

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

**LESOTHO TELECOMMUNICATIONS
CORPORATION
THAMAHANE C.F.D. RASEKILA**

**1ST APPELLANT
2ND APPELLANT**

AND

**MAKHOBOTLELA NKUEBE
SELIKANE SELIKANE
THABO SEKONYELA
MAHOLELA MANDORO
MICHAEL RAMOSALLA
KOALEPE MAKATSELA
FUSI CHOPO
RAMOKHETHI DAMANE
LEMOHANG FANANA
PHAKISO FOSA
AMDREAS HANI
PAUL HLABANE
LESALA HLALELE
TSEPISO HLEHLISI
EZEKIEL HLONGWANE
TEBOHO HOOHLO
MATLALA KAEANE
THAPELO KAKA
SELAKE KALI
RAMAHETLANE KHAKANYO
MAKALO KHAKETLA
'MATEBOHO CHALUMEAU
KHASIPE KHASIPE
MOHAPI KHAMA
NTSANE KHATALA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT
14TH RESPONDENT
15TH RESPONDENT
16TH RESPONDENT
17TH RESPONDENT
18TH RESPONDENT
19TH RESPONDENT
20TH RESPONDENT
21ST RESPONDENT
22ND RESPONDENT
23RD RESPONDENT
24TH RESPONDENT
25TH RESPONDENT**

KHECHANE KHECHANE	26TH RESPONDENT
MALEFETSANE KHEO	27TH RESPONDENT
LIMPHO KHETSI	28TH RESPONDENT
SELLO KHIBA	29TH RESPONDENT
MOKHESENG KHOABANE	30TH RESPONDENT
ROSA KHOETE	31ST RESPONDENT
‘MASENTLE KHOLUMO	32ND RESPONDENT
MOITHERI MOHAPI	33RD RESPONDENT
ELIZABETH KHUTLANG	34TH RESPONDENT
NTOILE KOLANE	35TH RESPONDENT
LERATO KOLISANG	36TH RESPONDENT
PHAKISI KOLOBE	37TH RESPONDENT
POELO KOLOBE	38TH RESPONDENT
PAUL KULEHILE	39TH RESPONDENT
TLANTLI LEBALLO	40TH RESPONDENT
‘MAMARALING LEBALLO	41ST RESPONDENT
THABANG LEBOKOLLANE	42ND RESPONDENT
SEKONYELA LEBOPO	43RD RESPONDENT
TELEKO LEBUSA	44TH RESPONDENT
SEEISO LECHE	45TH RESPONDENT
TANKISO LEFULEBE	46TH RESPONDENT
RICHARD LEHLAHA	47TH RESPONDENT
TSABALIRA LEJAHA	48TH RESPONDENT
LISEMELO LEKHANYA	49TH RESPONDENT
LEPHEANE LEKHETHO	50TH RESPONDENT
LEBABO LEKHOOA	51ST RESPONDENT
RAMOFOLO LEKOATSA	52ND RESPONDENT
GEORGE MOKOENA	53RD RESPONDENT
HUBBERT LELIMO	54TH RESPONDENT
LEPHEANE LEPHEANE	55TH RESPONDENT
HERBERT LEPHEANE	56TH RESPONDENT
RAMOTSELISI LEPHOTO	57TH RESPONDENT
KARABELO LEROTHOLI	58TH RESPONDENT
ALBERT LESAOANA	59TH RESPONDENT
LEQALA LESEO	60TH RESPONDENT
KHOTHATSO LETELE	61ST RESPONDENT
MOLIBETSANE LETLAKA	62ND RESPONDENT
PHILLIP LETLATSA	63RD RESPONDENT
SEEISO LETSIE	64TH RESPONDENT
TOKA LETSIE	65TH RESPONDENT

