IN THE LABOUR COURT OF LESOTHO
CASE NO LC 106/96

HELD AT MASERU

IN THE MATTER OF:

NATIONAL UNION OF RETAIL & ALLIED WORKERS
APPLICANT

AND

SOTHO DEVELOPMENT CORPORATION (PTY) LTD
RESPONDENT

JUDGMENT

Following the lodging of this application on 13th September 1996, the applicant approached the High Court in CIV/APN/340/96 seeking an interdict to the effect that respondent be *"restrained from hiring any employees on a permanent basis in replacement of employees who are union members of the applicant .... pending the hearing and finalization of the matter in LC/106/96 of the Labour Court."* This interdict was duly granted by Justice W.C.M. Maqutu on the 30th September 1996. It was on account of the urgency dictated by the interdict that this matter was heard on an urgent basis on the 9th October 1996.

This case arises out of the dismissal of nearly the entire workforce of the respondent on or around 11th September 1996; for allegedly having engaged in an illegal strike. The respondent avers in the affidavit made by its General Manager that on the 6th and 9th September the company held disciplinary hearings against two of its former employees who were found guilty as charged and dismissed. These dismissals generated dissatisfaction among the workforce and when management noticed this it called a meeting with the branch committee of the applicant union and briefed them about the disciplinary proceedings against the two employees. In particular they were informed that the procedure followed complied with the Labour Code Order 1992 (the Code) and the Recognition Agreement (the Agreement) between the

applicant and the respondent. This meeting was held on the 9th September at around 1100 hours. It appears that the branch committee raised concern that the Agreement allegedly relied upon by management had expired.

In the afternoon workers refused to resume work. Management consulted with the branch committee who informed them that workers demand reinstatement of their dismissed colleagues as a precondition for resumption of work. Management requested them to advise workers to resume work as it was not for them to pronounce the wrongfulness or otherwise of a dismissal, but workers could not be persuaded. At 1345 hrs management issued an ultimatum in which they informed workers that their sudden stoppage of work constituted an illegal strike and that they should report back to work by 1400 hrs or vacate company premises. The employees responded by requesting for a meeting with management, which was accepted. The meeting was held at 1500 hrs and the employees were informed that the cases of the dismissed employees were a matter either for the Labour Commissioner or this Court to determine the fairness or otherwise of the procedures followed and the penalties imposed, not them. They were also told that their strike was illegal and urged to return to work. When workers still did not return to work management issued yet another ultimatum at 1535 hrs which was also not heeded. At 1600 hrs management issued a circular informing all striking employees that they were suspended.

According to paragraph 10 of Grinberg's affidavit, at around the sametime as the meeting with the workforce was held, one of the members of management Mr. Molemohi was instructed to contact Mr. Ramochela of the applicant union to inform him of the work stoppage; and request for his intervention. However, Mr. Ramochela did not arrive as expected to talk to the striking workers. The following day the now suspended workers were not allowed to enter the company premises. However, when the security personnel opened gates for members of management to enter, the striking workers forced their way into the premises. Others entered through holes they had made in the fence. Mr. Ramochela was telephoned at his office and he was only able to come at around 1000 hours.

On his arrival a misunderstanding arose between him and the management regarding the atmosphere in which the two sides could meet. Mr. Ramochela wanted to come to the meeting with the striking workers, but the management was of the feeling that he should tell the striking workers to leave the respondent's premises. It is Mr. Ramochela's contention that respondent's insistence that they would only meet with him if he had instructed the workers to leave the premises contravened Section 198 of the Code in that they were denying him facilities for conferring.

In paragraph 16 of his affidavit Mr. Grinberg confirms that Mr. Ramochela was requested to tell the striking workers, who were accompanying him to the office to leave, and that the meeting could only proceed after he had cleared them. He goes further to say that Mr. Ramochela did not only decline to ask the workers to leave, he also declined to talk to him (Mr. Grinberg), because he said his hands (Mr. Grinberg's) were dirty. He said he would rather speak to Mr. Kahanovitz who is one of the directors of the respondent based in Johannesburg. It does appear from the correspondence annexed to the papers that Mr. Ramochela did decline to ask the striking workers to disperse. (See Annexure D1 to the answer, in which Mr. Ramochela had written to Mr. Grinberg complaining that the latter had refused to talk to him because he did not disperse the workers). It seems also true that he made contacts with Mr. Kahanovitz in Johannesburg complaining about Mr. Grinberg (see Annexure D1 to the answer which is Mr. Kahanovitz's letter responding to Mr. Ramochela's letter).

