**IN THE LABOUR APPEAL COURT OF LESOTHO**

**HELD AT MASERU** **LAC/CIV/A/13/2013**

**In the matter between:**

**'MANAPO MAISA AND 142 OTHERS** APPELLANTS

**AND**

**NEIN HSING INTERNATIONAL (PTY) LTD** RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS : MR R. MOTHEPU

MR L. MOFELEHETSI

Heard on : 31 OCTOBER 2013

Delivered on : 7 NOVEMBER 2013

**SUMMARY**

*Appeal from the Labour Court to the Labour Appeal Court – appellants having been dismissed for participating in an illegal strike – two unions negotiating with management for reinstatement of workers but 143 workers not reinstated.*

*Appellants complaining inter-alia that there was selective none-reinstatement of appellants as well as selective reinstatement of other employees leaving appellants "out in the cold". – Whether the Labour Court was correct in not addressing the issue of selective reinstating.*

*Labour Appeal Court held that the Labour Court erred in not determining the issue of selective reemployment despite the fact that the issue had been raised and pleaded. – Court holding that the 143 appellants had been victimise of selective none-reinstatement and that the Labour Court ought to have so found.*

*Matter remitted to the Labour Court for the court to determine whether reinstatement is possible or whether appellants should be given compensation including the determination of the quantum for compensation.*

**JUDGMENT**

**MOSITO AJ**

## 1. INTRODUCTION

1.1 This is an appeal from the Labour Court. There were 143 Applicants in this matter in the Labour Court and only 2 Applicants testified. Parties agreed that the remaining Applicants would file affidavits confirming the evidence of the 2 Applicants as far as it related to them. This proposition was accepted by the Court and parties duly complied with.

1.2 Secondly, this dispute involved claims for discrimination and unfair dismissal for participation in a strike. Before the Labour Court, the parties informed the Court that they had agreed on the withdrawal of the claim for discrimination on the ground that they had also realised that it had not complied with the said section. They then by agreement requested the Labour Court to disregard all evidence and submissions concerned with the claim for discrimination and to concentrate only on the evidence relating to the dismissal for participation in a strike. It is on this basis that the Labour Court's judgment was made.

1.3 The Labour Court noted that the claim for discrimination had not complied with the provision of section 227 (5) of the ***Labour Code (Amendment) Act 3 of 2000,*** in that it had not been conciliated upon. The implication of this was that this Court had no jurisdiction to entertain that claim. As a result both parties were called in to address the Court on this issue. Having considered the submissions by the parties, The Labour Court came to the conclusion that it had jurisdiction over the claim. It held that, the agreement concluded between the trade unions concerned and the 1st Respondent was in relation to those employees who were reinstated back to work. It considered that this was a simple settlement agreement which bears no reference to the Applicants. It only provided for those who were reinstated and as such it was binding upon them alone.

1.4 The matter was finalised on the 25th March 2013 in the Labour Court. The background to this matter is essentially that an originating application was served upon the 1st Respondent on the 2nd April 2012. Realising that they had failed to file their answer within the stipulated time periods, 1st Respondent applied for condonation for the late filing of its answer, which application was not opposed. In fact, not only was the application unopposed, parties had also agreed that the application be granted.

1.5 In its answer, Respondent had raised three preliminary points of law in terms of which it sought the dismissal of the Applicants' claim. However, two were withdrawn leaving only one couched in the following:

> *"The Honourable Court lack jurisdiction to entertain the matter as the dismissal was as a consequence of an agreement that was reached between management of Respondent company and Applicants' trade unions."*

1.6 The Labour Court was in agreement with Applicants that the claim before it was not about the settlement agreement but rather arose out of the settlement agreement reached between the Appellant and the two unions. Consequently, the authorities cited by Appellant were not applicable in the matter as they concerned a situation involving the enforcement of settlement agreements. Having heard the submissions of parties, The Labour Court made an award in the following terms:

a) That the dismissal of Applicants was fair;
b) That the Applicants' claims are dismissed; and
c) That there is no order as to costs.

**2. THE APPEAL BEFORE THE LABOUR APPEAL COURT**

2.1 The first ground of appeal was that the Labour Court erred in not awarding costs in favour of applicants over the failed preliminary point of

jurisdiction. As indicated above, this was a case of unfair dismissal. Section 74 (2) of the **Labour Code Order 1992**, provides that, '[n]o costs shall be awarded in favour of either party in proceedings for unfair dismissal unless the Court decides that the party against whom it awards costs has behaved in a wholly unreasonable manner.' In the present case, there is no indication on the record that the Court considered that the 1st Respondent behaved in a wholly unreasonable manner. It is therefore not possible to find the basis for this ground. The ground cannot succeed.

2.2 The second ground of appeal is that, the Labour Court erred in applying section 227 (5) of the ***Labour Code (Amendment) Act 3 of 2000***, in respect of discrimination in holding that the claim on discrimination had not been conciliated upon. However, as indicated earlier on in this judgment, the Court noted that the claim for discrimination had not complied with the provision of section 227 (5) of the *Labour Code (Amendment) Act 3 of 2000,* in that it had not been conciliated upon. This argument is being pursued by advocate Rasekoai despite the fact that, before the Labour Court the parties agreed on the withdrawal of the claim for discrimination on the ground that they had also realised that it had not complied with the said section. They by agreement requested the Court to disregard all evidence and submissions concerned with the claim for discrimination and to concentrate only on the evidence relating to the dismissal for participation in a strike.

