

HELD AT MASERU

In the matter between:

REFILOE LUCY OKELLO

APPLICANT

And

THE PRINCIPAL SECRETARY – MINISTRY OF TOURISM,
ENVIRONMENT AND CULTURE

1ST RESPONDENT

THE HUMAN RESOURCE OFFICER - MINISTRY OF TOURISM,
ENVIRONMENT AND CULTURE

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION

4TH RESPONDENT

JUDGMENT

Date of Hearing: 31/10/2012; 15/11/2012; and 29/11/2012

Claims for stay of transfer and interdiction from removal on urgent basis. On return day, Respondent raising four preliminarily issues of jurisdiction, urgency and ex parte basis of the matter and the locus standi of Applicant representative. All preliminary points failing to sustain and matter being considered on the merits. Respondent failing to establish a clear right. Court finding that other elements of a final interdict depend on the existence of a clear right. Court not finding it necessary to consider other elements of a final interdict - Court dismissing application.

BACKGROUND OF THE ISSUE

1. This matter was heard over a series of dates from the 31st October 2012 to the 29th November 2012 and judgement was deferred. Applicant made an application in the following;

“1. Dispensing with the Rules of Court pertaining to period and modes of service of process owing to the urgency of this matter.

2. That a Rule Nisi be and is hereby issued returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:

a) The respondents' decision to transfer the applicant to the position of district tourism officer, Maseru shall not be stayed pending finalisation of the matter in A1147/2012.

b) The respondents shall not be ordered to interfere with and/or remove the applicant from the position of principal licensing Officer which she is currently occupying.

c) The fourth respondent shall not be directed to dispense with the matter in A1142/2012 owing to urgency of the matter.

d) The respondent herein shall not be directed to pay the costs of this application in the event of opposing same.

e) Granting applicant such further and/or alternative relief.

3. That prayers 1 and 2 (a) and (b) operate with immediate effect as an interim order."

2. This matter was duly opposed by Respondent. Respondents had also raised four preliminary issues against which they sought the dismissal of Applicant claims. These points were based on jurisdiction; the proceedings being referred *ex parte*; Urgency of the matter; and *locus standi* of Applicant representative in the matter. Both parties were given the opportunity to make representation both on these points and in the merits. They were also advised in the event that this Court found in favour of Respondent on the preliminary issues, it would not bother to consider the merits. It was on this basis that this matter proceeded over the said dates. The ruling and reasons are henceforth.

SUBMISSIONS

Preliminary issues

Jurisdiction

3. It was submitted on behalf of Respondent that this Court lacked jurisdiction to entertain this matter. It was argued that Applicant is a public officer as defined in the Public Service Act of 2007. Further that in terms of section 30 of the Act, the Labour Code does not apply over Applicant. It was furthermore submitted that as a result, this Court has no primary jurisdiction to entertain Applicant's claim unless this claim was brought as an appeal to this Court. It was further argued that primary jurisdiction over Applicant's claim lies with the High Court of Lesotho in terms of section 119 of the ***Constitution of Lesotho***.
4. In response, Applicant argued that this Court has jurisdiction over this claim as the relief sought is interlocutory to the matter before the DDPR. It was argued that the fact that the ***Labour Code Order 24 of 1992*** does not apply to public

officers cannot be used to oust the jurisdiction of this Court in this matter. It was further argued that in any event this is not the proper forum to raise this point as the DDPR is the one that is seized with the main case.

5. We are in agreement with Respondent that this Court has no primary jurisdiction over disputes involving public officers unless such matters are appeals. However, the matter before us is not a primary claim but rather a claim that is incidental to the proceedings before the DDPR, which claim the DDPR has no jurisdiction to determine. Rather, it is this Court that is seized with such jurisdiction in terms of section 228 of the **Labour Code Order (supra)** as amended, under the heading “*Urgent proceedings.*” As a result, We agree with Applicant that this Court has jurisdiction over the current claim as the order sought relates to the proceedings before the DDPR. Consequently this point fails and We reserve our comment on the rest of the issues.

Ex parte Proceedings

6. It was argued this matter was not urgent and that an interim relief ought not to have been granted in favour of Applicant on an *ex parte* basis. It was submitted that the Court can only be approached in this fashion if service of the application would defeat its purpose. It was further submitted that, without admitting that there was urgency, any possible urgency was brought about by the Applicant herself in that she waited for three months before she could protect or enforce her rights. Further that given this said, Applicant had no reason to move this application without notice to the other party. Reference was made to the case of **BP Lesotho (Pty) Ltd vs. Stanley Maitse Moloi and Another C of A (CIV/01/2006)** in support.
7. In response, it was submitted that the Respondents were first served with the application before it was moved before this Court. It was argued that this Court has already granted an order for the dispensation of the ordinary periods and modes of service. In their opinion, this means that the issue is now academic particularly in the absence of any prejudice that has been or is being suffered by the Respondents.
8. We have taken notice of the arguments raised by Respondent in relation to the circumstances under which a Court may be approached on an *ex parte* basis. We are in agreement with Respondent that the principles are as they have submitted. However, from our observation of the circumstances surrounding this matter, the application was first served upon the Respondents before the Applicant could approach this Court for the remedy

sought. According to the records, the application was served upon Respondents at around 10:33 in the morning and only moved later that day in the afternoon. As a result, it cannot be accurate that this application was moved on an *ex parte* basis. Consequently, this point does not hold water.

