IN THE LABOUR COURT OF LESOTHO

CASE NO LC 27/97

HELD AT MASERU

IN THE MATTER OF:

LESOTHO WORKFORCE TRADE UNION 1ST APPLICANT

FORMER EMPLOYEES OF LESOTHO HIGHLANDS PROJECT CONTRACTORS & 'MUELA HYDROPOWER PROJECT CONTRACTORS (As reflected in Schedule 1)
2ND APPLICANT

AND

MUELA HYDROPOWER PROJECT CONTRACTORS
1ST RESPONDENT

LESOTHO HIGHLANDS PROJECT CONTRACTORS
2ND RESPONDENT

JUDGMENT

This case arises out of the dismissal of the entire workforce of the respondents on the 12th September 1996. It is common cause that following upon the said dismissals the respondents attempted without success to evict the workers from their camps where the workers were accommodated during their employment. These attempts culminated in the unfortunate incident of 14/09/96 when the police allegedly armed with a court order, forcibly evicted the workers from the camps, in the process of which, at least five workers were shot and killed and several others sustained injuries.

There are substantively two issues on which the applicants seek relief. Firstly, the second applicants allege that ever since they were employed by the respondents,

they were underpaid and discriminated against "in that white expatriate employees in the same boat as them have been paid upper rates than 1st applicant's members and 2nd applicants." Secondly, they seek a declarator that their dismissals on the 12th September 1996 were unfair.

This matter was initially filed out of the Registry of this Court on the 12th March 1997. Thereafter the matter was set down on several occasions, but for reasons which are unclear it could not proceed. It was finally heard on the 12th January 1999. Even then only the preliminary points raised by Mr. Mpobole on behalf of the respondents were heard. After hearing arguments the court reserved its judgment. It is on these points in limine that the present judgment is based.

Mr. Mpobole raised the following points in limine;

(a) That the first applicant had no locus standi in these proceedings.
(b) That no case is set out for relief.
(c) That the relief sought is inherently vague and unenforceable.
(d) That the matter is res judicata.

It must be recorded that in paragraph 1.1 of their Originating Application the applicants state that the 1st applicant is a trade union which is in the process of being formed. The 1st applicant stated in argument through its lawyer Mr. Mosito, that it was bringing these proceedings in terms of Section 222(2) of the Labour Code Order 1992 (the Code) which provides that;

> ***"(2) an unregistered trade union or employers' organisation may sue, be sued or prosecuted under the name by which it has been operating or is generally known."***

Mr. Mpobole argued that there is no evidence that the 1st applicant is indeed in the process of being formed. He contended that Annexure "A" to the Originating Application which the 1st applicant relied on for the authority to represent its members is unsigned. He argued further that at no stage during the events leading to this application was the 1st applicant in existence and did not play any part in the relevant events as such it has no locus standi or interest in these proceedings. Mr. Mpobole argued further that the list of members of the 1st applicant attached as Annexure "B" to these proceedings does not constitute an authorisation to the 1st applicant to launch these proceedings as it is alleged in the Originating Application.

Mr. Mosito argued on the contrary that, the applicants are not saying that Annexure "B" is an authority to 1st applicant to bring these proceedings. They are merely saying that the 1st applicant is authorised to bring the proceedings by its members whose names appear in Annexure "B". We are in full agreement with this submission. This is exactly what the applicants say in paragraph 1.3 of their Originating Application.

Mr. Mosito contended further that the first applicant's legal status to bring the present proceedings would be determined by whether it has a constitution. He argued that 1st applicant's constitution is annexed as Annexure "A" to the originating Application. In terms of the Code ten or more persons may form a trade union. (see Section 3 of the Code). The view that we hold is that such ten or more persons shall sign their names as evidence that they are indeed forming a trade union. In hoc casu some ten names of alleged founding members and three trustees are attached to the constitution as Annexure "B", but these names are not signed for in any manner whatsoever. The subsequent pages of Annexure"B" also contain lists of names allegedly members of the 1st applicant, but again none of these names are authenticated by a signature or mark.

In terms of the third schedule to the Code sub-clause (6) thereof;

> ***"every application for the registration shall be made in the form set out in form A and shall be accompanied by two printed or typed copies of the rules of the trade union or employers' organisation <u>signed</u> as specified in that form."*** **(emphasis added)**

We have emphasised the word "sign" because it confirms what we have just said. The 1st applicant has not, apart from making wild allegations that it's in the process of being formed provided any evidence that it is indeed being formed as alleged. Certified copies of form A for application of registration would have been helpful. Even at the hearing hereof which was roughly two years since filing of this case, 1st applicants could not proof if the 1st applicant did finally get registered, which brings into question the truthfulness of 1st applicant's allegation that it was in the process of being formed at time of launching these proceedings.

