IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/79/2013**

IN THE MATTER BETWEEN

LESOTHO WORKERS ASSOCIATION **APPLICANT**

AND

TŠEPONG (PTY) LTD **1ST RESPONDENT**
DDPR **2ND RESPONDENT**

JUDGMENT

Application for a declaratory order that not all 1st Respondent employees are essential employees in terms of section 232(1), and consequential relief. 1st Respondent raising three points of law namely, res judicata; litis pendentia; and improper procedure. Court dismissing the first two points of law and upholding the third one. On strength of third point, Court dismissing application. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for a declaratory order in the following terms:
   "(1) Determining and making a pronouncement on whether all Tšepong employees are essential employees.
   (2) Determining whether or not such employees who are not essential employees or who do not render essential services within 1st respondent's workplace have a right to strike.
   (3) Ordering the 2nd respondent to issue the applicant herein with a set down for conducting a strike ballot for those non-essential employees within 1st respondent employment.
   (4) Pay the costs of this application.
   (5) Granting the applicant further and or alternative relief.

2. The brief background of the matter is that Applicant had referred a dispute of interest with the Directorate of Dispute Prevention and Resolution (DDPR) sometime in October 2013. Conciliation was conducted and in the end the dispute remained unsolved. The learned Arbitrator then issued a report of non-resolution and referred the matter for compulsory arbitration.

3. On the date of compulsory arbitration, Applicant raised a point of law. It argued that the DDPR did not have jurisdiction to proceed with the matter into compulsory arbitration, in respect of all its members as some did not render essential services. Having heard the arguments of parties, the learned Arbitrator issued an award in terms of which He made a finding that Respondent fell under essential services. The premise of the learned Arbitrator's decision was that, the *Labour code (Essential Services) Regulation of 1997,* does not categorise essential services in terms of occupation. He thereafter ruled that the DDPR had jurisdiction in respect of all Respondent employees and directed that the matter proceed into arbitration.

4. Before the date of hearing of the compulsory arbitration, Applicants referred the current application with this Court for a declaratory order as quoted above. On the date of hearing, Respondent raised three points of law on the basis of which it sought the dismissal of this application. Both parties were heard and Our judgment follows.

SUBMISSIONS AND ANALYSIS

5. Respondent submitted that this matter is *res judicata* in that it was dealt with and finalised by this Court in LC/57/2014. It was argued that in LC/57/14, parties were the same, the issues for determination were the same and that this Court was competent to determine the said matter. It was added that in LC/57/14, this Court made a determination that all Respondent employees offered essential services and could therefore not engage in a strike.

6. Applicant answered that the plea of *res judicata* does not hold *in casu*, for the reason that while parties are the same, the

issues differ and consequently the determinations made. It was argued that in LC/57/14, the issue was the legality of the strike action and that it was not a declaratory order that is sought *in casu*. It was added that the matter in LC/57/14, was initiated by Respondent and not Applicant. On these bases it was submitted that a plea of *res judicata* does not sustain.

7. In order for a plea of *res judicata* to sustain, there are a number of requirements that must be met. These are that,
   (a) both matters must be between the same parties;
   (b) both matters must be based on the same cause of action; and
   (c) both matters must concern the same subject matter or thing.
   (see *Sechele v Sechele C of A (CIV) 06/1998; Mohai and another v Lesotho Electricity company and others LAC/CIV/A/13/13).*

8. It is without doubt that parties are the same in both cases, save that in this matter Applicant was Respondent in LC/57/2014 and *vice versa*. What is left for the determination is whether, the rest of the requirements have been met. In order to effectively make the determination, it is necessary to refer back to LC/57/2014. To avoid confusion, We will refer to parties as cited in these proceedings.

9. LC/57/2014 was an application that was made for two substantive prayers namely;
   (1) That the strike intended by the Applicant and its members be declared illegal; and
   (2) That Applicant and its members be interdicted from embarking on a strike intended to start on 30th April 2014.

10. These prayers were premised on two grounds namely that the learned Arbitrator who was seized with the dispute at conciliation, made a pronouncement that Respondent was an essential service and She had referred their unresolved dispute to arbitration for resolution. Secondly, that the learned Arbitrator who was seized with the dispute at arbitration, had made a determination that Respondent was essential services

and that the unresolved dispute had to go for compulsory arbitration.

