

IN THE HIGH COURT OF LESOTHO

In the matter of:

NTHABISENG LEKHANYA

Plaintiff

v

CO-OP LESOTHO LTD

Defendant

JUDGMENT

Delivered by the Hon. Mr. Justice Sir Peter Allen
on the 1st day of November, 1988

This is a claim for unpaid salary since October 1983 by the plaintiff who had, until then been employed as a cashier by the defendant Co-op in Maseru since 1978. At the time she was earning M288 gross per month.

Usually a suit of this sort is for damages for unlawful dismissal and possibly for reinstatement, but in this instance the plaintiff claims that she was never dismissed but only suspended and so she is still an employee of the defendant.

The claim is for:

(a) An order directing Defendant forthwith to pay plaintiff's salary in respect of October 1983;

(b) An order directing Defendant to pay

/plaintiff's ...

plaintiff's monthly salary with effect from the date of suspension to date.

The summons was filed on 24 November 1987, over four years after the date of the plaintiff's suspension, though no explanation of this long delay was given to the Court. Two months later, in January 1988, the defendant paid to the plaintiff her salary for October 1983. Thus that part of the claim has been dealt with.

The defence called only one witness, Mrs Malethoko Lebeko (DW 1), also employed as a cashier by the Co-Op. In October 1983 she was working in the Headquarters office in Maseru and the plaintiff was a cashier in the Seed Depot in another part of Maseru. According to Mrs Lebeko the plaintiff telephoned her on the morning of Tuesday 18 October 1983 and asked to meet her to discuss something. They agreed to meet at lunch time in the Headquarters office. She said the plaintiff was at first reluctant to bring up the matter that she wanted to discuss. She then said that if Mrs Lebeko did not agree with what she wanted to suggest she should keep quiet about it and let the matter end there.

The plaintiff pointed out that the Co-Op was not paying them very well and that she had a plan that involved about two people who would steal the Co-Op's money when it was being taken to the bank by Mrs Lebeko. She should remain calm at the time because she would not be hurt. The men would merely threaten the person who /escorted ...

escorted her to the bank. Mrs Lebeko said that she told the plaintiff that she was afraid and was not willing to be involved in the matter and that she was satisfied with whatever she was being paid. The plaintiff replied that since Mrs Lebeko did not agree to the plan the matter would end there and she should forget about it. Mrs Lebeko did not report this conversation to anybody.

On the morning of Friday 21 October, that same week, Mrs Lebeko went to the Lesotho Bank with cash and cheques amounting to M.38,000.00 to be deposited. She was escorted by a gate man called Lekitla. Just outside Co-Op Headquarters two men appeared. The escort was struck on the head and the men took the money and escaped in a car. Apparently they were not caught. Mrs Lebeko was not hurt at all.

After persistent questioning on this point Mrs Lebeko stated that after the robbery the first thing she did was to go to her office and telephone to the plaintiff to tell her that her plan had been carried out. She said that the plaintiff replied that she was not involved in any way and it was just unfortunate that they had spoken of it. She asked Mrs Lebeko to forgive her.

Only then did Mrs Lebeko report the matter to her supervisor who called in other senior officials who questioned Mrs Lebeko, each of whom asked the same question that was put to her several times in Court;

/that is, ...

that is, why had she not reported the conversation with the plaintiff about the planned robbery before the event. Her answer every time was that she did not believe it would happen. Yet, after further persistent questioning in Court she admitted that she thought that the plaintiff was serious at the time but she merely put it down to a grudge of some sort. That, of course, was no reason for failing to report it and Mrs Lebeko's next excuse was that, since she had not agreed to take part in the robbery, it therefore would not happen. When it was pointed out to her that the plan did not envisage her having any part to play in the robbery, she merely replied, after a lot of evasions, that she thought the whole matter had ended with her own disagreement. It was very unconvincing in my opinion.

At any rate Mrs Lebeko was taken to the police station where she told the same story. She was suspended from duty for a week by the Co-op and then re-instated and paid her salary for October.

The plaintiff was arrested on 22 October, the day after the robbery, and detained in custody for five days. She was then released and was not told to report back to the police again. She completely denied Mrs Lebeko's version of events and added that she did not know why Mrs Lebeko would lie about it.

On 31 October she was given a letter (exhibit 'A') from Mr. Thabisi, the Co-Op Personnel and Admin. Manager which reads as follows:

/Subsequent ...

Subsequent to my letter dated 24th October 1983, management of Co-Op Lesotho hereby confirms that you have been suspended without pay until such time that the police shall have finished with their investigations.

