IN THE LABOUR COURT OF LESOTHO LC 24/17
HELD AT MASERU

In the matter between:

LESOTHO REVENUE AUTHORITY STAFF UNION (LERASU) **APPLICANT**

and

LESOTHO REVENUE AUTHORITY **RESPONDENT**

JUDGMENT

24/08/17

Good/ bad faith Bargaining - Unfair labour practice - Concept of bargaining in good / bad faith and intimidation of union members - Union alleging unfair labour practice on the part of the employer - For alleged acts of intimidation and threats to its members - Following a purported leak of confidential information on wage increments which culminated in the initiation of investigations by the employer to get suspects - Union considering this an act of intimidation on union members and accusing the employer of bargaining in bad faith - Court raising question of jurisdiction over the issues raised before it mero motu (on its own accord) - The Court cannot hear a matter in which it otherwise has no jurisdiction - Union failing to establish the jurisdiction of this Court - Application therefore dismissed for want of jurisdiction.

INTRODUCTION

[1] The Lesotho Revenue Authority Staff Union (LERASU) has approached this Court on an urgent basis seeking an Order restraining the respondent from interrogating and or threatening its members in relation to some confidential information on wage increments allegedly leaked which apparently prompted the employer, the Lesotho Revenue Authority (LRA) to initiate investigations on possible suspects. According to the applicant, the said act constituted an unfair labour practice in that it purported to threaten and intimidate its members in contravention of the principle of ***"bargaining in good faith."*** Respondent's reaction was to deny any involvement in acts of intimidation or threats against union members as alleged and to dispute the urgency of the matter.

THE COURT'S ANALYSIS

[2] This Court has jurisdiction to entertain, among others, disputes impinging on unfair labour practices. To the extent relevant to this case, the ***Labour Code (Amendment) Act, 2000***[1] provides that:

> ***Every person has the right -***
>
> ***(i) to participate in forming a trade union;***
>
> ***(ii) to join a trade union; and***
>
> ***(iii) to participate in its lawful activities.***

It further provides that no ***"person may discriminate against an employee, or a person applying for employment, for exercising any right conferred by this Act*** [2] and that any ***"breach of the provisions of this subsection is an unfair labour practice***."[3] The Act further imposes a duty on the employer to ***"bargain in good faith"*** with a representative trade union.[4]

[3] The applicant having accused the respondent of engaging in acts that constitute an unfair labour practice, the Court had to first satisfy itself whether, on the face of it, the purported acts constituted an unfair labour practice. If established, this would confer jurisdiction on it, and secondly, whether it was appropriate for the Court to have been approached on an urgent basis. Applicant's case was founded on the allegation that the LRA increased its employees' wages in a discriminatory manner[5] and when approached about this, it started threatening its members by interrogating them.[6] The employer acceded to undertaking such an investigation but argued that it had every right to do so because it considers what happened to have been an illegal disclosure of confidential information which if proven breached the employees' terms of the contract of employment.

[4] Two issues are discernable from this brief exposé. On the one hand, was this an ordinary exercise of the employer's prerogative to carry out investigations where it suspects acts of misconduct and on the other, whether the employer was engaging in acts aimed at threatening or intimidating union members, an act which constitutes

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[1] Section 196 (1) (a)
[2] Subsection (b) supra
[3] Subsection (c) supra
[4] Section 198 (2) of the Labour Code (Amendment) Act, 2000
[5] Paragraph 8 of the originating application
[6] Paragraph 10 of the originating application

an unfair labour practice in terms of ***Sections 196 (1) (a) and 198 (2) of the Labour Code (Amendment) Act, 2000*** as enunciated above thereby warranting an urgent intervention by this Court? The two issues are clearly distinct.

[5] It did not come out very clear during the proceedings whether the parties were already in negotiations regarding wage increments when the purported leak occurred or whether it was the latter that instigated a dispute between the parties. The answer to this question is very critical because it would bring us to the issue whether the dispute we are confronted with revolves around the purported leak of confidential information by some employees or whether there was a negotiation or bargaining process already in motion on wages. This boils down to whether we are talking about a dispute impinging on a negotiation process or not, such that we would have to invoke such concepts as ***"bargaining in good faith."*** It was such a struggle to get this issue straightened out, and the Court even went out of its way to explain to applicant's Counsel what the concept of ***"bargaining in good faith"*** entailed. One does not bargain over a dispute but over terms and conditions of employment. A dispute is resolved and parties could either fail or succeed in its resolution. The Collective bargaining is a process of negotiation between employers and a group of employees or trade union aimed at arriving at an agreement to regulate wages, working conditions, and other benefits including workers' compensation. In terms of the ***International Labour Organization's (ILO) Convention on Collective Bargaining***,[7] collective bargaining entails:

