IN THE LABOUR COURT OF LESOTHO **LC/01/2010**

HELD AT MASERU

IN THE MATTER BETWEEN

MASEBOFANE RAMAEMA	**1ST APPLICANT**
PULENG SAKOANE	**2ND APPLICANT**

AND

LEROTHOLI POLYTECHNIC	**1ST RESPONDENT**
RECTOR LEROTHOLI POLYTECHNIC	**2ND RESPONDENT**

JUDGMENT

Date: 20/04/2010

Urgent interim interdict – Section 228(1) of Act No.3 of 2000 permits a party whose dispute is pending resolution by arbitration at DDPR to approach Labour Court for urgent relief including interim relief – Applicants approached court before referring dispute as DDPR was closed – Court granted urgent relief sought by applicants – Respondent opposed confirmation of the rule – Whether common law rule that appeal automatically stays execution applies to domestic administrative tribunal such as a disciplinary committee – Held: referral of dispute to DDPR is not an appeal hence disciplinary tribunal decision not stayed. Held further that applicants correctly approached the court for stay of their eviction – The rule was confirmed.

1. The two applicants are former employees of the 1st respondent. They were both employed as lecturers. They were dismissed on the 3rd November 2009, following a disciplinary hearing. They appealed against the decision. On the 4th January 2010 they were advised that their appeal had been unsuccessful as such the decision to dismiss them was confirmed.

2. It is common cause that as lecturers the two applicants qualified for staff housing in terms of 1st respondent's housing policy. They had thus each been allocated a staff accommodation in terms of the said policy. Following confirmation of their dismissal, the Secretary of the 1st respondent's housing committee wrote them letters, which they got on the 5th January 2010, requesting them to vacate the staff houses by the 8th January 2010. The reason for asking them to vacate the houses was that their services had been terminated.

3. The applicants filed an urgent application out of the Registry of this Court for a rule nisi to issue for an order:

> "(a) That the termination of tenancy by the respondents to applicants be stayed pending the finalization of intended litigation at DDPR.
>
> (b) Alternatively that applicants shall not be removed from the 1st respondent's premises pending the final payment of their full terminal benefits/emoluments which are due to them to enable them to relocate."

4. On the 8th January 2010, I granted prayer (i) of the Notice of Motion and further directed that the intended referral be filed

within 7 days of the opening of the DDPR on the 11th January 2010. This was of course a unique application in as much as the application for urgent interim interdict was sought and obtained before the applicants filed a referral at the DDPR.

5. This uniqueness was explained by the applicants in their statement of case. They explained that, after receipt of the letter of confirmation of dismissal, they learned when they were about to file a referral with DDPR on the 5th January 2010, that the latter had closed for Christmas and New Year recess and that it would only open on Monday 11th January 2010.

6. The applicants then resolved to approach this court *ex parte* on an extremely urgent basis in order that they secure an interdict against their eviction on the 8th January 2010. They explained that their eviction would prejudice them as they were precluded from referring the dispute due to the closure of the DDPR. In terms of Section 228(1) of the Labour Code (Amendment) Act 2000 (the Act) the application for interim interdict in respect of a matter that is to be resolved by arbitration is competent where the matter is pending before the DDPR.

7. The section provides as follows:

> *"(1)Any party to a dispute that has been referred in terms of section 227 may apply to the Labour Court for urgent relief, including interim relief pending resolution of a dispute by arbitration."*

The reality was that applicants could not refer the dispute which while it was awaiting resolution by the DDPR, they could apply for urgent interim relief against their eviction. The reality was again that the applicants were faced with eviction on Friday 8th January which would be before the DDPR reopened for business. In the light of these realities

the court granted the urgent interdict sought and proceeded to direct, pursuant to section 228(2) that the intended referral be filed within 7 days of the reopening of the DDPR. The rule was returnable on 20/01/2010.

8. On the return day the respondents indicated that they were opposing the confirmation of the rule and duly filed opposing affidavits. Their reasons for opposing the rule was that in terms of the Housing Policy of the 1st respondent the applicants' tenancy is supposed to terminate immediately, inter alia, upon dismissal. The respondents contended that this policy is well known to the applicants and that they were infact kind to the applicants to have given them 3 days notice as the policy stipulates that the tenancy terminates immediately.

