

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAMUSA MUSA

Applicant

v

TEBA
M. MAHULA

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the Hon Mr. Justice B.K. Molai
on the 7th day of June, 1988.

The applicant herein has filed with the Registrar of the High Court, a notice of motion in which she moves the court for an order framed in the following terms :-

- "(a) Setting aside the dismissal of the applicant.
- (b) Directing the 1st Respondent to re-instate the applicant with all her rights and benefits.
- (c) Directing the Respondents to pay the costs of this application.
- (d) Such further and/or alternative relief."

The Respondents have intimated their intention to oppose this application. Affidavits have been duly filed by the parties.

It emerges from the facts disclosed by the affidavits that in December 1982 the applicant, who is a woman married in community of property, was engaged as receptionist by the 1st Respondent. The letter of

2/ employment,

employment, annexure "A" attached to the founding affidavit, set out her conditions of service. They included, inter alia, that she would receive a starting wage of M150 per month. Indeed, it is clear from annexure "F" her pay advice slip attached to the answering affidavit, that the applicant was a monthly paid employee of the 1st Respondent.

It is significant to note that the conditions of employment set out under annexure "A" to the founding affidavit do not include a clause which specifically state, how the contract entered into by the applicant and the 1st Respondent was to be terminated. However, Clause (h) thereof does provide that;

"All the conditions of your employment will be laid down by current law."

It can safely be presumed, therefore, that the contract was to be terminated in accordance with the provisions of the Employment Act 1967 (as amended) which is the current law.

It is common cause that during 1985/86 applicant became allergic to a smoking environment. On medical advice she applied for and was granted internal departmental transfer to another office which was free of smoking, on conditions that her designation, grading but her salary would change - see annexure "B", a letter of 31st December 1986 attached to the founding affidavit, where it is clearly stated at paragraph 2 :-

3/ "Please note

"Please note that in effecting the said transfer, your designation, grading but your salary will change."

On 5th January, 1987 applicant assumed duties in her new office clearly on conditions set out under the above cited para. 2 of annexure "B". However, on 9th January, 1987 2nd Respondent asked her to sign a certain document (annexure "E" to the answering affidavit). According to applicant, the document required her to opt either to sign a declaration that she would not be entitled to annual increment or to go back to her former office or to resign. She opted to return to her former office rather than forfeit her annual increment or resign her job.

Although in his answering affidavit James Van Heyninger Coetzer, the Lesotho Manager of the 1st Respondent, averred that annexure "B" to the founding affidavit made it quite clear to applicant that there would be a change in her salary upon transferring to the new office, I must say I have underscored the words "but your salary" in the above cited para 2 thereof to indicate my disagreement with the averment. A proper reading of para 2 of annexure "B" to the founding affidavit leaves me with no doubt whatever that the only conditions agreed upon when the applicant transferred to her new office were that her designation and grading would change, but not her salary. It follows therefore, that James Van Heyningen Coetzer is not correct when, in his answering affidavit, he deposes that annexure "B" to the founding affidavit made it quite clear to the applicant that there would be a change in her salary.

4/ I have

I have also had the occasion to read through annexure "E" to the answering affidavit. Although this document embodies no condition that the applicant must opt to return to her former office or resign her job and the applicant is therefore wrong in saying it does, it certainly requires her to make an undertaking that she will not be entitled to increments until other staff members in her new department have reached her salary level. This was not one of the conditions under which it was originally agreed that the applicant should transfer to the new department. It was in effect an introduction of an additional condition under which the applicant was to transfer to the new department. She was entitled to accept or decline it and the Respondents had no right to impose it unilaterally. However, in her own testimony, instead of just declining the additional condition the applicant decided (verbally) to return to her former office.

It appears from annexure "C" to the founding affidavit that following some discussions which the 2nd Respondent held with the applicant on 23rd January, 1987 the former advised the latter that she could revert to her previous office on condition that she was able to produce a medical certificate from a certain Dr. Ntlhakana to the effect that she was no longer allergic to a smoking environment. The applicant was consequently examined by Dr. Ntlhakana who, however, issued annexure "D"

5/ to the founding

to the founding affidavit, which annexure "D" showed that the applicant was still unfit to work in a smoking environment.

