LAC/CIV/A/20/14

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between

'MATŠEPO MOHALE	**1ST APPELLANT**
MPHO LETOOANE	**2ND APPELLANT**
'MAMOLLELOA MPATI	**3RD APPELLANT**
'MATUMELISO THAKHOLI	**4TH APPELLANT**
SENATE LEROTHOLI	**5TH APPELLANT**
'MAMOTHETSI KHATI	**6TH APPELLANT**
'MAPOLO MANKA	**7TH APPELLANT**
'MASEMENYANE SEMENYANE	**8TH APPELLANT**
'MASAENE PHETHOANE	**9TH APPELLANT**
'MALEFU LATELA	**10TH APPELLANT**
'MAKHAHLISO MOKOTJO	**11TH APPELLANT**
KAO TOFOSA	**12TH APPELLANT**
NTHABISENG MONKHE	**13TH APPELLANT**

And

TZICC CLOTHING MANUFACTURERS PTY LTD	**RESPONDENT**

JUDGEMENT

Coram	:	The Hon Acting Justice Keketso Moahloli
Assessors	:	Mrs L. Ramashamole
		Mr L. Matela
Date of hearing	:	9 September 2014
Date of judgement	:	14 November 2014

SUMMARY

Appeal against decision of Labour Court dismissing claim for unfair labour practice – Labour Court must establish real dispute between parties – Not bound by incorrect categorization of dispute by employee – Chief function of the Court is to do substantial justice between the parties - Court must also seek to avoid formality in its proceedings – Discrimination against employees for exercising the right to refer disputes for statutory resolution

ANNOTATIONS

Cases

Buthelezi & Others v Eclipse Foundries Ltd (1992) 13 ILJ 959 (LAC)

Department of Finance v CCMA [2003] 9 BLLR 865 (LC)

Department of Justice v CCMA [2001] 11 BLLR 1229 (LC)

Department of Justice v CCMA [2004] 4 BLLR 297 (LAC)

CUSA v Tao Ying Metal Industries & Others [2009] 1 BLLR 1 (CC)

Kroukam v SA Airlink (2005) 26 ILJ 2513 (LAC)

NUM v Namakwa Sands (a Division of Anglo Operations Ltd) (2008) 29 ILJ 698 (LC)

Van Rooy v Nedcor Bank Ltd [1998] 5 BLLR 540 (LC)

Statutes

Labour Code Order 24 of 1992

Labour Court Rules 1994

Books

Hosten et al, Introduction to South African Law and Legal Theory 2ed Butterworths 1995

MOAHLOLI AJ

INTRODUCTION

[1] This is an appeal against the decision of the Labour Court in case number LC/51/2012, dismissing the claims of 'Matšepo Mohale and 12 others for unfair labour practice on the basis of discrimination.

[2] The Applicants challenge the decision of the Acting Deputy President of the Labour Court on the following grounds:

"(a) The Learned Acting Deputy President erred and/or misdirected himself by disavowing himself of discretionary powers by restricting himself to the provisions of Section 202(2) (b) of the Labour Code when the evidence supports the view that there was discrimination though admittedly it does not fall within the ambit of the said section.

(b) By dismissing the matter before him, the Acting Deputy President erred and misdirected himself in failing to take into account his very own concession to the effect that there was discrimination coupled with the fact that there was a prayer for further and/or alternative relief."

During their submissions Applicants also argued that the Labour Court is a court of equity, whose priority is substantial justice not slavish adherence to formalities.

[3] At the commencement of the hearing Applicants applied for an order condoning the late filing of the Notice of Appeal and the record of proceedings. This was granted.

[4] Applicants further applied for leave to amend the first ground of appeal by removing the words "Section 202 (2) (b)" and substituting them with the words "Section 196(2)". This was also granted.

BACKGROUND

[5] This dispute was unsuccessfully conciliated by the Directorate of Dispute Prevention and Resolution ["DDPR"], and a Report of Outcome duly issued [see page 29 of the record].

