C.of A (CIV) No.14/1997

IN THE LESOTHO COURT OF APPEAL

In the Matter of

NATIONAL UNION OF RETAIL AND ALLIED WORKERS **Appellant**

vs

COURT PRESIDENT (LABOUR COURT) **1st Respondent**
SOTHO DEVELOPMENT CORPORATION **2nd Respondent**

HELD AT:
MASERU

CORAM
VAN DEN HEEVER, J.A.
GAUNTLETT, J.A.
SHEARER, A.J.A.

DATE OF HEARING: 29TH JULY, 1998
DATE OF JUDGEMENT: 31ST JULY, 1998

JUDGMENT

Van den Heever, J.A.

This is an appeal against the order granted by **MOFOLO, J.** in **Civil**

Application No. 390 of 1996. That purported to be a review of a decision by the Labour Court which was adverse to the appellant ("The Union"). I refer in what follows to second respondent as "the employer" or "the corporation".

In that matter, LC case 106/96, the Union launched proceedings by way of an unsworn document by **Mr. Ramochela**, a Union organiser, in which it claimed an order declaring the employer's suspension and dismissal of employees to have been unlawful and invalid as having constituted an unfair labour practice. The Union asked that its dismissed members be reinstated as employees, and be paid their wages as from 9th September, 1996. This was the date on which they had been suspended.

The "originating application" or particulars of claim is somewhat confused. It alleges that the employees, having been suspended on the 9th of September 1996, entered the premises on the 10th despite the employer regarding such entry to be unlawful, intending to

- find out what their position was
- negotiate a settlement
- vent their grievances
- negotiate the reinstatement of two colleagues who had been unlawfully dismissed.

They instructed their Union representative, **Mr. E.T. Ramochela,** "to enter

the negotiating process on their behalf" but the employer refused him an opportunity to do so. While the Union representative was (note: not "the employees were") anticipating that negotiations would commence "regarding the suspension, and other grievance", (the latter being undefined), the employer issued an ultimatum to its employees, a copy of which was purportedly annexed to the Union's "originating application" as "Annexure "NURAW I". This enjoined the employees to return to work at 07h30 on the 11th September, 1996, failing which "they will be automatically dismissed". On the 11th the affected Union members did return to work, but

> "were issued with a letter stipulating certain unilateral and unacceptable condition which were unlawful per se in that they were aimed at capriciously depriving union members of their right to embark on whatever lawful conduct stipulated under the labour code." (Sic)

A copy of "the said undertaking" was purportedly attached as Annexure NURAW 2. The application says further (para. 3 (k), but does not annex any document in support of this contention, that

> "the Respondent further informed the said members that their return to work is not automatic and that they should be well informed in advance that they will be treated as employees who are newly engaged. Thus the Respondent's conduct amounted to depriving union members of the benefits which would have accrued to them".

The Union employees refused to sign this undertaking, it not having been preceded by negotiations and thus constituting an unfair labour practice. The employer then dismissed the employees without affording them a fair hearing. Its conduct in doing so was ultra vires in that it was "outside its empowering memorandum and articles, and was also unreasonable in that it was manifestly unjust and capricious."

The originating application has neither of the annexures to which it refers, in the record before us.

The general manager of the employer corporation, **Mr. Grinberg** filed an "Answer" or plea to the Union's statement of claim with a number of annexures and supported this by an affidavit also with annexures, which pointed a totally different and detailed picture. I summarise:

There had been an armed robbery resulting in loss to the Corporation in the sum of about M127,000 on a pay-day in May, followed by a strike by employees on 28th May, 1996. There were serious problems of progressively decreasing productivity, indiscipline, thefts, insubordination.

On 6th September, 1996 a disciplinary hearing was held against K. Sehloho for refusing to comply with a lawful instruction by the Section Manager. He refused to say anything in his defence. He was found guilty and suspended with pay while management considered what the final penalty was to be. (He was dismissed on the 10th).

On the 9th of September a disciplinary hearing was held against S. Lekhooa, for coming late without good reason. Having done so often before and received warnings in the past, he was dismissed but noted an appeal which had not been heard yet when **Mr. Grinberg** deposed to his affidavit.

