CIV/APN/502/97

IN THE HIGH COURT OF LESOTHO

In the matter between :

MAKHOBOTLELA NKUEBE	1ST APPLICANT
SELIKANE SELIKANE	2ND APPLICANT
THABO SEKONYELA	3RD APPLICANT
MAHOLELA MANDORO	4TH APPLICANT
MICHAEL RAMOSALLA	5TH APPLICANT
KOALEPE MAKATSELA	6TH APPLICANT
FUSI CHOPO	7TH APPLICANT
RAMOKHETHI DAMANE	8TH APPLICANT
LEMOHANG FANANA	9TH APPLICANT
PHAKISO FOSA	10TH APPLICANT
ANDREAS HANI	11TH APPLICANT
PAUL HLABANE	12TH APPLICANT
LESALA HLALELE	13TH APPLICANT
TŠEPISO HLEHLISI	14TH APPLICANT
EZEKIEL HLONGWANE	15TH APPLICANT
TEBOHO HOOHLO	16TH APPLICANT
MATLALA KAEANE	17TH APPLICANT
THAPELO KAKA	18TH APPLICANT
SELAKE KALI	19TH APPLICANT
RAMAHETLANE KHAKANYO	20TH APPLICANT
MAKALO KHAKETLA	21ST APPLICANT
'MATEBOHO KHALEMA	22ND APPLICANT
KHASIPE KHASIPE	23RD APPLICANT
MOHAPI KHAMA	24TH APPLICANT
NTSANE KHATALA	25TH APPLICANT
KHECHANE KHECHANE	26TH APPLICANT
MALEFETSANE KHEO	27TH APPLICANT
LIMPHO KHETSI	28TH APPLICANT
SELLO KHIBA	29TH APPLICANT
MOKHESENG KHOABANE	30TH APPLICANT
ROSA KHOETE	31ST APPLICANT
'MASENTLE KHOLUMO	32ND APPLICANT
MOITHERI MOHAPI	33RD APPLICANT

ELIZABETH KHUTLANG	34TH APPLICANT
NTOILE KOLANE	35TH APPLICANT
LERATO KOLISANG	36TH APPLICANT
PHAKISI KOLOBE	37TH APPLICANT
POELO KOLOBE	38TH APPLICANT
PAUL KULEHILE	39TH APPLICANT
TLANTLI LEBALLO	40TH APPLICANT
'MAMARALING LEBALLO	41ST APPLICANT
THABANG LEBOKOLLANE	42ND APPLICANT
SEKONYELA LEBOPO	43RD APPLICANT
TELEKO LEBUSA	44TH APPLICANT
SEEISO LECHE	45TH APPLICANT
TANKISO LEFULEBE	46TH APPLICANT
RICHARD LEHLAHA	47TH APPLICANT
TŠABALIRA LEJAHA	48TH APPLICANT
LISEMELO LEKHANYA	49TH APPLICANT
LEPHEANE LEKHETHO	50TH APPLICANT
LEBABO LEKHOOA	51ST APPLICANT
RAMOFOLO LEKOATSA	52ND APPLICANT
GEORGE MOKOENA	53RD APPLICANT
HURBERT LELIMO	54TH APPLICANT
LEPHEANE LEPHEANE	55TH APPLICANT
HERBERT LEPHEANE	56TH APPLICANT
RAMOTŠELISI LEPHOTO	57TH APPLICANT
KARABELO LEROTHOLI	58TH APPLICANT
ALBERT LESAOANA	59TH APPLICANT
LEQALA LESEO	60TH APPLICANT
KHOTHATSO LETELE	61ST APPLICANT
MOLIBETSANE LETLAKA	62ND APPLICANT
PHILLIP LETLATSA	63RD APPLICANT
SEEISO LETSIE	64TH APPLICANT
TOKA LETSIE	65TH APPLICANT
PAUL LIETA	66TH APPLICANT
SEMA LIKOBELO	67TH APPLICANT
'MALINEO LIPHOLO	68TH APPLICANT
RETŠELISITSOE LITLALI	69TH APPLICANT
THABANG MACHELI	70TH APPLICANT
VICTOR MAEMA	71ST APPLICANT
PETER MAFANE	72ND APPLICANT
LEFA MAFATA	73RD APPLICANT
TOBATSI MAFELESI	74TH APPLICANT
'MASEKOANE MAHAO	75TH APPLICANT
TŠILONYANE MAHASE	76TH APPLICANT
THABO MAHLEKE	77TH APPLICANT
MOHALE MAHLOANE	78TH APPLICANT
'MAKOENANE MAHLOMOLA	79TH APPLICANT
THABO MASIA	80TH APPLICANT

