IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/161/2013**

In the matter between:

MAPESELA MOEJANE **APPLICANT**

And

ELLERINES FURNISHERS (PTY) LTD **RESPONDENT**

JUDGMENT

Hearing Date: 19th February 2014
Application in terms of section 37 of the Labour Code Order 24 of 1992. Applicant approaching the Court on urgent basis. Respondent challenging the urgency of the matter and asking for the dismissal of the matter with costs. Respondent further challenging the reasonableness of the harm feared by Applicant. Court finding that the matter is not urgent. Court further finding that the fear of harm is not reasonable and dismissing the application. Furthermore, Court not finding the circumstances of the matter warranting an award of costs and therefore declining to make an award of costs.

BACKGROUND OF THE ISSUE

1. This is an application that has been made in terms of section 37 of the *Labour Court Order 24 of 1992*. The said section provides as follows,
   "Where it appears to the President of the Court that an employer against who proceedings have been instituted under the provisions of the Code is likely to abscond to avoid payment of wages or other sums of money owed to any of his or her employees, the President may order such employer to post a bond until the hearing of the proceedings or until earlier payment of such wages has been made in full."

2. In the light to the above section, Applicant prays for an order in the following,
   "a) That this matter be heard in terms of the provisions of the Labour Court Rules for an urgent interlocutory relief
   b) That the respondent be Ordered to post a bond with the Honourable Court equivalent to the amount awarded in favour of applicant, M374 328.00 in C0035/13 pending finalisation [of] the review proceedings main hereto.
   c) Costs only in the event of opposition hereto."

3. The facts surrounding this application are that, Applicant was an employee of the Respondent until his dismissal for misconduct on the 26th September 2012. He thereafter referred a claim for unfair dismissal with the DDPR, wherein an award was issued in his favour. In terms of the said award, Respondent was ordered to pay to Applicant, the amount of M374,328.00 as compensation for the unfair dismissal.

4. Respondent then initiated review proceedings on the 17th December 2013, wherein it sought the review, correction and/or setting aside of the said award. The said application was however, only served upon Applicant ton the 7th January 2014. On the 29th January 2014, Respondent appeared before this Court for an order of stay of the enforcement of the said arbitration award and the dispatch of the record of proceedings in the same referral. There being no opposition to the prayers sought, they were accordingly granted and an order was made to that effect.

5. On the 4th February 2014, Applicant initiated the current proceedings and had them set down for hearing on the 7th February 2014, for the granting of prayer a). On this day, both parties appeared before this Court and it was agreed that the matter be postponed to the 19th February 2014, for argument and to allow Respondent to file its opposition. In opposing the matter, Respondent denied that the matter is urgent or that there was reasonable apprehension of danger. On the basis of this, it sought the dismissal of the application with costs as amounting to an abuse of the processes of this Court.

6. During the hearing, Respondent argued that Applicant should not be allowed to make submissions in reply for the reason

that he has failed to formally reply to Respondent's answer. It was submitted that it is a rule in motion proceedings that parties must stand and fall by their pleadings so that what was not pleaded cannot be argued. The court was referred to the case of *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623.* In reply, Applicant submitted that there is no rule of this Court that makes a reply mandatory. Further that failure to formally reply does not mean that the averments contained in the answer are admitted.

7. On the first issue, We are in agreement with Respondent that where a party has not formally pleaded, they have no basis against which to make submissions. Authoritative and supportive of Our finding is the decision of Ramodibeli AJ in *Kaone Leoifo v Bokailwe Kgamena & another CA/048/2007*, where he make the following remark,
   "*It is trite that a case can only be decided by the court on the pleadings and evidence before it. It is not for the court to make out a case for the litigants. Nor can this Court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded.*"

8. The principle in *Kaone Leoifo v Bokailwe Kgamena & another (supra)* forms part of Our law and has been applied by Our Labour Appeal Court in the case of *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v Lesotho Highlands Development Authority LAC/CIV/17/2009.* We wish to add that while there is no rule that makes the filing of a reply mandatory, that option is left at the behest of the parties. The Court simply cannot compel any of the parties to plead where they have no desire to do so, in as much as the Rules of this Court cannot purport or attempt to do so.

9. Regarding the second issue, it is an established principle of law that what is pleaded in affidavits but not contradicted, should be taken as true and accurate. Authoritative in this regard in the authority in *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd (supra).* This authority and the principle enunciated, have been cited with approval by Our Court of Appeal in the cases of *Makhoabe Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd C of A CIV/06/2009*;

Mathiba Malothoane v Commissioner of Police & another C of A CIV/18/2009.

10. On the basis of this said above, We find that Applicant has no right of audience to submit in reply and further that what is contained in the Respondent answer is accepted as unchallenged. Consequently, We will only consider the submissions of Applicant to the extend that they relate to his pleadings in chief. In view of this finding, We now proceed to deal with the merits of the matter.

SUBMISSIONS

11. It was Applicant's case that since his dismissal on the 26th September 2012 to date, Respondent Company has closed down two of its branches, at Hlotse in the Leribe district and at Sefika complex in the Maseru capital. It was submitted that these branches were closed down on the ground of what was termed *"trading at severe loss"*. The Court was referred to annexure MM1 in support. It was added that this is indicative of the fact that Respondent is undergoing a serious financial strain that is headed towards the full closure of its business in Lesotho.

12. Applicant further submitted that he is thus in fear of the likelihood that Respondent will have closed down all of its branches in Lesotho by the time that the review application is heard and finalised. He argued that should closure occur as anticipated, he will suffer irreparable harm, as this Honourable Court will not be able to enforce his award, should the review application fail. Applicant added that an order in terms of section 37, will guarantee that his right to the awarded amount is protected. Further, that Respondent will not suffer any prejudice from the granting of the order sought, as the posted amount will be returned should the review application succeed.

