C of A (CIV) NO 38\95

IN THE COURT OF APPEAL OF LESOTHO

In the matter between :

LUCY LERATA	1ST APPRLLANT
'MAKHAUTA MARABE	2ND APPELLANT
ALINA LEPHOI(duly assisted by her husband)	3RD APPELLANT
ALIDA KHAMA	4TH APPELLANT
ARCILIA MOHALE(duly assisted by her husband)	5TH APPELLANT
DINA MOFOKA(duly assisted by her husband)	6TH APPELLANT
MAMEKHOA NELLY LETSIE	7TH APPELLANT
MABOKANG SEFALI	8TH APPELLANT
HAPE RAMOHLANKA	9TH APPELLANT
ALICE PHEKO	10TH APPELLANT
RASALIA NYOKONG	11TH APPELLANT
MAKENENG THAMAE	12TH APPELLANT
ADEL MPHALE	13TH APPELLANT
ELIZABETH MONESE	14TH APPELLANT
MATUMO RAMOKHORO	15TH APPELLANT
MOIPONE RANOOE	16TH APPELLANT
LERATO MOHAMI	17TH APPELLANT
NTHATI MAKAKOLE	18TH APPELLANT
MAMOEA MOSIUOA	19TH APPELLANT
MAMAKHOOA MOIMA	20TH APPELLANT
MAMOSHOESHOE MOHLAHATSA	21ST APPELLANT
TEBOHO KHOHLOCA	22ND APPELLANT
THOPE LETSAPO	23RD APPELLANT
ANNA MAEPE	24TH APPELLANT
MANTSANE LEKORO	25TH APPELLANT
FLORENCE SEKOPO(duly assisted by her husband)	26TH APPELLANT
NOMOKO	27TH APPELLANT

and

SCOTT HOSPITAL	RESPONDENT

HELD AT MASERU

CORAM:

STEYN, A.P.
LEON, J.A.
VAN DEN HEEVER, A.J.A.

For Appellants : Adv Rakuoane
For Respondent : Mr Sello

J U D G M E N T

Van den Heever, A J A

The pre-history to the matter which is on appeal before us, may be gleaned from the record on appeal to have been as follows.

In February of 1995, the Lesotho Union of Public Employees ("LUPE") declared a dispute with the Ministry of Health and Social Welfare in respect of the conditions of employment of nursing assistants employed by the Ministry who are members of LUPE.

Instead of attacking, on behalf of its allegedly disadvantaged members, the employer of those members, namely the Ministry, LUPE on 8 February called a nation-wide strike by all of its members who were nursing assistants. The hospital of the Lesotho Evangelical Church at Morija known as Scott Hospital was caught totally unawares, and all efforts by its Board of Mangement, through its Administrator who is also the Secretary of the Board, to discover what the grievances of its striking workers were, were fruitless. The latter refused either to listen or talk to management. On the fifth day of the strike, the 13th of February, the workers were given an ultimatum: to return to work by 11.00 a.m. or to give reasons in writing why they should not be summarily dismissed. The striking assistants did neither. They were accordingly dismissed later that day.

The Administrator advised them by letter that the Board of the hospital had directed that "you be and you are hereby dismissed with immediate effect" by reason of their breach of contract: their failure to work as obliged in terms of their contracts, without explanation of their failure to do so.

Since Scott Hospital is an institution providing essential services, the Minister of Labour and Employment, being informed on 24th February that a trade dispute existed there, took proceedings in terms of section 232(1) of the Labour Code. The Hospital did not accept the recommendation of the Labour Commissioner which followed, namely that it should reconsider its decision to dismiss its nursing assistants who had participated in the strike. The Minister then launched an application in the Labour Court, LC case 40\95, *in* terms of section 232(4), aimed at compelling the parties to "normalise the operation of the essential service" were the Labour Court to find that the work stoppages and dismissals did interfere with the provision of an essential service.

