

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C of A (CIV) NO. 17/2022
LAC/REV/05/2020**

In the matter between

TLELIMA RAMOHAFU

APPELLANT

And

THE LABOUR COMMISSIONER

1STRESPONDENT

WORKMAN'S COMPENSATION

MEDICAL BOARD

2NDRESPONDENT

SEFALANA LIQUOR (LESOTHO)

3RDRESPONDENT

MINISTRY OF LABOUR AND EMPLOYMENT

4THRESPONDENT

MINISTRY OF HEALTH

5THRESPONDENT

ATTORNEY GENERAL

6THRESPONDENT

CORAM: MOSITO P
MUSONDA AJA
CHINHENGO AJA

HEARD: 12 OCTOBER 2022
DELIVERED: 11 NOVEMBER 2022

SUMMARY

*Appellant injured at workplace and assessed to have sustained 16 % permanent bodily incapacitation;
Appellant dissatisfied with assessment of degree of permanent incapacitation and seeking review thereof by Labour Appeal Court; Court mero motu raising question whether it had jurisdiction to entertain matter and deciding it had no such jurisdiction;*

Appellant taking decision on lack of jurisdiction on appeal;

Held Labour Appeal Court has no jurisdiction and that the court with jurisdiction is the Subordinate Court of the Regional Magistrate Class in terms of the Workmen's Compensation Act 1977;

Appeal dismissed with costs

JUDGMENT

CHINHENGO AJA :-

Introduction

[1] The appellant was an employee of the third respondent at its liquor business. On 14 January 2019, whilst at work, he went up a ladder to pack goods on a shelf. He fell to the ground and sustained certain injuries. He was admitted into a hospital for about four days and discharged on 19 January 2019. The employer notified the 1st respondent pursuant to the provisions of the Workmen's Compensation Act 1977 for the purpose of an assessment of the appellant's degree of incapacitation or disability and compensation payable therefor. The injury that

appellant sustained is described in the founding affidavit as *“fracture of the right neck femur (sic) post open reduction internal fixation(ORIF) with plate and screw, permanent in situ.”*

[2] The appellant remained unwell and had to be absent on sick leave on several occasions until 1 June 2020, when his contract of employment was terminated due to illness and his total incapacity to perform work as a result of the injury. His degree of disability occasioned by the injury was initially assessed by a government doctor to be 7%. Upon protestation, he was re-assessed by the 2nd respondent at the instance of the 4th respondent, per its memorandum dated 4 December 2019. The 2nd respondent determined that the appellant had suffered “39% lower extreme impairment which is 16% whole person impairment.” On 27 February 2020, he was awarded compensation of M44 013.23. His employer also paid him compensation for medical expenses in a further sum of M2 464.50. He was thus compensated on the basis of the 16% capacity impairment or permanent disability.

[3] The appellant was dissatisfied with the assessment and compensation awarded. He thought it was too low because he continued to experience pain in his body. He sought further treatment and independent assessment of the injuries. Dr Chabeli Mohatlane, a medical Orthotist and Prosthetist examined him and produced a “motivational report” dated 31 July 2020 which states:

“Mr Tlelima Ramohafa was seen at CTM Orthopaedics Lesotho, he presented with painful spine and right hip.

On examination and X-ray findings:

- Bend spine/Scoliosis noted*
- Right hip femur fracture ORIF noted*
- Due to the above problems the right leg is short by 1 cm*

Mr Ramohafa can benefit from the:

- TLSO Brace*
- Hip suspension Brace*
- Right leg 1 cm compensation shoe insole.”*

[4] The appellant instituted proceedings in the Labour Appeal Court (“LAC”) for a review of the assessed degree of permanent disability or impairment of 16%. He sought a declaration from the court that he be assessed to be 100% incapacitated, alternatively 75% incapacitated. He also sought an order that the amount of compensation be re-calculated on that basis. He contended that the assessment of the compensation “*was invalid and unfair*” because, among other things, “*it failed to make provision for medical expenses, both present and future, including but not limited to, surgical and/or provision for artificial limbs as well as their repair.*” In relation to this alleged failure, he claimed from 3rd respondent payment of “*M70 100.00 ... as provided in the Workmen’s Compensation*

Regulations 2014.” His case is more succinctly made at paragraphs 9.4 and 9.5 of the founding affidavit as follows:

“9.4 All the above indicate that I am no longer employable. I can no more use my leg since I even use crutches and I cannot walk without them; my leg is as good as non-existent and I am duly advised, which advice I believe to be true and correct, that in terms of the Workman’s Compensation Act, total permanent loss of use of member shall be treated as loss of member.

