IN THE LABOUR COURT OF LESOTHO **CASE NO.LC/15/95**

HELD AT MASERU

IN THE CASE OF:

LACTWU **APPLICANTS**

AND

CRAYON GARMENTS (PTY) LTD **RESPONDENTS**

RULING ON POINTS IN LIMINE

Applicants in these proceedings have raised some four points in limine and the respondents in turn have raised six points in limine. I will start by deciding applicants' points in limine and finish with respondents points in limine, even though this is not the order in which the points were presented in court.

Firstly applicant argues that the two supporting affidavits filed with respondents' answer be struck off for one or all of the following reasons:

(A) The rules of this court do not recognize filing of affidavits. Only an originating application or answer are recognized by the rules. The affidavits filed by respondent are therefore irrelevant and should be struck off.

(B) Even if there may be instances where under the rules an original affidavit may be filed, it may not be filed in that dismissal case. Therefore, Mr. Mosito submits, should the court rule that the rules do

recognize filing of affidavits, they may not be filed in dismissal cases and therefore the court should strike them off.

(C) Alternatively, if the court finds that they are correctly filed even in the case of dismissals, then the affidavits should be struck off on grounds of inadequate stampage. He pointed out that contrary to the provisions of the Stamp Duty Order relating to amount of duty that should be paid for an affidavit, respondents' supporting affidavits had not adhered the necessary 40 lisente stamp duty required for attestation of an affidavit. Secondly the supporting affidavits bore insufficient stampage in regard to the court fees to be paid.

(D) Finally Mr. Mosito submitted that should the affidavits be accepted by the court, paragraphs 2 - 8 of Cheng's affidavit should be struck off because they contain irrelevant and vexatious averments. Further more their averments are hearsay, he argued.

Mr. Makeka sought to answer the points raised in limine. In his answer he alluded to two important issues. Firstly that the Labour Court as a court of equity is specially designed to dispense with the technical rules of the ordinary courts and secondly that the rules of court are not exhaustive. They are merely meant to assist the court in its function. I entirely agree with this submissions and on this basis alone. I overrule any plea regarding the inadmissibility of affidavits in any proceedings before this court.

There is, however, substance in Mr. Mosito's submission with

regard to compliance with the Stamp Duty Order 1972 and Part C of the Labour Court Rules 1993. There is a glaring under stampage in respect of both the court fees and the duty to be paid on affidavits in accordance with the schedule to the Stamp Duty Order 1972. Mr. Makeka sought to convince us that his supporting affidavits are infact annexures to the respondent's answer. With respect, I disagree. An annexure is a document which is already in existence prior to the start of proceedings and it is extracted or uplifted from existing records, so that it can be attached to proceedings in court with a view to clarifying a particular point. The two affidavits are independent documents that have been initiated and drawn specifically for these proceedings. They cannot therefore be annexures.

Even if they are styled supporting affidavits they are infact original affidavits and they should accordingly be stamped as such. The fourty lisente that Mr. Mosito talked about is different from the court fees payable in terms of Part C of the Rules of Court. It is infact a duty which is payable in terms of the stamp duty order to enable an affidavit to be admissible as such in any proceedings before any court. I accordingly direct that the respondent affixes the correct amount of stamps on the two supporting affidavits before any of these documents and their contents can be admitted.

I agree that certain parts of paragraphs 2, 3 and 8 and the whole of paragraphs 5, 6 and 7 of Cheng's affidavit are hearsay and they shall accordingly be struck off. On the question whether their averments are relevant in so far as they relate to the past developments which allegedly have no reference in the present dispute, we shall leave that to the court's overall evaluation of the submissions made by council when we make our final award.

RESPONDENTS' POINTS IN LIMINE

The respondent also raised several points in limine. Particularly, the respondent requested the court to quash the interim order restraining respondent from employing persons in purported replacement of the purportedly dismissed employees on behalf of whom these proceedings are allegedly being pursued, on the basis that it was granted contrary to Rule 22(1) of the rules of this court. The respondents argue that when they were served with the interim order, they ought to have also been served with

the originating application, in accordance with the provisions of Rule 22(1). He further argued that absence of the originating application has caused respondent losses.

In response Mr. Mosito pointed out that the rule being referred to does not say that the order be served with originating application.

He pointed out that the rule merely says that when the originating application is made the interim order should be included therein. He referred us to paragraph 5(B) of the originating application which he said incorporates the interim order in the originating application as is required by Rule 22(1).

