IN THE LABOUR COURT OF LESOTHO **LC/16/2012**

HELD AT MASERU

In the matter between:

BOFIHLA MAKHALANE **APPLICANT**

And

LETŠENG DIAMONDS (PTY) LTD **1ST RESPONDENT**
JOHN HOUGHTON – GENERAL MANAGER **2ND RESPONDENT**

JUDGMENT

Date: 26th September 2012
Urgent application to compel Respondent to acknowledge Applicant as its employee – to compel Respondent to accept the existence of contractual relationship with Applicant – to declare dismissal of Applicant as null and void – an order for payment of salaries, benefits and entitlements but for the alleged termination. Applicant requesting postponement of the matter – application being refused. Respondent raising points in limine to the main claim – points in limine succeeding and Applicant's claims being dismissed.

BACKGROUND OF THE ISSUE

1. On the 26th April 2012, Applicant filed an urgent application seeking an *ex parte* order that:

> *"1. A Rule Nisi be issued returnable on the date and time to be determined by this court, calling upon the Respondents to show cause, if any, why,*
> *a) The Rules of Court pertaining to the mode of service and time limits shall not be dispensed with due to the urgency of this application.*
> *b) The Respondents shall not be compelled to acknowledge/accept that there is an employer/employee relationship between the Applicant and 1st Respondent.*
> *c) And due to (b) above, Respondent shall not be compelled to acknowledge/accept that, there is a contract of employment between the*

Applicant and the 1st Respondent and therefore be compelled to stop to act or behave otherwise.

d) The purported dismissal of the Applicant by the 1st Respondent cannot be declared as illegal, and of no force, and therefore, Null and Void.

e) The Applicant cannot resume his duties as the 1st Respondent's security Manager, as a matter of urgency, possibly by Monday 7th May 2012.

f) The Respondents shall not pay the Applicant his salary arrears with effect from 1st September 2010 to date and the monthly salary after assumption of duty.

g) The Respondents shall not pay the Applicant allowances; he is entitled to with effect from 8th October 2007 to date. And the end of year bonuses for the years 2010 and 2011.

h) An interest of 18.5% p.a. shall not be charged on all salary arrears, outstanding unpaid allowances and bonuses.

i) The Respondent shall not be ordered to pay costs of suit in the event of opposition.

j) The alternative and/or further relief is, if the Respondent unreasonably reuses to comply with the final orders for prayers b) to g), whether that shall not amount to contempt of Court. And if proper adn appropriate sentence will not be delivered against 1st and 2nd Respondents.

2) That prayers (a), (b), (c), (d), (e), (f) and (g) in paragraph 1 above to operate with immediate effects as an interim order pending the finalisation of this application."

2. This matter was initially before the late President of the Labour Court, Judge President L. A. Lethobane. From the record, it does not appear like a *rule nisi* was ever issued and in these proceedings, parties made no mention of the existence of the rule. The application was opposed and it proceed on this day. However, before the matter could proceed, Applicant made an application for the postponement of the proceedings. Respondent was opposed to the application and as a result, I requested parties to make formal presentations.

3. Presentations were duly made after which, I made a ruling dismissing the Applicants request for a postponement and directing that the matter proceed in main claim. At the commencement of the main proceedings, Respondent raised two points *in limine* explicitly, that of *lis pendens* and lack of jurisdiction of this Court to entertain this matter. These points were argued and judgment was reserved for a later date. Parties were promised the reasons for both the postponement and *points in limine* at a later date. These are dealt with below.

SUBMISSIONS

Application for postponement

4. Applicant submitted that the application was based on two grounds. Firstly, that there were good prospects of settlement of the matter between the parties. He sought the postponement to allow them to negotiate the matter further. Secondly, that he had not made any preparations to proceed with the matter in anticipation that this matter would be postponed. He was however initially prepared to proceed with the matter in May 2012, after the proceedings closed but due to the delay in having set down, his position of preparedness has changed.

5. Respondent replied that they did not wish to negotiate the matter much further that than they had and as such there were no prospects of success whatsoever. They wanted to proceed with the hearing and have the matter finalised. In relation to the second ground, they indicated that Applicant is the initiator of this matter, and as such he could not be heard to allege unpreparedness on his part. Further, that the pleadings closed on the 23rd May 2012 and by the 28th August 2012, Applicant was well aware that the matter was proceeding today. It was furthermore, argued that before this date, Applicant had almost a month to prepare for hearing so that clearly, he had no valid excuse not to proceed today. However, they prayed that if the Court were to grant the postponement, then it should be with costs.

