

IN THE LABOUR COURT OF LESOTHO

LC/REV/02/11

HELD AT MASERU

In the matter between:

FUTHO HOOHLO

APPLICANT

AND

LESOTHO BREWING COMPANY (PTY) LTD

RESPONDENT

JUDGMENT

DATE: 14/05/13

Practice and procedure - Death of a presiding officer prior to delivery of judgment - Parties agreeing that another judge make a determination on the basis of papers filed of record and submissions made instead of the matter starting afresh -The Labour Court is a creature of statute and can only exercise its jurisdiction within the limitations of the statute that created it - Court orders that it be addressed before a determination can be made.

1. The Court is herein seised with a matter which was heard to completion by my late brother Lethobane P., but judgment was reserved. He unfortunately passed on before he could deliver judgment. Counsel for both parties have approached this Court with a request that anyone of the remaining presiding officers determine the matter on the basis of papers filed of record and submissions made instead of it commencing *de novo*.

2. As a general rule, where a judicial officer is unable to complete a case due to supervening circumstances such as death, resignation or some other form of incapacity, his or her successor or fellow judge have to commence the trial *de novo* notwithstanding that to do so would involve recalling those witnesses who have already testified to adduce their evidence afresh.

3. Undoubtedly, commencing a matter (that has already been heard) *de novo* brings a host of problems. For one, the second judicial officer cannot make findings of credibility. He or she would have missed out on the atmosphere of the trial, making it very difficult to make a determination. Furthermore, he or she would have been deprived of the advantage of seeing and hearing the witnesses for himself or herself and being able to observe their demeanour. Granted, the case before us is not a trial but a review application. Indeed, the desirability of continuing with a matter from where the other judicial officer left off is immense as there is avoidance of wasted costs, time and inconvenience.

4. Counsel have submitted some authorities and I also identified others which indicate that where in a civil matter, as in the present case, the hearing has been completed and the presiding judge dies or is for some reason unable to conclude a matter parties can agree that the record be placed before another judge for the delivery of judgment - See *St Paul Insurance Co., SA Ltd v Eagle Ink System (Cape) (Pty) Ltd 2010 (3) SA 647 (SCA)*. These are however South African authorities which are not binding on our part but are merely persuasive. *Section 17 (2) of the Supreme Court Act 59 of 1959* provides that:

If at any stage during the hearing of any matter by a full court, any judge of such court dies or retires or is otherwise incapable of acting or is absent, the hearing shall, if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing shall be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing (emphasis added) to accept the decision of the majority of such remaining judges or of such one remaining judge as the decision of the Court.

5. The consent of both parties is critical. To this end, Gubbay CJ emphasised in *Mhlanga v Mtenengari and Another 1993 (4) SA 119 (ZS)* at 122-3 that it is only in the event of it being agreed by the parties that the trial continues. In the absence of consent, the judge must commence the trial afresh. This position applies in Swaziland as well. In terms of *Section 2 (1) of the High Court Act 20 of 1954 (Act 20 /1954)* the High Court of Swaziland is empowered to apply the laws governing the Supreme Court of South Africa. There is no corresponding provision in Lesotho. The common law position therefore still prevails. Thus in the case of the death of a judge before giving judgment, the case must be tried *de novo*. Consequently, as much as Counsel

for both parties have agreed in writing that the judgment be written, there is no enabling statutory provision empowering the Court to do so.

THE LABOUR COURT IS A CREATURE OF STATUTE

6. The Labour Court is constituted in terms of *Section 22(1) of the Labour Code Order, 1992* which provides that;

There is hereby established the Labour Court, hereinafter referred to as “the Court.”

It is therefore a creature of statute. It derives its powers, obligations and jurisdiction from the four corners of the statute (the Labour Code), and therefore has no jurisdiction beyond that granted by the Code. Unlike superior Courts it has no inherent jurisdiction. Hence, it cannot claim any authority which cannot be found within the four corners of its constituent Act - See Jones & Buckle *The Civil Practice of the Magistrate Courts in South Africa* (9th ed., Vol 1 (The Act) at p.34 and the *Lesotho Amalgamated Clothing & Textile Workers’ Union v Maluti Leather LC 1/94*. It is in the spirit of this fundamental legal principle that I am not able to finish off the case left by my late brother. There is no enabling provision either express or implied that empowers another presiding officer to continue where a previous one left off. The Court has defined powers of jurisdiction outside which it cannot function without it being *ultra vires*.

ORDER

7. The Court comes to the conclusion that Counsel for both parties address it before a determination on the merits can be made.

THUS DONE AND DATED AT MASERU THIS 14TH DAY OF MAY, 2013.

**F.M. KHABO
PRESIDENT (a.i)**

L.MATELA
MEMBER

I CONCUR

M.RAMASHAMOLE
MEMBER

I CONCUR

FOR THE APPLICANT: P. S. NTS'ENE CHAMBERS
FOR THE RESPONDENT: WEBBER NEWDIGATE & CO