

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/40/2014

In the matter between:

NKATANA PHATELA
TŠIU MOSALA
THAPELO KOALI
‘MAPHALI PHAMOTSE
‘MAMPINANE MASUPHA
‘MATANKI MOHLAKANA
‘MAMASHEANE MATELA

1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT
5th APPLICANT
6th APPLICANT
7th APPLICANT

And

DIRECTOR – DEPARTMENT OF RURAL
WATER SUPPLY
P. S MINISTRY OF ENERGY,
METEOROLOGY & WATER AFFAIRS
MINISTER OF ENERGY,
METEOROLOGY & WATER AFFAIRS

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT

JUDGMENT

Hearing Date: 25th February 2014

Application for a declaratory order made on urgent basis. Court requiring parties to make addresses on the urgency of the matter. Court considering the two requirements for urgency. Applicant succeeding to establish inconvenience but failing to establish that they would not obtain substantive relief if heard on ordinary modes and period. Court finding that the matter is not urgent and ordering that it be heard through normal modes and periods. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for a declaratory order in the following terms,

“1. That the rules of this Honourable Court pertaining to normal modes and periods of service be dispensed with in account of urgency hereof.

2. A rule nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why an order in the following terms shall not be made final: -

(a) That the 1st Respondent’s act of renewing/extending daily paid employees contracts that ended on 31st December 2013, to the exclusion of the applicants herein is declared unfair discrimination and therefore unlawful.

(b) That the 1st Respondent be ordered to continue to receive applicants into service and to pay their salaries accordingly pending finalisation of this matter.

(c) That the 1st Respondent consequent to order under 2 (a) above be ordered to pay applicants salaries for the month of January 2014.

(d) That respondents pay costs of suit only in the event of opposition.

(e) That applicants be granted such further and/or alternative relief.

3. That prayer 1 and 2 (b) operate with immediate effect as interim order.”

2. On the 21st February 2014, both Applicants and Respondents appeared before this Court. They indicated to the Court that they had agreed on the granting of the interim order but only wished for the Court to put them to terms regarding the filing of other court processes. That notwithstanding, We indicated to parties that We wished to be addressed on the issue of urgency. We then postponed the matter to this day for addresses on the issue.

SUBMISSIONS

3. It was Applicant’s case that the matter is urgent for the reason that Respondents are not paying their salaries on account of an illegality. It was argued that in terms of annexure C, Respondent claims that it is not paying the Applicant salaries because they have no contracts of employment, as they were not renewed. It was further argued that the act of non-renewal of the Applicants contracts, which is the main premise for non-payment of their salaries, is discriminatory as therefore illegal.

It was submitted that the non-payment of the Applicants salaries on these bases, is a continuing illegality which this Court cannot turn a blind eye to.

4. The Court was referred to the case of *Best Boxers Club v Lesotho Amateur Boxing Association CIV/APN/97/2003*. It was argued that in this case, the learned Judge stated that a continuing illegality coupled with extreme unreasonableness warrants that the matter be treated with urgency. The Court was referred to the following passage of the judgment, *“Mr. Phoofolo contended that if he had resisted the application he would have succeeded in proving that the whole application would have to be dismissed on account of lack of urgency. I would not have entirely agreed. In viewing the prayers 1(a) and 1(b) one need not forget that what are being applied for are discretionary remedies.”*

It was submitted that in this same case, the Court further went on to say,

“I would have viewed the basis of the prayer 1(a) as being that a continuing wrong was taking place to the detriment of the Applicant's interests. Despite the lardiness of the Applicant a case of continuing prejudice and extremely unreasonable conduct on the part of the Respondent always cried out for urgent treatment and relief by the Courts. This was very compelling and overwhelming. It could even explain the reason why the Respondent itself decided not to oppose the whole application.”

It was argued that the conduct of Respondents constitutes both a continuing illegality and unreasonable conduct and that this renders the hearing and determination of this matter urgent.

5. It was further submitted that a salary is the right of an employee and a source of livelihood. As a result, where the matter involves the intervention of the Court against the denial of the means of livelihood, the Court is inclined to treat the matter as urgent. The Court was referred to the case of *Seeiso Leche v Telecom Lesotho & others LAC/REV/26/2009*. It was submitted that this case merely illustrates that a salary is the property right of an employee. The Court was further referred to the case of *Standard Lesotho Bank Limited v T. J.*

Construction (Pty) Ltd & others CIV/APN/592/2012. It was submitted that in this authority the Court made a finding that a matter involving money, which is the right of parties, must be heard on urgent basis.

