IN THE LABOUR COURT OF LESOTHO

LC/16/94

HELD AT MASERU

IN THE CASE OF

SAMUEL MABOTE & OTHERS

APPLICANTS

AND

MASERU CITY COUNCIL

RESPONDENT

AWARD

The seven applicants in this matter, were at all material time up to 31st August 1994, employees of the respondent. It is common cause that they were each served with letters dated 30th August 1994 advising them that they had been dismissed ".... from the services of Maseru City Council (MCC) with effect from 31st August 1994." The letters had been signed by Mr. Qobo, the Town Clerk.

Applicants allege in papers that their dismissal on 31st August 1994 was a culmination of events that started with the formation of a Workers' Committee (the Committee) in June 1993, into which the seven applicants were elected as members. It is further alleged that the purpose of the formation of the Committee "... was to make it a point that respondent's employees demands were met. It was inter alia respondent's employees problem that they did not know their rights as they possess no employment contracts." It may just be observed that respondent's version is that its employees know their rights although those rights have not been reduced to writing in the form of employment contracts.

Notwithstanding the conflicting versions on this point, it is common cause that in June 1994 the employees of the respondent went on strike, citing precisely this point as one of their grievances. This much is admitted by both the applicants and the respondents as is reflected in paragraph 6 and paragraph 9 of Mabote's and Ntlaloe's affidavits respectively. The strike ensued and was embarked upon by employees of the respondent under the leadership of the applicants as current members of the Committee.

On or around 4th August 1994, respondent made an ex parte application (cc863/94) in which it sought a court interdict against the present applicants from :

(a)"... unlawfully occupying applicants' premises known as Old Abattoir which is situated opposite the National Tennis Courts in Maseru;"

(b)" ... blocking access to the said premises at the old abattoir and thereby preventing other employees of the applicant from entering the premises and preventing them from discharging their daily duties as employees of the applicant;"

(c) "... inciting other employees to unlawfully occupy old abattoir premises and to block applicant's other employees' access into the said old abattoir premises and thereby preventing them from discharging their daily chores as employees of applicant;"

(d) "... entering the abovementioned premises pending the finalisation of this application".

Finally the order required the respondents (present applicants) to show cause why they should not go back to work and follow the correct procedures in dealing with their grievances.

It is common cause that following respondent's urgent application a rule nisi was issued against the present applicants returnable on 18th August 1994. However on 12th August, just four days before the return date, applicants were individually served with letters requiring them to appear before a disciplinary committee to answer certain charges, some of which clearly included the issues in respect of which respondent had obtained the order of court against the applicants. Applicants, following the advise of their lawyer, ignored the invitation. A second letter of invitation to appear before the disciplinary committee the following day at 2.00 p.m. was written on 15th August. This second letter clearly stated that it was a last notification and it had an additional charge of defying previous notification to appear before the disciplinary committee. Even this second letter was ignored, because the charges laid against applicants were said by their counsel to be sub-judice.

On the same day that applicants ignored a second letter to appear before the disciplinary committee, respondent wrote to the chairman and the rest of the committee members a letter in which he advised them that "... in terms of Section 171(3) of the Labour Code Order 1992 your committee is deemed dissolved and has no legal status, as such the management of the City Council does not recognize it." On 30th August, the individual members of the committee each received letters of dismissals which advised them that the disciplinary committee made the decision to dismiss them on 16th August 1994, which was the second day of their failure to appear before the disciplinary committee.

Mr. Mafantiri for the applicants, submitted that applicants' dismissal by respondent is contrary to Section 66(3)(b) of the Labour Code Order 1992 (The Code), because they were dismissed simply because they were members of the committee, representing their fellow workers. He further submitted that since the applicants' invitation to appear before the disciplinary committee and their subsequent dismissal, were a sequel to a strike that involved all the employees of the respondent, their dismissal is unfair because it is selective.

He referred us to the South African case of Black Allied Shops Offices and Distributive Trade Workers Union .v. HOMEGAS (Pty)Ltd (1986) 7 ILJ 411, where the Industrial Court per Landman AM considered the dismissal of the shop steward for absenteeism due to political unrest. It came out that the dismissed shop steward was one of four other black employees of the respondent who had failed to report for duty on the day in question for fear of being caught in the crossfire of unrest. Landman AM had this to say:

"... none of the other black employees were subjected to an inquiry concerning their absence. Why then was applicant dismissed?

