

IN THE LABOUR COURT OF LESOTHO LC/26/08

HELD AT MASERU

IN THE MATTER BETWEEN

MOUPO NTOKO	1ST APPLICANT
MOJALEFA PHUMANE	2ND APPLICANT
MOTHABATHE HLALELE	3RD APPLICANT
MATHABO TSENASE	4TH APPLICANT
LIMPHO MOHAPI	5TH APPLICANT
MANNETE LETSOELA	6TH APPLICANT
SEIPATI KHECHANE	7TH APPLICANT
MAMELLO NTSIKA	8TH APPLICANT

AND

LOCAL GOVERNMENT	1ST RESPONDENT
SERVICE COMMISSION	2ND RESPONDENT
LERIBE DISTRICT COUNCIL	3RD RESPONDENT
BEREA DISTRICT COUNCIL	4TH RESPONDENT
MASERU DISTRICT COUNCIL	5TH RESPONDENT
QACHA'S NEK DISTRICT COUNCIL	6TH RESPONDENT
BUTHA-BUTHE DISTRICT COUNCIL	7TH RESPONDENT
MAFETENG DISTRICT COUNCIL	8TH RESPONDENT
QUTHING DISTRICT COUNCIL	9TH RESPONDENT
MOKHOTLONG DISTRICT COUNCIL	

JUDGMENT

Date of hearing : 9/07/09

Locus standi – it is sufficient for a deponent to allege under oath that he or she is authorized to depose to an affidavit on behalf of a juristic person in the absence of concrete evidence to the contrary –

Non-joinder – Applicants failure to join the Government and the Minister of Local Government as their employer is fatal to the whole action-

Dispute of interest – conciliation and mediation are proper mechanism for resolution of interest disputes – They are usually not justiciable on a court of law – Act No.2 of 2008 provide for a conciliation board to resolve dispute of interest.

1. The eight applicants are employed as Senior Legal Officers in the respective District Councils cited as 2nd - 9th respondent. The position of Senior Legal Officer has been classified at Grade LA4 of the District Council Organisational Structure for remuneration purposes. The eight applicants contend that their classification at Grade LA4 constitutes an unfair discrimination in as much as other incumbents of positions who are directly responsible to Chief Executive Officer i.e. District Council Secretary are classified at Grade LA3.
2. Applicants submitted without evidence to back the submission, that the position of Senior Legal Officer in the respective District Councils “fall in the category of Line Managers and also Heads of Department along with the Administration Managers, Human Resources Managers and Finance Managers all of which are directly responsible to Chief Executive Officer that is District Council Secretary” (see para 6 of the Originating Application). Respondents dispute this submission in particular the averrements that Senior Legal Officers fall in the same category with Line Managers and Heads of Department.
3. Applicants contend further that notwithstanding the disparity in the classification and grading of their position vis-à-vis those of the Line Managers and Heads of Departments the workload and the value of work of the incumbents of the three positions of managers and also that of Senior Legal Officers are equal in that:
 - (a) The amount of skill needed is more or less the same in terms of value.
 - (b) The amount of responsibility entrusted to them is more or less equal.

- (c) Both the managers and Senior Legal Officers are on a par in terms of seniority as they are all Heads of Department.
 - (d) The conditions under which work performed by Managers and work performed by applicants are more or less the same.
 - (e) Applicants position has been placed on the same footing and on par with the position of procurement officer and store officers which they submit are lower in seniority and status to the position of Senior Legal Officer.
4. The list of factors applicants allege their workload and that of Line Managers are the same, is long and it serves no useful purpose, to detail them all for the purposes of this judgment, save to mention that the factors are mainly argumentative and as would be expected, they have attracted a stern denial from the respondents side. The respondent has filed an opposing affidavit in which they raised two points in limine. The applicants in turn filed a Replying Affidavit in which they challenged the Authority of the deponent to the Answering Affidavit to depose to the affidavit on behalf of the respondents.
 5. Given that applicants' *locus standi* is not challenged, it is procedurally proper to deal first with a party whose *locus standi* is in issue. That party is Ntsiuoa Seala whose authority to depose to the Answering Affidavit on behalf of the respondents is challenged by applicants on the grounds that she has not shown the source of the Authority and that there is no resolution which authorizes her to depose to the affidavit as she has purported to act. Applicants went further to state that deponent has no iota of right to represent 2nd to 9th respondents as she is neither the Chief Executive Officer nor the chairperson of the said respondents.
 6. Advocate Phafane KC argued in response that it is now settled law that a deponent to an affidavit who states under oath that she is duly authorized to depose to such affidavit is, in the absence of concrete evidence to the contrary considered to be duly authorized as she alleges. He referred us to a number of authorities in support of the proposition. The cases in point are

National Independent Party (NIP) & 2 Others .v. Anthony Clovis Manyeli & 2 Others C.of A (CIV) No1/2007 at pp22 and 25 of the typed judgment. Lesotho Revenue Authority & Ors. .v. Olympic Off Sales 2005 - 2006 LAC535 at p.541.

