IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/88/2014**

IN THE MATTER BETWEEN

MOHAPELOANE MOHAPELOA **APPLICANT**

AND

LESOTHO ELECTRICITY COMPANY (PTY) LTD **RESPONDENT**

JUDGMENT

Application for an interdict. Respondent raising three point of law in answer on jurisdiction, failure to establish a right to an interdict and material non-disclosure. Court finding that it has jurisdiction over this application. Court however finding that Applicant has failed to establish a right to an interdict and that he also failed to make a material disclosure of facts. Court dismissing application and no order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for an interdict in the following terms:
   "1. Dispersing with the ordinary rules and modes of service pertaining to the present application.
   2. Restraining the respondent from removing the applicant out of the respondent's house the applicant occupies in Qacha's Nek pending finalisation of the DDPR proceedings in A0669/2014.
   3. Directing that prayers 1 and 2 above should operate with immediate effect.
   4. Granting further and/or alternative relief to the applicant as this Honourable Court may deem fit."

2. Prayers 1 and 2 were granted and a rule nisi was issued returnable on the day of hearing. In its answer to the Applicant's claim, Respondent had raised three points of law,

on jurisdiction, failure to establish a right to an interdict and material non-disclosure. These were replied to by Applicant issuably. Parties were heard on these points and Our judgement follows.

SUBMISSIONS AND ANALYSIS

Jurisdiction

3. Respondent argued that Applicant's case centres around removal from occupation, wherein Applicant claims to have the right to occupy. It was argued that the remedy sought lies within the jurisdiction of the Subordinate Courts in terms of section 18(1) of the *Subordinate Court Order of 1988*. In terms of that section;
   "Subject to the limits prescribed by this order, the court may grant against persons and things, orders for arrest tangham suspectus de fuga, attachments interdicts and mandament van spolle."

4. It was argued that if this Court proceeds to hear and determine this matter, it will be usurping the powers of the subordinate Courts conferred under section 18(1). It was added that the practice to usurp such powers was discouraged by the Lesotho Appeal Court in *Nko v Nko LAC 1990-1994 3/2 at 314-315*. The Court was specifically referred to the following extract of the judgment,
   "Subordinate Courts Order, 1988 repeals the Subordinate Courts Proclamation 1938. It provides per the Constitution of Subordinate Courts provided over by magistrates (section 3). Section 29 declares which matters are beyond the jurisdiction of subordinate courts. Chieftainship and Succession to Chieftainship are not excluded by section 29. It is necessary therefore, to consider whether section 17 that pronounces which causes of action fall within the ambit of jurisdiction of subordinate courts confers such power. It does not expressly confer such power but sub-section 1(e) thereof does provide that a subordinate court shall have 'such other jurisdiction as shall be specially conferred by any other law."

5. It was argued that from the above extract, the Magistrates Courts have jurisdiction in all matters in respect of which their jurisdiction has not been specifically excluded. It was added

that this is distinct from the position in the Labour Court where its jurisdiction is only limited to cases of unfair dismissals, per the interpretation of section 25(1) of the Labour *Code Order 24 of 1992*, by the Court of Appeal in *CGM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others C of A (CIV) 10/99*.

6. It was argued that in terms of section 25(1) of the *Labour Code Order (supra)*,
   "The jurisdiction of the Labour Court shall be exclusive as regards any matter provided for under the Code including but not limited to trade disputes. No ordinary or subordinate court shall exercise its civil jurisdiction in regard to any matter provided for under the Code."

7. It was submitted in confirming the conferment of jurisdiction exclusively on the Labour Court, in respect of unfair dismissal cases, the Court of Appeal in *CGM Industrial (Pty) Limited .v. Lesotho Clothing and Allied Workers Union and Others (supra)* had the following to say,
   "It is important to emphasise that in matter[s] provided for under the Code, the High Court has no jurisdiction and that only the Labour Court has jurisdiction. See in this regard attorney General .v. Lesotho Teachers Trade Union & Others C of A 1991-1996 Vol. 1 LLR 16 at 25. Failure to recognise the exclusivity of the Labour Court's jurisdiction in matters provided for under the Code, would inevitably lead to unsatisfactory practice of what has been termed 'forum shopping'. CF the paper printing Wood and Allied Workers case, supra at 640 G-H."

