IN THE LABOUR COURT OF LESOTHO LC/23/13

HELD AT MASERU

In the matter between:

NTHATI MOKITIMI APPLICANT

And

CENTRAL BANK OF LESOTHO RESPONDENT

JUDGMENT

Date: 16th July 2013
Application for an interlocutory interdict pending finalisation of claims per the originating application. Applicant failing to establish a prima facie right to a final relief. Respondent going beyond merely casting doubt to the existence of a prima facie right to a final relief. Court finding that the prima facie right is primary to the determination of other requirement. Court finding it unnecessary to consider other requirements on the premise of the absence of a prima facie right. An order for an interlocutory interdict pending finalisation of the main claim refused. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for an interlocutory interdict pending finalisation of the several claims per the originating application in LC/23/2013. The matter was heard on this day and judgment was reserved for a later date. The background of this application is basically that Applicant is an employee of the Respondent. She was employed in the position of Section Head – Insurance and Other Licensed Institutions. She was later appointed to act in the position of Head Supervisory, Policies and Regulatory Division, whose mandate was later transferred to the Legal Service Division. Applicant acted in this position for over five years, until she was transferred to a different division.

2. It was the above said transfer that gave birth to both the main claim and this interlocutory interdict application. In the main claim Applicant is asking for a declaratory order that she has been tacitly promoted; alternatively that she be reinstated to the position of Head Legal Services Division; and alternately that the recruitment process for the said position be set aside. The interlocutory application essentially seeks an order halting the recruitment process for the position of Head Legal Service, pending finalisation of the main claim. An interim interdict was granted in favour of Applicant pending finalisation of this application.

3. On this day, both parties addressed the Court on whether or not the interim order granted earlier, should be made final pending finalisation of the main claim as reflected in the originating application. Both parties were present and/or represented, and they duly made their presentations on the matter. Applicant was represented by Advocate N Moshoeshoe while Respondent was represented by Advocate PJJ Zietsman. Our judgment is thus in the following.

SUBMISSIONS AND ANALYSIS

4. Applicant started by laying out the legal requirements applicable in a claim for an interlocutory interdict. These were identified as follows,
   a) a *prima facie* right;
   b) a well grounded apprehension of harm;
   c) the balance of convenience; and
   d) the absence of other satisfactory remedy.
   The Court was referred to LCT Harms in *Civil Procedure in the Superior Courts, at page 40 and the case of Tsabane v Caba & another CIV/APN/218/2000.*

5. On the first requirement, it was submitted that a *prima facie* right essentially relates to *prima facie* proof of the facts that establish the existence of a right, in terms of the substantive law. Reference was drawn to the case of *Webster v Mitchell 1948 (1) SA 1186* at 1189. It was added that in terms of the authority in *BP Lesotho v Moloi & another C of A (CIV) 01/2006*, where the Court cited with approval the holding of the Court in *Setlogelo v Setlogelo 1914 AD 221* at 227, a *prima facie* right need not be without doubt to sustain.

6. On the premise of the above principles of law, it was submitted that according to facts that are common cause, Applicant acted in the position of Head Legal Services for over five years. It was further submitted that Applicant was made to act for the stated period, notwithstanding that the policies of the Respondent provide that an acting appointment shall not exceed a period of 12 months. Having acted beyond the period stipulated in the rules of the Respondent, Applicant was tacitly promoted to the position in question.

7. It was further submitted that the length of the period that Applicant took in the acting position, together with the fact that it as never suggested to her that she would neither be confirmed nor promoted into that position, gave her the legitimate expectation that she would acquire the position. It was added that the decision to remove Applicant from the position that she had occupied for over 5 years, to which she clearly had a right to, was unfair. It was said that in law, an employer is bound by its policies and is further enjoined to act fairly towards its employees. Reference as made to the case of *Koatsa v NUL C of A (CIV) 15/ 1986.*

8. When asked which of the four requirements is key to the granting of an interlocutory interdict, Applicant submitted that it is the balance of convenience. He made reference to the authority in *Tsabane v Caba & another (supra)*, where the Court stated that the balance of convenience is the core test.