PAUL LIETA	66TH RESPONDENT
SEMA LIKOBELo	67TH RESPONDENT
‘MALINEO LIPHOLo	68TH RESPONDENT
RETSELISITSOE LITLALI	69TH RESPONDENT
THABANG MACHELI	70TH RESPONDENT
VICTOR MAEMA	71ST RESPONDENT
PETER MAFANE	72ND RESPONDENT
LEFA MAFATA	73RD RESPONDENT
TABATSI MAFELESI	74TH RESPONDENT
‘MASEKOANE MAHAO	75TH RESPONDENT
TSILONYANE MAHASE	76TH RESPONDENT
THABO MAHLEKE	77TH RESPONDENT
MOHALE MAHLOANE	78TH RESPONDENT
‘MAKOENANE MAHLOMOLA	79TH RESPONDENT
THABO MAISA	80TH RESPONDENT
SETHO MAJORO	81ST RESPONDENT
SENATLA MAKAE	82ND RESPONDENT
TLALANE MAKEPE	83RD RESPONDENT
REFUOEHAPE MAKHAKHE	84TH RESPONDENT
THEBE MAKHALE	85TH RESPONDENT
LIKHANG MAKHOTHE	86TH RESPONDENT
HELEN MAKHOTLA	87TH RESPONDENT
SEBAKE MAKHUTLA	88TH RESPONDENT
TEBOHO MAKOKO	89TH RESPONDENT
TSOLO MAKOSHOLO	90TH RESPONDENT
‘MALEFU MALEFANE	91ST RESPONDENT
MARTIN MALEKE	92ND RESPONDENT
REENTSENG MALIEHE	93RD RESPONDENT
MAOELA MAOELA	94TH RESPONDENT
PUSETSO MAOELA	95TH RESPONDENT
MAPANYA MAPANYA	96TH RESPONDENT
BOFIHLA MAPHATSOE	97TH RESPONDENT
MOTLATSI MAPOOANE	98TH RESPONDENT
MBULELO MAQUTU	99TH RESPONDENT
‘MAMPHO MARAISANE	100TH RESPONDENT
KHETHANG MARE	101ST RESPONDENT
KHAUTA MARIE	102ND RESPONDENT
TAUKU ‘MASEATILE	103RD RESPONDENT
REFILOE MASENYETSE	104TH RESPONDENT
SEPITLE MASENYETSE	105TH RESPONDENT

‘MALISENTE MASHAPHA	106TH RESPONDENT
MOTEBANG MASHEANE	107TH RESPONDENT
THATO MASITHELA	108TH RESPONDENT
THABO MATAMANE	109TH RESPONDENT
MOOROSI MATELA	110TH RESPONDENT
SEHLOHO MATHAHA	111TH RESPONDENT
‘MABULARA MATOBO	112TH RESPONDENT
SENTLE MATOBAKO	113TH RESPONDENT
THABISO MATSOAI	114TH RESPONDENT
SEUTLOALI MATSOSO	115TH RESPONDENT
THORISO MATSOSO	116TH RESPONDENT
LEBOHANG MBOLE	117TH RESPONDENT
THAPELO MOBE	118TH RESPONDENT
KHOBOSO MOELETSI	119TH RESPONDENT
LAWRENCE MOFOKA	120TH RESPONDENT
MASOABI MOFUBE	121ST RESPONDENT
TSEKO MOHALE	122ND RESPONDENT
NAPO MOHAPI	123RD RESPONDENT
JOBO MOHAPI	124TH RESPONDENT
MAMPHO MOHAPI	125TH RESPONDENT
‘MATHATO MOHASI	126TH RESPONDENT
LIBOKO MOHLALISI	137TH RESPONDENT
THABANG MOIKETSI	138TH RESPONDENT
LEBOHANG MOILOA	139TH RESPONDENT
LEBUSA MOKATI	140TH RESPONDENT
TUPA MOKHALINYANE	141ST RESPONDENT
KOPANO MOKHALOLI	144TH RESPONDENT
NTLOKO MOKHESI	145TH RESPONDENT
SEHLABAKA MOKHOTHU	146TH RESPONDENT
MAFOLE MOKOMA	147TH RESPONDENT
TANKISO MOLAOA	148TH RESPONDENT
KHOBATHA MOLAPO	149TH RESPONDENT
THAPELO MOLAPO	150TH RESPONDENT
MAMOLEBOHENG MOLELEKI	151ST RESPONDENT
SEABATA MOLEPA	152ND RESPONDENT
MOLEFI MOLETSANE	153RD RESPONDENT
TEBOHO MOLETSANE	154TH RESPONDENT
E. MOLISANE	156TH RESPONDENT
MOLOPI MOLISE	157TH RESPONDENT
TSELISO MOLISE	158TH RESPONDENT

