CIV/APN/155/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

C.A.W.U.L.E.	Applicant
and	
SPIE BATIGNOLLES	1st Respondent
PROJECT MANAGER (KATSE AREA)	2nd Respondent
OFFICER COMMANDING - MASERU	3rd Respondent
ATTORNEY GENERAL	4th Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 3rd day of July, 1990

According to the amended Notice of Motion the applicant is now applying for an order in the following terms:

1. Declaring as null and void the summary dismissal of the applicant's members by the first respondent.

2. Granting applicant further and/or alternative relief.

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It is common cause that on the 10th April, 1990 the applicant declared a trade dispute in terms of the Labour Laws of this country after there was a deadlock in the negotiations between the applicant and the first respondent.

The Ministry of Labour appointed two conciliators, Mr. Khotle as the chairman and Mr. Tau as a member. At the conciliation meeting there were eight matters that were to be discussed and at the end of the meeting only three matters remained unresolved. Mr. Khotle did ask the parties as to what their attitude was to arbitration. The first respondent's attitude was that if the Minister's decision was that the matter be referred to arbitration they would accept the Minister's decision and go to arbitration. Furthermore if the arbitrator then made an award in excess of their proposed 12% increase across the board the first respondent would have no choice but to pass it to the client. The representative of the applicant declined to accept arbitration and made it clear that they would opt for a strike action. The conciliation meeting took place on the 7th, 8th and 9th May, 1990.

On the 15th May, 1990 the applicant gave notice to the Labour Commissioner in terms of section 58 of the Trade Unions and Trade Disputes Law 1964 that the members of the applicant would go on strike in four weeks' time. The letter reads as follows:

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C.A.W.U.L.E.
P.O. BOX 4055,
MASERU 100
15th May, 1990.

The Labour Commissioner,
Labour Department,
Private Bag A 116,
MASERU 100

Dear Sir,

re: NOTICE OF A LEGAL STRIKE

With reference to the deadlooked negotiations between the Construction and Allied Workers Union of Lesotho and Spie Batignolles, we hereby wish to take this opportunity to clarify the position of the said Union as follows:

1. The Union is now giving four weeks notice in terms of section 58 of the Trade Union and Trade Disputes Law of 1964. The reasons for this notice are as follows:

   1.1 Spie Batignolles management clearly stated that they would not make any move.

   1.2 They said they would not change their position unless they are told by the government or The Arbitrator to offer better wage increments.

   1.3 They requested that the matter should be referred to arbitration because they would claim that from the government.

   1.4 The Union does not see any possibility of making any other settlement through further conciliation mettings with Spie Batignolles as the company is no longer prepared to proceed with negotiations in good faith.

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1.5 They in most cases state that they want to offer wages in accordance with the minimum wage scale as set out by the government.

The Union has because of these reasons been mandated by the members to give this notice in support of the three outstanding issues namely: wage increment, accomodation allowance and monthly transport to and from Maseru.

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I remain,
Yours Respectufully,

Justice Sello Tsukulu,
General Secretary.

c.c Spie Batignolles."

I think it is convenient at this stage to set out in some detail those sections of the Trade Unions and Trade Disputes Law of 1964 (The Law) which deal with strikes and lockouts.

Section 55 (1) and (2) provide that:-

1. If within two weeks of the appointment of a conciliator under the last foregoing section an agreement has not been reached on all the matters in dispute, or if, before that time the conciliator considers that there is no prospect of reaching an agreement, the conciliator shall submit a report to the Member setting out the facts and stating -

   (a) how far, if at all, agreement has been reached; and

   (b) what are in his opinion the issues which remain in dispute; and

   (c) the arguments used for and against the contentions of the parties.

2. The Member, on receipt of a report under sub-section (1) of this section shall either proceed to serve on the parties a notice under the next following section or appoint the Labour Commissioner or some other person to act as additional conciliator and make further endeavours to arrive at an agreement."

Section 56 (1) provides that:-

1. The notice mentioned in the last foregoing section to be served by the Member shall be a notice -

   (a) stating what are in his opinion the issues between the parties; and

   (b) asking the parties whether they agree to those issues being referred to and determined by arbitration."

Section 58 (1) and (2) provide that:

(1) Where the Member has, under section fifty-five of this Law, served notice on the parties to a trade dispute either party may consent to arbitration or may serve on the Member and on the other party a notice refusing consent to arbitration.

(2) A notice refusing consent to arbitration may also contain a statement of intention to declare, at the expiration of four weeks from the service of such notice, a strike or as the case may be a lockout in furtherance of the dispute."

Section 59 provides that:-

"A strike or lockout carried out in accordance with a statement of intention notified under the last foregoing section is lawful. Any other strike or lockout is unlawful."

It is quite clear that the notice given to the Labour Commissioner on the 15th May, 1990 was premature. At that time the Minister was still considering the report of the conciliators and had not yet given notice to the parties in terms of section 56 of the Law. The applicant could not give notice to take a strike action before the Minister had given them notice and asked them whether they would accept arbitration. On the 21st May, 1990 the Labour Commissioner warned the applicant that in his opinion the notice was premature and not in accordance with section 58 (2) of the Law. He advised the applicant not to call a strike unless and until the lawful machinery to settle trade disputes has been completely exhausted.