It seems to the Court that Mr. Ramochela has misconstrued Section 198 of the Code, as an axe with which he will intimidate every employer into submission. That Section clearly states that an employer shall grant a union official reasonable facilities for conferring. The word "reasonable" is very important. But in the present case it is not even necessary to go into the analysis of what that word implies, save to say that it was not reasonable for Mr. Ramochela to have not taken into account management's legitimate concern for their safety and the safety of the property of the company when they requested him to clear off the striking workers before the meeting could proceed.

Furthermore, the Court is of the view that it is remote to imagine a situation where the respondent can, in the circumstances of this case, be found guilty of contravening Section 198 of the Code. In the first place, respondent and applicant are parties to an agreement in terms of which Mr. Ramochela's union is recognized by the respondent. Even as at the hearing of this matter respondent still displayed unequivocal commitment to this agreement though the applicant through its branch committee wants to challenge its continued validity. In the second place since the inception of the impasse, the respondent has been in constant consultation with the applicant union's branch committee in an attempt to get a solution to the problem. Apart from consulting with the committee the respondent took steps to locate Mr. Ramochela himself to come and help diffuse the situation. He was only able to come the following day, after he had been telephoned by the management, at around 1000 hours. We see no reason why the respondent could have made such efforts to find Mr. Ramochela only to come and refuse to talk to him. Indeed all correspondence that flowed from the respondent's side indicate a continued willingness to talk with Mr. Ramochela in an attempt to find a solution to the problem. The Court does not agree that there has been violation of Section 198 as alleged and as such there has not been any unfair labour practice committed by the respondent in this regard.

The applicant seeks a declarator to the effect that the suspension of its members is unlawful and that the purported dismissal of the union members is null and void. It is common cause that when the employees did not heed the second ultimatum to return to work by 4.00 pm on the 9th September, they were informed that they were suspended. However, the following day at 1630 hours Mr. Ramochela met with management, after he had agreed to clear the striking workers. It is not clear from the papers before Court how this meeting ended. However, according to paragraph 21 of Grinberg's affidavit, which has not been denied, Mr. Ramochela was requested at that meeting to talk to the striking workers to return to work, which thing he promised to do, though he said he had no power over them (the workers). Management followed this promise by issuing yet another ultimatum that the striking workers should return to work at 0730 hours the following day. It seems to the Court that, clearly the issue of suspension became the thing of the past as soon as management reopened avenues for the workers to return to work. We accordingly find that in the circumstances of this case there is no suspension to declare unlawful as it was long overtaken by events.

With regard to the second declaration, to the effect that the dismissals must be declared unlawful, it was Mr. Putsoane's contention that the alleged reason for the termination of the members of the applicant does not fall under Section 66(1) of the Code, hence the burden of proofing the validity of the dismissal lies on the respondent in terms of section 66(2). He added that an illegal strike is not an offence for which one can be dismissed since Section 231 of the Code says a person does not commit an offence by reason only of stopping to work.

Mr. Van Tonder stated on the other hand that an illegal strike is a serious misconduct for which an employee may be dismissed under Section 66(1)(a) of the Code. He referred the Court to the Case of Lesotho Haps Development Co. (Pty) Ltd .v. Employees of Lesotho Haps Development Co. (Pty) Ltd & Another LC/52/95 at p.5 (unreported), where this Court held that *"it is (an) established law that an illegal strike is a misconduct."* This in our view suffices to dispose of Mr. Putsoane's argument with regard to whether an illegal strike is a misconduct. Section 231 under which Mr. Putsoane tried to seek succour cannot provide him the assistance he seeks. That Section protects workers from being criminally prosecuted for merely ceasing to work or refusing to accept employment. It does not prevent an employer from instituting disciplinary proceedings against an employee who refuses to work.

