

**IN THE COURT OF APPEAL OF LESOTHO  
HELD AT MASERU**

**C of A (CIV) 20/2022  
CIV/APN/0125/2022**

In the matter between-

**PEETE MOLAPO and 16 OTHERS**

**APPELLANTS**

and

**GOVERNMENT OF THE KINGDOM  
OF LESOTHO**

**1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY  
OF TOURISM, ENVIRONMENT AND CULTURE  
MINISTRY OF TOURISM, ENVIRONMENT  
AND CULTURE**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY  
OF PUBLIC SERVICE**

**4<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION**

**5<sup>TH</sup> RESPONDENT**

**MINISTRY OF PUBLIC SERVICE**

**6<sup>TH</sup> RESPONDENT**

**ATTORNEYGENERAL**

**7<sup>TH</sup> RESPONDENT**

**CORAM:**

P MUSONDA, AJA

M CHINHENGO, AJA

J VAN DER WESTHUIZEN, AJA

**HEARD:** 18 OCTOBER 2022

**DELIVERED:** 11 NOVEMBER 2022

## **SUMMARY**

*The cause of action as disclosed in the pleadings determine the jurisdiction of a court, not the status of the applicants. The Labour Court is a specialized court created for labour matters and must be used. Because of its original and inherent jurisdiction, the High Court has jurisdiction to hear an application for the review of an administrative decision by a public functionary. The fact that the decision impacts on the employment situation of the applicant does not necessarily mean that the Labour Court has exclusive jurisdiction.*

## **JUDGMENT**

### **J VAN DER WESTHUIZEN, AJA:**

#### **Introduction**

[1] Should the appellants, as applicants in the court *a quo*, have approached the High Court for relief, as they did, or rather the Labour Court? This question about jurisdiction is the single issue to be decided in this appeal.

#### **Background**

[2] The appellants were employed, on contract, by the Lesotho Highlands Development Authority Northern Parks, under the Ministry of Tourism, Environment and Culture (the Ministry) of the Lesotho Government. According to them, they were promised that they would be absorbed into the Ministry as permanent and pensionable members of the Ministry and thus as fully fledged

public officials. This was their desire and expectation. Instead, their contracts were not renewed by the second respondent, the Principal Secretary of the third respondent, the Ministry of Tourism, Environment and Culture. As far as their relationship with the government was concerned, they were left unemployed.

[3] Dissatisfied with the decision of the Principal Secretary, they approached the High Court on the basis of urgency.

### **High Court**

[4] The prayers in their Notice of Motion put the respondents on terms to show cause, if any, why –

*“(1)(b) ... Respondents shall not be restrained and interdicted from engaging and/or filling the Applicants’ positions within the Ministry ... by advertising and/or employing anyone whether temporary or by contract pending the finalization of this matter...”*

*(c) ... Respondents shall not deny Applicants entry into their respective sites to perform their duties and not remove them from the payroll ...*

*(2) The decision of the second Respondent in terminating Applicants’ employment and appointments within the 3<sup>rd</sup> Respondent be reviewed, corrected and set aside as irregular, procedurally unfair and unlawful ...*

*(3) ... in alternative ... reviewing and setting aside the failure or refusal by 1<sup>st</sup> Respondent to renew Applicants’ employment contracts ... as irregular, procedurally unfair and unlawful ...*

(4) ... setting aside the decision ... by the 2<sup>nd</sup> Respondent and Re-instating the Applicants to their respective positions ...

(5) Directing and ordering the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ... to facilitate the engagement and employment of the Applicants as permanent and pensionable public officers ...

(6) Alternately, declaring that the Applicants legitimately expected to be engaged, appointed and employed as permanent and pensionable public officers ...

(7) Directing and ordering the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to pay the Applicants' respective monthly salaries ....”

(sic)

[5] The respondents wished to oppose the prayer for urgency only, but the High Court *mero motu* raised the question whether it had jurisdiction and invited oral submissions from counsel. Counsel addressed the court.

[6] The High Court found that it had no jurisdiction to hear the application. It emphasized the exclusivity of the Labour Court and Labour Appeal Court as specialist courts to deal with labour matters. The court reasoned that the appellants and the third respondent were in an employment relationship. Because the appellants were not public officers in terms of the Public Service Act 1 of 2005, they had to approach the Labour Court.