Respondent's point in my judgement has no merit. Interim reliefs are normally sought on an urgent basis, hence why they are usually exparte. It is again because of their urgent nature that the president is permitted to hear them and grant the relief sought with immediate effect sitting alone. The procedural niceties of complying with the rules will normally

follow only after the harm has been allied by the interim order. This is when the originating application for final relief comes in. The originating application seeks to make the interim relief permanent, hence why it should include the urgent application so that with the harm diminished there is a return to the normal procedures. Invariably, when an application is urgent the normal procedures are dispensed with and are only returned to when the danger has subsided. This is what Rule 22(1) envisages, so there is nothing irregular about the order. If, however, respondent was saying that even as he attends court he still has not received the originating application that would be something else. On the losses sustained by the employer, one fails to see how the availability of the originating application at the time of service of the order would have saved the respondent the losses complained of.

Respondent further raised an objection basing himself on Section 28 of the Labour Code Order 1992 (The Code) which provides that in proceedings before the Labour Court a party may be represented *"....by a legal practitioner, but only when all parties other than the government, are represented by legal practitioners."* He pointed out that applicant is represented by a legal practitioner while respondent is represented by an employee of an employer's association.

In response Mr. Mosito observed that since the Code does not define legal practitioner, the court would have to adopt the definition made by the legal practitioners Act No.11 of 1983. In terms of that act *"legal practitioner" "means a person admitted to practice as an advocate, attorney, notary public or conveyancer in terms of this act,"* he therefore submitted that since Mr. Makeka did not seek to assail Mr. Mosito's contention in any way. Indeed Mr.

Makeka is widely known in this country as an advocate of the High Court of Appeal of Lesotho. The fact that he is not running his chambers or that he is currently an employee of an employer's association does not disqualify him as a legal practitioner. The objection is accordingly overruled.

Mr. Makeka further argued that respondents' documents filed of record do not have a resolution authorising the three signatories who have signed the authority to represent, to so sign documents on behalf of the union. Furthermore he pointed out that the list of complainants is not attached therefore, respondent does not know in respect of which individuals applicant is acting. He referred us to the case of national union of leatherworkers .v. Olympic Footwear 1993 ICD Part IV, where the issue of the absence of list of names of complainants was in issue and it was upheld by the industrial court.

In response, Mr. Mosito referred us to the Court of Appeal judgement in Central Bank .v. Phoofolo Court of Appeal (CIV) No.6 of 1987 at page 12 (unreported) where an objection had been raised that there was no resolution evidencing the authority of the governor to depose to an affidavit on behalf of appellant and Mahomed J. A. held that *"this objection was without substance and was correctly dismissed by Molai J. There is no invariable rule which requires juristic person to file a formal resolution manifesting the authority of a particular person to represent it in legal proceedings, if the existence of such authority appears from other facts. In the present case the authority of the governor to represent the appellant in the proceedings in the court appears amply from the circumstances of the case including the filing of the notice of apposition to the application."*

He further pointed out that respondent has always dealt with applicant and it cannot later be heard to say it does not know

who applicant represents. He referred us to the case of LACTWU .v. Lesotho Apparel CIV/APH/214/94. In reply, Mr. Makeka pointed out that, the respondent has accorded applicant conferring rights as is required by the Code. He argued that conferring and having dealings are two different things.

Mr. Makeka also raised two further points that applicants have not made any reference to their constitution which could perhaps grant them power to represent their members. Finally he observed that they have raised certain points in their answer which have not been replied to.

On the question of the absence of the resolution, I am of the view that the judgment of Mahomed J. A. and Phoofolo supra and Maqutu J. in LACTWU supra completes this matter. Indeed the circumstances of this case clearly show that respondent knows the applicant and in their own papers filed in these proceedings they keep on referring to Lebone, the General Secretary of the applicant. They cannot later in proceedings before the court claim not to know the applicant. Conferring rights in terms of the Code are given to an organisation which has members among employees of an employer. It follows therefore that respondent knows applicant. Indeed, if the number of persons to be reinstated are what constitutes a problem for respondent in light of those who allegedly accepted their termination packages, applicant's remedy is already one of a declaratory order, so that those employees who may have accepted their termination will be dealt with separately by respondent, each in accordance with the merits of his or her own case.

On the issue of absence of a list of complainants we were referred to the case of the National Union of Leatherworkers in particular the award of De Klerk. In respect, the case was

taken on review to the Cape Supreme Court and the entire judgement of De Klerk was overturned. It cannot therefore, be an authority that dismissed employees should attach their names to enable a trade union to represent them in court proceedings. In the same manner non-reference to the constitution of applicant is dismissed, especially because the respective capacities of the signatories to the authority to represent are not challenged.

Accordingly, respondent's points in limine are dismissed and there is no ruling on the question that the applicant has not replied to certain issues raised in the answer as that is not a point to be raised in limine.

THUS DONE AT MASERU THIS 14TH DAY OF FEBRUARY, 1995.

L. A. LETHOBANE

PRESIDENT

M. KANE **I AGREE**

MEMBER

A. T. KOLOBE **I AGREE**

MEMBER