IN THE LABOUR COURT OF LESOTHO **LC 44/09**

HELD AT MASERU

In the matter between:

PHEKO MAFANTIRI **APPLICANT**

and

LESOTHO REVENUE AUTHORITY **RESPONDENT**

JUDGMENT

Practice and Procedure - Applicant's prayer in the initial application problematic - Court ending up granting a declaratory order - Applicant subsequently lodging an application for compensation following an order declaring respondent's conduct as having been unfair - Respondent's Counsel objecting to this subsequent suit by the applicant as being in violation of the "once and for all" rule - Whether the rule is a bar to a subsequent action for damages arising out of the respondent's unfair conduct - Rule found inapplicable to this case.

1. The applicant is herein seeking a compensatory relief for the loss of increased earnings following failure to be appointed to at least one of the positions he had applied for. He felt that had the selection process been fair he stood a chance of having been successful. He was successful in this claim in LC 13/08. The Court had declared the procedure that had been adopted by the respondent in the screening process of candidates for the position of Project Management Consultant and Change Management Consultant to have been unfair in that it did not meet the job specifications that had been set out in the advertisements posted by the respondent.

2. The applicant had prayed ***inter alia*** that the selection process be started afresh despite the fact that candidates had already been appointed and occupied the said positions. The Court found this prayer to be problematic in that the incumbents had already acquired rights thereto and to restart the process would embroil the Lesotho Revenue Authority (the respondent herein) into yet another suit. The Court therefore just made a declaratory order to the effect that respondent's conduct had been unfair, without ordering a consequential relief as it was not sought. The power to make declaratory orders is a discretion endowed on Courts by the common law. In regard to the Labour Court, this right has been entrenched in the law by statute through Section 24 (2) (a) of the Labour Code Order, 1992 (as amended), which empowers the Court;

> ***to inquire into and decide the relative rights and duties of employees and their respective organisations in relation to any matter referred to the Court under the provisions of the Code and to award appropriate relief in case of infringement.***

3. The Court in LC 13/08 issued out a declaratory order pronouncing itself on the rights of the applicant in respect of the fairness or otherwise of respondent's conduct, but did not order any relief as the applicant's counsel seemed not to have anticipated that the Court would find the relief he had initially sought problematic. The Court merely established liability by finding respondent's conduct unfair. Having succeeded in his earlier claim, the applicant has now approached the Court for a compensatory relief in the amount of One and Half Million Maloti (M1,500.000.00) for lost prospective earnings; costs of suit and further and /or alternative relief.

4. Respondent's Counsel is contesting this claim. He first and foremost raised a special plea that applicant's claim is barred by the ***"once and for all"*** rule. This was raised as a preliminary point. He argued that the current action is based on the same set of facts as in LC 13/08, which preceded the current application. He submitted that the rule requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such a cause. He pointed out that the purpose of this rule is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. On this aspect he referred the Court to the case of ***Symington v Pretoria - Oos Privaat Hospital Bedryf's (Pty) Ltd 2005 (5) SA 550 (SCA).***

5. He contended that applicant's claim in these proceedings is based on the same cause of action as the one that was canvassed in LC 13/08, and the danger is for the

applicant to once more air the issues that were canvassed in LC 13/08 for the second time thereby effectively re-opening issues that were already determined by the Court. According to him, the applicant ought to have asked for compensation from the onset, and not bring a separate action.

6. In reaction, applicant's Counsel contended that the ***"once and for all"*** rule is but a rule of convenience. He indicated that it is indeed desirable that one should pray for all the reliefs open to him, but it is not a total bar to an aggrieved party to pursue the other reliefs open to him. He pointed out that what the applicant is seeking is a consequential relief. He submitted that the applicant first established respondent's liability and has now come to Court to claim compensation. He maintained that these were two separate enquiries and were not mutually destructive. Over and above this, he maintained, the respondent had not even shown what prejudice he was likely to suffer if this application was entertained. He therefore prayed that the point ***in limine*** be dismissed, and merits of the case be traversed.