[7] The non-renewal of a fixed-term employment contract may constitute a dismissal, according to section 68(b) of the Labour

Code Order of 1992 (the Labour Code). Section 38A(1)(b)(iii) states that the Labour Appeal Court has exclusive jurisdiction ... “to hear and and determine all reviews of any administrative action taken in the performance of any function in terms of this Act or any other labour law”. No court should exercise its civil jurisdiction in respect of any matter provided for under the Code. Thus, found the High Court.

[8] According to the court, “a plethora of authorities” support the view that despite the High Court’s unlimited original jurisdiction to hear any civil or criminal proceedings, it had no jurisdiction in matters such as this one. Specialist courts must be used.

[9] The appellants appealed to this Court on the ground that the High Court had erred in declining jurisdiction.

### **Submissions**

[10] The appellants rely on the unlimited original jurisdiction and inherent power of the High Court. They submit that the High Court did have jurisdiction to hear a review application in which it is alleged that an act of a public official or body is illegal, irregular, irrational, or ultra vires, or on any other ground for the review of administrative decisions and conduct. On their behalf it is argued that the application before the High Court was indeed a review application. The appellants were not public officials, but the essence of their case is their desire to be public officials, as well as

their expectation, based on the undertaking to them, that they would become public officials.

[11] Counsel for the appellants also submit that the decisions referred to by the court *a quo* are irrelevant to the determination of this matter.

[12] The respondents' submissions correspond with the High Court's reasons. It is submitted, with reference to the Labour Code and *Ts'epo Mokotjo v Miles Kennedy* (C of A 19/2020), that the Labour Court has exclusive jurisdiction over labour matters. Counsel distinguished between employees who are public officials and those who are not. Regarding disputes around employment, those who are not public officials, have recourse to the Labour Court only. According to them, the core question was whether the appellants were public officials, with reference to *Government of the Kingdom of Lesotho and six others v Moorisi Matela and twelve others* C of A (CIV) 85/2019.).

[13] Thus they interrogate what a public official is; and refer to section 137(1) and (2) of the Constitution, which confers the power to appoint public officers on the Public Service Commission, as well as the Public Service Act 1 of 2005 and the Public Service Regulations {Legal Notice 78 of 2008}. The respondents conclude that the appellants in this matter were not public officials. They

had to approach the Labour Court. They do seek to distinguish between two categories of appellants, though.

### **Analysis**

[14] As stated by this Court in *Tau Makhalemele v Board of Enquiry of the National Security Service and Others (C of A (CIV) 38/2022)*, legal disputes calling for judicial adjudication cannot always be placed into distinct categories with clear labels. They may involve different areas of law. With the creation of specialist courts, like the Labour Court, parallel to the High Court with its inherent jurisdiction, the power of a specific court to hear a matter can often be questioned. Points about jurisdiction are regularly raised, mostly *in limine*.

[15] The appellants' unhappiness is obviously rooted in a situation that resulted from their employment, on contract, by the government; as well as their desire and alleged expectation to be employed as permanent officials with pension and other benefits. This does not, without more, make their case a labour matter, over which the Labour Court has exclusive jurisdiction.

### ***The question***

[16] The core question is not whether the appellants were public officials or not, but rather whether the High Court was asked to deal with a labour matter, or an application to review an administrative act by a public functionary. The emphasis should

neither be on the status of the appellants, nor on the area of law affected by the decision, but on the nature and the maker of the decision which they attack. The decision-maker in this case is the Principal Secretary, clearly a public functionary.

### ***The pleadings***

[17] In *Tau Makhalemele* (referred to above in [11]) this Court referred to *Gcaba v Minister of Safety and Security (2010(1) SA 238 (CC)*, where it was stated that the pleadings, not the substantive merits of a case, determine jurisdiction.

[18] The prayers in the Notice of Motion (in [4] above) refer to the *decision* of the second respondent to terminate the appellants' employment. They call for the decision to be *reviewed, corrected* and *set aside* as *irregular, procedurally unfair* and *unlawful*. These are classical features of an application to review an administrative decision by a public functionary.

