CIV/APN/30/83

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESOTHO UNION OF BANK EMPLOYEES — Applicant

and

SOLICITOR GENERAL — 1st Respondent
STANDARD BANK LTD — 2nd Respondent
BARCLAYS BANK LTD — 3rd Respondent
VASENDHA RUTH NAIDOO — 4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 18th day of November, 1983.

The applicant seeks an order of this Court against the Respondents in the following terms :

"(a) Setting aside Legal Notice Number 98 of 1982.

(b) Directing the Second and Third Respondents forthwith to enter into negotiations with the Applicant in terms of the Recognition Agreement between the said parties for revision, if any is due, of the salary structure and other working conditions obtaining prior to October, 1981.

(c) Interdicting the Second and Third Respondents from unilaterally imposing upon the Applicant a different salary structure and other working conditions contrary to Recognition Agreement between the parties.

(d) Directing the Respondents to pay the costs of this application only in the event of their opposing the same.

(e) Granting the Applicant such further or alternative relief as this Hon. Court may deem fit."

In support of their cases, the parties filed voluminous affidavits but the gist of the founding affidavit was simply that on 22nd October, 1981 the Lesotho Union of Bank Employees (hereinafter referred to as the

2/ Union) and the .....

Union) and the Standard Bank Ltd and the Barclays Bank Ltd (herein after referred to as the Banks) concluded an agreement whereby the Banks recognised the Union as the representative of its members. The agreement covered a wide range of subjects but of particular interest for the decision in this matter is Clause 5(e) which in part, reads:

> "It is hereby agreed that the subjects for negotiation between the Bank and the Union shall be any matter which falls within the interpretation of Trade Unions and Trade Disputes Law No. 11 of 1964."

On 1st September, 1981, the Banks addressed a letter to the Union advising that unlike before, the Banks would no longer adopt the new salary structure introduced by their counterparts in the Republic of South Africa but would instead retain the salary structure then obtaining in Lesotho and,in due course, discuss with the Union the revision thereof. The Union wrote back requesting copies of the proposed revised salary structure. On 18th January, 1982, the Banks wrote another letter to the Union and enclosed copies of the new salary structure which they said they were implementing with effect from the 1st January, 1982. The Union did not accept the new salary structure unilaterally imposed by the Banks. They sought the advice of a lawyer who drafted a letter dated 25th January 1982 which letter was sent to the Minister of Planning, Employment and Economic Affairs with copies to the Banks. In that letter they deplored the Banks' conduct of unilaterally changing the existing salary structure and introducing new ones. They also threatened to call a strike with effect from 29th January, 1982. The threatened strike was in fact called on 22nd February, 1982. His attempts to reconcile the disputing parties bore no fruits and on 17th March, 1982, the Minister notified both the Banks and the Union that in terms of S.56(1) of the Trade Unions and Trade Disputes Law No. 11 of 1964, he intended referring the matter to Arbitration. He called for the response of the

3/ parties who, ...

parties who, however, declined to give their consent to Arbitration proceedings, on the ground that there had been no Trade dispute as yet between the parties which dispute could be the subject of Arbitration proceedings.

On 23rd March, 1982, the Union called yet another strike. On 25th March, 1982, the Prime Minister declared all banking services essential services in terms of the Essential Services Arbitration Act No. 34 of 1975 and on 30th March, 1982, the Union and the Banks were then informed by the Minister that, following a report by the Labour Commissioner acting pursuant to S.6(3) of the Essential Services Arbitration Act 1975 that a trade dispute between the Union and the Banks existed and that there had been a failure to reach a settlement thereof, he had decided to refer the matter to the Essential Services Arbitration Tribunal for settlement.

During about April ,.1982, the Minister appointed one Mr. B.L. O'Leary as the Arbitrator, who, on 12th May, 1982, met the parties and their legal representatives to agree, inter alia, on the issues for arbitration. It was agreed, inter alia that the issue to be determined on arbitration would be

> ".....whether or not the two banks are bound to implement wit effect from 1st October, 1981, the new salary structure and salary increases which came into force on the same date in the Republic of S.A."

For reasons not known to the Union, the arbitration proceedings were never held until the 16th November, 1982 when by proclamation in Gazette No. 47 of the same date the Prime Minister gave notice that he had appointed the Fourth Respondent as an Arbitrator to determine the matter between the Union and the Banks.

It was submitted that the action of the Prime Minister in appointing an Arbitrator was irregular and contrary to the Essential Services Arbitration Act, supra, in as much as no Trade dispute between the Union

4/ and the Banks .....

and the Banks had been reported in writing to the Labour Commissioner by or on behalf of either of the parties as contemplated by S.6(1) of the Essential Services Arbitration Act, 1975. Consequently there was no trade dispute within the meaning of the Essential Services Arbitration Act 1975. The issues referred to the Tribunal for arbitration were simply a question of law which was not capable of arbitration and no award could be made in connection therewith as required by S.6(6) of the Act. As there was no trade dispute reported to the Labour Commissioner the reference of what the Minister considered to be trade dispute to the Tribunal made within twenty one days from the date on which it had been reported to the Labour Commissioner. Hence this application for an Order as aforesaid.