8. It was further submitted that in so far as interdicts are concerned, the jurisdiction of the Labour Court is limited only in respect of matters which,
   'a) in the first place do not fall within the jurisdiction of the DDPR.
   b) they have to do with an issue arising predominantly from the provisions of the Labour Code.'

9. It was concluded that the relationship between Applicant and Respondent was that of occupier and owner which is the tenant and the landlord. It was argued that as a result, the

relationship has nothing to do with the provision of the Labour Code. It was prayed that the claim be dismissed on the ground above.

10. In answer, Respondent submitted that the dispute has a remedy under section 228(1) of the *Labour Code (Amendment) Act 3 of 2000*. It was submitted that in terms of that section, *"Any party to a dispute that has been referred in terms of section 227, may apply to the Labour Court for urgent relief, including interim relief pending the resolution of a dispute by arbitration."*
It was argued that as a result, there is no usurping of powers.

11. It was further argued that the right to occupy arises from the parties' employment contractual relationship and the policies of the employer. It was submitted that this being the case, this Court has jurisdiction to grant an interdict in terms of section 228(1) as reference above.

12. It is not in dispute that the interdict sought is pending finalisation of a matter before the DDPR. That being the case, it falls within the jurisdiction of this Court, at least in terms of section 228(1) of the *Labour Code (Amendment) Act (supra)*. We are therefore in agreement with Applicant that the remedy sought lies within the jurisdiction of this Court and no other.

13. The above view standing, We wish to comment on the submissions of the Respondent to set the record straight. We confirm that the Subordinate Court have jurisdiction to grant interdicts in terms of section 18(1) of the *Subordinate Courts Order (supra).* However, such jurisdiction is subject to the provisions of section 25 of the *Labour code Order (supra),* as amended by section 9 of the *Labour Code (Amendment) Act (supra).*

14. In terms of that section,
"(1) The jurisdiction of the Labour Court is exclusive and no court shall exercise its jurisdiction in respect of any matter provided under the Code –
(a) Subject to the constitution and section 38A; and

(b) Notwithstanding section 6 of the High Court Act, 1978 (Act No. 13 of 1973).

(2) The Minister, the Labour commissioner, the Director of Dispute Prevention and Resolution and an aggrieved party shall have the eight to present a claim to the court as provided under the Code."

15. As We have already made the determination, this Court has jurisdiction in terms of the *Labour Code (Amendment) Act (supra)* to hear and determine this claim. That being the case, the case at hand is one in respect of which this Court has exclusive jurisdiction. As can be observed from the provisions of section 25 as amended, the jurisdiction of this Court as provided for under the code is only subject to the constitution. Consequently, the Subordinates Courts have no jurisdiction over this matter.

16. We also wish to reject the suggestion that section 25, both in its original form and as amended, limited the jurisdiction of this Court to unfair dismissal cases. We further wish to reject the suggestion that the extract from the Court of Appeal decision in *CGM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union and Others (supra)*, confirmed the conferring of the jurisdiction of this Court only in respect of unfair dismissal claims. Rather what the Court merely did was to emphasise that this Court has exclusive jurisdiction over labour matters.

Failure to establish a right to interdict

17. Respondent submitted that Applicant has failed to establish the requirements for the granting of an interdict. It was submitted that the requirements were laid out in the case of *Kamogelo v Motlhagodi and Others 1997 BLR 216 (HC)*, as follows'

"A person who requires an interdict should by law satisfy four elements. These are (a) a prima facie right; (b) a well grounded apprehension of a harm or in fact an existing harm if the relief is not granted; (c) the balance of convenience favours the granting of an interdict; and (d) that the applicant has no other satisfactory remedy. These grounds are inter-related and are not to be considered individually in isolation."

18. It was argued that *in casu*, Applicant lost the right to occupation when it was confirmed that he no longer has the status that goes in tandem with the alleged right. It was submitted that this being the case, there is no *prima facie* right and therefore that it is not necessary to consider other elements as they depend on the existence of a right.

19. It was argued that that notwithstanding, Applicant has an alternative remedy to rent a home and to later claim damages should he win. Further that the balance of convenience favours the refusal of the interdict, in that it is the substantive holder of the position that has a right to occupation. It was added that someone has since been appointed in the position which Applicant initially held and that candidate has the right to occupy in terms of the Respondent policies. It was also argued that Applicant has not shown any irreparable harm that he stands to suffer.

