IN THE LABOUR COURT OF LESOTHO **LC/64/2011**

HELD AT MASERU

In the matter between:

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY ACADEMIC STAFF UNION **APPLICANT**

And

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY **RESPONDENT**

JUDGMENT

Date: 22nd November 2012
Application for several relief. Applicant abandoning some of its claims and proceeding on two. Court declining jurisdiction to entertain both claims. Court finding that prayer 2 (e) of the Applicant's originating application is an unpaid wages claim. Court leaving affected members of Applicant at liberty to refer this claim with the DDPR as a Forum of first instance.

BACKGROUND OF THE ISSUE

1. On the 26th April 2012, Applicant filed an urgent application seeking an *ex parte* order that:
   "1. That the rules of this Honourable Court pertaining to normal procedural formalities, modes and period of service and time limits be dispensed with on account of urgency hereof and this matter be heard and adjudicated upon on an urgent basis.
   2. That a rule nisi be and is hereby issued and returnable on the time and date to be determined by this Honourable Court calling upon respondent to show cause, if any, why an order in the following terms cannot be made final, to wit,
   (a) That the purported refusal to accept indefinite suspension of strike by applicant shall not be declared unlawful
   (b) That the indefinite suspension of strike by applicant shall not be declared lawful.

(c) That the continued lock-out of members of applicant from the premises of respondent shall not be declared unlawful.

(d) That pending the finalisation hereof applicant's members shall not be allowed access to the premises of respondent.

(e) That effective from the 9th day of December 2011 members of applicant be entitled to their pro rata salaries for the month of December as applicant's members have, by suspending their strike action, tendered their services to respondent

(f) That the denial of access of applicant's members to the premises of respondent under the cloak of a lock-out be declared an unfair labour practice

(g) That the respondent shall not be held guilty of unfair labour practice for bargaining in bad faith.

(h) That respondent shall not be ordered to forthwith implement the issues initially agreed upon by the parties.

3. That respondent shall pay costs only in the event of opposition.

4. that applicant be granted such further and/or alternative relief.

5. that prayer 1 herein operate with immediate effect as interim relief."

2. From the record, it does not appear like a *rule nisi* was ever issued and in these proceedings parties made no mention of the existence of the rule. However, Applicant informed the Court that most of its claims had been overtaken by events and that as a result they no longer wished to pursue them. They indicated that they now applied for an order in terms of prayers 2 (c) and (e) of their originating application, safe that in prayer 2 (c) the word *"continued"* no longer applied. Consequential to this new development, Respondent raised two *points in limine* on the jurisdiction of this Court, in terms of which it sought the dismissal of Applicant's claims. The application was opposed and as such both parties made representation. After representations were made, this Court declined to deal with the merits before pronouncing itself on the preliminary issues. The ruling and reasons on these points are as follows.

SUBMISSIONS

3. Respondent argued that the prayers sought by Applicant bordered on issues of interest and issues of right that fell exclusively within the jurisdiction of the Directorate of Dispute Prevention and Resolution (DDPR). It was argued that prayer 2 (c), which was to declare the lock-out to be unlawful, was an issue of interest whose determination fell within the exclusive jurisdiction of the DDPR. Respondent further submitted that the DDPR has primary rights

to either grant of decline a certificate to strike or lock-out, so that the right to decide if a strike or lock-out is lawful or not lies with it.

4. Respondent further submitted that prayer 2 (e), which was to declare that Applicant members are entitled to unpaid wages for the period of the alleged unlawful lock-out, was an issue of right whose determination similarly fell within the exclusive jurisdiction of the DDPR. It was further argued that from the wording of this prayer, clearly this is a simple claim for unpaid wages which falls squarely within the jurisdictional powers of the DDPR, as a court of first instance.

5. Respondent furthermore, argued that secondary to this issue is that of the jurisdiction of the Applicant to sue on behalf of its members on matters of right. It was argued that Applicant being a trade union, its powers to sue on behalf of its members are limited only to matter of interest and not right. It was further argued that the approach adopted by Applicant in prayer 2 (e) is *actio popularis* in nature in that it seeks payment of outstanding wages of employees without stating who those employees are. It was argued that this is particularly important as not all of the Applicant union members were on strike and as a consequence not all of them were affected by the non-payment of wages.

6. Applicant responded that had the issue of its *locus standi* to sue on behalf of its members been raised earlier, they could have applied for joinder of the relevant employees to the matter. As a result, they argued that this is just a delaying tactic on the part of the Respondent. They however argued that in the event that this Court finds that it had jurisdiction to entertain their claim, they request an opportunity to apply for joinder of the relevant parties.

7. Applicant responded that initially when the papers were filed, this Court had jurisdiction and that such jurisdiction did not end when they withdrew some of their claims. Applicant argued that for purposes of this case, the Court must consider whether it had jurisdiction when the matter was first lodged and not after a change in the circumstances. It was further argued that while the DDPR may have original jurisdiction in respect of prayer 2 (c), this Court has original jurisdiction over prayer 2 (e) in terms of section 231 of the Labour Code. This being the case, the Labour Code (Amendment) Act of 2000, provides that where a claim involves issues that fall within the

exclusive jurisdiction of the Labour Court, then it will have jurisdiction over the entire claim.

