

HELD AT MASERU

In the matter between:

SEFATSA MOKONE

APPLICANT

And

G 4 S CASH SOLUTION (PTY) LTD

RESPONDENT

JUDGMENT

Hearing Date: 10th September 2013

Claim for discrimination in payment of wages. Respondent raising two preliminary points – Court upholding the preliminary points and dismissing the matter.

BACKGROUND OF THE ISSUE

1. This is a claim for discrimination in the payment of wages. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Mr. Masoebe, while Respondent was represented by Advocate Mohapi. The background of the matter is that Applicant had referred a claim for underpayments with the DDPR. The matter was conciliated upon and conciliation having failed, it was brought for adjudication before this Court.
2. On the date of hearing, Respondent raised two preliminary points, in terms of which it argued that it was the wrong party to be sued. It has further argued that the Applicant's pleadings did not disclose the cause of action. On the premise of these points of law, it prayed that the matter be dismissed. Applicant had then raised an objection in relation to the second preliminary point on the ground that it was only being raised for the first time from the bar. His objection was dismissed for the reason that a point of law may be raised at any point. We however, offered to adjourn the proceedings to allow him to prepare his response. This option was rejected and as such the

matter proceeded in arguments. Both parties were given the opportunity to make their address. Having heard their submissions, Our full judgment is thus in the following.

SUBMISSIONS AND ANALYSIS

3. On the first preliminary point, it was Respondent's case that it had been wrongly sued *in casu*. It was argued that Applicant was employed by a company called Securicor whose name was later changed to G4S Security Services Lesotho (Pty) Ltd. The Court was referred to annexure "C" and "B1". It was submitted that Applicant continues to maintain employment with the same company to date.
4. It was added that Respondent herein is G4S Cash Services Lesotho (Pty) Ltd, which is the former Fidelity Services Group Lesotho, which is commonly referred to as G4S Cash Solutions, as Applicant has put. The Court was referred to annexure "B2". It was argued that on this basis, Respondent had been improperly sued as G4S Security Services and G4S Cash Services are two distinct legal entities, as annexure B indicates.
5. In reply, Applicant submitted that G4S in one company with 3 different divisions which offer the security services, cash in transit services and alarm systems respectively. It was further submitted that annexure "C", is an expired contract of employment between Applicant and Securicor, as it ran for six months from June 2005. It was argued that this contract is inapplicable *in casu*.
6. Applicant argues that G4S Security Services and G4S Cash Services are divisions within the mother company called G4S. If this argument by Applicant is to hold, it would therefore mean that he agrees with Respondent in principle that G4S Cash Services is the wrong party to sue as it is not a legal entity that is capable of suing or being sued, by virtue of the fact that it is only a division within a legal entity called G4S.
7. Further, Applicant's argument would also mean that he is guilty of non joinder of the interested party in these proceedings. If G4S is the mother entity of the three alleged divisions, then Applicant ought to have claimed against G4S

and also cite either G4S Security Services or G4S Cash Services as a division/s within G4S in which he is placed. Having failed to do so would mean that Applicant is guilty of non-joinder of an interested party.

8. The above points notwithstanding, Respondent's claim for being incorrectly sued is not based on its legal capacity as a division. Rather it denies being a division and argues that it is not the employer of Applicant. From the pleadings as well submission of both parties, We have been able to discern that G4S Security Services and G4S Cash Services are two distinct legal entities. We say this because, Applicant does not dispute the validity of annexure "B1" and "B2," at least directly if he does. These are certificates of incorporation in respect of G4S Security Services and G4S Cash Services, respectively.
9. These certificates essentially confirm the argument by Respondent that both G4S Security Services and G4S Cash Services are distinct legal entities and not divisions within the alleged G4S. What therefore remains for determination is who among the two is the employer of Applicant. In Our view, the fair and equitable determination of whether Respondent is the right party to be sued lies in whether Applicant was employed by G4S Cash Services or G4S Security Services This determination cannot be simply made from the affidavits of parties but rather requires the leading of *viva voce* evidence.
10. On the second preliminary point, Respondent submitted that Applicant's pleadings did not disclose the cause of action. In amplification, it was submitted that none of the factors that constitute discrimination listed under section 5(1); 196(1) and 235 of the *Labour Code Order 24 of 1992* as amended, were alleged by Applicant in his pleadings. It was argued that it is trite law that for a claim for discrimination to succeed, it must be based on the factors listed in the said section.
11. In support of the above argument, the Court was referred to the cases of *Mohapi Khaile v Lesotho Electricity Corporation LC/REV/63/2010*; *Remaketse Molaoli & 9 others v Lesotho Highlands Development Authority LAC/A/06/2005*; and *Keneiloe Matela & another v Principal Officer, Public Officers' Defined Contribution Pension Fund & others LC/28/2012*. It

was submitted that the allegations by Applicant are not discrimination as contemplated by the *Labour Code (supra)* and that as a result, the matter stands to be dismissed.