KHETHANG MOLOISANE	159TH RESPONDENT
ITUMELENG MOMPE	160TH RESPONDENT
TEBOHO MONAHENG	161ST RESPONDENT
LOKISANG MONETHI	163RD RESPONDENT
SELLO MOOROSI	164TH RESPONDENT
ADEL MORIE	165TH RESPONDENT
NTELELE MOROANYANE	166TH RESPONDENT
THETSANE MOROMELLA	167TH RESPONDENT
PHOLO MOSEBO	168TH RESPONDENT
MAPHELETSO MOSENENE	158TH RESPONDENT
TLOKOTSI MOSHASHA	169TH RESPONDENT
MOFEREFERE MOSHEOA	170TH RESPONDENT
THABO MOSHOESHOE	171ST RESPONDENT
LETSITSI MOSIUOA	172ND RESPONDENT
TEBOHO MOSOLA	173RD RESPONDENT
‘MALIMAKATSO MOSOLA	174TH RESPONDENT
NTHUSO MOTHOANA	175TH RESPONDENT
TUMELO MOTHOKHO	177TH RESPONDENT
‘MANTHA MOTOPI	178TH RESPONDENT
MALEFETSANE MOTSETSERO	179TH RESPONDENT
MOTLATSI MOTSOANE	180TH RESPONDENT
THAPELO MPASI	181ST RESPONDENT
MOTLATSI MPETE	182ND RESPONDENT
NOOSI MPELA	183RD RESPONDENT
AZARIEL MPHOFE	184TH RESPONDENT
‘MATLALI MPITSO	185TH RESPONDENT
THABANG MPO	186TH RESPONDENT
LIKELELI NALELI	187TH RESPONDENT
EVODIA NKO	188TH RESPONDENT
SHADRACK NKOALE	189TH RESPONDENT
LEPEKOLA NOLOANE	190TH RESPONDENT
TSUKULU NONYANE	191ST RESPONDENT
‘MALISEBO NTEE	192ND RESPONDENT
‘MABATAUNG NTELANE	193RD RESPONDENT
TEMOSO NTOAMPE	194TH RESPONDENT
‘MUSO NTOBO	195TH RESPONDENT
THABANG NTSANE	196TH RESPONDENT
LIAKO NTSEKHE	197TH RESPONDENT
TEBOHO NTSINYI	198TH RESPONDENT
THABANG PANYANE	199TH RESPONDENT

THABO PEEKECHE	200TH RESPONDENT
PALESA PETLANE	201ST RESPONDENT
NOCODEMUS PHALIME	202ND RESPONDENT
MOTLATSI PHAROE	203RD RESPONDENT
LETHUSANG PHEKO	204TH RESPONDENT
SEQAO PHENYA	205TH RESPONDENT
MOTSAMAI PHERA	206TH RESPONDENT
KOMETSI PHITSANE	207TH RESPONDENT
RETSELISITSOE PHORI	208TH RESPONDENT
LERATO PITSO	209TH RESPONDENT
BAPHOTHI POFANE	210TH RESPONDENT
KOSI POTSANE	211TH RESPONDENT
JOSEPH QABA	212TH RESPONDENT
KHOABANE QHOBELA	213TH RESPONDENT
KOTSI QHOBOSHEANE	214TH RESPONDENT
MAKHAUTA QOACHELA	215TH RESPONDENT
TEBOHO QOPHE	216TH RESPONDENT
BROWN RAJOELE	217TH RESPONDENT
MATUMISANG RAMABELE	218TH RESPONDENT
LEKHOOANA RAMALIEHE	219TH RESPONDENT
BASIA RAMAOKANA	220TH RESPONDENT
LETEKA RAMASHAMOLE	221ST RESPONDENT
RAPHAEL RAMASHAMOLE	222ND RESPONDENT
JULIUS RAMATABOE	223RD RESPONDENT
MPAI RAMMUSETSI	224TH RESPONDENT
HLOLO RAMORAKANE	225TH RESPONDENT
MAHLOMOLA RAMOTHAMO	226TH RESPONDENT
MPHOBOLE RAMPHOBOLE	227TH RESPONDENT
‘MATEBOHO RANOOE	228TH RESPONDENT
LEBOHANG RAPILE TSA	229TH RESPONDENT
ALFRED RATJOPA	230TH RESPONDENT
TENNYSON SAOANA	231ST RESPONDENT
DAVID SAUDI	232ND RESPONDENT
BAILE SEAKHOA	233RD RESPONDENT
GLADYS SEBATANA	234TH RESPONDENT
THABISO SEHLABAKA	235TH RESPONDENT
LEBOHANG SEKHOAHLA	236TH RESPONDENT
‘MAMOOROSANE SEKOALA	237TH RESPONDENT
AMELIA MOLAPO	238TH RESPONDENT
SECHOCHA SENYANE	239TH RESPONDENT

