I am not sure that singing could continue for days on end without the demonstrators being deemed to be violating the rights of others or of harassing them.

I do not believe the fourth respondent when he says a crowd of hundreds could continue to be orderly over a period of days and weeks. The problem becomes worse when new people came everyday to join the others in that demonstration. If one group behaved the next might not. It seems to me that the Ministry of Education was not obliged to let this chaos that was mismanaged by its organisers to continue. This is particularly so when the police were unable to control it because they were beyond the capability of five to ten policemen that used daily to be assigned to guard the Ministry of Education offices. The militancy of the demonstrators was bound to rise when their salary cheques were with-held and their grievances not redressed.

Having heard the evidence and seen the witnesses I can also say I do not believe fourth respondent when he claims he was aware of everything that happened with such a big crowd to manage. I believe he is at places being consciously untruthful when he states the police did whatever they did without provocation or reason. Even accepting the police were inexperienced, out-numbered and inclined to over-react, they could not hurl tear-gas into an orderly crowd. Fourth respondent says they did not approach the court against the police because

they were afraid the court might declare what they were doing illegal. To blame the pandemonium and disorders that used to occur on the police when fourth respondent did nothing at the time the acts complained of occurred does not persuade.

There is no presumption that the police acted rightly omnia praesumuntur rite esse acta. This is particularly so where the police could have been called as witnesses. See R. v. Henkins 1954 (3) S.A. 560 at 563. In this case the matter of the police clashing with respondents is more or less in the past. These were allowed to be matters of routine and this is not litigation directly involving the use of police powers. When the applicant is complaining that the rights of the Ministry of Education were being violated, respondents blame this on the police. Although the police did not give evidence, I do not believe fourth respondent whom I saw and whose evidence I heard viva voce and which I have weighed against surrounding facts and probabilities.

I am a bit puzzled that they did not move the courts against the police when the police prevented them from picketing at the Maseru urban schools on the 16h August 1995. This was the place where they should have legitimately picketed. Although this is not in issue before me, in terms of Section 233 of the Labour Code of 1992, that is where they were supposed to picket.

The court does not have all the facts, but it seems to me

that by claiming they were lawfully picketing the respondents nailed their colours on the wrong mast. They do not claim nor were they trying to persuade the officials of the Ministry of Education not to go to work. This was what they were expected to be doing if they were picketing at what was their place of work. The respondents place of work was at the schools not the Ministry of Education headquarters. They admit they were there to disturb the officials of the Ministry of Education, albeit moderately to highlight their grievances. Excesses were caused by police uncalled for violence. I am not sure respondents can claim disturbing the Ministry of Education, however moderately on a sustained basis as a right. In a democratic society, such conduct might be tolerated for a short time, but protesters cannot claim it as a right. It is illegal.

However after hearing evidence I am satisfied that these protesters did sometimes get out of control. The probability is that the more they protested and were ignored the more militant they became. On the 10th October 1995 it is common cause that the situation became ugly. Fourth respondent does not deny that files were strewn on the floor or documents burnt, he blames whatever happened on the police. To put this in fourth respondent's words the police used flaming torches, therefore:-

> "I deny any responsibility by our members for the scattering of office files.... Any damage to property should be blamed on the police, not our members."

I went to the Ministry of Education Offices on inspection in

-loco. The fourth respondent claims their members were at least 44 paces from the Ministry of Education headquarters, which is where the police were. I find it strange that they got into headquarters building in which Dr. Khati was when police threw tear gas. I should have expected them to run in the opposite direction. The only conclusion to reach is that they were going towards the out-numbered police when the police threw tear-gas at them and some of them got through.

Fourth respondent went into the Teaching Service Division. He cannot be in a position to contradict Dr. Khati about those who went into the headquarters across the street. I do not believe fourth respondent in his viva voce evidence when he said he did not see files strewn on the floor. If the respondents were not told to disperse, it was probably because the police had not intended to disperse them but they had gone over the police cordons and the five policemen (when they threw tear gas) were desperate to throw them back.

The suggestion that they were just congregating and singing is not born out by the facts as I see them. They were in my view moving towards the buildings the police were protecting. Fourth respondent says the teachers had not been paid and that on the 10th October 1995 the teachers kept their pain to themselves and were orderly. A mob of over 300 people rarely remains orderly especially when grievances are not being redressed. I do not believe fourth respondent on this point.