The most probably reason was that the applicant was the spokesman for his co-employees. This would mean that Nxumalo was victimized on account of his standing in the trade union. It is, however, unnecessary to make an express finding in this regard because it is clear that whatever motive caused the respondent to single the applicant out on account of his failure to attend work, it was prima facie an improper one. It involved a selective dismissal of one of a group of employees who had all engaged in the same misdemeanour."

In response Mr. Nathane for the respondent denied that applicants' dismissal was selective. He pointed out that they were charged with specific acts which they are alleged to have committed as against the strike, which involved the broader section of respondent's employees. In particular they were charged with preventing those other employees who wished to resume their duties from doing so.

Furthermore respondents deny that applicants were dismissed because they were members of the committee. They argue that they gave the applicants a fair opportunity to be heard as is envisaged under the Code. To show their bona fides in this regard they pointed out that one Teboho Thomas who was the only committee member to attend the enquiry was not dismissed. He instead was given a punishment of reduction in salary for three months and was also ordered to vacate the council house he was occupying.

Respondents further denied the allegation that applicants could not attend the disciplinary hearing because of the sub judice rule. They point out that at the time that they received the letters inviting them for disciplinary hearing, applicants knew that the proceedings in cc863/94 were no longer being pursued. The reason why the case was only formally withdrawn in September was because of the constitutional crisis that started from 17th August, in consequence whereof, legal practitioners boycotted courts until the crisis was resolved.

It was further respondents' contention that, they had after all only obtained a court order and that did not preclude them from proceeding with disciplinary proceedings against applicants. The order merely prohibited the applicants from continuing with the acts into which a disciplinary enquiry was going to be conducted.

In conclusion Mr. Nathane submitted that should the court find in favour of applicants, the court should not order that they be paid for the period that they have not rendered services to the employer. He contended that an employee who is found to be unfairly dismissed can only be remunerated if it can be shown that during the period, he tendered his services and his attempts were foiled by the employer. Since there is no evidence that applicants tendered their services and were frustrated by the employer, they should not be remunerated.

In response Mr. Mafantiri pointed out that, the court should take account of two things; firstly that there was a court order prohibiting applicants from entering respondent's premises. Should applicants have responded positively to the letters requiring them to attend a disciplinary enquiry, they might have been found guilty of contempt of court. Secondly that the disciplinary proceedings are themselves not worth taking into account. They were not conducted in a proper manner as no evidence of the charges laid against applicants was led. He contended that at least evidence should have been led even if the applicants did not attend the enquiry, or at least affidavits from some of the persons who were allegedly harassed or intimidated could have been filed in this court.

I wish to first of all deal with the later submission by Mr. Mafantiri, because it is interrelated with respondent's submission that applicants were only dismissed after being afforded a fair opportunity to be heard, but in their own wisdom elected not to appear before the disciplinary committee. It has been a long established tradition by our courts that a person must be given an opportunity to defend himself against allegations made, prior to any action that may be prejudicial to his interests, being taken. Our statute law has now incorporated this common law rule of natural justice by making an express provision in Section 66(4) of the Code that any person who is dismissed either as a result of his conduct at work or his capacity to do the work he is employed to do, must be given an opportunity to defend himself prior to dismissal.

The point that arises for determination from Mr. Mafantiri's argument is whether if a disciplinary inquiry was held it was a proper one at which the applicants could legally and justifiably have been found guilty and subsequently dismissed. Mr. Mafantiri's argument in my view, seeks to challenge the propriety of the enquiry, because he contends that not even a single person who was allegedly harassed, incited or intimidated ever gave evidence before that enquiry. Before I proceed to consider Mr. Mafantiri's argument in detail, I wish to refer to the following passage extracted from the judgement of Joffe J in the case of

Hoechst (Pty) Ltd. .v. Chemical Workers Industrial Union & Another (1993) 14 ILJ 1449 at 1456.

