IN THE LABOUR COURT OF LESOTHO LC/13/12

HELD AT MASERU

In the matter between:

MANAPO MAISA & 142 OTHERS APPLICANT

And

NIEN HSING INTERNATIONAL (PTY) LTD RESPONDENT

JUDGMENT

Date: 12th September 2012 to 25th March 2013
Claims for discrimination and unfair dismissal for participation in a strike. Respondent filing its answer out of time together with an application for condonation – Court granting condonation and admitting Respondent answer. Respondent raising three preliminary points of law and withdrawing two – Respondent contesting jurisdiction of this Court over claim – Respondent arguing that claim arises from a settlement agreement - Court not finding merit on argument and dismissing preliminary point. Court raising preliminary issue on own motion – Court's jurisdiction over a claim not conciliated upon. Parties conceding to lack of jurisdiction and discrimination claim being withdrawn. Applicant claiming not to have engaged in a strike – further that their union was not involved prior to their dismissal - Court finding that Applicants were not only on a strike but an unlawful strike – further that the union was involved in all steps. Court dismissing the matter and no order as to costs being made.

BACKGROUND OF THE ISSUE

1. This dispute involves claims for discrimination and unfair dismissal for participation in a strike. The matter heard on over a series of dates and finalised on the 25th March 2013, with judgment being deferred for a later date. The background of this matter is essentially that originating application was served upon the Respondent on the 2nd April 2012. Realising that they had failed to file their answer within the stipulated

time periods, Respondent applied for condonation for the late filing of its answer, which application was not opposed. In fact, not only was the application unopposed, parties had also agreed that the application be granted. Notwithstanding the parties agreement for automatic granting, We having satisfied ourselves of the merit in the application granted it and admitted Respondent's answer.

2. In its answer, Respondent had raised three preliminary points of law in terms of which it sought the dismissal of the Applicants' claim. However, two were withdrawn leaving only one couched in the following,
"The Honourable Court lack jurisdiction to entertain the matter as the dismissal was as a consequence of an agreement that was reached between management of Respondent company and Applicants' trade unions."
Both parties made their submissions and the preliminary point was dismissed. The submissions of parties and reason for the ruling are in the following.

SUBMISSIONS AND ANALYSIS

3. It was submitted by Advocate Kao, on behalf of Respondent that Applicants were dismissed from employment by Respondent. Subsequent thereto, an agreement was reached between the Applicants unions namely FAWU and LECAWU to the effect that out of the total number of all dismissed employees, only 130 would be reinstated. It was argued that this meant that the rest would remain dismissed. The agreement forms part of the record as annexure A to the Applicants' originating application. It was argued that based on the agreement, this Court had no jurisdiction over this claim as it been rendered *res judicata* by the agreement. Reference was made to cases of *CGM vs. DDPR and another LC/REV/88/2006* and *LNFOD vs. Mojalefa Mabula LAC/A/07/2010*.

4. In response, Advocate Rasekoai for Applicants submitted that the two authorities are distinct from the case at hand in that Applicants are neither attempting to enforce the settlement agreement nor to challenge it. It was argued that this Court would only be divested with the jurisdiction to entertain this claim if Applicants were part of the settlement agreement and

they were attempting to enforce it. Advocate Rasekoai argued that *in casu*, Applicants are not enforcing the agreement as they were not part of it, but are rather enforcing their right not be unfairly dismissed on the ground of participation in a strike.

5. Having considered these above submissions, We came to the conclusion that this Court had jurisdiction over this claim. In Our view, the agreement concluded between the trade unions concerned and the Respondent was in relation to those employees who were reinstated back to work. We had considered the simple reading of the settlement agreement which bears no reference to the Applicants. It only provides as far as those who were reinstated are concerned and as such it is only binding upon them alone. Consequently, the matter is not *res judicata*.

6. We are in agreement with Applicants that the claim before Court is not about the settlement agreement but rather arises out of the settlement agreement reached between the Respondent and the two unions. Consequently, the authorities cited by Respondent are not applicable in this matter as they concern a situation involving the enforcement of settlement agreements.

7. Before We proceed to deal with the evidence of the parties in the main claim, We wish to highlight two major developments that occurred in these proceedings after all evidence had been led. Firstly, there are 143 Applicants in this matter and from them only 2 Applicants testified. Parties agreed that the remaining Applicants would file affidavits confirming the evidence of the 2 Applicants as far as it related to them. This proposition was accepted by the Court and parties duly complied. Secondly, the Court noted that the claim for discrimination had not complied with the provision of section 227 (5) of the *Labour Code (Amendment) Act 3 of 2000,* in that it had not been conciliated upon. The implication of this was that this Court had no jurisdiction to entertain that claim. As a result both parties were called in to address the Court on this issue.

