IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/66/2013**

IN THE MATTER BETWEEN

ALEC RALPH THABISO RAMOKOENA **APPLICANT**

AND

NEDBANK LESOTHO LTD **1st RESPONDENT**
NEDBANK LESOTHO PENSION FUND **2nd RESPONDENT**

JUDGMENT

Claims for payment of interest accrued on pensions benefits and reimbursement of finance charges on loan facilities. Court making a determination that the former claim is an unpaid monies claim which should be heard before the DDPR in terms of section 226(2) of the Labour Code (Amendment) Act 3 of 2000. Further, that the latter claim is a purely commercial claim which this Court has no jurisdiction over. Court rejecting argument that section 227(9)(b) gives an applicant party the option to approach the Court for adjudication of matter without a report of non-resolution having first been issued. Court declining to make an award of costs.

BACKGROUND OF DISPUTE

1. Applicant has referred claims for payment of interest accrued on his pension benefits, and the reimbursement of finance charges on loan facilities advanced to him by the 1st Respondent. The matter had initially been referred to the Directorate of Dispute Prevention and Resolution (DDPR) for resolution by conciliation and arbitration. It is alleged that the matter was conciliated upon but that before a certificate anticipated under section 227 of the *Labour Code (Amendment) Act 3 of 2000* could be issued, Applicant approached this Court for resolution of the dispute by adjudication.

2. In an answer to Applicant's originating application, 1st Respondent had raised several points of law, all of which challenged the jurisdiction of this Court in the matter. In view of the points of law raised, and in particular the one relating to the competence of the 1st Respondent to be sued *in casu*, Applicant applied for a joinder of Nedbank Lesotho Pension Fund as 2nd Respondent. The joinder was granted by agreement of parties. Parties thereafter filed their heads of argument and the matter was then set down for hearing. Having heard the submissions of parties in the points of law, Our judgment is therefore as follows.

SUBMISSION AND ANALYSIS

3. 1st Respondent argued that Applicant had taken an irregular step in these proceedings. In amplification, it was submitted that these are trial proceedings which have been initiated in terms of Rule 3 of the Rules of this Court. That notwithstanding, Applicant has replied to 1st Respondent's answer with an affidavit. It was argued that in trial proceedings, affidavits are not allowed.

4. In answer, Applicant submitted that while he may have filed an affidavit contrary to the Rules of Court, this Court is the master of its own rules and as such it can condone the irregularity committed. It was added that the contents of the said affidavit are similar to those that they could have pleaded in the reply. Applicant prayed that the Court to condone the irregular step.

5. In terms of Rule 27(1) and (2) of the Rules of this Court;
   "(1) Failure to comply with any requirements of these rules shall not invalidate any proceedings unless the court directs.
   (2)Notwithstanding anything contained in these Rules, the court may in its discretion, in the interest of justice, upon written application, or oral application at any hearing, or of its own motion, condone any failure to observe the provisions of these Rules."

6. It is evident from the above provisions that not only will an irregularity not invalidate any proceedings, but also that this

Court can condone the breach of its rules. This is in line with the submissions of Applicant that this Court is the master of its own Rules. We have considered the reply filed on behalf of Applicant had determined that, at least, materially its content would still be the same even if it were a reply filed in terms of Rule 3. Further, no prejudice has been alleged on the part of Respondent that has been occasioned by this breach. We therefore find that it would be in the best interest of justice to condone this irregular step.

7. It was further 1st respondent's case that this Court has no jurisdiction over both Applicant's claims. It was argued in amplification that the one of the claims concern the non-payment of monies allegedly due out of the employment relationship, while the other concerns payment of monies arising outside the employment relationship.

8. It was submitted that the first claim falls within the jurisdiction of the DDPR in terms of section 226(2) of the *Labour Code Act (supra).* It was added that the sound claim falls within the jurisdiction of ordinary civil courts as it arises out of contractual relationship between the 1st Respondent as a bank and Applicant as its customer. It was said that the claim arises out of a loan extended to Applicant by the 1st Respondent bank, and therefore purely contractual in nature.

9. Applicant answered that this Court has jurisdiction over both claims as they both arise out of the employment relationship. In relation to the 2nd claim, it was submitted that it was a staff loan and not a bank loan as 1st Respondent suggests to the Court. On the premise of this said, it was argued that section 227(9)(b) of the *Labour Code Act (supra)*, gives this Court the power to hear both claims if after 30 days from the date of referral, the DDPR will still have not resolved them. 1st Respondent replied that the averments that the loan was staff loan is an afterthought, as it had not been pleaded in reply, and as such should be disregarded.

10. We have gone through the Applicant's reply and wish to confirm that indeed he has not averred that the loan was a staff loan as opposed to a bank loan. As a result, this is an

afterthought and We accordingly disregard it. The effect of this is to render the averments of 1st Respondent unchallenged. It is trite law that what has not been challenged stands to be taken as true and accurate (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242).* On these bases, the Applicant's second claim is reduced to nothing but a purely commercial loan that has been extended to a customer by a bank, the dispute over which We lack jurisdiction. We say this because the jurisdiction of this Court is limited, by the statute that created it, to matters that arise out of the employer-employee relationship (see *LHDA v Mantsane Mohlolo LAC/CIV/07/2009).* Consequently, We decline jurisdiction over same.