8. Respondent replied that contrary to the submission that when the matter was referred this Court had jurisdiction, the issue of jurisdiction comes into play at the hearing. As a result, it would be wrong to limit this issue to the referral and filing of the documents to the matter. In reaction to section 231, Respondent argued that it is not applicable to this case as it relates to a situation where a declaration has already been made about the lawfulness or unlawfulness of ether a strike action or lock-out. Respondent prayed that this matter ought to be dismissed on the basis of these grounds alone.

9. We have considered the submissions of both parties in relation to the preliminary issues raised. We wish to start by making a comment on the right to time to contest jurisdiction. We are in agreement with Respondent that the issue of jurisdiction may arise at any point depending on the circumstances of the case. While this Court might have had jurisdiction when the papers were filed, a change in the circumstances of the case may alter the *status quo*. As a result, we are of the view that a point challenging the jurisdiction may be raised at any point of the proceedings provided that it is only arising then.

10. In view of this said, we shall now proceed to deal with the first issue which relates to prayer 2 (c). We find merit in Respondent argument that disputes involving not only lock-outs but also strikes are disputes of interest. The resolution of these disputes is provided for under section 225 of the ***Labour Code Order 24 of 1992***. The provision of this section are quite lengthy in content but the important aspect of this section, and for purposes of this case, is that such disputes must be referred to the DDPR for resolution. The section further goes on to provide that after referral, a conciliator must be appointed to attempt to resolve the concerned dispute through the process of conciliation.

11. A procedure for both the referral to and resolution of disputes of interest at the DDPR is provided for under code 39 of the ***Labour Code (Codes of Good Practice) of 2003***. Similar, the provisions of this section are lengthy in terms of content but their essence is to tabulate the procedures that must be followed from the referral stage, to the commencement of an industrial action, it being strike action or a lock-out, up to the point that the dispute is ultimately resolved. At this point, it is important to highlight that this above

said goes to fortify the argument that the DDPR has primary jurisdiction over disputes of interest.

12. The essence of the point is to also draw attention to that fact if this Court is to have jurisdiction over disputes of interest, it would only be over disputes of interest which are extra judicial the DDPR. This is supported by the provision of section 231 of the ***Labour Code order (supra)***, reference of which has been made by Applicant in support of his argument. The provisions of this section read as follows,
" a person who declares, instigates or incites others to take part in or otherwise acts in furtherance of a strike or lockout that is stipulated to be unlawful by sections 230 or 232 (5) shall be liable to a fine of one thousand maloti. The Labour court may make an order forbidding the continuance of such action and failure to comply with such an order may be punished as if it were contempt of the High Court. However, no person shall be deemed to have committed an offence under this section by reason of merely having ceased to work or having refused to accept employment."

13. In the case at hand, Applicant is not asking for an order in terms of this section as neither of its grounds relate to the said section. This being the case, what they are asking for is not extra judicial the DDPR and as such this Court has no jurisdiction over their claim as appears in prayer 2 (c) of the originating application. In our view, the legality or otherwise of an industrial action is determined from the conciliation report issued by the DDPR, after which the role of this Court is to impose a punishment in respect of offences relating to a strike action or lock out, which in terms of the same report is considered unlawful.

14. In relation to prayer 2 (e), there is no dispute that it relates to unpaid wages of members of Applicant union who were on strike. Further, there is no dispute that the said claim falls within the exclusive jurisdiction of the DDPR. In view of our ruling on prayer 2 (c), this Court has no jurisdiction to entertain prayer 2 (e) on its own safe in circumstances where it was incidental to a claim rightly before this Court. Authoritative to this argument are provisions of section 226 (3) of the ***Labour Code Order (supra)*** which read as follows:
" Notwithstanding the provisions of this section, the Director may refer a dispute contemplated is subsection (2) to the Labour Court for determination if the Director is of the opinion that the dispute may also concern matters that fall within the jurisdiction of the Court."

15. We also wish to comment that Respondent has rightly pointed out that the way prayer 2 (e) is framed, it is *actio popularis* in nature. In view of the fact that not all of Applicant union members were on strike, and thus not paid their wages during the lockout period, it would be unfair and highly prejudicial on Respondent if prayer 2 (e) were to be determined as it appears. As a result, we have come to the conclusion that if those affected employees so wish, they may refer their claims for unpaid wages with the DDPR either individually or in a single referral as co-applicants.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

a) That this declines jurisdiction to entertain applicants claims;
b) That Applicant members may refer their claims for unpaid wages with the DDPR individually or in a single referral as co-Applicants; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 30th DAY OF NOVEMBER 2012,

T. C. RAMOSEME
DEPUTY PRESIDENT OF THE LABOUR COURT OF LESOTHO (AI)

Mr. MPHATŠOE **I CONCUR**
MEMBER

Ms. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. M. KOTO**
FOR RESPONDENT: **ADV. T. MACHELI**