

HELD AT MASERU

In the matter between:

LESOTHO COLLEGE OF EDUCATION
STAFF UNION
MPHOLO LEOISA
`MANTSUBISE MOKHETHI
`MABOKANG SEKATLE
`MAPHAKOA MOILOA
`MANKOPANE NKHABU
LEKHOOA HABASISA
RETHABILE MOKITIMI

1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT

and

LESOTHO COLLEGE OF EDUCATION

RESPONDENT

JUDGMENT

DATE: 18/03/15

Strikes / Lockouts - "No work, no pay" principle - Employees who had participated in a strike refusing to do work that ought to have been carried out during the subsistence of the strike and insisting that if they do it, they should be remunerated for it - Employer serving the said employees with notices of its intention to hold disciplinary proceedings against them - Union contending that the impending disciplinary hearings were not only acts of intimidation and threats against union members but also constituted forced labour and also amounted to an unfair labour practice - Court finds respondent to have acted within the ambit of the law - Application therefore dismissed.

1. The 2nd to the 8th applicants are members of the 1st applicant, the Lesotho College of Education Staff Union (LECESU). The 2nd and 3rd applicants are members of the academic staff whilst the 4th to the 8th applicants are in the Finance Department. It is common cause that the union members had embarked on an industrial action from 6th to 17th December, 2013 demanding better pay and improved working conditions. The respondent simultaneously exercised its right to lockout in terms of *Section 230 (1) of the Labour Code (Amendment) Act, 2000*. The said strike and lockout ended through an agreement signed between the parties on 17th December, 2013 following conciliation efforts by the

Directorate of Dispute Prevention and Resolution (DDPR) in *A 1076/13* which was a dispute of interest referred to it by the union. In terms of the settlement agreement parties agreed, *inter alia*, that there would be an across the board 5% salary increase which would be retrospectively applied from April, 2013. Members who were on strike were to report back to work on 6th January, 2014.

2. Despite this agreement, a dispute arose when the respondent ordered some members of the academic staff to enter marks into *SIMS* (the Students' Information Management System) on 7th and 10th January, 2014 for first and third year students, respectively. Some members in the Finance Department were also alleged to have refused to do some tasks that were behind as a result of the strike. It is significant to note at this juncture that the respondent had invoked the "*no work, no pay*" principle during the subsistence of the strike. Also worth noting, is that the College's activities for each year are dictated by an almanac and are time - bound. Respondent threatened lecturers who were refusing to enter the marks into *SIMS* with disciplinary action. The deadline for the entering of marks into *SIMS* for Year 1 students was 6th December, 2013 according to the 2013/2014 academic almanac.

3. The affected academic staff members ultimately complied through a Court Order issued by the High Court. This Court raised a concern with Counsel whether the case it is being called to determine is not academic as the main bone of contention had been resolved through the Order of the High Court. It is trite that Courts exist for the settlement of concrete disputes and not to make pronouncements on abstract questions or to render advice on differing contentions, however important - Innes C.J in *Geldenhuis and Neethling v Beuthin 1918 AD 426 at 441*. They are neither a negotiation nor bargaining fora, and they are also not meant to give opinions but to determine rights of parties. Both Counsel, however, insisted that there was a real dispute to resolve.

APPLICANTS' CASE

4. This dispute turns on whether employees can be compelled to do work that is pending as a result of a strike and not be paid for it. 1st Applicant's members insisted that they have to be paid for the entering of marks as it was work that was behind as a result of the strike. They argued that they did not have a duty to do work that was affected by the strike, but would only do prospective work as reflected in the academic almanac. Applicants' Counsel therefore, submitted

that respondent's conduct was tantamount to forced labour, a thing prohibited by the Constitution of Lesotho.

5. He further contended that the impending disciplinary hearings are acts of intimidation and threats to union members and constitute an unfair labour practice in terms of *Section 196 of the Labour Code Order, 1992* as amended by the *Labour Code (Amendment) Act, 2000*. Furthermore, he argued that by its intention to subject the 2nd applicant, Mr Mpholo Leoisa, the union's Secretary General, to a disciplinary hearing, the respondent violated *Section 11(8) of the Labour Code (Codes of Good Practice) Notice, 2003* because it had not consulted the union about it. In reaction to these arguments, Respondent's Counsel argued that by refusing to enter marks in *SIMS*, and to undertake financial tasks, 1st applicant's members were refusing to discharge their contractual duties and therefore liable to be charged disciplinarily.

