C. of A. (CIV) No.13 of 1984

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:

LESOTHO UNION OF BANK EMPLOYEES (LUBE) (BAHLAKOANA MOLIKO) — Appellant

and

STANDARD BANK LIMITED — Respondent

HELD AT MASERU

Coram:

MAHOMED J.A.
AARON J.A.
WENTZEL J.A.

J U D G M E N T

Wentzel J.A.

The appellant Trade Union seeks leave to appeal to this Court against the judgment of Molai J in the High Court, in which the learned Judge upheld respondent's appeal against an order made by the Unfair Labour Practices Tribunal. ("the Tribunal").

Mr. B. Moliko ("Moliko") was employed as an Assistant Manager by the respondent. His services were terminated on 31st May, 1982. Moliko was a member of the appellant, which then brought an application to the Tribunal, in which it alleged that the termination was an act of victimization by virtue of that membership, and constituted an unfair labour practice as is defined in Section 61(2) of the Trade Unions and Trade Disputes Act 11 of 1964. ("the Act").

/The.....

The issues was very fully canvassed in the Tribunal. The proceedings there started by way of three sets of affidavits, as in motion proceedings, and thereafter evidence was given viva voce. In the result the Tribunal, by a majority, made an order that -

> "(1) Respondent must restore the position of Mr. Moliko, i.e. Mr. Moliko must be reinstated to the position he held before he was dismissed. It was made clear at the beginning of these proceedings in July last year that Mr. Moliko was still unemployed and awaiting the outcome of this case. His reinstatement is not going to force him to leave another job.
>
> (2) Compensation: Respondent must pay Mr. Moliko the sum of M14,640.32 being loss of earnings from 1st June, 1982 to 14th April, 1983.
>
> (3) Respondent must pay costs on the High Court Scale."

Unfair Labour Practices are dealt with in Part XI of the Act. The relevant provisions are these -

> "Section 61(1) If a person discriminates against any person, as respects the employment or conditions of employment which he offers, because that person is a member or officer of a trade union, he is guilty of an unfair labour practice.
>
> (2) If a person seeks by intimidation, by dismissal, by threat of dismissal, or by any kind of threat, by imposition of a penalty, or by giving or offering to give a wage increase or any other means, to induce an employee to refrain from becoming or continuing to be a member or officer of a trade union he is guilty of an unfair labour practice.
>
> Section 66(1) There shall be a tribunal, to be called the Unfair Labour Practices Tribunal, and the provisions of the Second Schedule to this Law shall have effect as respects its constitution and proceedings.
>
> (2) The Tribunal shall have jurisdiction to enquire and determine, in cases brought before it in accordance with its rules of procedure, whether a person has engaged in any unfair labour practice as defined in this part of this law, and to make such orders as are provided for by this Part of this law.

Section 67(1) Where the Tribunal finds that a person has engaged in an unfair labour practice, they may, if they think fit, make an order forbidding him to engage in any such activities as they may specify in the order as being a continuance or repetition of the unfair labour practice.

(2) Where the Tribunal finds that a person has engaged in an unfair labour practice under section sixty-one of this law which involves the termination of employment of an employee or the alteration of his employment or of the conditions of his employment, the Tribunal may, if it thinks fit, make an order requiring his employer -

(a) to take such steps as may be specified in the order to restore the position of the employee; and

(b) to pay to the employee a sum specified in the order by way of compensation for any loss of earnings attributable to the contravention.

(4) An order of the Tribunal under this section shall have effect as if it were a judgment of a Subordinate Court and may be enforced accordingly in proceedings in a Subordinate Court notwithstanding the amount involved.

Section 68 A person against whom the Tribunal makes an order under the last foregoing section may, within twenty-one days of making of the order, appeal to the High Court -

(a) on the ground that there was no evidence before the Tribunal to support a finding of an unfair labour practice; or

(b) on the ground that the order was not justified;

Appellant's case was based specifically on S.61(2). To succeed, appellant had to prove before the Tribunal that

(a) there had been either intimidation, dismissal, a threat of dismissal, or any kind of threat, the imposition of a penalty, the giving or offering to give a wage increase, or any other means, and

(b) the respondent sought to use the aforegoing means to induce an employee to refrain from becoming or continuing to be a member or officer of a trade union.
(Holiday Inn vs Makhooane & Others 1976 LLR.225)

From a reading of the Tribunal's judgment, it appears very doubtful whether the Tribunal sufficiently appreciated that appellant had to prove the two separate elements in Sec. 61(2) to which I have just referred. Be that as it may, the Tribunal came to the conclusion that the respondent had engaged in an unfair labour practice, and made the consequential order referred to above. The respondent appealed to Molai J who upheld the appeal on the ground "that there was no evidence to support the finding of unfair labour practice". In doing so Molai J brought his findings on appeal within the terminology of Section 68 of the Act; I shall aver hereunder, however, to the approach and reasoning of the learned Judge.