It cannot be said that on the 15th May, 1990 when the applicant purported to give notice to the Minister in terms of section 58 (2) of the Law all lawful machineries to settle trade disputes had been completely exhausted. The Minister was still entitled under section 55 (2) of the Law to appoint the Labour Commissioner or some other person to act as an additional conciliator and make further endeavours to arrive at an agreement or to refer the dispute to arbitration.

The applicant's notice of the 15th May, 1990 was premature, unprocedural and unlawful.

On the 31st May, 1990 the Minister indicated that he had received the report of the conciliators and noted that out of eight issues which were in dispute a deadlock was reached on three of them. He asked the parties whether they agreed that the remaining issues should be referred to arbitration in terms of section 56 (a), (b) of the Law.

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In paragraph 3 (g) of his affidavit Sello Tsukulu who is the General-Secretary of the applicant deposes that on the 4th June, 1990 the Minister wrote to the parties to the dispute and asked them whether they would consent to arbitration or not. He deposes that the applicant reiterated its earlier position that it would go on a strike.

The applicant ought to have realized when it received the Minister's notice that its own notice was premature. A new notice ought to have been issued by the applicant on the 4th June, 1990 and the four weeks period prescribed by the Law would expire on the 2nd July, 1990. Instead of issuing a new notice the applicant merely reiterated what it had already said. That reiteration had no effect on the earlier notice which was null and void. The strike action which followed that notice was also unlawful and premature. As I have already said above the applicant ought to have issued a new notice on the 4th June, 1990 when it received the notice of the Minister.

In his founding affidavit Sello Tsukulu stated in no uncertain terms that on the 15th June, 1990 the workers went on strike. He deposes in paragraph (j) that -

> "On the 15th June, 1990 workers decided to stop working in pursuant of the strike declaration made. I saw senior staff members of the 1st respondent leaving the KATSE area. The Project Manager said they had no mandate to talk to us. I however told MR. MOLAPO that if he brought supervisors who hold work permits the workers may resume work."

In paragraph (n) he deposes that -

> "I further submit that since the notice of intention to declare a strike was not nullified the workers were entitled to proceed with the strike and further the workers could not be forced to obey orders from unlawfully employed supervisors."

I am surprised that his so-called supplimentary affidavit Sello Tsukulu now gives the impression that the workers were prepared to go to work on the 15th June, 1990 but that Warrant Officer Motenalapi told him "that management had requested him to stop workers from getting into the office site as there might be a strike and so police must stop any person from getting inside the gates."

On the 13th June, 1990 the workers unanimously decided that they would proceed with the strike if management did not negotiate in good faith with the applicant and also if the management did not bind itself that it would discipline or dismiss supervisors who assault workers. It will be realized that these new demands by the applicant's members were not covered by the unresolved issues which were contained in the Minister's notice namely, 1. Monthly transport to and from Maseru, 2. Accommodation allowance and 3. Wage increase demand.

That the strike was on on the 15th June, 1990 is confirmed by the applicant in its letter of the 16th June, 1990 addressed to the first respondent (This letter is on page 74 of the record). In that letter the applicant strongly warned the first respondent not to employ scab labour. It was alleged that such a move would be met with the utmost resistance .

It is common cause that on the evening of the 14th June, 1990 the first respondent started to evacuate its supervisors from the Katse camp because it was clear that there was going to be a strike on the following day. The applicant cannot be heard to say that the workers failed to work on the 15th June because supervisors were not at the site. The strike had been planned over a very long time and as late as the 13th June, the workers made it quite clear that the strike would take place.

I reject it as a pack of lies that on the 15th June, 1990 the workers were prepared to go on with their normal duties.

In terms of section 59 of the Law I find that the strike was unlawful.

On the 16th June, 1990 the first respondent summarily dismissed the striking workers in terms of section 15 (3) (b) and (e) of the Employment Act 1967. It seems to me that an employee who goes on an unlawful strike is absenting himself or herself from work without the permission of the emplyer and without a reasonable excuse.

The workers who have been dismissed are not entitled to a notice because they were being summarily dismissed for being involved in an unlawful strike.

The applicant is unhappy that the first respondent employs supervisors who have no valid certificates of employment issued by the Minister in terms of section 28A of the Employment Act 1967.

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The workers are not prepared to obey orders of such employees on the ground that their orders are not lawful. I am of the view that the applicant and its members have totally misconstrued the provisions of section 28A of the Employment Act 1967. The certificates of employment issued to supervisors who come from outside Lesotho have nothing to do with the employees of the first respondent who are under the supervision of such foreigners. The orders given by such foreigners can be disregarded by workers only if they are unlawful in the sense that they are outside the terms of employment of the workers or to any law or regulation in force in the country. The mere fact that such foreigners have no certificates of employment cannot make their orders unlawful. If the applicant is unhappy about the employees of the first respondent who have no certificates of work, all it can do is to report them to the appropriate authorities so that they can be prosecuted under subsection (6) of section 28A of the Employment Act 1967.

It was submitted on behalf of the applicant that the workers were not asked if they associated themselves with the strike. I am of the view that this submission is not sound. The workers referred to are members of the applicant who had meetings at which it was agreed that a strike action should be taken. The applicant represented all its members and informed the management of the first respondent that the workers would go on strike on the 15th June, 1990 and this is exactly what they did.

In the result the application is dismissed with costs.

J.L. KHEOLA
JUDGE

3rd July, 1990.

For the Applicant - Mr. Rakuoane
For 1st and 2nd Respondents - Mr. Moiloa.