to in Section 226(1) of the Code. The 2000 amendment took away the Labour Courts` original jurisdiction in the sense that the DDPR now became the place where settlement rather than litigation was promoted. Clearly, the Legislature intended that the DDPR was to be the place of first instance in labour disputes where conciliation and mediation and settlement was to be encouraged. Only if this failed then the more serious matters were to be adjudicated upon by the Labour Court while the less serious ones were to be resolved by arbitration in the DDPR itself. The historical evolution of the relevant legislation in Lesotho as well as the words used therein all point to this. It will be remembered that section 4 of the Labour Code Order 1992 provides that the interpretation of the Code should be undertaken in conformity with the ILO Conventions and Recommendations. This interpretation is also consistent with ***ILO Recommendations 166 of 1982*** and 158 of 1982 which encourage consensus-type resolution of disputes arising out of dismissals at the initiative of the employer.

11. Mr Woker argued that the judgments of the Labour Court in, for instance, ***Thamahane Rasekila v Tele-com Lesotho (Pty) Ltd LC93/01*** and ***James Lefu Phatsoane v Frasers Lesotho Ltd LC117/00 and Lehlohonolo & Others v the LHDALC33/08*** were wrongly decided. Mr Woker argued that, if the Rasekila and Putsoane judgments referred to above have been correctly decided, then it would mean that retrenchment-type dismissals fall outside this new framework. In other words, they cannot be conciliated or mediated by the DDPR. He argued that this would mean that there are time-

frame for these dismissals to be referred to the Labour Court; they can be referred to the Labour Court at any time. I now turn to deal with this jurisdictional issue.

12. Before I consider the arguments advanced above, it is convenient to consider the Labour Court judgments that the parties sought to rely upon herein. In our view, the case of ***Thamahane Rasekila v Tele-com Lesotho (Pty) Ltd LC93/01*** referred to above is distinguishable from the present case as that case did not concern retrenchment-type dismissals. It related to dismissals that are arbitrable by the DDPR. The Labour Court was therefore correct in requiring that the matter ought to have been referred to the DDPR. The case of ***Ramabanta & 3 others vs Likhoele Dry Cleaners LC 40/03***, is also distinguishable from this case in as much as, that case related to a situation where in the case had first been referred to the DDPR and later to the Labour Court, which is the issue contended for *in casu*. In the case of **James Putsoane vs Frasers Lesotho LTD LC 117/00** the Labour Court held that section 227(5) of the Act deals with disputes that are filed with the DDPR**.** This is of course correct, as long as it is understood that, the dispute in issue should be one that should be resolved by adjudication in the Labour Court. In such a situation, the Director is enjoined to appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court for resolution in exercise of its exclusive jurisdiction. No time-frame is expressly provided for in respect of the referral of such matters to the Labour Court after conciliation has failed. However, the retrenchment-type dismissals must first be referred to the DDPR within six months to see if it could settle through conciliation. If it fails, the litigant is then free to approach the Labour Court for it to adjudicate the matter. It seems to us that

it was the intention of the Legislature that all disputed dismissals – as distinct from all other disputes" which must be referred within three years of the dispute arising – must first go via the DDPR within six months and only after the DDPR has done its work can those disputes, reserved for the exclusive jurisdiction of the Labour Court, be entertained and resolved by it.

13. In amending the Code in 2000 it is clear that the Legislature intended to introduce a new mechanism for resolving labour disputes which was intended to be speedy and which was intended to avoid protracted litigation. To this end dismissal-type disputes have to be (and should be) dealt with in the DDPR within six months of the cause of action arising. We agree with Mr Woker that, it would give rise to a glaring anomaly if retrenchment-type dismissals could be brought at any time simply because of the nature of the dispute i.e. simply because it is retrenchment-type dismissal whereas all other disputes have to be lodged either within six months or three years depending on the nature of the dispute.

14. Moreover, employers should be entitled to feel secure that they can get on with their affairs if no claim is brought against them after six months has lapsed from the date of retrenchment. This gives rise to certainty which in turn is conducive to direct foreign investment which is good for further job creation. These are accordingly sound policy reasons for concluding that the DDPR should first have been approached. The Appellant submitted that the Court *a quo* lacked jurisdiction to hear the matter. We agree with this submission. It follows that the Appellant`s point *in limine* should have been upheld. We agree with the remarks in **Queenstown Fuel Distributors CC v**

J Labuschagne and others (2000)21 ILJ 166 (LAC) 172I onwards in which Conradie JA

> [18] …The idea of the labour law reforms was to take most of the (less important) individual dismissals out of the courts altogether and to entrust their resolution to quasi-judicial bodies which could deal with them swiftly and relatively informally. The more socially disruptive – and potentially explosive – dismissals, such as dismissals arising from strike action or for operational reasons, were left to the labour court to resolve….. Not only were the less contentious dismissals relegated to less important *fora* but the right to have the decisions of those *fora* adjusted by a superior tribunal was severely curtailed. Testing could now only be done on review and then only on certain fairly narrow grounds.
>
> [20] The pattern is that of greater indulgence in regard to matters of greater social and economic importance, and lesser indulgence where the aim of the dispute resolution procedures is to ensure that matters are dealt with swiftly and determined once and for all, subject to a review procedure designed to ensure an acceptable level of administrative justice….. The legislature evidently considered that our country lacked the resources to permit individual dismissal disputes to go on endlessly. This is an argument favouring a premptory intention

15. Indeed even in our country, the more socially disruptive – and potentially explosive – dismissals, such as dismissals arising from strike action or for operational reasons, were left to the labour court to resolve. They are not matters for resolution by the DDPR.