"... it is to be borne in mind that the industrial court is a court of first instance. Where the dismissal followed a disciplinary enquiry, the Industrial Court sits neither as a Court of Appeal nor as a court of review in respect of those disciplinary proceedings. A complete rehearing of the matter takes place before the industrial court and it is enjoined to consider the fairness or otherwise of the dismissal on all the facts presented to it and then to determine whether an unfair labour practice was or was not perpetrated."

It shall be noted that the equivalent of what the South African judicial system refers to as the Industrial Court is in our case the Labour Court. This passage is, therefore, going to be our guiding principle in determining this case. This court is not an appeal body or a review court of the proceedings that took place prior to the dismissal of the applicants. What is of significance is whether on the facts as put before us we are of the view that the dismissals are unfair as alleged or not.

It is important to note that an employee is under a duty to attend disciplinary proceedings instituted by the employer. Even where he attends only to raise the sub judice rule in limine, if the point fails he is under duty to attend the enquiry because his failure to participate may render his credibility suspect if no satisfactory explanation is given should he later participate in Industrial/Labour Court proceedings. See Hoechst's case supra at page 1457.

It would appear that having refused to attend a disciplinary enquiry, the applicants may not later turn round and say the proceedings of the enquiry were unfair and therefore, should not be sustained, unless they can satisfy the court about the justification of their refusal. In Reckitt & Colman (SA) (Pty) Ltd. .v. Chemical Workers Industrial Union & Another (1991) 12 ILJ 806 at 813 the court had this to say about appearance at disciplinary hearing:

"... it would appear that under normal circumstances an employee who is to be disciplined has to attend and partake in those proceedings. If he refuses to do so, he could hardly allege that the proceedings and the outcome of the proceedings were unfair or amounted to unfair labour practice. There may obviously be occasions when employees with reason could refuse to attend such proceedings."

The point to decide therefore is whether in the instant case there was justifiable reason for refusal to attend the enquiry and I shall return to this point later.

The next argument by Mr. Mafantiri was that his clients' refusal to attend the enquiry was as a result of the Court Order which prohibited them from entering the premises of the respondent. In my view this argument cannot be sustained. Applicants had been "barred from entering the abovementioned premises ..." and the mentioned premises are what is called both in the Notice of Motion and in the Order of the Court "Old Abattoir". Applicants were on the other hand required to attend an enquiry in the Town Clerk's office which is about a kilometre and a half away from the Old Abattoir. This argument therefore falls away.

I now turn to the question whether applicants were justified in refusing to attend the enquiry as they did. In the case of Bosch .v. Thumb Trading (Pty) Ltd (1986) 7 ILJ 341 at 344, Bulbulia M. said the following:

"In the court's view the rules relating to the holding of disciplinary enquiries, as discussed by different writers, cannot and should not be applied mechanically to every to every situation. In certain circumstances justice requires that the enquiry be held as

quickly and as speedily as possible; in other circumstances it becomes highly desirable, if substantive justice and is to be done to an employee that he be afforded every latitude to prepare himself for the hearing. A disciplinary enquiry which is held in the absence of an employee and with undue haste, can and does in most cases amount to a traversity of justice and is the clearest denial of the audi alteram partem rule."

It is important to note two points in respect of the instant case. Applicants were given notice on Friday 12th to appear before the disciplinary committee on Monday 15th at 9.00 a.m.. When they failed to appear they were written second letters requiring them to appear the following day at 2.00 p.m. By no stretch of imagination can this be said to be sufficient time to consult and prepare for the case in which no less than ten charges were preferred.

Secondly it is pertinent to note that some of the charges preferred against the committee were the same as those that applicants were going to argue on the return date which was the 18th August. The question is why the respondents acted so hastily to institute disciplinary proceedings to the extent of proceeding in the absence of the applicants when they had already filed an urgent application the return date for which was a couple of days away?

Respondents have sought to show that infact when applicants were served with notices to appear before the disciplinary enquiry the proceedings in cc863/94 had already been discontinued and applicants were aware of this. They further argued that cc863/94 was only formally withdrawn in September because of then prevailing crisis which led to legal practitioners boycotting the courts. This argument cannot possibly be true. The letters inviting applicants to appear before the disciplinary enquiry were dated 12th and 15th August respectively. It is common cause

that the crisis referred to only started on the morning of 17th August. Even thereafter the courts continued to function normally for about a week or two before protest actions began. So to all intents and purposes at the time that the disciplinary proceedings were instituted, cc863/94 was still alive and the return date still remained 18th August although this date could still be extended to a later date on the return date itself.