For fourth respondent to deny or even avoiding admitting that the Ministry officials were tense during this period struck me as being untruthful and evasive.

It is clear from the evidence given by fourth respondent that the demonstration they call picketing began on the 12th September 1995. Tear gas was first thrown at the respondents on the 12th and the 13th September 1995 yet in his affidavit fourth respondent had said:

> "Before engaging in picketing actively I informed the Commissioner of Police. Our resolve was confirmed by letter dated 13th September 1995 ... marked JM3."

Fourth respondent does not say how he informed the Commissioner of Police. This letter dated 13th September 1995 begins:-

> "This is to notify you that our members will from tomorrow be picketing the Headquarters of the Ministry of Education in Maseru, and ALL district education offices daily ...."

The letter gives the impression that this was the first notification and that picketing would begin the following day which was the 14th September 1995. In other words it might not be true that when picketing began on the 12th and 13th September, 1995 the police had not been informed. If this was confirmation of a previous notification, one would expect this to be stated in the letter. This makes me not to trust what fourth respondent said he kept on changing on this point. He alleged the notification to the commissioner was in a previous letter which he promised to bring but never brought.

It has been argued that this application was unnecessary because respondents never went back after the 10th October 1995 following their being tear-gassed by the police. They had been tear-gassed about six to nine times before, and still came back for more. Respondents had not told the Ministry of Education that they were no more coming back to demonstrate. This demonstration that the police could not manage and which by respondents own admission was full of violent incidents with the police was causing the Ministry of Education concern and was now threatening the records and property of the Ministry of Education. It was also causing tension among the officials of the Ministry of Education. I am of the view that this application had become necessary.

According to fourth respondent (when giving viva voce evidence) the police were not stopping them from what they were doing. They never complained of any illegal acts. They would order them to disperse before throwing tear gas without giving reasons. The police would advise them to get a court order so that they could leave them alone. Respondents did not know if there was a trap because the respondents did not know what the results of going to court would be. They were afraid their presence would be declared illegal. I think the fourth respondent and his committee were aware that what they were doing was illegal. It is not true that they were puzzled as to why the police themselves did not get an order against them. This is the

picture painted by fourth respondent before the Attorney General brought this application on behalf of the Ministry of Education.

An interdict of the nature applicant sought is intended to secure the permanent cessation of an unlawful act. For applicant to succeed has according to Jones and Bucle Civil Practice of the Magistrate Courts in South Africa 7th Edition Volume 1 must establish

1. A clear Right
2. An injury actually committed or reasonably apprehended.
3. The absence of any other satisfactory remedy available to applicant.

The police had failed to effectively control the demonstration which the respondents erroneously called picketing. Instead they were periodically throwing tear gas at respondents. On the 10th October 1995 it became clear that records and property of the Ministry of Education were at risk. There was apprehension which was not fanciful or even speculative that more incidents of a similar nature would follow.

There was a definite right on the side of the Ministry of Education to go about their normal administrative business without any noise, nuisance, or harassment from the demonstration of the striking respondents. Respondents had gone beyond demonstrating they were now coercing the Ministry of Education

which was refusing to do as they asked. Self-help is not allowed, people should resort to litigation. To crown it all respondents erroneously believed what they were doing was lawful picketing when it was not.

In my view the requirements of an interdict had been met. There was no other way to bring to an end the state of affairs which was changing from an irritation to a threat to safety of people and property caused by violation of the Ministry of Education rights except by bringing this application.

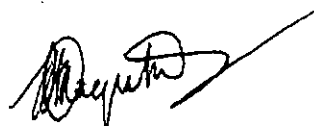
Having traversed the merits of the case and having determined issues of credibility I am now in a position to say the conduct or respondents was unlawful. I say this not only on admitted facts as the Court of Appeal could only say in passing C. of A. (CIV) No.29 of 1995. I have seen and heard the main witnesses. I believe Dr. Khati and disbelieve fourth respondent. I am satisfied that the respondents were out to disrupt the normal functioning of the Ministry of Education unless they heeded their demands. This fact respondents themselves admit. I am satisfied their denial of this aim is not genuine.

