IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/A/13//**13

In the matter between:

MOKETE MOHAI 1ST APPELLANT

MAJORO TSABEHA 2ND APPELLANT

AND

LESOTHO ELECTRICITY COMPANY 1ST RESPONDENT

LORDSHIP MR. LETHOBANE J. 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

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

ASSESSORS: MS. P. LEBITSA

MRS. M. MALOISANE

Heard on : 22 JANUARY 2014

Delivered on : 27 JANUARY 2014

SUMMARY

Appeal from the Labour Court to the Labour Appeal Court – applicants complaining that the Labour Court erred in holding that the matter was res judicata and les pendens. – Appellants also complaining of factual findings by the Labour Court.

Held the application for condonation granted as prayed. The appeal succeeds with costs.

JUDGEMENT

MOSITO AJ

1. INTRODUCTION

1.1 This is an appeal from the decision of the Labour Court in LC/REV/64/10 which upheld the award of the DDPR in A0016/12. The appellants are employees of the 1st respondent. In 2007, the 1st respondent enlisted the services of a firm of contractors to carry out a grading system which is referred to in the papers as matrix grading system. It is common cause that that grading system placed the appellants at Grade B3. However, when the appellants received their pay cheques at the end of the month the salary was equivalent to that of employees placed at Grade B2 which was lower than that of Grade B3. It seems that attempts were made at trying to resolve the matter amicably with the 1st respondent but all in vain. The appellants ultimately referred the dispute to the DDPR. The DDPR dismissed the appellants claim on the basis that the matter was *res judicata.*

1.2 The DDPR held that the matter was *res judicata* because there had been a matter before it involving a trade union (of which there is a dispute as to whether appellants were members) and the present 1st respondent. At the time when the present dispute was before the DDPR, it seems that the case between the union and the 1st respondent was pending in the Labour Court on review. The Labour Court had not as yet disposed off the matter.

1.3 The appellants then brought the present dispute on review before the Labour Court contending that the learned arbitrator misdirected himself in upholding the point that the matter was *res judicata*. The Labour Court

dismissed the application and ordered that there would be no order as to costs. The appellants then brought the present appeal.

2. APPLICATION FOR CONDONATION

2.1 Before considering the grounds of appeal on which the present the case was brought, it is perhaps apposite to consider one aspect of this case about condonation. The judgement of the Labour Court has two dates on it on the first page, the following words appear "Dates: 17/08/11, 20/10/11" at the end of the judgment the following words appear "Thus done at Maseru this 7th day of December 2011." The appellants noted an appeal before this court on 14 May 2013. It follows therefore that at the cursory look of the dates mentioned above; the appeal was noted out of time. It would therefore follow that the appellants ought to have applied for condonation for the late filing of the appeal.

2.2 However, the problem seems to be much more profound than that. The problem is that while the parties in this matter are in agreement that the matter brought by the present appellants before the Labour Court was argued to finality before the court in 2011, none of the parties appears to know when the judgment was actually handed down. The dates as quoted above do not shed some light on the issue either because the judgment does not say when the judgment was handed down. In their affidavits filed in support of the condonation application, the applicants point out in essence that they had been visiting the office of the Registrar of the Labour Court ever-since the matter was argued in 2011 trying to find out as to when judgment would be handed down in the matter. They were unable to find out when. The 1st appellant deposes that their lawyers had been frequenting the offices of the Registrar of the Labour

Court since October 2011 looking for the judgment all in vain. She goes on to aver that it was only in February 2013 that their lawyer happened upon the some minute when they were perusing the file of the Labour Court.

2.3 The minute was that of the President of the Court. That minute reflected that the President of the Labour Court had on 12 December 2011 delivered his judgment. The deponent also indicates that the President gave judgment to the 1st respondent's counsel who appeared alone. It appears that this is not accepted by the 1st respondent's lawyers. Mr Setlojoane informed this court that it is not true that he was ever given or any of the lawyers of the 1st respondent, the judgment by the President. The long and the short of the story seems to be that neither of the parties new when the judgment was handed down if at all inasmuch as none of them is in a position to say when it was handed down.

2.4 However, *ex abundanti cautela*, the appellants applied for condonation for the late noting of the appeal. The contention is that they did not have money when in February they came to know that the judgment was available. They had to look around for money in order to note an appeal through securing the services of a lawyer. It seems to me that they were too months late, they however ultimately secured the money and brought the appeal as it is now before court. I say two months late with some degree of reluctance because none of the parties seems to known when the judgement was actually handed down and who was actually in attendance when it was so handed down. Mr Setlojoane informed the court that the judgment was brought to their offices by a Mr Toka, who was a messenger of the Labour Court. Unfortunately both the President of the Labour Court and Mr Toka who was his driver and messenger have

since passed away. There is no knowing as to when the judgment was handed down if it was handed down at all. It is difficult to pinpoint a date on which it could be said that it was delivered on that date. Even assuming that it was handed down on the 12th day of December 2011 as reflected in the minute of the President, it is not shown who was in attendance when it was handed down and whether any of the parties was before court. For all we know, in February 2013 a minute that the judgment had been handed down was found.