The plaintiff's attorneys then wrote demanding that her October salary be paid to her. No other demand or request was made at that time. In reply on 3 November (exhibit 'A') one Moorosi writing on behalf of Thabisi (above) explained about the robbery and the plaintiff's alleged part in it and her detention in police custody. He repeated that she was suspended pending the outcome of police investigations. He added that they would only pay her if she produced evidence showing that she had been cleared by the police of any complicity in the robbery.

Nothing more then happened for three and half years. On 7 May 1987 the plaintiff's attorneys wrote to the Co-Op (exhibit 'A') demanding her salary "from the date of suspension to date" as there had been no police charge preferred against her. They added that failure to pay would result in a summons being issued. On 18 May the acting Managing Director, Mr Khanyane, wrote to the attorneys to the effect that the case was still in the hands of the police who had made no report about it, so she was still suspended. Six months later the summons was filed and issued.

Meanwhile the plaintiff had remained suspended and not working from 24 October 1983 until she took a

/clerk's ...

clerk's job with Kali & Partners in April 1984, that is five months later. She was paid M.200 per month. After a few months in 1984 she obtained a clerical job with Maseru Tyre Co. at M.250 per month. She stayed with them until September 1987 when she obtained a job with a shop called Collier & Yeats (Pty) Ltd at M.400 per month. She is still working for them and had thus been in gainful employment continuously since April 1984.

In spite of that she was claiming her Co-Op salary M.288 per month for the full time since she was suspended in October 1983. It was put to her that she could not expect to receive two salaries for each month of that period. Mr Pheko on her behalf suggested that she should be paid the difference in her salaries up until she joined Collier & Yeats, when, of course, it became considerably more than her Co-Op salary.

In the defendant's plea there was an assertion that "the defendant has since dismissed plaintiff for misconduct." However, no evidence was adduced to support this contention and so it should not have been pleaded. The plaintiff claimed that she had never been dismissed but only remained suspended for these four years. The three letters from the defendant in the bundle (exhibit 'A') all refer only to the suspension of the plaintiff. There is no mention of any dismissal. That also perhaps explains why the plaintiff was not in a position to bring an action for unlawful dismissal.

With regard to the evidence before the Court I found both of these women, the plaintiff and Mrs Lebeko,

/to be ...

to be most unconvincing witnesses. It may be that the police did not find sufficient evidence upon which to base a prosecution; possibly because they did not catch the two men involved or recover the money. But, whatever the position, Mrs Lebeko was a shifty and evasive and unreliable witness, and the plaintiff's denials were equally unconvincing. It is difficult to believe that Mrs Lebeko, if she was innocent, could have failed so badly in her duty as not to report the robbery plan to her superiors. Or that, knowing what was planned, she could have calmly walked out of the building carrying a large sum of money without any apprehension or fear or without taking any precautions, unless she not only knew of the plan but was also certain that she would be unharmed and unblamed and would gain something by it. It is significant that her first move after what should have been a most frightening experience of being robbed, was to telephone to the plaintiff to report the success of the plan. Only after that did she report to her superiors. This was surely not the normal reaction of an innocent person. However, these are not matters to be decided in the present case.

The question that does have to be decided is whether or not the plaintiff is still an employee of the defendant under suspension; and whether, since no police charge is pending or has been brought against her, she is entitled to be paid for that period. She told the Court that she still considers herself to be an employee of the defendant and she would be willing to go back to work there in spite

/of the ...

of the higher salary that she is now earning with Collier & Yeats. But she has not asked the Court for an order reinstating her. She explained that she had meanwhile taken up successive employments with the three different businesses since April 1984 simply because she had been divorced since 1982 and so she needed to earn money to live and keep herself. She admitted that she has been in continuous employment since April 1984. In fact, if she was not dismissed then she was also employed by the defendant during her period of suspension from October 1983 until April 1984 even if that suspension was without pay.

Most organisations, when they suspend employees, do so on reduced pay such as half-pay or one third pay since obviously an employee still has to live somehow during his period of suspension. In my view it is unusual and indeed unfair to suspend anyone without pay at all. Unfortunately the Employment Act 1967 (as amended) is silent about the matter of suspension.

Normally a period of suspension ends when the employee is either reinstated or dismissed. In the present case it appears that neither of these options was exercised by the defendant, thus introducing an unnecessary complication into the issue.