SETHO MAJORO	81ST APPLICANT
SENATLA MAKAE	82ND APPLICANT
TLALANE MAKEPE	83RD APPLICANT
REFUOEHAPE MAKHAKHE	84TH APPLICANT
THEBE MAKHALE	85TH APPLICANT
LIKHANG MAKHOTHE	86TH APPLICANT
HELEN MAKHOTLA	87TH APPLICANT
SEBAKE MAKHUTLA	88TH APPLICANT
TEBOHO MAKOKO	89TH APPLICANT
TŠOLO MAKOSHOLO	90TH APPLICANT
'MALEFU MALEFANE	91ST APPLICANT
MARTIN MALEKE	92ND APPLICANT
REENTSENG MALIEHE	93RD APPLICANT
MAOELA MAOELA	94TH APPLICANT
PUSETSO MAOELA	95TH APPLICANT
MAPANYA MAPANYA	96TH APPLICANT
BOFIHLA MAPHATŠOE	97TH APPLICANT
MOTLATSI MAPOOANE	98TH APPLICANT
MBULELO MAQUTU	99TH APPLICANT
'MAMPHO MARAISANE	100TH APPLICANT
KHETHANG MARE	101ST APPLICANT
KHAUTA MARE	102ND APPLICANT
TATUKU 'MASEATILE	103RD APPLICANT
REFILOE MASENYETSE	104TH APPLICANT
SEPITLE MASENYETSE	105TH APPLICANT
'MALISENTE MASHAPHA	106TH APPLICANT
MOTEBANG MASHEANE	107TH APPLICANT
THATO MASITHELA	108TH APPLICANT
THABO MATAMANE	109TH APPLICANT
MOOROSI MATELA	110TH APPLICANT
SEHLOHO MATHAHA	111TH APPLICANT
'MABULARA MATOBO	112TH APPLICANT
SENTLE MATOBAKO	113TH APPLICANT
THABISO MATSOAI	114TH APPLICANT
SEUTLOALI MATSOSO	115TH APPLICANT
THORISO MATSOSO	116TH APPLICANT
LEBOHANG MBOLE	117TH APPLICANT
THAPELO MOBE	118TH APPLICANT
KHOBOSO MOELETSI	119TH APPLICANT
LAWRENCE MOFOKA	120TH APPLICANT
MASOABI MOFUBE	121ST APPLICANT
TSEKO MOHALE	122ND APPLICANT
NAPO MOHAPI	123RD APPLICANT
JOBO MOHAPI	124TH APPLICANT
MAMPHO MOHAPI	125TH APPLICANT
'MATHATO MOHASI	126TH APPLICANT
LIBOKO MOHLALISI	137TH APPLICANT

THABANG MOIKETSI	138TH APPLICANT
LEBOHANG MOILOA	139TH APPLICANT
LEBUSA MOKATI	140TH APPLICANT
TUPA MOKHALINYANE	141ST APPLICANT
KOPANO MOKHALOLI	144TH APPLICANT
NTLOKO MOKHESI	145TH APPLICANT
SEHLABAKA MOKHOTHU	146TH APPLICANT
MAFOLE MOKOMA	147TH APPLICANT
TANKISO 'MOLAOA	148TH APPLICANT
KHOBATHA MOLAPO	149TH APPLICANT
THAPELO MOLAPO	150TH APPLICANT
MAMOLEBOHENG MOLELEKI	151ST APPLICANT
SEABATA MOLEPA	152ND APPLICANT
MOLEFI MOLETSANE	153RD APPLICANT
TEBOHO MOLETSANE	154TH APPLICANT
E. MOLISANE	156TH APPLICANT
MOLOPI MOLISE	157TH APPLICANT
TŠELISO MOLISE	158TH APPLICANT
KHETHANG MOLOISANE	159TH APPLICANT
ITUMELENG MOMPE	160TH APPLICANT
TEBOHO MONAHENG	161ST APPLICANT
SEKHEFU MONAPHATHI	162ND APPLICANT
LOKISANG MONETHI	163RD APPLICANT
SELLO MOOROSI	164TH APPLICANT
ADEL MORIE	165TH APPLICANT
NTELELE MOROANYANE	166TH APPLICANT
THETSANE MOROMELLA	167TH APPLICANT
PHOLO MOSEBO	168TH APPLICANT
MAPHELETSO MOSENENE	158TH APPLICANT
TLOKOTSI MOSHASHA	169TH APPLICANT
MOFEREFERE MOSHEOA	170TH APPLICANT
THABO MOSHOESHOE	171ST APPLICANT
LETSITSI MOSIUOA	172ND APPLICANT
TEBOHO MOSOLA	173RD APPLICANT
'MALIMAKATSO MOSOLA	174TH APPLICANT
NTHUSO MOTHOANA	175TH APPLICANT
TUMELO MOTHOKHO	177TH APPLICANT
'MANTHA MOTOPI	178TH APPLICANT
MALEFETSANE MOTSETSERO	179TH APPLICANT
MOTLATSI MOTSOANE	180TH APPLICANT
THAPELO MPASI	181ST APPLICANT
MOTLATSI MPETE	182ND APPLICANT
NOOSI MPELA	183RD APPLICANT
AZARIEL MPHOFE	184TH APPLICANT
'MATLALI MPITSO	185TH APPLICANT
THABANG MPO	186TH APPLICANT
LIKELELI NALELI	187TH APPLICANT

