IN THE LABOUR COURT OF LESOTHO

CASE NO.LC/45/95

HELD AT MASERU

IN THE MATTER OF:

LUCY LERATA & OTHERS	*APPLICANTS*
AND	
LESOTHO EVANGELICAL CHURCH	*1ST RESPONDENT*
SCOTT MEMORIAL HOSPITAL OF THE L.E.C.	*2ND RESPONDENT*

JUDGMENT

Applicants herein are all former employees of Scott Hospital at Morija. They were dismissed on 13th February, 1995 following their taking part in a strike on 9th and 10th February 1995. Applicants are Nursing Assistants who were understandably members of the Lesotho Union of Public Employees (LUPE), a duly registered trade union in terms of the Labour Code Order 1992 (the Code).

It would appear that LUPE had a dispute with the Ministry of Health and Social Welfare arising out of a failure to agree on a review of the conditions of employment of the Ministry's Nursing Assistants. As a result of this dispute LUPE called a strike which started at the Ministry of Health's Queen Elizabeth II Hospital in Maseru on 8th February, 1995. On the 9th February the Nursing Assistants at Scott Hospital also downed tools, presumably in support of their colleagues at Queen Elizabeth II Hospital in Maseru. They however pointed out that they joined the strike in accordance with a call by LUPE that all nursing assistants must take part in the strike.

It is common cause that neither LUPE nor the nursing assistants at Scott had communicated any grievance to the Management of the hospital that could be said to be the subject of a dispute. Even though the nursing assistants said that they wrote some

letters to management sometime in November, 1994, which were not even acknowledged, this strike does not seem to have any link with those letters. Indeed the letters only requested for a meeting without stating what the subject of the meeting was.

Management of the Scott Hospital made efforts to communicate with the striking nurses in order to get what their grievances were. Management alleges, however, that their efforts were snubbed by the workers who refused to talk to them and instead said since they were members of LUPE, the latter would be coming from Maseru to enter into talks with Management. Letters were written to the employees to state what their grievances were but they refused to take them.

When the Administrator of the Hospital asked them to select a committee to come and represent them in talks with Management they said they would all want to be present. When finally the Administrator succumbed to their demand, they had already dispersed as it was time to knock off. The Chief of Morija, in his capacity as such and in his capacity as the member of Management Board of the Hospital tried to broker peace by arranging a meeting with the striking workers on Friday 10th, but the employees refused to talk to him. He allegedly invited them to a meeting with the Board on Saturday 11th, but the employees allegedly refused to attend. It is not explained why the Chief and not the Administrator who is the Secretary of the Board had to call workers to a Board Meeting.

On 13th February the Administrator wrote a letter to the individual employees outlining the events that transpired since 9th February and Management's attempts to talk to the workers in order to get what the workers' grievances were. In the same letter the Administrator gave the employees an ultimatum to return to work by 11.00am that day or to show cause in writing why they should not be dismissed. The employees neither returned to work nor showed cause why they should not be dismissed. Later that day they were dismissed.

The employees made this application challenging their dismissal on two grounds. Firstly that the Administrator had no authority to dismiss them as in terms of the Constitution of the hospital they can only be dismissed by the Board. Secondly that

they were not given a hearing. Mr. Sello who appeared for the respondents did not address the merits of the application but instead raised two pleas, one of estoppel and another relating to the jurisdiction of the court to hear the application.

Firstly, Mr. Sello argued that while this court may have the authority to declare a dismissal unfair, it does not however have the authority to declare a dismissal unlawful. He argued that, only a court of law can declare a dismissal unlawful. He referred the court to Section 16(1) of the Code which empowers a Labour Officer to refer matters to a court of law and pointed out that the court referred to there is not a Labour Court but the ordinary courts. In his submission, this is the section under which a dismissal may be referred to court to declare it unlawful. No other section of the Code empowers applicants to approach the court for a relief declaring the dismissal unlawful. He further pointed out that none of the powers vested in the court by Section 24 of the Code can be interpreted to include a power to declare dismissals unlawful.