11. In relation to the first claim, We are in agreement with 1st Respondent that it is a claim for unpaid monies. That being the case, it falls under section 226(2)(c) of the *Labour Code Act (supra).* Section 226(2)(c) provides that
"(2) The following disputes of right shall be resolved by arbitration –
…
(c) a dispute concerning the underpayment or non-payment of monies due under the provisions of this Act;"

12. Applicant has in defence of this argument attempted to suggest that section 227(9)(b), gives him the option to approach this Court for a remedy, where the DDPR has failed to resolve a dispute referred before it, within 30 days of referral. The said section provides that,
"(9) If a dispute contemplated in subsection (5) remains unresolved after 30 days from the date of referral –
…
(b) any party to the dispute may make an application to the Labour Court."

13. The above interpretation of section 227(9)(b), provided by Applicant, does not hold for a number of reasons. Applicant is interpreting section 227(9)(b) in isolation of the rest of the subsections in that section. Subsection 9(b) has to be read

together with subsection 5, 6 and 9(a). These subsections provide as follows,

"(5) If the dispute is one that should be resolved by adjudication in the Labour Court, the Director shall appoint a conciliator to attempt t resolve the dispute by conciliation before the matter is referred to eh labour Court.

(6) If the dispute is resolved –

(a) the conciliator or arbitrator shall issue a report; and

(b) the settlement agreement shall be reduced to writing and signed by parties to the dispute.

…

(9) If a dispute contemplated in subsection (5) remains unresolved after 30 days from the date of referral –

…

(a) the conciliator shall issue a report that the dispute remains unresolved;"

14. In terms of these subsections an arbitrator shall attempt to resolve the dispute by conciliation and where successful, there shall be a report and a settlement agreement. However, where unsuccessful, there shall be a report that it remains unresolved, after which any party may then approach this Court. Consequently, it is incorrect that subsection 9(b) gives this Court jurisdiction to hear a claim which has not gone through all the steps under subsection 5, 6 and 9.

15. It was further, 1st Respondent's argument that it had been wrongly sued in these proceedings. It was argued in support that both Applicant and 1st Respondent are members of 2nd Respondent and that 1st Respondent contributes to 2nd Respondent fund like Applicant. Further that at the end of the employment relationship between Applicant and 1st Respondent, 2nd Respondent pays Applicant his benefits that derive from both his contribution and 1st Respondent contribution on his behalf into the 2nd Respondent fund. It was submitted that this is clear from the constitution of 2nd Respondent, which is a distinct legal pension from 1st Respondent.

16. In answer, Applicant submitted that 2nd and 1st Respondents are one and the same thing. It was added that whereas a certificate of registration (Constitution) of 2nd Respondent, presents it as a separate legal person, Applicant has contributed into 2nd Respondent fund as far as since his employment in 1974, together with 1st Respondent. As a result, Respondents have in the past been one and the same thing and continue to be the same hence why they have been joined as respondents in this matter. It was added that to further fortify this argument, 1st Respondent did not oppose the joinder application because it new that 2nd Respondent is part of it.

17. We note that there is a constitution in respect of 2nd Respondent which separates it from 1st Respondent. While that is the case, We cannot ignore the unchallenged fact that the fund operated long before the 2nd Respondent was established. We have stated before that in law what has not be challenged is taken to have been admitted (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242).* As a result, We are of the view, and in agreement with Applicant, that 1st and 2nd Respondent are one and the same, at least up to the point which 2nd Respondent was established as a separate legal person. Consequently, 1st Respondent has been properly sued in these proceedings.

18. We wish to add that We agree with Applicant that the fact that 1st Respondent did not oppose the joinder application demonstrates that 1st Respondent accepted liability at least to an extent. We say this because joinder can only be appropriately made to a party that is right before court *(see FAWU o.b.o Labane & others v Tai Yuan Garments (Pty) Ltd LC/52/2012).* Where the situation is on the contrary, the proper route is substitution. In acceding to the joinder being made, Applicant was by conduct also acceding to being the right party to be sued.

19. 1st Respondent prayed for costs mainly on two grounds. Firstly that a wrong party has been sued and secondly that costs follow suit. Applicant objected to an order of costs on the

ground 1st Respondent had been properly sued and in turn counter applied for costs to follow suit in his favour.

20. Evidently, the claim for costs on the ground of a wrong party being sued falls off due to Our finding above. Regarding the second ground and the counter claim, We have stated before that costs normally follow suit in ordinary civil courts. This Court is a Court of equity and fairness and only awards costs in extreme circumstances of abuse of its process. We have said this to be the case, where there is frivolity and/or vexatious conduct (*see Mokone v G4S Cash Solutions (Pty) Ltd LC/31/2012; Thabo Makhalane v The Ministry of Law and Constitutional Affairs & others LC/PS/A/02/2012; Thabo Moleko v Jikelele Services LC/40/2013; Kopano Textiles v DDPR & another LC/REV/101/2007; Sefatsa Mokone v G4S Cash Solution (Pty Ltd LC/31/2012). In casu*, none of the two circumstances has been established by either of the two parties. We accordingly decline to award costs.

AWARD

We therefore make an award as follows:

(1)This court has no jurisdiction over Applicant's claims; and

(2)No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF JULY 2014

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

MR. MATELA **I CONCUR**

MRS. RAMASHAMOLE **I CONCUR**

FOR APPLICANT: **ADV. MARITI**
FOR RESPONDENT : **MS. TOHLANG**