**IN THE LABOUR COURT OF LESOTHO** **LC 36/16**

**HELD AT MASERU**

**In the matter between:**

**TEBOHO SHATA** **APPLICANT**

**and**

**LEROTHOLI POLYTECHNIC** **1st RESPONDENT**

**RECTOR, LEROTHOLI POLYTECHNIC** **2nd RESPONDENT**

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# JUDGMENT

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**24/01/17**

- ***Interlocutory application - for an order of restraint against eviction the of an employee from a staff house he occupied following his dismissal on grounds of misconduct by the disciplinary panel - Employee lodging an appeal against the said dismissal with the institution's Council and contending that he cannot be evicted from the staff housing facility whilst his appeal to the Council is still pending - Court deciding that since the disciplinary panel's decision to dismiss him is not final, it is only fair that the appeal machinery be allowed to take its course;***

- ***Jurisdiction - Respondent raising a point in limine that this Court has no jurisdiction to determine the issue at hand - Court assumed jurisdiction.***

1. The applicant is a lecturer at Lerotholi Polytechnic, an educational institution and 1st respondent herein. The 2nd respondent is the Rector of this institution. Following a disciplinary enquiry, the applicant was found guilty on for breaching Clause 4.3.1 of the institution's Code of Conduct and dismissed. He received a letter from the acting Rector informing him of his guilty verdict and the sanction of a dismissal. He was further informed in the said letter that he would be expected to vacate the institution's house he was occupying by the next day, 25th October, 2016 having been notified of the dismissal on 24th October, 2016.

2.The 2nd respondent further informed him of his right to lodge an appeal to the Governing Council in terms of the institution's statutes within five (5) working days of receipt of the letter, if he so wished. The applicant duly noted an appeal on 1st November, 2016 and requested that he be allowed to occupy the house until his appeal hearing had been finalised. This request was turned down, and he was given an

extension of up to 27th October, 2016. The acting Rector wrote him another letter dated 7th November, 2016 in which she warned him that he was illegally occupying the institution's house as he had been dismissed. Aggrieved by this decision, he approached this Court on an urgent basis for an order restraining the respondents from evicting him from the institution's house pending the finalisation of his appeal to the Council. It is applicant's case that he has good prospects of succeeding in his appeal and stands to suffer prejudice if the eviction would be effected.

***RESPONDENTS' CASE***

3. In opposing the application, respondents' initial reaction was to raise a point ***in limine*** to the effect that this Court has no jurisdiction to entertain this application as it can only determine interlocutory applications where there is a case before the Directorate of Dispute Prevention and Resolution (DDPR). Respondents' Counsel submitted that ***Section 228 (1) of the Labour Code (Amendment) Act, 2000*** was clear that urgent matters may only be heard by this Court pending the resolution of a dispute by the DDPR. Thus, he submitted, that because there was no matter pending before the DDPR, applicants were not properly before this Court.

4. He contended further that this Court could not intervene in a matter that was still pending before an administrative body. He relied for his submission on this Court's decision in ***Moeko Maboee v Maluti Mountain Brewery (Pty) Ltd***.[1] In his opinion, the applicant had to plead with the institution's Housing Committee. He argued that the applicant was no longer an employee of Lerotholi Polytechnic and his tenancy terminated immediately upon his dismissal. This, he pointed out, coupled with the fact that he was no longer paying rent, rendered his occupation of 1st respondent's premises illegal. On the merits of the application, respondents' Counsel submitted that the application failed to meet the essential elements of interlocutory applications as enunciated in the classical case of ***Setlogelo v Setlogelo***.[2] He therefore prayed that the application be dismissed.

***THE COURT'S EVALUATION***

5. This application raises two main issues. Firstly, whether this Court has jurisdiction to hear this matter and if this question is answered in the affirmative, whether the applicant has a right to remain in 1st respondent's accommodation pending the finalisation of his appeal to the Council. The question of jurisdiction has to be determined first because if the Court finds that it has no jurisdiction, it will not have to consider the second issue.