The Ministry of Education has a right to conduct its affairs free from violent and noisy disturbances whether inside or outside their premises. The officers of the Ministry of

Education were subjected to harassment as the Court of Appeal in C. of A. (CIV) No.29 of 1995 has observed. The Attorney General was correct in coming to court because (according to fourth respondent) the police were not sure how to handle what respondents were doing. The reason being that it was never intended to be a demonstration but a confrontation with the Ministry of Education who were not reacting favourably to the strike. It therefore degenerated into frequent police tear gas assault on the respondents. When even the property of the Ministry was threatened action had to be taken.

The order the applicant seeks is by no means very broad.

I therefore confirm the rule nisi with costs as prayed.



W.C.M Maqutu
JUDGE
16th July, 1996.

For the Applicant: Mr. Letsie

For the Respondents: Mr. Phoofolo

CIV/APN/347/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

ATTORNEY GENERAL — APPLICANT

and

LESOTHO TEACHERS TRADE UNION — 1ST RESPONDENT
THABANG KHOLUMO — 2ND RESPONDENT
MAIEANE KHAKETLA — 3RD RESPONDENT
MALIMABE MOTOPELA — 4TH RESPONDENT
TLOTLISO MOTOLO — 5TH RESPONDENT

J U D G M E N T

Delivered on the 5th August, 1996 by the
Honourable Mr. Justice W.C.M. Maqutu

This application has been remitted to this court for hearing after the Court of Appeal in C of A (CIV) No.29 of 1995 had found that this court had erred in declining to hear it on the grounds that it had no jurisdiction.

The problem that arose when this matter was re-heard is that the Court of Appeal seemed to have determined the merits. Steyn JA in that appeal had remarked:-

> "The court a quo was in my view correct when it described the conduct of the Respondents as "unlawful". On the admitted facts, the Respondents violated the rights of the Ministry to conduct its affairs free of violent disturbance or illegal occupation of its premises. Moreover the intimidation and harassment to which its officers were subjected were in clear contravention of the provisions or

> the Labour Code itself. Any person is entitled to approach the conventional courts of law for protection against such conduct. It could never have been intended that a Labour Court - let alone only a Labour Court - should be the forum for the adjudication of proceedings brought to protect such rights ...
>
> "It was common cause that, in the event of our coming to this conclusion, the matter should be referred to the High Court for its adjudication."

It fell upon me to interpret and apply this judgment of the Court of Appeal. The litigants are domini lites, if they want only one point decided they are free to ask the courts to do so. This often helps to settle disputes. It is the policy of the courts to allow full ventilation of grievances. To achieve this courts sometimes bend backwards to allow amendment they have a discretion to refuse. In Shill v. Milnes 1937 AD 101 at 105 de Villiers JA emphasised that the court should try and find what the real issue is in a case. That is the purpose of the rules generally and pleadings which include applications as well. The view I take is that it is quite legitimate for any court to help the parties define the issues clearly, even by postponing the matter (in the case of the trial court) and in the case of an appellate court, by sending the matter back to the court below. This can be done provided none of the parties suffer any substantial prejudice.

Both parties wanted the matter referred back to the court below. The Court of Appeal was obliged to refer the matter back to the trial court unless there was a good reason for not doing

so. This is what the Court of Appeal did in this case and it emphasised that "it is common cause" that this is what the parties wanted, once the issue of jurisdiction had been determined by the Court of Appeal. The parties themselves and not the court had a peculiar knowledge of what really was in issue. Apart from that if they felt the grievance ought to be more fully ventilated, the Court of Appeal felt they should be given a chance to do so as only a part of the evidence was common cause. The court could not on its own assume that what was in dispute could not affect the final outcome. After all an amendment of issues was always open to the parties provided none of the parties might feel prejudiced.

In Collett v. Priest 1931 AD 290 De Villiers CJ at page 302 said:'

> ".... whatever the reasons for a decision may be, it is the principle to be extracted from the case, the ratio decidendi, which is binding and not necessarily the reasons given for it."

A proper reading of the Court of Appeal judgment and the meaning attached to it, show clearly that the intention was not to go into the merits. It required the matter to heard by this court because (contrary to what this court believed, when it held it had no jurisdiction) the Court of Appeal had found it had jurisdiction to hear the matter.

What the Court of Appeal said was assuming that what was

alleged by the applicant was all that happened and it was true) the respondents had acted illegally. There was a dispute of fact and the respondent deny what was alleged against them (at the request of the parties) no complete decision could be made on the merits unless the factual dispute was first resolved. Therefore what was expressed by the Court of Appeal in the course of judgment was not essential for the determination of the matter at issue (which was jurisdiction).