13. It was argued that the right that Applicant seeks to have protected accrued the moment that an award was made in his favour. It was further argued that the order for stay of enforcement, which was granted on the 29th January 2014, has merely postponed the implementation of the award to a future date and that it did not extinguish it altogether. It was submitted that as such, the circumstances surrounding this

application, call for urgent attention to the matter. It was added that, it would also be in the interest of both parties if this matter is dealt with on urgent basis before the review application is heard and finalised. It was prayed that this application be granted as prayed.

14. It was Respondent's case that the fear of harm on the part of Applicant is not reasonable. It was stated whereas two branches has since closed down, Respondent still has eighteen branches that are up and running around Lesotho. It was submitted that the closure of the said branches was due to the inability to make profits. It was added however, that all the employees of the closed down stores have been absorbed into other operating branches. It was argued that this a clear indication that Respondent is not undergoing any financial strain at all.

15. It was further submitted that Respondent does not intent to close down its business in Lesotho. It was added that evident to this are annexures EF2 and EF3, which are sublease agreements in respect to the Leribe and Butha-Buthe branches of Respondent. It was submitted that although the said sublease contracts will expire in 2016 and 2015, respectively, they contain the Respondent desire to extend them by three and two more years, respectively. It was concluded that if anything at all, the contracts evidence that Respondent is far from closing down.

16. It was argued that even assuming that the fear of apprehension of harm was reasonable, Applicant has no right to protect. It was submitted that the moment an order for stay of enforcement was granted, it took away the said right. It concluded that in the absence of a right to any claim, nothing is owing to Applicant. It further argued that the amount in issue is neither certain nor ascertainable as it is based on what the learned Arbitrator considered fair and equitable. Reference was made to the case of *First National Bank of South Africa Ltd v Myburgh & another 2002 (4) SA 176 (C)* at 181F-H.

17. Regarding the issue of urgency, it was argued that this matter is not urgent and that as such it must be dismissed with costs as an abuse of court processes. It was argued that

Applicant had failed to act swiftly in that this Court was only approached on the 7th February 2014, after an order for stay and dispatch of the record of proceedings had already been granted. It was added that this was about a month from the time that Applicant became aware of the review proceedings. It was submitted that above narration merely illustrates that if at all there is to be any urgency, it was self-created. It was argued that in law, this warrants the dismissal of the matter. The Court was referred to the case of *B. P. Lesotho (Pty) Ltd v S. M. Moloi LAC (2005-2006) 429*, in support.

ANALYSIS AND FINDINGS

18. The facts presented established that whereas only two branches were closed down in the period between Applicant's dismissal and the initiation of the current proceedings, all the employees of Respondent who were based in the closed branches were absorbed into other branches of Respondent that are up and operating. In Our view this contradicts Applicant's claim that Respondent is undergoing a financial strain. In fact, it suggests that Respondent is free of strain.

19. We are of the view that the Respondent business will not close down, at least anytime soon as facts before us lean towards longevity. As a result, the fear of closure on the part of Applicant is not reasonable. While We agree with Applicant that he has a right to the awarded amount, at least until the award has been set aside, he has however failed to convince Us that his right needs to be protected. Closure of 2 out of 20 stores simply cannot hold as sufficient and reasonable ground of fear of harm.

20. We wish to comment that the argument about the awarded amount not being liquidated, payable or ascertainable, just cannot sustain. Applicant's claim has been liquidated by the DDPR in clear and certain terms. Further, the authority in *First National Bank of South Africa Ltd v Myburgh & another (supra)*, does not advance Applicant's case in any way. That authority deals with an application for a summary judgment.

21. Regarding the issue of urgency, We are in agreement with Respondent that this matter is not urgent at all. There is no reasonable fear of harm that Applicant is facing. In fact,

Applicant will still have a remedy even if the ordinary periods of this Court are observed. In addition, Applicant has failed to act swiftly in bringing this application to this Court. Whereas he became aware of the review application on the 7th January 2014, he only approached this court about a month later. In Our view, if at all there is to be any urgency, it is one that is self-created and where this is found to be the case, Our law provides for the dismissal for such a matter (see *B. P. Lesotho (Pty) Ltd v S. M. Moloi (supra).*

22. Regarding the issue of costs, Respondent relies on the authority in *B. P. Lesotho (Pty) Ltd v S. M. Moloi (supra).* We have gone through this authority and it provides that where urgency is alleged but not established, the application in issue will be taken to be an abuse of court process and a Court may order costs against an applicant party. In Our view, this leaves it within the discretion of the Court that is seized with such a matter to or not make such an award.

23. We have stated before that this Court only makes an award of costs in extreme circumstances that involve frivolity and vexatious conduct (see *Teba Ltd v DDPR & another LC/REV/38/2012; Kopano Textiles v DDPR & another LC/REV/101/2007; 'Mapaballo Mokuoane v Care Lesotho LC/25/2012; Abiel Mashale v Lesotho Revenue Authority LC/30/2014*). Neither of these grounds have been alleged by Respondent against Applicant, nor have We found them to exist *in casu*. It is in fact Our opinion that, while Applicant has failed to make out a case for the relief sought, the circumstances of the case *in casu* are not so extreme as to warrant an award for costs. Consequently We decline to make same.

AWARD

On the basis of the above reasons, We therefore make an award in the following terms:

a) That the application is dismissed; and

b) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 25th DAY OF FEBRUARY 2014.

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

Mr. MATELA **I CONCUR**
MEMBER

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

FOR APPLICANT: **ADV. MACHELI**
FOR RESPONDENT: **MISS. CHOBOKOANE**