9. In reply, Respondent submitted only on two of the requirements, namely the *prima facie* right and the balance of convenience. It was submitted that the alleged *prima facie* right is based on the principle of legitimate expectation and an alleged act of discrimination or victimisation. It was argued that it is not accurate that Applicant had legitimate expectation over the position in issue. It was submitted that in the year 2010, Applicant had applied of the position in issue but was unsuccessful during interviews. Again in 2012, she applied and was similarly unsuccessful. It was argued that the fact that she applied for the position on more than one occasion, clearly showed the absence of a legitimate expectation that she would acquire it and as well as the absence of a tacit promotion.

10. It was further argued that, the above submissions notwithstanding, the Lesotho Labour Laws, in particular the *Labour Code Order 24 of 1992 as amended* and the *Labour Code (Codes of Good Practice) Notice 4 of 2003*, do not recognise the principle of legitimate expectation in contracts of employment. It was argued that at best, it could be argued that these laws recognise the doctrine *vis-a-vis* substantive rights to the extent that they related to the termination of an employment contract where the contract provided for the possibility of renewal. It was further submitted that even assuming so, the *Labour Code (supra)* does not create a substantive cause of action based on legitimate expectation.

11. It was submitted that the doctrine of legitimate expectation is an administrative law principle which is not applicable in the law of contract. It was argued that the principle merely applies to require that before an adverse action is taken against someone, they must be heard first. It was said that this essentially limits the application of the principle to procedural and not substantive rights. Reference was made to the South African Supreme Court of Appeal case in *Duncan v Minister of Environment Affairs & Tourism 2010 (6) SA 374 (SCA)* at para 13 on page 308A-G*;* and *Administrator Transvaal & others v Traub & others 1989 (4) SA 731* at 748*.*

12. In relation to allegation of discrimination or victimisation, Respondent submitted that no basis has been laid against which discrimination is claimed. It was added that none of the averments made illustrate how the conduct of Respondent amounted to either a discriminatory act or victimisation. It was concluded that on the basis of the above said, Applicant had failed to establish a *prima facie* case. In reaction to the aspects on discrimination and victimisation, Applicant answered that these are addressed under paragraphs 11 to 13 of her founding affidavit.

13. Before we deal with the merits of the matter, We wish to address the issue of the doctrine of legitimate expectation in labour matters. While We acknowledge that the doctrine has its origin in the English Law and that it is an administrative law principle, its scope of coverage has been extended over time through case law, to apply in labour matters. To illustrate this

point, section 68 (b) of the *Labour Code (supra),* provides as follows,

"For the purposes of section 66 "dismissal" shall include –

(a) ...

(b) the ending of any contract for a period of fixed duration or for performance of a specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal; and ..."

14. Over time, this section has been interpreted to mean that where a contract provides for the possibility of renewal, then this creates a legitimate expectation on the part of the non-renewed employee that the contract would be renewed. A clearer illustration of this point is to be found in the case of *Limkokwing University of Creative Technology (Pty) Ltd v Tebello Mothabeng & another LC/REV/88/2011*, where the Court held as thus,

"In Our view, this section governs the issue of legitimate expectation in the labour law of Lesotho and as such was applicable to the 1st Respondent's case. As a result, anyone determining whether or not a party had a legitimate expectation of a renewal of their contract, is bound in law to consider the factors outlined in the provisions of section 68 (b) of the Labour Code Order (supra)."

15. While the above extract relates to the application of the principle in respect of unfair dismissal claims, where there is a possibility of renewal, the doctrine applies generally in all labour matters, alongside the maxim of *audi alteram partem*. In the case of *Mokhokhoba v The Manager – Malea-lea Secondary School & others LC/4/1995*, the Court relied on a quotation from the case of *Muller & Others v Chairman of Ministers' Council, House of Representatives & Others (1991) 12 ILJ 761* to come to the conclusion that the doctrine of legitimate exception is part of the Labour Laws of Lesotho.

16. In coming to the above conclusion, the Court made reference to page 769 of the *Muller & Others v Chairman of Ministers' Council, House of Representatives & Others* judgment where Howie J held that:

"When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty,

property, existing rights or legitimate expectations, he has the right to be heard before that decision is taken unless the statute expressly or impliedly indicates the contrary ...."

17. In view of this said above, We now proceed to deal with the merits of the matter. The principles underlying an application for an interdict are as parties have outlined them. On the first requirement, it is without doubt that Applicant acted in the position of Head Legal Services for a period over five years. This period is far above the acting period anticipated by the rules of the Respondent. We say this because in terms of the rules, an acting appointment is fixed at 12 months. Ordinarily, this would create a valid expectation on the part of Applicant that she would eventually hold that position on a permanent basis, it being by way of a promotion or confirmation.