Section 222(2) on which 1st applicant relies says it can sue or be sued under the name by which <u>it has been</u> operating or is <u>generally</u> known. There is no evidence that prior to these proceedings the first applicant ever operated by the name by which it is now suing or that it has generally been known by that name. According to the papers before Court, in particular the respondents' Answer, the first applicant is not known to the respondents. In paragraph 2 of the Answer they state, "at no stage during events giving rise to this application was the first applicant in existence and nor did it play any part in the relevant events." This has not been contradicted by the 1st applicant. In the premises we cannot find otherwise than to uphold the respondents' point in limine that the 1st applicant has no locus standi in these proceedings.

Mr. Mosito argued however, that even if it is upheld the objection is merely technical since the individual employees have been cited as co-applicants. There is merit in this contention for as it is stated in the Civil Practice of the Magistrates Court in South African Vol. 1 9th Ed. p.180;

> ***"when a plea (of joinder/misjoinder) is upheld the main action is not dismissed, but is stayed until the proper party has been joined. In the case of misjoinder the court strikes out the unnecessary party or cause."***

Accordingly therefore, the first applicant is struck out as a party to these proceedings.

Mr. Mpobole contended further that the applicant's Originating Application lacks proper factual basis on which the relief is being sought. Mr. Mosito contended that the issue being raised relates to evidence. This much is true, but rule 3(f) of the rules of this court state that an Originating Application must;

> ***"(f) contain a clear and concise statement of the material facts upon which the applicant relies with sufficient particularity to enable the respondent to replay thereto."***

The issue relating to the unfair dismissals clearly lacks this particularity. Equally the issue of underpayments is blunt. These clearly prejudice the respondents in their reply. Once again however, these are objections that cannot defeat the main action.

Whilst upholding the objections the court will give the applicants the opportunity to furnish the necessary particulars provided of course that the remaining points in limine will not defeat the main action.

It was further argued by Mr. Mpobole that the relief being sought is vague and unenforceable. In particular he argued that should the application succeed, further questions will arise such as; when and by which respondent was each of the employees employed? What position and what wage was each employee occupying and earning respectively? Once again Mr. Mosito's response to this objection was, correctly in our view, that these are not insurmountable issues as they are matters of evidence. This point is accordingly overruled.

Lastly, Mr. Mpobole contended that this matter is res judicata for two reasons. Firstly he contended that the events leading to the dismissal of the applicants herein were a subject of a High Court litigation, where it was found that the respondents had engaged in an illegal strike and as such their dismissal was lawful. He attached a copy of the High Court Order by Monaphathi J. to this effect.

In response Mr. Mosito contended that for res judicata to succeed as a defence three things must be established. These are whether the parties in both actions are the same, secondly were the merits of the case before court determined and lastly

whether the cause of action is the same. With regard to the first issue he contended that the parties in the present application are not the same as the parties in the High Court matter. He sought to question who the 12th respondent in the High Court matter who are referred to as "the collective workforce of the 1st and 2nd respondent are?"

In the view of this Court, save for the first applicant in the present matter, which has since been struck off, the parties were the same in both litigations. The collective workforce of first and 2nd respondents are the employees of the two respondents who at the material time were on strike and were finally dismissed on the 12th September 1996. This is common cause. The present applicants are part of the collective workforce referred to under 12th respondent in the High Court proceedings. In their Originating Application, the applicants have stated as much under paragraph 1.4 that "2nd applicants are former employees of respondents."

On the 2nd issue Mr. Mosito argued that there is no evidence that the fairness of the dismissal of the applicants was determined by the High Court. We are in full agreement. The lawfulness of a dismissal does not necessarily mean such a dismissal is fair. The High Court has clearly limited its order to the lawfulness of the dismissals.

Lastly, it was Mr. Mosito's contention that the cause of action was not the same as the fairness of the dismissals was not in issue in the High Court matter. Once more we are, so far in agreement with learned counsel for the applicants.