9. The respondents contended further that the closure of the DDPR did not render the matter urgent in as much as their referral of the dispute to the DDPR would neither stay their eviction nor clothe the DDPR with such power. Accordingly, they argued that even if the DDPR was open it would not come to the applicants' rescue.

10. It was contended further on behalf of the respondents that both applicants have their own houses where they can move to, while awaiting the outcome of the DDPR case. It was contended further that as they are no longer employees of the 1st respondent the applicants are not entitled to enjoy a courtesy enjoyed by staff members. Moreover rent is paid by deduction from monthly salary and since "applicants draw no salaries from 1st respondent their stay will be without payment and to the prejudice of the school whose property, water, electricity, utilities and land will be used and depreciated by these individuals who will be giving 1st respondent nothing in return." (Ad para 6.2 of the Answer).

11. For their part the applicants relied on the case of Tumo Majara .v. Seeiso Sehloho 1974 – 1975 LLR 170 where it was held that:

> *"when a party to civil proceedings in a subordinate court appeals against a judgment of that court, the noting of the appeal automatically suspends the execution of that judgment pending appeal and deprives the judgment of any effect which would bring about a change in the status quo ante. The same rule applies to a judgment of Judicial Commissioner against which an appeal has been noted and should also be applied to judgments of the local and central courts."*

Mr. Maieane for the applicants submitted that challenging of the dismissal of the applicants in the DDPR is akin to appeal and the same principle "should be applicable to that quasi-judicial judgment as we submit that ejecting applicants amounts to an execution of a quasi-judicial decision."

12. There is no doubt that the decision in Tumo Majara's case represents the correct legal position under the common law (see also Herbstein and Van Winsen 4th Ed. P870). It is however doubtful whether the common law rule that applies to the courts of law also applies to decisions of domestic administrative bodies such as that of the Disciplinary Committee of the 1st respondent. Mr. Molete for the respondents said it does not and said the rule only applies to the courts of law. More on this later.

13. Mr. Molete contended further that the present application does not follow rule 22 (1) of the Rules of the Labour Court 1994 which provide that:

> *"Applications for interim or interlocutory relief arising*

before proceedings have been otherwise instituted shall be included in an Originating Application for final relief filed pursuant to rule 3 stating why the matter is urgent…. In accordance with paragraph 5 of Form LC1 contained in Part A of the Schedule."

He contended that the present application is not only in respect of a matter pending before this court, the substantive case is not even envisaged/anticipated to be brought to this court.

14. There are two answers to the argument of Mr. Molete. The first is that the application for interim relief is infact included in the Originating Application for final relief in accordance with rule 22(1). This is so because the final relief in this application is the confirmation of the rule that eviction be stayed pending finalization of the DDPR arbitration proceedings.

15. The second answer is to be found in section 228 of the Act, which empowers a party whose referral is pending before the DDPR to approach the Labour Court for any urgent interim relief he may require pending the resolution of the dispute by arbitration. This is the case in casu as applicants' referral No. A035/10 is currently pending resolution by arbitration at the DDPR.

16. Mr. Molete argued further that the applicants have not disclosed why the matter was urgent and stated that mere assertion that applicants could be evicted before lodging referral at the DDPR did not render the matter urgent. This argument is the converse of the argument that, even assuming the DDPR was open; it would in any event not come to the rescue of the applicants as it could neither stay execution nor could it have the power to do so. Clearly, Counsel was unaware of section 228 of the Act at the time that he was

making this submission.

17. The section empowers a party to approach the court for urgent interim relief pending resolution of that party's dispute by arbitration. Applicants have clearly established urgency in as much as if they were to await the DDPR to open on Monday 11th January they would have been evicted on Friday 8th January 2010. They thus had to act swiftly to stop their eviction while they awaited the opening on Monday 11th when they would then file the referral which while it was pending they are entitled to protection under section 228 of the Act.

18. It was argued further on behalf of the respondents that applicants ought to have established that they had a clear right to occupy the premises and that they had a reasonable apprehension of interference with that right. Mr. Molete contended that there was no interference with their right, on the contrary there was a proper exercise of a right by the employer that the premises must be vacated upon dismissal.

