IN THE LABOUR COURT OF LESOTHO

CASE NO LC 64/00

HELD AT MASERU

IN THE MATTER OF:

JUSTICE SELLO TS'UKULU APPLICANT

AND

CONSTRUCTION AND ALLIED WORKERS UNION
1ST RESPONDENT

TS'ELE MOEKO 2ND RESPONDENT

JUDGMENT

The applicant herein was until November 1999, the General Secretary of the first respondent. The second respondent was his successor. According to him his separation with the first respondent was a smooth one. He informed the National Congress of the first respondent that he would no longer be available for the position of General Secretary as he intended to join the planned Directorate of Dispute Prevention and Resolution. The National Congress accepted his request but in turn requested him to stay on as National Organiser until the Directorate took of.

Applicant says that he thus continued as an employee of the respondent in a position of National Organiser. He served for the month of December and in January he was unceremoniously booted out of office by the second respondent. It is common cause that the respondent vehemently denies ever employing the applicant as alleged. It followed therefore, that the applicant bore the burden of proof that he was ever employed as he claims. This much was categorically made clear by the Court to the applicant, that he had to prove his claim that he was employed as National Organiser of the respondent.

Originally applicant sought to persuade the court to rely on his *ipse dexit* without proof of either the minutes or affidavit of any of the persons present at the said National Congress. When this could not happen he produced a letter dated 8th August 2000 written by the National Treasurer of the first respondent to the second

respondent informing him that the National Executive Committee has suspended him with pay pending a disciplinary hearing on the 19th August 2000. One of the reasons for the disciplinary hearing was said to be that the second respondent had defied the decision of the National Congress that the applicant continues to work for the union dealing with litigation and collective agreements. This letter was handed in as proof that the applicant was indeed employed and that that employment was unfairly terminated by the second respondent.

Assuming that it is true that the applicant was employed as he alleges, it seems to this court that that employment was irregular in terms of the constitution of the first respondent. The letter of the Treasurer General refers to the resolution of the National Congress. But National Congress resolutions have to be implemented by the National Executive committee. For the National Congress resolution to constitute employment for the applicant, it had to be reduced into a formal appointment by the NEC because in terms of Article 9.4.4 of first respondent's constitution, it is the function of the NEC "to engage, determine employment terms and conditions of, and discharge any employee of the union." There being no evidence that the NEC did its work of implementing the congress decision it was wrong and unfair to place the blame at the door of the second respondent.

Coming now to the letter itself, this letter cannot constitute proof of applicant's employment. It was written in August while respondent's answering papers were filed in June. It thus contradicts respondent's statement of case before this court. If anything it creates confusion as to what exactly respondent's position is with regard to applicant's alleged employment. The author of the letter, is part of the first respondent and if he desired to contradict respondent and thus testify for the applicant, he should have done so on oath. Furthermore, the letter constituted a charge of misconduct against the second respondent which he had to answer. In fairness to the second respondent, the letter could only be put to the second respondent to give him chance to rebut its accusations. Without him (second respondent) having had the opportunity to rebut it, it cannot be admitted as evidence. In the circumstances we are of the view that not only has applicant failed to prove that he was employed, but even if it were assumed in his favour that he was employed, *ex facie* the papers before us the employment was not regular.

Applicant further averred that in 1994, he was granted study leave by the first respondent. The agreement was that during his period of absence he would be paid 50% of his salary as allowance which would be paid directly to his family. He averred further that he left for school in August 1994 and came back in October 1995. The first respondent was only able to pay him allowance for two months and thereafter the allowance was stopped. All these were admitted by the respondent's representative thus dispensing the need for tendering evidence.

Mr. Moroka for the respondent stated and this was confirmed by the applicant, that whilst the applicant was away on study leave, his term of office as General Secretary

expired. Whilst they could not agree on the exact month, they were in agreement that it was during the first three months of 1995. Thus when applicant came back in October 1995, there was an incumbent in the office of General Secretary. It was not clear if he incumbent was acting or had been substantively appointed. Mr. Ts'ukulu and Mr. Moroka could not agree on the terms of the incumbent's appoinment, and no evidence was adduced to prove what the correct position was. The applicant was reelected General Secretary in 1997, which term expired in November 1999. It was Mr. Moroka's contention that during all this time since his return from school the applicant never said anything about the owing allowance.