The application was opposed by the 1st, 2nd and 3rd Respondents only.

On behalf of the 2nd and 3rd Respondents, One John Benjamin Smith, the Lesotho Manager of the 3rd Respondent filed the opposing affidavit in which, on the whole, he conceded the above averments made by the applicant save that as the Union was insisting on the application of the South African salary structure which the Banks were not and still are not prepared to negotiate, the Banks were left with no alternative but to unilaterally impose the new salary structure. He also denied that there was no dispute (between the Banks and the Union) which could be the subject of arbitration. The Banks' letter of 15th March, 1982 addressed to the Minister and copied to the Labour Commissioner clearly showed that such a dispute existed. He denied the submissions made regarding the actions taken by the Prime Minister and the Minister of Planning, Employment and Economic Affairs and averred that the submissions were based on the misconception that neither a dispute existed between the Banks and the Union nor was any such dispute ever reported to the Labour Commissioner.

5/ In his affidavit .....

In his affidavit, Abel Leshele Thoahlane, on the whole, associated himself with the averments made by John Benjamin Smith and deposed that he had in fact known the dispute to have existed between the Union and the Banks since 1st September, 1981.

A replying affidavit in which the contents of the founding affidavit were adhered to was filed.

I propose to deal first with the question whether or not there was a trade dispute between the Union and the Banks.

Trade Dispute is defined under S. 2 of Trade Unions and Trade Disputes Law No. 11 of 1964 as :

> "..... any dispute or difference between employer and employees or between employees and employees, connected with the employment or non-employment, or the terms of the employments, or with the condition of Labour of any person."

It is common cause that with effect from 1st January, 1982, for reasons that they explained to the Union, the Banks unilaterally implemented new salary pays which the Union, representing its members who are Bank employees, did not and still do not accept. It can hardly be argued that a dispute between the Banks as employers and the Union as representative of the Bank employees is not a dispute connected with the terms of employment, and therefore, falling within the ambit of the difinition of Trade dispute as envisaged by S.2 of the Trade Unions and Trade disputes law, supra. I take the view that the question whether or not there was a dispute between the Union and the Banks must, therefore, be replied in the affirmative and such a dispute was in my opinion, the subject of negotiation in terms of Clause 5(e) of the recognition agreement concluded by the Banks and the Union.

It is common cause that numerous attempts by the Minister of Planning, Employment and Economic Affairs to

6/ have the dispute .....

have the dispute resolved failed and on 15th March, 1982 the Banks addressed the letter (annexure I12) to the minister with copy to the Labour Commissioner making it clear that they on one hand, would not revert to the old salary structure out of which the Union, on the other hand, was not prepared to negotiate. In terms of the provisions of s. 56(1) of the Trade Unions and Trade Disputes Law, supra, the minister decided to refer the matter to arbitration.

It has been argued that in as much as it did not state what were, in his opinion, the issues between the parties, the notice given by the Minister in terms of s. 56(1) of the Trade Unions and Trade Disputes was irregular or ultra vires. It would,however, appear that the Minister ultimately referred the matter to the Essential Services Arbitration Tribunal and did not,therefore, proceed in terms of s. 56(1) of the Trade Unions and Trade Disputes Law, supra. I consider, therefore, that a decision on this issue is unnecessary as it will now be purely academic.

What is of importance for this case is that it was common cause that on 25th March, 1982 the Prime Minister, acting in terms of the Essential Services Arbitration Act No. 34 of 1975, declared all Banking Services essential services. He was empowered to do that by the provisions of s. 20 of the Essential Services Arbitration Act supra. I now come to the submission that the action of the Prime Minister in appointing, as he did, the arbitrator was irregular and contrary to the Essential Services Arbitration Act, Supra. The basis for the submission was that neither a Trade dispute between the Union and the Banks existed nor had it been reported in writing to the Labour Commissioner by or on behalf of either of the parties as required by Section 6(1) of the Essential Services Arbitration Act 1975.

I have already decided that a trade dispute did exist between the Banks and the Union. What now remains for determination is whether or not the dispute had been reported to the Labour Commissioner. It must be observed that ad para. 8

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8.2 of his founding affidavit, Mosehle Khalema deposed that on the 30th March, 1982, the Minister had written to the Union informing it that he had decided to refer the matter between it and the Banks to the Essential Services Arbitration Tribunal. That was conceded by the Respondents. A copy of that letter was annexed and marked "L". It reads in part

> "The Labour Commissioner, Acting pursuant to Section 6(3) of the Essential Services Arbitration Act, 1975, has reported to me the existence of the above Trade dispute, and informed me that there has been a failure to reach a settlement thereof.
>
> In the circumstances, I have decided to refer the matter to the Essential Services Arbitration Tribunal for settlement."