19. It is common cause that the applicants were dismissed on the 3rd November 2010. They appealed against the dismissal and were allowed to continue in occupation pending the outcome of that appeal. Quite clearly by their own conduct the respondents have imported the common law rule that applies to the courts of law that appeal stays execution.

20. After the outcome of the appeal which confirmed the decision of the tribunal *a quo* to dismiss the applicants, the respondents rightly sought to evict the applicants. This is the correct approach in terms of the principle of finality of administrative decisions. The decision of the disciplinary

tribunal of the 1st respondent is an administrative decision and as such it is not appealable in the sense that we understand appeals. It may however be taken to court for scrutiny whether the decision has been fairly and justly made in the light of prevailing labour law jurisprudence and the rules of the common law.

21. When the applicants referred their dispute to the DDPR they were not appealing against the dismissal per se. Accordingly, execution could not be automatically stayed. They were rather taking the employer's decision for scrutiny whether it had been made fairly in light of evidence tendered and the principles of legality in general. This is akin to a review even though it is a review *sui generis* as it is not based on the known common law grounds of review. As it was held in JDG Trading (Pty) Ltd t/a Supreme Furnishers .v. Monoko and Others LAC/REV/39/04 (unreported);

> *"the noting of an appeal at common law has the effect of staying execution of the judgment or decision appealed against. In the case of a review however, unless there is an order of court or statute or rule of court to the contrary, the filing of review application per se does not have the effect of staying execution of the decision sought to be reviewed."*

It follows from what we have said that, if applicants had not approached the court for interim relief as they did, they would have been evicted.

22. There is no dispute that up to the time of their dismissal the applicants were legal tenants at the 1st respondent's staff houses. It is also not in dispute that the dismissal which the applicants are presently challenging would have resulted in

the termination of the said tenancy. Applicants' right to occupation arises out of the tenancy which if they had not secured by a court order would have terminated on the 8th January. Clearly, therefore applicants' apprehension that there was to be interference was not only reasonable, it was real, in as much as they had already been served with a notice to vacate the houses.

23. Counsel for the respondents placed heavy reliance on the fact that in terms of the housing policy the applicants ought to vacate because they are dismissed. Counsel did not however, suggest that because of the existence of that policy, this court did not have the power to issue the interdict as it has issued, restraining the respondents from evicting the applicants. Section 228 of the act is couched in broad terms and places no limitation on types of disputes in respect of which a party may seek interim relief from the court while they await resolution of main dispute by arbitration. The applicants cannot therefore be faulted for approaching the court for relief as they did.

24. The respondents also argued that both applicants had their own houses to which they could move. The same argument could have been applied prior to dismissal that because applicants had their own houses they should not be allocated staff houses. They were however allocated those houses nevertheless. A heavy reliance was placed on the argument that applicants were no longer employees, but this argument seem to place respondents in a position of judges in their own cause. Applicants have sought neutral arbiter to intervene in the dispute, why are the respondents beholden to the enforcement of the very decision which the applicants are asking for intervention on to determine its fairness? The 1st respondent must not forget that it is public employer and it cannot conduct itself and its affairs as though it is a private

entity.

25. It was argued further that since applicants no longer draw salary from 1st respondent it means the latter will not be able to get rent as it is deducted from employees' monthly salary. The applicants have said in their founding affidavits that the 1st respondent has not yet paid them their terminal benefits. This was not denied by the respondents. While there are many ways in which rent may be recovered apart from conveniently deducting it from salary, the 1st respondent is clearly not without remedy in as much as it still has money belonging to the applicants in their possession. In the premises respondents' objection to the confirmation of the rule is dismissed. The rule granted on the 8th January interdicting respondents from evicting applicants from the staff houses pending resolution of their dispute by arbitration at the DDPR is confirmed. There is no order as to costs.

THUS DONE AT MASERU THIS 12TH DAY OF MAY 2010.

L. A. LETHOBANE
PRESIDENT

J. M. TAU **MEMBER**	**I CONCUR**
M. MAKHETHA **MEMBER**	**I CONCUR**
FOR APPLICANTS:	**MR. MAIEANE**
FOR RESPONDENTS:	**MR. MOLETE**