IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/57/2014**

In the matter between:

TŠEPONG (PTY) LTD **APPLICANT**

And

LESOTHO WORKERS ASSOCIATION **RESPONDENT**

JUDGMENT

Hearing Date: 5th May 2014
Application for a declaratory order that strike by Respondent is illegal. Applicant basing argument on two grounds namely,
- *non-compliance with section 225(6)(b)(ii) of the Labour Code (Amendment) Act 3 of 2000*
- *Non-compliance with the arbitration award issued on 11th December 2013*

Court finding merit in arguments and declaring the strike by Respondent and its members illegal. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for a declaratory order and it was made on urgent basis. Applicant specifically sought an order in the following terms,
   "1. Dispensation with the ordinary rules pertaining to the modes of service.
   2. A Rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why an order in the following terms shall not be made final:
   (a) That the strike intended by respondent and its members cannot be declared illegal;
   (b) That the respondent and its members cannot be interdicted to embark on the strike that is intended to start on or around 30th April 2014 pending finalisation of this matter;

3. Costs of suit in the event of opposition;
4. Further and/or alternative relief.
5. That prayers 1, 2(b) and 3 hereof operate with immediate effect as interim relief."

2. The brief background of the matter is that Respondent had referred a despite of interest with the Directorate of Dispute Prevention and Resolution (DDPR). It had claimed the following from Applicant,
   "(i) Access to the Public Private Partnership Agreement entered into between the Government of Lesotho and Tšepong.
   (ii) Restructuring of salaries of the union members in the same scale as government employees."

3. The dispute was duly conciliated upon but could not be resolved. As a result, the learned Conciliator issued a certificate of non-resolution wherein She determined that Applicant (herein) was an essential services and then referred the dispute for compulsory arbitration. At the commencement of arbitration proceedings, Respondent (herein) raised a preliminary point that the matter ought not to have been referred for compulsory arbitration for the reason that not all its members offered essential services within Applicant organisation. The learned Arbitrator dismissed the argument and made an award as follows,
   "(a) The respondent herein is an essential service and therefore the matter is to be set for compulsory arbitration.
   ...."

4. The matter was eventually set down for arbitration on the 26th April 2014. However, it could not proceed on that day and as a result it was postponed to 29th April 2014. In the interim period between the issuance of the arbitration award and the first notice of set down, Respondent issued a notice of commencement of strike action. The notice was served upon the Applicants on the 23rd April 2014, indicating that Respondent would embark on a strike action on the 30th April 2014. It was in reaction to this notice that the current application was made.

5. The application was initially intended to be moved and argued to finality on the 28th April 2014. However, on this date the matter was postponed to the 29th April 2014, at the request of

both parties, to enable the Respondent to answer to the Applicant claims. Still on the 29th April 2014, the matter could not proceed and was further postponed to the 5th May 2014, to enable Applicant to reply to the Respondent's answer. In addition to granting the postponed on the 29th April 2014, We also granted prayers 1 and 2(b) of the notice of motion, as interim Court Order pending finalisation of the matter on the 5th May 2014.

6. On the 5th May 2014, parties presented an agreement which they had made to the effect that they had agreed to narrow down the issues for determination, by abandoning and no longer pursuing all the preliminary issues that they had raised in favour of the merits of the matter. We accepted their agreement and made it an Order of Court, and directed that they proceed to address the merits of the matter. In the light of this development, the issue that remained to be determined was the legality or otherwise of the strike by the Respondent. Having heard the submissions and arguments of parties, Our judgment is therefore in the following.

SUBMISSIONS

7. Applicant submitted that the strike action undertaken by Respondent is illegal in that it is contrary to the arbitration award issued on the 11th December 2013. It was argued that in terms of the arbitration award, Applicant organisation was declared an essential services and that the learned Arbitrator had also directed that the dispute which remained unresolved at conciliation, be referred for resolution by compulsory arbitration. It was added that the said award has not been reviewed and as such it remains binding on all parties concerned and that includes the Respondent and its members.

8. It was further argued following the conclusion of the conciliation stage, the learned Conciliator issued a certificate of non-resolution, wherein She made a determination that parties are engaged in essential services and accordingly directed that the dispute be referred for compulsory arbitration. It was submitted that owing to both the determination of the conciliator as well as the finding of the learned Arbitrator, arbitration became a compulsory means by which the unresolved dispute could be dealt with. The Court was referred

to section 225(6)(b)(ii) of the *Labour Code (Amendment) Act 3 of 2000,* in support.

