

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO UNION OF PUBLIC EMPLOYEES

APPLICANT

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

1st RESPONDENT

THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Chief Justice
Mr. Justice J.L. Kheola on the 6th day of
August, 1997

This is an application for an order in the following terms:

- "1. Dispensing with the rules of this Honourable Court as to modes and periods of service.
2. Declaring as null and void clauses or sections 31 (2) and 35 of the Public Service Bill, 1995 passed by the National Assembly in September, 1995.
3. Declaring clauses or sections 31 (2) and 35 of the Public Service Bill or Act 1995 as unconstitutional.
4. Directing the 1st respondent to delete clauses 31 (2) and 35 of the Public Service Bill 1995 from the text of the said Bill or law when presenting it for assent.

or Alternatively

5. Directing 2nd respondent and 3rd respondent to delete clauses 31 (2) and 35 of the Public Service Bill or Act, 1995 when submitting it for gazettelement.

6. Directing respondents to pay costs of this application.

It is quite clear that prayers 2, 4 and 5 of the Notice of Motion are not capable of being enforced because they attempt to stop the Legislature from doing its constitutional work. I doubt if this Court has the powers to stop Parliament from legislating. That process must be allowed to come to the end until an act of Parliament is passed; only then can the legislation be challenged in this Court as being unconstitutional.

At the time this application was heard the Public Service Act 1995 had been passed by Parliament and published in a Government Gazette No.16 dated March 12, 1996. The parties agreed that the prayers which require the decision of this Court are prayers 3 and 6 of the Notice of Motion.

The facts of this case are common cause. They are that the applicant is a duly registered trade union and its certificate of registration and constitution are Annexures "A" and "B" to this proceedings. The Public Service Act 1995 got the Royal Assent on the 28th February, 1996 and its commencement date is the 9th April, 1996.

The real issue before this Court is a point of law namely,

whether section 31 (2) and 35 of the Public Service Act 1995 (The Act) are unconstitutional or not. Section 31 (2) reads as follows:

"Notwithstanding any other law, public officers shall not become members of any trade union registered under the Labour Code Order 1992".

Section 35 reads as follows:

"The Labour Code Order 1992 shall not apply to public officers".

The above two sections of the Act have been written in plain and unequivocal language. Section 31 (2) means that as soon as the Act was enacted the existence of the applicant ceased because its members are public officers who are prohibited from becoming members of a trade union. Being a member of the applicant is now unlawful because it contravenes sections 31 (2) and 35 of the Act. The purpose of the present application is to ask this Court to make a declaration that the above two sections are unconstitutional because they are inconsistent with section 16 of the Constitution of Lesotho.

Section 3 of the Constitution provides that 'the Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall to

the extent of the inconsistency, be void.' It follows that if any person alleges that his constitutional rights have been violated or are likely to be contravened he can make an application challenging that contravention in terms of section 22 of the Constitution which reads as follows:

1. If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
2. The High Court shall have original jurisdiction -
 - (a) to hear and determine any application made by any person in pursuance of subsection (1); and
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of forcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The section of the Constitution which protects freedom of association is section 16 which reads as follows:

- "(1). Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes.
- (2). Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision -
- (a) in the interests of defence, public safety, public order, public morality or public health;
 - (b) for the purpose of protecting the rights and freedoms of other persons; or
 - (c) for the purpose of imposing restrictions upon public officers.
- (3). A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfied the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2) (a) or for any of the purposes specified in subsection (2) (b) or (c)."

Another important and relevant section of the Constitution, ; section 31 which reads as follows:

"Lesotho shall take appropriate steps in order to encourage the formation of independent trade unions to protect workers' rights and interests and to promote sound

labour relations and fair employment practices."

In its founding affidavit deposed to by Nthakeng Selinyane who is the President of the applicant, it is alleged that in order for the Government and/or any law to restrict or curtail a fundamental right such as the freedom to associate, section 16 (3) of the Constitution provides that such an abridgement must be necessary in a practical sense in a democratic society.

The actual words of the Constitution are that the abridgement must not be greater in extent than is necessary in a practical sense in a democratic society in the interests of imposing restrictions upon public officers.