It is clear from this letter that the Labour Commissioner had reported to the Minister pursuant to s. 6(3) which reads as follows ·

> "(3) Where a matter has been referred pursuant to subsection (2) and there is a failure to reach a settlement or in the opinion of the Labour Commissioner, a settlement is unduly delayed, the Labour Commissioner shall cancel the reference and report to the minister."

Granted that in reporting to the minister the Labour Commissioner was acting pursuant to the provisions of s. 6(3) then subsection (3) in turn presupposes that a report had been made to the Labour Commissioner pursuant to the provisions of subsection (2) which in part reads :

> "The Labour Commissioner shall consider any trade dispute reported to him under subsection (1)..." (My underlining).

In his affidavit the Labour Commissioner deposed that apart from knowing that a trade dispute existed between the Banks and the Union since 1st September, 1981 he associated himself with the averment of John Benjamini Smith that by the copy of their letter of 15th March, 1982, the Banks had reported to him that there was a difference of view point between them and the Union on the question

/of the

of the new salary structure unilaterally imposed by the Banks. When the minister wrote the letter of 30th March 1982 he (Labour Commissioner) was therefore in receipt of the report contemplated by s. 6(1) of the Essential Services arbitration Act 1975.

It is significant to note, however, that it would appear that under the provisions of s. 6(1) of the Essential Services Arbitration Act 1975 a written report to the Labour Commissioner is not mandatory , that section reads.

> "6 (1) If any trade dispute in an essential service exists or is apprehended, that dispute if not otherwise determined, may be reported in writing to the Labour Commissioner by or on behalf of either party to the dispute, and the decision of the Labour Commissioner as to whether or not a dispute is or is not a trade dispute in an essential service and whether or not a dispute has been so reported to him and as to the time at which a dispute has been so reported shall be conclusive for all purposes. (My underlings).

I have underscored the word "may" to indicate that in my view, by the use of that term the Legislature did not in any event intend the requirement of a written report to be mandatory. It is also clear from the rest of the underlined words that the decision of the Labour Commissioner whether or not a dispute has been reported to him and as to the time at which a dispute has been so reported is conclusive. In the present case the Labour Commissioner has deposed that he associates himself with the averment of John Benjamin Smith that a report was made to him on 15th March, 1982. In terms of the provisions of the above cited s. 6(1) the decision of the Labour Commissioner affirmatively and conclusively answers the question whether or not the report had been made. On 29th March, 1982 (14 days after the report had been made to the Labour Commissioner) by Legal Notice No. 22 of 1982 of the same date the Prime Minister, acting under the powers vested in him by the provisions of s. 4(1) of the Essential Services Arbitration Act 1975, appointed Mr. B.L.O' Leary as the Arbitrator who met the parties

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and their legal representatives to agree inter alia on the issues for arbitration. It is common cause that the parties through their legal representatives agreed, inter alia that the issue to be determined on arbitration would be .

> "... whether or not the two Banks are bound to implement with effect from the 1st October, 1981 the new salary structure and salary increases which came into force on the same date in the Republic of South Africa."

By Legal Notice No. 98 of 1982 dated 16th November, 1982, the Prime Minister appointed the 4th Respondent as the arbitrator in the place of Mr. B.L.O' Leary whose appointment was, by the same instrument, cancelled. It has not been disputed in argument that the appointment of the 4th Respondent came as a result of Mr. O'Leary's non-availability to carry out the function of arbitrator. That granted, it seems to me that the Prime Minister was empowered by s. 4(2) to appoint as he did the 4th Respondent to replace Mr. O'Leary.

In the premises I take the view that the submission that the action of the Prime Minister was irregular and contrary to the Essential Services Arbitration Act cannot be substantiated and must, therefore, fall away. Likewise the conclusion that "consequently the reference of what the Minister considers to be a trade dispute to the Tribunal has not been made within twenty-one (21) days from the date on which it was reported to the Labour Commissioner" is in my view a non sequitur which has no evidential support.

It follows, therefore, that in the circumstances I am left with no alternative but to come to the conclusion that Legal Notice No. 98 of 1982 cannot be set aside. Prayers (b) and (c) of the notice of motion presupposes that the Court has granted the order as prayed in terms of prayer (a). Having decided that Legal notice No. 98 of 1982 cannot be set aside it becomes unnecessary to deal with prayers (b) and (c).

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In my opinion this application ought not to succeed and I accordingly dismiss it with costs.

(J U D G E)

18th November, 1993.

For the Applicant . Mr. Sello,
For 1st Respondent . Mr. Tampi,
For 2nd & 3rd Respondents : Mr. Harley.