In that matter, the Minister cited all parties he considered to have an interest in the matter: Scott Hospital, and, separately, the Lesotho Evangelical Church and the hospital's Board of Management on the one hand: on the other, the "nursing assistants - Scott Hospital" and LUPE. A list of names of those intended under the relevant category of nursing assistants, was annexed to the Minister's affidavit. His application was opposed by both factions. Papers were filed by

management in which it was stated i.a. that the posts of the dismissed assistants had since been satisfactorily filled. Management's attitude was accordingly that there was no disruption of essential services requiring ministerial intervention. No documents were filed by or on behalf of either the listed assistants or their union, opposition being limited to technical objections. These were that the women had no locus standi, there being no allegation that they were assisted by their husbands; and that the Union should not have been joined at all. On 11 April 1995 the Labour Court rejected the arguments advanced by the representative who appeared on behalf of both the assistants and LUPE. It upheld the contention of management's lawyer. It commented that the parties were free to seek relief under other sections of the Code; that the nursing assistants had indeed already done so in LC case 45\95; but that the Minister's attempt to intervene was misconceived:

> "The dismissal could not be said to be disrupting the essential services as they were an action actually meant to normalise the situation at the hospital".

It seems that the hospital had launched an application in the High Court for the eviction of the sacked nursing assistants from hospital premises which they were entitled to occupy only for as long as they were in the employ of the hospital. This was not opposed, the nursing assistants pursuing only the parallel application No 45\95 in the Labour Court to which that Court referred in case 40\95.

In their own application, the nursing assistants

challenged their dismissal on two grounds -

(a) that it had been ineffective;

(b) that it had been unfair;

In their statement of facts the allegation was made that the Administrator had had no authority to dismiss them. This power vested only in the Board, in terms of the constitution of the hospital, and the Board had never met and resolved to dismiss them. And they had not been given a hearing before being dismissed.

The Labour Court found it unnecessary to deal with contention (b); which should in any event have received short shrift. The nursing assistants had been beseeched to tell management what the motivation was for their striking but had spurned the opportunities tendered. As regards contention (a), it is alleged - and not denied - that the Labour Court had before it copies of the papers in the High Court application for eviction (CA 6 of 1995), and these included allegations under oath by the Administrator as to the role of the Executive Committee and the Board of Management in the dismissal of the assistants, as well as a copy of the resolution of the Board that the eviction proceedings be instituted.

During the hearing of LC case 45\95 one must assume that no evidence was tendered apart from the documentary evidence as to the parallel High Court matter, referred to above. According to the judgment of the Labour Court, which lies at the

heart of our present proceedings, Mr Sello challenged the jurisdiction of the Labour Court to decide on the lawfulness of the dismissal of the assistants, both intrinsically and by reason of the High Court application. This argument was countered by one that since in the High Court it was LUPE that had been cited, not the individuals, the High Court application was irrelevant. The Labour Court held that LUPE was cited in a representative capacity as the body representing the individuals listed in annexure E to the hospital's Notice of Motion. Those individuals were the applicants in LC 45\95. They were not to be permitted to play hide and seek with the Labour Court. But it then came to the startling conclusions

> that the validity or otherwise of the decision to dismiss the assistants was never in issue in the High Court application for eviction;
>
> that even had it been, a plea of res judicata based on an eviction order by the High Court could not succeed since only the Labour Court has original jurisdiction "in matters such as this one";
>
> that where only labour had filed papers in LC 45\95, management had not challenged the allegation that the Board had not met and decided to dismiss the assistants; the Labour Court using its own knowledge that normally the members of Boards "like Scott Hospital which is a church organisation are made up of persons from far apart; who cannot meet easily especially at short notice. This is why the constitution has probably made room in article 3.3(g) for the Board to delegate its appointment and dismissal powers to its main standing committee in appropriate circumstances" It concluded, from this, that "it will prima facie be doubtful if a board actually met, where as in the instant case it is alleged to have made a decision, which has clearly been made at short notice". Despite the challenge constituted by the allegation of the assistants to the effect that the Administrator had indulged in a frolic of his own, management had filed no papers itself, such as an affidavit that the Board had directed the Administrator to dismiss the assistants. Management

had therefore not discharged "the onus (which) then rest(ed) on the respondent to show that the Board did meet and authorised the Administrator to dismiss applicants".

