IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

Case No. : LAC/REV/05/11

In the matter between:

MAMATSELISO TSOANA & 61 OTHERS	Applicants
and	
NIEN SHING INTERNATIONAL (PTY) LTD	1st Respondent
LABOUR COURT PRESIDENT	2nd Respondent

CORAM:	C.J. MUSI, AJA
ASSESSORS:	MRS LEBITSA MRS MOSEHLE

HEARD ON:	14 JUNE 2013

DELIVERED ON:	25 JUNE 2013

JUDGMENT BY:	C.J. MUSI, AJA

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[1] This is a review application wherein the applicants sought to have the decision of the President of the Labour Court (second respondent) in case number LC/10/2010 set aside and allied thereto an order that the matter should start *de novo* before another presiding officer.

[2] The applicants were employed by the first respondent. They were part of approximately 1200 employees of the first respondent, who were dismissed for participating in an illegal strike on 11 December 2009. They were members of the Factory Workers' Union (FAWU). They unsuccessfully referred an unfair dismissal dispute to the Directorate of Dispute Prevention and Resolution (DDPR). Some of them filed an unfair dismissal claim in the Labour Court. Their claim was dismissed. The current applicants save for one of them, were not part of that claim. When their claim for unfair dismissal was heard it was dismissed on the basis that the "claim relates to the same events which we made Judgement in respect of events of 11th December 2009 (sic)." The applicants were not satisfied with the decision of the Labour Court and launched these proceedings.

[3] Before dealing with the merits of the review application I pause to deal with the applications for condonation launched by the applicants and the first respondent.

[4] The applicants applied for condonation of the late filing of this review application. The first respondent, on the other hand, applied for condonation because it filed its answering affidavit late. I will consider the applicants' application first.

[5] The order of the Labour Court was made on 20 April 2011. The review application was launched on 21 July 2011.The applicants state that they did not know what to do after the order was made. They then consulted their current

attorneys, who informed them that a review application will have to be launched. The applicants, being unemployed, did not have sufficient funds and some of them had to borrow money to put their attorneys in funds. They also had to go to different places to get the signatures of all the applicants so that the attorneys could be properly authorised to act on their behalf. They all signed the authority to represent on 11 May 2011.

[6] The first respondent opposes the application on the basis that the delay was self-created and unreasonable given the fact that the judgment under case number LC/36/10 was already known. It was also argued, by the first respondent, that the applicants' lack of financial means cannot be a factor for the delay because when they signed the authority to represent on 11 May 2011 they had money.

[7] The Rules of the Labour Appeal Court do not prescribe a time within which a review application should be launched. That being the case, the review application should be filed within a reasonable time, without undue delay.

[8] In my view, the delay in launching these review proceedings was not inordinately long. It was three months. The first respondent did not argue that the period of three months was inordinately long.

[9] The explanation for the delay is also acceptable. Although the first respondent argued that the lack of financial means is

not a valid reason, the reality is that attorneys and advocates, in most cases, prefer or demand to have payment of a substantial portion, if not all, of their fees upfront. If a client does not have the money, chances are that his/her legal representative will not act on his/her behalf. In my view, considering the length of time and the number of applicants, as well as their employment status, the explanation is reasonable.

[10] The applicants also have very good prospects of success in this matter, as I will demonstrate presently. The matter is obviously of high importance to the applicants, because they have lost their jobs and the application is geared at their reinstatement. The doors of justice should not be closed in front of them under these circumstances. Their application for condonation ought to be granted.

[11] The first respondent only filed its answering affidavit on 20 December 2011. Its legal representative stated that the delay was caused by the fact that the former representative of the first respondent did not give him all the documents relating to this matter. He contacted FAWU's counsel in order to ascertain the veracity of the allegations made against it. According to him, he was consistently promised that the documents will be forthcoming, but they were not given to him. When he was informed on 15 December 2011 that the matter was set down for 20 December 2011 the answering affidavit and application for condonation were filed. Mr Kao, on behalf of the first respondent, argued that

the applicants did not comply with Rule 15(6) and therefore the first respondent could not file its answering affidavit timeously.

[12] Rule 15(6)(b) reads as follows:

> "The applicant shall within 21 days after the Registrar has made the record available deliver a notice that the applicant stands by its notice of motion."

[13] Rule 15(7), on the other hand, provides that:

> "Any person wishing to oppose the application to review shall within 14 days of receipt of a notice referred to in sub-rule (6) deliver an affidavit in answer to the allegations made by the applicant."

[14] The applicants conceded that they did not comply with Rule 15(6)(b) and that the explanation for the delay becomes irrelevant if it is established that they (applicants) did not comply with Rule 15(6)(b) in order to trigger Rule 15(7). In the circumstances, the first respondent's condonation application should also be granted. I now turn to the merits.

[15] As stated above, all the applicants duly signed an authority to be represented by FAWU at the DDPR. There were 134 applicants represented by FAWU at the DDPR. Conciliation failed.

