IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/09/2010**

In the matter between:

PHOLE NTENE **APPLICANT**

And

HIGHLANDS NATURAL RESOURCES AND RURAL INCOME ENHANCEMENT PROJECT (HNRRIEP) **1st RESPONDENT**

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY (LHDA) **2nd RESPONDENT**

MINISTRY OF TOURISM, ENVIRONMENT AND CULTURE (MTEC) **3rd RESPONDENT**

ATTORNEY GENERAL **4th RESPONDENT**

JUDGMENT

Hearing Date: 28th August 2013
Claims for unfair dismiss and underpayments. 2nd Respondent claiming that it has been wrongly sued as it is not the employer of Applicant. Parties addressing the Court on the issue. Court finding that no employment relationship exists between Applicant and 2nd Respondent. Court dismissing claims against 2nd Respondent for want of jurisdiction. Court directing that the matter be set down for hearing with the remaining parties. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is a dispute involving claims for unfair dismissal and underpayments. The history of this matter is rather unusual, so to say. Applicant had initially referred three claims namely, unfair dismissal, unpaid salaries and underpayments. Realising that he had not complied with section 227(5) of the *Labour Code (Amendment) Act 3 of 2000*, which requires that all claims that fall within the jurisdiction of the Labour Court

must first be conciliated upon, Applicant withdrew the matter and referred his claims with the DDPR.

2. On the date of the conciliation before the DDPR, only Applicant was in attendance and the matter proceeded into arbitration by default, notwithstanding the fact that the DDPR did not have such jurisdiction. An award was thereafter issued in favour of Applicant. Then 2nd Respondent initiated review proceedings with this Court and obtained judgement. The matter was then remitted to the DDPR. It was conciliated upon and having failed to reach settlement, it was referred to this Court for adjudication. In view of the fact that the matter had since been withdrawn, Applicant then applied for its reinstating which was duly granted, hence the current position.

3. Whereas, Applicant had referred three claims, he withdrew the unpaid salaries claim leaving both the unfair dismissal and underpayments claims. It is Applicant's case that he was an employee of the 2nd Respondent under the 1st Respondent project, until his retrenchment. He further claims that he was underpaid during the period of his employment with the 2nd Respondent. 2nd Respondent rejected all the claims of Applicant and argued that it had no employment relationship with him at the time that they all accrued.

4. In Our view, the defence raised by the 2nd Respondent goes to the jurisdiction of this Court over the Applicant's claims. The jurisdiction of this Court is limited to claims that arise out of the employment relationship. As a result, where there is no employment relationship between parties, then this Court would lack jurisdiction to hear and determine the lodged claim. Consequently, We directed the parties to address this issue before We could proceed into the merits of the matter. Pursuant to Our directive, both parties led evidence and made submissions on the issues. Our judgment is therefore in the following.

FACTS AND EVIDENCE

5. Applicant testified under oath that he was first employed by the 2nd Respondent in February 2005 as an accountant. His contract was verbal as no written contract was concluded and signed. In April 2007, he was laterally transferred to the 1st

Respondent project. According to him, the 1st Respondent project is owned and run by the 2nd Respondent. He stated that his transfer was also verbal. He worked under the 1st Respondent project until he was retrenched. He therefore claims that the 2nd Respondent was his employer at the time that his claims arose.

6. During cross examination, Applicant conceded that the 1st Respondent project was owned by the 3rd Respondent and not 2nd Respondent. Further that at the end of the 1st Respondent project, himself together with the rest of the 1st Respondent employees were paid their terminal benefits. He stated that he was involved in the calculations of these benefits as an accountant.

7. Respondent led the evidence of one Palesa Nkofo who testified that she was the acting special projects manager in the 2nd Respondent Authority. She was charged with the responsibility to administer special projects like the 1st Respondent project, which she did on behalf of the 3rd Respondent. She stated that Applicant was not an employee of the 2nd Respondent, but of the 1st Respondent project. She added that the 1st Respondent project is owned by the 3rd Respondent and only administered by the 2nd Respondent.

8. It was conceded that Applicant was employed by 2nd Respondent but that his contract with 2nd Respondent terminated before he worked in the 1st Respondent project, in April 2007. It was said that evident to the termination was the fact that he was paid his terminal benefits. Witness further testified that Applicant had a written contract with 2nd Respondent and that he also has a written one with the 1st Respondent. The Court was referred to pages 45 to 49 of the pleadings bundle for the copy of the unsinged contract of employment between Applicant and 1st Respondent. It was stated that the signed contract had gone missing from the 2nd Respondent records.

SUBMISSIONS

9. Applicant submitted that there is ample evidence that he was an employee of the 2nd Respondent, placed in the 1st Respondent project. It was argued that evident to this is the

admission on the part of Respondent that it employed him in February 2005. It was added that although 2nd Respondent alleges that it terminated his contract of employment and that he subsequent thereto signed a new contract with 1st Respondent, no evidence has been placed before Court in support. He argued that 2nd Respondent relied on an unsigned contract of employment bearing his names, which he categorically denied knowledge of. He submitted that as a result, his evidence of continued employment with the 2nd Respondent remains unrebutted.