THE COURT'S ANALYSIS

7. First and foremost, a look at the meaning of the ***"once and for all"*** rule; it connotes that ***"a single wrongful act gives rise to a single cause of action for all the damage past and future - that it causes. This means that a plaintiff cannot claim compensation piecemeal for various losses as they occur: he must sue "once and for all" for the whole of his damage, seeking redress not only for the harm he has already suffered (actual or accrued loss) but also for the harm he expects to suffer in the future (prospective loss)" -*** See Boberg in ***Delict*** at p. 476. The rule gives a claimant only one opportunity to claim compensation or damages, and bars the applicant from claiming damages in piecemeal. It derives from English law but has been recognised and applied for so long in our legal system that it now forms part of our common law.

8. According to the case of ***Evins v Shield Insurance Co Ltd 1980(2) SA 814(A***), once judgment has been obtained in a cause of action, the matter is exhausted. The Court pointed out at p. 835 that ***"the principle of res judicata taken together with the "once and for all" rule means that a claimant for aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional*** (underlining mine for emphasis) ***damages in respect of further loss suffered by him (i.e loss not taken into account in the award of damages in the original action) even though such further loss manifests itself or becomes capable of assessment only after the***

conclusion of the original action." The rule was further discussed in ***Truter and Venter v Deysel [2006] SCA 17 (RSA)*** where the Court confirmed at paragraph 22 the ***"once and for all rule"***, namely that a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action. For a full discussion of the rule see - Visser and Potgieter in ***Law of Damages*** (2003) 135 ***et seq.***

9. According to Van Winsen AJA in ***Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 "the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause".*** In a nutshell, all damage (already sustained and expected in future) may be claimed only once. Hence, it is critical for a claimant to make a proper assessment of all losses already suffered and possible future loss which falls within a single cause of action as he/she has only one chance to claim damages in a single cause of action. The rule is one of the basic principles of the law of damages.

10. From the aforementioned passage, it follows that in order for the defence of ***"once and for all"*** to be sustained, the fundamental question becomes whether the cause of action is the same or similar to the initial one; whether it relates to the same defendant; whether it is in respect of additional damages; and whether it has finally been litigated upon/determined. The enquiry becomes whether the applicant is demanding the same thing on the same ground. As put by Van Winsen AJA (as he then was) in ***Custom Credit Corporation (supra) "if a cause of action had been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an exception rei judicatae vel litis finitae."***

11. It is perhaps worthwhile at this juncture to consider the meaning of the words ***"cause of action."*** It was defined in ***Evins v Shield Insurance Co., (supra)*** as ***"every fact which it would be necessary for the plaintiff to prove …in order to support his right to judgment."***

12. Applying the test set out in ***Evins v Shield Insurance Co.,*** (paragraph 10 above) to the case before us, the question to be asked becomes: Were the proceedings that were instituted in LC 13/08 based on the same claim as the one that forms the subject matter of the present claim? The answer is in the negative. As it were, in the initial claim the applicant had prayed that respondent's conduct be declared unfair, and he is currently seeking damages having succeeded in the initial claim. These are two distinct claims. The claim for damages constitutes a

different cause of action. The question of damages was not considered in the previous judgment, and is arising for the first time. Respondent's plea would be sustainable if it was proved that the applicant obtained a judgment on the same issue that that was raised before the Court in LC13/08.

13. Whilst the claim for compensation arises from the declaration of respondent's conduct as unfair, the two claims existed independently. It is critical to look at whether the cause of action is substantially the same or similar, that is whether the applicant has to traverse the same facts that he traversed in the original claim in order to prove his case. The cause of action in the initial claim was the declaration of respondent's screening process as discriminatory and unfair, and the present case is a claim for damages. These are entirely different causes of action. The applicant having succeeded in the initial claim is now claiming compensation for the infringement of his rights which is a consequential claim. This kind of approach has been referred to in ***Cape Town Municipality v Allianz Ins. Co., Ltd 1990 (1) SA 311 (C)*** at p. 333 as a ***"two-stage procedure"***. It was held in this case that the plaintiff was entitled first to seek an order declaring the liability of the defendant and thereafter to institute an action to prove the quantum of his claim and to obtain judgment in the amount. Thus in LC 13/08 the applicant merely established liability, and is now seeking a relief.