6. The Respondent had issued a number of memos persuading those lecturers who were supposed to enter marks into *SIMS* to comply. These included a memo dated 6th January, 2014 issued by its Deputy Rector, Academic Affairs. It contended that by refusing to complete the ordered task 1st applicant's members were actually violating the terms of the agreement that brought the strike to a halt. The Union, however, insisted that there was no such clause in the agreement.

7. When it appeared that the concerned Union members were adamant, the respondent issued an ultimatum which ordered members to have complied by the 17th January, 2014. When there was still no reaction on their part, the respondent served them with notices summoning them to disciplinary hearings.

RESPONDENT'S CASE

8. Motivating its case, the respondent argued that the disciplinary charges were not meant to intimidate 1st applicant's members but were a managerial prerogative. In his opposing affidavit, respondent's Rector, Dr Oliphant, pointed out that the settlement agreement signed at the DDPR had been preceded by "*ML 4*" and "*ML 5*" which detailed the parties' terms of ending the industrial action. He contended that "*ML 5*" unequivocally stated that 1st Year marks be entered by 7th January, 2014 whilst 3rd Year marks by 10th January, 2014. He further emphasised that applicants' work was neither fixed to specific periods nor paid per task.

9. As far as he was concerned, the nature of their work was continuous and integrated with each step necessarily leading to the next. He argued that without students' marks being entered into *SIMS*, their results would not be submitted to the College Senate for consideration and affected students would not proceed to the following year, repeat if they have to, or graduate, as the case may be. Similarly, 4th to 8th applicants who are in the Finance Department had to continuously capture into the College system monthly payroll expenditure, print payslips, process and disburse to the bank and other service providers and carry out other finance related tasks. All this work, he averred, is integrated from month to month.

10. He maintained that all the memos were issued in a bid to persuade 1st applicant's members to abide by the terms of the settlement agreement and to return the College operations to normality. He contended that not all union members received notices for disciplinary hearings, and anyway, the hearings were within the College's rights to charge its employees for refusing to do work they had been employed to do. Again, this was after several efforts of persuasion.

11. He further averred that the respondent never threatened nor intimidated anyone. Refusal to do work in terms of the employment contract is a clear case of misconduct and can attract disciplinary action. He submitted that the respondent was not guilty of an unfair labour practice, and prayed that the application be dismissed with costs.

THE COURT'S ANALYSIS

12. As aforesaid, the main bone of contention was whether the applicants were within their rights in refusing to do work that was supposed to have been covered during the duration of the strike and to insist on being remunerated for it.

- ***THE PRINCIPLE OF "NO WORK NO PAY"***

It was applicants' case that if the employer compels them to do the work, it must pay them for their services. The right of workers to strike for purposes of collective bargaining is a fundamental right and is protected by the law. It is one of the essential and legitimate means by which workers and their organisations may promote and defend their economic and social interests. It therefore forms an integral part of the free exercise of the rights guaranteed by the International

Labour Organization's (ILO) Conventions on Freedom of Association which are the *Right to Organise Convention of 1948 (No. 87)* and the *Right to Organise and Collective Bargaining Convention of 1949 (No. 98)*, although they do not expressly provide for the right to strike. It appears to be implied. The United Nation's *International Covenant on Economic, Social and Cultural Rights (ICESCR)* explicitly guarantees the right to strike. These international instruments have influenced the guarantee of the right to strike in the *Labour Code Order, 1992* as amended by the *Labour Code (Amendment) Act, 2000*. Employees may therefore lawfully strike in support of collective demands.

13. The employer, however, has a right to withhold striking employees' wages during the period of the strike under the notion of "*no work, no pay.*" The tender of services is a prerequisite to the employee's right to claim payment of wages. The doctrine of "*no work, no pay*" is a fundamental axiom in industrial relations. The philosophy is that when a person is employed, it is expected that he or she will carry out the work that he or she has been assigned to do. When this work is not done, the employee is not eligible to be paid any wages. The employee's right to receive remuneration and the employer's commensurate duty to pay arises when the employee tenders his or her services - see Grogan J., in *Workplace Law*, Juta 7th ed., 2003 at p. 41. It is clear; therefore, that employees who go on strike have no right to be paid for this period because such a right accrues from services rendered, the exception, of course, being when one is on paid leave.