EVODIA NKO	188TH APPLICANT
SHADRACK NKOALE	189TH APPLICANT
LEPEKOLA NOLOANE	190TH APPLICANT
TŠUKULU NONYANE	191ST APPLICANT
'MALISEBO NTEE	192ND APPLICANT
'MABATAUNG NTELANE	193RD APPLICANT
TEMOSO NTOAMPA	194TH APPLICANT
'MUSO NTOBO	195TH APPLICANT
THABANG NTSANE	196TH APPLICANT
LIAKO NTŠEKHE	197TH APPLICANT
TEBOHO NTŠINYI	198TH APPLICANT
THABANG PANYANE	199TH APPLICANT
THABO PEKECHE	200TH APPLICANT
PALESA PETLANE	201ST APPLICANT
NICODEMUS PHALIME	202ND APPLICANT
MOTLATSI PHAROE	203RD APPLICANT
LETHUSANG PHEKO	204TH APPLICANT
SEQAO PHENYA	205TH APPLICANT
MOTSAMAI PHERA	206TH APPLICANT
KOMETSI PHITSANE	207TH APPLICANT
RETŠELISITSOE PHORI	208TH APPLICANT
LERATO PITSO	209TH APPLICANT
BAPHOTHI POFANE	210TH APPLICANT
KOSI POTSANE	211TH APPLICANT
JOSEPH QABA	212TH APPLICANT
KHOABANE QHOBELA	213TH APPLICANT
KOTSI QHOBOSHEANE	214TH APPLICANT
MAKHAUTA QOACHELA	215TH APPLICANT
TEBOHO QOPHE	216TH APPLICANT
BROWN RAJOELE	217TH APPLICANT
MATUMISANG RAMABELE	218TH APPLICANT
LEKHOOANA RAMALIEHE	219TH APPLICANT
BASIA RAMAOKANE	220TH APPLICANT
LETEKA RAMASHAMOLE	221ST APPLICANT
RAPHAEL RAMASHAMOLE	222ND APPLICANT
JULIUS RAMATABOE	223RD APPLICANT
MPAI RAMMUSETSI	224TH APPLICANT
HLOLO RAMORAKANE	225TH APPLICANT
MAHLOMOLA RAMOTHAMO	226TH APPLICANT
MPHOBOLE RAMPHOBOLE	227TH APPLICANT
'MATEBOHO RANOOE	228TH APPLICANT
LEBOHANG RAPILETSA	229TH APPLICANT
ALFRED RATJOPA	230TH APPLICANT
TENNYSON SAOANA	231ST APPLICANT
DAVID SAUDI	232ND APPLICANT
BAILE SEAKHOA	233RD APPLICANT
GLADYS SEBATANA	234TH APPLICANT

THABISO SEHLABAKA	235TH APPLICANT
LEBOHANG SEKHOAHLA	236TH APPLICANT
'MAMOOROSANE SEKOALA	237TH APPLICANT
AMELIA MOLAPO	238TH APPLICANT
SECHOCHA SENYANE	239TH APPLICANT
T. SENYANE	240TH APPLICANT
LEBOHANG SEPERE	241ST APPLICANT
MAKHAOLA SPERE	242ND APPLICANT
MALEFETSANE SEQHOALA	243RD APPLICANT
DANIEL SESING	244TH APPLICANT
REFUOE SETEKA	245TH APPLICANT
CASWEL SETEMERE	246TH APPLICANT
'MAMPHO SETLOBOKO	247TH APPLICANT
MOLIBELI SHABE	248TH APPLICANT
KHETHANG SHALE	249TH APPLICANT
KHOMOATSANA SHALE	250TH APPLICANT
KHUPISO SHEA	251ST APPLICANT
HILDA SHOLU	252ND APPLICANT
MOJALEFA SUOANE	253RD APPLICANT
THABANG TAELI	254TH APPLICANT
ANDRIAS TAKALIMANE	255TH APPLICANT
MOHAU TAKANA	256TH APPLICANT
S. THOKOANA	257TH APPLICANT
THABANG THABA	258TH APPLICANT
PRESCILLA THAKEDI	259TH APPLICANT
BOKAE THAMAE	260TH APPLICANT
MATLERE THAMAE	261ST APPLICANT
TJOKA THOKO	262ND APPLICANT
RUSSELS THULO	263RD APPLICANT
MALATSI TIHELI	264TH APPLICANT
'MAMOHALE TJABANE	265TH APPLICANT
TEMANE TOPO	266TH APPLICANT
THATO TSALONG	267TH APPLICANT
HLOMOKA TSEPANE	268TH APPLICANT
PANYANE TŠEPHE	269TH APPLICANT
KUBUTU TSIANE	270TH APPLICANT
MOTLOHELOA TŠIRA	271ST APPLICANT
LEPHOTO TŠIU	272ND APPLICANT
TEBOHO TŠOENE	273RD APPLICANT
NKHAHLE TŠOSANE	274TH APPLICANT
KOPANG VOMBUKANI	275TH APPLICANT
BLYTH BAHOLO	276TH APPLICANT
PUSELETSO BAHOLO	277TH APPLICANT
ISAAC BELEME	278TH APPLICANT
JOHN BERENG	279TH APPLICANT
LEREKO BERENG	280TH APPLICANT
MOLISE BOHLOKO	281ST APPLICANT