[1] LC 49/11

[2] 1914 AD 221

***(i) JURISDICTION***

Both ***Rule 22 (1) and (4) of the Labour Court Rules, 1994*** and ***Section 228 of the Labour Code (Amendment) Act, 2000*** project two scenarios on urgent applications and interim reliefs, namely, matters that arise before and after proceedings have been instituted with the Court. ***Rule 22 (1)*** provides that:-

> ***Applications for interim or interlocutory relief arising before proceedings have been otherwise instituted*** (emphasis added) ***shall be included in an originating application for final relief, filed pursuant to rule 3, stating why the matter is urgent, in or substantially in accordance with paragraph 5 of Form LC 1 contained in Part A of the Schedule.***

6. This Rule envisages a situation where there are no proceedings pending before Court altogether, and arguably, even before the DDPR. Clearly, a party has a right to approach this Court despite having no matter pending before the DDPR, contrary to respondents' Counsels' submissions. On the strength of ***Rule 22 (1)*** a party may also institute an interim relief where there is no matter pending before the Labour Court. Hence, 1st respondents' Counsel's argument that this Court can only entertain interlocutory applications where there is a matter pending before the DDPR does not hold water.

7. ***Subrule (4)*** thereof covers cases where there is already a case pending before this Court. It reads:-

> ***Applications for interim or interlocutory relief arising after the institution of proceedings*** (emphasis added) ***by originating application or appeal and all other applications incidental to such proceedings, shall be in writing or substantially in accordance with LC 4 contained in Part A of the Schedule and shall be presented, or delivered by registered post, to the Registrar and, in the case of interlocutory applications, to the opposing party or parties on not less than four days' notice, or as the President may direct.***

8. These Rules were promulgated before the inception of the DDPR. With the ushering in of the DDPR, ***Section 228 (1) of the Labour Code (Amendment) Act, 2000*** was enacted to exclusively cater for interim or interlocutory reliefs for matters pending before the DDPR. The Section provides that:-

> ***Any party to a dispute that has been referred in terms of section 227*** (namely, a dispute of right pending before the DDPR) ***may apply to the Labour Court for urgent relief, including interim relief pending the resolution of a dispute by arbitration***.

The existence of ***Section 228 (1)*** does not necessarily mean that the Court can only entertain interim reliefs brought under it as suggested by respondents' Counsel. We have come across a number of cases instituted before Court in the absence of any case pending either before it or the DDPR. For instance, parties have approached this Court

on issues around legal representation in disciplinary proceedings as was the case in ***Maboee***.[3]

9. That said and done, ideally this matter ought to have been heard by the Labour Appeal Court under ***Section 38 A (1) (b) (iii) of the Labour Code (Amendment) Act, 2000*** which gives it power:-

> ***to hear and determine any administrative action taken in the performance of any function in terms of this Act and any other labour law.***

The administrative action taken by the respondents is the attempt by the respondents to evict the applicant from its housing facilities following the exercise of its managerial prerogative to discipline him under the common law.

10. Be that as it may, applicant's Counsel intimated to the Court that he initially instituted this application before the High Court[4] and the Labour Appeal Court[5] respectively, which both declined jurisdiction. He therefore prayed that applicant's solace lay with this Court. This put the Court in a predicament between assuming jurisdiction which it did not have; setting a bad precedence; and appealing to its a sense of justice in the circumstances of this case. The latter prevailed. Being a Court of equity, we felt in the interests of justice and fairness, we could not allow an aggrieved party to be sent from one forum to the other and ultimately be devoid of relief in an employment setting, which is our area of interest. We decided to hear the matter.

11. We were further inspired in this by the spirit of ***Section 27 (2) of the Labour Court Order, 1992*** which provides that the chief function of this Court shall be ***"to do substantial justice before the parties before it***.***"*** Again, the relief sought being only interim with no final effect, we felt the 1st respondent will not be prejudiced thereby. Having passed this preliminary hurdle on jurisdiction, we come to the second enquiry which is whether the applicant has a right to remain in 1st respondent's house despite the verdict of a dismissal by the disciplinary panel.