In response Mr. Mosito argued that he court is empowered to deal with all matters arising out of a contract of employment. He added that since the dismissals have arisen ex-contracto, the court should have jurisdiction to entertain the case. With regard to the power to declare a dismissal unlawful, Mr. Mosito averred that an unfair dismissal is infact also unlawful. The concept of unfairness is only an administrative law concept which means that rules of natural justice have not been observed.

Mr. Sello's argument that this court does not have the power to declare a dismissal unlawful does not seem to the court to have merit. In terms of Section 25 of the Code the Labour Court's jurisdiction is defined as *".....exclusive as regards any matter provided for under the Code ...."* Mr. Sello's reliance on common law principles regulating the power of the courts, and not the Labour Court to declare dismissals unlawful cannot therefore be upheld because as Mr. Mosito correctly pointed out the dismissal having arisen out of a contract of employment over which this court has jurisdiction fall within the sphere of jurisdiction of this court.

Mr. Sello further argued that even under Section 24, there is nowhere where the court is empowered to declare dismissals unlawful. He said Section 24(1)(d) and (f) to which he

had been referred by counsel for the applicants do not apply. In my view, however the wording in these two paragraphs is so broad and wide as to include almost any other matter that may not have been specifically covered under Section 24(1) and this includes declaration of dismissals as unlawful. The wording used in paragraph (d) is *"to inquire into and make awards and decisions in any matters relating to industrial relations...."* In paragraph (f) the court is empowered *"to determine any dispute arising out of the terms of any contract of employment...."* The dispute is this case is the lawfulness or otherwise of the termination of applicants' contracts of employment and there is no reason why it should not be entertained by this court either under Section 24(1)(d) or (f) of the Code.

The concept of unfair dismissal has its roots in English Law. It has invariably been defined as the degree tow which an employer can be said to have acted unreasonably in failing to go through a fair procedure for dismissal when it seems that there were good substantive grounds for dismissal. In his article Exceptions to Procedural Fairness at Dismissal: Developments in Enghlish Law[1], Reagan Jacobs refers to the English Employment Appeal Tribunal decision where Phillips J. said the following:

> ***"It is important to note, I think, that the expression "unfair dismissal" is in no sense a common sense expression capable of being understood by the man in the street, which at first sight one would think it is. Infact, under the Act, it is narrowly and, to some extent, arbitrarily defined. And the concept of unfair dismissal is not really a common sense concept, it is a form of words which would be translated as being equivalent to dismissal "contrary to statute" and to which the label "unfair dismissal" has been given."[2]***

It is common cause that the Code provides for cases where an employee may be lawfully dismissed and cases where it would be unlawful to dismiss an employee[3]. If an employee is dismissed for any of the reasons listed under Section 66(3) of the Code as not

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1 (1988) 9 ILJ 16

2 at pp 16 - 17

3 See Section 66 of Labour Code Order No.24 of 1992

constituting valid reasons for termination of employment, would it not be correct for the employee in question to challenge his dismissal as either unlawful for being contrary to the Code or unfair as is envisaged in Section 66(1) and (2)? There would be no basis for dismissing the applicants' application merely because he has used the term unlawful instead of unfair. However, in determining the lawfulness or fairness of the dismissal the court will be guided by equity principles which go beyond the narrow and restricted interpretation of the statute.

Mr. Sello also referred us to Section 16(1) of the Code and argued that the court to which a Labour Officer is empowered to refer a dispute thereunder is not a Labour Court but the ordinary courts. I cannot agree with this generalised statement. Court under the Code means Labour Court unless otherwise stated. Section 25 of the code gives the Labour Court exclusive civil jurisdiction in matters provided for under the code. Section 26 reserves criminal jurisdiction in matters arising out of the application of the code in the Criminal Courts. In the court's view, Section 16 must be read together with these two Sections namely 25 and 26. Section 16(a) empowers a Labour Officer to institute and carry in his name proceedings in respect of any contravention or any offence committed against the provisions of the Code. Since this subsection implies exercising criminal jurisdiction, a Labour Officer invoking it will have to refer the matter to a criminal court. Paragraph (b) clearly speaks of instituting and carrying on civil proceedings, obviously that would have to be instituted in the Labour Court.