10. In support of his agreements, Applicant referred the Court to the case of *United Clothing v Phakiso Mokoatsi & another LAC/REV/436/2006*, where the principle of the onus of proof was explained as *"the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade the court, at the end of the trial that claim or defence as the case may be should succeed."* It was argued that *in casu*, 2nd Respondent has failed to prove that it ended its contract with Applicant or that Applicant signed a new contract with 1st Respondent.

11. Further reference was made to the book of Schwikkard, *Principles of Evidence*, 2nd Ed. At page 538, where the author stated that *"he who makes a positive assertion is generally called upon to prove it with the effect that the burden of proof generally lies on the person who seeks to alter the stasu quo. Thus he who asserts the positive is the one with the burden of proof."* It was argued that 2nd Respondent had failed to discharge its burden as it sought to alter the *status quo* that Applicant was an employee of the 2nd Respondent until his retrenchment.

12. Applicant further made reference to the case of *Pillay v Krishna 1946 AD 946 at 951-952* to the effect that *"where the person against whom the claim is made relies on a special plea he is regarded quad that defense to be the claimant and for the defence to be upheld he must satisfy the court that he is entitled to succeed on it.* It was argued that 2nd Respondent relied on a special plea that is was not the employer of Applicant as it terminated his contract of employment in 2007. Having raised this special plea, 2nd Respondent failed to show any evidence of

either a written contract or termination thereof, except for the uncorroborated evidence of its sole witness.

13. Further reference was made to the case of *R. v Pitso Matobo CRI/T/18/1993.* It was submitted that in terms of this authority, *"evidence ought not to be accepted merely because it is not contradicted."* It was argued that *in casu*, Applicant denied that he was ever terminated by 2nd Respondent. It was added that the fact that Applicant has not contradicted the evidence of 2nd Respondent regarding his termination, does not in any way discharge its burden of proving its allegations, especially where there is testimony by Applicant that he was never terminated.

14. 2nd Respondent submitted that evidence shows that Applicant was engaged under 1st Respondent contract in terms of the contract appearing on pages 45 to 49, earlier referenced. It was argued that there is credible evidence to the effect that the 1st Respondent project is owned by 3rd Respondent. It was added that further fortifying this position is the concession of Applicant to this position during cross examination. It was also submitted that there is credible evidence that the 1st Respondent project ended and that all its employees including Applicant were paid their terminal benefits.

15. It was argued that in the light of the above credible facts, it cannot be disputed that 1st Respondent project was owned by the 3rd Respondent and that the role of the 2nd Respondent was merely to administer it. It was argued that if Applicant was an employee of 2nd Respondent, he would not have been paid his terminal benefits but would still have his contract with 2nd Respondent. Consequently, the fact that he was paid his terminal benefits by 1st Respondent demonstrates the existence of an employment relationship between them, at least as at the time.

16. It was further argued that Applicant cannot be described as a truthful witness for the reason that, he denied that he signed the contract of employment with 1st Respondent, when he did. It was added that evident to this is the fact that the evidence of 2nd Respondent witness was never challenged in that regard. It was said that another incident illustrative of untruthfulness is

the fact that Applicant denied having a written contract but admitted that he knew no one with an oral contract in the 2nd Respondent employment. It was argued that on these bases, Applicant's evidence cannot be relied upon to decide this matter.

17. Furthermore, it was argued that in terms of the *Labour Code Order 24 of 1992*, an employer is defined as follows,
"any person or undertaking, corporation, company, public body or body of persons who or which employs any person to work under a contract and includes:
(a) any agent, representative, foreman, manager of such person, undertaking, corporation, company, public authority or body of persons who is placed in authority over the employee."

18. It was argued that for purposes of the case *in casu*, the word employer means and undertaking. It was submitted that 1st Respondent is the trading name of the 3rd Respondent. It was argued that the 2nd Respondent is merely an administrator and neither an agent, foreman nor a representative of the 3rd Respondent. It was added that in view of this said, the 2nd Respondent has been sued in error. It was prayed that the Applicant's claims against the 2nd Respondent should be dismissed on this ground.

ANALYSIS

19. Applicant's case is premised on the argument that his contract, which began in February 2005, was never terminated until his recent retrenchment. Although the 2nd Respondent has not placed any evidence of communication of termination to Applicant, We are inclined to agree with Respondent that Applicant was indeed terminated, before he worked under the 1st Respondent project. We say this because, it has been suggested by 2nd Respondent that Applicant was paid his terminal benefits as a consequence of his termination. This has not been denied or challenged by Applicant.

20. It is a trite principle of law that what has not been denied is taken to have been accepted as true and accurate (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242*). This being the case, coupled with the fact that where

payment of terminal benefits has be made, it signifies the end of the employment relationship, We find it more probable that Applicant was terminated prior to joining the 1st Respondent project. Consequently, it is inaccurate that Applicant was laterally transferred from the 2nd Respondent authority to the 1st Respondent project.