On the strength of this reasoning, the Labour Court on 26 February 1995 granted two of the prayers of the assistants, declaring their "purported dismissal" on 13 February to be null and void and of no force and effect, and ordering the hospital to pay them their salaries for the months of February and March. The remaining prayers, for interest and costs, were dismissed.

There was further skirmishing in the Labour Court which served no purpose. The assistants launched contempt proceedings against management for failure to reinstate them (which the hospital had not been ordered in so many words to do); and management countered with an application for stay of execution pending review of the proceedings in LC 45\95. Both applications seem to have been unsuccesaful. They are not material to the issues we are to decide, subject to what is set out in the third paragraph below.

Then Scott Hospital cited twenty-seven named individuals and the three members of the Labour Court in the High Court (CIV\APN\235\95). Its Notice of Motion dated 11 July 1995 indicated that it intended to apply for an order -

(a) calling on all the respondents to show cause why the decision of the Labour Court on 26 April 1995 in matter LC\45\95 "shall not be reviewed, corrected or set aside";

(b) calling on the members of the Labour Court

(respondents numbers 28, 29 and 30) to dispatch the record of the proceedings in that to the Registrar of the High Court within 14 days of receipt of the Notice of Motion, together with any reasons they may be required or desire to give, and to notify the applicant that they have done so;

(c) directing the first twenty-seven respondents to pay the costs of the application jointly and severally.

This Notice of Motion was supported by an affidavit of the Administrator of the hospital. In it he alleges that he acts on the authority of the Board, and annexes a resolution to this effect taken on 17 May and signed by the Chairman of the Board. He sets out a summary of the history which I have outlined above. He points out that it was the assistants ("formerly employed" by the hospital) who themselves annexed documents to their initiating statement of facts in LC case 45\95. These were the affidavit of the Administrator in the ejectment application "where I specifically make an averment regarding the role played by the Hospital Executive Committee and the Board of Management in the dismissal of the (assistants)" and annexures to that: a copy of a resolution of the Board authorising institution of the ejectment proceedings; and copies of the two letters dated 13 February to the assistants, in the second of which the Administrator clearly stated that in dismissing the assistants he was acting as the mouthpiece of the Board. He deposes further that the Labour Court had asked for the rest of the papers in the High Court application from counsel for the assistants, which the latter undertook to provide; counsel for the hospital undertaking to be of help if his help were needed. Then he says that the application by the Minister (LC 40\95) was argued together with

that of the assistants (45\95); that in LC 40\95 a report of the Labour Commissioner had also been filed; and that there had been no suggestion in that report, nor indeed by anyone, that the former assistants had in those proceedings ever contended that their dismissal had been ineffective. The Administrator annexed to his affidavit also a copy of the judgment of the Labour Court in LC 40\95. For the rest, the affidavit contains argument which it is unnecessary to detail, save perhaps that he argues that it was unnecessary for the hospital to counteract a bald allegation that the Administrator had lacked authority, both in principle and by reason of all the evidential material placed before the Labour Court by the assistants themselves.

A second Notice of Motion was filed, bearing the same case number (CIV\APN\235\95) on the 18th July, again supported by an affidavit by the Administrator. This was aimed at the review, at the same time as matter LC 45\95, of the refusal of the Labour Court on 7 July to stay execution of its order of 26 April pending its review. (According to the supporting affidavit the Labour Court had been scathing of the proposed review as being "not bona fide" and "a frivolous attempt to gain time with a view to harass the (assistants)"). The members of the Labour Court were in this Notice of Motion again called upon to submit its record of also those proceedings to the Registrar of the High Court.

