IN THE LABOUR COURT OF LESOTHO

LC/7/04

HELD AT MASERU

IN THE MATTER BETWEEN

FACTORY WORKERS UNION **APPLICANT**

AND

EVER UNISON GARMENTS (PTY) LTD **RESPONDENT**

JUDGMENT

Dates of hearing: 26/08/04, 23/08/05, 01/11/05, 14/02/06, 28/03/06.

Strike – Referral in terms of sec.226(1)(i) and 227(5) of Act No.3 of 2000. Evidence – Witnesses evidence inconsistent with union case – Testimony of witnesses also contradictory – Whole thing a fabrication.
Evidence – Respondent witnesses testimony consistent – strike was violent – police involvement to maintain law and order inevitable.
ILO – Freedom of Association Committee of Governing Body of ILO jurisprudence confirm same.
Pleadings – union not alleging on whose behalf its suing and relationship with persons sought to be benefited by application – Application dismissed.

As it can be seen this matter was heard over a number of dates; with each hearing taking a full day. As it is to be expected with matters that take so long to complete, it was not always possible to have all parties available. Thus on the 14th February 2006, one of the panelists assigned to this case Mr. Mofelehetsi was unable to attend due to ill-health. Since the matter had

already taken too long and the date itself had been set over a long period, it was felt by all sides that postponement due to his absence would prejudice the speedy determination of this dispute. Accordingly the court proceeded to dispose of the case pursuant to rule 25(2) which provides:

> *"where during the course of (a) hearing a vacancy arises or vacancies arise in the membership of the court, provided the remaining members constitute a majority of the original membership of the court, the decision of the remaining members shall be the decision of the court…."*

This explains why only two members have subscribed to this judgment as opposed to the normal three members.

Events giving rise to these proceedings occurred on the 17th September 2003. This is two and a half years todate. The Originating Application was filed on the 10th February 2004, some seven months after the events. It would appear however that on the 13th October 2003, one Mafusi Jack, PW2 herein, and three hundred and forty one others made a referral at the Directorate of Dispute Prevention and Resolution (DDPR) in Leribe under referral case No.261/03. On the 27th November 2003 the DDPR referred the dispute for adjudication in terms of section 226(1)(i) read with section 227(5) of the Labour Code (Amendment) Act 2000.

It is common cause between the parties that a strike broke out at the respondent factory on the 17th September 2003. It is also common cause that the said strike had not followed the legally prescribed steps for embarking in a lawful strike. It is further common cause that following that strike, all the employees of the respondent were dismissed. The applicant union (the union) filed the present proceedings without alleging on whose behalf it was suing. However, in paragraph 16 of the Originating Application the union prayed for relief as follows:

(a) That the Honourable Court declare the dismissal of the respondent's employees null and void.
(b) Reinstatement of all the respondent's employees back to their jobs/position.
(c) Payment of their wages from the purported dismissals up to the declaration of "A" above.

(d) Imprisonment of the employer in terms of section 80 of the Labour Code.
(e) Further and/or alternative relief.

On the 15th July 2005, the union filed an application for amendment of the Originating Application wherein it inter alia, attached as annexure Ever Unison "A" the list of the dismissed employees whom it sought to have joined as co-applicants. We will revert to this issue at a later stage.

In their statement of case the applicants allege that on the 16th September 2003 an employee by the name of Ntsoetso Lejaha was assaulted by a Chinese supervisor by the name of Shaw u Lin. The union alleges that Ntsoetso's co-employees were unhappy and they requested the shop-stewards to intervene. The shop-stewards requested a meeting with the Personnel Manager, Mr. Brown who refused to meet them.

On the 17th September Ntsoetso was allegedly called by the Personnel Manager and asked if she had a witness for the alleged assault. Ntsoetso allegedly agreed that she had a witness, whereupon the witness was called to the office whereat both of them were dismissed and told to come back on the 22nd September 2003 for their terminal benefits. The Originating Application goes further to state that the two dismissed workers reported their plight to the shopstewards at 12.00 noon, which is incidentally time for lunch break. The shop stewards allegedly again requested for an urgent meeting with the Personnel Manager who allegedly once again refused to meet them. It is averred that the shop stewards reported the situation back to the workers who "were dissatisfied with management refusal to handle the issue properly (and then) gave solidarity support to the dismissed co-workers by downing tools at 15.00 hrs."

The union alleges further that management responded by calling security guards and Lesotho Police who beat and evacuated the workers from the factory's premises. Two union officials Messrs Kaizer Mapota and Daniel Theko requested a meeting with management but were not allowed. Instead management told them that all workers were dismissed.