[16] FAWU decided to proceed to the Labour Court under case number LC/36/10. Although the matter in the Labour Court is styled Lerato Mohapi and 93 others only 16 ex-employees of the first respondent signed an authority to be represented by FAWU. FAWU, however, indicated in its originating application that it represents all 94 applicants. Only one person, Lerato Mohapi, of the 16 who gave FAWU authorisation to represent them, is also an applicant in this matter. The rest of the applicants instructed K.E.M. Chambers to represent them. They all signed the necessary authority to represent in favour of K.E.M. Chambers on 23 June 2010. They filed their originating application in the Labour Court under case number LC/10/2010.

[17] For unknown reasons case number LC/36/2010 (the FAWU case) was heard before LC/10/2010. The FAWU case was dismissed by the Labour Court. When the present applicants wanted to proceed with their case (LC/36/2010) the first respondent raised a special plea of *res judicata*, which was upheld by the Labour Court.

[18] The applicants stated that they were not parties to the FAWU case as they had already instructed K.E.M. Chambers to appear on their behalf. Mr Rafoneke, on behalf of the applicants, submitted that the applicants did not mandate FAWU to represent them in the Labour Court and that FAWU's mandate ended when conciliation failed. He argued that the Labour Court erred in finding that the applicants

were properly before it, because they did not sign any authority to represent.

[19] Mr Kao, on behalf of the first respondent, argued that the Labour Court in LC/36/10 made a decision as to who the applicants were and that included the current applicants. The decision in LC/36/10 is therefore applicable to the current applicants.

[20] Rule 26 of the Labour Court Rules reads as follows:

> "Where a party is represented by a legal practitioner, or any of the persons specified in section 28(1)(a) of the Code, that party shall file in Court a written authority for such representation in or substantially in accordance with Form LC6 contained in Part A of the Schedule."

The relevant part of section 28 of the Code reads 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 employer's organisation;
>
> b) by a legal practitioner, but only when all the parties, other than the Government, are represented by legal practitioners…".

[21] It was common cause that the authority to represent that conformed with form LC 6, was only signed by 16 applicants, who are, bar one, not applicants before us.

[22] The Labour Court did not specifically enquire or deal with the issue of authority to represent. It accepted, so it would seem, that annexure "A" to the originating application in the FAWU case was a proper authority to represent.

[23] The need for and importance of a proper authority to represent cannot be overemphasised. It is not merely a formality that must be complied with. It determines whether a person has standing to represent another. In the absence of a proper mandate to represent, one cannot say that FAWU was authorised to institute the proceedings on behalf of these applicants. Moreover, it is common cause that these applicants filed their papers under case number LC/10/2010 before the FAWU case was filed.

[24] The two cases should have been consolidated and not dealt with separately. The fact that they were prosecuted separately and a separate mandate given to K.E.M. Chambers is indicative of the fact that the current applicants did not want FAWU to represent them in the Labour Court.

[25] *Res judicata* is defined by Hoffman and Zeffertt: **The South African Law of Evidence**, 4th Ed at 337 as follows:

> "… that a prior final judgment had been given in proceedings involving (a) the same subject matter, (b) based on the same res or thing, (c) between the same parties, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the

> other on the same case, for the same relief, can be met by the exception *res judicata*."

See also **Fidelity Guards Holdings (Pty) Ltd v PTWU and Others** (1998) 10 BLLR 995 (LAC) and **Horowitz v Brock and Others** 1988 (2) SA 160 (A) and 178H – I.

[26] Parties should not be allowed to sue each other on the same cause of action demanding the same relief. It is against public policy to do so. It is also against the principle of finality. Once a matter has been settled by way of a final judgment in the proper court, then the aggrieved party must escalate the matter to a higher court by taking it on review or appeal.

[27] The party raising the special plea of *res judicata* bears the onus of proving that the later proceedings involves the same parties, the same subject matter based on the same thing or relief.

[28] In my view, the first respondent has not discharged its onus by proving on a balance of probabilities that the Labour Court adjudicated the matter involving the same parties, because the authority to represent was only signed by 16 applicants. The special plea of *res judicata* must be upheld as far as the 13th applicant, Lerato Mohapi, is concerned. She deposed to the founding affidavit in LC/36/10. She should not be allowed to hunt with the hounds and run with the hares.

[29] It therefore follows that the Labour Court misdirected itself and committed an irregularity by ruling that the plea of *res judicata* should succeed. The order of the Labour Court should therefore be set aside. I do not deem it necessary to order that the matter be heard by another presiding officer because it was heard by the late Mr. Lethobane.

[30] Accordingly the following order is made:

(a) The order of the Labour Court upholding the plea of *res judicata* against the applicants, except the 13th applicant, Lerato Mohapi, is set aside.
(b) The matter is remitted to the Labour Court to deal therewith in accordance with the law.
(c) No order as to costs is made.

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C.J. MUSI, AJA

I agree.

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MRS LEBITSA

I agree.

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MRS MOSEHLE

APPEARANCES:

For the applicants:	Adv Rafoneke
Instructed by:	K.E.M. Chambers
For the first respondent:	Adv Kao

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