It is not disputed that annexure "D" to the founding affidavit was communicated to the 2nd Respondent who, however, addressed to the applicant annexure "F" (attached to the founding affidavit) the letter of 30th January, 1987 in which he notified her that her contract of employment with the 1st Respondent was terminated with effect from 1st February, 1987 in accordance with the provisions of paragraph (b) of subsection (4) of section 14 of the Employment Act 1967 (as amended).

It is worth noting that at para 4 of the answering affidavit which was deposed to by the 2nd Respondent the reasons behind the decision to terminate the applicant's contract with the 1st Respondent are stated as follows :

"Because of the stalemate which had been reached i.e. the applicant could not work in the cash office because of her health condition and she refused to sign an acknowledgment regarding her post designation and annual increments I decided to discuss this matter with Mr. Coetzer and he arrived at the decision that the applicant's services be terminated."

It is significant to note that in para 8 of his answering affidavit James Heyningen Coetzer has associated himself with the above cited averments deposed to by the 2nd Respondent. By the "cash office" I understand the deponents to mean the office in which the applicant was working prior to her being transferred to the new office.

6/ That being.....

That being so, it is to be remembered that by annexure "C" to the founding affidavit the 2nd Respondent had told the applicant that she could revert to her former office on condition that she was able to produce Dr. Ntlhakana's medical certificate as proof that she was fit to work in that office. However, Dr. Ntlhakana's medical certificate showed that the applicant was still allergic to smoking environment and, therefore, not fit to work in her former office. As the only condition on which she was to revert to her former office had not been satisfied the applicant could not be expected to return to that office. Nor, indeed, could she be blamed for not going back to her former office.

As regard the alleged applicant's refusal to sign an acknowledgment for the alteration of her post designation it is to be remembered that on 5th January, 1987 she did assume duties in her office after the 2nd Respondent had clearly informed her by annexure "B" to the founding affidavit that in effecting her transfer her designation would change.

That being so, it is highly improbable that the reason behind her refusal to sign annexure "E" was that the applicant did not want her post designation to change. The real reason behind the applicant's refusal to sign annexure "E" to the answering affidavit was obviously that the Respondents required her to sign away her annual increments as a new condition for her transfer to the new office.

7/ It has already ...

It has already been pointed out earlier that after the applicant had agreed with the Respondents that she was transferring to the new office on conditions clearly set out under paragraph 2 of annexure "B" to the founding affidavit, the latter had no right to change unilaterally those conditions by the introduction of the additional condition viz. that the former should sign away her annual increments. If they did, the applicant was perfectly entitled to decline to sign annexure "E" to the answering affidavit.

It follows, therefore, that in terminating, as they did, the applicant's contract with the 1st Respondent for the reasons set out under paragraph 4 of the answering affidavit the Respondents acted unlawfully.

That is, however not the end of the story. It must be borne in mind that the applicant is a woman married in community of property and, therefore, subject to her husband's marital power. This was pointed out by James Van Heyningen Coetzer who deposed to the answering affidavit in which he averred that as she was unassisted by her husband the applicant had no locus standi to institute these proceedings. In his replying affidavit the applicant conceded that as a woman married to her husband subject to the marital power she had no locus standi to institute the proceedings. She, however, added that on the day of hearing she would apply for the amendment of her founding affidavit to the effect that she was assisted by her husband. She never did. The end result is that the applicant, a woman married in
8/ community of

community of property and therefore, subject to the marital power of her husband is neither assisted by her husband, nor granted leave by this court, to institute these proceedings unassisted by the husband.

In his work the South African Law of Husband and Wife (2nd Ed) at p. 186, H.R. Hehllo has this to say on the issue:

"As a general rule, a married woman who is subject to her husband's marital power has no locus standi in judicio, that is to say, she may not conduct legal proceedings unassisted, whether as Plaintiff or defendant."

Later on at p. 187 the learned author went on to say :

"Where a woman who is married to her husband subject to the marital power sues or is being sued unassisted by her husband the proceedings are without legal effect."

I agree, and it is for the simple reason that the applicant has no locus standi that I come to the conclusion that this application ought not to succeed. It is accordingly dismissed. In the discretion of this court no order is made as regards costs.

B.K. MOLAI

JUDGE

7th June, 1988.

For Applicant : Mr. Monyako,
For Respondents : Mr. Koorhoff.