

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/30/2014

In the matter between

ABIEL MASHALE

APPLICANT

And

LESOTHO REVENUE AUTHORITY

RESPONDENT

JUDGMENT

Date of hearing: 29th January 2014

Claim for an anticipated breach of contract brought on urgent basis. Respondent raising two points of law relating to the jurisdiction of the Court over the claim and the lack of urgency of the application. Court further mero muto raising another point of law relating to its jurisdiction to grant the relief sought. Court finding that it has jurisdiction to determine a claim for an anticipated breach. Court, however, finding that Applicant has failed to establish urgency of the matter. Court further finding that it has no jurisdiction to grant the relief sought. Court dismissing the application. No order as to costs made.

BACKGROUND OF THE ISSUE

1. This is an application for prayers in the following,
 - “(a) That respondent be interdicted from unlawfully and prematurely terminating the applicant’s contract of employment which applicant legitimately expects to terminate in July 2016.
 - (b) That in the alternative to prayer (a) above the respondent should terminate applicant’s contract on condition that applicant is paid out the benefits and emoluments he stands to earn until July 2016.
 - (c) That pending finalisation of this application the respondent is interdicted from terminating or engaging into any process intended to affect applicant’s emoluments and benefits.”

2. The matter was initially scheduled to proceed on the 22nd January 2014, but was postponed to this day to allow Respondent to file its opposition. An interim order was granted temporarily staying the retrenchment process against Applicant pending finalisation of this application. Respondent did indeed file its opposition and in opposing the matter, it raised two preliminary points. These points form the subject matter of arguments in this judgment. In addition to these points, We also raised a preliminary point on jurisdiction. We will deal with these points later.
3. The background of this matter is that Applicant is an employee of Respondent in the position of Assistant Commissioner – Large Tax Payers Unit. Sometime in January 2012, Respondent commenced the process of restructuring positions within its structure, under a project called Organisational Structure Alignment to Strategy (OSAS). The purpose of the project was to align the structure of the Respondent positions to the strategy in place.
4. Several consultations were conducted between Respondent and its employees, including Applicant. In the consultations it was made clear to all concerned, and that includes Applicant, that the restructuring process would not culminate into job losses. Subsequently to thereto, Respondent informed Applicant of its intention to retrench him, on the ground of operational requirements. Based on the earlier made promise, Applicant claims an anticipated breach of contract. His argument is premised on the following,
 - (i) That Respondent had promised that the restructuring processes would not culminate into job losses;
 - (ii) That the above notwithstanding, Respondent has indicated its intention to retrench him; and
 - (iii) That this is contrary to his contract of employment which will only end in July 2016, hence the claim for an anticipated breach.
5. Respondent seeks to have Applicant’s claim dismissed on the basis of the preliminary points raised. Having heard the submissions of both parties, Our judgment is therefore in the following.

SUBMISSIONS AND ANALYSIS

6. It was Respondent's case that this Court has no jurisdiction to entertain Applicant's claim in that it falls within the exclusive jurisdiction of the DDPR, as it involves a claim for breach of contract. Reference was made to section 226(2)(b)(ii) of the *Labour Code Order 24 of 1992*, as amended. The said section reads in the following,
"The Following disputes of right shall be resolved by arbitration–
(a) ...
(b) a dispute concerning the application or interpretation of –
(i) ...
(ii) a breach of a contract of employment;
(iii)...."
7. It was added that not only is the claim a section 226(2)(b)(ii) claim, it was brought prematurely before this Court. It was argued that Respondent has not terminated the Applicant's contract of employment, but has merely pronounced its intention to retrench him.
8. The second point was that this matter is not urgent as Applicant has barely alleged urgency of the matter, without stating the factors that make it urgent. It was specifically argued that the legal requirements for an urgent application had not been met. It was then prayed that this application be dismissed for lack of urgency. The Court was referred to the judgement of the Constitutional Court of Lesotho in *The President of the Court of Appeal v The Prime Minister (Dr. Motsoahae Thomas Thabane & others CC/11/2013)*. It was argued that in this case, when addressing the issue of urgency of the matter before Court, the Court stated that a matter that has been brought on urgent basis, but fails to establish urgency must be dismissed.
9. The third point, which *We mero muto*, raised was that the ultimate effect of the prayers sought by Applicant was the permanent stay of the retrenchment process, in respect of Applicant. In raising this point We were guided by the authority in *Thabo Mohlobo & others v Lesotho Highlands Development Authority LAC/CIV/A/02/2010*, where the following was said,

“Where a point of law is apparent on the papers, ... a court is not only entitled but is in fact also obliged, mero muto, to raise that point of law and require parties to deal therewith:

In view of the above authority, the issue was therefore whether this Court had jurisdiction to make such an order, in the light of our retrenchment law. Respondent did not have much to add save to align himself with the attitude of the Court.

10. Applicant answered that in as much as the claim is based on a breach of contract, it relates to an anticipated breach and not the actual breach. It was argued that it cannot be accurate that the claim is premature, by the mere fact that an actual breach has not occurred. The Court was referred to the judgment of the Labour Appeal decision in *Tumelo Monyane v National University of Lesotho LAC/CIV/A/23/2013*, in support. It was submitted that in the said judgment, the Court made a finding that a decision taken but not yet implemented, which has a prejudicial effect on another upon implementation, may be interdicted from being actually implemented.
11. Further, that even assuming it was entirely a breach of contract claim, it involves issues that do not fall within the jurisdiction of the DDPR, namely the issue of retrenchment. It was added that if this matter had to be determined by the DDPR, it would have to delve into the matters over which it has no jurisdiction to determine. It was argued that on the contrary, the Labour Court has jurisdiction over retrenchments.
12. On the second preliminary point, it was argued that the issue of urgency has been overtaken by events. It was said that in terms of the Court of Appeal of Lesotho authority in *Makhoabe Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd & another C of A (CIV) 16/2010*, once the matter has been postponed to allow a respondent party to plead, the requirements for an urgent interdict application pale into insignificance and failure to plead them cannot lead to the dismissal of the claim. Specific reference was made to the following comment,
“The point that the proceedings should not have been instituted as matters of urgency and accordingly the point based on High

court rule 8 (22) cannot be raised at this stage on appeal where the applications were disposed of in the Court a quo after the appellant had been given a full opportunity to put his case:...”