Only one of the twenty-seven assistant respondents filed an affidavit in opposition to each of these applications

for review. The only factual statement her first affidavit (dated 2 August and presumably intended to deal with the Administrator's first affidavit) contains, is a denial that she or any of her twenty-six co-respondents "were formerly dismissed in the employ of (the hospital)" they are "in fact and in law" still in its employ. For the rest she too raises argument: primarily that the hospital's application for review is in fact an appeal against the judgment of the Labour Court and, as such, incompetent.

A second affidavit by the same deponent, dated 10 August and presumably in answer to the hospital's Notice of Motion dated 18th July, takes the matter no further. It merely raises a purported point in limine that since the members of the Labour Court are sued, the Attorney-General should have been joined. I dispose of that forthwith: it has no merit. The members of the court were not "sued", no relief was claimed against them as litigants, they were merely notified that they were to transmit the record(s) of proceedings before them, to the Registrar of the High Court. They were not as a result made parties to the suit, any more than the trial magistrate is made party to a suit when he is taken on appeal.

The members seem to have disregarded both notices of motion requesting them to submit the records of the proceedings before them to the High Court. It was probably unnecessary to cite all three: the President is presumably capable of giving administrative instructions about his court's documentation

without the concurrence of his colleagues. His failure to comply with the procedure of the High Court, if my impression is correct, appears to me to be quite improper, but it is unnecessary to go into this question. Though joinder of the Attorney-General would have been necessary had an application been brought for a mandamus compelling compliance, since it would prima facie have justified an adverse costs order against the President, this step was not taken.

The High Court, according to the record before us, heard the first matter - that in which the Labour Court declared the assistants' dismissal null and void and ordered payment of two months' salary - on the strength of the Administrator's affidavit with its annexures, and the relevant judgment of the Labour Court. How that came to be before the High Court, and what happened to the application that review of the matter relating to the stay of execution be heard simultaneously, is not apparent from the papers before us, any more than one can determine with any certitude what the Labour Court actually ruled in the latter. There is no indication that the point was taken before the High Court that the material on which review of the Labour Court proceedings was sought, was inadequate.

That Court (per Guni, J,) dealt with the arguments advanced before it, as follows (I paraphrase) :

1. On behalf of the hospital, it was argued that the Labour Court had had no jurisdiction to determine the purely contractual issue, whether the dismissal of

the assistants had been lawful (as opposed to whether it had been fair). This, it was held, was covered by the provisions of not only section 24 of the Code, but also section 25 which confers on the Labour Court "exclusive civil jurisdiction as regards any matter provided for under the Code".

2. Although section 38(1) of the Labour Code provides that no appeal lies against its decisions, review of such decisions by the High Court is competent. There was no evidence in support of the allegation that the Management Board of the hospital had not met, (which the assistants had undertaken to produce if required, but not in fact produced) to justify an inference that it was the Administrator who had purported to dismiss the assistants, not the Management Board; and the factual finding by the Labour Court that lack of authority had been proven was irregular, being based on an erroneous burdening of the hospital with the onus of disproving an allegation made without any evidence to support it.

3. Accordingly Guni J ruled that "the application to have the decision of the Labour Court in LC 45\95 reviewed, corrected and set aside must succeed with costs".

The twenty-seven assistants appeal against the order granted by Guni J on grounds listed as follows :

"1. The learned judge erred in law in entertaining the application as a properly conceived application for review.

2. The learned judge erred by proceeding with the hearing of the application without the record of the proceedings.

3. The learned judge erred by granting the application as prayed in that that application was for correction of the proceedings or setting aside of the proceedings.

4. The learned judge erred by granting two opposite prayers simultaneously and thereby failing to give effective judgment.