Noting dissatisfaction among the employees at the decisions relating to these two, management convened a meeting that same day, the 9th of September, with the Union Committee, and explained why Sehloho and Lekhooa had been dealt with as they had. This meeting took place from approximately 11h00 to 12h00. After lunch the workers downed tools. Management called on the Union Committee for an explanation of the refusal to work. They were told that the employees wanted Sehloho and Lekhooa reinstated before they would resume working. Told that it was not the perquisite of workers to determine whether the dismissal of a colleague had been wrongful, the Committee was apparently unimpressed. Accordingly at 13h45 staff members were circularized that their refusal to work constituted an illegal strike, and if they did not recommence by 14h00, they would be required to vacate the premises of the Corporation (annexure A to the Answer). Through their Committee the workers asked for a meeting. Management agreed that one be convened at 15h00, during the tea break; and sent a message to **Mr. Ramochela** urging him to intervene, as the situation appeared tense. He did not arrive. At the meeting it was explained to the workers that the dismissals of the two workers were matters for adjudication by the Labour Commissioner or Labour Court, not by them; and that they were

on an illegal strike. They were urged to return to work. The proceedings at this meeting were electronically recorded. The workers did not alter their views or deeds as a result of those proceedings. They wrote a letter allegedly annexed to **Grinberg**'s affidavit but not before us, i.a. demanding that Sehloho and Lekhooa be reinstated

A second circular to staff was issued at 15h35 which again advised that the work stoppage was illegal, and extended the time by which workers were to return to work to 16h00, failing which they were to leave the property.

Not having commenced work at the stipulated time, they were all suspended and ordered to leave the premises. They failed to comply with this order also. A report dated "09/09/96 - 14h32" by an employee of Gray Security services (Lesotho) (Pty)Ltd (which guards the premises of the Corporation) made in the course of his duties to his employer, ("Gray's") was annexed as "B" to the Corporation's Answer. It alleges that at the Corporation's premises

> "there were some people doing their work while strikers chased them away from doing their work. Strike went on until at 17h00 when workers left premises"

On the 10th of September, despite their suspension the previous day, the strikers forced their way into the premises despite attempts by security personnel to prevent them. **Grinberg** testifies that

> "There was nearly an ugly scene, had management not intervened and asked security personnel to cool down. The strikers entered in this manner and also made holes in the fences, where they could come and go as they wished ..... in the process damag(ing) the company's property. See Annexure 7"

We have no Annexure 7 to this affidavit, but the reference appears to be to what was C to the Answer: a Gray's report dated 10th September that

> "the people who went on strike entered with the means of force when P.M.Motlaila opened the gate for S.D.C. Management team staying on the premises. P.M. Rabele observed that they have made a hole at the gate to enter in the premises. But those who made a hole through the fence are recognised also i.e. known".

Grinberg testifies that the strikers had become aggressive and militant, and threatened to attack Management, who decided to close the factory and move to an office "next to the second gate away from the gate where the strikers were congregating". There the telephone and fax were still working. **Mr. Ramochela** was again contacted and asked to come and intervene.

He arrived at about 10h00, coming not to the office of Management, but where the strikers were congregated. He spoke to them, and then came accompanied by them, to meet with Management. The latter asked that he persuade suspended strikers to leave the premises after which the meeting between Management and **Ramochela** as their representative could take place. Ramochela refused not only to convey this message to the strikers, but to talk to Grinberg at all:

"He said he would not talk to me, but to my boss in Johannesburg because my hands are not clean or are dirty".

Just before 14h00 Management issued an ultimatum to workers stating that if the strikers did not resume work at 07h30 on the 11th September, 1996 they would automatically be dismissed as they would have repudiated their contract of employment by refusing to work. This was issued in English and Sesotho, and constituted annexure 10 to Grinberg's affidavit but is, again, omitted from the record.

It was, however, common cause before us, that the document on page 18 of our records, is this ultimatum. I quote it in full:

"**SOTHO DEVELOPMENT CORPORATION**
PRIVATE BAG A24, MASERU 100 LESOTHO.

10.09.96

TO ALL EMPLOYEES,

I wish to refer to my three previous letters of yesterday 9th September, 1996 wherein you were requested to stop the illegal strike and return to work immediately.

You were requested in my said letter to vacate the factory premises by 16:00 HRS on the 09.09.96 if you did not return to work by that time.

Unfortunately at 16:00 HRS you did not return to work and you you illegally refused to leave the premises, Management suspended you from duty, but this morning you forced your way (illegally) into the premises.

Management gives a last and penultimate chance to return to your duty stations by 07:30 HRS on the 11th September, 1996.

Any worker who fails to return to work by this time, will be regarded as having repudiated his Contract of employment with us and will automatically be dismissed and will be required to leave factory premises immediately.

You should note that all the time of your work stoppage will not be paid by the Company. Employees who wish to take advantage of Management officer to return to work will be required to sign and undertaking to refrain from any illegal action of this nature".