The deponent alleges further that such a law must be made in pursuit of a legitimate aim and must have been necessary to protect the rights of the larger society. The said clauses are not made in pursuit of a legitimate aim as the law only protects a certain employer against the interests of its employees.

He alleges that the term democratic society denotes that Government's action or law be proportional to interests protected and a fair balance be made between societal interests and individual rights. He alleges that in the present case the obvious deregistration of the applicant and the violation of international conventions that Lesotho has ratified and has incorporated them in the Labour Code Order 1992 far outweighs the hidden motive pursued by Sections 31 (2) and 35 of the Public

Service Act 1995. He submits that the law has failed the test of necessity which further implies that there should be in existence a pressing social need to protect the Government against a trade union which is regulated by a law which conforms to international labour standards.

He avers that the law in question is actually a misuse of the envisaged restrictions provided for under the Constitution.

The answering affidavit has been filed by the Prime Minister of the Kingdom of Lesotho, Dr. Ntsu Mokhehle who is the Minister responsible for the public service in terms of the Public Service Act 1995. Paragraphs 11, 12, 13, 14, 17, 18 and 19 read as follows:

11.

"In the perception of the Government the philosophy behind the provisions of section 31 (2) and 35 is the following: Firstly, the economic conditions prevalent in the country and the resources available to Government have to be considered in any sound management of the nation's economy. It is a trite fact that our resources are extremely limited due to several constraints. Not only that the government has to make provisions for its day-to-day operations it must also provide for developmental activities without which the country's economic future will become bleak. It is a notorious fact that the main economic nightmare faced by the government is the growing unemployment. Jobs are simply not available to those who enter the labour market. The prospect of Basotho miners now profitably employed in the mines in South Africa being retrenched therefrom has created problems of frightening magnitude. The prospects of substantial investment of capital from the international donors is not that rosy. Against this bleak economic scenario the Government has no option but to limit its wage-bill to manageable proportions. Cutting-down the operational budget of the Government is the ever-present demand of the International

Monetary Fund and the World Bank, our main donors. A large deficit triggers spiralling inflation which will distort the economy.

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Secondly, public officers, not unnaturally are prone to compare their remuneration package with those prevalent in the neighbouring countries like the Republic of South Africa, Botswana etc. But in the foreseeable future there are no prospects of Lesotho being able to introduce similar structures as obtaining in those countries.

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Thirdly, trade union organisations from their historical origins are confrontational in nature. Industrial action can have no legitimate place in the public service, because governmental activities are not profit oriented but meant to serve the people.

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Fourthly, any settlement of disputes with public employees which would entail unjustifiable upward revision of salaries will cause concomitant problems in the private sector and will result in galloping inflation. History had demonstrated the dangers in such situation.

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It should be appreciated that while the new Public Service Act prohibits public officers from becoming members of a trade union, in section 31 (1) it provides that public officers may form and establish staff associations under the provisions of the Societies Act 1966. It is trite that the freedom of association had not been taken away.

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Section 32 and 33 of the Public Service Act have provided for a negotiating forum for public officers whereat matters of interest to them could be discussed and solutions could be found in a calm and reasonable manner. The provisions of Section 34 of the Public Service Act are very significant in this regard.

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It will be clearly apparent that the impugned provisions of the Act are absolutely necessary in Lesotho. The restrictions imposed by the Act are an imperative to protect the larger interests of the country and all its people including future generations. Government had to balance the needs and interests of the nation as a whole, and to provide for a fine proportionality between the measure passed by Parliament and the object desired to be achieved."

It seems to me that section 16 (2) of the Constitution gives the Government the right or power to restrict the freedom of association as far as public officers are concerned. It provides that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision, among other things, for the purpose of imposing restrictions upon public officers in the sphere of labour practices. That is exactly what section 31 (2) of the Public Service Act 1995 does. It provides that public officers shall not become members of any trade union registered under the Labour Code 1992. This power or right given to the Government by the Constitution is not absolute because it is qualified by subsection (3) of section 16.