> ***a) determining working conditions and terms of employment; and / or***
>
> ***b) regulating relations between employers and workers; and / or***
>
> ***c) regulating relations between employers or their organisations and workers' organisations.***

[6] This is distinct from the employers' right to discipline its employees. The employment relationship bears a heavy load of implied terms for both parties to the employment contract. These terms impose duties on the parties which must be discharged even if they have not been expressly agreed to by them.[8] They have their roots in the common law and include the employee's duty to respect the employer's property rights and interests,[9] including information.[10] Documents belonging to the

[7] C 154 : Collective Bargaining Convention, 1981 (No. 154) - Article 2 thereof
[8] John Grogan : Workplace Law, 11th ed., Juta & Co., 2015 at p. 51
[9] Brassey : Employment and labour Law Vol. 1, Juta, 1998
[10] Supra at D2 : 17

employer cannot be appropriated by an employee for his or her own use, nor can disks containing computer programs or data.[11] Any threat to this tends to undermine trust and confidence between the parties which is an integral part of the contract of employment.

[7] The Court posed a number of questions to applicant's Counsel all aimed at establishing jurisdiction, but was not able to elicit clear responses. These included: was the process of bargaining into employees' terms and conditions already on when the purported investigations or threats ensued? What were the parties bargaining on and whether applicant's members were targeted? The answer to these questions would have gone a long way in assisting the Court ascertain whether or not the concept of ***"bargaining in good faith"*** could be invoked thereby conferring jurisdiction on it. It is a trite legal principle that once a person has decided to litigate, he or she must select the proper Court in which to proceed.[12] Absence of jurisdiction is a legal point and one can be taken on review for determining a matter over which he or she had no jurisdiction. At some stage applicant's Counsel even suggested that the Court had no power to raise the question of jurisdiction ***mero motu***. It does. Jurisdiction is a very critical question in any matter and can therefore not be overlooked.

[8] It was very difficult to grasp how the concept of bargaining in bad faith fitted in in the dispute. Relying on the High Court case of ***Standard Bank v `Mabotsang Matsoso***,[13] applicant's Counsel insisted that the Court just has to take his version as it is because it is contained in an affidavit and can therefore not be challenged. For starters, the applicant had lodged an ***"originating application"*** and not an affidavit. An affidavit has to be styled as such and be duly sworn to. Proceedings in this Court are initiated by an originating application according to the ***Labour Court Rules, 1994,*** however, the Court having a mandate to promote accessibility to its services and a quest to have disputes that come before it resolved expeditiously, also accepts affidavits and notices of motion. This does not mean they are the same. An affidavit is evidence when the others are not. Secondly, this principle was cited out of context because the matter was contested. The Court was at a total loss over these arguments.

[9] On the face of it, the applicants could not establish that respondent's purported investigations were tantamount to an unfair labour practice. The applicant had a duty to convince the Court that they raised the concept of the ***"duty to bargain in good***

[11] Supra
[12] Herbstein & Van Winsen : The Civil Practice of the Supreme Court of South Africa - 4th ed., 1997 at p. 36
[13] CCA/64/2013

faith" appropriately, thereby giving it powers to entertain the matter. The concept had to fit in in order to found jurisdiction. The fact that the Directorate of Disputes Prevention and Resolution granted a referral certificate does not necessarily clothe this Court with jurisdiction. It all depends on what was placed before it for determination. Facts and the law applicable have to establish jurisdiction. Having failed to establish jurisdiction of this Court over the matter, it will not go into the issue of urgency.

ORDER

[10] In the circumstances, the Court has no option but to decline jurisdiction and comes to the following conclusion:

i. **The application is dismissed for want of jurisdiction; and**

ii. **The respondent having prayed for costs on an attorney and client's scale, the Court feels only persuaded to grant costs on an ordinary scale. It therefore orders costs of suit.**

THUS DONE AND DATED AT MASERU THIS 24th DAY OF AUGUST, 2017.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

R. RAMPA — I CONCUR
ASSESSOR

K. MOHALE — I CONCUR
ASSESSOR

For the Applicant : Adv., P.A. `Nono - Astute Chambers
For the Respondent : Adv., R. Ntema - Lesotho Revenue Authority

ANNOTATIONS

INTERNATIONAL INSTRUMENTS

C 154 - Collective Bargaining Convention, 1981 (No. 154) - (ILO)

STATUTES / RULES

Labour Code (Amendment) Act, 2000
Labour Court Rules, 1994

LITERATURE

Herbstein & Van Winsen	:	The Civil Practice of the Supreme Court of South Africa - 4th ed., 1997
John Grogan	:	Workplace Law, 11th ed., Juta, 2015
Martin Brassey (SC)	:	Employment and Labour Law, Vol. 1, Juta, 1998.