Urgency

9. It was submitted that this matter is not urgent contrary to Applicant assertion. In support, Respondent submitted that the very the office that Applicant wishes to be protected against eviction from, has already been filled. Reference was made to Applicant averments in her founding affidavit, in particular paragraph 4.7. In terms of this paragraph Applicant averred that someone had already been appointed to the same position at least three months before this matter was referred to this Court. They maintain that the matter lost urgency when Applicant delayed to enforce or protect her alleged rights.
10. In response, it was submitted that the issue of urgency has been addressed under paragraph 6 of the Applicant founding affidavit. In terms of this paragraph Applicant was in fear of eviction which was to take effect on the 1st November 2011, just a day from the date that this application was moved. It is further argued that given the short notice, it would be difficult for Applicant to comply with the directive to transfer, something that would lead to a disciplinary action begin taken against her and thus cause irreparable harm on her. It was further argued that the said transfer would undermine Applicant's efforts to secure confirmation in the same position as she had already commenced the necessary processes for same. It was further argued that the letter of transfer was only given to Application on the 29th October 2012 when the matter was moved on the 31st of the same month, hence why the Court was approached in this manner.
11. In our view, the question of whether or not this matter was urgent ought to have been canvassed before the interim relief was granted. As indicated above, We have noted from the notice of motion that this application was served upon the Respondents before it was moved. As a result, they were given the opportunity to appear and contest the issue of urgency as per the dictates of the *audi alteram partem* rule. However, Respondents did not attend the proceedings and as a result the interim relief was granted on the basis of the unchallenged submissions of Applicant. Had they attended the proceedings on that day, they would have had the opportunity to argue this point on the basis of the arguments they have raised herein. As it is, this issue

has been overtaken by events as an order has already been made and as such We see no need to deliberate any further on it.

Locus standi

12. It was submitted that Adv. Rafoneke from KEM chambers was not properly before court both at the time that he moved the interim application and even in these proceedings. Reference was made to section 6(2) of the ***Legal Practitioners Act of 1993*** in support of this argument. It was argued that in terms of this section an advocate can only appear in court if instructed by an attorney admitted to practice in the courts of law of Lesotho. The case of ***Matsaseng Ralekoala vs. Ministry of Justice, Human Rights and Constitutional Affairs C of A (CIV/116/2012)*** was also cited in support. It was thus argued that KEM chambers had not right to appear on behalf of the Applicant as it was not instructed in terms of the ***Legal Practitioners Act (supra)***. In response, it was briefly argued by Applicant that they have been instructed by T. Maieane to appear in the matter as it appears in their notice of motion.

13. We are conscious of section 6 (2) of the ***Legal Practitioners Act (supra)*** safe to add that the correct year for the Act is 1983 and not 1993. We wish to highlight that the terms of this Act are as per Respondent submissions. However, the said Act does not make it a mandatory requirement that the names of the appearing advocate be reflected in the notice of motion. The mere fact that the names of the appearing advocate are not reflected on the notice of motion, does not mean that they have not been properly instructed to appear. We are inclined to this view by the fact that in his presentation of the case, Adv. Rafoneke seems to have a thorough knowledge of the matter which he can only be expected to have if properly instructed. We do acknowledge that it is an established practice that both names of the instructing attorney and practicing advocate appear on the notice of motion. However, in our view the omission to do so cannot vitiate the entire proceedings and warrant the dismissal of a referral. Rather, there has to be more than just that omission for this prayer to succeed.

The Merits

14. Applicant submitted that sometime in 2009, she was appointed to act in the position of Principal Licensing Officer until the incumbent of the office came back to her post. When the incumbent of the office did not come back, she was told that the position would be advertised and that she would have an opportunity to apply for it. After some she made inquiries about the position

and was told that someone had already been appointed into the position. She then engaged into some extensive negotiations with the Respondent about the position and how it could have been filled without her knowledge.