5. The learned judge erred by interfering with

> the discretionary powers of the Labour Court which the court had no power to do".

A point in limine is mooted on behalf of respondent on appeal in counsel's heads of argument, that leave to appeal should have been obtained from the court a quo as a necessary pre-requisite to pursuit of the matter, in terms of section 16 of the Court of Appeal Act No.10 of 1978. It is unnecessary to decide whether this is so because of my vie that the appeal cannot succeed on the merits. It is prefer ble to deal with those instead of leaving the parties to s culate what the outcome would have been had a declinatory p nt not prevented determination of those.

Grounds 3 and 4 of the appellants' h ads listed above, put form before substance. A cursory reading f the judgment of Guni J makes it clear that she came to the c clusion that the Labour Court had erred in ruling that the dismissal of the nursing assistants by the hospital had been unlawful. There was nothing irreconcilably contradictory in the order granted. She had in fact reviewed the proceedings, and the first part of the order merely confirms her view as to the propriety of her doing so. And she corrected the error into which she found the Labour Court to have fallen, by setting aside its order. Where she herself made no order amending that of the Labour Court, there is no ambiguity in her intention, and the suggestion that she failed to give an effective judgment cannot be taken seriously.

The fifth ground of appeal is equally without merit.

The discretion vested in a Labour Court, is the discretion to order continuation, in the interests of industrial peace, of the relationship created by the contract of employment between the parties, despite the fact that that relationship has been validly terminated were the common law to be the touchstone; or to determine what, if anything, would be equitable compensation for employees lawfully dismissed judged by the norms of the common law of contract, where such dismissal is nevertheless regarded as unfair under the circumstances That was never an issue raised before the Labour Court, save in so far as it may be regarded as having been "raised" by the allegation that the assistants had not been given a hearing before being dismissed. From the recital of facts above, it is clear that that contention is totally unfounded. One cannot give a hearing to parties not prepared to accept your invitation that they talk to you. There cannot, in both logic and law, be any discretion vested in a Labour Court required to determine whether dismissal was lawful (as distinct from having been unfair). To hold that the Labour Court may by the exercise of a discretion decide whether a dismissal was lawful, would clothe it with ad hoc legislative power: the power to say "the law is in this instance what I say it is, regardless of common law rules applicable to the populace generally". Such a proposition need only to be stated, to be summarily rejected. Why not then a discretion to make orders against parties not properly before it, or parties without proof that they ever contractually entered into a relevant relationship?

The Labour Court's disregard of the proceedings in the High Court for eviction of the assistants, seem to me to have been based on two misconceptions :

(a) that the validity of their dismissal was not in issue in that matter.

(b) that only the Labour Court has jurisdiction in matters "such as this".

As regards (a), of course the validity of the dismissal was in issue before the High Court. That court could not evict employees from premises they were entitled to occupy only by virtue of their contract of employment, without holding that that contract had been validly terminated, where such termination was the only right relied on by the employer to seek their ejectment. Similarly a court could not grant an order of divorce - instead of, say, a declaration of nullity - without finding the marriage between the parties proven. Whether the Labour Court may in an appropriate matter as it were overrule an eviction order of the High Court on grounds of fairness, and what procedures would have to be adopted to prevent the Deputy Sheriff from attempting to execute upon the order of the High Court, is an exercise we need not embark on now. The only "unfairness" alleged by the assistants was, as already pointed out, without merit: i.e. that they had not been given a hearing before being dismissed.

As regards (b), it all depends on what is intended by the words "such as this". Had the assistants contended that their eviction would be an unfair labour practice, on whatever grounds, because the relationship between them and their employer

should continue, this contention may well have held water. Where an application is brought in terms of the common law seeking to enforce the ordinary common-law consequences of cancellation of a contract by reason of its breach, the fact that those parties are fortuitously employer and employee is irrelevant. The assistants did not oppose the application in the High Court for eviction, i.e. did not raise any issue which altered tne purely common law contractual dispute into a labour matter so as to deprive the High Court of jurisdiction. See Attorney General vs Lesotho Teachers Trade Union and Others, C of A (CIV) 29 of 1995, 19 January 1996.