Respondents were the initiators of the proceedings before the Magistrate Court, they therefore ought to have been patient until they were finalised. By acting hastily against applicants without a reasonable justification they ran the risk of their action being interpreted as unfair. I accordingly rule that in the circumstances applicants were justified to have refused to be party to the proceedings which were going to duplicate the issues they were already set to appear before court to answer. Respondents should have been more sensitive and at least shown respect to their own case that was pending in court before pressing other charges against applicants.

As earlier on observed, this court is not an appeal court let alone review tribunal to the proceedings of the respondents' disciplinary committee. We will therefore avoid getting bogged down with the correctness of their decision to dismiss applicants. Our concern is whether on the facts and legal arguments as presented before us it was fair to have

terminated applicants' services. Mr. Mafantiri referred us to Section 66(3)(b) of the Code which provide that "seeking office as, or acting or having acted in the capacity of a workers' representative" shall not constitute valid reason for termination of employment.

Respondents have argued that applicants have not been dismissed because they were members of the committee, rather that they were only dismissed after being afforded a fair chance to be heard. I have already made a finding with regard to the fairness or otherwise of the hearing that the applicants were purportedly given. What then remains is to determine whether the charges that led to the dismissal of the applicants can be said to have been levelled against them because of their membership of the committee.

In my view, applicants' membership of the committee attracted the attention of the management committee of the respondent in deciding who to cite in both the court and disciplinary proceedings. Surely the respondent cannot say that the seven applicants who include two women, were the only people who were unlawfully occupying the Old Abattoir premises or blocking access to the said premises as prayed in the cc863/94 application by the respondent. To show its attitude towards the committee respondent management committee only singled out the committee members in seeking an interdict.

The civil case in the Magistrate Court was a prelude to the disciplinary case that was once again only directed at the committee. Once more a quick look at the charges will show that several of the charges could still have been preferred against other employees of the respondent who also participated in the strike. Charges like insubordination, transgression of Council rules and policies, to mention just a few could still have stood against other employees. A charge of intimidation sounds ridiculous when it is levelled against a woman who is said to have intimidated the able-bodied young and middle aged men in the employ of the respondent. These charges were obviously pressed against these women, even though they could in all likelihood not be true, because they were committee members.

It was alleged by the respondents that another committee member, one Thomas, attended the disciplinary inquiry and was not dismissed. It is highly doubtful if Thomas was infact a committee member or whether he did appear before the disciplinary committee. The reason for this doubt is because Thomas was not cited as the respondent in the cc863/94 case in which all the present applicants were respondents. That case was a prelude to the disciplinary inquiries that resulted in the dismissal of the applicants. It becomes apparent that by citing only committee members as respondents, the respondent already demonstrated who in their view were trouble makers and indeed these later became targets for disciplinary action. By not citing Thomas as respondent, respondent showed that he had no problem with his conduct, why then would he later be disciplined?

To further demonstrate its negative attitude towards applicants' committee, the respondent advised them by letter dated 15th August, 1994, that their committee had been deemed dissolved and as such was no longer recognized by respondent. Needless to say that a completely irrelevant provision to applicants' committee was invoked in an attempt to determine its legality, it is significant to take cognizance of the context within which the purported dissolution and derecognition of applicants' committee

arose. Not only did it emanate when the committee was up on its feet championing the interests of its co-workers, but the committee was also facing a court action in respect of the course of action they were embarking upon and they had just refused to attend a disciplinary hearing scheduled for the same day that the letter notifying them of the dissolution and derecognition of their committee was written. I therefore have no hesitation in finding that applicants were indeed singled out for disciplinary action and subsequent dismissal because of their membership of the committee contrary to the provisions of Section 66(3)(b) of the Code.

