

HELD AT MASERU

In the matter between:

IRELAND

APPLICANT

and

THUTO MOKONYANA
SEKHAMETSI MATAMANE
MATHAKANE LEROTHOLI
MPHO NTS'EKHE
PUSELETSO RAMOHAPI
LERATA LEBITSA
ALFRED RAMOHOMANE
RELEBOHILE MAKHAJANE
TEBOHO NKALOSI

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT
6th RESPONDENT
7th RESPONDENT
8th RESPONDENT
9th RESPONDENT

JUDGMENT

DATE: 21/11/14

Practice and Procedure - Interlocutory application - For stay of proceedings in the Labour Court pending the adjudication and finalisation of proceedings in the High Court to found jurisdiction - Wherein the applicant is claiming sovereign/ diplomatic immunity - Application for stay dismissed.

BACKGROUND TO THE DISPUTE

1. This is an application for stay of proceedings filed by the respondents in this Court in *LC 90/14* (bearing the same reference number as this application for stay). The application was instituted subsequent to respondents' application in the High Court (*CIV/APN/382/2014*) in which they prayed for the attachment of the Irish Embassy's bank account in Lesotho in order to found jurisdiction. The applicant is contesting this application on the basis that this Court, and any Court in Lesotho for that matter, does not have jurisdiction to entertain any action against the Embassy of Ireland (Lesotho) because Ireland enjoys sovereign and diplomatic immunity and can neither sue nor be sued.

2. It is common cause between the parties that the Embassy of Ireland is a representative of the Republic of Ireland as a sending State, and therefore nothing turns on citing the applicant as Ireland. The applicant is before this Court seeking that the proceedings filed against it pending before it be stayed until the adjudication and finalisation of the High Court application. It is also common cause that the Embassy of Ireland, Maseru closed down officially on 19th September, 2014, and the respondents are all its former employees. Following the closure respondents' contracts of employment were terminated. Respondents were all on fixed term contracts ending 31st December, 2016. They were paid their salaries up to the end of August, 2014 which was the last day of the Embassy's operations. It is respondents' case that they are entitled to payment of their salaries up to the expiration of their contracts. Aggrieved by the arrangement, they instituted *LC 90/14* with this Court on 8th September, 2014 claiming payment of their salaries for the full duration of their contracts.

3. In terms of **Rule 5** of the **Labour Court Rules, 1993** the applicant (respondent in the main application) had to file its answer to respondents' (applicants in the main) within fourteen (14) days of receipt of the originating application. They otherwise run the risk of having judgment entered against them in terms of **Rule 14**. To date, the applicant has not filed an answer to respondents' claim arguing that by so doing they would be submitting to the jurisdiction of this Court. They contend that by answering they would be defeating the whole purpose of sovereign or diplomatic immunity and their answer could be construed as a waiver to a claim of such immunity. As it turned out, respondents have actually filed an application for default judgment dated 30th September, 2014.

4. To avoid judgment being entered against it, the applicant has approached this Court asking it to stay its proceedings until the High Court has pronounced itself on the question of whether Ireland or the Embassy of Ireland is immune from litigation before Lesotho Courts or whether such immunity has been waived as claimed by the respondents. The applicant is praying in the alternative that should the above prayer not be successful they be given an indulgence to file their answering papers within fourteen (14) days of the handing down of this judgment.

EVALUATION OF THE CASE

5. The Embassy of Ireland is claiming diplomatic immunity and privileges in terms of the ***Diplomatic Privileges Act, 1969*** and the ***Vienna Convention on***

Diplomatic Relations, 1961 as well as *Customary International Law* in its case before the High Court. On the contrary, respondents contend that the Embassy has waived such immunity. What is pending before this Court is a labour dispute in which the respondents are claiming payment of their salaries up to 31st December, 2016 when their fixed term contracts with the applicant purportedly come to an end. The applicant is seeking, in the interim, to have this dispute stayed pending the finalisation of the matter relating to diplomatic immunity finalised.

6. Reacting to the application for stay of the proceedings pending before this Court, the respondents raised a point *in limine* to the effect that this Court has no jurisdiction to hear the application because it is a creature of statute and nowhere is it empowered to stay its proceedings pending finalisation of proceedings in another Court.

7. Indeed, this Court is a creature of statute and it can only exercise jurisdiction in respect of those matters that it is explicitly empowered to adjudicate upon by the statute that creates it, *viz*, the *Labour Code Order, 1992 (as amended)*. The Court does not have powers beyond that which the Legislature has given it. Hence, it lacks inherent powers. It can only award an appropriate relief where it has jurisdiction. The applicant has approached this Court by way of an interim or interlocutory relief. The entertainment of interim or interlocutory reliefs is made possible by *Rule 22 of the Labour Court Rules, 1994* and in this particular case by *Subsection (4)* thereof. This Rule is, however, subject to *Rule 25 (3) (b)*. It enjoins the Court to grant such orders as may be granted as final Orders under the Code. Quoted *verbatim*, the Rule provides that:-

In granting interim or interlocutory relief the Court or the President may make such order, as an interim or interlocutory order, as could be made as a final order.