7. In paragraph 1 of her Answering Affidavit deponent avers that she is the:

“Secretary of the 1st respondent. I have been duly authorized to depose to and file this Answer for and on behalf of the respondents herein.”

The applicants advanced no evidence to contradict deponent’s sworn testimony that she was authorized to depose to the affidavit as she alleges. Their denial of her authority was a bare denial premised only on the fact that no resolution evidencing her authority has been attached. As it was held in Central Bank of Lesotho .v. Hae Phoofolo LAC (1985 - 89) 253 at 259B:

“There is no invariable rule which requires a juristic person to file a formal resolution manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts.”

In hoc casu the existence of Ms Seala’s authority clearly appears from her sworn deposition that she is duly authorized to file the Answer on behalf of the respondents. In the absence of credible evidence to the contrary this court has no basis to disbelieve her. Accordingly applicants challenge to the authority of Ms Seala to depose to the Answering Affidavit is dismissed. The second point relating to non-disclosure was wisely abandoned by the applicants.

8. We come now to the respondents’ own points in limine. The first point related to non-joinder of the Minister responsible for Local Government and by operation of law the Attorney General as the representative of the Government of Lesotho in all civil proceedings. Advocate Phafane argued that as evidenced by relevant employment documents that applicants signed, they

- are employees of the Government of Lesotho and that they are paid their salaries by the Government. He submitted that the Government is not only an interested party but a necessary party to these proceedings, as such it ought to have been joined in these proceedings.
9. The court was referred to, and was shown the “Form of Agreement For Officers Employed by Local Authorities.” The said agreement is signed by the person engaged and the Principal Secretary for Local Government. We were further shown a specimen letter of appointment in particular the letter of appointment of the 3rd applicant. The letter is written and signed by the Principal Secretary for Local Government. It was not disputed that the rest of the applicants also got identical letters of appointment. Finally, we were shown a Casualty Return for 4th applicant which is an instruction to the Accountant General to include the person mentioned, in the Government payroll from the date stipulated in the Casualty Return.
 10. Applicants do not deny that their letters of appointment are signed by the Principal Secretary. They however, contend that in terms of section 41 of the Local Government Act 1997 (the Act) the employer of employees of the Local Government is the 1st respondent. This submission cannot hold water because by applicants’ own admission section 41 of the Act was repealed by section 34 of the Local Government Service Act 2008. (Act No.2 of 2008).
 11. Applicants contended further that they consider themselves employees of the Local Government Service Commission despite the repeal of section 41 of the Act. They further argued that in terms of section 71 of the Act, the power to regrade their position from LA4 to LA3 as they want, vests in the Commission and not the Minister. Once again the applicants seek to rely on section 71 of the Act, notwithstanding that they acknowledge that even that section has been repealed by section 34 of Act No.2 of 2008.
 12. Applicants submitted that they find support for their approach of relying on repealed sections from section 18 of the

Interpretation Act 1977. In particular they relied on paragraph (c) of that section which provides that the repeal of an Act shall not “affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed”. It was applicants’ contention that they acquired the right to be employed or to be employees of the Commission; and to have their position of Senior Legal Officer classified and graded by the Commission, under the repealed sections and that those rights cannot be extinguished by the repeal of the sections that gave rise to the rights.

13. It is common cause that Act No.2 of 2008 defines employer as “the Government of Lesotho represented by a local authority.” Section 12(2) of the same law gives power to the Minister to make provision for among others, the establishment or abolition of departments or offices and for salary administration, remuneration and benefits, job evaluation and job grading. The power to classify or grade posts in the service which vested in the Commission under section 71 of the Act, is now vested in the Minister in terms of section 12 (2)(i) of Act No.2 of 2008.
14. Despite these clear provisions which clearly state that the employer of employees of the Local Government is the Government of Lesotho and that only the Minister can revise classification and grading of positions, applicants insist that their employer is the Commission and that it is the only one that can revise the classification and grading of their position. The sole reason for this anomalous approach is that applicants are seeking to enforce rights allegedly acquired under the repealed sections.
15. For the sake of clarity it is important to quote the sections applicants are relying upon in full. Section 41 provides:

“Every person employed by the Local Government Service Commission or by a Council shall retire on attaining the age of fifty five years: provided however, that any such employee may be given an extension of service beyond the age of fifty five years but not beyond sixty five years.”

Section 71(1)(d) provides that the Commission shall among others have power:

“(d) to classify into classes or grades executive posts in the service and to determine qualifications necessary for appointment to any such posts or to a post in any class or grade and to revise or adjust with effect from such date as the Commission may determine any scales so fixed.”