Mr. Putsoane contended further that the workers had done nothing that warranted their dismissal. They merely stopped work to demand an explanation from the respondent regarding the dismissal of two of their colleagues. In response Mr. Van Tonder referred to paragraphs 5, 6, 8 and 10 of Grinberg's affidavit and stated that it is clear from these paragraphs that the explanation was given first to the branch committee, and then to the whole workforce on 9th September at 1500 hours at a meeting which had been convened at their request. We are indeed in agreement

that if the workers wanted an explanation it was given. But what is clear from Annexure 3 of Grinberg's affidavit, and the precondition the workers gave to management for resumption of work immediately after the workstoppage started, is that the workers were not seeking for an explanation as alleged. They were demanding unconditional reinstatement of their dismissed colleagues.

It is certainly incorrect for Mr. Putsoane to say the workers had done nothing that warranted their dismissal. It is clear from the record that from the afternoon of 9th September the workers refused to carry on with their normal duties until they were dismissed on the 11th September. The workers' refusal to work cannot by any stretch of imagination be interpreted as *".....doing nothing to warrant dismissal."*

Respondent's workers are unionised and from the look of things, good working relationship exists between the union and management. This is evidenced by management's quick consultation with the branch committee immediately when they realized that the workers were unhappy. Management was clearly trying to avoid unnecessary tension. This should have taught the branch committee that if they had a genuine dispute they should have followed the dispute settlement procedures. Even when Mr. Ramochela arrived one would have expected him to have tried to get in motion the dispute settlement procedures especially because respondent was willing to allow the striking workers to resume work. But neither the branch committee nor Mr. Ramochela even alluded to these statutory procedures. In the Lesotho Haps case supra this Court, relying on an article by Gauntlet & Rogers; <u>When all else has failed: Illegal Strikes, Ultimatums and Mass Dismissals</u> (1991) 12 ILJ 1171 held that;

> ***".....where the illegality of the strike ..... is not merely technical but involves a material breach by the employees of their obligation to use the conciliation machinery of the Act and/or of a procedural agreement governing the relationship between the employer and his employees, the employees are less likely to receive the protection of the court from the wrath of the employer."*** **(at pp. 5-6).**

We have no hesitation in finding that the employees' refusal to resume work on the afternoon of 9th September constituted an illegal strike in an attempt to force the respondent to reinstate the two dismissed co-workers. In the Lesotho Haps case supra this Court held at p.6 of the judgment that for illegal strikers to get the protection of the Court they must discharge the onus to provide reasonable and satisfactory explanation why they resorted to illegal strike and why they had no other choice under the circumstances. In the case before Court, not even an attempt was made by the applicants to discharge the onus because in the argument of their counsel they had done nothing that warranted their dismissal.

It is common cause that the workers contended that the agreement between their union and the respondent had expired. The respondent contended that even as recently as July 1996, the union were seeking to have certain provisions of that Agreement relating to stop orders to be complied with. They annexed Annexure 1 to Grinberg's affidavit which was Mr. Ramochela's letter demanding compliance with the Agreement on the part of the respondent. They therefore, expressed shock at the workers' suggestion that the Agreement had expired. Even assuming however, that the Agreement had lapsed as alleged, that would not be a license for applicant's members to embark on illegal strike in total disregard of the statutory conciliation machinery provided in the Code.

It was further contended by Mr. Putsoane that the workers could have complied with the ultimatum to return to work on the 11th , but for respondent's unilateral imposition of a form which it demanded that the returning employees must sign. In their statement of case the applicants alleged that this form was illegal as it *"....were aimed at capriciously depriving union members of their right to embark on whatever lawful conduct stipulated under the Labour Code."* It is common cause that in the ultimatum that called on workers to return to work on the 11th September at 0730 hours, it was stated in the last paragraph that *"employees who wish to take advantage of management offer to return to work will be required to sign an undertaking to refrain from any illegal actions of this nature."* It was a form seeking to enforce this condition which the workers refused to sign until the time open for them to report back to work lapsed. It is this same form which applicants say it was illegal. It is annexed to the Originating Application as NURAW 2 and to the affidavit of Grinberg as Annexure 12.

