

**HELD AT MASERU**

**In the matter between:**

**FACTORY WORKERS UNION O.B.O  
THANDIWE LABANE & 23 OTHERS**

**APPLICANT**

**And**

**TAI YUAN GARMENTS (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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*Date: 4<sup>th</sup> April 2013*

*Claim for dismissal on the ground of operational requirements. Court having earlier intimated its intention to raise a preliminary issue of locus standi of the Applicant union in a dispute of right. Matter being postponed under request of Applicant to be given time to attempt to cure the defect. Applicant applying for joinder of the affected employees to the proceedings. Court finding that joinder depends on existence of locus standi on the part of initiator of the matter. Court finding that the initiator has no locus standi - application for joinder being declined - Court finding it improper to join parties to a party lacking capacity. Applicant applying for substitution from the bar in breach of the Rules of this Court - Court refusing to condone the breach of its rules - Application for substitution being dismissed. The main claim being dismissed on account of lack of locus standi on the part of the Applicant.*

**BACKGROUND OF THE ISSUE**

1. This dispute involves a claim for unfair dismissal on the ground of operational requirements. It was heard on the 4<sup>th</sup> April 2013 and judgment was deferred for a later date. The matter was initially scheduled to proceed on 28<sup>th</sup> February 2013 but was postponed. The postponement was occasioned by the fact that on the date of hearing, the Court had brought it to the attention of both parties that it intended to raise a preliminary issue on *locus standi* of the Applicant union. In

raising this point, We acted on the basis of the authority in *Thabo Mohlobo & others vs. Lesotho Highlands Development Authority LAC/CIV/A/02/2010*, that the Court has the power to raise a point of law on its own motion.

2. Parties had then agreed on the postponement to allow Applicant to exercise the choice of either curing the defect in their pleadings by substituting the Applicant union with the affected employees to the proceedings or for both parties to prepare their addresses on the issue. On this day, Applicant moved an application for joinder of the affected employees to the proceedings, instead. This application was opposed by Respondent. Both parties made their submissions and Our judgment is thus in the following.

### **SUBMISSIONS AND ANALYSIS**

3. Advocate Rasekoai submitted on behalf of Applicant union that they applied for the joinder of the affected employees as Applicants in the matter. It was submitted that they are affected in the sense that their dismissal forms the subject matter of these proceedings. He submitted that the effect of the joinder, if granted, would be that the Applicant union would take the place of a nominal Applicant in the proceedings. He maintained that the union had *locus standi* in that it had a substantive interest in the matter. He submitted that the union's *locus standi* arose from the fact that its members had been affected by the decision of the Respondent to dismiss.
4. Advocate Rasekoai furthermore, submitted that in the event that this Court finds that their application for joinder stands to be dismissed, he is asking for the substitution of the affected employees in the place of the union. He submitted that although this application is made from the bar, this Court nonetheless has the power to condone breach of its procedural rules, provided that the breach is in good faith. He submitted that this will not prejudice Respondent in any way and that it would be in the interests of justice if the breach is condoned.
5. In response, Advocate 'Nono submitted that in terms of section 28 of the *Labour Code Order 24 of 1992*, a trade union can only appear in a dispute of right as a representative and not a party. He submitted that contrary to the provision of section 28, the

Applicant union is cited in these proceedings as a party. He argued that on the premise of the above provision, the union has no *locus standi* in these proceedings. He maintained that from this logic, it would thus be improper to join the affected parties to a party that has not been properly cited in the proceedings.

6. Advocate Nono further submitted that in the present circumstances, the proper route whole have been for the Applicant union to have been substituted with the affected employees. He further submitted that it is unprocedural for a Applicant to apply for substitution from the bar and that this Court should not allow this approach. Respondent prayed that both the application for joinder and substitution be dismissed and that the main claim be dismissed on the ground of lack of *locus standi* of the Applicant union.
7. The general rule in application for joinder was outlined in the case of *The Amalgamated Engineering Union vs. Minister of Labour 1949 (3) SA 631 at 637*, where the Court had the following to say,  
“If a party has a direct and substantial interest in the order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should the joined in the proceedings.”  
This principle was cited with approval and authority in *Nalane & others vs. Molapo & others LAC (2007-2008) 457*.
8. It is without doubt that *in casu*, the parties who seek to be joined into the proceeding as co-applicants have a direct and substantial interest in the matter. These are the dismissed employees on behalf of whom this matter has been lodged. By virtue of their attributes, they fall within the requirements for a joinder to be made. An application for joinder, by its nature, assumes that there is an applicant party to whom those applying to be joined wish to join as co-applicants or co-defendants, whatever the case may be.
9. Essentially, in joinder application proceedings, the assumption is that the main party has *locus standi* in the proceedings before court. *In casu*, the issue of *locus standi* of the main party to the proceedings, being the Applicant union, has been

placed under challenge. Under the circumstances, the presumption can no longer stand but must rather be established before dealing with the issue of joinder of the affected parties. The logic is that, if it is found that the main party has no *locus standi*, a joinder application would not sustain.

10. The principle of *locus standi in judicio* essentially relates to the right or legal capacity of a party to sue or be sued. The test in determining this right or legal capacity was outlined in the case of *United Watch & Diamond (Pty) Ltd vs. Disa Hotels Ltd 1972 (4) SA 409 (C) at 415A*. The Court stated that to establish that one has *locus standi in judicio*, one must show, “... that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial...”
11. *In casu*, the Applicant union does not have a sufficiently direct and substantial interest in the matter. We say this because the dismissals have only directly and substantially affected the employees who were dismissed. The effect on the union, is not of the dismissal itself but rather of the effect of the dismissal on its members. This is the extent to which its interest lies in this matter. It is Our view that the nature of the interest that the Applicant union has, incapacitates it from being an initiator of these proceedings. The Applicant union’s interest does not and would not entitle it to bring this clam on its own and thus it lacks *locus standi*. In view of this said, there is no applicant in this matter and by necessary implication there is no application before court. Consequently, there can be no joinder.
12. Our conclusion leads us to the Applicant’s prayer for the alternative relief of substitution. In terms of the rules of this Court, all applications must be in writing and must be served on the party respondents to the proceedings. further, such a party/parties must be given sufficient time, as determined by the rules of the Court, to react thereto in writing (see Rules 3, 4 & 5 of the *Labour Court Rules of 1994*). *In casu*, there is no such application as Applicant seeks substitution from the bar. If this is the case, clearly the rules of this court have been breached.

13. In view of this breach, Applicant union has invoked the provisions of Rule 27 and in particular (1) and (2) thereof, that this Court may condone a breach of its rules. In Our view, the moment condonation becomes an issue, it is the responsibility of an Applicant party to satisfy its requirement, namely the explanation for failure to comply with the rules and Prospects of success (see *Phethang Mpota vs. Standard Lesotho Bank LAC/CIV/A/06/2008*) . *In casu*, neither of these requirements have been met as no averments were in that sense. Applicant has simply alleged lack of prejudice and that it would be in the interest of justice to grant condonation. Consequently, We decline to condone failure to comply with the rules and dismiss the application for substitution.

### **AWARD**

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

- a) That the both the applications for joinder and substitution are hereby dismissed;
- b) The main claim is dismissed on account of lack of *locus standi* of the union in these proceedings; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 27<sup>th</sup> DAY OF MAY 2013.**

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

**Mr. L. MATELA  
MEMBER**

**I CONCUR**

**Mrs. M. MOSEHLE  
MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENT:**

**ADV. RASEKOAI  
ADV. 'NONO**