14. The key factor at the end of a strike is to restore the employers' operations to normalcy. Hence, when 1st applicant's members resumed duty on 6th January, 2014 following the strike, the employer expected its operations to run normally. This being an academic setting, it is only normal that scripts are marked and marks recorded and disseminated to enable students to know how they fared in a particular academic year or semester. With lecturing, marking of scripts and entering of marks is part and parcel of the job, whilst with the staff of the Finance Department, preparation of payrolls, bank reconciliation and other finance tasks are part of the package.

15. Applicants' stance would bring about very absurd consequences. In respect of lecturing, students would not be able to proceed to the next academic year, supplement or repeat if needs be, unless they knew how they performed and this can only be ascertained from marks. Respondent's Counsel drew a very

interesting analogy with the construction of a public road. He gave a scenario of an occurrence of a strike during the construction of a public road, and asked whether the workers would leave the portion of the road which ought to have been covered during the strike period. If one were to give a concrete example of the construction of a road between Maseru and Mafeteng, and then a strike occurs when work is supposed to be done on a stretch between Morija and Motsekuoa, it begs the question: - would the workers when they resume duty leave this stretch and commence construction from Motsekuoa to Mafeteng?

16. Applicants' reasoning in this regard defies logic. As it is, the nature of applicants' work is continuous, and integrated and they are not paid per task be it in lecturing or in finance. The purpose of a strike is to exert pressure on the employer for a particular cause. When employees return to work after the strike it is on the same terms as before the strike other than for any changes that may have been agreed upon following the strike. Where tasks have not been completed as a result of the strike they must be completed and parties can agree on a catch up schedule. By entering into a contract of employment, employees undertake to render their services to the employer and any absence from work does not mean that the particular tasks no longer have to be performed.

17. The employment relationship carries with it a number of rights and duties, normally referred to as "*implied terms*" of the contract of employment. This include the duty to co - operate. To flourish, the employer needs employees to co-operate with each other and with him in pursuing the mandate of an organisation or entity. Also significant is the duty to serve, and to serve in accordance with the agreed standards; the duty to maintain, respect and where appropriate, promote the employers' interests (for these duties see *Brassey - in Employment Law, 1999*).

- ***INFRINGEMENT OF THE AGREEMENT***

18. It was respondent's case that by refusing to do work that ought to have been covered during the strike period, 1st applicant's members violated the terms of the agreements signed by both parties. Two of the agreements were in the form of memoranda and the other was signed before the DDPR and were filed of record. One of them read (all reproduced *verbatim*):-

MEMORANDUM

FROM : DRAA (a.i)
TO : ACADEMIC STAFF
Ufs : RECTOR (a.i) signature of M. Khati (Dr)
DATE : 16th DECEMBER, 2013
SIGNED : - signatures of M. Khahloe (DR)

and

M. Leoisa (MR)

SUBJECT: COMMUNICATION ON THE END OF THE INDUSTRIAL ACTION BY LESOTHO COLLEGE OF EDUCATION STAFF UNION (LECESU) - 17TH DECEMBER, 2013

Following an agreement that was reached between Lesotho College of Education Management and Lesotho College of Education Staff Union (LECESU) on 16th December, 2013, the following dates for entering of marks into SIMS have been agreed upon:-

1. *First Year - 7th January, 2014*
2. *Third Year - 10th January, 2014*

LCE Management thanks all who worked hard to bring College operations into (sic) normal.

Thank you.

This was “**ML5**” and “**LCE 2**” to respondent’s and applicants’ papers, respectively.

19. The second one which was “**ML 4**” to respondent’s papers read as follows:-

MEMORANDUM

FROM : THE REGISTRAR
TO : ALL COLLEGE STAFF
DATE : 16TH DECEMBER, 2013
SIGNED : Signed by: **L.E.M LEPOTA (MRS)**

and

M. LEOISA (MR)

SUBJECT: COMMUNICATION ON THE END OF THE INDUSTRIAL ACTION BY LESOTHO COLLEGE OF EDUCATION STAFF UNION (LECESU) – 17TH DECEMBER, 2013

Following the agreement that was reached between the Lesotho College of Education Management and the Lesotho College of Education Staff Union (LECESU) on the 16th December, 2013, the following shall apply:

- 1. All staff will be expected to be back at work on the 16th January, 2014 as scheduled on the College almanac;*
- 2. All staff are expected to cooperate to ensure that College operations return to normalcy;*
- 3. Any changes on the College almanac will be communicated to staff as appropriate.*

Gratitude is extended to all of us for joining hands in ensuring that College operations return to normalcy.