[6] The Applicants' union, FAWU, then referred the case to the Labour Court. It's originating application [page 25-26 of the record] sets out the background and nature of the dispute. Applicants claimed that their employer discriminated against them by not allowing them to work overtime and on rest days, while the rest of the workforce was allowed to. They alleged that the employer did this because they had, a month earlier, won a case at the DDPR against the company. The employer was angry when they demanded payment of monies awarded to them in this case, and singled them out for victimisation. [para 4.2-4.4 at pages 25-26 of the record].

[7] Applicants claimed that by treating them in this manner their employer contravened section 196(2) of the Labour Code [para 4.5 of the record].

[8] They therefore asked for the following reliefs:

"(a) That it be declared that the conduct of the respondent company amounts to an Unfair Labour Practice in that discrimination was put in motion,

(b) Respondent be ordered to treat workers equally and not discriminate others to work overtime and on rest days if need be.

(c) Respondent be committed and punished for Unfair Labour Practice in terms of Section 202 (2) (b) of the Labour Code Order, 1992.

(d) Further and/or alternative relief as this Honourable Court may deem fit in the circumstances.

(e) Costs of suit."

[9] The Labour Court dismissed Applicants' claim. It held that:

> "It is clear from a simple reading of [section 196 (2)] that an unfair labour practice in the form of discrimination applies in respect of issues involving discriminatory acts against union members and officials, to compel them to disassociate from unionisation. In Our view, this is not the case of Applicants as their claim has nothing to do with the intend (sic) on the part of the Respondent to compel them to disassociate from their union. Consequently the Applicants have

failed to prove a case for discrimination in terms of section 196(2)." [Para 10 of the Judgment].

[10] In other words the court *a quo* ruled that the Respondent was not liable purely and solely because Applicants had quoted a wrong section of the Code: they had relied on the wrong pigeon hole into which to slot their dispute!

ANALYSIS

[11] It is imperative for judicial officers and practitioners to always remember that the Labour Court is a court *sui generis*. Unlike the other courts of the land it operates subject to the following three legislative injunctions, which define its character:

Firstly, "the need for informality, low cost and expedition in proceedings before [it]";[1]

Secondly, "[It] shall not be bound by the rules of evidence in civil and criminal proceedings";[2] and

Thirdly, "it shall be the chief function of the court to do substantial justice between the parties before it"[3] [my emphasis].

Informality

[12] The first two injunctions are also dealt with in rule 17(2) of the Labour Court Rules 1994 as follows:

> "The Court shall conduct the hearing of an originating application or appeal in such manner as it considers most suitable to the clarification of the issues before it and

[1] Section 27(3) of the Labour Code Order
[2] Section 27(2) of the Labour Code Order
[3] Section 27(2) of the Labour Code Order

> generally to the just handling of the proceedings; it shall, so far as appears to it appropriate, seek to avoid formality in its proceedings and, subject to the provisions of section 29(3) of the Code, it shall not be bound by the rules of evidence in proceedings before courts of law."

[13] The behest or enjoinder to avoid formality means that the court must not be legalistic in its proceedings, as this often invites point-taking and results in disputes frequently getting bogged down in technicalities.

[14] This behest has been interpreted by the South African labour courts to mean, amongst other things, that although as a general rule parties are bound by what appears in the statements of case or responses, "however, this requirement should not be relied upon to place undue technical hurdles before the parties to disputes."[4]

[15] Furthermore the courts have held that a presiding officer is obliged to determine the real nature of the dispute. Although an applicant can choose his or her cause of action, the court must determine the main issue to be decided and the nature of the real issue in dispute.[5]

[16] *In casu* it is significant to remember that the originating application was dawn up by a lay person. Even the inelegant language of the document betrays this. In view of this it was not considerate of the court *a quo* to judge the Applicants harshly, especially considering that when one reads their application it comes out very clearly that their main gripe was that Respondent treated them unfairly by not allowing them to work overtime

[4] Van Rooy v Nedcor Bank Ltd; Cf Buthelezi & Others v Eclipse Foundries Ltd.
[5] Department of Justice v CCMA 2001; Department of Finance v CCMA; Department of Justice v CCMA 2004.

and on rest days. The court *a quo* took a very legalistic and technical approach, which led to a very unfair result. This despite the legislative injunction set out above.

