IN THE LABOUR COURT OF LESOTHO **LC/40/12**

HELD AT MASERU

In the matter between:

FAWU O.BO. MOTŠO-MOTŠO
& 18 OTHERS **APPLICANT**

And

ECLAT EVERGOOD TEXTILE
COMPANY (PTY) LTD **RESPONDENT**

JUDGMENT

Date: 21st March 2013; 16th May 2013
Claims for unfair dismissal for insubordination and for participation in a strike. Applicant applying for the substitution of Applicant union with the dismissed employees – Respondent not objecting to the substitution. Court finding merit in the application for substitution and granting same. Respondent raising a preliminary issue of res judicata. Court also on own motion raising two preliminary issues – lack of jurisdiction over claims of dismissal for insubordination – lack of jurisdiction on account of non-compliance with section 227 (5) r/w (9) of the Labour Code (Amendment) Act 3 of 2000. Court finding that claims are not res judicata – further that all claims fall under section 226 (1). Court dismissing claims on the basis of non compliance with the provision of section 227 (5) r/w (9). No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This dispute involves claims for unfair dismissal for insubordination and for participation in a strike. The matter was set down for hearing on the 21st March 2013 but was only finalised on the 16th May 2013, with judgment being deferred for a later date. The background of this matter is essentially that from the 18 dismissed employees, some were dismissed for participation in a strike while others were dismissed for

misconduct. Thereafter they lodged a claim with the DDPR in their individual capacities. In the end the DDPR declined jurisdiction to determine the matter, leading to the referral of the claims with this Court.

2. On the 21st March 2013, the Court had intimated to the parties that it intended to raise three preliminary issues relating to the *locus standi in judicio* of the Applicant union in this matter; lack of jurisdiction over claims of dismissal for insubordination; and lack of jurisdiction on account of non-compliance with section 227 (5) read with (9) of the *Labour Code (Amendment) Act 3 of 2000*. Advocate Rasekoai and Mr. Bohloko, who were appearing for the Applicant Union, had then requested a postponement to allow them to address the Court's concerns. The matter was accordingly postponed to the 16th May 2013.

3. On the return day, Applicant Union had filed an application for the substitution of the Applicaton union with the dismissed employees. The Applicaton was unopposed. Having satisfied itself that there was merit in the application, the Court duly granted it. The effect of granting this application was that, Applicant now had to address the Court on the two remaining preliminary points of jurisdiction. In addition to the two, Respondent had also raised a preliminary point that this matter was *res judicata*. Both parties were then given the opportunity to make their addresses on all the points raised and Our judgment is thus in the following.

SUBMISSIONS AND ANALYSIS

4. Advocate Klass for Respondent submitted that this matter is *res judicata* in that it has been decided upon by the DDPR. He submitted that this being the case, this matter cannot be placed before this Court as a court of first instance. He stated that rather, Applicant ought to have approached this court by way of a review of the DDPR award that has been issued. He submitted that the claims before this Court are the same claims as those that were referred before the DDPR. he submitted that Applicants are complaining about the fairness of their dismissals in both cases. As to the other preliminary points, Advocate Klass submitted that he aligned himself with the concerns of the Court.

5. In response, Mr. Bohloko for Applicants submitted that this matter is not *res judicata* in that in the award, the learned Arbitration simply declined jurisdiction but did not deal with the merits of the matter. He stated that the award issued was rightly so, given the then circumstances of the case. He stated that in that case, the learned Arbitrator had heard the matter and only discovered that there was an issue of jurisdiction when he was preparing His arbitral award. He them called both parties to address Him on the issue of His jurisdiction to determine the claims in the merits. He thereafter issued an award in terms of which he declined jurisdiction.

6. For a claim of *res Judicata* to succeed, there are a number of requirements that must be met. These requirements were outlined in the case of *Lethoko Sechele and Lehlohonolo Sechele C of A (CIV) No. 6 of 1988* as thus,
   "...the judgement in the prior suit had to be:
   a) With respect to the same subject matter;
   b) based on the ground;
   c) between the same parties."

7. According to *H. Daniels in Beck's Theory and Principles of Pleading in Civil Actions (6th Ed.)* , at p. 164, the above three requirements assume that the Court before which the proceedings took place, was a Court of competent jurisdiction over the matter and that the matter was determined by a judgment which was final in nature. We agree with this suggestion for the reason that a court lacking jurisdiction over a particular claim cannot make a final determination, as it lacks such the jurisdiction.