RULING

6. It is trite that an application for postponement may be granted on good cause being shown and at the discretion of the Court. Reference is made to the conclusion of the court in ***Real Estate Services (Pty) Ltd vs. Smith (1999) 20 ILJ 196*** at 199, where Revelas J had this to say,

"In courts of law, the granting of an application for postponement in an indulgence by the court exercising its judicial discretion. A reasonable explanation is usually required from the party seeking the postponement."

This case was cited with approval in the case of ***Tumo Lehloenya and Others vs. Lesotho Telecommunications Corporation LC/20/2000.***

7. In view of the submissions of parties, my view is that the grounds advanced by Applicant are not sufficient to justify the granting of the postponement application. In relation to the first ground, Respondent has made it undoubtedly clear that it has no intention to conciliate or renegotiate the matter. As a result, it is obviously clear that there are not prospects of success.

It would thus be futile and unnecessarily dilatory to grant a postponement on this ground.

8. On the second ground, I am in total agreement with Respondent that Applicant simply has no excuse at all to not to proceed with the matter. If Applicant was ready as soon as the pleadings had closed, that is in May 2012, I do not see how he can now argue unpreparedness. The argument that the delay caused unpreparedness is simply preposterous and cannot be entertained by this Court. This is a specialised Court which was intended to resolve labour disputes speedily, without technicalities and through simple processes. To grant an application for postponement on the grounds laid by Applicant would be contrary to the very spirit and purport of this Court, which would undermine its very existence. Consequently, the explanation for a postponement is not reasonable and does not warrant the grating of a postponement.

POINTS IN LIMINE

Lis pendens

9. It was argued on behalf of Respondent that the issues raised in this matter are *lis pendens*. Respondent submitted that this is the third application that Applicant has brought before this Court involving substantially the same issues, between the same parties. Further that the first one was LC/68/2010 and later LC/42/2011 which were lodged in the years 2010 and 2011, respectively. Reference was made to these cases and they were duly brought before this Court. It was submitted that both these matters are still pending as they have not finalised. Respondent maintained that the conduct of Applicant is abuse Court process which stands to be dismissed on ground of *lis pendens*.

10. In response, Applicant submitted that LC/68/2011 has been withdrawn and that the Court file will bear proof. Applicant stated that the matter is a contempt application against Respondent for failing to comply with an order of the Labour Appeal Court to reinstate him without loss. He stated that LC/42/2010 is pending the decision of the Court of Appeal against the decision of the Labour Appeal Court in which it refused to hear this case as a court of first instance. This matter concerns Applicants unpaid salaries from March 2010 to date of judgment. He indicated that the distinction between LC/42/2010 and this matter(LC16/2012) is that while he claims his salaries in the former, he wants to resume his duties in the later. As a result, Applicant submits that the point of *lis pendens* cannot hold water.

11. For a claim of *lis pendens* to hold, the principle is that a litigant must proof that there is a pending case between the same parties, concerning the same subject matter and founded on the same cause of action (see ***Becks Theory and Principles of Pleading in Civil Action***, 6th Ed., at page 157). It is important at this stage to highlight the gist of the current claim by Applicant. Applicant seeks to this court declare his 2nd dismissal null and to order his reinstatement with effect from the 7th May 2012 as well the payment of his benefits, seniority and entitlements that he would have received but for the purported dismissal, with interest at the rate of 18.5%.

12. LC/42/2010, on the one hand relates to payment of his salaries from March 2010 to date, which period is covered under the prayer f) of his notice of motion in this matter. In close observation of both cases, I have found this matter to pass the requirements for a *lis pendens.* In both matters, parties are still the same, the subject matter is same being a clam for unpaid salaries which are both based on the purported failure by Respondent to pay them when he was obliged to.