Mr Pheko referred to a decision of the Appellate Division in Steward Wrightson (Pty) Ltd v Thorpe 1977(2) SA 943, in which it was held that "the exercise of a right to terminate a contract must, as a juristic act, require an expression of intent. However, any requirement /that ...

that the party against whom it is exercised should be notified does not rest upon any need for consensus but must flow from other considerations, whatever they might be." That does not really take us any further since it is in any case reasonable and practical, indeed essential, that an employee should be informed if and when his contract of employment has been terminated.

In Norton v. Mosenthal & Co 1920(2) SA (EDL) 115, the defendant wrote to the plaintiff suspending him on suspicion of theft of their property. He was told to hold himself at the defendant's disposal until further notice. He was later convicted and his sentence suspended on conditions. He then sued the defendant for wages. The defendant pleaded that the plaintiff's arrest and conviction amounted to a dismissal and that he had forfeited wages from the date of suspension, or at least from the date of arrest. The Court agreed with the plaintiff's counsel that the arrest and conviction was not a fact from which dismissal must inevitably be inferred. It was held that in order to justify a master from withholding wages from a servant on the ground of misconduct warranting dismissal, the dismissal must either be in express terms, or there must be facts brought to the servant's notice from which a dismissal may be inferred. But that case can clearly be distinguished from the present instance on several grounds. For instance, the present plaintiff was not charged and so not convicted. She was not told to hold herself at the disposal of her employer and she obtained alternative employment.

/It is ...

It is this last point which makes this case unusual and perhaps unique. At any rate, counsel have not been able to cite any precedents or cases in which a suspended employee plaintiff has sought and obtained employment elsewhere without having been formally dismissed or having resigned first. Thus I can only give my own opinion about it

I find the plaintiff's statements in Court that she was holding herself available to return to work at the Co-Op throughout these last four years, and that she considered herself to be still employed by the defendant, to be at variance with her previous conduct as well as her pleadings.

Neither in her attorney's letters to the defendant (exhibited) nor in her pleadings did she say even a word to this effect. Why were there no letters from her or her attorney in the last four years informing the defendant of this view and claiming or requesting reinstatement? Why did she not ask the Court for an order reinstating her? Without anything of this kind I find it very difficult to give any credence to her testimony on this point.

Furthermore, if she was so keen to return to the defendant's employment why did she wait so very long, four years in fact, before bringing her action to Court? Equity aids the vigilant. The dilatory cannot expect sympathy or success.

Apart from the first five months of her suspension period she has been in full-time paid employment and her
/present ...

present job is probably better paid than if she had stayed with the defendant. Clearly the defendant should not have left the question of her suspension or dismissal in the air. A decision should have been taken when it was clear that she was not going to be prosecuted and she should have been informed of it. Similarly the plaintiff had a duty to inform the defendant that she was all the time holding herself available for immediate reinstatement, if this was so.

However, the plaintiff has not asked for reinstatement and I cannot therefore accept that she wants it nor that she is serious in her statement that she considers herself still to be in the employment of the defendant. In my opinion her actions indicated that she assumed that she had been dismissed. By electing to accept fresh full-time employment elsewhere for so long she impliedly repudiated her contract of service with the defendant just as if she had resigned or walked out.

Thus I hold that by her own actions the plaintiff terminated her contract with the defendant in April 1984 when she sought and obtained other long-term full-time employment. Consequently she is not entitled to recover wages from that time onwards.

With regard to the first five months of her suspension she was clearly still an employee of the defendant and she was entitled to some remuneration, whether it was the full amount or a fraction of it. There was no evidence that the defendant was legally entitled under the

/contract ...

contract of employment to suspend her with no pay at all. As I have already indicated, I would regard such an order as being unfair and inequitable. The defendant also acted inequitably by not defining precisely the plaintiff's position with them after she had been released by the police. She should have been informed long ago whether she was to be reinstated or dismissed. It should have been easy enough for the defendant to obtain confirmation that the plaintiff was not going to be prosecuted.

Since I find that the defendant's actions in these two respects were unfair and lamentably lacking in consideration, I hold it to be appropriate for the defendant to pay the plaintiff her salary for those first five months (November 1983 to March 1984 inclusive), but no more than that since she deserves no more and in any case she has not prayed for any damages. This amount will be 5 x M288, which comes to M.1440. The delay in bringing this action was caused by the plaintiff herself and so interest will not be back-dated. As the plaintiff has partially succeeded and the defendant was in the wrong, the plaintiff is entitled to her costs.

Accordingly, judgment is entered in favour of the plaintiff in the sum of M.1440 with interest at 11% from the date of this judgment and costs in the suit.

P. A. P. J. ALLEN
J U D G E

1 November 1988

Mr Pheko for Plaintiff

Mr Molete for Defendant