IN THE LABOUR COURT OF LESOTHO

LC/02/06

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO UNIVERSITY TEACHERS AND RESEARCHERS UNION **1ST APPLICANT**

NON-ACADEMIC WORKERS' UNION **2ND APPLICANT**

AND

NATIONAL UNIVERSITY OF LESOTHO **RESPONDNT**

JUDGMENT

The two joint applicants are unions which organize and have members within the respondent. The first applicant organizes teaching and research staff, while the second applicant organizes non-academic staff. Both unions have an identical clause to the effect that "all full time and part time teaching research staff of the University shall be regarded as members of LUTARU unless they notify the Secretary in writing of their unwillingness to be so regarded" (clause 4.1 of the Constitution). In the case of the second applicant clause 15 provides that "every person employed under the conditions and terms of service of the non-academic staff shall be a member unless he declines to be so by a letter to the Secretary General of the union, within one calendar month of his assumption of duty."

On the 12th January 2006 the two unions filed an urgent applicant seeking an *ex parte* order that:

(1) the rules of court relating to the periods and modes of service be dispensed with on the grounds of urgency hereof;

(2) The respondent be directed to show cause if any on the 27th January 2006 why;
   (a) The respondent shall not be restrained from preferring/prosecuting disciplinary proceedings against members of the applicants' employees of the National University of Lesotho, pending finalization of the proceedings herein;
   (b) Prayer 1 and 2(a) operate with immediate effect as an interim court order;
   (c) Granting applicants further and/or alternative relief.

The rule nisi was issued and on the return date the rule was extended to 30th January 2006. On the 30th January the rule was extended again to 17th February for arguments.

BACKGROUND

It is common cause that on the 28th and 29th June 2005 the Council of the respondent adopted a new disciplinary code and new terms and conditions of service which commenced operation on the 1st July 2005. A misunderstanding arose between the two unions and their members on the one hand and the administration of the University on the other hand. There was a feeling among a section of the staff supported by their unions that the new regulations and terms and conditions of service were unlawful because certain of their clauses failed to comply with mandatory provisions of the Higher Education Act of 2004.

It is also common cause that a number of the employees of the respondent who were members of one or the other of the two unions were subjected to disciplinary processes using the new terms and conditions of service. At the time of the filing of this application one such disciplinary case had been finalized and the staff member concerned dismissed. A number of others were in the pipeline. These resulted in the union approaching court on an urgent basis to seek suspension of those hearings and others which were to be preferred pending the determination of the application on the validity or otherwise of the clauses of the new terms and conditions under which they were being charged. At the hearing hereof the respondent raised a number of points in limine which I deal with herein below.

POINTS IN LIMINE

LOCUS STANDI

Respondent contended that the applicants did not have *locus standi* to bring these proceedings because:

(a) there is no collective bargaining or recognition agreement between any of the two unions and the respondent.

(b) Any disciplinary proceedings that the respondent may institute against any of its employees is a private matter strictly of a contractual relationship between any such employee and the respondent.

This argument looses sight of the provisions of section 198A(1) of the Labour Code (Amendment) Act 2000 which provides that;

> "(2) An employer shall bargain collectively in good faith with a representative trade union"

A representative trade union is defined as one that represents over 50% of the employees.

In paragraph 1.5 of the Originating Application the applicants aver that they represent "the bulk of the employees of the respondent who are members thereof." The respondent has denied this averrement and put the applicants to the proof thereof. Clauses 4.1 and 15 of the applicants' constitutions show clearly that they are representing the bulk if not the entire workforce of the respondent in the relevant categories. It seems to us therefore that once the applicants have proved representativity as we believe they have, by operation of law viz section 198A the respondent has to deal with them and allow them to negotiate on behalf of their members. Equally the applicants assume the right of representation of those of their members by reason of their having agreed to belong to the union. There is no proof that they disaffiliated in writing to the General Secretaries as provided in Articles 4.1 and 15 of their constitutions.

The issue of the union suing on behalf of their members as is the case in casu is one of labour jurisprudence as opposed to the common law. In

labour law it is not surprising to find unions instituting actions even on matters touching on contracts in their own name on behalf of their members. These rights and powers are usually provided for in their own constitution. No suggestion was made that the unions do not have such a power vested in them by their constitutions. This point accordingly falls away.

The respondent argued further that the application is defective in as much as the identity of the members on behalf of whom the application is made are not disclosed. In LUTARU .V. NUL 1999-2000 LLR-LB 52the court of appeal did remark obiter that the union had failed to specify the individuals whom it sought to be benefited by the order sought. Whilst that was the case the court did not nullify the proceedings on that basis. In casu the applicants have specified individuals in paragraph 2.5 of the Originating Application whom they state that disciplinary charges have been preferred against them. These are the persons whom the unions state in paragraph 4.2 that they "reasonably fear that in all pending cases all the accused persons will be found guilty and dismissed." We are of the view that there is adequate disclosure of the persons that are sought to be benefited by the order sought.

Thirdly, it was argued that there was no urgency and that the applicants should have given the respondents notice of the intended interdict even if a short one. Reference was made to the fact that the parties reside within the same campus and applicants would have suffered no prejudice if they had served the respondents prior to obtaining the order. Rule 22 of the Labour Court Rules 1994 empowers the court to grant ex parte interim relief if a party furnishes reasons showing that the matter is urgent. The requisites for such a relief were laid down in Setlogelo .v. Setlogelo 1914 AD221 which was cited with approval in LUTARU .V. NUL
supra at page 62. These were said to be:

1. a prima facie case though open to some doubt;
2. a well grounded apprehension of irreparable harm if the interim relief is not granted;
3. that the balance of convenience favours the granting of the interim interdict;
4. that the applicant has no other satisfactory remedy.