Mr. Sello further raised the plea of estoppel on the grounds that applicants' facts are *res judicata* in that an action has been filed in the High Court which applicants in this case have decided not to contest. Mr. Mosito argued that the principle of *res judicata* cannot apply in this case, because in the High Court the litigants were Scott Hospital and Lesotho Union of Public Employees, while in the present application the individual employees and not LUPE are the applicants. Secondly he argued that the subject matter in the High Court case is not the same as the relief being sought by applicants in this court. In support of the latter argument he referred us to the Court of Appeal decision in Lethoko Sechele .v. Lehlohoonolo Sechele.[4]

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4 C. of A. (CIV) No.6 of 1988 (unreported)

With regard to the first defence that, the parties in the High Court proceedings are different from the parties in the present proceedings I am of the view that applicants are trying to play hide and seek game with the court and they should not be allowed to. LUPE was cited as respondent in the High Court case in a representative capacity, as a body jointly representing the individuals listed in Annexure E to the notice of motion, which individuals are the present applicants. Since LUPE had been cited in a representative capacity the persons it represented will be estopped from seeking to bring the same case that was decided against LUPE before any court, purporting to act in their personal capacities. (See Ramolesane & Another .v. Andres Mentis & Another).[5]

It is however a completely different issue whether the facts of this case are infact res judicata as it has been pleaded. In the case of Sechele supra to which we were referred by Mr. Mosito, Ackerman J. A. referred to the judgment of Kheola J. in the court <u>aquo</u> where the learned judge held, *"....that for a defence of <u>res judicata</u> to succeed the judgment in the prior suit had to be:*

(a) with respect to the same subject matter;
(b) based on the same ground;
***(c) between the same parties."*[6]**

I have already found that requirement (c) is satisfied in that in the court's view the parties are the same. I am not however satisfied that the High Court proceedings involved the same subject matter. The issue of the ground on which the decision was based may well be the same, but the subject matter is certainly different.

In the present proceedings applicants pray for an order declaring their dismissal null and void. In the High Court, respondents sought to confirm their purported termination of applicants' dismissal by praying for an order of evicting and prohibiting applicants from entering respondents' premises at Scott Hospital. The validity or

5 (1991) 12 ILJ 329

6 Sechele's case supra at p.5

otherwise of the decision to dismiss applicants was never in issue in the High Court application. Even assuming that it was in issue it appears that the plea of *res judicata* would still not be successful because according to the decision of Maqutu J. in Potlako Makoa .v. Lesotho Highlands Project Contractors[7], the High Court has no original jurisdiction in matters such as this one. They are an exclusive area of the Labour Court. Respondent's plea of *res judicata* therefore fails.

Applicants' case is that their dismissal be declared *"....as null and void and of no force and effect ..."* because they were dismissed contrary to Article 3.3 (g) of the Scott Hospital Constitution, which vests the power to appoint and dismiss in the Hospital Board of Management. They contended in their statement of the facts supporting their claim that *"... the administrator of the second respondent has been writing letters purporting to dismiss applicants without the authority of the Board."* They argued that Minutes of the Board at which it was resolved that applicants be dismissed bearing the names of persons present at that meeting could not be produced. Applicants also contended that the Board never gave them a hearing prior to their purported dismissal.

It is common cause that respondents did not address the merits of applicants' case. There is therefore nothing from their said to help the court to decide the application. It can be safely deduced that they are willing to abide by whatever decision this court will arrive at.