T. SENYANE	240TH RESPONDENT
LEBOHANG SEPERE	241ST RESPONDENT
MAKHAOLA SEPERE	242ND RESPONDENT
MALEFETSANE SEQHOALA	243RD RESPONDENT
DANIEL SESING	244TH RESPONDENT
REFUOE SETEKA	245TH RESPONDENT
CASWEL SETEMERE	246TH RESPONDENT
‘MAMPHO SETLOBOKO	247TH RESPONDENT
MOLIBELI SHABE	248TH RESPONDENT
KHETHANG SHALE	249TH RESPONDENT
KHOMOATSANA SHALE	250TH RESPONDENT
KHUPISO SHEA	251ST RESPONDENT
HILDA SHOLU	252ND RESPONDENT
MOJALEFA SUOANE	253RD RESPONDENT
THABANG TAEI	254TH RESPONDENT
ANDREAS TAKALIMANE	255TH RESPONDENT
MOHAU TAKANA	256TH RESPONDENT
S. THOKOANA	257TH RESPONDENT
THABANG THABA	258TH RESPONDENT
PRESCILLA THAKEDI	259TH RESPONDENT
BOKANG THAMAE	260TH RESPONDENT
MATLERE THAMAE	261ST RESPONDENT
TJOKA THOKO	262ND RESPONDENT
RUSSELS THULO	263RD RESPONDENT
MALATSI TIHELI	264TH RESPONDENT
‘MAMOHAE TJABANE	265TH RESPONDENT
TEMANE TOPO	266TH RESPONDENT
THATO TSALONG	267TH RESPONDENT
HLOMOKA TSEPANE	268TH RESPONDENT
PANYANE TSEPHE	269TH RESPONDENT
KABUTU TSIANE	270TH RESPONDENT
MOTLOHELOA TSIRA	271ST RESPONDENT
LEPHOTO TSIU	272ND RESPONDENT
TEBOHO TSOENE	273RD RESPONDENT
NKHAHLE TSOSANE	274TH RESPONDENT
KOPANG VUMBUKANI	275TH RESPONDENT
BLYTH BAHOLO	276TH RESPONDENT
PUSELETSO BAHOLO	277TH RESPONDENT
ISAAC BELEME	278TH RESPONDENT
JOHN BERENG	279TH RESPONDENT

