CIV/APN/39/02

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

CONSTRUCTION AND ALLIED WORKERS UNION — APPLICANT

AND

MOHALE DAM CONTRACTORS — RESPONDENT

JUDGEMENT

Delivered by Honourable Mr. Justice G. N. Mofolo
on the 23rd day of August, 2002.

The applicant approached this court in the matter of an urgent application for interdict and other relief seeking an order as follows:-

1. Dispensing with the periods and modes of service of process on account of the urgency hereof.

2. That a Rule Nisi be and it is hereby issued returnable on a date and time to be determined by this Honourable Court calling upon the respondent to show cause (if any) why:

   (a) Respondents shall not be directed and compelled to comply with a certain Arbitration Award handed down on the 24th August, 2000.

   (b) Respondent shall not be directed to pay costs hereof

3. Granting applicant such further and/or alternative relief as this Honourable Court may deem meet.

It is to be observed that though the application was deemed urgent there was no Certificate of Urgency.

It is also noteworthy that while the Notice of Urgency was filed with the Registrar of this court on 20th January, 2001, notice of intention to oppose was filed on 19th February, 2002 a year and more after the application was filed. The application was opposed and in his Answering Affidavit the Respondent has raised several points in limine, namely;

1. Lack of Jurisdiction by this court

2. Urgency

3. Lack of Authority

4. Novation

5. Impossibility of performance

6. No Certificate of Urgency

In so far as 1 above is concerned, Mr. Wessels both in his heads of argument and before me has submitted that the matter has to do with Labour relations and practices over which the Labour Court (vide s.25 as amended of the Labour Code Order, 1992) has exclusive jurisdiction.

Regarding 2 above, Mr. Wessels has quoted Rule 8 (22) of the Rules of Court in terms of which 'any petition or affidavit filed in support of an urgent application the applicant is to set forth in detail the circumstances which he avers render the application urgent' and the reasons why he claims that he could not be afforded substantial relief in a hearing in due course ----.' This because, according to Mr. Wessels, the Notice of Motion was signed by the

applicant's attorney on 22nd November, 2001 and the Founding Affidavit by the deponent thereon on 30th November, 2001 and that as a result the urgency which might have existed or the predicament the applicant 'believed' it's members to be in/ by the end of January, was self-inflicted. It is to be observed that although the application was launched on 22nd November, 2001 as urgent it was heard on 24th May, 2002 almost six (6) months after it was launched. Mr. Wessels ha quoted **Lesotho University Teachers and Researchers Union v. National University of Lesotho C of A (unreported) no. 13/1998** in terms of which the Court of Appeal found where unfounded reliance is placed on urgency, there is justification for the dismissal of such an application. In this regard also refer to the judgement of this court in **Lesotho Highlands Development Authority (LHDA) v. Matee Phatela (CIV/APN/08/02 unreported).**

Concerning 3 above it would appear the resolution of the applicant giving authority for representation was adopted after the attorney had signed the Notice of Motion for the Resolution is dated 29th November, 2001 whereas the

Notice of Motion was signed on 22nd November, 2001 and on paper it would seem there is no ratification of the power to represent nor was there the allegation by the applicant that the board of directors were aware of the application and the circumstances surrounding it.

On the basis of the application having been signed before authority, the act having not been ratified and I may add there being no allegation by the applicant that it was aware of the authority and circumstances surrounding it (see **Griffith and Inglis v. Southern Cape Blasters, 1972 (4) SA 249 (CPD)),** Mr. Wessels has submitted that the application is a nullity and I could not agree more.

As far as 4 above being novation of obligations provided for in the Arbitration Award and/or waiver of rights obtained in terms thereof, Mr. Wessels has submitted, quoting from judgement in **Trust Bank of Africa Ltd v. Dhooma, 1970 (3) SA 304 (NPD),** that this is not a case where, in entering into subsequent agreement the rights in the Arbitration Award were preserved

or strengthened but that in entering into subsequent agreement the Arbitration Award was extinguished and replaced by the agreement as the only binding contract between the applicant and the respondent, with this submission I also agree.

As to 5, The Arbitration Award having been extinguished and replaced by the Agreement I agree as it no longer exists, it is not enforceable and compliance with it is impossible.

With regard to 6 above, it is true there was no Certificate of Urgency as is in law required for, according to Rule 8 (22) (e), 'every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he *bona fide* believes it to be a matter for urgent relief.' Mr. Wessels has referred to the case of the **Commander LDF and Another v. Matela C of A (CRI) No. 3/99** in terms of which the Appeal Court has noted (at p.16) that 'it is also not enough that counsel merely certifies urgency. Certificates of Urgency must shortly state the grounds for

urgency. Again a failure to do so may well lead to a dismissal of applications and special costs orders in appropriate circumstances.' In the instant case, not only is there no certificate of urgency, but it has not been stated why the application being urgent it must jump the queue.

With regard to Mr. Wessels' submissions, Mr. Kulundu was in general agreement and for this he is commended. I am the last to say that these slip-ups and omissions are deliberate or reflect on the ability or knowledge of counsel concerned for more often than not they are the result of pressure of work.

Having regard to the circumstances of this application and totality of points in limine raised I have come to the conclusion that it is not a fitting case to allow the applicant to bring a fresh application on the same papers supplemented by proof of authority and other requirements and much as I am not disposed to have cases decided on technical points but on their true issues, the judgement of this court is to have this application dismissed. It is also my painful duty to order costs on a higher scale.

Accordingly, this application is dismissed with costs on an attorney-and-client scale.

G. N. MOFOLO
JUDGE

For the Applicant : Mr. Kulundu

For the Respondent : Mr. Wessels, S.C.