I directed that evidence be heard on what had occurred during the strike between the 12th September and the 10th October 1995. Even on points on which there seemed to be agreement, I discerned there was no real consensus. Consequently parties were allowed not only to elaborate on points on the affidavits but to call any viva voce evidence they saw fit to call.

The Attorney General through Mr. Ts'okolo Makhethe an attorney of this court had issued a certificate or urgency on the 11th October, 1995 following upon incidents that had occurred on the 10th October, 1995. When he did this supporting affidavits had not been sworn to.

What he was asking the court to do for him was the following:-

(a) That the respondents including all members of 1st respondent should be restrained and or interdicted from congregating along constitution road in the city of Maseru, in front of the buildings occupied by the

Ministry of Education, Teaching Service Department, Examination Council, Planning Unit and Ministry of Education Headquarters or anywhere near, at or about the Ministry's Headquarters and the other mentioned offices or from congregating anywhere within 1km radius from the said offices.

(b) Respondents including all members of 1st respondent be restrained and or interdicted from shouting, singing obscene and insulting songs and issuing threats directed at the officials of the Ministry of Education.

(c) That respondents including members of 1st respondent be restrained and or interdicted from entering upon premises in the occupation and use of said officials of the Ministry of Education and interfering with the peaceful and lawful discharge of their official functions.

(d) That respondents including all members of 1st respondent be restrained and or interdicted from entering the Ministry of Education without lawful authority or permission and destroying official property, documents, files and furniture and vandalising government property.

(e) That respondents including all members of 1st respondent be restrained and or interdicted from behaving and or conducting themselves in a manner likely to intimidate and annoy any officials of the Ministry so as to prevent them from discharging their official functions.

By the time the matter was heard the strike that had allegedly been accompanied by the acts complained of had been called off. The matter was nevertheless heard as if the need for the interim order still existed. Whatever rule nisi had been issued had lapsed. The parties required a determination of the merits of the application as the case would have been determined in October 1995 or immediately thereafter. I have already stated the matter was highly contested.

According to the affidavit of Dr. Khati the Principal Secretary for Education (who was applicant's deponent) a strike was declared by first respondent. First respondent subsequently filed case number 122/95 before the Labour Court. Then respondents and a crowd invaded the offices of the Ministry of Education and disrupted the smooth functioning of the Ministry. Police intervened and dispersed the crowd and thus restored order. The group then congregated at the doors making it difficult to enter. On some days they became unruly beating drums, singing in loud voices and using insulting and abusive language to official of the Ministry. This affected the smooth functioning of the Ministry. This was continuing even on the day the affidavit was drawn. I will assume the affidavit was drawn between the 10th and 11th October, 1995 and sworn to on the 12th October, 1995.

The 10th October, 1995 was the worst day of this daily presence of teachers at the Ministry of Education. Giving viva voce evidence he says although the place was cordoned off the striking teachers from time to time used to go over the cordon. On the 10th October, 1995 they were tear-gassed and entered the Ministry of Education building. He does not know why the tear-gas was thrown at them. Some teachers rushed into his section of offices. He was later called to the Teaching Service Division where he found filed strewn about the offices and burnt ash of documents.

On the 10th October, 1995 they decided to seek the protection of the courts. They were afraid the property of the Ministry of Education and staff were in danger. Although teachers did not come again they were afraid they might come again to cause a disturbance. Answering questions Dr. Khati said he was not intimidated by the noise and disturbance. No specific threats were levelled at him. Among the derogatory songs was that the Minister Makhakhe should wake up.

The fourth respondent while denying most of the allegations in his Answering Affidavit said:

> "I only wish to add that our subsequent demonstrations and picketing were directed to the Ministry of Education headquarters in Maseru because we were directed there by the Prime Minister's Office on 4th august, 1995 ... That Ministry which by law deals with affairs of Lesotho teachers, particularly salary matters.

He then goes on to say they had to do so because of government's "stated policy and stand of refusing to talk about the salary increase agreement of the 22nd September 1994, which it had reneged from." They therefore resolved to stage picketing activities on the Ministry of Education. They informed the police of this by letter dated 13th September, 1995. They had previously picketed schools in the Maseru urban area on the 16th August 1995 but police officers had sternly warned them that this should not be done.