13. On the last point, it was argued that this Court has jurisdiction to entertain a claim for a permanent stay of the retrenchment process, if it is carried out in an illegal manner as Respondent is attempting to. It was argued the jurisdiction to do so arises from sections 24(2) (a) (g) (h) and (i) of the *Labour Code Order (supra)*. It was added that these sections expand the jurisdictional scope of the powers of this Court to include the claim *in casu*.
14. We are in agreement with Applicant that this Court has jurisdiction to determine an anticipated breach of contract claim. Applicant’s argument finds support in the Labour Appeal Court decision in *Tumelo Monyane v National University of Lesotho (supra)*. Further, contrary to Respondent suggestion that this is claim is arbitrable in terms of section 226(2)(b)(ii), it is not. The said section relates to claims for breach of contract whereas the claim *in casu* relates to a breach that is yet to occur. Therefore this point is dismissed.
15. However, we wish to comment that assuming that this matter was entirely a breach of contract claim, it cannot be accurate that in determining it, the DDPR would have to delve into issues over which it has no jurisdiction. The tribunal would only have to determine the basis of the alleged breach of contract. Even if the DDPR would have to delve into the issues of retrenchments as suggested by Applicant, it would be seized with an incidental jurisdiction to do so.
16. Regarding the issue of urgency, it is trite law that an application purporting to be urgent but lacking sufficient arguments to substantiate that claim, stands to be dismissed on that point alone. This finds support in the above cited Constitutional Court decision in *The President of the Court of Appeal v The Prime Minister (Dr. Motsoahae Thomas Thabane & others)* and the several authorities referenced in the judgment. We wish to add that the Court of Appeal authority in *Makhoabe*

Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd & another (supra), does not advance Applicant's case at all.

17. In the *Makhoabe Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd & another (supra)* authority, the issue of urgency was raised for the first time on appeal and it related to the proceedings not before the Court of Appeal, but the court *a quo*. The finding of the Court of Appeal was that the issue of agency cannot be pleaded for the first time on appeal especially where the application had been disposed off, without any challenge to the issue of urgency. Consequently, We reject the Applicant's interpretation of the *Makhoabe Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd & another (supra)* authority and uphold Respondent's argument.
18. On the third point, it is Our opinion that this Court cannot permanently prevent an employer from going on with its retrenchment processes, either against a single employee or all of its employees. To do so would be for the Court to unduly encroach into the domain of the employer. At best this Court can halt the retrenchment process pending the execution of an order to cure an illegality or a default in the processes. This is not the case *in casu* as the order sought carries a permanent effect as far as Applicant is concerned. This we have no jurisdiction to do and therefore it would be pointless to grant a rule, whose substantive relief We cannot confirm.
19. We have carefully considered the decision in 24(2) (a) (g) (h) and (i) of the *Labour Code Order (supra)*, in this regard. They are couched in the following,
“(2) *The Court shall have the power –*
 (a) *to inquire into and decide the relative rights and duties of employees and their respective organisations in relation to any matter referred to the Court under the provisions of the Code and to award appropriate relief in case of infringement.*
 ...
 (g) *to fix an amount of compensation for loss of or damage to the property of an employer where such loss has been occasioned by the wrongful act or omission of his or her employee.*

(h) to adjust and set off one against the other all claims on the party of either the employer or employee arising out of incidental to such relation between them as the Court may find, whether such claims are liquidated or unliquidated or are for wages, damage to person or property or for any other cause, and to direct payment of the balance found due by one to the other;”

20. The above provisions do not in any way open doors for this Court to permanently halt a retrenchment process. While subsection 2(a) provides room for this Court to deal with an anticipated breach of contract claim, both subsections (2)(g) and (2)(h) depend on there being a breach to sustain. *In casu*, no such claim has arisen as Respondent has not terminated Applicant’s contract. Further, Applicant has not illustrated how the communication of the intention to retrench him has resulted in there being loss to him. Consequently, Applicant’s claim and arguments do not hold.

COSTS

21. Respondent had prayed that this application be dismissed with costs. It was argued that this application is an abuse of court process as it is premature and does not establish urgency. Reference was made to the Constitutional Court judgment in *The President of the Court of Appeal v The Prime Minister (Dr. Motsoahae Thomas Thabane & others (supra))*, where the Court stated that a claim that has been brought on urgent basis but fails to establish urgency may be dismissed with costs. No submissions were made on behalf of Applicant either in favour or against the prayer for costs.

22. In Our view, the authority cited by Respondent leaves it in the discretion of the Court to make an award of costs and as such it is not binding to the letter. We have stated before that this Court is not bound by the practices of ordinary courts in dealing with the issue of costs (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*). We only award them in extreme circumstances of frivolity and vexatious conduct during the proceedings. 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

We therefore make an award in the following,

- 1) That this application is dismissed for the reasons stated above;
- 2) The interim order granted on the 22nd January 2014 is discharged; and
- 3) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 7th DAY OF FEBRUARY 2014.

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

**Mr. S. KAO
MEMBER**

I CONCUR

**Mrs. L. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MOLATI
ADV. MANYOKOLE**