9.5 The 2nd respondent, during its assessment failed to make any findings regarding whether there are any other measures to be undertaken in order to repair my condition, which ought to be compensated by 3rd respondent.”

[5] In the notice of motion appellant also sought an order that the 2nd respondent deliver to the registrar of the court the record of proceedings on the decision resulting in the assessment and compensation and furnish reasons in support of that decision. The 6th respondent filed a notice of opposition on behalf of the 1st, 2nd, 4th and 5th respondents on 27 August 2020.

[6] The court issued an order on 26 October 2020 requiring the “1st and/or 2nd respondents” to deliver to the registrar within 14 days of service of the order, the record of proceedings and reasons for the decision recommending 16% permanent incapacitation. It appears that the order was eventually issued on 12 November 2020 and made available to the respondents. After that order was served the only response or further action taken by the respondents in relation to the

court order was a letter dated 8 December 2020 from the 3rd respondent to the registrar stating that the impugned decision was made by the 2nd respondent and not the office of the Labour Commissioner, and that being the case, the 3rd respondent was not in a position to provide the record of proceedings. No answering affidavits were filed for the respondents.¹ No record of proceeding was filed with the registrar or the court. Eventually the matter was set down for hearing on 23 February 2022.

[7] At the hearing on 23 February 2022, the court invited the parties to address it, as a preliminary issue, on whether it had jurisdiction to hear the application. After hearing argument on that preliminary issue, the court decided that it had no jurisdiction in the matter and that the Subordinate Court of Resident Magistrate Class was the proper forum as provided in s 24(1) of the Workmen's Compensation Act 1977. The court's reasons for decision and the purported order had not been issued as at the date that the appellant filed his heads of argument.² They were availed to the parties on 5 October 2022 and to this Court on 7 October 2022, about three days before the appeal was heard.

Decision of LAC on jurisdiction

[8] The respondents withdrew their opposition to the appellant's application but the judge proceeded to hear

¹ See para 7 of appellant heads of argument

² See para 11.3 of appellant heads of argument

argument on jurisdiction, with the participation of counsel for the respondents.³ He dismissed the application upon satisfying himself that the Labour Appeal Court had no jurisdiction. In so deciding he relied on two decisions of this Court – *Ministry of Trade and Industry v Seleke*⁴ and *Matela v Lesotho Telecommunication Authority*⁵, and the provisions of the Workmen’s Compensation Act No. 13 of 1977.

[9] The judge *a quo* set out the issue before him very well in these terms:

“The appellant’s counsel, Adv Lesaoana, contends that this court, rather than the Subordinate Court of the Resident Magistrate, has jurisdiction to hear and determine this review application. She says that the court’s competence derives from section 38A(1)(b)(iii) of the Code, since the assessment made by the board and related decisions constitute administrative action taken in the performance of a function in terms of any other labour law (namely, section 18(1) of the Compensation Act.”

Appeal

[10] The grounds of appeal to this Court are that the LAC erred (a) in deciding that it had no jurisdiction; (b) in holding that the Workmen’s Compensation Act 1977 “does not fall within the prescripts of section 38A(1)(b)(iii) of the Labour Code Amendment Act, 2000”; and (c) in holding that the Subordinate Court of Resident Magistrate Class has the jurisdiction in terms

³ Para [17] of judgment of LAC handed down 28 September 2022

⁴ ... at para [17]

⁵ C of A (CIV)35/2021 [2021] LSCA 37 (12 November 2021).

of s 24(1) of the Workmen's Compensation Act to deal with the appellant's review application.

[11] The sole issue for decision by this Court, therefore, is whether the LAC has jurisdiction. If it has, then the matter must be remitted to the LAC for decision on the merits. If it does not have jurisdiction, then the appellant has to take his complaint to the appropriate court.