[19] It was furthermore stated in *Tau Makhalemele*, with reference to *Gcaba*, that the mere use of formal terminology in the Notice of Motion alone does not necessarily suffice to determine jurisdiction. The affidavits accompanying the Notice of Motion are part of the pleadings and thus also relevant. In this case the contents of the founding affidavit do not contradict the prayers seeking the review and setting aside of the relevant decision.



[20] On behalf of himself and the other appellants, the first appellant alleges that the decision not to renew their contracts was *irregular, procedurally unfair and unlawful*”, because it was *contrary to a cabinet decision; violated the spirit of a memorandum of understanding between the Lesotho Highlands Development Authority and the first respondent; defeated a legitimate expectation; and was made without giving the appellants a proper hearing, which they were entitled to.*

[21] The affidavit, particularly by mentioning procedural unfairness and the absence of a proper hearing, strengthens the impression created by the express wording of the prayers in the Notice of Motion that the application was one for administrative review. It must be remembered that, as stated in *Tau Makhalemele* and *Gcaba* referred to above, that the pleadings and not the substantive merits of the case are determinative of jurisdiction. For example, whether the appellants were indeed entitled to a hearing and whether they were given one must be interrogated when the substantive merits are considered. The allegation of the absence of a hearing is fundamental to the appellants’ argument that the decision was irregular and procedurally unfair, a concern regularly raised in administrative review applications.

### **Conclusion**

[22] It is trite that the High Court is empowered to hear applications to review decisions of public functionaries, as a

normal and regular part of its work. This stems from its original jurisdiction.

[23] Such decisions can relate to a range of issues in various areas of law. In this case the decision was about the renewal or non-renewal of employment contracts. The fact that employment in the civil service is the appellants' foremost concern does not necessarily mean that the Labour Court has exclusive jurisdiction to hear the matter and that the High Court has no power to do so.

[24] The High Court correctly stated that specialist courts created by the legislature for the specific purpose of dealing with stated specialized areas of law must be utilized. However, the original inherent jurisdiction of the High Court must not be forgotten. It cannot easily be ousted by the hasty categorization of an issue as a labour matter, only to be heard by the Labour Court and Labour Appeal Court.

[25] Whether the appellants were public officials or not is – as stated above – not the decisive question. In any event, their status could be described either as not being public officials, or indeed as employees who would lose their potential status as civil servants or absorption into the civil service, which were allegedly promised to them. In other words, the basis of their case is that, according to them, they were entitled to become public officials.

[26] Counsel for the appellants referred to *Ministry of Trade and Others v Mohato Seleke* (C of A (CIV) 41/2021), in which a decision by the Minister on the renewal of a contract was found to be administrative, rather than a labour matter. In *The Government of the Kingdom of Lesotho and Others v Moorosi Matela and Others* (C of A (CIV) 85/2019), closely resembling the present case as far as facts, background and the relief sought are concerned, the High Court was ruled to have had jurisdiction. These decisions are more directly applicable to the present matter than the case law relied upon by the High Court. For example, in *CCM Industrial (Pty) Ltd v Lesotho Clothing and Allied Workers Union* (C of A (CIV) 10/1999) jurisdiction was correctly declined, because the case dealt with unfair dismissal, clearly a labour matter distinguishable from the present one.

[27] The administrative act by the Principal Secretary in this case was not “taken in the performance of any function in terms of this Act or any other labour law”, as required by section 38 A (1)(b)(iii) of the Labour Code. As mentioned above, the High Court relied on this provision.

[28] The High Court indeed had jurisdiction to adjudicate this matter. It erred in finding that it did not. The appeal has to succeed, and the matter must be referred back to that Court. On behalf of the appellants, it was submitted that another judge should hear the matter, because the judge a quo was mistaken on

“such a simple point”. The allocation of the case is, however, left to the management of that Court.

[29] The appeal was opposed. There is no reason why costs should not follow the result.

### **Order**

[30] In view of the above, it is ordered that –

- (a) the appeal succeeds, with costs; and
- (b) the matter is referred back to the High Court.



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**J VAN DER WESTHUIZEN**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**P MUSONDA**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**M CHIHENGO**  
**ACTING JUSTICE OF APPEAL**

**For the Appellant:** Adv ST Taaso

**For the Respondent:** Adv LM Motikoe