15. To her surprise, rather than being addressed on the issue, she received a letter of transfer from her substantive position to another other than the position of Principal Licensing Officer. She argued that by their conduct, Respondent is trying to irregularly remove her from the office of the Principal Licensing Officer which she has been occupying since 2009 to date, by way of transfer. According to her, in terms of the Public Service Regulations, she was supposed to have long been confirmed into the said position. She further submitted that notwithstanding the new appointment of a candidate into the said position, she is still executing its functions as the new candidate never took over from her.
16. In response, Respondent denied that Applicant had been acting in the position of Principal Licensing Officer to date as she was only temporarily assigned and that the position has since been filled by a qualified candidate. The new candidate was promoted into the position after having been interviewed by the public service commission. It was denied that Applicant is executing the responsibilities of the Principal Licensing Officer as they are now being done by the new incumbent of the office. Further that Applicant had no right to be confirmed as her confirmation would depend on her meeting the requirements of the position which in the period of her acting she failed to meet. It was denied that the transfer is intended to irregularly remove Applicant as her substantive position of Senior Hotels and Restaurant Officer has been phased off after the process of restructuring which gave birth to the new position of District Tourism officer to which she is being transferred. It was concluded that Applicant had thus failed to establish a clear right and that this application should be dismissed. Reference was made to the case of ***Simon No vs. Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA)***.
17. It was further submitted on behalf of Applicant that she stands to suffer irreparably in the event that she is not granted the relief sought in that she has been given a very short space of time to move to her new location. Given the short space of time, she will not be able to comply with the directive the result of which may be herself being subjected to disciplinary proceedings and being eventually dismissed from her employment. Further that if transferred, her efforts to fight for her confirmation into the position of Principal Licensing Officer will be rendered academic and ineffective. In response, it was

submitted that Applicant will not suffer any harm as the position that she seeks protection for, has already been filled by another person.

18. It was furthermore submitted that Applicant has no other remedy against the interference with her clear right by Respondent. It was maintained that there is no other way that Applicant could have approached this court for a remedy other than in this fashion as she only received the letter of transfer on the 29th October 2012 requiring her to relocate by the 1st November 2012.

ANALYSIS

19. In an application of this nature, there are three main pre-requisites that must be met by the applying party. These principles were established in the case of ***Setlogelo vs. Setlogelo 1914 AD 221*** and cited with approval by our courts in a number of cases (see ***Ramochela vs. Moshoeshoe and others CIV/APN/172/1987***; ***Lithebe Makhutla and another vs. 'Mamokhali Makhutla and Another C of A (CIV) 7 of 2002***; ***'Maneo Moremoholo vs. 'Mantsupi Moremoholo and Others CIV/APN/135/2010***). The principles are as follows;

1. That Applicant has a clear right that they seek to protect;
2. That there has been an act of interference with the said right by Respondent; and
3. That Applicant must have no other remedy against the interference with their clear right.

In view of the above principles, we shall proceed to deal with the submissions of parties.

20. From a simple reading of prayer 2 (b) of the Applicant's notice of motion as quoted in para 1 above, it is clear that she seeks the protection of her right not to be removed from the office of the Principal Licensing Officer. As a result, the key issue is whether Applicant has a right to the said office as she alleges. From the evidence adduced, Applicant held the substantive position of senior Hotels and Restaurant Officer before she was temporarily placed into the position of Principal Licensing Officer, whether by assignment or on acting appointment as parties have put differently. Clearly, from the onset, Applicant was aware that her appointment was only temporary and subject to a condition. In our view, the condition imposed did not in any way vest a right unto her that the position would later become hers when its original incumbent did not come back.

21. Fortifying our above view is the fact that it was communicated to Applicant that the position would be advertised for everyone to apply, including herself. At this stage, it was clear to Applicant that the position of Principal Licensing Officer was not her position. We are in agreement with Respondent that the discretion on how to have it filled laid with the employer. This was clear from the communication made to Applicant about the position being advertised. As a result, it cannot be accurate for her to claim the right to be in that position particularly because she had not even referred this Court to a specific provision in Public Service Regulations which supported her argument. What makes Applicant's case worse is the fact that she has acknowledged that the position has already been filled by someone else.
22. The fact that Applicant was transferred at the time that she was trying to have her grievance addressed, does not in any way prove that she had a right to the position of the Principal Licensing Officer. Rather, at best Applicant can raise the issue to argue an unfair labour practice on the part of the Respondent against herself. The contention that the transfer is intended to remove her from the said office cannot hold water as by her own evidence, she stated that the position has already been filled by someone else. We also hold the same view in relation to the argument that she is still executing the functions of the said office despite the new appointment having been made. The argument does not in any way advance Applicant case as far as establishing a clear right is concerned. We therefore find that Applicant has failed to make out a case for a clear right over the position of the Principal Licensing Officer.
23. In view of this said above, We are of the view that it would only be an academic exercise to deal with the rest of the requirements for a final interdict, for the reason that they depend on the existence of a clear right. We hold that without a clear right, one cannot contest its interference by a third party in as much as without a clear right, one cannot claim prejudice or a remedy. We therefore find for the Respondent and dismiss this application.

AWARD

Having heard the submissions of parties, and having considered all evidence in support, We hereby make an award in the following terms:

- a) That this application is dismissed;
- b) That the interim rule is discharged; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 28th DAY OF JANUARY 2013.

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

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**Mr. L. MATELA
MEMBER**

I CONCUR

FOR APPLICANT:

ADV. RAFONEKE

FOR RESPONDENT:

ADV. TAU & ADV. MOSHOESHOE.