12. Relying on the ***Maboee***[6] case***,*** Respondents' Counsel contended that Courts are restricted in interfering in administrative action. Courts are indeed urged to exercise a lot of restraint in the intervention of administrative action. It, however, depends on the circumstances of each case. One of the eminent authors Lawrence Baxter, in his work on **Administrative Law**[7] stated that:-

> ***Except where legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever procedure is deemed appropriate, provided this does not defeat the purpose of empowering legislation and provided that it is fair.***

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[3] Note 1 above
[4] CIV/APN/404/16
[5] LAC/CIV/APN/06/16
[6] Note 1 above
[7] 3rd ed., Juta & Co., Ltd, 1984 at p. 545

At the root of it all is acting within one's powers and fairly. Courts' powers to review administrative action is to ensure that certain fundamental principles are upheld as succinctly put in ***Solomon v Commission for Conciliation, Mediation and Arbitration and Others***:-[8]

> ***The review process is designed to ensure that certain fundamental values are upheld, that 'due process' is followed in regard to administrative action…***

***(ii) THE INTERIM RELIEF SOUGHT BY THE APPLICANT***

13. As rightly pointed out by respondents' Counsel the Court was guided in its enquiry by principles regulating the grant of Interim reliefs as set in ***Setlogelo v Setlogelo***[9] which are:-

- a clear right on the part of the applicant;
- an injury actually committed or reasonably apprehended; and
- the absence of any other satisfactory remedy available to the applicant.

Respondents' Counsel contended that the applicant has not demonstrated any clear right to continue staying in 1st respondent's property. As it is, the applicant occupied 1st respondent's housing facility by virtue of him being its employee and qualifying for it. He therefore acquired a right to such housing on that basis. It is indisputable that he was found guilty of misconduct by the disciplinary panel. He, however, lodged an appeal with the Council, an appeal machinery provided by the 1st respondent.

14. Whilst we acknowledge that the Council reserves a right to arrive at whatever decision it deems appropriate, including confirming applicant's dismissal, it is our considered opinion that, it is inappropriate to evict the applicant from the institutional housing facility until the Council has pronounced itself on the finding of the disciplinary panel. 1st respondent's local remedies will not be exhausted until the Council makes a finding on applicant's appeal against his dismissal. The Council may either confirm or reject the disciplinary panel's verdict. The appeal procedure is a domestic remedy provided by the employer, and it must be respected.

15. The tenancy agreement is tied to applicant's tenure of employment and will cease to exist if the Council confirms the finding of the disciplinary panel. Council could overturn the disciplinary panel's decision, and if evicted before then the applicant will have suffered an undue hardship and prejudice which could have been avoided by a little patience on the part of the respondents. Respondents' Counsel argued that there is no apprehension of harm on the part of the applicant because he already knew that if found guilty he was likely to be dismissed. As already canvassed, the sanction meted out by the disciplinary panel can only be effected if the Council confirms its verdict. On the rent, we appreciate that the 1st respondent is entitled to rent for the duration of applicant's stay in its facility. Our advice would be for parties to come to an arrangement

[8] (1999) 20 ILJ, 2960 at p. 2967
[9] Refer to Note 2

which would be fair to both parties on the payment of rent, either defer it until the Council has reached its decision or negotiate any terms best suited to the parties.

16. The issue of an alternative remedy has already been addressed in paragraph 10 above.

***ORDER***

On the basis of the above analysis, the Court comes to the following conclusion:-

***(i) That the termination of applicant's tenancy be stayed in light of the fact that he has noted an appeal with the Council of Lerotholi Polytechnic;***

***(ii) There is no order as to costs***.

**THUS DONE AND DATED AT MASERU THIS 24TH DAY OF JANUARY, 2016.**

**F.M. KHABO**
**PRESIDENT OF THE LABOUR COURT OF LESOTHO**

**L. MATELA** **I CONCUR**
**ASSESSOR**

**R. MOTHEPU** **I CONCUR**
**ASSESSOR**

**FOR THE APPLICANT : Adv., P.M. KOTO**
**FOR THE RESPONDENTS : Adv., H.P. TS'OLO - ASSOCIATION OF LESOTHO EMPLOYERS AND BUSINESS**

## ***ANNOTATIONS***

***STATUTES***

**Labour Code (Amendment) Act, 2000**
**Labour Court Order, 1992**
**Labour Court Rules, 1994**

***CITED CASES***

**Moeko Maboee v Maluti Mountain Brewery (Pty) Ltd LC 49/11**
**Setlogelo v Setlogelo 1914 AD 221**
***Solomon v Commission for Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ, 2960***

***LITERATURE***

***Lawrence Baxter - Administrative Law 3rd ed., Juta & Co., Ltd, 1984***