The applicants have sought to establish a right to represent their members whom they allege are threatened with disciplinary action and inevitable dismissal. They have further expressed apprehension that if their members

are dismissed their pension policies, retirement benefits, insurance policies and medical aid contributions will be adversely affected regard being had to the fact that they rely solely on their salaries for survival. They further alleged that it would be costly to get relief in the form of damages.

Applicants' apprehension is without doubt subjective. The issue to decide is whether objectively determined the factors which give rise to applicants' fear justify approaching the court *ex parte*. As a general rule, basic considerations of fairness and the need to prevent the administration of justice being brought into disrepute, require appropriate notice to be given. Orders should only be granted without notice where this is rigorously justified (where for instance, there is extreme urgency or the need to prevent the order from being frustrated where any prior notice could well have had that effect." (Per Gauntlett J.A. in The Commander LDF & Another .v. Matela 1999-2000 LLR – LB13 at p.16. See also Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 1997 Juta & Co. 4th Ed. At p.367 and Amandu Mpiti Taole .v. Deputy Principal Secretary and others CIV/APN/256/95 (unreported) at p.4 of the typed judgment and Mapuseletso Mahlakeng and 55 others .v. Southern Sky (Pty) Ltd and 7 others C. of A. (CIV) No.16 of 2003 and a host of other authorities the learned Steyn P. referred to therein.

That is far less costly to institute proceedings by way of motion proceedings does not beg the question. That does not however, justify proceeding against another party without notice. Herbstein and Van Winsen supra p.232 gives three exceptions where an *ex parte* application may be the right way of proceeding against another party. Those are:

1. When the applicant is the only person who is interested in the relief sought;
2. when the relief sought is a preliminary step in the proceedings e.g. an application to sue by edictal citation or to attach property *ad fundandam jurisdictionem*;
3. when though other persons may be affected by the court's order, immediate relief is essential because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall e.g. an application for interdict or an arrest *tamquam suspectus de fuga*. See also remarks of Maqutu J in Mpiti Taole's case supra at p.4 of the typed judgment.

I have considered the three exceptions and I do not see where the present application would suit. The authorities to which we have referred are unanimous that even a short notice suffices because that goes a long way to satisfy the fundamental principle of *audi alteram partem*. The reasons advanced by the applicant do not justify their denying the respondent their common law and constitutional right of being heard. In Mapuseletso Mahlakeng and others *supra* the lack of urgency was treated as sufficient ground to discharge the rule nisi.

Fourthly, it was contended on behalf of the respondent that the applicants are guilty of non-disclosure in as much as they knew at the time of seeking the *ex parte* temporary interdict that the first of the disciplinary cases they were apprehensive about was only scheduled for the 19th January 2006. It was argued that for this reason the applicants should have given respondent a notice of the intended action even if a short one. It was further argued that should the court have been aware of this fact namely; that the first case was to proceed only on the 19th January, it would in all probability not have granted the order sought. The applicants have not controverted the respondent's averrements in this regard.

Mr. Letsika for the applicants submitted that this court being a court of equity must do substantial justice. He averred that even if the points in limine are upheld it still remains the discretion of the court to decide whether to dismiss the application or to set aside the temporary interdict and to proceed to hear the merits. This argument finds support in Herbstein and Van Winsen *supra* at p.367 where the following is said:

> *"The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently which might have influenced the decision of the court whether to make an order or not, the court has discretion to set the order aside with costs on the ground of non-disclosure. It should, however be noted that the court has discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."*

It is trite that a court vested with discretion must exercise it judicially. In Schlesinger .v. Schelesinger 1979(4) SA342 the court held that unless there are cogent practical reasons why an order should not be rescinded, the court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application.

The fact that the Labour Court is enjoined by section 27(2) to do substantial justice between parties before it was dealt with by the Court of Appeal in Lucy Lerata .v. Scott Hospital 1995-1996 LLR –LB6 at p.17. Leon J.A. stated that that section cannot:

> *".....mean that the Labour Court can confer on, or deprive of rights any of the parties before it on mere gut feeling.... It does not mean that the Labour Court is entitled to make its own rule in regard to who is to bear the onus in proceedings before it nor to take cognizance of evidentiary material quite outside that placed by the parties before it. Still less may it base its findings on mere speculation."*

These remarks apply with equal force to the submission of Mr. Letsika on behalf of the applicants herein. Authorities abound as to what should happen in circumstances similar to those that exist in this matter. No cogent practical reasons were advanced why the court should exercise its discretion to override those authorities. In any event this is not necessarily the end of this matter as the applicants reserve the right to relaunch these proceedings following legally acceptable procedure of giving all those who have interest in the outcome notice. With these remarks we conclude that the procedure followed by applicants should not be countenanced. Accordingly these proceedings fall to be set aside and the rule is accordingly discharged with costs.

THUS DONE AT MASERU THIS 23RD DAY OF FEBRUARY 2006

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA **I CONCUR**
MEMBER

L. MATELA **I CONCUR**
MEMBER

FOR APPLICANTS: **MR. LETSIKA**
FOR RESPONDENTS: **MR. MOILOA**