Statutory provisions on jurisdiction

[12] The Workmen's Compensation Act 1977 (No. 13 of 1977) (*"the Act"*) as amended in 1993 must, of course, be examined in considering the issue of jurisdiction. The Act provides for a workman's entitlement to compensation payable by the employer for injury sustained at work (s 5) and the calculation of the quantum thereof (s 8). Relevant notices on any such occurrence are to be given in terms of s 13 and 14. Section 15 obliges the employer, at his cost, to arrange for the workman's medical treatment. Section 16 provides that an agreement between the employer and the workman regarding compensation is permissible provided it is endorsed by the Labour Commissioner. Sections 17 and 18 deal with the establishment of the Workmen's Compensation Medical Board and its functions, one of which is to determine disputes referred to it by the Labour Commissioner regarding the degree and duration of incapacity.

[13] Section 19 (2) of the Act specifies the court with jurisdiction to deal with all claims for compensation under the Act and provides that –

“All claims for compensation under this Act unless determined by agreement, and any matter arising out of proceedings thereunder shall be determined by the court whatever the amount involved, and the court may, for that purpose, call upon any government officer or independent medical practitioner to give evidence if the court is of the opinion that such officer or practitioner is, by virtue of his expert knowledge, able to assist the court.”.

[14] Section 22(1) of the Act provides in elaborate terms that-

“Save as provided in this Act and any regulations made thereunder, the court shall, upon or in connection with any question to be investigated or determined thereunder, have all the powers and jurisdiction exercisable by a Subordinate Court of the Resident Magistrate in or in connection with civil actions in court; and the law, rules and practice relating to such civil actions and enforcement of judgment and orders shall mutatis mutandis, apply.”

[15] In terms of the interpretation s 3 of the Act *“‘court’ means a Subordinate Court of the Resident Magistrate”*. So defined, the court with jurisdiction to deal with any matter arising from proceedings instituted by a workman, is the Subordinate Court of the Resident Magistrate. The role of another court, in this case the High Court is set out in sections 23 and 24 of the Act. In terms of s 23, the Subordinate Court of the Regional Magistrate may refer any question of law, as a special case, for determination by the High Court. In terms of s 24 an appeal

from the decision of the Subordinate Court of the Regional Magistrate lies to the High Court.

[16] The appellant's contention is that it is the Labour Court that has jurisdiction arising from s 24 of the Labour Code Order 1992 as amended. That section provides:

"Subject to the Constitution and section 38A, the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other labour law are to be determined by the Labour Court."

[17] The jurisdiction conferred on the Labour Court by this section is of a general nature, as further elaborated by subsection (2) of that section. However, the Labour Code, in s 25, pronounces that the Labour Court's jurisdiction is exclusive. In this regard the s 25(1) provides:

"The jurisdiction of the Labour Court is exclusive, and no court shall exercise its civil jurisdiction in respect of any matter provided for 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 1978.)"

[18] Section 38A provides for the jurisdiction of the Labour Appeal Court in these terms:

"(1) The Labour Appeal Court has exclusive jurisdiction -

(a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court;

(b) to hear and determine all reviews –

(i) from judgments of the Labour Court;

(ii) [deleted by 2000 Amendment];

(iii) of any administrative action taken in the performance of any function in terms of this Act or other law.”

[19] Counsel for the appellant contended that s 38A of the Labour Code Order vests review jurisdiction in a matter, such as the one under consideration here, in the Labour Appeal Court.

[20] The Workmen’s Compensation Act is the legislation in terms of which the appellant sought relief. That Act contains elaborate provisions on how a claim for compensation for injury sustained at a workplace must be handled and by who. It is specific that any matter or dispute arising under that Act shall be determined by the Subordinate Court of the Regional Magistrate, and that any appeal shall lie to the High Court. There can be no clearer provision showing the Legislature’s intention. And, by using the words “any matter arising from proceedings” under that Act, the intention was clearly to include a review of decisions taken in such proceedings. Absent the Workmen’s Compensation Act, a claim for compensation from an employer for injury sustained in the course of employment gives rise to an ordinary action for damages which would be recognisable by the High Court subject to monetary

jurisdiction of lower courts. Section 19 of the Act therefore provides, with no limitation as to monetary jurisdiction, that claims for compensation fall within the jurisdiction of the Subordinate Court of the Regional Magistrate. When the Labour Code Order was enacted, the Legislature was well aware of the provisions of the Workmen's Compensation Act. It did not amend them so as to provide a separate route for claiming compensation. As stated in *Hoohlo v Lesotho Electricity Co*⁶, the Legislature is presumed to know the state of the law and to legislate with such knowledge.

