



**REPORT TO THE HONOURABLE MINISTER OF EMPLOYMENT AND LABOUR
ON THE QUEEN 'MAMO HATO MEMORIAL HOSPITAL/TŠEPONG AND
HEALTH WORKERS DISPUTES**



1. INTRODUCTION

The purpose of this report is to advise the Honourable Minister on the DDPR's involvement in "the alleged" dispute/strike staged by the Health Workers at Queen 'Mamohato Memorial/Tšepong Hospital. The dispute is referred to as "alleged" because it has not been referred to the Directorate of Dispute Prevention and Resolution (DDPR), in terms Regulation 3 (1) (2) of the Directorate of Dispute Prevention And Resolution) Regulations 2001, which state thus:

"A dispute may be referred only if the referral is -

- (a) In writing and in accordance with the form prescribed in schedule I; and**
- (b) Accompanied by proof of service on the other parties to the dispute."**

Regulation 3 (4) further specifies that

"A referral that does not comply with this Regulation shall not constitute a referral for the purpose of the Code."

2. DDPR'S MANDATE

The DDPR has been assigned to resolve disputes between the Employers and Workers, governed by the Labour Code Order 1992. The DDPR is mandated to prevent and resolve disputes by either conciliation or Arbitration, depending on the nature of the dispute. The DDPR's functions are tabulated under **Section 46B (5) of the Labour Code (Amendment) Act 2000.**

The Law has not been specific on the prevention activities, but has been very elaborate on the resolution steps, requirements and procedures. As a result the prevention has always been done by way of sensitization, education, advising and orientation of the Employers and employees either individually or collectively. These strategies have been used upon the stakeholders' request or voluntarily by the DDPR, inclusive of addressing situations, where the Director apprehends that a dispute may arise or escalate. The latter

is always done in view of the provisions of **Section 46B (6) (b) of the Labour Code (Amendment) Act 2000.**

3. NATURE OF DISPUTES

It is critical to appreciate that the Labour Code (Amendment) Act 2000, draws a distinction between the disputes that may arise at the workplace, into two different categories. The Law has further set out different paths for the resolution of disputes depending on their nature and the sectors of work.

Sections 225 and 226 of the Amendment Act 2000, classify the disputes into the following two categories:

- a) **Dispute of Interest** - easily interpreted, it is a dispute under which the Workers express their wish/es and desire for the improvement of their terms and conditions of employment, or the introduction of new ones. These can only happen during the existence of a contract of employment between the employer and employee/s. However, once the wishes are granted by the employer, they become rights and form part of the contract of employment;
- b) **Disputes of Right** - It is a dispute that results from a breach or violation of the already existing right/s of the worker/s, under the existing and continuing employment contract. These may be claimed during the existence of the contract and after.

The two sections further lay-out the procedure/s to follow in resolving these disputes.

4. RESOLUTION OF A DISPUTE OF INTEREST

The focus shall, for purposes of this report be on a dispute of interest, because in DDPR's view, the situation in question at Tšepong, revolves around an **“alleged dispute of interest”**. **It is referred to as alleged, because it has not been referred or filed with the DDPR, in terms of the Law.**

In view of the provisions of **Section 46B (6) (a) of the Labour Code (Amendment) Act 2000**, in order for the DDPR to prevent or resolve a dispute, it first has to be referred to it.

However, the DDPR may also attempt to prevent or resolve a dispute, if the Director apprehends that a dispute, inclusive of “an alleged” one, may arise or escalate.

In summary the procedure for prevention or resolution of a dispute of interest, is conciliation, with the aim of the Conciliator to advise and lead the disputing parties to reach their own settlement. If successful, the Conciliator helps the parties to draw a Settlement Agreement on the terms and conditions voluntarily agreed upon by them.

Where the parties to a dispute of interest fail to reach an agreement within a thirty (30) days’ period, the Labour Code (Amendment) Act 2000 provides that, the parties may:

- a) In view of **Section 225 (6)(b)** consent to Arbitration or
- b) Resort to industrial action (lawful strike), in view of **Section 229**.

