CIV/APN/390/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

NATIONAL UNION OF RETAIL & ALLIED WORKERS (NURAW) — APPLICANT

and

THE COURT PRESIDENT (LABOUR COURT) — 1ST RESPONDENT

SOTHO DEVELOPMENT CORPORATION (PTY) — 2ND RESPONDENT

J U D G M E N T

To be delivered by the Honourable Mr. Justice G.N. Mofolo on the 10th day of January, 1997.

In this application an order of court is sought in the following terms:-

1. That all the periods and modes of service prescribed by the Rules be dispensed with on the basis of the urgency of this application.

2. That a Rule Nisi issue returnable on a date and time to be determined by this Honourable Court calling upon the Respondents herein to show cause, if any, why,

(a) The 1st Respondent herein shall not be ordered and directed to transmit the record of proceedings in LC 106/96 to to this Honourable Court within four (4) days of receipt of the order herein.

(b) The matter in Lc 106/96 shall not be reviewed and set aside, by this Honourable Court.

(c) The interim order of this Honourable Court granted on the 30th September, 1996 in CIV/APN/340/96 shall not remain in operation pending the hearing and finalisation of this application.

(d) This Honourable Court shall not grant applicant further and/or alternative relief.

The application was opposed.

Mr. Putsoane for the applicant has submitted on behalf of the applicant that the reason for the strike was because members of the applicant were demanding from the 2nd Respondent reason(s) for the dismissal of some of the employees. While an employer may dismiss, it was necessary for the employer to first inform the union for such a decision. The strike which union members

engaged in was not an illegal strike as the law countenanced collective bargaining by Union members. The suspension of union members was, nevertheless, according to Mr. Putsoane, illegal for all workers had returned to work on 11th September, 1996 at 7.30 a m

According to Mr. Putsoane, workers had returned to their work site but had refused to sign a from requiring them not to engage in further strikes. The form, so Mr. Putsoane submitted, was restrictive and amounted to an unfair labour practice and was used as an arm-twisting tactic. It could not be said that because workers did not sign the form it meant they did not want to return to work.

The Labour Court was not to have decided on the legality or otherwise of the strike for workers had returned to work. The first ultimatum was an inducement to return to work but the second one was redundant and superfluous. The onus was on the respondent to show that refusing to sign a form against one's interest amounted to a dismissal. Effectively the form frustrated the workers. Several cases were quoted by counsel in support of his submissions. Further, so Mr. Putsoane submitted, the form was not within the law and the onus was on the 2nd respondent to show that he had acted lawfully - otherwise the dismissal was capricious and arbitrary. According to sec. 66 (1) of the Labour Code, nowhere does it say failure to sign amounts to or is a valid reason for expulsion. It was settled law that

an illegal strike amounted to misconduct; an ultimatum, though, was inducement to return to work but workers were not to be intimidated to return to work.

There were, so submitted Mr. Putsoane procedural aspects to be observed and these included:-

(1) ensuring that many workers were not dismissed;

(2) workers receiving advise from unions of their choice;

(3) employer not being adamant, uncompromising and unimaginative in approaching the decision whether or not to dismiss workers;

(4) dismissal not being the last resort.

Moreover, so contended Mr. Putsoane, dismissal was not necessary to avoid economic harm.

According to Mr. van Tonder for the respondents, this strike was illegal because it did not follow procedures in the Code being, according to sec. 226 (1) of the Code, conciliation, mediation, intervention. It was only when these remedies had been exhausted that workers could engage in a strike. Applicants without taking necessary steps as contemplated by the Labour Code downed tools and refused to work. There had been two meetings on 10 September, 1996 where workers were informed that they had engaged in a wild cat strike being one which does not follow procedures. If the right procedure had been followed the Labour Commissioner would have conciliated. Workers had been rightly dismissed as it was for misconduct. According to Mr. van Tonder,

there is no way the strike could have been lawful unless it had followed provisions of sec. 230 of the Labour Code.