[21] Section 38A of the Labour Code Order, in my view, does not take away the jurisdiction of the Subordinate Court of the Regional Magistrate in respect of claims for compensation for workplace injuries sustained by workers: it merely provides for the review jurisdiction of the Labour Appeal Court in respect of administrative action taken in the performance of any function in terms of that Act or other labour law.

[22] Counsel for the appellant submitted that the Workmen's Compensation Act is "*other law*" contemplated by s 38A. This submission is not sustainable when regard is had to the decision of the Workmen's Compensation Medical Board that is sought to be reviewed. The decision awarding 16% permanent incapacity to the appellant was reached after processes mandated by the Workmen's Compensation Act. The appellant's degree of incapacitation was assessed by medical practitioners. When the appellant was dissatisfied with the

⁶ Cof A 09/20, (2020) LSCA 23 (October 2020)

initial assessment of 7% permanent disability, he followed the course set by the Workmen's Compensation Act and took his grievance to the Medical Board. The Act provides that if dissatisfied with the decision of the Medical Board, the aggrieved person must take that decision to the Subordinate Court for determination on the merits. He is not permitted by the procedure set out in the Act, in proceedings of this kind, to resort to the Act in one instance and opt out of the Act in another instance. That procedure, in my view, excludes the matter being taken on review to the Labour Appeal Court.

[23] Another point that to me seems to have been implicitly ignored by the parties in argument before us and in the Labour Appeal Court is that judicial review is essentially concerned with legality of administrative action and not to secure a decision by a judge in place of the administrator.

[24] The appellant in this case called upon the Labour Appeal Court to substitute the decision of the Medical Board. It did not set out what illegality, either of law or procedure, was committed by the Board. He was simply dissatisfied with the decision of the Board on the merits. That is hardly a matter to be taken on review. The appellant should have taken the decision on appeal to the relevant authority, in this case the Subordinate Court of the Resident Magistrate. That is what is envisaged by s 19(2) of the Workmen's Compensation Act.

[25] In the notice of motion, the appellant uses the words “invalid and unfair” in reference to the Board’s decision, but that description of the decision does not show that the appellant is aggrieved by anything other than the correctness of the decision on the merits. No imputation is made against the legality of the process. I think that practitioners must be aware that review proceedings are predicated on the unlawfulness and other recognized grounds of review of administrative decisions and not so much on the rights of the parties on the merits. The Workmen’s Compensation Act provides a mechanism for resolving disputes arising from dissatisfaction with an assessment of permanent incapacity and the quantum of compensation where no illegality of the decision concerned is implicated. To me, this was not a matter for review at all but one of appeal to the designated authority.

[26] The appellant’s counsel relied mainly on one decision of this Court in support of the submission that the Labour Appeal Court has jurisdiction, *Matela v Lesotho Communications Authority*⁷ as decided both in the High Court and on appeal. I examine that decision.

Case law on jurisdiction cited

[27] In *Matela*, the High Court and this Court made a statement that would suggest that proceedings in terms of the Workmen’s Compensation Act are reviewable by the Labour Appeal Court. In the High Court⁸, Banyane J discussing the question whether

⁷ (C of A (CIV) 35/2021) [2021] LSCA 37 (12 November 2021).

⁸ *Mamarama Matela v Lesotho Communications Authority & 13 others* LAC/REV/03/2021 [2021] LSHC 87.

the action taken by the Minister in that case was in the performance of a function under any other law as provided in s 38A(1)(b)(iii), stated:

[49] What may fall into the category is not clearly discernible from the Code. It is our considered view that what the legislature envisage herein is perhaps legislation such as Workmen's Compensation Act 13 of 1977, the common law, International Labour Organization Conventions etc. The Communications Act does not in our view fall under '*any labour law.*'"

[28] On appeal this Court, referring to Banyane J's discussion of three aspects of the central question before her, stated:

"[16] Thirdly, the LAC found that the exercise of the Minister's statutory powers conferred on him by 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."