Mr. Ts'ukulu on the other hand averred that he approached the NEC about his outstanding allowance and was requested to wait until the financial position of the respondent improved. This may or may not be so, but significantly in paragraph 25 of his Originating Application, the applicant has stated that from April 1999 the financial position of the respondent improved. This was during his own term as General Secretary and it has been said that he was the one who made payments. There is no evidence that the he reminded the NEC about his outstanding allowance. It appears that he kept quite until after his separation with the respondents.

All claims have to be filed within a given period. Thus the result of applicant's silence is that as of May 2000, when he launched these proceedings the claim had in terms of section 25(2) of the Labour Code Order, 1992 (the Code) prescribed. In terms of that section "....except as provided by section 70 in respect of a claim for unfair dismissal, any claim under the Code shall be filed within three years of the occurance which gives rise to the claim." One year and six months had lapsed without applicant doing anything about the claim. The conclusion to which we arrive is that, the institution of this claim is an afterthought, resulting from the undisclosed ternsions underlying the separation. Otherwise, if things had not changed it was no longer applicant's intention to persue the issue. In the circumstances we hold that the claim for study leave allowance is time barred.

Applicant contended further that his severance pay was improperly calculated in that the two periods before and after study leave were separated. This resulted in the period before he went to school being calculated at the rate of pay he was earning in 1994 instead of what he was earning in 1999. Furthermore, this caused his service period to be short by one year namely, 1995 because his service after he returned from school was calculated from 1996. The respondents did not provide any explanation for this, but clearly they acted as though the applicant's service were terminated when he went to school in 1994.

In terms of section 79(4) of the Code the two weeks' wages for purposes of severance pay "*.....shall be wages at the rate payable at the time the services are terminated."* In terms of section 3 "*continuously employed*":

> ***"means employed by the same employer including the employer's heirs, transferees and successors in interest, for a period that has not been interrupted for more than four weeks in each year of such employment, during which four-week period there was no contract of employment in existence and no intention on the part of the employer to renew it once that period had elapsed. No break of employment due to illness certified by a registered medical practitioner, sick leave, weekly day of rest, maternity leave, public holiday, paid holiday or <u>other leave granted by the employer shall be deemed to break the continuity of employment.</u>"*** **(emphasis added).**

It was regarded as common cause between the parties that during his absence applicant's term of office expired. This situation would have brought about a result which the respondents have wrongly assumed namely; termination of his contract, if the first respondent had not granted the applicant leave. The underlined words clearly state that any leave granted by the employer shall not break the continuity of employment. It follows that the respondents were wrong to have regarded applicant's employment as terminated when he proceeded on study leave as they had themselves granted him the leave. Similarly, the respondents were wrong to have left out 1995 in the calculation of applicant's severance pay, as he was on leave of absence granted by the employer in that year.

Applicant's further and last contention was that in 1998 he was discriminated against when all the employees were paid a bonus in the form of the 13th cheque with the exception of himself. Mr. Moroka for the respondents averred and it was confirmed by the applicant that infact the staff of the first respondent were, with the exception of the applicant paid by first respondent's donors. Only the General Secretary is paid directly by the first respondent. Mr. Moroka contended therefore, that it was for the applicant to have negotiated the bonus with his employer.

Applicant's contention is that he did negotiate the bonus and was promised the same by the NEC; when the financial position improved. Once again there was no evidence at all either establishing a right or that the applicant was indeed promised to be paid the 13th cheque. In the absence of proof we cannot take this issue any further, it is accordingly dismissed.

AWARD

The applicant having succeeded on the claim of severance pay, it is hereby ordered that:

(a) Applicant's severance pay for the period prior to his study leave be calculated at the rate of his earnings in November 1999.

(b) The year 1995 be included in his qualifying period of service and that it also be calculated at the rate of applicant's earnings in November 1999.

THUS DONE AT MASERU THIS 24TH DAY OF OCTOBER, 2000.

L.A LETHOBANE
PRESIDENT

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

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

FOR APPLICANT : **IN PERSON**
FOR RESPONDENT: **MR. MOROKA**