The qualification shifts the onus from the applicant to the Government by providing that a person shall not be permitted to rely in any judicial proceedings upon such a provision of law as referred to in subsection (2) except to the extent to which he satisfied the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic

society for the purpose of imposing restrictions upon public officers. The crux of the matter is whether the Government has discharged the onus imposed on it by subsection (3) of section 16 of the Constitution.

Mr. Rakuoane, counsel for the applicant, submitted that the respondents have failed to discharge the burden of proof imposed upon them. To do so they had to prove that the provisions are reasonable or necessary in a practical sense in a democratic society. He submitted that the word reasonableness describes a just relationship between the means and the end. He quoted from "The Legal System of Lesotho" 1992 by V. Palmer and S.M. Poulter where the learned authors question the reasonability of a person who heads only south to reach the north pole, who burns his house to roast a pig or who purchases a rifle to hunt a unicorn. Such acts are deemed unreasonable because there is a bad relationship between the means and the end as they are too disproportionate.

He submitted that to satisfy the test of reasonability the following issues must be present:

- (i) there must be a rational connection;
- (ii) the connection must not be too remote;
- (iii) the restriction should not be disproportionate;
- (iv) the end must be possible and lawful.

In the context of the Public Service Act 1995, so he

submitted, the object of Parliament is to fight strikers in the public service or to cultivate harmonious relationship between the public officers and the Government of Lesotho. He asks whether Parliament can achieve this objective by banning or prohibiting trade unions. He submitted that it is a well established worldwide phenomenon that trade unions are promoted by the United Nations system itself. Article 23 of the Universal Declaration of Human Rights, sub-Article 4 provides:

"Everyone has the right to form and join trade unions for the protection of his interests."

The United Nations established the International Labour Organisation (ILO) to oversee the promotion and interests of both workers and employers. Lesotho is a member of ILO. He submitted that the connection is irrational in that the trade unions can even be a better guarantor of good and harmonious relationship between the government and its employees as the United Nations standards are demonstrating it.

Mr. Rakuoane submitted that the issue is whether the banning or prohibition of public officers from joining and or forming a trade union is not too remote to achieve the designated or desired objective or purpose. A statute may be considered unreasonable because the relationship is remote or simply hypothetical rather than proximate.

In his submissions **Mr. Tampi**, the Deputy Attorney-General,

seems to agree with **Mr. Rakuoane** as regards the principles of law involved in the present case; but does not agree with him as far as the application of the law to the facts of the present case is concerned. He submitted that the first test to be applied is whether the restriction is reasonable. Reason describes a just relationship between means and end. There must be a rational relationship between the measure passed by Parliament and the object Parliament wishes to achieve. Another aspect to be considered is that the connection should not be too remote. Lastly the restriction must not be disproportional. To determine whether a particular restriction is necessary a number of guidelines have been developed by the European Court of Human Rights and they have been summarised in the **Silver Case Series** **A No.61**. In the above case it was held that the objective "necessary" is not synonymous with "indispensable" neither has it the flexibility of such the expression of "reasonable" or "desirable". It was also held that the contracting states enjoy a certain but not unlimited margin of appreciation in the matter of imposition of restrictions. Thirdly it was held that the phrase "necessary in a democratic society", the interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued. A country should have the freedom to fashion its approach in the light of the situation obtaining in its respective territory.

There is another case which is very instructive as far as imposition of restrictions is concerned. It is another case decided by the European Court of Human Rights. It is **Berrehab**

Case. In that case the applicant's case was that the refusal to grant him a new residence permit after the divorce and the resulting expulsion order infringed Article 8 of the Convention, which provides":

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

- 2: There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The facts of the case were that Berrehab was a citizen of Morocco. He lived in the Netherlands for some time before he married a Dutch woman. He obtained a residence permit based on the ground that he married a Dutch citizen. Their daughter was born after their divorce. The State refused to grant him a new residence permit after the divorce.

In dealing with "legitimate aim" the Court said:

"25. In the applicants' submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8 §2; in particular, they did not promote the "economic well-being of the country", because they prevented Mr. Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.

