IN THE LABOUR COURT OF LESOTHO

CASE NO. LC/15/95

HELD AT MASERU

IN THE APPLICATION OF:

LESOTHO AMALGAMATED CLOTHING & TEXTILE

WORKERS UNION **APPLICANT**

AND

CRAYON GARMENTS (PTY) LTD **RESPONDENT**

APPLICATION FOR THE INTERIM ORDER TO BE SET ASIDE

RULING

At the start of these proceedings both sides raised certain points in limine which were decided upon by the court. One of these points concerned the issue whether applicant had correctly proceeded by way of an urgent application or he could have proceeded in the normal way i.e. by originating application. A ruling was made that the order granted by way of a rule nisi was in order and as such not irregular.

Yesterday when counsel for respondent stood up to address the court in answer to applicant's address to the court, he again reverted to this point save that this time he was using a different basis for which he wanted the court to quash the

interim order. The reasons advanced were that applicant has proceeded by motion proceedings where a bona fide and serious dispute of fact existed. To this end he referred us to the detailed historical background to the disputes that culminated in the dismissal of applicant's members which is elaborated in his answer to the originating application. In this regard reliance was made on the judgment of Maqutu J. in Phomolo Seboka .v. Lesotho Bank CIV/APN/227/91.

The respondent further submitted that applicant has failed to make full disclosure of all the material facts which have given rise to the dismissal of applicants' members as the court might have reconsidered whether to grant the exparte order if it had the full knowledge of the facts. He then submitted that applicant, having failed to observe the duty of utmost good faith, the court must use its discretion and set the order aside on grounds of non-disclosure. Reliance was made on Herbstein & Van Winsen, The Civil Practice of the Superior Courts in South Africa 3rd Edition pages 80-81.

In response Mr. Mosito has denied that there is any existence of dispute of fact in this matter. He therefore submitted that the application is misguided. He referred us to the cases of Soffiantini .v. Mould 1956 (4) E.D.L.D. 150 where it was held that a respondent cannot defeat or delay an applicant who comes to court on motion by a mere denial in general terms as motion proceedings would otherwise be worthless. The learned Judge President further held that - "it is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem."

We were further referred to the case of Room Hire Co. (Pty)

Ltd. .v. Jeppe Street Mansions 1949 TPD 1155. In that case the learned Acting Judge President Murray, after stating that the real test in deciding whether to proceed by motion or by trial is the existence of a dispute as to fact, not as to law, he went on to say, "it is difficult to appreciate what greater advantages are derived by a judicial officer from viva voce evidence, than from affidavits when he has to ascertain only the law to be applied." (see page 1161 of the judgment).

In my view the principles in Soffiantini's case and the Room Hire Co. (Pty) Ltd. are complementary. In the latter case it is held that a Judicial Officer actually derives greater advantage by not being inundated with volumes of viva voce evidence and being required only to determine the correct legal position. In the former, which is actually a later case to the Room Hire Co. case, the court is directed to be especially careful of artificially created dispute of fact, and indeed to adopt a robust approach in determining whether a real dispute of fact exists.

I entirely agree with the principle enunciated by Maqutu J. and the views of Herbstein and Van Winsen. However, Maqutu J. was discussing the principle where a dispute of fact has been found to exist. My task is to determine whether a dispute does exist, and whether if the applicant had disclosed the facts elaborated by respondent in its answer, the court would have had a different attitude towards the exparte order.

In the first place in determining whether a serious dispute of fact which is not capable of easy ascertainment on the papers exists or not, I would have to be guided by the principles in the two cases of Soffiantini and Room Hire Co. (Pty) Ltd. In so doing I would have to adopt a robust approach, but before doing that I would have to adopt a robust approach, but before

doing that I would want to highlight the three principal ways in which a dispute of fact has been said by Watermeyer C. J. to arise in motion proceedings. (see Peterson .v. Cuthbert & Co Ltd 1945 AD 420).

(a) When a respondent denies all the material allegations ade by various deponents on the applicant's behalf and produces or will produce positive evidence by deponents or witnesses to the contrary.

(b) Where the respondent admits applicant's affidavit evidence but allege other facts which the applicant disputes.

(c) Where the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, thereby putting applicant to the proof thereof.

I have studied applicant's and respondent's papers filed of record none of the foregoing ways comes into play in respect of the respondent's answer to applicant's originating application. Apart from admitting all the material allegations made by applicant the respondent has volunteered an additional elaborate information, pertaining to the case. However, applicant has not denied that additional factual information and this much has been submitted by respondent that since the allegations have not been denied, it is trite law that they are taken to be admitted.

Apart from the foregoing applicant has studiously avoided to make mention of any of the detailed facts that respondent has availed. They have acknowledged that workers have been allegedly dismissed and respondent does not deny this. Notwithstanding the surrounding facts, they call upon the court to declare whether in the circumstances, dismissal of

applicant's members was lawful, indeed their submissions in chief have concentrated on law and procedural issues. For the benefit of their case respondents have availed additional facts to the court, which are not being disputed by applicant, thereby rendering the facts to have been admitted by applicant. Accordingly therefore, there is no dispute of fact that can affect the motion procedure adopted by applicant in approaching the court.

There being no dispute of fact, I have studied the detailed facts provided by respondent, in order to establish whether the court would have had a different attitude to the exparte order, if they were made known to the court by applicant at the time of making the application. The wording of the order is very material in this regard. It directs the employer not to employ in replacement of the purportedly dismissed employees until these proceedings are finalised. It does not prohibit the employer from employing temporary labour who if applicants are successful in this proceedings may have to be released. In the light of the cautious wording of the Order the court would not have refused to grant the interim order, even if all the facts that respondent availed were put before the court at the time of moving the application. Accordingly therefore, the argument that the order be quashed on the grounds of non-disclosure of material facts is dismissed.

THUS DONE AT MASERU THIS 16TH DAY OF FEBRUARY, 1995.

L. A. LETHOBANE

PRESIDENT

PANELLISTS: **A. T. KOLOBE**

M. KANE