13. In relation to LC/68/2011, although Applicant has alleged that the matter has been withdrawn, the court file depicts a contrary position. There is no notice of withdrawal and without same, the matter is still in existence before this very same Court. Similarly, in close observation of LC/68/2011 and the current matter, and in view of my understanding of the gist of Applicant's claim, I have found the requirements of *lis pendens* to be present. In both cases, Applicant wants to be reinstated to his position without any loss of his salaries, benefits and other entitlements, no matter how he has framed his claims. This is an issue of semantics surrounding the claims construction.

Jurisdiction

14. Two grounds were raised under jurisdiction. Firstly, it was submitted that this Court does not have jurisdiction to entertain Applicant's claim in that he was clearly unhappy about his dismissal. It was submitted that the proper forum is the DDPR which has original jurisdiction to entertain Applicant's claim. He submitted that it was clear that the intention of Applicant was to avoid his second dismissal, following his reinstatement pursuant to the Labour Appeal court decision that he be reinstated. Respondent stated that Applicant was dismissed, which dismissal was declared unfair by the Labour Appeal Court in and Applicant was reinstated. Subsequently thereto, Applicant was given new charges, found guilty and dismissed in August 2010. This is the dismissal against which he seeks to have prayers granted in terms of his notice of motion.

15. In reaction to this point, Applicant submitted that he has never been dismissed since his reinstatement per the Labour Appeal Court judgment. According to him, evident to this is that he was never called for a hearing, there is no letter of dismissal. He, however, indicated that despite the absence of these two, Respondent has since stopped paying him his salaries as at September 2010 to date hence his prayer that they be ordered to pay him.

16. I have made a concerted consideration of the submissions of both Applicant and Respondent. They lead me one conclusion, which unfortunately seems to favour the argument of Respondent that Applicant was indeed dismissed. According to Respondent, Applicant was dismissed sometime in August. Accordingly to Applicant, he stopped receiving his salaries from September 2010 to date, which suggest that the last salary that was paid over to him was in August 2010. If this is the position, the attitude of Respondent was quite clear from its conduct that it no longer considered Applicant as its employee, hence the hold placed on payment of Applicant's salaries.

17. Consequently, I have come to the conclusion that Applicant was indeed dismissed as put by Respondent. If Applicant is unhappy about his dismissal, the DDPR is the proper forum and not this Court. Reference is made to section 226 (1) (c) r/w section 226 (2) (d) of the ***Labour Code Order (supra).*** The said section read as follows,

"(1) The Labour Court has exclusive jurisdiction to resolve the following disputes:

... (c) and unfair dismissal if the reason for the dismissal is –
i) for participation in a strike;
ii) as a consequence of a lockout; or
iii) related to the operational requirements of the employer.

(2) The following disputes of right shall be resolved by arbitration –

... (d) unfair dismissal for any reason other than the one referred to in subsection 1 (c).

18. The second ground was that the effect of Applicant's claim was to cause this court interpret the judgment of the Labour Appeal Court, which indicated that the High Court did not have jurisdiction to entertain Applicant's claim as it was purely a labour matter. It was maintained that this Court does not have

jurisdiction to interpret the decision of the Labour Appeal Court. Applicant replied that his intention was not for this Court to interpret the judgment of the Labour Appeal Court but to shed an understanding of what the Court said.

19. Applicants argues that he simply wants this court to shed an understanding to the parties about the judgment of the Labour Appeal Court, in relation to the High Court judgment. What he is asking for in essence is for this court to make parties to understand what the judgment of the Labour Appeal Court says. In order to create such an understating, the process requires the interpretation of the same judgment. This is the issue that Respondent challenges on the ground that this Court does not have jurisdiction to do. I am in agreement with the argument for the reason that the Labour Appeal Court is a superior Court and as an inferior court, I cannot meddle with its judgments safe to apply them as the law. This is derived from the dictates of the principle of *stare decisis.*

AWARD

Having heard the submissions of parties, I hereby make an award in the following terms:

a) That this application is dismissed; and
b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 29th DAY OF OCTOBER 2012,

.....
T. C. RAMOSEME
DEPUTY PRESIDENT OF THE LABOUR COURT OF LESOTHO (AI)

..... **I CONCUR**
Mr. R. MOTHEPU
MEMBER

..... **I CONCUR**
Mr. L. MOFELEHETSI
MEMBER

FOR APPLICANT: **IN PERSON**
FOR RESPONDENT: **ADV. WOKER H.**