However, option (b) is not an option available for the parties, engaged in an essential service. See: Section 225 (6) (b) (ii) of the Labour Code (Amendment) Act 2000.

What is an essential service? The answer to this question is in **Section 232 (1) of the Labour Code Order 1992**, which reads thus:

“ “essential service” is confined to undertakings that provide a service whose interruption would endanger the life, personal safety or health of all or any part of the population of Lesotho.”

5. TŠEPONG’S DISPUTES REFERRED TO THE DDPR

The DDPR first attended to the disputes between the two parties in 2013, and thereafter received a series of referrals by the Workers/their representatives as follows:

1. Lesotho Workers Association (LEWA) Vs Tšepong (Pty) Ltd (**A1095/13**);
2. Lesotho Workers Association Vs Tšepong (Pty) Ltd, Ministry of Health and Ministry of Finance (**A0267/17**);
3. ‘Makhanya Moteuli and 3 Others Vs Tšepong (Pty) Ltd (**A0809/19**);
4. Lesotho Workers Association (LEWA) Vs Tšepong (Pty) Ltd (**A0446/20**).

All the above were each assigned a Conciliator/Arbitrator to resolve, as guided by the Labour Code (Amendment) Act 2000.

N.B. The sole intention of mentioning the above disputes is to show the matters that the DDPR was officially made aware of by the interested parties, by way of a formal referral, which the DDPR resolved or is currently ceased with. The aim is also to establish whether the continuing strike may in anyway be associated with the listed disputes and if there is any role to be played or that has already been played by the DDPR in terms of the Law.

5.1 NATURE OF DISPUTES

a) In A1095/13 – Dispute of interest:

- demand for access to the Public Private Partnership Agreement entered into between the Government of Lesotho and Tšepong;
- demand for the restructuring of the Union members' salaries to be in the same scale as the Government Employees.

Outcome: The matter was resolved by Compulsory Arbitration, where the DDPR issued an award in favour of Tšepong. Further attempts were made by the Union to resuscitate the matter in 2014, but the matter was ultimately closed for lack of prosecution.

b) In A0267/17 - Dispute of right:

- Breach of a collective agreement – Return to work agreement. This agreement was entered into by the disputing parties outside of the DDPR.

Outcome: An award was issued, dismissing the applicant's claim and bringing the dispute to an end.

c) A0809/19 – Dispute of right:

- Breach of contract- failure to pay contractual entitlements in full.

Outcome: The matter is still pending before the Arbitrator. Note should be given to the fact that this is a dispute by individual employees not the Union. Its details cannot be part of the report.

d) A0446/20 – Dispute of interest:

- Demand for salary increase for different categories of employees.

Outcome: The matter remains unresolved. Conciliation is still continuing. The parties had asked for time to go and negotiate the matter on their own. The last physical appearance before the Arbitrator was in September 2020, where they requested an extension up to 30 October 2020. During November 2020, a number of cases could not proceed due to the Arbitrators' go slow which ended on 30th November 2020. In December of every year, the DDPR only operates for two weeks as it officially closes for the Christmas break on 16th December until 8th January the following year. The DDPR re-opened on 11th January 2021, but the disputes could not proceed because of the Covid-19 challenges.

This was also because of the national lock down that was introduced from 18th January until 4th February 2021. On 19th February 2021, The Arbitrator summoned the parties to appear before the DDPR, for feedback. The aim was also to establish whether there was any relationship between **A0446/20** and the strike at Tšepong, which started sometime in January 2021. This was a follow-up to the parties' telephonic confirmation that, the continuing strike was in no way connected to the referred dispute in **A0446/20** or any other dispute before the DDPR.