12. Applicant's reply was that in labour law, litigants are not limited within the provision of the *Labour Code (supra)* in making a claim for discrimination. It was further submitted that while it may be that the premises of Applicant claim is not reflected under sections 5(1), 196(1) and 235 of the Labour Code, the conduct of Respondent was a clear case for discrimination as the pleadings reflect.
13. An exception is raised where one of the parties objects to the pleadings of the other as a whole. *In casu*, Respondent objects to the pleadings of Applicant as a whole on the ground that they do not disclose his cause of action. Where a party raises an objection of this nature, it is assumed in law that such a party, accepts the correctness of the averments made but then argues that they do not make out a case in law (see *Daniels H., (2002) (6th ed.) Beck's Theory and Principles of Pleadings in Civil Actions Durban: Butterworths*).
14. *In casu*, Respondent's argument is premised on the definition of discrimination in terms of sections 5(1) and 196 (1); and section 235 of the *Labour Code Order (supra)*. Section 5(1), on the one hand, provides for discrimination based on race, colour, sex, marital status, religion, political opinion, national extraction or social origin; while section 196(1) provides for discrimination based on union membership, and section 235 relates to discrimination based on a person's HIV and AIDS status.
15. We acknowledge that Applicant does not deny the allegation that his grounds are not based on the facts listed under the said sections of the *Labour Code Order (supra)*. Rather, he confirms the position but then seeks to argue that parties are not confined to the definition of discrimination in the *Labour Code (supra)*. Applicant's argument cannot sustain for a simple reason that it does not find support in any law of Lesotho. Rather, the plethora of authorities relied upon by Respondent are in opposition of the proposition.

16. In the cases of *Mohapi Khaile v Lesotho Electricity Corporation* and *Remaketse Molaoli & 9 others v Lesotho Highlands Development Authority LAC/A/06/2005 (supra)*, both the Labour Court and the Labour Appeal Court held that a claim for discrimination must be limited to the factors listed under the *Labour Code (supra)*. Again in the Labour Court decision in *Keneiloe Matela & another v Principal Officer, Public Officers' Defined Contribution Pension Fund & others LC/28/2012*, the Court held that the provisions of the *Labour Code Order (supra)*, on discrimination are very restrictive and that a claim for discrimination must be made in terms of the factors listed therein.
17. The above being the case, having failed to premise his claim on the factors listed in relevant sections of the *Labour Code Order (supra)*, the averments of Applicant do not make out a case for discrimination as contemplated by the *Labour Code Order (supra)*. Consequently, We find that Applicant's pleadings do not disclose a cause of action. In view of this finding, this matter is dismissed and We no longer deem it necessary to call for *viva voce* evidence, to determine the employment of Applicant.
18. Respondent had asked for costs. It had argued that it is a cardinal rule that a successful party to litigation must be awarded costs, unless there are exceptional circumstances. It was submitted that more often than not the Labour Court relies on section 74 of the *Labour Code Order (supra)*, in dealing with the issue of costs. It was argued that section 74 only applies to cases of unfair dismissal, whereas the case at hand deals with a claim for discrimination in payment of wages. It was argued that the Court should follow the cardinal rule. Applicant rejected the suggestions and prayed that no order be made.
19. We wish to highlight that while section 74 relates to the award of costs in claims for unfair dismissal, this is not the basis of every decision on this issue. The Labour Court is a specialised Court of equity and fairness that serves four main purposes namely, the advancement of economic development, the attainment of social justice and labour peace as well as the promotion of workplace democracy. In Our view, if costs were

to be awarded in the manner proposed by Respondent, that would be contrary to these purposes.

20. As a result, an award of costs is made in extreme circumstances of abuse of the processes of Labour Court. The approach suggested by Respondent is often adopted in the ordinary Civil Courts. We have often stated that an award for costs before this Court may be made in circumstances where, among others, there is vexatious conduct or frivolous behaviour of parties. Respondent does not base his request on either of the two and neither do We find any. Consequently, We decline to make an award of costs.

AWARD

We therefore make an award in the following terms:

- a) That the Applicant's claim is dismissed; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 14th DAY OF OCTOBER 2013.

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

**Mrs. MOSEHLE
MEMBER**

I CONCUR

**Miss. LEBITSA
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**MR. MASOEBE
ADV. MOHAPI**