[29] Counsel for the appellant elevated Banyane J's assumption to a statement of law, which it obviously was not, and submitted that *"all reviews of any administrative or organisational decisions/actions made in relation to the Act or the Workmen's Compensation Act of 1977, have to be dealt*

with by the Labour Appeal Court”⁹, and quoted Banyane J’s statement. He further submitted:

“[15.4] The above means that, in as much as section 22 of the Workmen’s Compensation Act of 1977 gives the Subordinate Court to deal with matters arising out of and in connection with the Act, such powers have been taken away from the Subordinate Court by the Labour Code Order as amended, especially by section 38A as mentioned above in so far as all reviews of administrative actions performed in accordance with the Workmen’s Compensation Act are concerned.”

[30] The elevation of the *per incuriam* statement of the High Court is, in my view, misplaced. The position is set out above: the jurisdiction of the Subordinate Court of the Regional Magistrate under the Workmen’s Compensation Act has not been taken away from it by s 38A of the Labour Code Order. A person aggrieved by the decision of the Medical Board, whatever the nature of that decision, must approach the Subordinate Court of the Regional Magistrate, that being the court with jurisdiction to deal with all claims for compensation and any matter arising out of proceedings under the Workmen’s Compensation Act. The decisions of that board are appealable to the High Court.

[31] This Court, in two appeals this October 2022 session, has had to deal with the issue of the jurisdiction of the High Court as it has been affected by other legislation and rules of court – *Tau Makgalamele v Board of Inquiry of the National Security Service and Others*¹⁰ and *Peete Molapo and 16 Others v*

⁹ Para 15.3 of heads of argument

¹⁰ C of A (CIV) No. 38 of 2022

*Government of the Kingdom of Lesotho and 6 Others*¹¹. In *Tau Makgalamele, J Van Der Westhuizen AJA* had this to say:

“[11] Life and law are not one dimensional. Complex legal disputes can often not easily be confined to separate boxes with neat and accurate labels. Thus, differences on the jurisdiction of the High Court in its general capacity and specialized courts, or the High Court sitting as a specialized court for, for example labour and constitutional matters, fairly regularly have to be adjudicated by the very High Court itself, in one or the other capacity.

[12] Potential litigants have the right to choose which cause of action would best serve their interests; and thus which court or other forum to approach. At the same time though, what is referred to as “forum shopping” should be discouraged for a range of (sometimes obvious) reasons. Therefore the legislature and the courts try to stipulate rules or guidelines as to which forum is the correct one.

Significance of pleadings

*[13] Causes of action often overlap. Authorities indicate that the determining factor as far as jurisdiction is concerned, is indeed the pleadings. Counsel for the first respondent relied on *Gcaba v Minister of Safety and Security 2010(1) SA 238 (CC)* at 263:*

*‘Jurisdiction is determined on the basis of the pleadings, as *Langa CJ* held in *Chirwa*, and not the substantive merits of the case In the event of the Court’s jurisdiction being challenged at the outset ... , the applicant’s pleadings are the determining factor.’”*

[32] The above sentiments are relevant to a consideration of jurisdiction in this appeal.

¹¹ C of A (CIV) No.20 of 2022

Plea to find Labour Appeal Court already assumed jurisdiction

[33] Counsel for the appellant entreated this Court to find that the Labour Appeal Court assumed jurisdiction in the matter because it heard the parties and an order that the record of proceeding and reasons for decision be delivered to it before it considered the issue of jurisdiction. The short answer to this is that if a court has no jurisdiction, that puts the matter before it to an end. That is why the lack of jurisdiction on the part of a court may be raised *mero motu* by the court, and by a party, at any stage of the proceedings before judgment.

[34] Counsel also submitted that in the event that this Court found that the Labour Appeal Court had jurisdiction, then it should deal with the merits of the dispute and determine the matter finally. Having found that the Labour Appeal Court correctly decided that it had no jurisdiction, the only logical and legally sustainable direction that this Court can give is that appellant should take his case to the Subordinate Court of the Regional Magistrate, where evidence will be led to determine the merits of his grievance, should that become necessary.

[35] The appellant's counsel prayed for costs on the legal practitioner and client scale but did not seek to justify that scale of costs. We have no reason to depart from the ordinary rule on costs. They must also follow the event.

[36] In the result the appeal is dismissed with costs.



**MH CHINHENGU
ACTING JUSTICE OF APPEAL**

I agree



**KE MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree



**P MUSONDA
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADV T A LESAOANA

FOR RESPONDENTS: ADV P D PHATSOANE