TANKISO MAEKANE	282ND APPLICANT
MALOLI MOTHIBELI	283RD APPLICANT
RAMOFAO MONAKALALI	284TH APPLICANT
RAMAISA RAMAISA	285TH APPLICANT
MOTSOELA SEETANE	286TH APPLICANT
LEFA SEKOATI	287TH APPLICANT
MOCHEKO ISAAKA	288TH APPLICANT
MOTLALEPULA MASIA	289TH APPLICANT
SERUPE MOILOA	290TH APPLICANT
MAFA HLALELE	291ST APPLICANT
LEFA MATENA	292ND APPLICANT
NTJA POSHOLI	293RD APPLICANT
MAJARA MASOABI	294TH APPLICANT
MAHASE RABOSHABANE	295TH APPLICANT
LEMOHANG MOLOFI	296TH APPLICANT
MASUPHA SEPERE	297TH APPLICANT
MOKOENIHI CHOBOKOANE	298TH APPLICANT
THABANG MPUTSOE	299TH APPLICANT
MOTLATSI NKUNYANE	300TH APPLICANT
THABO TŠOENE	301ST APPLICANT
NTHAKO PHATE	302ND APPLICANT
TUMELO MOQHALI	303RD APPLICANT
MOLEFI MOLEFI	304TH APPLICANT
MOLEFI MAILE	305TH APPLICANT
TANKISO ISAAKA	306TH APPLICANT
KANATE KOLISANG	307TH APPLICANT
RANTSOTI MOLOLI	308TH APPLICANT
LEBONA LEBONA	309TH APPLICANT
MOLEFI MOTSEKI	310TH APPLICANT
SEFALI MOKHACHANE	311TH APPLICANT
HLOLO RAMORAKANE	312TH APPLICANT
SEPHEKANE MOHAPI	313TH APPLICANT
ROBERT KOTELO	314TH APPLICANT

and

LESOTHO TELECOMMUNICATIONS CORPORATION	1st Respondent
THAMAHANE RASEKILA	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 24th day of June 1998

The following are my reasons for a decision in the matter of the 11th February 1998. It was over the three issues on which I decided for Applicants.

At the time of the hearing of the application the contracts of the Applicants No. 282 to 309 and 310 to 314 should have already expired at different times hence the apparent confusion in the notice of motion as under the alternative prayers. All the Applicants were employees of the First Respondent including Applicant No. 162 whose application was withdrawn following an argued application for my recusal. The application fell off after the withdrawal of the application for recusal.

A rule nisi was issued calling upon the Respondents to show cause (if any) why:

"(a) (¡) The purported dismissals of applicants 1 to 281 by Second Respondent shall not be declared null and void and unfair.

(ii Respondents shall not be directed to reinstate Applicants 1 to 281.

ALTERNATIVELY:

(iii) Respondents shall not be directed to pay to applicants 1 to 281 pension benefits and compulsory savings.

(b) The purported dismissals of applicants' number 311 to 314 shall not be declared unfair and thus null and void.

(c) Respondents shall not be directed to pay applicant number 310

salary for the months on which his contracts were still to subsist.

(d) The respondents shall not be directed to pay to applicants 282 to 309 their gratuities, and severance pays.

(e) The respondents shall not be directed to pay to applicants arrears of their salaries for the period 11th to 31st day of August 1997.

(f) The respondents shall not be directed to pay the salaries of applicants 1 to 281 and 310 to 314 for the period 30th day of September to the 1st day of October 1997.

(g) The respondents shall not be directed to pay applicants 1 to 281 arrears of salaries and such other benefits as would be due, with effect from the date of the purported dismissal to the date of decision on their appeals by 2nd respondent."

It will perhaps be convenient to record that on the 11th February 1998 I made the following orders for which my reasons now follow. That:-

"A (I) The purported dismissals of Applicants 1 to 281 by 2nd Respondent is hereby declared null and void and set aside.

(ii Respondents are hereby directed to reinstate Applicants 1 to 281.