8. Before Court, the parties informed Us that they had agreed on the withdrawal of the claim for discrimination on the ground

that they had also realised that it had not complied with the said section. They then by agreement requested the Court to disregard all evidence and submissions concerned with the claim for discrimination and to concentrate only on the evidence relating to the dismissal for participation in a strike. It is on this basis that Our judgment is in the following.

FACTS AND EVIDENCE

Respondent's case

9. 1st witness was Seabata Matšela, the Human Resources Manager at the Respondent company. He stated that on the morning and again on evening of the 24th November 2011, his office received reports that some employees in the packing and washing departments were refusing to work. Upon inquiry, they met with the Shop Stewards who told them that the employees were on a work stoppage, because they wanted a wage increment. They then advised the shop stewards to meet with the employees to elect a team of representatives who would discuss their demand with their employer while they continued to work.

10. However, the employees, refused to work and this resulted in the issuance of their 1st ultimatum by Respondent. Notwithstanding the ultimatum, they continued with their stoppage of work, the consequence of which was another ultimatum, about 30 minutes later. In spite of the 2nd ultimatum, they persisted with their stoppage of work. A third ultimatum was thus issued another 30 minutes later, followed by their dismissals. 3 days after their dismissals, the Union officials approached them for negotiations with the view to resolve the issue of the dismissals.

11. 2nd witness was Daniel Bo, and he is part of management of Respondent. His account of the incidents that led to the dismissal of Applicants was similar to the narration given by 1st Witness. He testified that he was part of the team that met with the shop stewards when the incidents started up to the dismissals of Applicants. He stated that he was also part of the negotiations with the Union after the dismissals. He added that Applicants were fairly dismissed as they were on an unlawful strike. He further stated that their Union was involved in all the processes that led to their dismissals.

Applicants' case

12. 1st Witness was Tanki Sepamo, who is one of the Applicants and a shop steward. He testified that on the day in issue, the employees of Respondent in both the washing and packing departments, including himself, downed tools. The purpose was to talk to their employer about their wage increment. When the employees down tools, he left with his fellow shop stewards to meet with management to communicate the desire of the employees. However, in reaction to their work stoppage, the Respondent issued an ultimatum. After the 1st ultimatum, all employees resumed their duties. Witness later changed to testify that, After the 1st ultimatum, the employees did not resume duty as they continued with their work stoppage. Witness further stated that, it was only after the 2nd ultimatum had been issued that the employees resumed their duties up to their lunch break.

13. Furthermore, witness testified that, after lunch all employees went back to their departments but did not resume work. The Respondent then reacted by issuing a 3rd ultimatum which was followed by their dismissals. When asked where the employees were when the last ultimatum was issued, witness then changed to say they were working but that they only stopped when the 3rd ultimatum was issued. He stated that thereafter all the dismissed employees were told to leave the firm. He testified that this happened during both the day and night shifts. He stated that they were not on strike and that the union was not involved before they were dismissed. He prayed that the Court find their dismissals to have been unfair.

14. The 2nd witness was Sam Mokhele, the union organiser. He testified that he received a report that there was a problem about work stoppage at the Respondent firm. As the Union, they went to meet with the Respondent management to inquire about the situation. They were told that the dismissed employees had stopped working because they wanted the Respondent to increase their wages. He stated that prior to the dismissals of the Applicants, the Union had not been involved in the matter. They then attempted to negotiate with Respondent about the reinstatement of all the dismissed employees. However, only a portion was reinstated in the end.

He stated that the Applicants were not on strike but were rather on a work stoppage.

15. 3rd witness was 'Manapo Maisa. She testified that prior to the date in issue, they as employees had written to the Respondent requesting a forum to negotiate their wages. During cross examination, witness sated that this letter was written by their union, Factory Workers Union. She stated that by its conduct, the Union had initiated the work stoppage and that it was fully aware about the events that took place. She stated that when Respondent did not reply to their letter, they then resolved to stop working on the day in question. Respondent's reaction was a 1st ultimatum. When they did not react to the 1st ultimatum, a 2nd one was issued.

16. It was only after the 2nd ultimatum that they resumed their duties up to their lunch time. After lunch, they all came back to their workstations but did not resume their duties with the intention to make the Respondent management to change its position to meet them. The Respondent then issued a third ultimatum which was later followed by their dismissals. She stated that under normal circumstances, before the ultimatums are issued, their shop stewards are usually called in to intervene. She stated further that they were not on strike but rather on a work stoppage and prayed that their dismissals be declared as unfair and that they be reinstated to their work positions.