14. Further applying the test in ***Evins v Shield Insurance Co., Ltd*** (paragraph 10 herein), that is, whether the applicant is claiming additional damages. An analysis of the claim reveals that the applicant is not claiming any additional damages. As aforementioned, he had initially just obtained a declaratory order, and is now seeking a relief for compensation. This is quite in order. It follows therefore that the ***"once and for all"*** rule does not feature and cannot be held against him as he is claiming damages/compensation for the first time.

15. The case of ***Goldfields Laboratories v Pomate Engineering 1983 (3) SA 197***, clearly demonstrates how the ***"once and for all"*** rule applies. In that case the plaintiff had let machinery to the defendant in terms of a written lease agreement which was subsequently cancelled due to arrear rentals. Summons were then issued in the Boksburg Magistrate Court for arrear rentals and the plaintiff obtained judgment following which the judgment debt was paid. However, subsequently the plaintiff issued a claim for payment of costs for transporting machinery to his premises; costs of replacing a compressor which was said to have been missing; and costs of bringing the machinery into a good and proper state of repair. The Court held that the plaintiff's latter claim was clearly for damages suffered by him because of the defective compliance with obligations of the contract in regard to

the return of the leased machinery. The claim was therefore for damages for breach of contract. The action was between the same parties; based upon the same contract; and apart from arrear rentals, interest and costs of suit, covered the same terrain, but no judgment for damages had been granted in the Magistrate Court. The Court noted that the claim before the Magistrate Court had been wide enough to have included the claim for damages, but since they were not determined, the plaintiff reserved a right to bring an action subsequently to claim damages.

16. The case draws a clear distinction between the facts giving rise to a right and the actual relief claimed, which ***in casu*** was for the recovery of damages. The Court noted respondent's Counsel's concern that if the applicant was allowed to proceed with the present application he would re-open issues that were already determined by this Court in the initial application, but felt that this would not arise in the present action as the applicant is not seeking to controvert any conclusion reached in LC 13/08.

17. The ***"once and for all rule"*** may clearly be illustrated in an action for damages arising from a personal injury allegedly sustained by a claimant as a result of a surgical procedure to his/her eyes that went wrong. According to the rule it would be incumbent upon the claimant not only to claim for the actual consequences brought about by the wrong surgical procedure but also to claim for foreseeable damage, for instance, any further complications that are likely to occur such as blindness.

18. The claim that was awarded in LC 13/08 related to a declaration of respondent's conduct as unfair, and what is being claimed now is compensation. The same thing is not being claimed in the respective actions, and therefore applicant's claim is not ***"on the same cause and for the same relief" - Custom Credit Corporation (supra)***. The respondent was not compelled to defend himself twice on the same cause of action as the two claims are clearly distinguishable.

19. In ***National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributor's (Pty) Limited 2001 (2) SA 232 (SCA)*** the applicant had brought two claims, one relating to a contractual claim and the other to damages. The Court held that the ***"once and for all"*** rule did not mean that contractual claims and those in respect of damages have to be brought in one and the same action. Respondent's Counsel had cited this case in support of his defence of the ***"once and for all"*** rule against applicant's claim, but as it turned out, it did not favour his cause.

20. Whilst the Court acknowledges the undesirability of piecemeal litigation, and the trite principle that there should be an end to litigation, here the applicant is squarely within his rights to claim a relief for damages/compensation, it being a separate cause of action. If respondent's counsel could argue inconvenience in that he has come to Court twice, yes, but justice cannot be compromised in the name of convenience.

21. Since the cause of action relating to the claim for compensation had not formed part of the judgment granted in LC 13/08, the ***"once and for all"*** rule is not applicable in this case, and cannot stand in applicant's claim for compensation. The two claims are distinct. Accordingly, respondent's point ***in limine*** is dismissed. As applicant's Counsel had not sought any order of costs in the event of him being successful, the Court is not going to address the issue.

THUS DONE AND DATED AT MASERU THIS 09TH DAY OF JULY, 2010.

F.M. KHABO
DEPUTY PRESIDENT

J. TAU **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

REPRESENTATION:

FOR THE APPLICANT: **Adv., H. NATHANE**

FOR THE RESPONDENT: **Adv., M. DICHABA**