2.3 Mr Rasekoai relies on the judgment of the Court of Appeal in **Mbangamthi v Sesing-Mbangamthi LAC (2005-2006) 295** at 296 in which Steyn P (as he then was) remarked that, '... neither of the two issues raised had been adverted to in the court below, nor had they been raised in the papers during the 9 months period whilst the matter had served

before the High Court. Counsel submitted that he was entitled to do so "because a point of law could be raised at any time, even for the first time on appeal". There are circumstances in which such an indulgence will be granted, however, only in circumstances where it would be fair and proper to do so. See Malebo v Attorney-General - C of A (CIV) No. 5 of 2003 (unreported). Moreover, it is not only prejudice to the other side that has to be considered. A Court of Appeal hears matters after it has had the benefit of heads of argument and has had the opportunity to have regard to precedents which could guide its decisions. Full and helpful arguments and fair adjudication can be severely hampered - indeed negated - when only ill-prepared and poorly considered arguments have been submitted. This would almost always be the case if the points of law are raised for the first time at the appellate hearing and without notice to the other side or to the Court. See The Teaching Service Commission and Others v St. Patrick's High School and Another - C of A (CIV) No. 26 of 2004 (unreported). Indeed in that matter the Court held that to seek to raise new points on appeal was "both irregular and without merit". The same applies to the arguments sought to be advanced without notice to the respondent or to the Court in this appeal. It amounted to an attempt to "ambush" the other side and the Court will, as master of its processes not tolerate such an abuse. See in this regard also the decision in T.A.M. Industries (Pry) Ltd v ALFA Plant Hire (Pty) Ltd. C of A (CIV) No. 19/20004. We accordingly ruled that Mr. Mosae could not raise his points in limine on appeal for the first time without any notice to the respondent or to us and that he would have to confine himself- as indeed he had agreed - to debate the spoliation issue.’

2.4 In my opinion, the **Mbangamthi'**s case, is no authority for the proposition that, a point *expressly* abandoned in the court below, can later be raised again in the higher Court. It is therefore, not open to Adv Rasekoai to attempt to resuscitate the point before us when it was withdrawn before the Labour Court.

2.5 The next complaint is that, the Deputy President erred by inviting the parties to address him on the issue of jurisdiction. To my mind, the Court is duty bound to invite the parties to address it on the meritsof a point whenever it considers making a decision thereon, by affording them an opportunity to do so. The address by each party on the merits of a point, is and remains an important final act of participation on their part towards the determination of the issue. It is an opportunity afforded as of right to the parties to influence the trial Court's decision. The parties have a right to persuade the Court. The right to participate in the proceedings is a fundamental principle the denial of which is *per se* an infringement irrespective of the prospects of success. It seems to me proper for the Court to invite the parties to address it, even if belatedly, so long as it is before making the decision on the issue. Failure to do so would bring about an unfair result. A Judgment founded on a substantially unfair procedure must surely be void. Such a Judgment is no Judgment at all and it is without legal efficacy. See: ***Honourable MM Corbett, Writing a Judgment*** **(1995) 115 SALJ 116 at 117**. I am of the view that this ground cannot succeed either.

2.6 The fourth ground of appeal is one that seems to give me some anxiety. The appellants complain that the Acting Deputy President misdirected himself by failing to determine the aspect of consistency in the application of disciplinary measures in the alternative to the claim of

discrimination. In motivating this ground, Mr Rasekoai argued that, while it may be conceded that that the issue of discrimination was abandoned in the court a quo, the issue as to why the 143 applicants were selectively not reinstated was not addressed by the Labour Court despite the fact that it was presented before the court. He also argued that, there were no objective criteria used in deciding whether or not to leave appellants "out in the cold."

2.7 As foreshadowed in the originating application, the applicants' complaints were that there were no objective criteria used in deciding whether or not to leave appellants out of the reinstatement arrangements. This is their complaint in paragraphs 4.4(a), (b)and (d) of the originating application. The Respondent argues that this was done in accordance with the Agreement between itself and the two unions. That may well be so, but it does not answer the issue as to the existence or otherwise of objective criteria used in deciding whether or not to leave appellants "out in the cold." In the result, there is substance in the complaint that the Labour Court misdirected itself by failing to determine the aspect of consistency in the application of disciplinary measures in the alternative to the claim of discrimination, more especially, the issue as to the existence or otherwise of objective criteria used in deciding whether or not to leave appellants "out in the cold."

## 3. CONCLUSION

It is apparent that this appeal is bound to succeed on the basis of the failure of the Labour Court to decide the issue of the existence or otherwise of objective criteria used in deciding whether or not to leave appellants "out in the cold."

**4. ORDER**

1. The appeal succeeds with costs.
2. The dismissal of the Appellants is declared both substantively and procedurally unfair.
3. The matter is referred to the Labour Court to determine whether reinstatement of the appellants is practicable. If impracticable, then the parties should file affidavits establishing their monetary quantum of appellants' entitlement as compensation.
4. The Registrar is requested to give this matter priority on the roll.
5. This is a unanimous decision.

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DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellants : Advocate M. Rasekoai

For the Respondent : Advocate T. Kao