9. The above said section provides as follows,
"(6) if the dispute remains unresolved after the 30 day period –
…
(b) the dispute shall be referred to arbitration if –
…
(ii) the parties to the dispute are engaged in an essential services as defined in section 232(1) as amended."
It was submitted in conclusion that under the above circumstances, there is no doubt that the Respondent's strike is illegal and stands to be declared as such. It was prayed that the application be granted as prayed and no prayer as to costs was made.

10. In answer, Respondent submitted that their strike is legal in that they have duly complied with the law on strikes. Specific reference was made to section 229 of the *Labour Code Act (supra)*, which provides as follows,
"229. When is a strike lawful –
(1) A strike is lawful if –
(a) it concerns a dispute of interest;
(b) that dispute of interest has been referred to the Directorate in terms of section 225;
(c) that dispute remains unresolved;
(d) the time periods contemplated in section 225 have expired;
(e) a notice of intention to commence a strike has been served on the other party to the dispute and on the Directorate; and
(f) at least 7 days from the date of that notice has expired.

(2) The notice referred to in subsection (1) may be served before the expiry of the time periods contemplated in section 225.

(3) A strike is unlawful if –
(a) It is not in accordance with the provisions of subsection (1);
(b) The parties to the dispute have consented to having the dispute resolved by arbitration."
It was argued that Respondent has complied with the prescribed procedures provided for by the Labour Code.

11. In addressing the Applicant's case, Respondent submitted that the arbitration award issued on the 11th December 2013, does not in any way prohibit the Respondent from engaging in strike action or to even render it illegal. It was submitted in amplification that the award merely makes a finding that *"The respondent herein is an essential service and therefore the matter is to be set for compulsory arbitration.*
...."

12. Further on the issue, it was submitted that even if the matter had gone for compulsory arbitrator, the award issued thereafter would not put an end to the matter. It was submitted that the Minister would still have to act in terms of section 232 of the *Labour Code Order 24 of 1992,* applied together with Rule 36 of the *Labour Court Rules of 1994*, to have the matter finalised. It was added that even still, this procedure is not binding upon the Respondent as all they had to do was to comply with section 229, which they did.

13. On the issue of non-compliance with section 225 of the *Labour Code Act (supra),* it was argued that the same section makes the consent of parties a pre-requisite for their unresolved dispute to go for compulsory arbitration. It was submitted that there is no point during the conciliation process where their consent was ever secured for the dispute to be referred for compulsory arbitration, in as much as nothing has been shown to prove same. It was submitted that on these basis, their strike cannot be declared illegal by reliance on section 225. It was prayed that this application be dismissed and no prayer for costs was made.

14. In reply, Applicant submitted that section 229, presents the general rule in dealing with disputes of interest. Further that section 225 makes provision for exceptional circumstances under which a deviation from the procedure in section 229 may occur. It was argued that such exceptional circumstances are where a dispute involves an essential services, as is *in casu.*

15. The suggestion that the arbitration award does not prohibit a strike action was rejected by Applicant as being inaccurate. It was submitted that the learned Arbitrator addressed this issue

under paragraph 11 of His arbitration award wherein He is recorded as follows,
"Having found that the respondent including its employees fall within the definition of essential service it is my considered view that the dispute herein will be dealt with in terms of section 225(6)(b)(ii) which provides that, the dispute shall be referred to arbitration if the parties to the dispute are engaged in an essential service."

16. Regarding section 232 and Rule 36, it was argued that the concerned provisions are permissive and as such squarely depend upon the discretion of the Minister to invoke or act on their basis. It was said that this is contrary to the provisions of section 229 subject to section 225, which are mandatory. Further, that it is inaccurate that section 232 would still apply even if parties had gone for compulsory arbitration, as the finding from the arbitration proceedings would put an end to the dispute.

17. On the issue of non-compliance with section 225, Applicant replied that the said section does not make it a requirement that the consent of parties be obtained before a dispute of interest can be referred for arbitration. It was further argued that the same section does not give an option to issue a notice of commencement of strike if services involved are essential in terms of section 232(1). It was argued that where such a notice is issued, section 225 makes it null and void, along with any other subsequent process that may be undertaken pursuant to it. It was thus prayed that the application be granted as prayed.