Mr. Van Tonder submitted that Annexure 12 was not an unfair request on the part of the respondent in the light of the fact that this was a second illegal strike at the respondent in a short space of time. We agree this was not an unfair demand by the respondent. No danger or prejudice would have flowed from the signing of Annexure 12. No where does this form prevent the workers from embarking on lawful conduct under the Code. It specifically required them to refrain from illegal strikes in the future and this had been explained in the ultimatum as well. The ultimatum stated clearly that failure to return to work would be treated as repudiation of contract.

It was contended further that on the 10th September that respondent staged an unlawful lock out. Mr. Van Tonder responded that this could not be a lock out as there had not been any declaration by the union that it was embarking on a strike. Under the Code a lock out need not only be in response to a union's declaration of a strike. However, Mr. Putsoane's submission in this regard is incorrect because, the respondent had not opened its gates to the workers because it regarded them as suspended. The gates were not closed for achieving any of the purposes for which an employer may impose a lock out under the Code. (See definition of "lock out" under Section 3 of the Code).

It was Mr. Putsoane's further submission that the employees were not afforded any hearing when they were dismissed. Mr. Van Tonder stated that the situation was not conducive to the holding of inquiries as workers had adopted a very hostile and militant attitude towards management. This much is clear from paragraphs 13, 14 and 15 of Grinberg's affidavit. Annexures "B" and "C" to the answer which are security reports filed by the security officer on the spot also show that workers were aggressive and that they forcefully entered the premises on the 10th September. Management had to close themselves inside the factory for fear of their lives as threats were being made to attack them. It seems that only a person behaving like an umpire would not appreciate the situation the management were faced with. They were the people who had to give the workers a hearing. Their union had already said it does not want to talk to them, at the sametime threats were being made to attack them. They genuinely feared for their lives. How, in the circumstances could they be expected to hold hearings. It must also be noted that we are dealing here with a three man management team namely, Molemohi, Grinberg and Pershn. Their vulnerability was beyond question, as the workers concerned were in excess of sixty.

Apart from the issue of their insecurity, the management had issued several ultimatums to the workforce to return to work. The last ultimatum specifically stated that an employee who would not return to work as required would be taken to have repudiated his contract and he will be dismissed. The Court is satisfied that notwithstanding the tense situation which prevailed the ultimatum which gave the employees until the following day (the 11th September) gave them time to ponder and consider the possible consequences of their actions, especially when it had a proviso that failure to return to work will be treated as repudiation of a contract. No further hearing in the circumstances was necessary. (See also LACTWU .v. Crayon Garments (Pty) Ltd LC/15/95 (unreported).).

Mr. Putsoane's last submission was that the person who dismissed members of the applicant namely, Mr. Grinberg did not have authority in terms of the respondent's memorandum and Articles of Association to dismiss them. When confronted with a question by the Court to prove his allegation he said Annexure D1 to the answer which is Grinberg's letter to Mr. Kahanovitz, who is one of the Directors of the respondent based in Johannesburg was prima facie indication that Grinberg did not have a final say. With respect we do not agree. In our view the applicant should have done more to prove their allegation. Mr. Van Tonder did submit two documents, one a letter written by Mr. Kahanovitz in his capacity as Director and another a job description of Mr. Grinberg both of which showed that he had power to employ and dismiss. They were not so necessary as applicant had not discharged the onus to prove that Grinberg had no authority as alleged (see Lucy Lerata & Others .v. Lesotho Evangelical Church & Another C. of .A (CIV) No. 38 of 1995).

The Court is of the view that applicant's members have indeed been involved in an illegal strike action which they have not explained why it was necessary that it be embarked upon without following the legally established procedures. We are there fore of the view that this application cannot succeed and it is accordingly dismissed.

There is no order as to costs.

THUS DONE AT MASERU THIS 18TH DAY OF OCTOBER 1996.

L. A. LETHOBANE
PRESIDENT

A. T. KOLOBE **I AGREE**
MEMBER

P. K. LEROTHOLI **I AGREE**
MEMBER

FOR APPLICANTS : ADVOCATE PUTSOANE
FOR RESPONDENTS : ADVOCATE VAN TONDER