LEREKO BERENG	280TH RESPONDENT
MOLISE BOHLOKO	281ST RESPONDENT
TANKISO MAEKANE	282ND RESPONDENT
MALOLI MOTHIBELI	283RD RESPONDENT
RAMOFAO MONAKALALI	284TH RESPONDENT
RAMAISA RAMAISA	285TH RESPONDENT
MOTSOELA SEETANE	286TH RESPONDENT
LEFA SEKOATI	287TH RESPONDENT
MOCHEKO ISSAKA	288TH RESPONDENT
MOTLALEPULA MASIA	289TH RESPONDENT
SERUPE MOILOA	290TH RESPONDENT
MAFA HLALELE	291ST RESPONDENT
LEFA MATENA	292ND RESPONDENT
NTJA POSHOLI	293RD RESPONDENT
MAJARA MASOABI	294TH RESPONDENT
MAHASE RABOSHABANE	295TH RESPONDENT
LEMOHANG MOLOFI	296TH RESPONDENT
MASUPHA SEPERE	297TH RESPONDENT
MOKOENIHI CHOBOKOANE	298TH RESPONDENT
THABANG MPUTSOE	299TH RESPONDENT
MOTLATSI NKUNYANE	300TH RESPONDENT
THABO TSOENE	301ST RESPONDENT
NTHAKO PHATE	302ND RESPONDENT
TUMELO MOQHALI	303RD RESPONDENT
MOLEFI MOLEFI	304TH RESPONDENT
MOLEFI MAILE	305TH RESPONDENT
TANKISO ISAAKA	306TH RESPONDENT
KANATE KOLISANG	307TH RESPONDENT
RANTSOTI MOLOLI	308TH RESPONDENT
LEBONA LEBONA	309TH RESPONDENT
MLEFI MOTSEKI	310TH RESPONDENT
SEFALI MOKHACHANE	311TH RESPONDENT
HLOLO RAMORAKANE	312TH RESPONDENT
SEPHEKANE MOHAPI	313TH RESPONDENT
ROBERT KOTELO	314TH RESPONDENT

**HELD AT:
MASERU**

CORAM:

BROWDE: JA
VAN DEN HEEVER: JA
SHEARER: AJA

JUDGMENT

BROWDE, JA

The background to these two appeals which, because they are so closely interrelated, were heard together, is the following:-

During 1997 the Appellant (referred to herein as LTC) brought an application before the High Court in which it sought an interdict against certain of its employees 8 of whom were named respondents while the 9th respondent was cited as “and others on strike”. The application was founded on allegations that the respondents had gone on an illegal strike and had caused and were causing damage to LTC ‘s property and equipment. The LTC asked for an interdict restraining the employees from vandalising property of LTC and striking illegally and also for an order that they return to work. The employees denied most of the factual allegations of LTC. Seven named individuals with “Collective Employees” named as the 8th applicant brought a separate application in which they alleged

that they had been unlawfully locked out of the premises. They asked the court, inter alia, for an order against LTC that the gates be opened to them and that they be permitted to return to work. The matters were treated as one by Guni J. who, despite the serious disputes of fact which existed on the papers in both matters, made credibility findings and granted the orders sought by LTC in the one application and dismissed the other brought by the employees. The employees noted appeals against both the grant of relief to the LTC and the order of Guni J. dismissing their application.

That appeal came before this court in the January 1998 session. It seemed to us that because of the disputes of fact there was a possibility on that ground already that the employees' appeal would succeed insofar as the order in favour of the LTC was concerned and would fail in respect of the order that the employees had sought from Guni J. The parties would then have found themselves in a stalemate position in which they had all incurred a great deal of costs and solved nothing. This court was of the view, therefore, that it would be in the interests of all concerned if the ongoing differences apparent from that record could be resolved by a process of mediation. This was suggested to the parties' counsel, who, after consultation with their respective clients, adopted the suggestion. Pending the outcome of the mediation process the appeal was, by

consent, postponed sine die.

LTC having obtained from Guni J an order which in paragraph 2(e) obliged the allegedly striking employees to return to work, the employees did so. It is common cause, however, that when they reported for duty most of them were met by letters informing them that they were suspended pending the outcome of disciplinary hearings which LTC intended conducting into their “strike” activities and other allegations of misconduct while others (Applicants Nos. 282 to 309 before Monpathi J) were summarily dismissed. All this in the face of that part of Guni J’s order, sought by the LTC itself, obliging employees to return to work.