The appellant now seeks the leave of this Court to appeal against the High Court's judgment. To do so appellant must have the leave of the High Court or of this Court, and the appeal must be on a question of law and not on a question of fact (Court of Appeal Act No.10 of 1978 Section 17).

A reference to the affidavit of Mr. Ntabeni on behalf of the appellant in support of the appellant's application for leave to appeal is revealing. The grounds of appeal are tabulated. They start with what can be called the traditional one, namely:

> "No reasonable Court properly directed would have found for the respondent"

Thereafter, however, are a list of complaints which effectively invite this Court to rehear the matter on the facts asif it were a first appeal.

During this session in a number of matters, this Court has had occasion pertinently to refer to Section 17 and to the limits it places on the ambit of second appeals (see Matooane vs Phillip C of A. (CIV)/APN No.10 of 1984; Molapo v. Rex, C. of A. CRI/APN No.5 of 1984).

/The.....

The Court raised the issue with Mr. Kuny S.C., who with Mr. Sello appeared for the appellant and invited them to formulate precisely the question of law. After an adjournment he did so and Mr. Beckley (who appeared for the respondent) agreed with the question as stated to us by Mr. Kuny.

The question as formulated by Mr. Kuny was -

> "Whether any reasonable appellate Court properly directed as to its powers in terms of Section 68(a) of Act 11 of 1964, should, on the evidence before the Labour Relations Tribunal, have come to the conclusion to which the High Court came, namely that there was no evidence before the Tribunal to support a finding of unfair labour practice in terms of Section 61(2)".

During argument that was somewhat modified to two related questions namely -

> (a) did the learned Judge misdirect himself in the appeal? and if so
>
> (b) whether a reasonable Court properly directed should have found, on the evidence before the Tribunal, that there was no evidence to support the finding that there was an unfair labour practice in terms of Sec. 61(2)?

I proceed to consider first whether the Judge a quo misdirected himself. The power of the Court a quo to hear an appeal derives from Sec. 68 of the Act. This specifies only two grounds upon which an appeal can be brought. The second of these is "that the order was not justified". If this is to be given a wide and unrestricted meaning, it would make the first ground redundant. Obviously some limitation is necessary. The nature of this limitation appears from the words of Sec. 67(1). This provides that the Tribunal must first make a finding that a person has engaged in an unfair labour practice, and may thereafter make an order. This gives a clue to the construction of Sec.68. The ground mentioned in paragraph (a) relates to the Tribunal's finding, while the ground mentioned in paragraph (b) is confined to the consequential order.

/It.....

It follows that in relation to the Tribunal's finding, the High Court was confined by Section 68(a) to the question whether there was no evidence to support the Tribunal's finding. "No evidence", as Roper J pointed out at p.403 F in R. vs Kritzinger & Others 952 (2) SA 401, does not mean no . Scintilla of evidence, but no evidence upon which a reasonable man might make the finding.

A fair reading of Molai J's judgment indicates to me that he, in fact, retried the facts presented to the Tribunal. I do not consider that it is necessary for me to analyse this judment in detail, but, by way of example, on the question as to who was to be believed on the issue of whether Bedingham (the Manager) asked Moliko whether he was on the side of the union or the management, (whether it was, essentially the word of the one against the word of the other), the learned Judge puts it thus -

> "One should, therefore, be rather reluctant to be too quick to interfere with the finding of the Tribunal".

That is the approach to be adopted in a full appeal on facts, but the question which ought to have been present to the mind of Molai J was simply whether there was "no evidence" to support the finding.

The High Court, moreover did not confine itself to a consideration of the conflicting versions of the facts presented to the Tribunal. Molai J examined the issue whether Moliko's participation in a ban on overtime was lawful because, so he reasoned, if it was, the respondent was entitled to dismiss him. The learned Judge after considering the provisions of the Essential Services Arbitration Act No.34 of 1975 concluded that the ban on overtime was an illegal strike in which Moliko had participated and that the respondent was entitled to dismiss him.

/Whether.....

Whether that be so or not as a legal proposition (and I am not called upon to decide it) this was not the respondent's case before the Tribunal. It is true that, in its answering affidavits, the respondent averred that the banning of overtime was a breach of the law (The Essential Services Arbitration Act and the Employment Act), and the respondent claimed that the termination of appellant's services was in accordance with the terms of the agreement between appellant and respondent, and also in accordance with the Laws of Lesotho. However, in presenting respondent's case, Mr. Bedingham took the stance that Moliko was not dismissed simply for refusing to work overtime or participating in the ban on so doing, but because he was not completing his duties and was not cooperating with management. Respondent was at pains to stress that Moliko's adherence to the appellant's decision to ban overtime was not the reason for his dismissal.