In the Labour Court it had been contended that the reason for the dismissal was the illegal strike; before this court counsel for the applicant is changing the thrust of his argument and is now claiming that the reason for dismissal is because the workers refused to sign a form which required workers to refrain from engaging in illegal strikes and it depended on the 2nd respondent to show that the form was signed or not signed. According to Mr. van Tonder, an ultimatum had been given on 10th September, 1996 requiring workers to return to work the following day at 7.30 a.m. There had also been an ultimatum to quit the premises.

Mr. van Tonder posed the question as on whom the onus lay considering it was the applicant who asserted that there was a document prescribing a condition precedent if the workers were to return to work. It was always understood that those who were not on strike would return to work even if they hadn't done so.

In reply Mr. [illegible]tsoane submitted the case was one of a worker who having returned to work was made to sign an undertaking not to strike and unable to commit himself, was dismissed. The test in this regard was objective and the Labour Court in coming to its conclusion should have applied an objective test for there was a reason for workers not to have signed the document binding

them to refrain from striking. If this was the employer's reason for dismissing the workers, he should have given them a hearing - it was speculation to say they did not sign because they were still on strike.

The inquiry in this application is whether the strike initiated by the applicant members was legal or illegal. If it was legal the question arises whether the 2nd respondent followed normal procedures and whether, therefore, he was entitled to dismiss the workers. On the other hand, if the strike was illegal this would be the end of the matter and I doubt 2nd respondent's decision to dismiss workers of an illegal strike would be questioned.

In his Founding Affidavit, Ts'eliso Ramochela, an officer of the Applicant says at

Paragraph 5.1

> "________ the only issue on the said judgment which I can say was correctly decided by the 1st Respondent is a portion contained in paragraph 4 where it is stated as follows:
>
> Management followed this promise by issuing yet another ultimatum that the striking (workers) should return to work at 07.30 hours the following day. It seems to the court that, clearly the issue of suspension became the thing of the past as soon as management re-opened avenues for the workers to return to work. We accordingly find that in the circumstances of this case there is no suspension to declare unlawful as it was long overtaken by events." (The underlining and word in brackets is ours).

Paragraph 5.2

> "I submit that the said ultimatum also had the effect

of overtaking the events of the strike, whether legal or illegal since the workers returned to their working stations in compliance thereof.

Therefore. the 1st Respondent improperly exercised his discretion in this regard, by deciding that the sixty union members were lawfully dismissed because they were engaged in an illegal strike. At the time of their dismissal they were no longer on strike. They had returned to their working stations. Instead of 2nd Respondent assigning them work, it issued them with forms.

Paragraph 5.3

"On the said ultimatum there was a stipulation that the workers who returned to work would be required to sign a form wherein they undertook to refrain from engaging in illegal strikes in the future.

The said condition did not state that any worker who refused to sign the said form would be dismissed. such that in my humble submission this was intended to enforce discipline."

Paragraph 5.4

The workers. all of whom had reported to their work stations at 7.30 hours on the 11th September. 1996 in compliance with the ultimatum were then issued with the said forms. and they were instantly dismissed when they refused to do the same. Therefore the workers were dismissed not because they were on strike at the time but because they refused to sign the said forms.

Mr. Leonid Grinberg. General Manager of the 2nd respondent says the following in his Opposing or Answering Affidavit:

5.

Ad Para. 5.2.1 thereof

(a) In order to fully understand the basis of the judgment of the Labour Court in this regard the full text of the ultimatum (please see Annexure 11 to Grinberg's Supporting Affidavit filed with Labour Court) must read:- the last

sentence of the last paragraph of the ultimatum reads as follows:

> "Employees who wish to take advantage of Management offer to return to work will be required to sign an undertaking to refrain from any illegal action of this nature."

(b) This is part of the ultimatum with which the Employees did not comply, because they refused to sign the `undertaking to refrain from any illegal action of this nature. How can it be said that they complied with the ultimatum, when they refused to sign the said undertaking'. The argument that Emplpyees complied with the ultimatum is not true as they failed to comply with a major integral part thereof. If you comply with the ultimatum, you comply with it fully not partially

(c) The Employee were still on an illegal strike. which could only end when they resumed work. after signing the undertaking in the last paragraph of the ultimatum

He says the signing of the undertaking was a pre-condition to return to their work stations. They had known of this pre-condition on 10th September. 1996 and when they returned on 11th September, 1996 the pre-condition not being fulfilled they could not return to work as by not signing the undertaking they were still on strike.