The respondent's answer is in stark contrast to the union's statement of case. The company avers that on the 16th September workers had gathered at the Personnel Office to complain about non-payment of their overtime pay with their normal wages. They were allegedly told that the issue would be

rechecked and that they would get an answer the following day. On the 17th at around 12.45 pm the workforce became divided into two groups, with one group singing and throwing cotton cones at the security guards and trainee staff, whilst at same time refusing to resume their work. Respondent alleges that the employees' conduct amounted to an unlawful strike, as a result all the employees were dismissed on that same day.

The union called three witnesses, PW1 Mr. Kaizer Mapota, PW2 Ms Mafusi Jack and PW3 Ms Mafusi Rantho. PW1's testimony did not advance the union's case in the slightest, because his evidence was that he was called to come to the factory by the Managing Director because there was a strike. He did not know the cause of the strike as he was not there when it started. He however, found that workers were not working. He stated that the Managing Director refused to talk to him even though he told him that he had dismissed all the workers. When he was asked if the Managing Director told him why he dismissed the workers he said the Managing Director told him that workers went on strike after they requested to meet him and he was unable to grant their request for a meeting because he was busy.

PW2's version is that on the 16th September 2003, one Ntsoetso Lejaha had a conflict with a supervisor who slapped her twice. Ntsoetso went to the office with a person who witnessed the assault to report. PW2 says since she was a shop steward she followed them to the office. When she got to the office she was told that the two had gone home and they would come back the following day for a hearing. The following day, the duo arrived and went straight to the office. PW2 says at 12.00 noon she found the two waiting for her to tell her that they had been dismissed. When they resumed work after lunch, workers demanded that shop stewards meet with management to find out why those two workers had been dismissed. She then went to the office accompanied by two other shop-stewards. Management refused to meet them. When they returned they did not report the outcome, but the workers deducted that the case of the two dismissed workers had not been amicably resolved. They immediately downed tools. At around 3.30 pm Police arrived and drove the workers out of the factory with the assistance of security guards. They chased them out of the factory premises and said they must go home and come back on 22/09/03 to collect their terminal benefits.

This testimony is very much inconsistent with the statement of case and the evidence of PW1. According to the Originating Application the shop

stewards requested a meeting with Personnel Manager after the alleged assault on 16/09/03. According to PW2 however, the assaulted employee herself went to the office to report. She as shop steward only followed them, but found that they had already been sent home. The Originating Application says Lejaha was called to the office on the 17th and asked to come with her witness. PW2 says the two went straight to the office on the 17th as they had already been told on the 16th to come back for a hearing on the following day. PW1 said in his evidence that the Managing Director admitted to him that workers went on strike because he failed to grant them a meeting they had requested. PW2's version is that it is the shop stewards not workers who wanted a meeting, but with the Personnel Manager Mr. Brown not the Managing Director. We see no reason why the Managing Director would want to cover the Personnel Manager.

The two witnesses, PW1 and PW2 are senior persons within the union. Their versions of what happened must not only be consistent with each but also with the union's case before the court. Failure to achieve this uniformity can point to nothing but fabrication.

PW3 also narrated events very much in contradiction with what PW2 said. Her version was that Lejaha was called to the office with her witness. The version of PW2 was that Lejaha and her witness went straight to the office as they had already been told to come for a hearing on the 16th. PW3 went further to say that employees sent the shop stewards to find out what was happening and they discovered that the two had been dismissed. That is not PW2's story. Hers is that, as the two went to the office the rest of the workers including shop stewards continued with their work. At 12.00 midday when they went for lunch they found the two waiting for the shop stewards to tell them that they had been dismissed. It was only at 1.00 pm when the shop stewards allegedly went to the office. As things are, there is no one witness of the applicant who tell the story of what took place in the same way as the other. This is inevitably disastrous to the union's case.

The respondent lined up four witnesses but only three were really material. DW2, Keketso Mafisa's role was merely to hand in photographs of the factory floor which was strewn with garments and other material during the strike and the Managing Director's car which sustained a broken window. DW1 was the head of MM Security Services Motsamai Ramarothole, which provides security to the respondent. His testimony was that on the 17th September 2003 he received a telephone call from the Managing Director of

the respondent, who told him that there was a strike at the factory. He testified that this could have been between 1.00 and 2.00 pm.

He testified that he rushed to the factory and on arrival he found that there was commossion as workers were singing and others had climbed on top of sewing machines. He testified that he advised that police be called. When the police arrived the workers became wild and three cotton/thread cones at both the police and the security personnel. He testified further that the officer in charge of the police contingent Sgt Tau sought to call workers for talks, but his call was not heeded, instead more cotton cones and bottles were thrown at them. One of the policemen trooper Libetso was struck by a bottle from the crowd and got injured. Sgt Tau ordered the police and the security guards to clear workers from the factory. When they (workers) got out of the factory they broke the window of the Managing Director's Mercedes Benz car. The police drove them out of the factory premises.