2.5 In the above circumstances, and considering the fact that the applicants indicates that they did not have resources to bring the appeal at the time they happened upon the judgment, and considering the importance of the case to the appellants, the prospects of success and the likely prejudice to the parties as well as the need for finality in litigation, we have exercised our discretion to grant the application for condonation.

3. DISCUSSION OF THE GROUNDS OF APPEAL

3.1 There are four grounds of appeal in this matter. The first one is that the Court erred in law in finding that his legal principles of *res judicata* and *lis pendens* applied to this case. the essentials for the *exceptio res judicata* are three-fold, namely that the previous judgment was given in an action or application by a competent Court (1) between the same parties (2) based on the same cause of action (3) with respect to the same subject matter, or thing. Requirements (2) and (3) are not immutable requirements of *res judicata*. Steyn CJ in **African Farmers and Townships v Cape Town Municipality 1963 (2) SA 555 (A) at 562D** commented that:

> *"The Rule appears to be that where a court has come to a decision on the merits of a question in issue, that*

question, at any rate as a causa petendi of the same parties cannot be resuscitated in subsequent pleadings.

3.2 Thus, the general principle is that a matter adjudged upon is *res judicata* and the decision is accepted as the truth (*res judicata pro veritate accipitur*).

3.3 The general principle is that "if an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, it is open to the defendant to take the objection of *lis pendens,* that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first".*(**Herbstein & Van Winsen 'Supreme Court Practice* **4th Ed. P 249**).

3.4 Unlike *res judicata with* the defence of *lis pendens* is not an absolute bar. It is within the court's discretion to decide whether proceedings before it should be stayed pending the decision of the first-brought proceedings, or whether it is more just and equitable that the proceedings before it should be allowed to proceed. ***(Michaelson v Lowenstein*** 1905 TS 324 at 328; ***Westphal v Schlemmer*** 1925 SWA 127; ***Loader v Dursot Bros (Pty) Ltd*** 1948 (3) SA 136 (T).). Considerations of convenience and fairness are decisive in determining this issue. In ***Yekelo v Bodlani*** 1990 (3) SA 970 at 973 the Court held that, whilst the institution of two actions is *prima facie* vexatious, 'it is within the court's discretion to allow an action to continue should this be considered just and equitable despite the earlier institution of the same action'.

3.5 It seems that in the case before us there is no evidence for holding that the appellants were members of the union which it is said had agreed with the 1st respondent on issues relating to grading. In fact the

appellants themselves disposed to an affidavit in which they were saying they were not members of that union. The union could not therefore purport to represent them. We are of the view therefore that the parties that were involved in that other case which was pioneered by the union were not the same parties as the parties in the present case. It was therefore not turnable to hold that the case was *res judicata.* The first ground is accordingly upheld.

3.6 The second ground of appeal is that the the Court misdirected itself in its factual finding that Applicants were complaining of being downgraded from grade B3 to B2. It appears from the referral form on page 4 of the Record that the nature of the dispute before the DDPR was that the applicants were complaining that the employer had breached the agreement between them and the employer that they were employed as "extra heavy duty drivers". The same appears on page 10 of the Record. It follows therefore that the issue before the DDPR and hence the Labour Court was not one of downgrading or underpayments. The issue was one of breach of contract between the parties which was a personal issue to be pioneered by the respective appellants. We are therefore of the view that the Labour Court misdirected itself in its factual finding that appellant were complaining about being downgraded from Grade B3 to B2.

3.7 The next ground of appeal is that the Court misdirected itself in making the factual finding that Appellants were Heavy Duty Drivers and therefore entitled to being paid in terms of grade B2. Our finding on the papers that appellants were complaining of having been extra heavy duty drivers also disposes off this issue. On the facts it appears that the appellants were extra heavy duty drivers and not heavy duty drivers. They were therefore entitled to be remunerated at Grade B3 and not B2.

3.8 The last ground of appeal is that the appellants complain that the Court *a quo* erred and misdirected itself in failing to take into account that the outsourced expert hired by Lesotho Electricity Company placed Applicants Grade B3 as Extra Heavy Duty Drivers in 2008 through the "Matrix Grading System" as opposed to the other Union Members who were placed at Grade B2 as Heavy Duty Drivers. It seems to us that on the Record, the appellants were indeed placed at B3 according to the Grading Matrix. In fact the letters that were written by the Managing Director to the appellants clearly indicates that their being placed at B2 was made as a result of the discussions between the trade union "(of which they were not members) and the decision of management". The appellants were never involved in that discussion and the letters do not indicate that they were ever involved let alone consulted.

4. CONCLUSION

In conclusion, it is apparent that this appeal is bound to succeed. It is accordingly ordered that:

(a) The application for condonation is granted.
(b) The appeal succeeds with costs.

This is an unanimous decision of the court.

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DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellants : Advocate M. Chonela

For the Respondent : Advocate R. Setlojoane