

IN THE COURT OF APPEAL OF LESOTHO

C OF A(CIV) 35/2021

In the matter between –

MAMARAME MATELA

APELLANT

and

LESOTHO COMMUNICATIONS AUTHORITY

1ST RESPONDENT

LESOTHO COMMUNICATIONS AUTHORITY - BOARD OF DIRECTORS

2ND RESPONDENT

UNIVERSAL SERVICE FUND – LCA

3RD RESPONDENT

KENEUOE MOHALE

4TH RESPONDENT

NIZAM GOOLAM

5TH RESPONDENT

MINISTER OF COMMUNICATIONS, SCIENCE AND TECHNOLOGY

6TH RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF COMMUNICATIONS, SCIENCE
AND TECHNOLOGY**

7TH RESPONDENT

DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES

8TH RESPONDENT

GLOBAL VOICE GROUP SA

9TH RESPONDENT

COMMISSIONER OF POLICE

10TH RESPONDENT

VODACOM LESOTHO (PTY) LTD

11TH RESPONDENT

SEKHAMETSI INVESTMENT CONSORTIUM

12TH RESPONDENT

PRIME MINISTER

13TH RESPONDENT

ATTORNEY GENERAL

14TH RESPONDENT

CORAM: PT DAMASEB, AJA
M CHINHENGO, AJA
J VAN DER WESTHUIZEN, AJA

HEARD: 19 OCTOBER 2021

DELIVERED: 12 NOVEMBER 2021

SUMMARY

The Labour Appeal Court does not have jurisdiction to determine disputes around the dismissal of the Chief Executive Officer of the Lesotho Communications Authority by the Minister of Communications, Science and Technology. The Minister is empowered by the Communications Act 18 of 2012. Review of administrative action in terms of section 38A of the Labour Code (Amendment) Act 3 of 2000 is not applicable.

JUDGMENT

J VAN DER WESTHUIZEN, AJA:

Introduction

[1] This appeal against a judgment of the Labour Appeal Court (LAC) deals with the jurisdiction of the LAC, in terms of section 38A of the Labour Code (Amendment) Act 3 of 2000 (Labour Code).

Factual background

[2] On 1 April 2019 the appellant was appointed by the sixth respondent, the Minister of Communications, Science and Technology (Minister) as the chief executive officer (CEO) of the first respondent of the Lesotho Communications Authority (LCA). The appointment followed on a recommendation by the Board of Directors (Board) of the LCA. By virtue of this position she was also a member of the Board, chaired by the second applicant in the LAC.

[3] On 3 June 2021 the Minister suspended the appellant from her CEO position, on allegations of corruption or irregularities regarding the award of a tender to Global Voice Group SA (the ninth respondent). The Minister's suspension letter allegedly followed on a decision of the Board.

[4] On 31 May 2021 the chairmanship and membership of the Board of the second applicant was terminated, based on alleged incompetence; the irretrievable breakdown of the relationship with the Minister; and a suspicious relationship with the CEO. The Minister appointed the fourth and fifth respondents respectively as the acting chair of the Board and as the acting CEO

In the High Court

[5] The dismissed CEO and the Chairperson of the Board approached the LAC as the first and second applicants, as a matter of urgency. Their prayers were many, asking for wide-ranging relief.

[6] The respondents opposed the application and raised a point of law. According to them, the LAC did not have jurisdiction to hear the matter.

[7] Of course the LAC is a court of appeal. According to section 38A(1)(a) of the Labour Code the LAC has exclusive jurisdiction to hear and determine "all appeals against the final judgments and final orders" of the Labour Court (LC). The matter was, however, not brought to the LAC as an appeal from the LC.

[8] The applicants approached the LAC directly on the basis that the Minister's action to suspend and dismiss them fell within the

wording of section 38A(1)(b) of the Labour Code, which gives exclusive jurisdiction to the LAC to hear and determine appeals against final judgments and orders of the LC; as well as –

“*all reviews –*

(i) ...

(ii) ...

(iii) *of any administrative action taken in the performance of any function in terms of the Labour Code or any other Labour Law”*

[9] The application was one for review. The question is thus whether the Minister’s action was (a) *administrative action*; (b) in the performance of any function in terms of *the Labour Code*; or (c) *any other labour law*.

[10] The Minister appointed the CEO in terms of section 13 of the Communications Act 18 of 2012. In dismissing her, he acted in terms of section 14 of the same Act.

[11] On behalf of the appellant it was argued before the LAC that subparagraph (iii) did apply. The Minister exercised a public power, conferred on him by statute. Thus his conduct was administrative action. The appointment contract between the appellant and the Minister was “*sui generis*”; and the Minister’s action fell “*within the sphere*” of section 38A and the LAC and within the ambit of “*industrial relations*”.

[12] The first and second respondents argued that the suspension of the CEO by the Minister, as a precautionary step, was not administrative action under subparagraph (iii). Even if it were,

such administrative action was not taken in the performance of any function under the Labour Code or another labour law. On behalf of the respondents, it was, however, argued that the suspension of the CEO under section 14 of the Communications Act involved issues of employment and industrial relations as set out in section 24(d) of the Labour Code. Thus, the appellant should have approached the LC, according to respondents' counsel.