DW3 was trooper Libetso. He was one of the five or so policemen who went to the respondent on the 17th September 2003 after they were informed that there was a strike. He testified that on arrival at the factory they reported to Mr. Brown who briefed them that there was a strike and workers were breaking machines. He reported that they went into the factory with Sgt Tau, Mr. Ramarothole and Mr. Brown. He testified that they found that there was singing and workers were not working. One of them, Mr. Brown attempted to talk to them but they did not listen. They threw cotton cones at them and they had to run outside. At that point Sgt Tau commanded them to move inside the factory and evacuate the workers since they were now destroying property. They duly evacuated the workers with the help of the security personnel.

Mr. Brown continued to address them and to advise them that their action was illegal and requested them to return to work. They ignored his calls and continued to sing. He then told the security to open the gates. The police drove the workers out of the factory premises. They started to throw stones and bottles at the police and DW3 himself got hit. He had to be taken to a filter clinic for treatment.

DW4 was Sgt Tau who at the time of giving evidence had since risen to the rank of Inspector. He testified that on the 17th September 2003 he got a telephone call which informed him that there was a strike at the respondent. He stated that he went to the factory with about five policemen. On arrival

he reported to the management who informed him that there was a strike. He testified that there were workers both inside and outside the factory and there was singing. He averred that he asked Mr. Brown to go inside the factory with him so that they could establish contact with shop stewards. He testified further that as they entered they found that workers had climbed onto the tables and they were singing and noisy. Some had climbed on top of machines. He testified that he sought to calm them, but they threw cotton rolls at then and they had to run back out of the factory. At that point the policemen who were accompanying him entered the factory and drove the workers outside. They were assisted by the security personnel. The Personnel Manager sought to tell the strikers to return to work as their action was unlawful. The noise became even louder and his call was not heeded. The Personnel Manager asked security guards to open the gates so that the workers could go out as they were not controllable. The police helped to drive them out. As they got outside they were able to find stones which they threw back at the police. It was at that point that DW3 was injured and the Managing Director's white Mercedes Benz car was damaged.

The evidence of these three witnesses is very consistent as to what transpired on the 17th September 2003. It is clear that there was a violent strike. Applicants concede there was a strike, but deny that there was violence and destruction of property of the respondent. Applicants would not admit that; since their case was to attack police involvement in the strike. There is no way the police would not be called in if the behaviour of the workers was what it was painted to be by the three witnesses for the respondent. Their evidence in this regard was firm and consistent and we have no reason not to believe it.

What the evidence of the respondent's witnesses has not established is what the cause of the strike was. This is understandable because they all came in after the strike had started. Witnesses for the applicant sought to advance the reason which conflicts with the statement of case. According to the Originating Application the strike was in solidarity with the allegedly dismissed two workers. PW1 and PW2 say the strike was caused by management's refusal to grant a meeting. Even then the two witnesses differ on who it was who had requested a meeting and with whom such meeting had been requested. As said earlier this evidence is riddled with inconsistencies of such magnitude that it simply cannot be relied upon.

The respondent averred in their answer that a dispute had arisen on the 16th September concerning failure to pay workers' overtime. Applicants witnesses deny this and the respondent led no evidence to establish this defence. In cross-examination the respondent's Counsel confronted PW2 with notices which had been couched in insolent language, but the essence of the message was that in the afternoon of the 17th September, the workers should stop working. The notices mentioned two dissatisfactions. One related to Saturday and Sunday's pay, presumably overtime pay, while the other was a complaint about the nice gate which officials use to leave the factory premises which workers did not use. One notice went on to state that "when we enter (the factory) we sing, any one who sits at their machine will be beaten…" (own translation).

These notices were picked up from the factory floor after the workers were evacuated from the factory and retained by the management. They were formally handed in by DW2 Kekeletso Mafisa who is the current Personnel Manager of the respondent. He handed them as part of the records of the respondent which are in his custody. These unsigned notices were put to PW2 and she denied knowledge of them. Her denial cannot however elude the court from detecting where actually the strike of the 17th September 2003 emanated. PW2 is clearly an untruthful witness whose testimony cannot be relied upon. Indeed whilst denying knowledge of the notices she could not explain how they came to be among the rubble that had been caused by the workers strike on the 17th September. Neither could she suggest that they were the creation of the respondent. For our part we cannot see why the respondent would manufacture such notices. If anything the actions of the workers as narrated by DW1, DW3 and DW4 are very much consistent with the contents of the notices.

We come now to the reliefs sought by the union. Against the background of the evidence summerised above, the union avers that the employer failed to hold a hearing for the assaulted employee. The evidence of PW2 is that on the 16th September the assaulted employee was told to come back for a hearing on the 17th September. The evidence of PW2 is further that the assaulted employee did attend the hearing with her witness and the outcome as reported to her was that both were dismissed. It is therefore inconceivable to say that no hearing was held when applicant's key witness says it was held.

