C of A (CIV) 13/90

IN THE LESOTHO COURT OF APPEAL

In the matter of:

C.A.W.U.L.E. Appellant

vs

SPIE BATIGNOLLES & OTHERS Respondents

Held at Maseru

Coram

Mahomed P.
Ackermann J.A.
Browde J.A.

JUDGMENT

BROWDE J.A.

This is an appeal from an order of Kheola J. in the Court *a quo* in terms of which the learned Judge dismissed an application brought by the appellant union in which the relief sought was a declaration that the summary dismissal of applicants members by the first respondent was null and void.

It appears from the founding papers that members of the applicant were employees of the first respondent in the Katse area. As a consequence of unfulfilled demands for wage increases the applicant, on 10 April, 1990, declared a trade dispute in terms of the Labour Laws - this after there was a deadlock in the negotiations. An unsuccessful conciliation meeting followed at the end of which the applicant made it clear that it was not prepared to submit to arbitration and that it opted for strike action. On 15 May 1990 the applicant wrote to the Labour Commissioner that in view of the fact that conciliation had failed members would go on strike after 4 weeks. The Commissioner replied to that letter and expressed the view that the notice of the intended strike action was premature and not in accordance with Section 58(2) of the Trade Union and Trade Disputes Law 1964. Because the Union had, in the opinion of the Labour Commissioner, not allowed for the arbitration procedure provided for in the Act, he advised the Union not to call for what might be an unlawful strike. Despite this advice and despite a letter from the Minister of Employment asking the parties whether they would consent to arbitration the workers decided to stop working in pursuance of the strike declaration. There is a dispute on the papers as to the exact sequence of events but the following aspects of the matter are clear:-

(i) It is common cause that the notice of the strike action was premature and that therefore the strike was "illegal".

(ii) The strike commenced on 15 June 1990 (In his founding affidavit Mr. Sello Tsukulu, the appellant's General Secretary, says this in Paragraph 3(j)).

(iii) The first respondent invoked the assistance of the police in an attempt to protect those members of its staff who considered themselves threatened by the strikers.

(iv) Letters dismissing them summarily were addressed to all the striking workers on 16 June 1990.

One of the issues argued by the parties in the Court *a quo* and which was repeated on appeal was whether or not the strike was legal. It appears to have been thought by the appellant that if the strike was not illegal, i.e. did not constitute a criminal offence, then the first respondent had no right to dismiss the strikers. If I am correct in thinking that this was the approach of the appellant then it is important to point out that it is

fallacious. Under the Common Law a strike, whether it be "legal" or "illegal" is a breach of the contract of employment of so fundamental a character that the employer is entitled to accept the strike as a repudiation of the contract and to dismiss the strikers. In R v Smit 1955(1) 239 Watermeyer A.J (as he then was) said:

> "At Common Law an employer clearly has the right to dismiss a servant who refuses to carry out his contractual obligation to work. Mr. Gordon was unable to point to, and I have been unable to find, any provision in ACt 36 of 1937 which "legalises" a strike in the sense that it authorises an employee to break his contract of employment by participating in a strike. All that the Act has done is to declare that striking in certain circumstances constitutes a criminal offence .... If those circumstances are not present then no criminal offence is committed, and in that limited sense the strike is "legal". It does not however follow that an employer is deprived of his Common Law right to dismiss an employee who refuses to work".
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> (p.241 H - 242 A).

In my judgment, therefore, nothing in this case turns on whether or not the strike was "legal". Unless there is a statutory enactment which prevents it from so doing the first respondent was entitled to dismiss the strikers for their breach of contract.

It seems that there is no statute in Lesotho which protects workers who go out on strike in consequence of a wage dispute for example. The concept of "unfair labour practice", which exists in South Africa and certain western countries has, as yet, not reached Lesotho. This concept enables a trade union, for example, to call its members out on strike when they have been unfairly treated without fear that their absence from work will be regarded as a repudiation of the workers' contracts of service. This bargaining weapon is regarded as essential, in this day and age, in order to maintain a fair balance of power between employer and employee, and there seems to be no good reason why Lesotho should not join the other countries I have mentioned in this regard. Counsel for the appellant, who argued the appeal tenaciously, submitted that striking workers are protected from dismissal by Section 15(3) of the Employment Act. The section reads as follows:-

> "(3) An employer may dismiss an employee summarily in the following circumstances and no others -
>
> (a) where an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the express or implied conditions of his contract, which would entitle the employer under the common law to dismiss him summarily;
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> (b) for wilful disobedience to lawful orders given by the employer;
>
> (c) for lack of skill which the employee expressly or by implication holds himself out to possess;
>
> (d) for habitual or substantial neglect of his duties;

or

(e) for absence from work without the permission of the employer and without other reasonable excuse."