B The purported dismissals of Applicants 311 to 314 are hereby declared unfair and null and void.

C Respondents are directed to pay Applicants number 310 salary for the month on which his contract was still to subsist.

D The Respondents are directed to pay Applicants 282 to 309 their gratuities and severance pay.

E The Respondents are directed to pay Applicants' arrears of their salaries for the period 11th to 31st days of August 1997.

F The Respondents are directed to pay the salaries of Applicants 1 to 281 and 310 to 314 for the period 30th day of September to the 1st day of October 1997.

G The Respondents are directed to pay Applicants 1 to 281 arrears of salaries and such other benefits as would be due, with effect from the date of the purported dismissal to the date of decision on their appeals by 2nd Respondent.

H Respondents are directed to pay to Applicants 310 to 314 gratuities and severance pay.

I Respondents are directed to pay costs.

J The above mentioned Orders are subjected to mediation but the party that refuses mediation reserves the right to inform the mediator that he should not mediate on this matter".

A considerably long absence from work by the Applicants on a so called unlawful strike resulted in two applications in the High Court in cases number CIV/APN/283/97 and CIV/APN/309/91/. The two cases were consolidated at argument for and after a judgment was delivered by Guni J on the 30th day of September 1997 and the judgment was annexed as "A" to these proceedings. This judgment was appealed and on the 5th February 1998 the Court of Appeal made the following Order:

"1. At the suggestion of the Appeal Court the parties have agreed to attempt to settle their differences by mediation.

2. The mediator will be appointed forthwith and will be a completely neutral person with no either side who will come from outside this country and will be a person whose credentials are considered suitable by the members of the

Appeal Court bench presently seized of the matter. to conduct the mediation proceedings.

3. The mediator is to be furnished with a copy of the record on appeal as well as Counsel's heads of argument, in order to be able to appreciate the issues between the parties.

4. The costs of the mediation, which may be expanded by agreement between the parties, to include other disputes between them, are to be shared equally between the parties.

5. The venue for the mediation proceedings will be decided by the mediator after consultation with counsel for the parties.

6. Both parties wish to have it recorded that they are anxious to have the mediation take place as soon as possible and with that in mind the earliest date will be fixed by the mediator after consultation with Ms. Kotelo (for the employees) and Mr. Makeka (for the employer).

7. The appeal is to be postponed sine die".

It was the understanding of the Applicants following the said judgment of Guni J that they were recalled to work which is confirmed by Annexure "B" to this proceedings whose effect was to call the applicants to report to work on the 2nd October 1997. This the Applicants say they did.

On reporting to duty the Applicants were issued with notices of immediate suspension from duty by the Acting Managing Director. This meant that the Applicants were disabled and could not attend at work contrary to the Order of Guni J. I attached importance to this aspect of reporting at work because the Applicants said they then intended to report to work.

The Applicants were furthermore issued with notices of disciplinary hearings which called the Applicants to attend on different dates on which they would answer the following charges -

"(a) Participating in a work stoppage;

(b) Unauthorized absence from duty (from the 21st September - 30th September 1997) contrary to your employment contract",

as annexure "C" on page 48 of the record shows.

On dates deposed to as being about the 10th October 1997 just prior to the dates appointed for hearing in respect of Applicants number 310 to 314 they were issued with letter similar to Annexure "D1" of termination in terms of the First Respondent's Personnel Regulation Clauses 3.5 3.7 27.3, 33.1.1 to 33.1.5, as amended. Their contracts were so purportedly terminated. These concerned Applicants were on a two year contract and as alleged "had not given a one month notice" before "resignation" because they should not have absented themselves from duty without authorisation from management.

The First Deponent was the First Applicant (MAKHOBOTLELA NKUEBE) whose affidavit was supported by the Second Applicant (SELIANE SELIANE) the Third Applicant (THABO SEKONYELA) Three Hundred and Tenth Applicant (MOLEFI MOTSEKI) Two Hundred and Ninety Fourth Applicant (MAJARA MASOABI) and Three Hundred and Twelfth Applicant (HLOLO RAMORAKANE). The First Deponent continued to state that that pre-suspension hearing, which it was common cause was conducted, could not have been in accordance with natural justice

and furthermore that the Applicants had since the end of September 1997 been entitled to full pay which has since been owing up to the date of hearing.

The contemplated disciplinary hearings commenced on or about the 6th October 1997 and for a period of about a month until the end of October 1997 and had been preceded by notices of suspension annexed as "C" which that the High Court in cases numbers CIV/APN/287/97 and CIV/APN/304/97 had ruled that the strike in which the Applicants had participated had been unlawful, hence the suspensions which commenced from the 30th September 1997as the Respondents sought to justify their attitude about suspensions.