The latest report as at 19th February 2021 before the Arbitrator was that, they are still continuing with negotiations and requested a further extension up to 31st March 2021. The justification was that the negotiations were frustrated by the on-going strike at Tšepong. However, they further both confirmed before the Arbitrator that, the continuing strike at Tšepong, was on issues totally different from the ones referred under **A0446/20**, in that:

- the interested parties are different; the strike is allegedly led by the Lesotho Nursing Association and involves only the nursing staff, while the referred dispute at the DDPR has been referred by the Union (LEWA) and is on behalf of all the staff, in their different categories;
- The LEWA representative, alleged that as the Union, they were not a party to the continuing strike at Tšepong, although some of their members, as the employees of the hospital, were part of the strike.

N.B. No further details regarding A0446/20 can be provided for purposes of this report, because the case is still being conciliated. It is a fundamental principle of conciliation that: conciliation proceedings are private, confidential and without prejudice. Reference may be made to Guideline 4 (3) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004. The same principle applies to referral number A0809/19. It should further be emphasised that, the dispute in A0809/19 concerns individual workers at Tšepong and is a dispute of right.

6. CONCLUSION

On the basis of the history and analysis above, this leads the DDPR to a conclusion that the continuing strike at Tšepong may be regarded as an **unlawful strike**; firstly because there is no dispute referred. Secondly, because Tšepong is an essential service provider. Lastly, even if they were not an essential service, the strike would still be regarded unlawful, as it has not met the legal requirements of a lawful strike, set out in **Section 229 of the Labour Code (Amendment) Act 2000.**

7. STEPS TAKEN BY THE DDPR

The DDPR through its Dispute Prevention Unit, investigated and advised two parties thus;

- The first interaction was between the DDPR's Dispute Prevention Officer (DPO) and the Tšepong Human Resources Manager (HRM); Ms. Thenjiwe Dlangamandla on 10th February 2021. The HRM assisted with the contact details for the employees' representative Mr. Raphael Tlali; in his capacity as Lesotho Nursing Association President, Mr. Raphael Tlali, could not be reached on his mobile phone. An alternative contact given was Mrs. 'Mamonica Mokhesi, the Secretary General (SG). She was called on 10th February 2021; Both the HRM and the SG were separately, advised of the requisite legal procedures for resolution of a dispute of interest. Allegedly the Secretary- General indicated that the situation was out of their control as the leadership of the Nursing Association and the Nursing staff was not prepared to back down despite the advice given;
- On 18th February 2021, the DPO called the LEWA Secretary General, Mr. Hlalefang Seoaholimo, to enquire about the Union's involvement in the Tšepong Strike and to establish whether, the strike was in any way related to any of the disputes already referred and pending before the DDPR and the answer was in the negative. The SG even suggested that LEWA was not a party to the continuing strike at Tšepong.

8. AVAILABLE OPTIONS TO THE MINISTER LABOUR AND EMPLOYMENT

The available options that may be resorted to are as follows:

- a) The aggrieved employees should refer a dispute to the DDPR in order for a Conciliator to be appointed to attempt to resolve the dispute;
- b) The Employer has every right to resort to disciplinary action for the striking workers should they continue with the strike without following the legal procedures; although it has serious negative implications, particularly in view of the fact that this is an essential service;
- c) **Section 3 of the Labour Code (Amendment) Act 2000**, gives the Minister of Labour and Employment, the power to appoint, in consultation with the Industrial

Relations Council (IRC), a person to prevent or resolve any trade dispute by Conciliation, if the Minister believes that to be in the national interest;

- d) In the alternative after receiving the Director DDPR's report, the Minister may invoke the provisions of **Section 232 of the Labour Code Order 1992, as amended;**
- e) However, it is the DDPR's observation and opinion, that the issues surrounding all these disputes, need a broader perspective. The DDPR therefore suggests that another option could be a joint meeting of the Ministries of Health and Finance and Queen 'Mamohato Memorial Hospital. It is the DDPR's view that unless the administrative terms and conditions surrounding the PPP agreement are revisited, there are likely to be recurring disputes between Tšepong and the Workers. The Ministry of Labour and Employment may also be coopted as an advisor, on Employer and Employee related matters. However, the DDPR has no mandate in the interpretation of the PPP agreement as it is not an employment contract or a matter between the Employers and the Employee/s.

Prepared By: Director DDPR

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