ANALYSIS

17. In essence, it is the Applicant's case, on the one hand, that they did not engage in a strike action and that even assuming that they did, the Respondent did not involve their union in the matter before resolving to dismiss them. On the other hand, it is the Respondent's case that Applicants were on an unlawful strike and that their union was involved in all steps leading to their dismissal. In view of this highlight, We shall not proceed to deal with the first issue of whether or not Applicants were on strike.

18. The authority in *Factory Workers Union vs. TZICC* provides the legal definition of a strike. In defining a strike, this authority echoes the provision of section 3 of the *Labour Code*

Order 24 of 1992. In terms of the said section a strike is defined as follows,

"Strike means the act of any number of employees who are or have been in the employment of the same employer or of different employers, done in contemplation of a trade dispute:

(a) In discontinuing that employment whether wholly of partially;

(b) In refusing or failing after any such discontinuance to resume or return to their employment;...

Such act being due to any combination, agreement, common understanding or concerted action, whether express or implied, made or entered into by any employees with intent to: -

(i) *Compel or induce any such employer to agree to terms and conditions of employment or comply with any demands made by such or any other employees ..."*

19. From the above extract of the law, the argument that Applicants were not on strike on the day in question does not hold water. It is clear from all the evidence adduced that the Applicants had stopped work on the day in issue because they wanted to compel their employer to come and negotiate their wage increment. Both Matsela and Bo have testified that they received reports that Applicants had downed tools with the intention to negotiate wage increment with Respondent management. This has been corroborated by the evidence of Sepamo who testified that he was part of those who informed the management about the cause of the work stoppage, it being to negotiate a wage increment. He also added that he was part of the employees who had downed tools.

20. The evidence of Maisa has further reinforced the position in that she did not only corroborate the evidence on the intention behind the work stoppage, but went to say that a letter had been written requesting a forum for such negations. She stated that they stopped work because the employer was not taking heed to their request. Essentially the conduct of Applicants was intended to compel the employer to concede to their demands. In law that conduct amounted to a strike as it is consistent with the legal definition of a strike under section 3 of the *Labour Code Order (supra)*, as highlighted above. Given the claim of Applicants that they were not on strike, it follows

that if the Court finds that they participated in a strike, then it was an unlawful strike.

21. We now turn to deal with the second issue about the involvement of the union. In terms of Code 18 (1) (d) of the *Labour Code (Codes of Good Practice) Notice of 2003*, before an employer decides on the cause of action to take against striking employees, such must first be communicated to the union of the concerned employee. This Code provides as follows,

    (c) ... Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.

22. According to the evidence of both parties it s clear that the Union was involved in throughout the incidents up to the dismissals of Applicants. From the evidence of both Matsela and Bo, shop stewards were involved with the view to attempt to resolve the matter at its early stages. Respondent witnesses have testified that they sought the intervention of the shop stewards before issuing their 1st ultimatum. However, this attempt failed as the employees, continued with their work stoppage. Further, the evidence of Sepamo confirms this as he has testified to the effect that he was part of the striking employees.

23. Sepamo had further stated that he was part of the team of shop stewards who communicated to the Respondent management that the stoppage was a result of the desire of the employees to negotiate wage increment with their employer. The evidence of Maisa, further affirms the involvement of the Union in that she testified that the stoppage followed a written request from the Union for a forum to negotiate the wage increment. She also made concession to the effect that the Union was fully conscious of all the events that took place on that day.

24. Although Sam Mokhele who is the organiser in the Union claimed no knowledge of all the events, this cannot be taken to mean that the Union was not involved at all. It may well be that Mr. Mokhele was not aware but his unawareness does not mean that the rest of the members of the Union were neither aware nor that they did not take part. We say this because not

only the employer has claimed its involvement but also the two Applicants who testified in these proceedings. Consequently, We find that the Union, at least through its officials namely the shop stewards, was involved in the events leading to the dismissals of Applicants. It was aware about all the ultimatums issued as well as the ultimate intentions of the Respondent about the striking employees.

25. Although much evidence led touches on the issue of ultimatums issued by Respondent, We decline to pronounce Ourselves over the issue for the reason that it is the not the Applicants' case. We accordingly find that the dismissal of Applicants were fair.

AWARD

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

a) That the dismissal of Applicants was fair;
b) That the Applicants' claims are dismissed; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 3rd DAY OF JUNE 2013.

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

Miss P. LEBITSA **I CONCUR**
MEMBER

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

FOR APPLICANTS: **ADV. RASEKOAI**
FOR RESPONDENT: **ADV. KAO**