6. It was furthermore submitted that Applicants would have no alternative remedy if the matter is to be heard through normal modes and periods of this Court. It was argued that this claim can only be heard and determined to finality by this Court, as the Directorate of Dispute Prevention and Resolution (DDPR) would have no jurisdiction to hear and determine a claim that is based on discrimination. It was added that given that the relief sought depends on the declaration of the conduct of Respondent as being discriminatory, then this Court is the proper forum of referral.
7. It was argued that the Applicants have acted swiftly in bringing this matter to Court. It was said that in employment law, the rule is that parties must explore and exhaust all local remedies before they proceed to the Courts. It was argued that this is what Applicant did in the period between the time that the dispute arose and its referral with this Court. The Court was referred to several correspondence between Applicants and Respondents, and in particular annexures B and C.
8. It was Respondents case that the matter is not urgent. It was submitted in support, that Applicants have no right to the salaries in issue as their contracts have ended. It was further submitted that Applicants have failed to act swiftly in bringing this matter before this Court, as they waited for 6 days before they could seek the intervention of this Court. It was argued that this illustrates that the matter is not urgent and must therefore be heard in terms of the ordinary modes and period of this Court. The Court was referred to the cases of *Mahlakeng and Others v Southern Sky (Pty) Ltd and others CIV/APN/240/2003*; and *Commander of LDF and Another v. Matela LAC (1995-99) 799*, in support.

ANALYSIS

9. Where a matter is brought on urgent basis before this Court, the applicant party must establish the following,

- That the circumstances of the matter require that it be heard and determined on urgent basis; and
- That if the normal modes and periods of the Court are followed, an applicant party will not obtain the substantial relief sought.

(see *Aroma Inn v Hypermarkets & Another* 1981 (4) SA 108 at pp 110-111, cited with approval in *Motemoka Mokabe v Security Lesotho (Pty) Ltd* LC/98/1995)

10. *In casu*, Applicants have attempted to illustrate that there are pressing circumstances that render the matter worthy of being heard on urgent basis. We wish to note that We acknowledge the authorities cited in support of the arguments raised by Applicants. In Our view, the Applicant's case is premised on that fact that they have not received salaries in January 2014 and that they are in fear that they will not get paid in February as well. While Respondents argue that Applicants have not right to the salaries and therefore not entitled to payment, We are of the view that this is an issue mainly for determination in the merits of the matter.
11. What is clear to Us and relevant for purposes of determining the issue of urgency is the fact that the claim involves the non-payment of salaries. Under the circumstances, We are of the view that this is pressing for the Applicants, particularly as they alleged that their livelihood is derived from their salaries. In essence, Applicants have been able to establish that the non-payment of salaries are an inconvenience to them. We wish to add that We are convinced that Applicants have acted swiftly in bringing this matter before this Court. The time taken to refer this matter is reasonable given the circumstances placed before Court.
12. However, this fact alone is not sufficient justification for the matter to be heard and determined on urgent basis. The reason is not hard to find as almost all, if not all, of the employment disputes centre around the livelihood of applicant parties. As a result, if this Court were to determine this issue solely on the basis of the first requirement, it would set a very ruinous precedent which would open up a can of worms as each and every employment dispute would be referred to this Court on urgent basis.

13. In addressing the second requirement, Applicants claimed that there would be no other remedy available to them, as the DDPR would not have jurisdiction to hear and determine their claim. We agree with Applicants that the DDPR has no jurisdiction to entertain a claim that is based on discrimination and that as a result, it would not have jurisdiction over their claim. However, the issue under the second requirement is whether or not Applicants would obtain their substantial relief if heard in terms of the ordinary modes and period of this Court.
14. There is nothing in the submissions of Applicants that suggests that they would not. Rather, their submissions simply attempt to justify why they approached this Court and do not in any way justify the approach adopted. We therefore find that the test for urgency is not met. Supportive of Our finding is the authority in *Authoritative* in this regard is the authority in *Makhuva v Lokoto Bus Service (Pty) Ltd* 1987 (3) SA 376, at pp 389-390, where the Court held as follows,
- "I am not persuaded that the matter was so urgent that anything more drastic than enrolment on the motion roll even in the ordinary way, even if that were on short notice, was required. In the present case some financial loss to applicants is alleged, albeit faintly, but there is no suggestion that it would be irrecoverable. Certainly the reasons which Fagan J. gave in Aroma Inn case cannot rescue the present applicants in the sense that they would be sustaining losses which they could not possibly recover by 'remedy in due course'."*

AWARD

We therefore make an award in the following terms:

- a) That this matter is not urgent;
- b) The prayer for dispensation is refused;
- c) That the matter must follow the ordinary procedures pertaining to the times, filing and allocation of dates for hearing; and
- d) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 26th DAY OF FEBRUARY 2014.

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

**Mrs. THAKALEKOALA
MEMBER**

I CONCUR

**Mrs. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENTS:**

**ADV. TLHOELI
ADV. MOHAPI**