The power of this Court to grant interim or interlocutory reliefs is therefore constrained, as it does not confer unlimited power in this respect.

8. The issue before us then becomes whether the order that is sought by the applicant, although interim “*could be made ... a final order*” as prescribed by the Rule. “*An interlocutory order is an order granted by a Court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such order may be either purely interlocutory or an interlocutory order having a final or definitive effect*” - *Herbstein & Van*

Winsen in the *The Civil Practice of the Supreme Court of South Africa - 4th ed.*, JUTA, 1997 at pp. 877-878. Determining whether or not an order is interlocutory Corbett JA., had this to say in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, 1977 (3) SA 534 (A):-

In a wide and general sense the term “interlocutory” refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action, and (ii) those, known as “simple (or purely) interlocutory orders” or “interlocutory orders proper”...

9. That the applicant is seeking an interim relief is without question because it is seeking an order incidental to the main action. The issue for determination at this juncture would be whether it is an order envisaged by **Rule 25 (3) (b)** (*supra*) which anticipates orders that have a final or definitive effect. An order that has a final effect has been defined in the leading case of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A) at p. 870*, as an order that that **“disposes of any issue or any portion of the issue in the main action or suit”** or **“irreparably anticipates or precludes some of the relief which would or might be given at the hearing.”**

10. We are herein faced with a situation where the applicant is seeking an interim relief in respect of a matter that is pending before another Court, the High Court. As things stand, we are not in a position to ascertain whether the interlocutory order sought by the applicant would have a final or definitive effect or whether it would dispose of the main application or any portion thereof. The problem is that the application for stay does not impinge directly on the case that we are seized with. The issue being whether respondents are entitled to payment of their salaries up to the expiration of their contracts in December, 2016 despite the applicant having had to close for operational reasons.

11. The interlocutory application is for stay pending the finalisation of the case that is before the High Court. The implications of that case are far reaching. As it is, if the High Court finds in favour of Ireland, it follows that the applicant would be immune from the jurisdiction of this country's Courts, and the decision will obviously bring an end to respondents' proceedings pending before this Court. If it decides in favour of the respondents the Labour Court would then be at liberty to determine respondents' claims, unless anyone of the parties takes the matter up on appeal.

12. Had the applicant answered the claim before this Court in terms of its Rules, and perhaps raised a defence that this Court had no jurisdiction to entertain the claim as a point of law we would have been able to make a determination whether or not such jurisdiction existed. As far as we are concerned, the applicant would not be submitting to jurisdiction. Had the applicant answered and pleaded lack of jurisdiction on our part either over the person or the cause of action, we would know exactly the nature of the case that is before us. This would put us in a better position to determine whether or not to grant the stay, and whether such stay could have a final or definitive effect as required by **Rule 25 (3) (b) (supra)**.

13. As it is, the issue of diplomatic immunity has come to our attention for the first time in a separate application for stay, and does not arise as a defence in the main application. The following analogy could be helpful. If a person filed a case before the Directorate of Dispute Prevention and Resolution (DDPR), and the respondent raised a defence of lack of jurisdiction on the part of the DDPR for instance a dismissal relating to operational requirements of the employer, an issue falling within the jurisdiction of the Labour Court, it would not mean that the defendant would be submitting to the jurisdiction of the DDPR. The latter would have to pronounce itself, as a preliminary point, whether it has jurisdiction or not.

14. Applicant's Counsel was at pains to draw a distinction between jurisdiction over a person and over a cause of action, but either way, whatever defence is pleaded, it must have been raised before this Court. The Labour Court from time to time grants prayers for stay of execution of DDPR awards as interlocutory prayers. It is able to do so because it would be having a review application brought in terms of the Labour Code pending before it.

15. **DETERMINATION**

- i) The application for stay of the Labour Court case is dismissed;
- ii) We grant the applicant an indulgence sought in the alternative to file their answer within fourteen (14) days from receipt of this judgment;

- iii) There is no order as to costs, as we do not find the application to have been frivolous.

THUS DONE AND DATED AT MASERU THIS 21ST DAY OF NOVEMBER, 2014.

**F.M KHABO
PRESIDENT OF THE LABOUR COURT (a.i)**

**P. LEBITSA
ASSESSOR**

I CONCUR

**L. RAMASHAMOLE
ASSESSOR**

I CONCUR

FOR THE APPLICANT: ADV., P. J. J. ZIETSMAN - HARLEY & MORRIS

FOR THE RESPONDENTS: ADV., N.B. PHEKO - KEM CHAMBERS