ANALYSIS

18. We wish highlight two important points before We proceed to address the arguments of parties. Firstly, that it is neither in doubt nor is it denied that an arbitration award was issued, which declares the Applicant organisation an essential services and directs that the dispute be resolved through compulsory arbitration. Secondly, that it is neither in dispute nor is denied that the learned Conciliator made a determination, in the certificate of non- resolution, that Applicant organisation is an essential service and referred the dispute for compulsory arbitration. These determinations have neither been challenged nor are they subject of challenge in these proceeding.

Consequently, they remain effective and therefore are both binding upon both parties.

19. In the light of this said above, We are in agreement with Applicant that the Respondent strike action is in contravention of both the arbitration award issued on the 11th December 2013, and the determination made in the certificate of non-resolution. We have carefully considered the arbitration award, in particular at paragraph 11 as well as under the final ruling, and the undisputed content of the certificate of non-resolution. They both make it clear that the Applicant is an essential services and that the unresolved dispute is referred to arbitration for resolution. These determinations clearly exclude any other means of resolution other than the one that they prescribe. In clear and explicit terms, both the arbitration award and the certificate prohibit a strike action. We therefore dismiss the suggestion that both or any one of them is silent on the prohibition of a strike action.

20. We also find no merit in the suggestion that compulsory arbitration does and/or would not have put an end to the dispute *in casu*. The correct position of the law is that is does, as arbitration awards are final and binding on the parties concerned and are only subject to review. Supportive of Our finding are the provisions of section 228E(5) read with section 228F(1) of the *Labour Code Act (supra)*, which provide as follows,

"228E Arbitration awards

…

(5) An arbitration award issued by the arbitrator shall be final and binding …"

"228F Review of arbitration awards

(1) Any party to a dispute who seeks to review any arbitration award issued under this Part shall apply to the Labour Court for an order setting aside the award -"

21. We also dismiss the suggestion that over and above compulsory arbitration, the Minister would still have to act in terms of section 232 of the *Labour Code Order (supra)* read with Rule 36 of the *Labour Court Rules (supra)*. We say this because once arbitrated upon, the outcome of the arbitration proceedings would finalise the matter and leave no room for

other processes safe for review, as We have already stated. As a result, there would be no need to resort to section 232. In fact the mere fact that parties have elected to have the matter resolved through section 229, that election excluded the use of the procedure under section 232. We wish to comment that had the matter been resolved through section 232, all procedures involved in that process would be binding on all parties and this includes Respondent.

22. It is also inaccurate that the consent of parties must be sought before a dispute of interest involving an essential services can be referred for arbitration. All that is required is for the conciliator to make a determination that parties involved in a dispute of interest, are engaged in an essential service. It is without doubt *in casu* that such a determination has been made. As a result, it is illegal for Respondent to embark on a strike action, particularly in the light of both the determination that parties are engaged in essential services and the provisions of section 225(6)(b)(ii) of the *Labour Code Act (supra)*. In essence section 225(6)(b)(ii) prohibits a strike action where parties are engaged in an essential service.

23. We wish to confirm that the procedure under section 229 is the general rule in dealing with disputes of interest. However, the procedure provided for under this section, is subject to the provisions of section 225 (*see quotation of section 229 on para 10 of this Judgment*). Section 225 makes is illegal to embark on a strike action where parties are engaged in an essential service. This is the same section that Respondent claims to be immune from on the premise that its consent was not sought prior to the referral of the matter for arbitration.

24. Section 225 does not require the consent of parties in order for a dispute of interest to be referred for compulsory arbitration. Rather consent is only sought where a dispute interest does not involve parties in an essential services, but such parties to a dispute interest wish for it to be resolved by arbitration. In essence, if the dispute in issue did not involve parties engaged in an essential services, We may have been inclined to find in favour of Respondent that it had complied with section 229.

AWARD

We therefore make an award in the following terms:

a) That the application is granted;
b) That the strike action by Respondent and its members is declared illegal; and
c) That no order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 7th DAY OF MAY 2014.

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

Mr. KAO **I CONCUR**
MEMBER

Mr. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. N. MOSHOESHOE**
FOR RESPONDENT: **ADV. P. R. SESINYI**