IN THE LABOUR COURT OF LESOTHO

CASE NO LC 49/99

HELD AT MASERU

IN THE MATTER OF:

MOHALE TUNNEL CONSTRUCTORS APPLICANT

AND

CONSTRUCTION & ALLIED WORKERS UNION OF LESOTHO (CAWULE) 1ST RESPONDENT

ARBITRATOR :- T. L. MONNAPULA 2ND RESPONDENT

JUDGMENT

This is an application in terms of Section 227(9) of the Labour Code Order 1992 (The Code) which provides in part as follows:

> ***"(9) The Arbitration award shall be final and binding; a party claiming in good faith that the Arbitrator exceeded his or her jurisdiction may none the less apply to the Labour Court for a judgment on that point only…."***

It is the applicant's case that the second respondent exceeded his jurisdiction in as much as he based his award on his conclusion that the retrenchment of 1st respondent's members was unfair because the applicant did not consider "reasonable possible ways of limiting or avoiding (the) retrenchments." In particular the second respondent found that the 1st respondent's members were not offered the opportunity to be hired at a much reduced salary as labourers. The applicant contended that the 2nd respondent's mandate was limited to determining whether there was consultation with the affected workers before the retrenchment or not.

Having made the finding that the applicant did not consider alternatives to retrenchment, the 2nd respondent went further to state that he could not put the complainants back into their jobs because the jobs are no more available. He then directed that the applicant pays each of the retrenched workers five (5) months

wages. The applicants argue that this was an unreasonable order in as much as the 2nd respondent had just ruled that he could not order reinstatement because the jobs were no longer available. By the same token, the applicants argued he could not order payment of wages against non-existent positions and for no work done.

In terms of Section 226 of the Code if within fourteen (14) days of a dispute coming to the attention of the Labour commissioner, the dispute still remains unsettled, the Labour Commissioner may;

> **(a) appoint a conciliator or**
> **(b) subject to Section 227(1)(b) refer the dispute to arbitration.**

Section 227(1)(b) requires the Labour Commissioner to obtain the consent of both parties before referring the dispute to arbitration. In terms of Section 227(2)

> ***"where all parties give their consent, the Labour Commissioner shall within fourteen days refer the issues specified for determination by notice to an arbitration tribunal."***

We pause here to observe that there is no notice issued by the Labour commissioner to the arbitrator outlining the issues that he is to arbitrate. It was neither filed nor presented by either side in court. It can at this stage be concluded that the arbitrator had no issues to arbitrate upon, none having been referred to him by the officer empowered in law to do so.

What we have is a letter of appointment of the 2nd respondent signed by the Minister of Employment and Labour. This is the letter which seeks to outline the issues in dispute which the arbitrator is mandated to arbitrate upon. The Minister's power under Section 227(3) of the Code is limited to appointing the arbitrator and assessors. He is not empowered to himself refer the issues in dispute to the arbitrator.

We will assume for the moment that the issue(s) outlined in the Minister's letter are indeed the issues which the arbitrator was called upon to arbitrate. The issue in our view is contained in paragraph 3 of Annexure "A" to the answer which is 2nd respondent's letter of appointment. It is stated as follows:

> ***"In brief the issues in dispute in the matter concern consultations on the part of MTC with CAWULE before the former retrenched and/or terminated the services of some of its skilled employees, who were also members of CAWULE on 30 April 1999. CAWULE's contention is that the retrenchment/termination of the said employees was effected "prematurely, unprocedurally, unfairly and unlawfully" and therefore demands that they be reinstated unconditionally. MTC on the other hand, contends that consultations did take place in as much as the concerned employees were duly informed of the company's intention to***

retrench in terms of its retrenchment policy and that consequently, they could not reverse their decision."

Whatever various purports may be given to the adverbs "prematurely", "unprocedurally", "unfairly" and "unlawfully", the author (i.e. The Minister) of the letter decided to summarise their meaning into one principle namely "consultation." It is not clear if the same letter (Annexure "A") was sent to the parties. But the arbitrator's mandate was clearly defined, was there or was there no consultation prior to the retrenchment?

It is our considered opinion that the arbitrator's award could not go beyond this mandate. Consideration of alternatives to retrenchment is neither impliedly nor explicitly specified, as such it is ultra vires his powers. On the compensatory aspect, the letter clearly stated that CAWULE was seeking reinstatement. The arbitrator ruled that reinstatement was not practicable. He had no power in his letter of appointment to consider an alternative to reinstatement. Neither did the parties themselves at the hearing agree to empower him to award alternatives to reinstatement if it came out that reinstatement was not possible.

An arbitrator appointed under the provisions of the code is arbitrating issues that are delineated by the parties themselves. Even when the Labour Commissioner sets out the issues in the notice to the arbitrator, those are the issues he has got from the parties themselves, hence why their consent is required. Great care must be taken therefore, that new issues which the parties have not consented to prior to the arbitration are not sneaked in through the back door at the arbitration; thereby improperly extending the powers of the tribunal beyond the issues specifically referred to it. In the premises we find that; the arbitrator has indeed exceeded his authority for the reasons we have outlined in the main body of this judgment. We accordingly order as follows:

(i) The dispute is again referred to arbitration under Section 227 of the Code.

(ii) The Labour Commissioner shall issue a notice to the arbitrator specifying the issues being referred for his determination.

It is common cause that 2nd respondent did not oppose this application. There is therefore, no basis for awarding costs against him. It shall be noted that this is an appropriate case for an award of costs in favour of a successful party. Accordingly the application succeeds with costs. These costs shall be paid by the 1st respondent only.

THUS DONE AT MASERU THIS 9TH DAY OF FEBRUARY, 2000

L.A LETHOBANE
PRESIDENT

G.K. LIETA
MEMBER **I AGREE**

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

FOR APPLICANT : **MR MAKEKA**
FOR RESPONDENT: **MR MPOPO**