Mr. Mafantiri further contended that, applicants' dismissal was unfair because it was selective and yet not only applicants participated in the strike. Respondents have argued that applicants have not been dismissed because of their participation in the strike but rather because of specific acts which they were charged with. I have already observed elsewhere that a good number of the charges that had been preferred against the applicants could still have stood against the rest of the employees who took part in the strike. The case of Black Allied Shops Offices & Distributive Trade .v. HOMEGAS (1986) 7 ILJ 411 to which we were referred by Mr. Mafantiri is an authority for the principle that it is wrong to single out one employee or a group of employees from others, for disciplinary action arising out of the same set of facts. The same principle was followed in the case of South African Boilermakers Iron & Steelworkers, Shipbuilders & Welders Society & Others .v. Roll-up (SA) (Pty) Ltd (1988) 9 ILJ 1043.

It is common cause that the charges that were preferred against applicants emanated from their participation in a strike. The seven applicants were selected from among their co-workers and subjected to disciplinary hearing. I am convinced that this was a selective action taken against a group of employees who are only part of a bigger group who had engaged in more or less the same improper conduct. The resultant dismissals were equally selective as they are a direct outcome of the selective disciplinary proceedings against the applicants. Accordingly even in this respect applicants' dismissal is unfair as it is discriminatory.

Applicants have in their notice of motion prayed for a declaratory order that their dismissal is null and void and that they be reinstated in their respective positions. I have already found that on the basis of the reasons I have outlined, applicants' dismissals by the respondent were unfair and wrongful. They are consequently null and void. On the question of reinstatement, it has been held that; "... it is generally undesirable to order the reinstatement of the employee in his employment where the employer and his concern is a small one involving a close association between its staff" per Landman AM in the Black Allied Shop & Distributive Trade Case supra at page 417. The respondent cannot be said to suit this definition. Respondent is a public concern at which every citizen of this country who can get a place of qualifies for certain skilled jobs is entitled to work. Personal conveniences cannot therefore come into play in determining whether a person should or should not work at that establishment.

We cannot also loose sight of the fact that the respondent has throughout, been found to have acted in a manner that is incompatible with sound labour relations practices. Its motive seem to have been predicated on carrying out vengeance against the committee.

It was submitted on behalf of the respondent that should the court find that the applicants have been wrongfully dismissed it should not order that they be remunerated for the period that they have not rendered services to the employer. In this regard we were referred to the case of Boyd .v. Stuttaford & Co. 1910 AD 100. I have indeed had the occasion to read through this judgement. This is a case of an employee who sued his employer for recovery of wages for the period that he was unable to render services to the employer due to illness. After considering a host of authorities extracted from distinguished text book writers the learned judge summarised the South African Law as distinct from English Law as follows; "... with the exception of domestic servants and other ordinary servants, whose position is now ascertained and defined by statute, the law is that employees prevented by illness from rendering the full services which they have undertaken to perform can recover their services only pro rata parte according to the amount of services actually performed." (author's emphasis) page 109.

The law as espoused in the above judgement clearly does not claim to be a general rule. It is obviously a common law position which does not purport to apply to instances where statute specifically makes provision as to what should happen should an employee be found to have been incapacitated to perform the contract. It is common cause that our law in this respect is now governed by Section 73(1) of the Code which provides in part that; "... if the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal." We are therefore an exception to the common law position enunciated in Boyd's case and that case has no application in the instant case.

AWARD

Having considered the sworn representations, other documents filed of record and submissions made by counsel for the applicants at the hearing of this case, the Labour Court has come to the unanimous conclusion that :

(a) The purported dismissal of the seven applicants by respondent on 31st August 1994, is unfair because it was selective and it was victimisation of the applicants for being members of the committee contrary to Section 66(3)(b) of the Code.

(b) The said purported dismissals are set aside and declared null and void.

(c) The respondent is ordered to;

(i) reinstate the applicants into their respective positions that they held prior to the 31st August 1994 without any loss of remuneration, seniority or other entitlements or benefits that they were entitled to prior to the purported dismissal;

(ii) pay applicants their arrears of salary with effect from 31st August

1994.

(d) There is no order as to costs.

THUS DONE THIS 31ST DAY OF JANUARY 1995.

L. A. LETHOBANE

PRESIDENT

MRS S. LETELE **I CONCUR**
MEMBER

MR. A. K. KOUNG **I CONCUR**
MEMBER