Ad. Para. 5.3 thereof

> "Management gives a last 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...."

Ad. Para. 5.4 thereof

The workers did not report at their work stations at 07.30 hrs on 11th September, 1996 according to our meaning of "Work Station" or "duty station." We consider "duty station" as the actual office.

> workshop, etc. where one works - not outside the gates of the company. If applicants' meaning of "duty station" is the gates of the company/factory, we beg to point out that he is wrong. Let it be noted that Employees were all along at the gates and/or on the premises when they were on strike and refused to vacate the said premises. Surely applicant cannot be heard to say that people who at all times had been on the premises, that on the 11th September, 1996 they were then on their duty stations - they were not on their duty stations but outside the gates of the company

I have made these reproductions with a view to elucidating some of the arguments that seemed to diverge and especially Mr. Putsoane's argument that the condition precedent by Mr. Grinberg had been overtaken by events in view of the fact that workers had returned to work and in any event the undertaking was oppressive to the workers and not sanctioned by the law. Also Mr. van Tonder's assertion that the question of an undertaking by Mr. Grinberg was being raised for the first time before this court.

As things are Mr. Grinberg's condition precedent in no way violates the code nor does it vitiate rights of the workers: where the condition precedent was intended to frustrate, inhibit or make workers refrain from their right to strike this court would certainly strike down such a requirement as illegal: I do not see workers as having been blackmailed in order to sign. All that was required of them was to refrain from engaging in illegal strikes to the detriment of the interests of the company. Mr. Grinberg's view remains inviolable for he says so long as the condition precedent was not complied with he took the worker's to be persisting in their illegal strike. Strictly, Mr. Grinberg

was willing to re-engage the worker's provided they showed remorse and willingness not in future to engage in illegal strikes. He also says there was another ultimatum namely, that if the workers did not return to work they would be regarded as having repudiated their contract of employment with resultant automatic dismissal.

As for Mr. van Tonder's submission also referred to above, he does not seem to have had a good grasp of facts as laid down in the court a quo.

Mr. van Tonder has submitted that this was not a legal strike and the 2nd respondent was in the circumstances entitled to dismiss the workers; sec. 230 of the Labour Code Order, 1992 quoted by him reads:

> "A strike or lock-out carried out in accordance with the provisions of section 229 shall be lawful. Any other strike or lock-out shall be unlawful."

Now, section 229

(1) reads:-

> where the Labour Commissioner has served a notice on the parties referring a trade dispute to arbitration, any party may either consent to arbitration or serve on the Labour Commissioner and on the other party or parties a notice refusing consent to arbitration, in accordance with sub-section (2).

(2) A notice refusing consent to arbitration may also contain a statement of intention to declare a strike or, as the case maybe, a lock-out in furtherance of the dispute. In no case may a strike or lock-out be initiated fewer than seven days after this notice has been served

on the other party or parties and on the Labour Commissioner.

(3) When the time-limits for the settlement of disputes prescribed in sections 225, 226, and 227 have been exceeded, a party to a labour dispute may declare a strike, as the case may be, a *lock-out in furtherance of the dispute.* In such a case, the seven-day notice required under sub-section (2) shall be deemed to have been given.

Sub-section (1) of section 229 appears, to this court, to be presumptuous, it does not say on what information the Labour Commissioner will be acting in referring the dispute to arbitration or for that matter by whom the Labour Commissioner is to be informed that there is a trade dispute.

In this case it appears that an undated letter was written presumably to the management of the respondent company requesting the management to re-instate two workers, namely: Sehloho and Scott. Whether this was the right thing to do has not been answered in the proceedings and whether the management having been notified on workers dissatisfaction in work place the management was to pass this to the Labour Commissioner has not been made clear. Suffice it to say though that the 2nd respondent ignored this letter perhaps on the ground that the strike was illegal as contained in his letter of 9th September, 1996 where it is intimated that work was stopped 'with no prior notice' 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. Such an action by an employer

cannot be said to have been in accordance with the behests of the statute and the tenets of natural justice' (see Paper Printing. Wood & Allied Workers Union v. Pienaar N.O.. 1993 (4) S.A. 621 (A.D.)