Thank You.

20. Parties filed with the DDPR the following agreement still dated 16th December, 2013 but signed on the 17th:-

AGREEMENT TO END INDUSTRIAL ACTION

Following the industrial Action that Lesotho College of education Staff Union (LECESU) engaged in from 6th December, 2013. The two parties being Management and LECESU hereby agree as follows:-

- 1. There will be a 5% increase to staff salaries at the Lesotho College of Education;*
- 2. The increase is retrospectively applied from April, 2013. Arrears from April, 2013 to December, 2013 will all be payable in January, 2014;*
- 3. Strike and lock - out come to an end on the 17th December, 2013;*
- 4. All strike rules which operated during the industrial action shall become nullified on the 17th December, 2013;*
- 5. All members on strike to report back to work on January, 6, 2014;*
- 6. Parties agree to have more engagement in matters that affect them in future;*
- 7. This agreement becomes final settlement of the matter in A1076/13.*

Agreement signed in Maseru on this 17 day of December, 2013

For Management

for LECESU

Signed:

M.KHATI (DR)
RECTOR (a.i)

M. FAKU (MR)
PRESIDENT

Witness

Witness

21. From these sets of communications it is clear that parties had agreed that staff return all respondent's operations to normality and explicitly that marks be entered into *SIMS*. The second memo clearly stipulates that "***any changes on the College almanac will be communicated to staff as appropriate***" and by asking the affected staff members to enter marks into *SIMS*, the respondent was communicating a change in the said almanac.

UNFAIR LABOUR PRACTICE

22. Applicants contended that the impending disciplinary actions against them constituted an unfair labour practice in terms of ***Section 196 of the Labour Code, 1992*** as amended by the ***Labour Code (Amendment) Act, 2000***. Taking of disciplinary action against employees who refuse to work is a managerial prerogative. Employee's duty to obey lawful instructions is at the heart of an employment contract. In an English decision of ***Sim v Rotherham Metropolitan Borough Council [1987] Ch 216***, schoolteachers who were taking part in an industrial action refused to cover the classes of absent teachers as they would have normally done. Their employer deducted a percentage of their monthly salaries in respect of the hours when they refused to work normally. The teachers' action was held to have been a breach of their contractual duty. The Court held that the employer was entitled to deduct the amount proportionate to the work that was not done. The teachers would only be entitled to their full salaries if they had fully performed their contractual obligations. As it were, the schoolteachers had refused to obey a lawful order.

23. The main duty under the contract of employment is to place their services at the disposal of their employer. Also important is the duty to maintain discipline in the workplace. Refusal to enter marks into the College system or to work on respondent's books of accounts was tantamount to disobedience. A disciplinary action by the employer is an enquiry into the conduct the employer is complaining about and it is a process during which an employee is afforded an opportunity to put his or her case across.

24. It emerged in respect of Mr Mpholo Leoisa, the union's General Secretary, that the respondent intended carrying out investigations against him as reflected in "LCE 4" to the opposing affidavit and had not yet instituted disciplinary proceedings. *Section 11(8) of the Labour Code (Codes of Good Practice) Notice, 2003* provides that "*discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.*" Because no disciplinary proceedings were pending against the union's General Secretary, this Section is not applicable.

DETERMINATION

25. On the above analysis, the Court comes to the following determination:-

1. *That the applicants are not entitled to any remuneration for the work undertaken to cover work that remained outstanding as a result of the industrial action;*
2. *It finds the concept of forced labour not applicable in 1st applicant's members' circumstances;*
3. *It discerned no conduct that constituted an unfair labour practice on the part of the respondent; and*
4. *There is no order as to costs.*

THUS DONE AND DATED AT MASERU THIS 18TH DAY OF MARCH, 2015.

F.M KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

S. KAO
ASSESSOR

I CONCUR

R. MOTHEPU
ASSESSOR

I CONCUR

FOR THE APPLICANTS: MR. Q. LETSIKA

FOR THE RESPONDENT: ADV., K.K MOHAU (KC)