18. However, the above position is subject to the circumstances surrounding the whole acting appointment, as they may intervene against the expectation. In looking at the circumstances of the case *in casu* closely, it is not in dispute that during the period of Applicant's acting as the Head Legal Services, she had applied more than once for the said position. In Our view, the fact that she applied, more than once for that matter, intervenes against the alleged expectation of either confirmation or even tacit promotion into the position.

19. In applying for the position, Applicant indicated her awareness and acceptance that she had not right over the said position. It did not only show that, but it also counteracts the argument that she was tacitly promoted for if she had this impression, she would not have applied even for once. Had Applicant raised this claim immediately when the position was first advertised in the year 2010, the circumstances would have been different to possibly influence this Court to find the existence of a *prima facie* right, based on either a tacit promotion or a legitimate expectation of either confirmation or promotion.

20. Further, We are in agreement with Respondent that Applicant has failed to establish the grounds for alleging either victimisation or discrimination. Even in looking at paragraphs 11 to 13 of her founding affidavit, nothing therein supports the

grounds for either of the two. At best, are the contents of paragraph 13 which also fall short to the extent that they illustrate a distinction between Applicant and others who were shortlisted with her. The moment a distinction is made between parties, a claim for discrimination is extinguished.

21. A claim for discrimination or victimisation is based on the existence of similar circumstances followed by unjustifiable dissimilar treatment. If the circumstances of Applicant were dissimilar to those of her competitors, then there was no way that she could have expected to have been accorded a similar treatment to them. According to the presentation made by Applicant, in the said paragraphs, her circumstances were different from those of other candidates. The circumstances pleaded do not present *prima facie* right but the contrary as they explain the differential treatment.

22. It is thus Our view that Applicant has failed to establish a *prima facie* right over the position of Head Legal Services in the employ of Respondent. The averments that she has set out, taken together with facts by Respondent which Applicant has not disputed, all amount to the non-existence of a *prima facie* right. The averments and submissions in totality point beyond a mere doubt, but to the total lack of the alleged right. While We acknowledge the principle in *Koatsa v NUL (supra),* about the obligation of the employer to act fairly, no unfairness has been perpetuated against Applicant, owing to her failure to establish a *prima facie* right.

23. During the proceedings, Applicant was given the opportunity to address the Court on the key requirement for the granting of an interdict. She had submitted that it was the balance of convenience and she based her submission on the authority in *Tsabane v Caba & another (supra).* We have thoroughly gone through the authority as it is the basis of the question that we posed to Applicant. In terms of the said authority, the learned Lehohla stated as thus,

"I accept Mr. Phafane's submission that in a case of interlocutory interdict such as the one under consideration the threshold test has with development of our law shifted from prima facie right that it used to be. The balance of convenience has since been elevated to being the core test."

24. Looking at this extract alone, one is quickly drawn to the conclusion that once the balance of convenience has been established, the application should be granted. However, the Court further goes on to state as thus,

"A critical look at the requirements to be satisfied before an application for a temporary interdict can be granted presents one with amazing though educative revelations. For instance with regard to prima facie right that should first be satisfied before the relief can be granted, it is further stated that the Court will be enjoined to grant the relief sought even if such a right is open to some doubt."

25. On the basis of the above extracts, it is Our view in as much as the Court accepted that the balance of convenience is the core test, it further acknowledged that there must exit a *prima facie* right prior to the consideration of any other requirements for an interim interdict even if it is doubtful. This essentially means that the other requirements flow directly from the existence of the *prima facie* right. That is to say, where there is no right, an applicant party cannot complain of injury. Similarly, without the existence of a *prima facie* right, there balance of convenience favours the refusal to grant the remedy sought, in as much as without an existing right, a party has no right to any remedy in law. It is thus Our view that Applicant having failed to establish a *prima facie* right, it is not necessary to consider the rest of the requirements but to refuse the entire application on these bases alone.

AWARD

We therefore make an award in the following terms:

a) That the application for an interim interdict pending finalisation of the main claim is refused; and
b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 2nd DAY OF SEPTEMBER 2013.

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

Mr. L. MATELA **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. N. MOSHOESHOE**
FOR RESPONDENT: **ADV. PJJ ZIETSMAN**