It was signed by the General Manager

Grinberg had annexed to his affidavit correspondence between Ramochela and Grinberg's superior, Mr. Kahanovitz in Johannesburg, but two of these letters are also missing from the record of the Labour Court as placed before us and the third appears in a different guise. Their gist is summarized by Grinberg under oath thus: Ramochela by fax told Kahanovitz that Grinberg had refused to talk to him. This was totally untrue, and Grinberg reported accordingly to Kahanovitz. Kahanovitz responded to Ramochela,

"urging him to stop fabricating and come to my office for talks".

Ramochela did come to Grinberg's office at about 16h30, again with the group of strikers, but this time obliged when asked to persuade them to leave, which they did. He asked that witnesses be present at the meeting. The request was acceded to and the proceedings electronically recorded. He was briefed about all the developments leading to the strike, and shown all relevant

correspondence and documentation. Grinberg says that management was keen to discover where it had erred, so that it could rectify any such error, but Ramochela could find nothing to criticise. The meeting ended on an amicable note, Ramochela undertaking - at the request of Management - to "talk to the strikers to return to work and he promised that he would try" but cautioned "that he had no power over them".

According to Grinberg's affidavit, the employees arrived outside the Corporation's premises on the following day at the stipulated time, but refused to sign the undertaking. They were dismissed.

No oral evidence was tendered in the Labour Court, certainly nothing to support i.a. the Union's contention in its paragraph 3(k) quoted above. Although Mr. Grinberg's affidavit does not deal with the allegation, the Corporation's Answer did challenge it: it admits that the Corporation adopted the attitude alleged in the first sentence of the Union's said paragraph, but says this was on the 12th of September. According to his affidavit, as stated above, they had already been dismissed the previous day, not being prepared to sign the undertaking required as a precondition to their returning to work.

After hearing argument based on the documentation referred to above, the Labour Court ruled against the Union but made no order as to costs. The Union promptly launched a review application in the High Court, obtaining a rule nisi calling on the first respondent to transmit the record of the proceedings before it to the High Court, and the Corporation to show cause

why these proceedings should not be "reviewed and set aside."

The record before us is unsatisfactory, as already intimated, annexures being either missing or attached to the wrong documents or incorrectly labelled. It is the duty of the appellant in a civil appeal to ensure that the record is in order; and practitioners should be made aware that they run the risk of prejudicing their clients by having matters struck from the roll with costs, if the papers are not so in order. In appropriate cases those costs may even be ordered to be met by the practitioner at fault, de bonis propriis.

The notice of motion in the High Court was supported by two affidavits. That by **Mr. Ramochela** advances argument which was repeated and elaborated on before us; and tries quite improperly to supplement the evidence which had been placed before the Labour Court. He says in para. 5.7 of his affidavit that the Labour Court -

> "failed to appreciate that the instant dismissal of the union workers deprived them of a chance to consult the union and obtain advise as to whether the signing of the said forms would be prejudicial to their rights or not, such that by the time I arrived and wanted to sign on their behalf I was told that it is too late, because the workers were already dismissed."

According to the evidence of **Mr. Grinberg** as outlined above, the ultimatum requiring not only return but also signature of an undertaking - I return to its

terms below - had been issued on the afternoon of the 10th just before 14h00. After that **Mr. Ramochela** had the meeting with Management and undertook to talk to the workers. That they were given no chance to obtain advice from the Union is therefore incorrect; as the new fact alleged, that he himself, wanted to sign on their behalf is irrelevant, even assuming he had any right to do so.

The second affidavit, by **Advocate Putsoane** who had appeared for the Union in the Labour Court, consists also of argument based on his interpretation of the ultimatum read in the light of Section 66 of the Labour Code Order of 1992.

In short, no evidence was advanced in the High Court relating to the conduct of the proceedings in the Labour Court as a ground of review consisting of for example any irregularity committed by the Labour Court other than alleged flaws in its process of reasoning or exercise of its discretion.

As to that, the court a quo went outside the parameters of the problem that it was faced with. That was to determine whether the Labour Court had either applied the law wrongly, or exercised its discretion in a fashion that was grossly unreasonable. Instead the learned judge seems to have approached the problem as though he had original jurisdiction, or the matter were on appeal, and made findings on matter not covered by the "pleadings" or evidence in the Labour Court - I quote as examples:

"I do not agree that work was stopped with no prior notice. I find, on the contrary, that the 2nd respondent was impatient, perhaps exasperated by the notice he received and decided to file and forget it."

and

"this court holds that common sense and rules of fairplay dictate that the second respondent should have reported the trade dispute for appropriate action"

Apparently in the review application it had been argued that the Corporation was at fault since it should have referred the dispute with the employees based on the sacking of two of their colleagues, for conciliation under the Labour Code; and was guilty of an unfair labour practice in not having done so. This was never a ground of grievance advanced in the Labour Court, which can consequently hardly be accused of having been guilty of an irregularity in not dealing with it.