Mr. Mpobole's second argument was that by an agreement of the 2nd October 1996 the dispute was settled. The Agreement is attached as Annexure "G" to the Originating Application. This agreement was entered into between the two respondents herein and the Construction and Allied Workers Union of Lesotho (CAWULE) as the mandated representative of the workers. It is common cause that prior to the events that led to the dismissals of the 12th September 1996, the respondents had a Recognition Agreement in terms of which CAWULE was the recognised union ".....to represent members at the premises and to negotiate on their behalf in accordance with the provisions of this agreement, provided that the union remains sufficiently representative of the employees in the employ of the company."

It is apparent from the agreement of 2nd October, that some problems arose regarding this agreement which led to the respondent purporting to terminate the agreement between the parties in June 1995. However, this is not the issue we are called upon to decide. What is of importance is that following the events of 12th and 14th, negotiations ensued at which certain agreements were reached. It is also important that at those negotiations CAWULE's mandate to represent the workers was never challenged.

At that meeting it was agreed by implication that the workers had indeed been dismissed on the 12th September 1996. The agreement therefore, concentrated on the recontracting of the dismissed workers and non-recontracting of the dismissed workers. In terms of the agreement the dismissed employees could apply for the approximately 1700 vacancies that existed. They further agreed that, "approximately 600 dismissed employees will not be re-contracted." The selection criteria was going to be based on available job categories, skills of applicants and length of service. The parties also agreed on a package to be paid to those employees who would not be recontracted.

Mr. Mpobole contended on p.4 of his heads of argument that "the disputes concerning the fairness or otherwise of their dismissal (the applicants) was settled by way of a compromise which is a contract whose purpose is to prevent or avoid or put an end to litigation."

He relied on Amler's Precedents of Pleadings 4 Ed p.67 and Food & Allied Workers' Council of South Africa & Others .v. Sabatino's Italian Restaurant (1996) 17 ILJ 197. In the Sabatino case reliance was made on the decision in Ford .v. Austen Safe Co. (Pty) Ltd (1993) 14 ILJ 751 where the court held that;

> ***"the settlement agreement constitutes an extra-judicial compromise of the respective claims of the parties.....such a compromise has the effect of res judicata and is an absolute defence to an action on the original contract or cause of action except where the settlement expressly or by clear implication provides that, on non- compliance with the provisions thereof a party can fall back upon his original right of action."***

It seems to this court that in the present matter a compromise was indeed reached between CAWULE acting on behalf of the applicants and the respondents. The agreement stipulated clearly the factors that would be taken into account in considering the re-contracting of the dismissed workers.

The applicants are not claiming that the respondents have not considered those factors that they laid in the agreement as relevant. But they claim that their non-recontracting was arbitrary and selective. This sounds untenable because by agreement factors that would be taken into account were reduced to writing and the applicants ought to have known about them. They also seem to imply in paragraph 6 of the originating Application that they were arbitrarily and selectively not recontracted "....consequent to the said agreement..." As we stated earlier, CAWULE was a mandated representative of the workers - applicants included. Whatever agreement it reached is binding on all those on whose behalf it entered into negotiations as their authorised agent.

The view that we hold is that indeed the effect of this agreement was to put to an end the litigation that is being resuscitated by the applicants. As Mr. Mpobole

argued in his heads of argument and indeed in answer to a question from the court whether the fairness of the dismissal was determined by the High Court, he stated that the question concerning fairness or otherwise of the dismissals does not arise as it was a matter of compromise by an agreement reached between CAWULE and the respondents on the 2nd October 1996. This will also put to rest Mr. Mosito's argument regarding whether the question of fairness was in issue in the High Court proceedings. We accordingly uphold respondents' contention that this matter is res judicata.

We noted at the start of this judgment that there are two issues on which the applicants are seeking relief. One concerns the alleged under payments and discrimination. The second one related to the dismissals of the workers on the 12th September 1996. The agreement between CAWULE and the respondents concerned itself exclusively with the latter issue. It is therefore, this latter issue which is declared as determined and as such res judicata as per the said agreement. The other issues concerning underpayments an discrimination are not determined. The applicants shall therefore, provide such further particulars as the respondents may hereinafter request to enable it to answer the alleged claims of underpayments and discrimination. Thereafter, the parties shall approach the Registrar for allocation of a new date when this matter can be heard.

Costs shall be costs in the cause.

THUS DONE AT MASERU THIS 27TH DAY OF JANUARY 1998.

L.A LETHOBANE
PRESIDENT

M. KANE
MEMBER **I AGREE**

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

FOR APPLICANTS: **MR MOSITO**
FOR RESPONDENTS: **MR MPOBOLE**
MS MOCHABA