The disciplinary hearings which followed can only be described as a sham. Those charged were in effect denied their rights to answer the allegations against them as is required for a fair hearing and were “convicted” on the basis of the finding by Guni J. (on disputed facts) that the few named and the amorphous group of unnamed “other workers on strike” had been involved in an illegal strike and had perpetrated acts of vandalism. Nothing more need be said about those hearings than that in argument before us in the present appeals, Mr Wessels, who appeared for LTC, very properly conceded that he could not defend them. After those so-called hearings an appeal was purported to be permitted to all employees

who had been dismissed by the disciplinary tribunal. The second Appellant in these proceedings who was the Acting Managing Director of LTC heard the “appeals” which were also formalistic ritual without substance and confirmed the dismissal of the employees. Then 314 named applicants approached the High Court in the applications which led to the two present appeals. One of them, No. 162, however abandoned his participation in the proceedings for reasons irrelevant to what is before us now.

In the application to the High Court the relief sought was (and I set out only relevant prayers) an order in the following terms, that :-

3. A Rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:
 - (a) (i) 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) Respondent 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.
- (h) Respondents shall not be directed to pay to applicants 310 to 314 gratuities and severance pay.
- (i) Respondents shall not be directed to pay costs hereof.

The rule nisi sought was granted ex parte and in due course a Notice of Intention to oppose was filed by LTC and an opposing affidavit by the Second Appellant on behalf of LTC served. This was replied to by the First Respondent.

The application came before Monapathi J. who, after hearing argument made the following orders on 11 February 1998:

- “A (i) The purported dismissals of Applicants 1 to 281 by 2nd Respondent are 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 No. 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 ordered 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 20th 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 abovementioned 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.”

On 24 June 1998 Monapathi J delivered his full reasons for making the orders referred to above and ended by explaining that Order J was “made against the background that mediation would in my mind affect the whole dispute, that is the aspects 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”.

Since, as I have referred to above, the parties had shortly before agreed to attempt to solve their differences by mediation the learned Judge’s inclusion of Order J as part of his decision was intended to make the balance of his order conditional, so as to avoid rendering nugatory the attempts, by means of mediation, to settle the ongoing bickering between employer and employees which had culminated in the judgment by Guni J.

On 16 February 1998 LTC launched an urgent application in which it sought the following relief:-

“That execution of his Lordship Mr Justice Monapathi’s judgment dated 11th day of February 1998 in the Application under case number CIV/APN/502/97 be and is hereby stayed pending the final determination of an appeal to the Appeal

Court of Lesotho against the judgment as aforesaid”.

The application was opposed and on 27 March 1998 Monpathi J made an order dismissing the application with costs.

Thus it came about that the two appeals came before us, the one against what may conveniently be termed Monpathi J’s conditional order of reinstatement of the employees, and the other the refusal by Monpathi J to make an order staying the execution of that order.

In his argument before us Mr Wessels on behalf of the appellants confined himself to two points namely

- (i) That Monpathi J was not justified in hearing the application for reinstatement as a matter of urgency and
- (ii) That the founding affidavit was deposed to by the first applicant namely Makhobotlela Nkuebe and that nowhere does he allege that he had the authority of the other applicants named in the heading to bring the application on their behalf. Counsel excluded from that criticism those named who had given supporting affidavits namely Thabo Ts’oene (the 301st Respondent), Molefi Motseki (the 310th Respondent) Majara Masoabi (the 294th Respondent) and Hlolo Ramorakane (the 312th Respondent).

In regard to urgency Mr Wessels, after submitting that there was no special circumstance that warranted the matter being treated as urgent, conceded that this was essentially something within the discretion of the judge hearing the matter to decide. There was nothing of substance to which Counsel could point to justify us in concluding that Monpathi J's exercise of that discretion could properly be interfered with on appeal. Counsel did not persist in objecting to e.g. Nkuebe's general testimony relating to disciplinary proceedings of his co-applicants, as having been inadmissible as hearsay. He conceded that those had been irregular.