Counsel sought to rely on Section 15(3)(e), arguing that if there was a reasonable excuse for the workers' absence from work their summary dismissal could not be resorted to by the employer. Counsel conceded, however, and correctly in my view, that the "reasonable excuse" had to be shown by the appellant to exist as an objective fact. This has not been shown on the papers before us. Counsel also conceded, and again correctly in my view, that in the context of the Act "reasonable excuse" would properly relate to something personal to the worker e.g. illness, and could certainly not apply to a situation where there is a trade dispute arising from a difference of opinion regarding wages.

During the course of his argument Counsel for the appellant submitted that the dismissal was a nullity because of "discrimination" and because it was "done for ulterior motives". It seems to me that there is no substance in this submission. Once it has been accepted that the workers stayed away from work without "reasonable excuse" then the first respondent was entitled to dismiss them notwithstanding any other unjustifiable motive which might have been lurking in the minds of first respondent's

officials.

Then it was submitted by appellant's Counsel that "failure to warn and give ultimatums amounted to denying the workers a hearing". There seem to be two answers to this. Firstly, on the 17 May 1990 the first respondent wrote to the appellant in response to the latter's letter to the Labour Commissioner dated 15 May 1990 - the letter in which the four weeks' notice of the intention to strike was given. In its letter the first respondent informed the appellant that "it is your duty as the leaders of the Trade Union to inform Employer/members (sic) that a strike lawful or unlawful is to be considered as a breach of contract in terms of the Employment Act". If the appellant wished to make representations it could then have done so, but, so it appears, it did not. Secondly, and in any event once the workers stayed away, as it is conceded they did, and this without "reasonable excuse", Section 15(3)(e) expressly gives the employer the right to summarily dismiss them. This means that no hearing need be given.

Finally appellant's counsel submitted that "the workers exercised their legitimate right to strike as a last resort to protect themselves". This was a reference to paras. 3(h) and 3(i) of the founding affidavit in which the following appears:-

"(h) On or about the 13th June, 1990 representative (sic) of the applicant which comprised of myself and Mr. Nkhahle met representative of the 1st respondent to deal with some other burning issue such as assaults by officials of the 1st respondent and violation of the Labour Laws by the 1st respondent. One pertinent issue was employment of persons who are not holding work permits and we told representative of the 1st respondent that their employment is illegal.

(i) We further told representative of the 1st respondent that workers are not bound to obey orders from unlawfully employed supervisors ..... (who) are South Africans who had no work permits."

Apart from the fact that the assaults are denied the whole question of the meeting of 13th June was put in issue by the first respondent. It has not been seriously contended before us, nor could it be, that assaults were the reason for the strike. The notice of the intention to strike preceded the meeting of the 13th June by four weeks and it seems it is on the latter date that we hear about alleged assaults for the first time. As these allegations are denied they cannot in any event be of assistance to the appellant.

As far as the "unlawfully employed supervisors" are concerned I fail to see how appellant's case is advanced by the legality or otherwise of their appointments. Suffice it to say that I agree with the learned Judge *a quo* who expressed the view that the certificates of employment issued to supervisors who came from outside Lesotho have nothing to do with the employees of the first respondent who are under the supervision of such foreigners. The mere fact that such foreigners have no, or no valid, certificates of employment cannot make their orders to workmen unlawful. That being so I find there is no substance in the suggestion that the appointment of "foreign" Supervisors by the first respondent is a reasonable excuse available to the members of the appellant for staying away from work.

There is, therefore, no reason why this Court should interfere with the order made by the learned Judge *a quo* dismissing the application.

The record in this case has, to say the least, been prepared in a slipshod manner. Some of the pages are illegible, while others have portions which are blank. Scribbled notes appear on the record in several places, notes which we were informed were made by the appellant's attorney. This careless approach shows a disrespect for the Court which is unacceptable and will not be tolerated. Practitioners must ensure that so far as lies within

their power records are clean and legible, or face orders of costs *de bonis propriis*.

The appeal is dismissed with costs.

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J. BROWDE
JUDGE OF APPEAL

I agree .....
I. MAHOMED
PRESIDENT OF THE COURT OF APPE

I agree .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at Maseru this 26th day of July 1991.

For the Appellant : Mr. L. Rakuoane
For the Respondents : Mr. J.T.M. Moiloa