Substantial justice

[17] The court *a quo* also ignored the third injunction which unequivocally enacts that "it shall be the chief function of the [Labour] Court to do substantial justice between the parties before it". [my emphasis]

[18] Substantial justice is defined as "justice of a sufficient degree, especially to satisfy a standard of fairness." That is to say, " justice administered according to the substance and not necessarily the form of the law. [e.g. all pleadings shall be so construed as to do substantial justice.]"[6]

[19] "Substantial justice means justice administered according to rules of substantive law in a fair manner. Here, the litigant's substantive rights are protected from the procedural errors of litigation. Substantial justice ensures a fair trial on merits."[7]

[20] Closer home, Hosten et al[8] write that: "it is not enough for a legal system merely to comply with the fundamental attributes of justice even though tempered by a spirit of equity. [T]o achieve substantial justice it is thought that the legal rules themselves must reflect values which are compatible with standards of reasonableness and have regard for fundamental

[6] Merriam-Webster's Dictionary of Law 1996
see dictionary. findlaw.com/definition/substantial-justice.html

[7] Definitions.uslegal.com/s/substantial-justice/

[8] Introduction to South African Law and Legal Theory, at at p30

rights". "The basic argument here is that law is inherently rigid, thus the fair-minded man or woman does not stand upon the strict letter of his or her rights but is content with less than his or her legal due in order to fulfil the spirit of the law."[9]

[21] *In casu* the court *a quo* accepted that: "Applicants were unfairly treated by the Respondent in excluding them from working both overtime and rest days in the period in issue." It however still insisted that the definitive question was whether [they] were discriminated against in terms of section 196 (2) as they claim and whether they were entitled to remedies under section 202 (2) (b) of the Labour Code [para 8 of the Judgement]. The Court adhered strictly to the rule that Applicants were bound by what they said in their papers. Its inflexibility derogated from the injunctions of substantial justice and informality.

[22] What baffles me is why the court *a quo* did not realise that Respondent's actions constituted discrimination as envisaged by section 196 (1) (b), since Respondent clearly punished Applicants for taking a case to the DDPR against it and winning. Therefore even if Applicants did not establish a case of discrimination in terms of section 196 (2), they established one in terms of section 196 (1) (b). Respondent clearly victimised them and discriminated against them for exercising the right given to them by sections 225 (1) and 227 (1) of the Code to refer a dispute to the DDPR.[10]

[23] As already stated above, the mere fact that Applicants quoted the wrong section of the Code did not absolve the court *a quo* from its responsibility

[9] At fn 58
[10] Compare Kroukam v SA Airlink and NUM v Namakwa Sands

to cut through all claims and counter-claims and reach for the real dispute between the parties. In doing so the court would have not been bound by the labels the parties attached to the dispute, but would have had to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the Applicants and the evidence presented during the trial.[11]

[24] If the court *a quo* had followed this approach instead of holding Applicants to the section 196 (2) they mistakenly quoted, it would have arrived at the correct fair and just answer without much trouble.

[25] I therefore conclude tht the Court a *quo* ought to have found that, on the evidence before it, Respondent had committed an unfair labour practice by visiting on Applicants some negative and punitive consequences for exercising their right to refer their dispute for statutory resolution.

DISPOSITION

[26] For these reasons I make the following order:

1. The appeal is upheld with no order as to costs.

2. The order made by the Court *a quo* is set aside.

3. The Court finds that Respondent has engaged in an unfair labour practice under section 196 (1) (b) of the Labour Code Order 1992.

[11] Cusa v Tao Ying Metal Industries at para 65-66

4. The matter is remitted to the Labour Court for it to hear evidence and make an appropriate order pursuant to section 202 (2) of the Labour Code Order 1992.

[27] This is unanimous decision of the Court.

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KEKETSO MOAHLOLI AJ
JUDGE OF THE LABOUR APPEAL COURT

For Appellant	**:**	Adv MS Rasekoai
For Respondent	**:**	No appearance