The union further contended that the employer's refusal to meet with the union undermines the Codes of Good Practice – Government Notice No.4 of 2003. To start with, the preamble to the Codes provides that "…the provisions of the Code do not impose any obligation on any person." (See p.11 first paragraph fourth line from the top). Secondly, the evidence of PW1 who is a union official does not support this charge. He testified that he was called by the Managing Director to come to the factory because there was a strike. When he arrived the police and security prevented him from going inside. The Managing Director who was still in his office directed that he be allowed in. He went to the Managing Director's office and the latter told him he had dismissed all the workers. That evidence does not paint a picture of a management which refuses to meet with the union. On the contrary one sees a management which is cooperating with the union.

Under paragraph 6 of the Originating Application it is alleged that the union General Secretary and his Deputy requested a meeting with the Managing Director. It is further said that initially the Managing Director agreed to meet with them but later telephone to cancel the meeting. None of the two officers testified on this allegation. Furthermore, assuming the correctness of the allegation, it is not suggested that the Managing Director's cancellation of the meeting was occasioned by bad faith. He could well have had good reasons for canceling it.

It was further contended that the calling of police and security guards to evict workers is breach of contract and an unfair labour practice. Police are agents of the state for the maintenance of law and order. Where there is evidence as has been the case in casu, that law and order was threatened there is just no way that the police will not get involved. Evidence is that the police intervened not in order to break the strike which was illegal anyway, but to ensure safety of property which the workers were damaging. This is very much in line with the guidelines and precedent of the Freedom of Association Committee of the Governing Body of the International Labour Organisation. At p.119 of the Digest of the decisions of the committee the following observations of the committee can be found:

> *"The Committee has recommended the dismissal of allegations of intervention by the police when the facts showed that such intervention was limited to the maintenance of public order and did*

not restrict the legitimate exercise of the right to strike…" (ad paragraph 579).

There is no evidence that the police intervention restricted a legitimate exercise of the right to strike. On the contrary evidence is that police protected property and saved lives which were being threatened by the throwing of objects by the striking workers.

The union claims further that there was an unlawful lockout by the respondent on the 18th September 2003. Everybody admits that there was an unlawful strike on the 17th September. Again all witnesses are in agreement that all the workers were dismissed and told to report back on the 22/09/03. There can therefore be no talk of a lockout on the 18th when the workers had already been dismissed on the 17th.

It is alleged further that the reasons for the dismissal were not clear. A sample of a dismissal letter is attached to the Originating Application as annexure "B". There is absolutely no ambiguity in the letter. The fact that workers were informed that they had taken part in the strike, alternatively that they unlawfully stopped work causes no confusion whatsoever. It is simply a standard legal methodology of drafting.

Finally it was alleged that there was selective reemployment which left all the shop stewards out. Nowhere in the pleadings, or even in evidence have those shop stewards been singled out in name. Assuming there is merit in this claim the court does not know who are those who are being sought to be benefited by this relief. (see LUTARU .v. NUL 1999-2000 LLR-LB52 at p.54). This also takes us back to the point we made earlier that the union filed the Originating Application without making necessary averrements regarding the persons on behalf of whom it was suing.

As a rule trade unions are permitted to sue on behalf of their members provided their constitution make proviso for such an eventuality. (See National Union of Mineworkers .v. Buffelsfontein Gold Mining Co. Ltd (Beatrix Mines Division) (1988) ILJ 341 at p.345J). See also National Union of Retail and Allied Workers LC25/98 (unreported at pp. 2-3). Even of more importance is that the union must allege that the employees on behalf of whom it is suing are its members. The attempt by the union to rectify the shoddy state of its pleading by annexing the names of the persons who were dismissed without any averrement what its relationship with those

persons is, does not advance its case. As it was held in National Union of Mine-Workers .v. Hernic Exploration (Pty) Ltd (2001) 2001 ILJ 203 at 212 I:

> *"....a registered trade union that acts on behalf of its members and cites its members as parties to the dispute (may refer their case to court in its name). The trade union would however, have to indicate who those members are and cite them as a party."*

In hoc casu the union has not said who the 330 persons it sought to apply for their joinder were and what its real relationship with them was. However, even assuming membership had been alleged, it seems correct that those individuals themselves should have applied that they be joined as a party to the proceedings. This case is, quite apart from the evidence which failed to support the reliefs sought; in itself a non-starter. It is outrageous that the union can seek to obtain an order for reinstatement of persons whose relationship with it is neither alleged nor established. Equally outrageous is the prayer that the employer be imprisoned. Not an iota of evidence was led to establish why the employer must be imprisoned. For these reasons this application ought not to succeed and it is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 12TH DAY OF APRIL 2006

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANTS: **MS RANTHITHI**
FOR RESPONDENT: **MR. MOHALEROE**