A question also arises as to who should have reported the trade dispute to enable the Labour Commissioner to take appropriate action in the circumstances. As the trade dispute was reported to 2nd despondent, this court holds that common sense and rules of fairplay dictate that the 2nd respondent should have reported the trade dispute for appropriate action. This court does not subscribe to the perception by the Labour Court that it was incumbent on workers following laid down procedures that before embarking on the strike the workers should have given such a notice for the fact of the matter is that the dispute was reported to the respondent management and had the management acted fairly and directed its mind to the letter. purportedly Annexurè "e", a different result would have eventuated. I say a different result because on report by him being received it is the Labour Commissioner who initiates conciliation or arbitration according to the circumstances of each particular case reported to him.

But circumstances in the case under review seem a little different for while it maybe said that the 2nd respondent should have acted, it appears in this case one Ramochela was present almost throughout the deliberations between the 2nd respondent

and the workers and that there was a time when Mr. Ramochela as a representative of the applicant acted on behalf of the workers. It is not clear why Mr. Ramochela did not for example. apply for conciliation when he could not agree with the 2nd respondent.

It was said in Amalgamated Engineering Union v. Minister of Labour. 1949 (4) S.A. 908 (A.D.) that in applying for a conciliation board the trade union was not benefitting itself but benefitting its members. It was also said in this case that while interests of employees were represented by a Trade Union. interests of employers were represented by an employer organisation and that where there is no employer organisation. interests of employers individually or as a group together with a registered trade union or group of trade unions may form an industrial council. This case is also authority for the proposition that where there is no registered industrial council a party or parties to the dispute as the case may be may apply for conciliation. In this case neither party applied for conciliation and although the law appears to be clear that either party may apply for conciliation the Labour Court as I have said was of the view that workers or the applicant for that matter should have applied for conciliation. This court is well-aware. though. that the Labour Court is not bound by rules of evidence in terms of the Code: this. notwithstanding, the presence of Mr. Ramochela as representing the applicant and the presence of second respondent was sufficient evidence that there was a dispute in which employees and employers were respectively

represented.

Centlivres, J.A. (as he then) was found that where, on the one hand, employees were represented by a trade union and an employer's organisation on the other, it did not seem that such a dispute was to be referred to a conciliation board except where a trade union applied for one. It also, according to the learned judge, appeared that individual employee(s) could also apply for a conciliation board.

In Walker, N.O. v. De Beer, 1948 (4) S.A. 708 (A.D.) "Strike" was described as

> "the refusal or failure by them (i.e. employee) to - accept re-employment and in pursuance of any combination, agreement or understanding, whether express or not, entered into between them; and if the purpose of that refusal (or failure _____ is to induce or compel any person by whom they or any other persons are or have been employed to agree or to comply with any demands concerning conditions of ___ re-employment or other matters made by or on behalf of them or any of them or any other persons who are or have been employed."

And the relevant portion of lock-out is defined as:-

> "Lock-out means _____ the refusal or failure by him (i.e. an employer) to re-employ anybody or member of persons who have been in his employ if that _____ refusal or failure is in consequence of a dispute regarding conditions of employment or other matters and if the purpose of that refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons, to agree or to comply with any demands concerning condition of ___ re-employment made by him."

According to Walker's case, once there is a dispute or put

in another way a 'strike' or 'lock out' on a particular date, there is no contract of employment in existence. In the instant case there was both a strike and lock-out. In Walker's case employers were willing to re-engage their employees at reduced rates though the dispute was not initiated by the workers. In this case the strike was by the employees and lock-out by the employers. The employer in the instant case was willing to re-employ the employees if they signed the undertaking and the latter were not willing to sign the undertaking so that it may be said that as they were not employed anymore they refused re-employment.

It was contended on behalf of the applicant that the demand to refrain from an illegal strike was oppressive to the workers and flew in the face of the fair labour relations between the employer and employee. I don't think so for in the first place the employer was entitled to protect his interests; apart from this, far from being oppressive and restrictive, it was an inducement on the part of the employer to have workers return to work.