The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the

meaning of paragraph 2 of Article 8 rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market."

In dealing with the phrase "necessary in a democratic society" the Court said:

"27. The applicants claimed that the impugned measures could not be considered "necessary in a democratic society".

The Government rejected this argument, but the Commission accepted it, being of the view that the interferences complained of were disproportionate as the authorities had not achieved a proper balance between the applicants' interest in maintaining their contacts and the general interest calling for the prevention of disorder.

28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the *W. v. the United Kingdom* judgment of 8 July 1987,

Series A no. 121 - A, p.27, §60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp 31-32, §67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, *inter alia*, the judgment previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted

(see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraph 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to beat those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing

especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8."

In the instant case it is alleged that the pressing social need lies in the fact as expounded in the answering affidavit of the Prime Minister is to prevent a situation whereby untenable claims for remuneration may be made by public officers when the Government has not means to meet them. It is alleged that it is a notorious fact which the Court can take judicial notice of that one of the pressing problems of this country is the narrowing opportunities of employment within and outside the country. It is a fact that many people who used to work in the mines in the Republic of South African are being retrenched and are returning to Lesotho in large numbers. It is also a fact that the Government is the largest employer and should a situation be created due to spiralling cost of the public service it will further narrow the scope of public employment and throw the entire national economy out of gear.

The above submissions were made by **Mr. Tampi**. He submitted further that it is a universally known fact that a trade union throughout history is confrontational by nature. In the private sector it certainly has a relevance in that history has demonstrated that the advent of trade union and collective bargaining had resulted in a manifest improvement of the working conditions of labour. Against that should be considered the fact that a commercial enterprise is profit-orientated. It is open to them should economic conditions permit, to pay higher wages and set it off by increasing the price of their product.

It is now time for the Court to make some findings of fact and then apply the law to such facts. One of the allegations made by the Prime Minister in paragraph 13 of the respondents' answering affidavit is that trade unions from their historical origins are confrontational in nature. Industrial action can have no legitimate place in the public service because governmental activities are not profit orientated but meant to serve the people. Is it a fact that trade unions are confrontational in nature? It would have been very helpful to the Court for the applicant in its replying affidavit to have specially answered this allegation. Instead it has only said that industrial action and trade union are not synonymous. That does not mean much to answer the allegation that trade unions are confrontational in nature. In my experience as a judge of the High Court and as former chairman of the Unfair Labour Practices Tribunal under the 1964 Labour Law I tend to agree with the respondents' allegation that the trade unions are

confrontational.

I have presided over a number of cases involving dismissals based on unlawful strikes. In almost all such cases I found that trade unions were not only confrontational but were also unreasonable. They usually take strike action before they have exhausted the procedure prescribed by law. The strike action is preceded by long negotiations in an attempt to reach settlement of the trade dispute. These procedures are set out in sections 225, 226, 227 of the Labour Code Order, 1992. The last strike by the Lesotho Union of Bank Employees is a typical example. One of the strikers appeared on television and admitted that the strike was unlawful but vowed that it would continue. It actually continued until one of the bank managers was murdered.

Other strike involved workers in the building industry and the employees of the contractors in the Lesotho Highland Water Authority.

I am convinced that the fear of the respondents that trade unions are confrontational in nature is not unfounded. In the past the strikes by the Lesotho Union of Bank Employees disrupted the lives of the people of this country so much that some people decided to transfer their accounts to Lesotho Bank or to other banks in the Republic of South Africa. The causes of these strikes were unreasonable demand of drastic upward revision of salaries without taking into account the economic resources of this country. The tendency of the employees in this country is

to compare their salaries with those of similar positions in the Republic of South Africa. This approach is altogether unreasonable because the economy of that country is far advanced as compared to Lesotho's economy.

If public officers' trade unions would behave like trade unions in the private sector (and there is no reason why they should not) the Government services would come to a standstill because there would be no money to meet the unreasonable demands for higher wages. It is true that the Government is the largest employer in this country. Many public officers would have to be retrenched if unreasonable demands for high salaries were made. The economy of this country cannot meet such demands unless very drastic entrenchment was undertaken.