Mr Wessels not only argued the second point with much greater enthusiasm, but pinned his colours to that mast. He submitted that the **actio popularis** is obsolete and is neither part of the law of South Africa nor of Lesotho. That this is so appears, inter alia, from **Roodepoort - Maraisburg Town Council vs Eastern Properties (Pty) Ltd** 1933 AD 87. This submission is no doubt correct and it seems clear that it is only in rare situations that anyone is entitled to bring an application on behalf of others without being duly authorised to do so. A rare situation referred to is such, for example, as was recognised in the case of **Wood & others v. Ondangwa Tribal Authority and another** 1975 (2) SA 294 (AD). In that matter Rumpff CJ held that an unauthorised Applicant could act on behalf of persons shown to be unable to act in their own interests, were the Court

satisfied that those so unable would have themselves sought the relevant relief had they not been prevented from doing so. It is unnecessary to decide the extent of the limitation of such a “concession”, for present purposes. Mr Wessels submitted that it was necessary for the deponent Nkuebe to have alleged that he was “duly authorised to act on behalf of” all the persons who sought relief in the court a quo and this phrase does not appear in either the founding affidavit or the reply. Counsel pointed out that the question had been pertinently raised in the answering affidavit and not been specifically dealt with in reply. The relevant portion of the paragraph in the answering affidavit of LTC’S Acting Managing Director, who was the second respondent in the court below, reads as follows:-

“2.3 Applicants, presumably 314 of them are not a trade union nor do they allege to be one. It is my assumption that they make this application in their individual capacities as they cannot act collectively. There is nothing in motion papers authored by Mr. T. Maieane to allege that he acts on behalf of the 314 named applicants nor that he is duly authorised to do so.”

Mr. Wessels is correct in stating that there is no express allegation in the affidavits that all the applicants named in the heading authorised the particular deponent to the founding affidavit to act on their behalf. To determine whether the application was authorised by those named as parties thereto, one is however not confined solely to the affidavits, since, as suggested in the answering affidavit, the Notice of Motion is also relevant. That is one of the documents

“authored” by Mr. T. Maieane who was the attorney of the named applicants in bringing their application. That the Notice of Motion should also be taken into account appears from the judgment in **Leith NO and Heath N.O. vs Fraser**, 1952 (2) SA 33. That case concerned an application by the liquidators of an assigned estate to eject the respondent from estate property. Only one liquidator had signed the affidavit supporting the notice of motion and the other liquidator did not file an affidavit at all. In the affidavit the one applicant alleged that he was acting with the full knowledge and consent of the other. The point was taken by the respondent that both liquidators should have signed the affidavit or, if the one did not, he should have filed a power of attorney indicating that he was joining in the application. The court found that in the circumstances of the case the sole supporting affidavit was adequate. In analysing whether there was sufficient on the papers to show that the second liquidator was party to the application the learned judge said (at p 35F)

“The proceedings were initiated by way of notice of motion and not petition and the petition referred to by counsel is really the affidavit supporting the notice of motion. The prayer was contained in the notice of motion and all that was required in addition was an affidavit stating the facts on which the claim was being made (**Barber and Barber v Flemmer** 1903 TH 266) and the notice of motion clearly indicates that the application is being made in the name of both the assignees. The heading sets out the name of both of them and it is signed in terms of the Rules by “applicants’ attorney”. According to the notice of motion, then, both the applicants are making this application and are properly before the Court”.

It is noteworthy that the learned judge came to the conclusion that both applicants were properly before the court without insistence on the ritual incantation of the phrase that the deponent was acting “duly authorised by” the other person named by the attorney as one of his principals.

I now turn to examine the facts of this case with particular reference to the contents of the notice of motion. I have already referred to the manner in which LTC in the former matter had cited the employees by naming 8 of them and for the rest adding “the others on strike”. That obviously prompted the heading of the founding affidavit of the first respondent viz “Makhobotlela Nkuebe and 313 others.” However the Respondents did also attach to the Notice of Motion the list of names, against their respective numbers, of all the respondents and the Notice of Motion itself contained the following:-

(i) It was signed by T. Maieane who is described as ‘Applicants’ Attorney’.

To see who those applicants are, one turns the page and finds the list of applicants and their numbers in detail, to discover their identity. Mr Wessels however stressed that his quarrel is not one of identity (which may well be a problem in the matters before Guni J.), but of authorisation. The fact that Mr Maieane is described as being the attorney of the named applicants necessarily represents that he has

authority to bring their application.