The consolidated judgment in the above cases ended up in the Court of Appeal as alluded earlier in the judgment. I understood that if in terms of the Order on page 21 (page 46 of the record) of the judgment the prayers in CIV/APN/283/97 succeeded and were confirmed this included the prayer in 2(e): "That they should desist from their unlawful strike and return to work."

The hearings themselves had been based on charges contained in annexure "C" (page 49) in which the Applicants were accused of:

(c) Participation in work stoppage;

(d) unauthorized absence from duty (from 21 August - 30th September 1997) contrary to your employment contract.

The charge document proceeded to direct that an Applicant would be

entitled to be accompanied by a co-worker of his choice. The name of a co-worker would have to be submitted at least twenty four (24) hours prior to the date and time of hearing by Respondents before the panel I would say that the Respondents seemed to confirm that "A member of staff appointed by an Applicant (charged employees) was not allowed to be part of the panel". All these happened despite the mandatory SHALL terms in which the "regulation is couched".

The reason put forward by the Respondents was that the requirement was impractical as the immediate supervisor of the charged employees was also charged with the same misconduct. That furthermore participation of the latter employee was unreasonable because that employee was either (himself) charged with misconduct or was awaiting his "turn to be before the disciplinary panel" or awaiting decision of the said panel. In any case regulations 1.2 1.3 and 29.3 were put into operation. I have had a look at regulation 1.2 which said:

> 1.2 Authorization power given in this regulation to the Managing Director (MD) may at MD's discretion be delegated to subordinate staff".

I did not see how a matter of procedural right of a charged Applicant could be delegated in the way suggested when it was not a power or authority of the MD. I found it difficult to accept this excuse as valid I thought unless there was a good reason elsewhere there was a breach of the procedure to the prejudice of the concerned Applicants.

I have had a look at regulation 1.3. It reads:

> "The MD may in special cases decide on exceptions from the regulations if not to staff and detrimental and if considered to promote the productivity of the working morale or if circumstances are extenuating".

I did not see how the circumstances suggested by the Applicant would justify this departure by the Managing Director. Nothing in my view appeared in his action to conduce to alleviating any detrimental situation or to promote productivity. Neither would I observe anything of extenuation so far as the rights of the persons charged with misconduct were concerned. Again I was not impressed that there were good reasons except pure expediency. I thought that even if I was wrong in agreeing with Counsel for Applicants that the couching of the three regulations in "shall" terms meant that they were mandatory at least it was a requirement that there be a good reason for dispensing with the presence of the immediate supervisor.

Where the question was that of pre-suspension hearing then expediency could be tolerated. With regard to the absence of pre-suspension even though Applicants challenged the procedure I was inclined to conclude that in the circumstances of the case that could be condoned. I thought the Applicants should challenge the most serious aspects of the disputed actions of the Respondents.

Following from the Applicants contention that there was no evidence led at the hearings to support he charges laid I was referred to LTC "B" at page 122. I did not see how the finding of the High Court as to the existence of the strike would constitute evidence by the mere fact of my sister Guni J having made a finding. As it was said in LUCY LERATA

AND TWENTY SIX OTHERS vs SCOTT HOSPITAL C of A (CIV) No. 38/95, June 1995 Van den Heever AJA at p.17

> "It does not mean that the Labour Court was entitled to make its own rules in regard to who is to bear the onus in proceedings before it nor take cognizance of evidentiary material quite outside that placed by the parties before it."

How could the judgment be evidence? It may even have been common cause that such was the finding but I thought the most important thing was the order that the learned judge had ordered that the Applicants must go back to work. This the Applicants said they did.

I disagreed with the Respondents submission that the finding by Guni J that because the same parties were involved in litigation the Applicants having been allegedly on an illegal strike was sufficient evidence in itself for a finding that there had been misconduct proved for a finding of dismissal. See LUCY LERATA'S case (supra) Put in simple terms the finding of Guni J should not have been conclusive in the absence of any evidence but the judgment itself. I did not see that the Respondents had had any evidence besides the judgment of Guni J. Moreover one could not say that the Applicants conceded at the hearings that they were engaged in an illegal strike.

Even though it was conceded before this Court there could have been illegal strike that was not sufficient to found a case of misconduct. Once it was accepted I did that there was no evidence of misconduct the finding of

guilt and dismissal of Applicants was illegal, irregular and unfair in most respects. That was the first leg over which I clearly found for the Applicants.

I found that the Respondents in their argument were concerned over the principles of legalities or illegalities of strikes. That lengthy debate of over issues of legalities or otherwise of strikes and concomitant justifications for strike actions were not part of the Applicants case. I noted with interest that Mr. Molapo the Acting Divisional Head in dismissing the Applicants noted that "the Panel has found you guilty as charged in that you were involved in an unauthorized absence from work and/or work stoppage. These acts have been ruled by the High Court as unlawful strike." I agreed with Applicants' Counsel that this aspect of the alleged strike action could correctly be said to belong to the resolution of the dispute brought by the judgment of Guni J. Once it was accepted that Guni J dealt with the matter of an alleged illegal strike it became a closed chapter thenceforth.