21. In view of Our finding above, the next issue for determination relates to the status of 1st Respondent in relation to the 2nd Respondent. Applicant alleges that 1st Respondent is a project that is run and owned by the 2nd Respondent. No further evidence was led on behalf of the Applicant to support this allegation, safe for the allegation that he was laterally transferred to 1st Respondent project by the 2nd Respondent. The rules of evidence dictate that he who alleges must proof their claim. Authoritative in this regard is the appeal decision of *United Clothing v Phakiso Mokoatsi & another (supra),* as cited by Applicant above.

22. It is Our view that Applicant has therefore failed to discharge his obligation to prove his claim, particularly because his allegations have been vehemently denied by 2nd Respondent. We have already made a determination that there was no transfer as the employment relationship between the parties, terminated before the 2nd Respondent joined the 1st Respondent project. Consequently, Applicant's argument does not sustain the point being made.

23. We wish to add that evidence that has been led, only goes to confirm that the 1st Respondent project is not owned by the 2nd Respondent but the 3rd Respondent. This is not only clear from the evidence of the 2nd Respondent, but also from that of the Applicant himself. He conceded during cross-examination that the 1st Respondent project was owned by the 3rd Respondent and not 2nd Respondent. Another factor evidencing this was his concession that at the end of the 1st Respondent project, his terminal benefits were paid by the 1st Respondent and not the 2nd Respondent. As a matter of principle, terminal benefits are only paid by an employer in acknowledgement the services and contribution of the employee concerned and to compensate an employee for the loss of seniority and job-related benefits.

Essentially, terminal benefits are paid where there was an employer and employee relationship between parties.

24. Further, We concede that whereas the 2nd Respondent has alleged that it terminated its contract with Applicant and further that Applicant concluded a new contract with the 1st Respondent, no evidence has been placed before this Court to substantiate the claim. However, the fact that Applicant has not denied that he was paid his terminal benefits, which We have taken to signify the ending of this contract with 2nd Respondent in April 2007, strengthens the 2nd Respondent case of absence of an employment relationship between them, at least as at the time of accrual of the referred claims.

25. Further, while 2nd Respondent sought to rely on an unsigned contract between the Applicant and 1st Respondent, to argue that Applicant was an employee of 1st Respondent, the said contract does not advance his case at all. We say this because, not only is the contract unsinged, but Applicant vehemently denies knowledge thereof. This being the case, 2nd Respondent having raised a special defence, was in law obliged to go further to prove same. This is clear from the authority of *Pillay v Krishna (supra),* as referenced by Applicant. Having failed to do so, Applicant's position that he did not sign a contract with 1st Respondent sustains. It must however, be noted that this is not conclusive that there was no employment relationship between 1st Respondent and Applicant.

26. We acknowledge all the authorities cited by the Applicant in support of his case, save to say that the 2nd Respondent has succeeded to prove that it ended its employment ties with Applicant, before he joined the 1st Respondent project in April 2007. Further that while 2nd Respondent may have failed to prove that Applicant was an employee of the 1st Respondent, it has nonetheless been able to establish that Applicant was not its employee at the time of the accrual of the claims before this Court. Furthermore, that the special plea raised by 2nd Respondent, about the termination of the Applicant's contract, has been substantiated with the unchallenged evidence of payment of terminal benefits, which as We have said signifies termination.

27. We wish to comment that although Applicant denied ever being terminated in a general manner, it was his duty to contradict the evidence of 2nd Respondent that he was terminated. Applicant has attempted to rely on the case of *R. v Pitso (supra)* to argue that the fact that he has not contradicted the evidence of 2nd Respondent, regarding termination of his contract, it should not be accepted as true and accurate. This argument cannot hold for two reasons.

28. Firstly, the authority that Applicant relies upon for his argument is a criminal trial. It is trite that the standards of proof in criminal and civil proceedings are different. In criminal proceedings, the standard is beyond reasonable doubt, whereas in civil proceedings it is on the balance of probabilities. As a result, the requirements of proof in both procedures differ. Secondly, We have stated that authorities in civil proceedings, dictate that what has not been denied should be taken to have been admitted (see *Theko v Commissioner of Police and Another (supra)).*

29. Regarding the reliability of Applicant as a witness, We do not find the cited incidents to be conclusive of such. Rather, the incidents referenced merely illustrate points of difference between Applicant and 2nd Respondent. We say this because, as we have already stated, no evidence has been presented to prove that Applicant actually signed a contract with 1st Respondent. Secondly, the fact that Applicant was not aware of any one without a written contract within 2nd Respondent authority other than himself, does not make him an unreliable witness. Consequently, the issue of the unreliability of Applicant as a witness falls off.

AWARD

We therefore make an award in the following terms:

a) That the 2nd Respondent is not the employer of Applicant;
b) That the 2nd Respondent has been sued in error;
c) That the claims against the 2nd Respondent are therefore dismissed for want of jurisdiction;
d) That the matter must be set down with the remaining parties; and
e) That no order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 28th DAY OF FEBRUARY 2014.

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

Mrs. THAKALEKOALA **I CONCUR**
MEMBER

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

FOR APPLICANT: **ADV. MOKEBISA**
FOR RESPONDENT: **ADV. WOKER**