The Tribunal considered this evidence and the The Essential Services Arbitration Act, and it came to the conclusion that the reasons advanced by the respondent for the dismissal, involving as they did a criticism of Moliko's performance as an employee, were nothing more than a charade, and that the real reason why Moliko was dismissed was his membership of appellant.

The question which the High Court was empowered in law to ask was whether there could be said to be no evidence to support that finding. That, however, was not Molai J's approach. I find, therefore, that he misdirected himself in his approach to the Tribunal's finding.

We are next put to the task of determining whether there was evidence upon which a reasonable man might have found an unfair labour practice in terms of Section 61(2) of the Act as I have analysed it.

/In.....

In the first place, I see no room for holding that the inducement by threats and the like must be directed at the very same employee who may be induced to refrain from becoming or continuing to be a member of a union. Thus I consider that to make an example of A, by dismissing him, in order to induce B,C, & D., falls within the terms of Section 61(2). The words are wide (cf. "any other means"), the statute is conceived in the public interest, and is remedial in scope. We should not be astute to cut down the remedy. Kinekor Films (Pty)Ltd. vs Dial -A- Movie 1977 (1) SA 450 AD (at 461 B -D).

Evidence was placed before the Tribunal to the effect that

(i) During February, March and April 1982 there was industrial action taken by appellant Union against the banks;

(ii) Moliko was an active member of the Union and participated in the February strike;

(iii) He was thereafter elected to a panel of Union members to negotiate with the management of the two banks on salary increases;

(iv) The Management of respondent refused him permission to attend the negotiations;

(v) On the 8th of April 1982 Mr. Bedingham asked Moliko whether he was on the side of the Union or on the side of management. Moliko said he was on the side of the Union;

(vi) It was after this meeting that he began to receive letters of complaint about the performance of his work;

(vii) In his oral evidence (as recorded on p.56 of the record before the Tribunal) he said

> "The main case was to build a case for my dismissal and to force me to resign from the Union.....".

It is open to some doubt whether all the evidence before the Tribunal established, on a balance of probabilities, that

there had been an unfair labour practice within the meaning of Section 61(2), but that is not the enquiry before an appellate Court. It is confined to the question whether a reasonable man might have found, on the basis of such evidence, that an unfair labour practice within the terms of Section 61(2) had been established. On this test, the answer must be in the affirmative.

I therefore conclude that the High Court erred in upsetting the Tribunal's finding.

The next issue related to the consequential order made by the Tribunal.

We have decided that we are not entitled to disturb the Tribunal's findings that the unfair labour practice has been established. Ordinarily that might imply that its compensatory order should stand. However, the order was made for the period 1.6.82 to 14.4.83. We do not know what has happed since then namely whether Moliko has been re-employed or not and whether the respondent has filled the position or not. It would not be appropriate for Moliko to be prejudiced by the delay caused by an appeal in which the appellant has succeeded. The remedies provided in Section 67 are equitable and the discretion given is a wide one. Reference may be made here to the criteria referred to by Cotran, C J in Holiday Inn v Makhoaane & others, 1976 LLR 225. We are not in possession of the facts in their entirety as they now are, and thus cannot form a view as to whether reinstatement is still appropriate, and whether the order for monetary compensation made by the Tribunal fits the situation. The Tribunal is the appropriate body to decide these matters. We propose therefore to refer the matter back to the Tribunal to consider again the order it made, both as to compensation and as to reinstatement. Naturally the fact that apppellant has

/succeeded .....

succeeded must imply that the reconsideration by the Tribunal should not result in an order less favourable to Moliko, but the issues of whether reinstatement is still appropriate and if so whether M14 640,32 is then the appropriate monetary compensation, should be considered afresh, and if reinstatement is then held not to be appropriate the Tribunal should consider what sum for compensation is in that event fitting.

In the result

1. The appeal is allowed with costs, including costs in the High Court.

2. The order made by the Tribunal as to reinstatement and compensation is set aside and the matter is remitted to the Tribunal, for reconsideration in the light of the remarks made in this judgment.

Signed: E.M. Wentzel
E.M. WENTZEL
Judge of Appeal

I agree Signed: I. Mahomed
I. MAHOMED
Judge of Appeal

I agree Signed: S. Aaron
S. AARON
Judge of Appeal

Delivered this 29th day of January 1985 at MASERU.

For Appellant : D. Kuny and K. Sello

For Respondent : A. Beckley