There was also the matter of the alleged illegal strike which ought to not to have formed part of the hearing was this question of alleged acts of sabotage and other kinds of mischief allegedly committed by the Applicants. This took much time of argument before me despite having been addressed by Guni J in her judgment. Inasmuch as there was before the hearings no evidence of such acts equally they would not be a good defence before this Court to justify dismissals that were irregular. I found this to be situation with regard to those appeals that followed before the Managing Director. This flaw permeated through the appeals.

There was this issue that led me to my main and second reason for allowing the application. It was about the alleged illegal strike by the Applicants. It was that at common law once a strike was proved whether it was an illegal strike or not became a breach of contract. It was indeed of a nature that the employer is entitled to accept the strike as a repudiation of contract and to dismiss the strikers. See CAWULE vs SPIE BAATIGNOLLES AND ORS C of A (CIV) No.13 of 1990 at 4. A party injured by the strike which amounts to repudiation is at liberty to claim relief in the nature of either specific performance or damages. That claim for specific performance necessarily means asking the striking employees to go back to work as yet another alternative. The first option is as aforesaid that of dismissal of the striking employees. So that one clearly speaks of a choice that the employer is entitled to make.

In the present case the Respondents chose to approach High Court before Guni J and claimed for specific performance as indeed it was held in LESOTHO TELECOMMUNICATIONS CORPORATION vs RASEKILA C of A (CIV) No.24 of 1991. See also LESOTHO BANK vs MAITSE MOLOI C of A (CIV) 31/95 at p. 5. I found the easiest way to express the situation about alleged misconduct to be that once specific performance has been ordered its basis may have been repudiation or misconduct but once it had been ordered as Guni J the acts founding the misconduct or repudiation as a matter of law fell off Counsel for the Respondents throughout studiously avoided addressing or responding on this issue on its four legs.

But what is important at this stage is that question of the effect of asking for specific performance once the choice has been made. I thought

this quotation by Mr. Mosito from CULVERWELL AND ANOTHER v BROWN 1990(1) SA 7 (AD) captured the whole essence of the issue. It said that a repudiation

> "..... does not per se bring the agreement to an end. At the date of repudiation, the agreement is still alive and the injured party has the right to elect whether to accept the repudiation and so terminate the agreement or whether to insist upon receiving performance in terms of the agreement. The injured party is afforded reasonable period within which to perform and the injured party to receive specific performance remains wholly unaffected. It is only when the injured party accepts the repudiation that the agreement is cancelled".

So much is captured above that one needs only add by way of repetition that once the injured party has asked for performance which the repudiators accept a basis no longer exists for acting on the basis of an offence or act of misconduct which was originally the substance of the repudiation.

Mr. Mosito referred me to page 16-17A of CULVERWELL'S case (supra) to buttress his submission that the Respondents by proceeding to dismiss the Applicants were approbating and reprobating which they were not entitled to do. It was quoted from the CULVERWELL'S case as follows:

> "When it occurred the plaintiff had a right of election. He might accept the repudiation (thereby terminating the contract) and or might refuse to accept it, in which event the contract would remain of full force. Having made this election, the injured party was bound by it - the choice of one remedy necessarily involves the abandonment of the other inconsistent remedy. He cannot both approbate and reprobate. Quod Semel placuit in electioni bus amplius displecere non potest."

I therefore agreed with Applicant's Counsel that Guni J granted specific performance that the Respondents had asked for. An order seeking to dismiss the Applicants was inconsistent with Guni J Order and was an indirect way of seeking to repudiate which was no longer open to the Respondents.

I observed accordingly that as after Guni J's order then had been no misconduct on the part of the Applicants. That they were suspended on the very date of the judgment of Guni J could only have been inexplicable in the circumstances. The Applicants had to come to work as ordered. As after Guni J's order one cannot speak of the Respondent the accepting the repudiation. As correctly submitted they had refused to accept the repudiation.

I accepted the premise that a Corporation such as the First Respondent is a body of rules and regulations some of the important rule being those that cloth a particular official and or organ with power to make a decision to dismiss an employee. Such power must be exercised by such depository of power above and no other". See LESOTHO TELECOMMUNICATION CORPORATION vs THAMAHANE RASEKILA C of A (CIV) No.24 of 1991, see also SEISA NQOJANE vs NATIONAL UNIVERSITY OF LESOTHO C of A (CIV) No.7/87 at p.25. In that regard what the Applicants herein questioned was the authority of Acting Divisional Manager who was not Human Resource Manager to have dismissed the Applicants. The letters dismissing the Applicants were similar in this regard.