16. From the preceding arguments, it is clear that Advocate Worker's argument is based on the distinction between the use of the words "resolved" and "settlement" as used in the Act. Is there a real difference in meaning between these words as they appear in the Act? In South Africa, article 34 of the Constitution as cited by Boulle and Rycroft in Boulle, Laurence and Alan Rycroft ***Mediation: Principles, Process, Practice*** (1997) Butterworths.

(note **Error! Bookmark not defined.**) at 231. reads: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum." It has been suggested that the use of the word 'resolved' in article 34 implies a final resolution of a dispute by mediation, adjudication or arbitration. (Cf Christie in Du Toit et al ***The Labour Relations Act of 1995*** at 327; E van Kerken '**Arbitrasie en die Howe' (1993) 13 *ILJ* 1**7 as cited by Boulle and Rycroft (note **Error! Bookmark not defined.**) at 231 *supra*).

17. The reason for the termination of the respondent's employment was based on what could be described as the "operational requirements" of the second appellant as the employer. Section 66 of the Labour Code deals in subsection 1 (c) with dismissal (as defined in section 68), where the reason for the termination is based on the "operational requirements" of the employer. It provides that:

> (1) An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is
>
> - (a) ……;
> - (b)……. or
> - (c) based on the operational requirements of the undertaking, establishment or service.
>
> (2) Any other dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment.

18. Section 226 of the Labour Code, introduced by section 25 of the Labour Code (Amendment) Act, 3 of 2000, ("Labour Code Amendment Act"), provides that the Labour Court has the exclusive jurisdiction to resolve disputes relating to "dismissal" (as defined in section 68) where the reason for the dismissal is related to the "operational requirements" of the employer (as provided for in section 66 (1) (c) referred to above). The relevant portion of section 226 reads as follows:-

> "(1) The Labour Court has the exclusive jurisdiction to resolve the following disputes:
> (a) subject to subsection (2), the application or interpretation of any provision of the Labour Code, or any other labour law;
> (b) ……..
> (c) an unfair dismissal if the reason for the dismissal is-
> (i) ……..
> (ii) ……...
> (iii) related to the operational requirements of the employer."

19. Upon the examination of the section, we are in respectful agreement with the view taken by the Court of Appeal of Lesotho in the case of ***Vice Chancellor of NUL and Another v Lana LAC (2000 -2004)527*** at 532 in which Grosskopf JA (as he then was), expressed himself in the following terms:

> 13. In my view the legislation referred to above clearly shows that the Labour Court had exclusive jurisdiction in the present case to resolve the dispute as to whether the respondent was dismissed (as defined in section 68 (b)), and whether the reason for his dismissal was based on the "operational requirements" of the second appellant, as required by section 66 (1) for a fair dismissal.

20. In ***CGM v LECAWU and Others 1999-2000 LLR-LB 1*** at 6-7, the Court of Appeal of Lesotho held that:

> "…The manifest purpose of the legislature in establishing the Labour Court was to create a specialist tribunal with expertise in labour matters. As **Botha JA** said in **Paper, Printing, Wood & Allied Workers' Union & Pienaar NO** 1993 (4) SA 621 (A) at 637 A-B.
>
> > 'The existence of such specialist Courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary Courts.'
>
> See also **Amalgamated Clothing & Textile Workers Union v Veldspun Ltd** 1994 (1) SA 162 (A) at 173 G-H.
>
> That is precisely what the legislature sought to achieve by the enactment of the Code. Its power to do so emanates from section 118 (1) of the Constitution."

21. The Court of Appeal in ***Vice Chancellor of NUL and Another v Lana*** (supra) at 533 further observed that:

> 16. The intention of Parliament to confer exclusive jurisdiction on specialist tribunals with expertise in labour matters and the aim of the legislature to refer all matters concerning industrial relations to the Labour Courts become apparent when the 2000 amendments to the Labour Code are considered. I have already referred to section 226 of the Labour Code which was introduced by section 25 of the Labour Code Amendment Act of 2000. Section 226 confers exclusive jurisdiction on the Labour Court to resolve certain specific disputes. The substitution of section 25 (1) of the Labour Code is another example of the legislature's intention to grant exclusive jurisdiction to the Labour Court in specific instances.

22. In my opinion therefore, while the Labour Court has been given jurisdiction to *resolve* dismissal type disputes, the jurisdiction to *settle* such dispute repose in the DDPR. The DDPR has jurisdiction to attempt to settle disputes before such disputes can be ultimately resolved by the adjudication in the Labour Court. For the above reasons, the appeal succeeds with costs.

23. This is a unanimous decision of this Court.

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K.E. MOSITO AJ

Judge of the Labour Appeal Court

For Appellants: Advocate H.H.T Woker

For respondent: Advocate B. Sekonyela