

IN THE HIGH COURT OF LESOTHO

In the matter between:-

SUN INTERNATIONAL OF LESOTHO

APPLICANT

and

PULENG MATHIBELI

RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 15th June 2000

In this application, the applicant moved the court for and was granted by My Brother Molai J. an order calling upon the respondents to show cause why the judgment of the Labour Court in case No.LC23/95 shall not be stayed, reversed and set aside and why pending finalization thereof, the execution of the said judgment shall not be stayed.

History of the case

It appears that the first respondent had been employed since 1988 as a slots cleaner by the Sun International of Lesotho and was working at the Maseru Sun Cabanas. On the 15th January 1995 she was dismissed by the chairman, a Mr Wilson, who presided over a disciplinary hearing set up to inquire into a theft scam in which overage monies from the slot machines were being systematically pilfered by the staff of the gambling department. Preliminary investigations had been conducted by a Mr Wilhehn Pieterse, a security manager from a sister Sun Hotel - the Thaba-Nchu Hotel. The first respondent allegedly made a written statement in which she admitted to have taken some bags containing coins on two occasions from the trays of the slot machines but also explained that she had been asked to do so by one Calex who had given her on those two occasions some money as a reward for her assistance.

In this proceedings it is not necessary however to go over the merits of the disciplinary hearing once more because the Labour Court decided that evidence supported the charge.

Having thus found, the Labour Court in its judgment of the 17th September 1996 came to a finding that-

“There being no evidence of delegation of power we are not the view that the purported dismissal of the applicant by Mr Wilson on the 15/1/95 was materially flawed and as such of no force or effect in law as he had no power to dismiss”

and in its award ruled that-

“She is lawfully and properly terminated as of the 17th September 1996 when the judgment of this court was delivered. It is therefore, only fair that she be compensated for the loss she has suffered since 15th January 1995 to that date”

It is this finding of the Labour Court that is being challenged by the applicant in the present proceedings.

In her originating application the first respondent states:-

“I was unlawfully dismissed on the allegations against me (which) were not proved. I was unlawfully punished for the wrongs (if any) of another person. I was not in charge. I was not given notice of termination, nor payment in lieu thereof; no severance payment.

4. Nature of relief sought or reference or question for determination of Court - Damages, notice of pay, severance of pay.”

It is clear that the grounds on which relief was sought did not challenge per se the authority or power of Mr Wilson as chairman to dismiss after the inquiry was concluded. In her supporting affidavit she states:-

6.

“I submit that my dismissal is unlawful for the following reasons:-

- 6.1. I was given no tice of termination in terms of section 63 of Labour Code Order no 24 of 1992.

- 6.2. I was not given payment in lieu (sic) of Notice in terms of Section 64 of the Order mention (in) 6.1. above
- 6.3. I was not given severance payment in terms of section 79 of the said Order”.

In her originating application she did not pray for an order that the purported dismissal by Mr Wilson be declared null and void for the reasons that Mr Wilson did not have authority or power to dismiss. The replying affidavit of the first respondent alleges that:

“The dismissal was never real when the purported dismissal Form was signed by the chairman.”

It is perhaps important to reproduce the notice of Dismissal Form in full-

“

Date: 15-1-95

Employee's name and address:

Puleng Mathibeli
Thetsane

Mr(s) Mathibeli
NOTICE OF DISMISSAL

This serves to confirm that, following the hearing held on 15-1-95 (date) concerning your serious misconduct, your services are hereby terminated. You are summarily

“She is lawfully and properly terminated as of the 17th September 1996 when the judgment of this court was delivered. It is therefore, only fair that she be compensated for the loss she has suffered since 15th January 1995 to that date”

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4. Nature of relief sought or reference or question for determination of Court - Damages, notice of pay, severance of pay.”

It is clear that the grounds on which relief was sought did not challenge per se the authority or power of Mr Wilson as chairman to dismiss after the inquiry was concluded. In her supporting affidavit she states:-

6.

“I submit that my dismissal is unlawful for the following reasons:-

- 6.1. I was given no tice of termination in terms of section 63 of Labour Code Order no 24 of 1992.

dismissed and your employment relationship with the company ends on 15-1-95 (date) we also confirm that you have the right to appeal in writing, within three (3) working days against this dismissal.

Kindly acknowledge receipt of this letter by signing where indicated below

Chairman's signature : K.E. Wilson
 Name : Keith Wilson
 Position : Slots Manager
 Employee's signature : P. Mathibeli
 Date: 15-1-95"

During the hearing in the Labour Court Mr Monyaka Makhetha Personnel Manager of applicant was cross-examined as follows by **Mr Fosa-**

“Question: It is correct that when a person is dismissed there is a dismissal form that is filled?

Answer: Yes, there is but it is not always filled sometimes it is a dismissal letter.

Question: After signing dismissal form is a dismissal complete or there is still something else?

Answer: The dismissal is complete, a person is dismissed.

Question: Is he dismissed by the person who signs the form?

Answer: Yes.

Question: And this is signed by Mr Wilson from Thaba-Nchu who chaired the hearing?

Answer: Yes.

Question: What power does Mr Wilson have to dismiss people in Lesotho?

Answer: He had been empowered by the Management of Maseru Sun Hotel as a chairperson of that hearing

Question: Do you mean that when a person is powered to chair a hearing he is also given power to dismiss?

Answer: Yes, once you are given power to chair a hearing at that time you were also given power to dismiss.

Question: No even power to recommend?