In addition the Applicants complained the fact that their dismissals had been made by the Disciplinary Panel not the Human Resource Manager nor for that matter the Managing Director. It was submitted that this clearly made the dismissals on that ground null and void. Although there were attempts to justify the powers of Mr. L. Molapo an acting Resource Manager I did not see how the Respondent sought to justify the situation where Mr. Molapo does not say in his capacity as Acting Resource Manager or as acting Divisional Head he made the dismissal. This I say looking at regulation 31.1.5 at page 55 of the record. Perhaps the letters of dismissals could have been inelegantly drawn as there was argument along this line.

In answer to the vexed question of Mr. Molapo's authority was a supplementary opposing affidavit of the Second Respondent which read on page 5 thereof:

> "Your Lordship will notice that Annexure "G" evidence an amendment to the Personnel Regulations in terms of which the Human Resources Manager became duty bound to sanction the penalties as set out in section 30.11.6 of the Personnel Regulations inter alia Your Lordship will also notice that certain other amendments are referred to in Annexure "G" which incorporate the intervention of the Human Resource Manager in regard to the sections of the Personnel Regulations referred to therein".

I thought Annexure "G" made it clear that there was a difference between a Divisional Head and Human Resource Manger as the supplementary affidavits of the First Applicant also showed. I did not see why if Mr. Molapo was acting as a divisional head in the Human Resources he was being made Acting Human Resource Manager by reason of LTC "G". This

was still short of explaining the query that Mr. Molapo was not a Humana Resources Manager. To round off this aspect of Mr. Molapo the case of CHIEF LEABUA JONATHAN v COMMISSIONER OF POLICE AND ANOTHER CIV/APN/276/86 Molai J 15th September 1986 was cited in similar vein and to show that as at page 5.

> "It cannot therefore be said that the Acting Commissioner of Police is the Commissioner of Police for the purpose of Internal Security (General) Act No.24 of 1984 and firstly the Internal Security (Amendment) Order 1986 does not amend the definition of the term "Commissioner" under the interpretation section 3(1) of the Principal Act".

I thought it followed that people who had been unlawfully dismissed without a hearing were normally entitled to their salaries and terminal benefits, severance pay and gratuity such as Applicant 310 to 314. Others would normally have to be re-instated as ought to be the case as regards other Applicants.

I was persuaded that in the present case where the First Applicant's affidavit was supported by affidavits of four others was not a case of *actio popularis*. I did not accept that only the First Applicant or the four (4) other deponents were entitled to relief and were the only ones who were properly before Court to the exclusion of about three hundred and fifteen others who allegedly did not have *locus standi*. Counsel for Respondents cited WOOD AND OTHERS v ODANGWA TRIBAL AUTHORITY AND ANO. 1975(2) SA 294(A) at 305 and 306. I thought that the present case was

distinguishable for the following reasons. The Applicants were determinable and were identifiable as people who were suspended, against whom certain hearings were held, who were dismissed and were employees of the First Respondent . They demonstrably had direct and substantiated interest and a similar cause of action or if that is not important their names were later referred to individually in the answering affidavit. They were not a community such as in WOOD'S case (supra).

I saw so many reference to the Applicants as clearly identifiable even in the notice of motion. I would have condoned the absence of a description of Applicants in detail in the interest of justice. In my view that description is a rule of practice but not of law. If argument had been that the Court would consequently have no jurisdiction that would be a serious point. In my view the real purpose of describing a party in full to disclose capacity to sue and question of jurisdictions and "any other technical requirements of advise or any other technical requirements of address or any other description" were held to be "unnecessary for any other purpose" in WITWATERSRAND AND DISTRICT TRADES vs HERHOLT 1956(4) SA 361 at 365(1). I did not think that in the circumstances of this matter this was a good point.

Another point made by the Applicants about the dismissals having been selective and discriminatory was made. I did not think it was helpful convincing on the facts nor was it significant as against larger issues.

That point-in-limine about urgency I thought was quite unsound in the light of a clear demonstration of urgency about alleged withholding of

salaries and about almost everything to do with the serious nature of the instant matter.

With so many issues of fact which were common cause I laboured to recognize matters that were of material dispute and I failed. I disagreed with Respondents Counsel that there were any except disputes over legal points or procedural issues. My suspicion was that there was a confusion between legal issues and issues of fact on the part of Counsel. This point-in-limine also had to fail.

The issue of referral of the matter for mediation as shown in my final order was made against the background that mediation would in my mind affect the whole dispute that is the aspect referred by the Court of Appeal and the issues before me. Inasmuch as it was conditional and a matter of choice it could not be a substantial decision by this Court. It remained peripheral. Counsel had addressed me on the matter following my invitation by the Court. That is why the element that a party would decline to subject any matter to mediation before the mediator was stipulated. It cannot have been by itself a substantial order affecting the rights of the parties, as it were.

I allowed the application with costs.

T. MONAPATHI
JUDGE

24th June 1998

For the Applicants : Mr. Mosito
For the Respondents : Mr. Nathane