20. In answer, Applicant submitted that he has a clear right to occupation which flows from his right to the position from which he has been removed. He added that in terms of the policy of the employer, one can only act for six months and no more. He submitted that having acted for four years he had claimed that the position is his, including the benefits, at the DDPR and is awaiting the outcome.

21. About irreparable harm, Applicant submitted that he will suffer irreparable harm in that he will be removed from the house which he occupies and that the inconvenience to be caused cannot be repaired. No further submissions were made in respect of other requirements for an interdict.

22. We wish to confirm that the requirements for an interdict are as Respondent has put. Regarding the first requirement, We wish to add that a party need not establish a certain right, but that even if doubtful, once established it is sufficient. The addendum is meant to lessen the burden on the Applicant party and to extend the application of the principle of *audi alteram partem*.

23. That notwithstanding, We are of the view that Applicant has failed to establish a right to an interdict. We say this because what he claims depends on another Court finding that he has a right to what he has claimed. From Applicant case, he has asked that the DDPR declare the position in issue his. It is only once such a declaration has been made that his right of occupation will arise. Therefore the alleged right is not even doubtful but non-existent.

24. Further, We agree with Respondent that the situation may have been different had Applicant claimed to have a right before he was removed from the position which he has asked to be declared his before the DDPR. In short, had Applicant contested an attempt to remove him, he would have remained with the right to occupy the house in issue rather than to wait until after his removal.

25. Regarding the other elements, We agree with Respondent that Applicant has an alternative remedy. As respondent has rightly put, Applicant can ask for damages occasioned by the removal from the Respondent premises. Further, the balance of convenience favours the refusal in that Applicant is no longer the incumbent of the position in issue. It is now occupied by someone else who has been appointed to act in the position, which appointment Applicant did not attempt to stop. Furthermore, We agree with Respondent that Applicant has not shown any irreparable harm. We are of the view that harm, if any, can be best cured by damages or compensation, should Applicant succeed in his claim before the DDPR.

Material non-disclosure

26. Respondent argued that Applicant has failed to disclose material facts before this Court that'

"a) he applied for the position of superintendent;

b) he was not successful in the said post;

c) he had been put on that post per the letter attached to the answering affidavit."

It was argued that had these facts been disclosed, he would not have been granted the interdict.

27. The Court was referred to the case of *Schlesinger v Schlesinger 1979 (4) SA 342*, where the Court had this to say'
"(1) In ex parte applications, all material facts must be disclosed which might influence a court in coming to a decision;
(2)the non disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and
(3)the court, appraised of the true facts, has a discretion to set aside the former order or to preserve it."
It was added that this extract was quoted with approval in *Mamahao Nkhasi v Lesotho Electricity Corporation and 4 Others CIV/APN/36/08*.

28. In answer, Applicant submitted that he acted in the position of superintendent for four years. He added that even if he had not disclosed that he had applied and was not successful, Respondent has not shown the effect of that on the order granted. It was submitted that there is no failure to disclose a material fact. The Court was referred to paragraph 5 of the Founding Affidavit.

29. We have gone through the Founding Affidavit of Applicant, and not just on paragraph 5. From its perusal, We have noted that position in respect of which the interdict is sought is that of superintendent. The right of Applicant to occupy the house in issue depends on him being in the position. As a result, it was incumbent upon him to disclose any evidence that is material or which had the likelihood of influencing the Court in its decision.

30. In Our view, the non-disclosed facts are material. We say this because these facts go to the heart of the Applicant's claim for a right to be granted an interdict. We say this because if Applicant had applied for the position in issue, it meant that he was aware that it could be given to someone else other than him, subject to the outcome of the recruitment process. At that stage, Applicant had then ceased to have a right to the position in issue. Therefore if this fact had been disclosed, We would not have granted the interdict. In Our view the rule in *Schlesinger v Schelsinger* applies *in casu*.

AWARD

We therefore make an award as follows:

1) Application is dismissed.
2) The rule granted is discharged.
3) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF FEBRUARY, 2015.

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

MRS. RAMASHAMOLE	**I CONCUR**
MISS LEBITSA	**I CONCUR**
FOR APPLICANT:	**ADV. NTAOTE**
FOR RESPONDENT:	**ADV. MOLATI**