IN THE LABOUR COURT OF LESOTHO **LC/26/2012**

HELD AT MASERU

In the matter between:

FACTORY WORKERS UNION **APPLICANT**

And

SUN TEXTILES (PTY) LTD **RESPONDENT**

JUDGMENT

Date: 21st November 2012
Claims for orders compelling Respondent to enter into a collective agreement with Applicant and to declare that such refusal and the refusal to recognise Applicant union amounts to an unfair labour practice. Court raising the preliminary issue of jurisdiction over the Applicant claims. Court declining jurisdiction over these claims and dismissing the matter.

BACKGROUND OF THE ISSUE

1. This matter was heard on the 21st November 2012 and judgement was deferred. Applicant prayed for two orders as follows,
   "(a) That Respondent be ordered to enter into a formal collective agreement with the Applicant upon the mutually agreed terms as both parties may deem fit under the circumstances.
   (b) That it be declared that the refusal by respondent to formally recognise and to enter into a formal collective agreement with applicant is an unfair labour practice."
   This mater was duly opposed by Respondent. However, on the date of hearing the Court *mero muto* raised an issue of jurisdiction to grant the prayers requested by Applicant. Both parties were given the opportunity to make representation. The ruling and reasons are as follows.

SUBMISSIONS

2. Applicant submitted that the jurisdiction of this Court is spelled out in section 24 of the ***Labour order 24 of 1992*** as amended. It was submitted

that in terms of this section, the Labour Court has jurisdiction to determine any matter that has to do with the interpretation of the rights of parties, it be individual or collective rights. Reference was made to section 24 (1) and (2) and in particular subsection (2)(a) which reads as follows,
" to inquire into and decide the relative rights and duties of employees and their respective organisations in relation to any matter referred to the Court under the provisions of the Code and to award appropriate relief in case of infringement;"
Applicant further submitted that their argument is supported by the ***Labour Code (Codes of Good Practice) of 2003***.

3. In support, it was argued that this application is based on paragraph 4.7 of the originating application which reads as follows,
"the respondent's recalcitrance, silence and or inertia displayed against the applicant in so far as the implementation of annexure FAWU 4 is concerned inevitably prompts the applicant to pray the Honourable Court to grant the following relief: ..."

4. Applicant argued that in view of this said, they are only asking that the conduct of Respondent be declared an unfair labour practice and for Respondent to be directed to enter into a collective agreement with Applicant on matters that may be mutually agreed upon by parties. Applicant argued that in refusing to enter into the collective agreement, Respondent is refusing to formally recognise them, which conduct they are asking to be declared an unfair labour practice. Applicant maintained that this claim is referred in terms of section 198(A) of the ***Labour Code (Amendment) Act of 2000***, in particular subsections (2), (3), and (4) on the duty to bargain in good faith.

5. Respondent replied that this Court has no jurisdiction over this claim for the reason that no one can be compelled to sign a collective agreement. It was submitted that this is the effect of Applicant's claim. It was further argued that before a collective agreement can be concluded parties must negotiate over it and only sign it when they are in agreement on the terms contained therein. Reference was made to section 29 of the ***Codes of Good Practice (supra)*** on the processes that must be followed before a collective agreement is concluded. Applicant submitted that these processes have not been adhered to hence why the agreement has not been made. Applicant replied that what they are asking for is an order directing Respondent to bargain in good faith and not to be ordered to sign a collective agreement.

6. Our basis for raising this preliminary issue on own accord draws from the case of ***Thabo Mohlobo and Others vs. Lesotho Highlands Development Authority LAC/CIV/A/02/2010*** where the Court had the following to say,
   "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what that law is, a court is not only entitled to raise that point of law but also to require parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."
   Having laid the basis of our concern, We shall now proceed to deal with the issues and submissions.

7. We wish to start by highlighting that indeed We agree with Applicant that this Court has jurisdiction to determine any matter that has to do with the rights of parties, it being individual or collective rights. However, in terms of section 24 (1), this is subject to this Court having jurisdiction over such matters. Without this limitation, Applicant's interpretation would mean that this Court has jurisdiction even over matters that fall within the realm of authority of both the DDPR and the Labour Appeal Court as long as they have to do with the rights of parties. This argument cannot be accurate as it would cause this Court to act beyond its powers conferred by statute.

8. Now in relation to prayer (a) as appears in para 1 above, we are of the view that key to this prayer are the words *"collective agreement"*. A collective agreement is defined under section 3 of the ***Labour Code Order 24 of 1992*** as follows,
   " an agreement entered into <u>freely</u> between an employer or a group of employers and a trade union representing any employees of that employer or group of employers;" [My emphasis].

9. From a simple reading of this definition, compulsion is ousted in the process of conclusion of a collective agreement. We have a view that what Applicant is asking from us in the form of a relief, is exactly that which We say is ousted in the process of conclusion a collective agreement. Applicant has in its submissions attempt to tilt this Court attention from this issue in arguing that they are not asking for Respondent to be compelled to sign the agreement but that in the event that they agree on terms then Respondent must sign. In our view, and as rightly pointed out by Respondent, the effect is still the same and as such We find that We have no power to grant this prayer. However, We do not see how reference to section 29 of the ***Codes of Good Practice (supra)*** advances Respondent's case.

10. Prayer (b) is two-legged in that it has two aspects namely to declare the refusal to formally recognise Applicant an unfair labour practice and secondly to declare the refusal to enter into a collective agreement an unfair labour practice. On the first issue, Applicant seems to rely on section 198A (2), (3) and (4) of the ***Labour Code Order (supra)*** as the basis of his claim. This section reads as follows

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

    (3) in any collective bargaining relationship –

    (a) a recognised trade union shall bargain in good faith with any employer or employers organisation;

    (b) an employer or employers' organisation shall bargain in good faith with the recognised trade union.

    (4) a breach of the provisions of this section shall be an unfair labour practice."

11. From a simple reading of this section, it does not in any way compel the employer to recognise a trade union so that Respondent is not obliged to formally recognise Applicant. It simply makes reference to the duty to bargain in good faith where a trade union is recognised. As a result, it cannot in any way form the basis of Applicant's claim before this Court. In any event there is generally no legally imposed obligation on the part of the employer to formally recognise a trade union. This is reflected in section 24 (2) of the Codes of Good Practice as follows,

    "There is no duty to recognise a trade union. The obligation is only to bargain with a representative one."

    In our view, this goes a long way to fortify our stance that We have no power to grant the prayer requested. This is an issue of interest which can only be dealt with in term of section 225 of the ***Labour Code Order (supra).***

12. In view of our conclusion on prayer (a), We are of the opinion that this Court lacks the power to declare the refusal to enter into a collective agreement an unfair labour practice. Our premise is simply that Applicant has failed to establish the legal basis of its claims. Unfair labour practices are provided for under sections 196 to 202 of the ***Labour Code Order (supra)***. None of the provisions reflected under these section provide for that the refusal to enter into a collective agreement is an unfair labour practice. Consequently, We decline jurisdiction over all Applicant's claims.

COSTS

13. Applicant prayed for an order of costs in the event that this Court determines that it has jurisdiction to entertain this claim. Having found that this Court has no jurisdiction, this prayer falls of.

AWARD

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

a) That this Court declines jurisdiction over Applicant's claims;
b) That this application is therefore dismissed; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 2012.

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

Ms. P. LEBITSA **I CONCUR**
MEMBER

Mrs. L. RAMASHAMOLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RASEKOAI**
FOR RESPONDENT: **ADV. MATETE.**