As regards the second of appellant's grounds of appeal, relating to the form of the record, it has not been suggested that the appellants were prejudiced by the failure of the Labour Court to do what it should have done. Any disadvantage caused by that failure accrued to the hospital, which was obliged as best it might to persuade the High Court of irregularities in the proceedings in the Labour Court without benefit of the record of those proceedings. It relied on the uncontradicted facts set out in the documentation I have referred to above along with the judgment of the Labour Court; and there is no indication that the assistants did not acquiesce in this procedure. It was analogous to a recreation of the record where that has been lost or destroyed. In such a case, the rights of either party to seek recourse in a higher court do not die along with the documentation. Cf. Dhayanundh vs Narain, 1983(1) SA 565, 567 A-G; S. vs Collier, 1976(2) SA 378, 379 A-D; S. vs Ndlovu, 1978(3)

SA 533, 534 H- 535 B.

That brings me to the appellant's main quarrel with the proceedings in the court a quo: which they urge were an appeal masquerading as a review, and as such incompetent in view of section 38 of the Labour Code. According to this, an award or decision of the Labour Court on any matter referred to it for its decision shall be final and binding and not subject to appeal.

The main weapon in the armoury of Mr Rakuoane, for the appellants (the assistants) seems to be the provisions of section 27(2) of the Labour Code which provides that :

> "The Court shall not be bound by the rules of evidence in civil or criminal proceedings and it shall be the chief function of the Court to do substantial justice between the parties before it".

That can obviously not mean that the Labour Court can confer on, or deprive of, rights, any of the parties before it on mere gut feeling. It goes no further than making it possible for the court to take cognizance of matters laid before it more informally than would be required in the courts of law: for example in a certificate, or by way of a signed resolution, without necessarily requiring sworn verification. It does not mean that the Labour Court is entitled to make its own rules in regard to who is to bear the onus in proceedings before it, nor to take cognizance of evidentiary material quite outside that placed by the parties before it. Still less may it base its findings on mere speculation. Even were it so entitled, it would

be obliged at the very least to inform the parties of such "material" it proposed considering or speculation in which it was indulging, and give the party potentially prejudiced thereby an opportunity to rebut such "material" or speculation. The injunction audi alteram partem is basic to equity as well as to our law. In the present instance, the Labour Court relied on speculation, not facts; moreover, speculation which ignored the rules of logic. That the Board may not have met immediately before the Administrator's second letter of the 13th February 1995 was written, is irrelevant, for many reasons. Nothing prevents a body like a board from taking decisions in advance, dependant on developments: if A does this, the Administrator on our behalf is to do AA; if X occurs, he is on our behalf to do Y, (where Y might mean "do nothing"). The strike had already lasted five days when the two letters were written on 13 February. There is no suggestion that the Administrator was not in contact with Board members during that time. Moreover, the Labour Court accepted that counsel who appeared before it held instructions from the hospital to do so. It is a necessary inference from the opposition of the hospital to the assistants' application, that it was satisfied that the Administrator had not indulged in a frolic of his own in dismissing those assistants.

In short, where the Labour Court (whether it is an inferior court or merely a quasi-judicial body matters not; but see the Lesotho Teachers Trade Union case, referred to above) based its decision adverse to the hospital on "facts" quite outside the material placed before it by the parties, it was

guilty of a gross irregularity. The court a quo was correct in setting aside the order of the Labour Court.

The appeal is dismissed, with costs.

Signed: .....
L. VAN DEN HEEVER
Acting Judge of Appeal

I agree Signed : .....
J.H. STEYN
Acting President

I agree Signed: .....
R.N. LEON
Judge of ~~Appeal~~

Delivered this.....day of June 1996.