16. The purpose of quoting the foregoing provisions is to examine the extend if any of the rights they create for the applicants, which the latter are purporting to enforce despite the repeal of those provisions. Section 71(d) does not create any right which the applicants can seek to enforce. It is merely an empowering provision for the Commission. As for section 41, the only right that it creates is that of retirement at the age of fifty five; which is not in issue in these proceedings. Clearly therefore, applicants’ adherence to the repealed sections is misconceived and it defeats the whole action they have instituted against the respondents.
17. The provisions of Act No.2 of 2008, are the ones that should form the basis of applicants’ claim for the regrading of their position. We have already said in terms of the provisions of Act No.2 of 2008, employer of the employees of any local authority is the Government of Lesotho. We have further pointed out that the power to classify and to grade positions in the service now vests in the Minister. It goes without saying that a petition for the exercise of the powers to reclassify and regrade must be directed to the Minister as the one who the Act gives the power to exercise those powers.
18. Since the Government of Lesotho is the employer of the applicants it ought to be cited in the proceedings. It is trite law that when a Minister is sued in his official capacity and the Government, the Attorney General must in terms of the law be cited with them. Advocate Phafane’s submission that Government is a necessary and interested party in these

- proceedings cannot be faulted because Government is not only the employer of the applicants, it is also the repository of powers that applicants seek to have exercised in their favour. It follows that respondent's first point in limine is well taken. It is accordingly upheld.
19. The next issue to interrogate is whether applicants' failure to join the necessary parties is fatal or it is merely dilatory. We were referred to a number of cases that show that a plaintiff that is guilty of non-joinder of a necessary and interested party ought to be non-suited on that ground alone. (see *Mabusetsa Makharilele and 4 Others .v. National Executive Committee of Lesotho Congress for Democracy (LCD) & 4 Others* CIV/APN/822/01 (unreported) at p.11 of the typed judgment, *Lesotho National Olympic Committee and Others .v. Motlatsi Morolong 2000 - 2004 LAC449*; *The National Independent Party (NIP) & 2 Others .v. Anthony Clovis Manyeli and 2 Others C. of A (CIV) No.1/2007* pp.12 - 15 of the typed judgment.
 20. Failure to join a necessary and interested party is excipiable. It follows that a defence of non-joinder can be raised by way of an exception. In general an exception that is well taken destroys the whole cause of action, because an exception goes to the root of the entire claim or defence as the case may be. (see H. Daniels, *Beck's Theory and Principles of Pleading in Civil Actions*, 6th Edition, Butterworths p.124 and p.140. This is the case in casu. There is no way the applicants' claim can stand against wrongly cited parties who have no power in law to exercise any of the powers demanded of them. The non-joinder of the Minister and the Attorney General in this application is clearly fatal and it ought to terminate the proceedings against the respondents.
 21. There are more reasons why this application should not succeed. The first one is that it is founded on repealed provisions of the Act. The second is non-justiciability of the dispute referred to this court by the applicants. Advocate Phafane approached the issue on non-justiciability from the converse position of failure to exhaust domestic remedies.

22. Part V of the Local Government Service Act deals with settlement of disputes. Section 27(1) establishes a Conciliation Board to conciliate disputes of interest. The interpretation section of Act No.2 of 2008 (sec. 2) defines dispute of interest as “a dispute over employment matters to which an officer or employer does not have an established right.” Contrary to their belief, applicants have no established right to be classified and graded at LA3 as they desire. What they have is an interest that they be so classified. A right will only follow if the Minister acts in accordance with their desire and regrade them accordingly.
23. Until now their complaint remains an interest which in terms of sec. 27(1) of Act No.2 of 2008, should have been referred to the Conciliation Board to seek to conciliate the dispute. As a rule disputes of interest are not justiciable in a court of law precisely because there is no right to enforce. They are usually settled through negotiation, mediation, conciliation and in extreme cases resort to a strike or a lock out by employees or an employer respectively as the case may be.
24. It is apparent from Annexure “C” to the Originating Application that the applicants have sought to present their case to the Commission in June 2008. It is not clear from the record what response they got, but that certainly constituted part of an effort to negotiate resolution of the interest dispute. It however, did not exhaust the negotiations, because the Principal Secretary and the Minister for Local Government had not yet been approached. When negotiations have failed the procedure prescribed by section 27 would then be set in motion. After that a referral could be made to the DDPR if need still arose.
25. These steps were not followed by the applicants. They instead shot themselves in the foot. They referred an interest dispute to the DDPR and styled it an unfair discrimination. Since the DDPR lacks jurisdiction to deal with cases of discrimination it referred the matter to this court. However we have found that even if necessary and interested parties had been joined, this application would still not succeed as it is an interest dispute

which ought to be dealt with as provided in section 27 of Act No.2 of 2008, failing which it may be referred to the DDPR in terms of the Labour Code (Amendment) Act 2000 to seek to further conciliate the dispute.

26. For the foregoing reasons this application ought not to succeed and it is accordingly dismissed. Counsel for the respondents asked for costs because he said already when they were before the DDPR they raised the same point namely; that interested and necessary parties have not been joined. Applicants ignored the point and proceeded to issue the Originating Application in this court still leaving out those parties. He prayed that they be awarded costs which would not have been incurred had necessary parties been joined. The prayer of costs cannot be acceded to in the light of the finding we have made that even if the necessary parties had been joined applicants' application would still be improperly before this court as the dispute they have brought is not justiciable. For these reasons we make no order as to costs.

THUS DONE AT MASERU THIS 21st DAY OF AUGUST 2009

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR APPLICANTS: **Adv. Phumane assisted by Adv. Ntoko**
FOR RESPONDENTS: **Advocate Phafane KC**