The letter written to applicants was a standard letter which in part reads as follows:

> ***"I inform you that the Scott Hospital Management Board has directed that the following attempts made to advice you to return to work into contract with which you have entered, but which you failed to perform from 9th and 10th February, 1995 without explanation as to why you did not, you be and you are hereby dismissed with immediate effect."*** **(Sic)**

It is common cause that the nursing assistants' strike started on 9th February. The

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7 **CIV/APN/400/93**

Administrator of the Hospital wrote his first letter on the 10th February, 1995 to the striking employees. In the same way as the letter of dismissal this letter purported to derive its authority from the Hospital Management Board. In the normal cause of things management boards of institutions like Scott Hospital which is a church organisation are made up of persons from far apart, who cannot meet easily especially at short notice. This is why the constitution has probably made room in Article 3.3(g) for the Board to delegate its appointment and dismissal powers to its main standing committee in appropriate circumstances. It will *prima facie* be doubtful if a board actually met, where as in the instant case, it is alleged to have made a decision, which has clearly been made at short notice. The onus then rests on the respondent to show that the Board did meet and authorized the Administrator to dismiss applicants as alleged.

In the case of Seeisa Nqojane .v. NUL,[8] the following statement by the Registrar of the respondent university to appellant was held to be hearsay and therefore inadmissible.

> ***"The Council of the National University of Lesotho has considered a report of the Non-Academic Staff Appointments Committee regarding your employment at the University. It was noted that you have been found guilty of the charges made against you in the letter of the 25th July, 1984."***

The Court of Appeal concluded that only an affidavit from the author of the letter confirming its truth could make it admissible. Respondent knew that applicant's case rested on challenging the Administrator's power to write the letters purporting to dismiss applicants. Respondent did not however deem it necessary to address this contention of applicants.

It seems to the court that on the authority of Nqojane's case above, the Administrator's allegation in his letter to applicants that he was exercising powers flowing from the Management Board is hearsay. The Board should have rebutted applicants' contention that it never met to make any of the decisions that the Administrator purported to implement as its agent. Their silence, compled with the doubt regarding the ability of

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8 C. of A. (CIV) No.27 of 1987 (unreported)

the board to meet at short notice, tilts the balance of probabilities in favour of applicants. In the absence of a deposition from one of the members of the Board that it actually decided to dismiss applicants, a copy of the minutes of the Board at which the decision was taken would have sufficed. (See also Thomas Makhupane .v. Lesotho Pharmaceutical Corporation & Another.[9])

Article 4.6 of the constitution deals with junior and other staff of the hospital. In the case of the junior staff, the Board is directed to delegate the powers of appointment and dismissal to the Internal Management of which the Administrator is the member. I do not think however that it is necessary to deal with the provisions of this article because they are not relevant. In his letters the Administrator purported to exercise the powers of the Board and not those of the Internal Management. It follows therefore that applicants' appointments and dismissals are not governed by Article 4.6 but Article 3.3 of the Constitution.

Since the determination of the issue whether the Board had authorized applicants' dismissal disposes of the matter, I do not intend to decide the other issue raised by the applicants relating to a hearing at the time of the dismissal. Since applicants are successful they are entitled to a relief they have prayed for. Their relief will however be limited to what they have asked for, if it is capable of being granted. We cannot given them what they have not asked for. Applicants are therefore granted their prayers as follows:

(a) The purported dismissal of applicants on 13th February, 1995 is declared null and void and of no force and effect.

(b) Second respondent is ordered to pay applicants their salaries for the months of February and March.

(c) Applicants had also prayed for payment of interest at the rate of 18% and

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9 CIV/APN/82/90

costs of suit. Even though the Labour Court does perform judicial functions, it is however not a court of law. It is a quasi judicial administrative body with no inherent power to order payment of interest unless specifically empowered by statute. With regard to costs, this court has consistently stated that in unfair dismissal cases it has no power to award costs except in rare cases where the party against whom it awards costs has acted unreasonably. Applicants have not suggested at any stage of the proceedings that respondents have behaved in an unreasonable manner that warrants that they be penalized with costs. This court has not found any unreasonable conduct on the part of the respondents either. There is therefore no reason to award costs against them.

THUS DONE AT MASERU THIS 26TH DAY OF APRIL, 1995.

L. A. LETHOBANE

PRESIDENT

S. LETELE **I CONCUR**

MEMBER

M. KANE **I CONCUR**

MEMBER