8. *In casu*, the DDPR had no jurisdiction over this claim and was thus not a court of competent jurisdiction. Further, the award of the DDPR does not finalise the matter as the learned Arbitrator merely declined to determine its merits. This in essence means that parties are at liberty to approach the appropriate forum for relief. Although, the three requirements for a plea of *res judicata* to succeed have been satisfied by Respondent, this matter cannot be dismissed on account of the absence of these above assumptions as outlined by *H. Daniels in Beck's Theory and Principles of Pleading in Civil Actions (supra).*

9. On the issue of the jurisdiction of this Court over claims of dismissal for insubordination, Mr Bohloko submitted that when the matter was referred with the DDPR, all Applicants had been joined in the same referral but with their claims separated. In that case, it was Respondent's defence that all Applicants had been dismissed for participation in a strike, as the award bears testimony. As a result when the DDPR issued an award, jurisdiction was generally declined in respect of all Applicants claims hence why they approached this Court for relief. In reply, Respondent submitted that it was not accurate that they raised that defence in respect of all Applicants but some.

10. In terms of section 226 (1) () (i) of the *Labour Code (supra)*, a claim for unfair dismissal for participation in a strike falls within the exclusive jurisdiction of the Labour Court for adjudication. In our view, the DDPR was right in declining jurisdiction over claims that fall under section 226 (1) (i). When Respondent raised a defence under section 226 (1), the DDPR ceased to have jurisdiction to determine the matter in the merits, including to determine the validity of the defence raised by Respondent, as the matter now fell squarely within the excusive jurisdiction of this Court.

11. Although Respondent has attempted to deny ever raising this defence before the DDPR in respect of all the Applicants, We find the version of Applicant to be more probable. We say this because Applicant's averments are supported by the arbitral award under paragraph 8 where the leaned Arbitrator stated that Respondent claimed to have dismissed Applicants for engaging in a strike. We consequently find that this is a dispute that falls under section 226 (1) of the *Labour Code (supra).* However, our stance on the issue of this Court's jurisdiction in respect of this claim and the rest, will depend on Our determination of the subsequent preliminary point.

12. On the issue of the jurisdiction of this Court over all claims for non compliance with the provision of the *Labour Code (supra)*, Mr. Bohloko submitted that the award issued served the purpose of a certificate or report of non-resolution. He admitted that though an award and the certificate or report are two different documents, the award was a clear indication that

the matter had been before the DDPR and has thus complied with the provisions of the *Labour Code (supra)*.

13. In the case of *Lesotho Highlands Development Authority vs. Mantsane Mohlolo & others LAC/CIV/07/2009*, the Court stated that all disputes that must be resolved by adjudication before this Court, must first be referred for conciliation before the DDPR. Where an attempt at conciliation has failed, the conciliator must issue a report indicating that dispute an attempt to resolve the matter, it remains unresolved. These legal conclusions are reflected under section 227 (5) of *Labour Code (supra)* read with (9) (a).

14. The two above referred sections are couched in the following,
"(5) If the dispute is one that should be resolved by adjudication in the Labour Court, the Director shall appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court.
(9) If a dispute contemplated in subsection (5) remains unresolved after 30 days from the date of referral –
(a) the conciliator shall issue a report that the dispute remains unresolved;"

15. It is clear that a party referring a matter to this Court for adjudication must be armed with the conciliator's report as proof that the provisions of section 227 (5) read with (9) have been complied with. In the absence of such a report, there is no evidence that the matter has been conciliated upon and as such this Court lacks jurisdiction over such a claim. The provision of section 227 (5) read with (9) are peremptory and must be complied with to the letter failing which the jurisdiction of this Court will not have been founded over the referred claims.

16. Our view above finds support in the Labour Appeal Court decision in *Lepolesa & others vs. Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd [2011] LSLAC 4*, the Court had the following to say,
"... disputes that are subject to resolution by the Labour Court must first be referred to the DDPR for settlement before being taken to the Labour Court for adjudicative resolution (See Lesotho Highland Development Authority v 'Mantsane Mohlolo &

10 Others LAC/CIV/ 07/2009). *Failure to do so renders the Labour Court to lack jurisdiction to entertain the matter."*

17. *In casu*, Applicants are armed with an award instead. Sections 227 (5) and (9) are clear on the requirement and an award is not one of them. Awards are provided for under section 228E and 228F and they render the matter final on the issue for determination which determination is only reviewable before this Court. What makes the Applicant's case worse is the fact that even the award alleged to represent a certificate does not make reference to an attempt at settlement through the process of conciliation before the DDPR. Consequently, We find that the provisions of section 227 (5) and (9) have not been complied with and therefore this Court lacks jurisdiction over all claims.

AWARD

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

a) That this matter is dismissed for want of jurisdiction; and
b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 3rd DAY OF JUNE 2013.

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

Mr. S. KAO **I CONCUR**
MEMBER

Mrs. L. RAMASHAMOLE **I CONCUR**
MEMBER

FOR APPLICANTS: **ADV. RASEKOAI & MR. BOHLOKO**
FOR RESPONDENT: **ADV. KLASS**