In the past the majority of the male adults of this country used to work in the mines in the Republic of South Africa. Due to growing unemployment in that country it has become necessary to retrench Basotho mineworkers and other employees from surrounding countries in order to accommodate the growing population of that country. It is a fact that large numbers of Basotho men are returning home and have to be provided with jobs locally. The Government cannot afford to do so if the salaries of the public officers are so high that no extra funds are available for the creation of new jobs. At the moment there are many Government buildings that are being built and many people have found some employment in the building industry.

Do sections 31 (2) and 35 of the Public Service Act 1995 pursue any of the legitimate aims listed in section 16 (2) of The Constitution, particularly subsection (c) which provides for the purpose of imposing restrictions upon public officers? It seems to me that the answer must be in the affirmative. The Government is empowered by section 16 (2) to impose restrictions upon public officers in the field of labour but they must justify the restriction in terms of section 16 (3) of The Constitution that it does not abridge the rights or freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of imposing restrictions upon public officers in the field of labour.

The purpose of the Public Service Act 1995 is stated in the Government Notice No 179 of 1995 as being "to develop and maintain a stable and disciplined public service under the general direction and control of the Minister Responsible for the Public Service and the other Ministers of Government of Lesotho, and under the supervision of the Principal Secretaries.

In **Berrehab case** - supra - it was held that "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. What is the pressing social need in the present case? The most serious problem facing the Government of Lesotho is the growing unemployment. School leavers and other young people wishing to join the labour market are unable to do

so because jobs are just not available. Because the economy of this country is not all that good, it is the duty of the Government to limit its wage - bill to manageable proportions, cutting down the operational budget of the Government is the ever-present demand of the International Monetary Fund and the World Bank, our main donors.

If it is correct that trade unions are confrontational in nature it means that the Government would from time to time be faced with unreasonable demands for higher wages and industrial actions which would further depress the economy of this country. The preservation of a sound economy is pressing social need which entitles the Government in terms of section 16 (2) (c) of The Constitution to impose restrictions upon public officers.

The next question is whether the restrictions imposed upon public officers are proportionate because the applicant's view is that the Government has not achieved a proper balance between their rights of forming or joining a trade union and the general interest of preserving a sound economy of this country.

It seems to me that although the Government has completely banned trade unions as far as public officers are concerned, the freedom of association has not been banned. Section 31 (1) of the Public Service Act, 1995 provides that 'Public officers may form and establish a staff association or staff associations under the provisions of the Societies Act 1966.' Section 32 (1) provides for the establishment of the Public Service Joint

Advisory Council which shall consist of equal number of members appointed by the Minister and members appointed by any registered associations representing the general body of public officers in the public service of Lesotho.

The objects of the Council are set out in section 34 (1) as follows:

"(1) The objects of the Council are:-

- (a) to secure the greatest measure of cooperation between the Government of Lesotho, as employer, and the general body of public officers in matters affecting the public service with a view to increased efficiency in the public service combined with the well-being of public officers;
- (b) to provide machinery for dealing with general grievances; and
- (c) generally to bring together the experience and different points of view of representatives of departments, sub-departments,

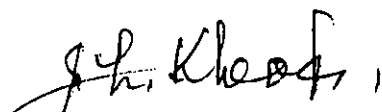
branches and offices of the
public service."

The preamble to the Societies Act 1966 reads as follows:

"To provide for registering societies and for dissolving unlawful societies, to the extent that is necessary in a practical sense in a democratic society in the interests of public safety, public order, public morality and for protecting fundamental human rights and freedoms; and to make provision for related matters."

I have come to the conclusion that the impugned legislation pursues the legitimate aim listed in section 16 (2) (c) of The Constitution. It seems to me that there is a proper balance between the applicant's interests of establishing staff association or staff associations in order to enjoy the fundamental human right of freedom of association and the general public interest of preserving a sound economy of the country.

In the result the application is dismissed with costs.


J.L. KHEOLA
CHIEF JUSTICE

6TH AUGUST, 1997.

For Applicant - Mr. Rakuoane
For Respondents - Mr. Tampi