According to the judgment in Walker's case supra, as the Trade Union was itself involved in the dispute (and it is the applicant before this court) and not the employees, it does seem there was no necessity for conciliation unless there was an application to the effect. There having been no conciliation there should, in terms of the law, have been arbitration and

pursuit of an improvement in their conditions of service or matters concerning or on behalf of other employees went on strike that constituted a strike within the meaning of the Act. A lock-out was converse of a strike for it occurred, according to the Act, when workers are dismissed or excluded from working premises. It was said exclusion or dismissal was a means of inducing workers to comply with the demand of the employer to comply with conditions of employment or other matters made by or on behalf of the employer though in Walker, N.O. v. de Beer above it was held the same set of facts could not constitute a "strike" as well as a "lock-out."

The complaint in this case had been that unless dismissed employees were re-employed work would not be resumed. According to the court, there was therefore a dispute in existence concerning the re-employment of the three dismissed workers. Employees demanded their re-employment and the company refused to employ them. It was said refusal to work was to induce the company to re-employ dismissed workers.
Held: appellant was participating in a strike as defined in the Act for the days of the strike inclusively. In the case it was said the company had made no demand and it was the employers who made the demand. The company's act to dismiss did not constitute a lock-out within the meaning of the Act and the dismissal was not in contravention of the provisions of the Act.

From a careful review of the reasoning in this case it

appears to be that if a worker participated in a legal strike such as demanding the re-employment of a dismissed worker, so long as the strike was within the Act and therefore legal this had the effect of prohibiting the employer from dismissing the worker. The court then said at common law an employer had the right to dismiss a worker who refused to work. According to the Act, striking in certain circumstances constituted a criminal offence and it was only when particular circumstances were absent that an offence could not be said to have been committed thus making the strike 'legal.' According to Watermeyer, A.J. as he then was this did not deprive the employer his common-law right to dismiss the worker in circumstances amounting to lock-out and victimization where these existed. The court then came to the conclusion that Delport was justified in dismissing appellant for failure to carry out his contractual obligation to work.

Watermeyer. A.J.'s reasoning seemed to be that a worker who refuses to comply with his contractual obligations may be summarily dismissed. The right law therefore seems to be that by participating in an illegal strike an employee was not automatically dismissed. On the contrary, by participating in a strike workers commit a breach of their contract of employment. It was also said there was evidence Delport did not want to dismiss employees but that he enduced them saying if they agreed to work they would be re-engaged.

Facts in Smit's case supra are almost identical with those

in the instant case, workers refused to work to induce the employer to re-engage two of their fellow workers who had been dismissed. The employer's attitude does not seem to have been a desire to fire the workers but Mr. Grinberg does appear to have been willing to re-engage them if they renounced an intention to engage in what he called an illegal strike. Facts in this case do not, unfortunately, in the opinion of this court, amount to an illegal strike for all that workers did was to stop work to induce the 2nd respondent to re-employ the two dismissed workers.

And as I have said earlier, the workers did notify the management of their dissatisfaction per Annexure "e" and it was up to the management to have reported the complaint to the Labour Commissioner for mediation. I have also said that the intervention of Mr. Ramochela representing the applicant on behalf of the workers made it unnecessary for a conciliation board and here again it was up to Mr. Ramochela to apply for arbitration as he had taken over functions of the workers.

I do not agree that workers were not given enough time to confer with the management for as I have shown Ramochela took over these functions.

I do not fully appreciate the attitude of the workers whom Mr. Grinberg was willing to re-engage and induced them to sign a document to the effect that in future they were not to engage

n an illegal strike I see nothing wrong with this demand which a effectively an inducement to return to work - afterall, the thor of workers argument is that they had not engaged in an illegal strike. If they had not engaged in an illegal strike, why refuse to refrain from doing so? Workers would be perfectly within their rights if they refused to commit themselves to not striking in the future for such a commitment would be depriving them of their legitimate right to strike.

In the circumstances of this case, this court has no option but to dismiss this application. In this court there will be no order as to costs, either.

G.N. MOFOLO
JUDGE
9th January 1997.

For the Applicant : Mr. Lutsoane
For the Respondent : Mr. van Tonder