[13] The LAC (Banyane J, with assessors M Thakalekoala and K Mohale) thoroughly considered the three aspects of the central question. It distinguished the positions of the CEO and Board chairperson from one another. Seeing that the Chairperson did not appeal to this Court, I focus on the CEO, who was the first applicant in the LAC and is the only appellant in this Court.

[14] The LAC concluded that the Minister's action regarding the CEO was administrative action. This followed on an analysis of case law and academic authority.

[15] According to the LAC, the Minister exercised statutory powers conferred on him by the Communications Act. The source of the Minister's power was not an employment contract, but a statute. Thus his action was clearly not taken in the performance of any function in terms of the Labour Code.

[16] Thirdly, the LAC found that the exercise of the Minister's statutory power under the Communications Act was not in the performance of a function in terms of any other labour law. The LAC conceded that it was not entirely clear what would qualify as "any other labour law". It assumed that it could refer to the

Workmen's Compensation Act 13 of 1977, or international labour conventions. In reaching this conclusion, the LAC considered several court decisions referred to by the parties.

[17] The LAC declined to reach a conclusion as to whether the LC would have jurisdiction to hear the application. It then upheld the law point that the LAC lacked jurisdiction; and dismissed the application with costs.

In this Court

[18] As stated above, only the first applicant in the LAC, the CEO, appealed to this Court. The Chairperson of the Board did not.

[19] The arguments presented to this Court on behalf of the appellant and the first two respondents were very similar to those debated in the LAC. Counsel for the four other respondents argued from a different angle. During the hearing, counsel for the appellant applauded him for "bringing some sanity" into the proceedings by "departing from the confused reasoning of the LAC". However, although counsel for the third respondent was critical of the LAC's reasons, he agreed with the first and second respondents that the appeal had to be dismissed.

[20] As to the case law relied on by the parties, in *Lesotho Revenue Authority v Dichaba* (C of A (CIV) 21/2018; [2019] LSCA 29 (1 February 2019) it was stated:

"It has to be borne in mind that the Labour Court and Labour Appeal Court are specialist courts in labour matters. Section 8 of the Labour ... Act, provides for the jurisdiction of the Labour Court in respect of not only labour and trade disputes, but, also, any other written law.

The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes which arise from employment and labour relations, such as suspension. The power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence.

...

The Labour Court and Labour Appeal Court were designed as specialists that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the Labour Code. Forum shopping is to be discouraged. The Labour Code is the point of entry. Thus, it is obvious to me that whether or not the Labour Court has jurisdiction to deal with matters of employee suspension is not a matter which could be said to be explicitly stated by section 8 of the Labour ... Act.” (The underlining is mine.)

[21] It is correct that the two courts mentioned are specialist courts in the field of labour relations. They must be used. Forum shopping should be discouraged. Each and every labour matter within their wider mandate of the specialization field of labour issues does not have to be explicitly stated in legislation.

[22] However, it is one thing to emphasize the expertise of the LC and LAC and to defend their turf against forum shopping by litigants who believe that they might get a better deal from another court; but it is quite another thing to summarily make an appeal court a court of first instance. Remarkably, in the quotation above

the LC and LAC are both mentioned, together, with regard to their broad mandate in labour-related matters. When *jurisdiction* is referred to, only the LC is mentioned though.

[23] There is a reason for any system where a litigant can appeal from one court to a higher one. A second level of consideration, normally by more judges, is a safeguard against mistakes and assures the public of some judicial quality control. Generally courts of appeal prefer matters before them to have gone through the courts below them, *inter alia* to give them the benefit of the views and reasoning of the court of first instance.

[24] The purpose of section 38A of the Labour Code is to establish the exclusive jurisdiction of the LAC. Thus it provides for the LAC to hear appeals against final judgments and orders of the LC. It grants limited direct access for reviews described in subsection (iii), which should not be given an unduly wide interpretation. *Dichaba* does not support the appellant's contentions.

[25] In *Thato Putsoa v Standard Lesotho Bank* (LAC/REV/03/2007) the LAC declined jurisdiction to entertain an application seeking to review an employer's decision to subject an employee to disciplinary proceedings, based on section 38A(1)(b)(iii). In *Hoohlo v Water and Sewerage Company (PTY) Ltd* (LC/84/20) the LC - not the LAC - decided that it had jurisdiction regarding the suspension of an employee by a private company.

Conclusion

[26] Essentially the LAC correctly determined that the Minister's conduct was administrative action, but that it was not performed in terms of the Labour Code, or any other labour law, as required by section 38A(1)(b)(iii). The difference between suspension and dismissal, emphasized by the appellant, matters little. The Communications Act empowered the Minister to appoint and dismiss the CEO. This he did. Cautionary suspension does not have to be expressly authorized, separately from dismissal.

[27] The appellant should not have approached the LAC directly. It lacked jurisdiction. The appeal cannot succeed.

Costs

[28] There is no reason why costs should not follow the result.

Order

[29] The appeal is dismissed, with costs.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



M H CHIHENGO
ACTING JUSTICE OF APPEAL

For the Appellant:

Adv CJ Lephuthing

Adv TM Matheka

For the 1st and 2nd Respondents:

Adv Q Letsika

For the 6th, 7th, 13th and 14th Respondents:

Adv K Ndebele