Respondents admit that they had occupied the Ministry offices as alleged in furtherance of their strike action and

picketing. They deny totally disrupting the functioning of the Ministry and I quote:-

> "Certainly the intention was to render the functioning not as smooth as when things were normal, but to cause minimal form of disruption in order to put pressure on the Ministry to give attention to their grievances."

What according to fourth respondent caused disruption was when the police unprovoked came into the boardroom and corridors of offices hurling abuse and throwing tear gas canisters into these places. Tear-gas attacks took place on the 12th and 13th September 1995. After that respondents resolved no more to go into the buildings of the Ministry of Education.

> "They congregated outside. This continued daily, starting with a prayer in front of the education offices at 10.00 a.m. followed by singing and dancing outside until 4.00 p.m."

They deny obstructing entrances and hurling abuse at the Ministry Officials. Police guarded the buildings. What applicant disliked was simply the singing and standing peacefully outside the Ministry of Education offices. The singing and beating of drums was often interrupted by the police who seemed to have resolved not to allow the respondents to picket. On the 19th and 22nd September 1995 the police attacked respondents with tear gas when respondents were no disrupting anybody. On the 26th and 27th September 1995 the place was cordoned off by heavily armed police, they therefore could not even picket.

According to the Pocket Oxford Dictionary picketing occurs when:

> "One or more persons are stationed outside the place of work to persuade others not to enter during a strike."

Mr. Phoofolo for the respondents conceded that what respondents were doing at the Ministry of Education was not picketing within the meaning Section 223 of the Labour Code of 1992. The way I understand what a picket does is peacefully persuading fellow workmen at a work-place to withdraw their labour and join the strike because they share a grievance with the striking pickets. In this case, the officers of the Ministry of Education were not doing the same work of teaching. Secondly their salaries had not been cut, which was the grievance of the teachers. A picket is not supposed to disturb those who are at work, or coerce them or intimidate them in any way.

What respondents were doing was demonstrating and protesting. Their with-holding of their services through a strike action without invading the rights of other was within their rights as human beings. The right to protest and demonstrate peacefully if also theirs as human beings provided they do not invade the rights of others.

A perpetual noisy demonstration which accompanies a protest is bound at some stage to affect the rights of others. In a democratic society this can be tolerated up to a point. It often

happens that to draw attention to their grievance the protesters are prepared even to break the law to some extent. When that happens protesters and demonstrators are prepared to be imprisoned or fined to highlight their grievance. In a democratic society, very often action that might have been taken is not taken provided breaches of the law are of a minor nature and they take place for a limited period. Indeed protests and demonstrations of short duration are facilitated and even regulated by law enforcement authorities. A protracted demonstration and protest lasting several days can only go on if it does not affect the rights of others or harass them in any significant way.

The respondents say they acted in an orderly manner in their assembly and moderation prevailed. It was the police that rendered their protest assemblies disorderly. They threw tear gas at them without the least provocation. The function of the police is not only to maintain law and order, prevent crime and prevent anything that might cause a breach of the peace. Their duty is also to facilitate the exercise of the right of assembly protest and ventilation of grievances without unlawful interference by others. This gives them a great deal of discretion.

Keir and Lawson in Cases and Constitutional Law 4th Edition at page 403 concludes about the police:-

"They know the facts better than any one else; they have a flair, derived from experience, for handling crowds; their judgment is likely to be better than anyone else's on the point whether they can give effectual protection without inordinate expense or strain on manpower."

The police referred to above are British and they undoubtedly have considerable experience. Our police in Lesotho have lost this tradition because for over twenty years Lesotho had no democratic rule, freedom of assembly and protests against government. Democratic rule was back for only about two and half years when they were faced with the teacher's strike.

If only five to ten policemen were assigned during the period between 12th September and 10th October 1995 to control crowds of about 300 people daily before the Ministry of Education, I can without hesitation say they were woefully thin on the ground for such a crowd. A crowd is expected to misbehave from time to time, which binds the police to take some remedial action. The police must expect this. If the police are too few this inclines them towards using excessive force in order to control the crowd. If indeed tear gas was thrown at teachers six to ten times (as fourth respondent says) between the 12th September and 10th October 1995, then the police exposed the teachers to serious bodily harm. The police should have insisted on a much smaller crowd, to enable he demonstration to continue.

The organisers of the demonstration or protest should have insisted on a much smaller crowd which they too could control.