Answer: No, he is given all powers to dismiss

Question: This is ridiculous, is this position known by the workers?

Answer: Yes

Question: Puleng says she did not know this?

Answer: At the beginning the chairman explained his position as chairman and his powers so Puleng knew about this.”

To his founding affidavit, Murtuza Rahman the General Manager of Sun International of Lesotho attached what is called “Grievance and Disciplinary Procedures”

“(viii) The following people will normally be present:

- You
- Your supervisor/charging officer
- Your manager (Chairman of the Hearing)
- Your representative (if required)
- Your witness (if required)
- Other witnesses (if required)

- Your interpreter (if required)

After hearing all parties and allowing questions, the Chairman will decide if you are guilty or not. He will then consider your work record and decide on what action may be taken.

This may be:

- Verbal warning
- Written warning
- Final warning
- Dismissal.

He will notify you of the action to be taken and give you the right to appeal.

He will also issue you with a disciplinary action form (see Appendix 3).

A copy of this will be placed on your file and will normally be valid for 12 months”

The ordinary import of this document despite its inelegant drafting implies that it is the chairman of the disciplinary hearing who decides upon the guilt or otherwise of the employee and it is the chairman may impose appropriate punishment i.e. verbal warning, written warning final warning, or dismissal. The fact that the convicted employee has a right of appeal from the decision of the chairman also implies that the Chairman’s decision is definitive and not merely a recommendation to be forwarded to the general manager. Also attached is a letter purportedly written by Mr Rahman to Mr Wilson appointing him to chair over the disciplinary hearing. It reads:-

“RM/mam

9th January, 1995

Mr K. Wilson,
Slots Manager,
Thaba-Nchu Sun.

Dear Sir,

This is to confirm that you have been appointed to chair and preside over disciplinary hearings of cases of the following employees of Lesotho Sun Hotels working at the slots department of Maseru Sun, Violet Lesenya, Julia Moholobela, Puleng Mathibeli and Calex Koloji.

We have appointed you because you are a senior manager within the Sun Group with knowledge of the operations of Slots Departments. These employees are facing very serious charges which if proven may warrant dismissals; and since you do not work at Maseru Sun, you are not intimate with the facts of the cases and you are thus the most neutral and unbiased Chairman we can get while still remaining within the Sun Group as these proceedings are an internal Management tool.

Even though you are familiar with procedure forms to be followed, we attach a copy for ease of reference.

Yours sincerely

RAHMAN MURTUZA
GENERAL MANAGER”

This letter in fact in my view authorises Mr Wilson to exercise all disciplinary powers in the said hearing including “dismissals”. If delegation of power was necessary, this letter constituted one.

I discern no procedure for recommendation but for appeal after the conclusion of the proceedings; I do not see any negation of the principles of natural justice.

In their originating application it was incumbent upon the first respondent to have placed the validity or nullity of dismissal directly in issue before the Labour Court in order that the applicant could avail that court with necessary documentation. The Lesotho Sun International is not a public or statutory body but a private entity (see **Koatsa v NUL** C. of A. (civ) No.15 of 1986) In the cited case of **Makhutla vs Court President and Lesotho Agricultural Development Bank** - CIV/APN/293/95 Mofolo J. said:-

“In the first place, powers vested on the Managing Director are by statute and the expectation is that they can be taken away from him or diminished by statute”

The learned judge decided that under the principle of **delegatus potestas non potest delegare** where a function is entrusted to an administrative organ, the task or function may not be carried over to another person in the absence of statutory authorization for this. Thus where an official purports to exercise a function that is not entrusted to him under statute, such act is **ultra vires** - In **Makhupane vs Lesotho Pharmaceutical Corporation & Another** - CIV/APN/80/96 per Kheola J. as he then was, decided that purported dismissal by a department head was **ultra vires** because the letter of dismissal had not been written in terms of section 12 of the Lesotho Pharmaceutical Order 1987. See also **Lesotho Telecommunications Corporation vs Thamahane Rasekila** - C of A (civ) No.24 of 1991 where Browde JA stated:-

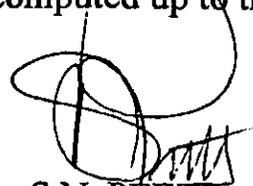
“I have come to the conclusion, therefore, that the decision to dismiss the respondent was taken by the Board of Directors and that being so the decision was in breach of the regulations which governed the relationship between the parties.” - p.8.

The learned judge of appeal also noted that it must be borne in mind that the onus of proof on the issue of unlawfulness of the dismissal is on respondent.

I am also of the view that since the issue of authority to dismiss only surfaced during the cross examination of Mr Makhetha it was incumbent upon the first respondent through his lawyer to have made an application before Labour Court to amplify or amend his grounds for relief-which-I should hasten to say - were of compensatory nature and did not directly challenge Mr Wilson’s authority to dismiss. This was a necessary step because the Labour Court - even as a court of equity could not - grant a relief not sought in the papers.

It is my view that the finding of the Labour Court that the chairman of the disciplinary hearing Mr Wilson had no authority to dismiss is not based on any evidence but on an assumption that only the general manager had this power. The onus on this issue was on the first respondent to show that the dismissal was null and void because Mr Wilson had no authority to dismiss; there is no iota of evidence in this regard.

In the circumstances, the finding of the Labour Court declaring the dismissal of the first respondent of the 15th January 1995 null and void is set aside. Consequently any benefits due to first respondent should be computed up to that date.



S.N. PEETE

JUDGE

For Applicant: Mr Makeka

For Respondent: Mr Fosa