(ii) The relief sought in the Notice of Motion is a Rule Nisi calling upon the respondents to show cause, inter alia, primarily why the purported dismissals of applicants 1 to 281 should not be declared null and void and why those applicants should not be reinstated; and calls on the respondents to take notice that Nkuebe's affidavit and supporting affidavits will be used in support of the prayers.

The clear intimation that the application is being made not only on behalf of the applicants whose numbered names are listed but on their authority is buttressed by the last sentence in the Notice of Motion which reads "Take Notice further that applicants have appointed the under mentioned attorney's address as the place whereat all process and documents herein may be served."

Then the affidavit of Nkuebe starts with the following allegation, "I am one of the Applicants herein and I am applying as applicant No.1 amongst the names of applicants herein". He goes on to say that he is a former employee of the first respondent (LTC) and that the other applicants are also former employees. Mr. Wessels submitted that that does not mean that Nkuebe had the others' authority to speak on their behalf. This, however, overlooks the statement in the Notice of

Motion that the affidavit will be used in support of the relief sought by all the numbered and named applicants, and that this was signed by the attorney who prima facie had authority to represent them all.

On the facts of this case there is in my view sufficient evidence to show that the application was authorised by all the named applicants, and the preliminary point taken by Mr Wessels must fail.

There is one further facet to Counsel's argument that should be dealt with. When the employees attempted to return to work after the order for them to do so had been issued by Guni J, the LTC required of them that they sign a document to the effect that they would return to work and would "dissociate themselves from the illegal strike". Those who were not willing to sign the undertaking were dismissed. Mr Wessels submitted that that was a ground for dismissal without more. That submission cannot succeed here. LTC had itself sought and obtained an order from the High Court to compel employees to "desist from their illegal strike and return to work". It also had obtained an interdict prohibiting them from indulging in defined illegal behaviour. Their suspension was, according to the papers before us, not motivated by any refusal to sign an undertaking which was unnecessary in the face of that interdict, but was based on their earlier conduct which had been

labelled illegal by Guni J on the strength of allegations which were not common cause.

For the above reasons the appeal No.5 of 1998 cannot succeed on the grounds advanced.

Although it was mentioned from the Bar that some of the applicants had been contract workers whose contract periods have already run out, and it seems as though the precise content of the order by Monpathi J may cause further problems when sought to be applied to the present situation of all parties, that was not pressed before us. It is the conditional order of the Court a quo which revives, so that possible problems are postponed to be dealt with in the future.

I now turn to deal with the appeal against Monpathi J's order refusing a stay of execution. Mr Wessels attempted to incorporate into the present appeal, a record of proceedings which occurred recently in which Monpathi J. cancelled what in effect was the suspension of his earlier order. Mr Wessels submitted that those proceedings were quite irregular. It would be equally irregular of this Court to consider them where the employees have not consented to the ambit of the matter before us being enlarged belatedly and informally. On the record before us, since the suspensive condition had not fallen away, it was premature to have sought a

stay of execution when this was done. Mr Wessels conceded this, and that this appeal must consequently fail.

The result of the present proceedings and the fact that others are pending between the parties (including not only that referred to in the proceeding paragraph, but another matter that was sought to be advanced belatedly, and the appeal against the judgment of Guni J which is still pending) can only serve to exacerbate the chaos that the parties have created by their legal manoeuvres. Litigation so far has served the interests of neither party but only of the lawyers. It would be in the interests of all concerned that emotions be controlled and wise heads put together to find a solution. We have already suggested mediation. We are not aware of reasons which may have delayed or permanently derailed that process. If wisdom does not prevail and no solution other than by continued litigation is sought, so be it. It is however fair to predict that the relationship between the parties will be further soured, only the lawyers will reap rewards for their services at the expense of their clients, and the clients may receive no true benefit whatsoever in the long run.

Appeal No.5 of 1998 and Appeal No.12 of 1998 are both dismissed with costs.

**J. BROWDE
JUDGE OF APPEAL**

I agree

**L. VAN DEN HEEVER
JUDGE OF APPEAL**

I agree

**D.L.L. SHEARER
ACTING JUDGE OF APPEAL**

Delivered at Maseru on 31st day of July, 1998.