He also held that the strike had not been an illegal one. The only evidence before the labour court was, however, that many employees downed tools and refused to work on the 9th, intimidated those who did, broke the fence, threatened management and so on. Whatever the motivation for their conduct, it was clearly unlawful and not excused by anything contained in the Labour Code.

Be that as it may, the Court a quo was not persuaded to interfere with the decision of the Labour Court. The appellant was obliged accordingly to

persuade us that whatever the reasoning by which that result was arrived at, that result was wrong: that the decision of the Labour Court was flawed in some way which would have entitled and obliged the High Court to interfere.

The difference between the approach of a court of law to the decision of a body such as the Labour Court on review, and its duty on appeal, is trite.

Before us, **Mr. Putsoane** for the appellant elaborated on the arguments advanced in the affidavits filed in support of the review application.

This amounted to no more and no less than that the illegal strike came to an end when the workers came to the premises of their employer on the 11th but on their own terms in the sense that they refused to sign the undertaking stipulated as a precondition in the ultimatum. Non-compliance with that condition, he urged, was the sole ground on which the workers were in fact dismissed; and the condition was neither valid nor reasonable. He relied heavily on the decision in the cases of Laeveld Kooperasie Bpk (Tobacco Division) and Others v. S.A. Commercial Catering and Allied Workers Union and Others (1993) 14 IlJ 13 54; and National Union of Mine Workers on behalf of Members v. Doornfontein Gold Mine (1993) 14 ILJ 1333, at 1337. The facts in both differ toto caelo from those placed before the Labour Court in this matter.

Merely as examples, even accepting that one could regard the true motivation behind the employees having downed tools as being dissatisfaction

with the disciplinary measures taken against their two colleagues (despite their wide ranging and generalized complaints set out in the originating application), there is no allegation, still less evidence, to suggest that such dissatisfaction would have been justified at all. There is no suggestion of anything unfair or improper in the treatment received by those two, to justify their co-workers taking up the cudgels on their behalf by withholding their own labour. In the Laeveld Kooperasie matter, the employer's ultimatum incorporated an undertaking which negated the workers' rights to strike in regard to a matter directly affecting each worker, and the main purpose for which labour legislation is promulgated to regulate the process of collective bargaining: wages. So too the Doornfontein Gold Mine, judgment, assuming it was correctly decided, was based on totally different facts.

The uncontested evidence tendered on behalf of the Corporation in the present matter, was that the workers had not merely stopped working, but had indulged in vandalism, threats, intimidation of non-strikers and so on. That entitled the Corporation to dismiss them under the provisions of section 66 of the Labour Code. Mr. Putsoane advanced no grounds on which the employees should be entitled to dissect the ultimatum, quoted earlier, to suit themselves and comply with only portion of that and ignore the rest; save that he said that the precondition was in itself an unfair labour practice.

The Labour Court did not regard it as such, "no danger or prejudice would have flowed from the signing of the form". I am unpersuaded that it erred in this, in the light of the employees' poor conduct over some period of

time as established by uncontradicted evidence of Grinberg, still less that its view was so grossly unreasonable as to constitute a ground for review. There was nothing unreasonable in the Corporation's being prepared to abandon its right to dismiss the employees only should they give a written undertaking, not to abstain from conduct permitted under the Code, but to abandon conduct which would in any event entitle the Corporation to dismiss them. The ultimatum sets out

> - that they had stopped work.
> - but illegally refused to leave the premises when asked to do so
> - and illegally forced their way in that morning although suspended from duty and were required to undertake to refrain from any **illegal** action of this nature.

No argument was advanced as to why an assurance that their unlawful conduct would stop, should have been regarded as unfair. The suggestion that the Corporation was obliged to negotiate the very terms of the ultimatum - the final one of many - with the employees who had ignored all previous ones, would if accepted, be a contradiction in terms.

The employees were clearly dismissed because they had not complied with this ultimatum, of which the precondition was an integral part which the Labour Court did not regard as unfair. We are, as I have said, unpersuaded that the appellant established any basis for review by the High Court, of the proceedings of the Labour Court.

In the result the appeal is dismissed, with costs.

L. VAN DEN HEEVER
JUDGE OF APPEAL

I agree

J.J. GAUNTLETT
JUDGE OF APPEAL

I agree

D.L.L. SHEARER
ACTING JUDGE OF APPEAL

For the Appellants : Mr. Putsoane,
For the Respondents : Mr. Ramochela.