11. *In casu*, Applicant is asking the Court to determine if all employees of Respondent provide essential services and that if judgment is entered in the negative, the Court should direct that a strike ballot be conducted to determine if there will be a strike action or not. Clearly, the 2nd and 3rd requirement have not been met, at least with regard to the claims before Us. If at all the claim of *res judicata* is to sustain, it will be in relation to another matter other than this one. We say the above because, in LC/57/2014, Respondent had asked for a declaration that the strike was illegal. The issues are clearly different.

12. Further, in LC/57/14, Applicant had threatened to commence a strike contrary to the award and certificate of non-resolution, while *in casu* there is no threat to commence a strike and there is no award or certificate of non resolution directing that the matter proceed into arbitration. Rather, Applicant *in casu* intends to follow due processes of the law to embark on a strike, in the event of a determination being made in its favour. For these reasons, We dismiss this point.

13. The second point of law was that an appeal has been made against the judgement in LC/57/2014 and that as a result, the matter is *litis pendentia*. It was added that it would be an unnecessary journey to take for this Court to determine a matter that is going to be determined by the Labour Appeal Court. Applicant answered that this matter is not *litis pendentia* as the appeal is against a judgement which is not fit to render the application *in casu res judicata*.

14. The second point of law is clearly premised in the assumption that We would have upheld the first point of law on *res judicata*. It is more of an alternative claim to the first point of law, at least by its nature and content. That notwithstanding, having made a determination that there is no relationship between LC/57/14 and the claim *in casu*, a plea of *litis pendentia* cannot sustain. What is left for determination

by the Labour Appeal Court is distinct from what is to be determined *in casu*. Consequently, this point fails.

15. The third point of law is that it is improper to bring this matter before this Court as a determination has already been made on it under referral A1095/13. It was submitted that in the said referral, Applicant had raised a point of law that the DDPR did not have jurisdiction to arbitrate over all its members as not all of them offered essential services. It was added that an award was issued declaring Respondent an essential services and further that the DDPR had jurisdiction to hold compulsorily arbitrator over all its employees, who are also members of Applicant. It was argued that the effect of the award was to declare all members of Applicant essential employees, which is what Applicant had objected to. It was argued that Applicant is attempting to have that determination set aside through these proceedings and that this is improper. It was submitted that the proper procedure is by way of review.

16. Applicant answered that the arbitration award does not hold because it was issued by an incompetent court. It was added that the DDPR has no inherent powers to interpret the Labour Code as such powers lie with this Court.

17. We have gone through the arbitration award and have noted that indeed Applicant herein contested the jurisdiction of the DDPR over all its members, to arbitrate their unresolved dispute. This clear from paragraph 4 of the arbitration award. This is captured as thus,
"The applicant raised a preliminary issue that the conciliator ought not to have referred the matter to arbitration as the respondent herein does not wholly fall under essential services as defined by section 232(1) .... He stated that not all personnel of the respondent provide essential services ...."

18. In order for the learned Arbitrator to determine this issue, He had to first determine if all employees of Respondent offer essential services. This is coincidentally that which Applicant is asking the Court to determine *in casu*. The determination has already been made by the DDPR that all members of Applicant fall under essential services. In arriving at the

determination, at paragraphs 7 and 8 of the arbitration award, making reference to section 232 (1), the learned Arbitrator is recorded as thus,

"7. The above section does not categorise an essential service in terms of occupation but in terms of the service provided by the organisation. it is my considered opinion that applicant did not have the opportunity to peruse the Labour Code (Essential Services) Regulations of 1997, the said regulations list the institutions that provide … nowhere do they categorise essential services in terms of occupation.…

8. …. On the basis of the above said the respondent herein falls under the definition of essential services."

19. The above being the case, there cannot be two determination on a single issue, between the same parties and based on the same set of facts and/or cause of action. We therefore agree with Respondent that the matter having already been determined by the DDPR, the proper route is to go by way of review, especially since Applicant claims that the DDPR had no jurisdiction to make such a determination. The fact that the DDPR has been cited as a 2nd Respondent to the proceedings *in casu*, further fortifies the view that Applicant is attempting to alter its decision. As We have already said, the way to go is by review and not a declaratory order. We consequently uphold this point of law and dismiss this application.

AWARD

On the strength of the above reasons, We make an award in the following:

(1) That this application is dismissed; and

(2) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 4th DAY OF JULY 2014

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

MR. MOTHEPU **I CONCUR**

MR KAO **I CONCUR**

FOR APPLICANT: **MR. SESINYI**
assisted by MR. SEOA-HOLIMO

FOR RESPONDENT : **ADV. TŠOLO**