

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/302/2019**

In the Matter Between: -

**THATOHATSI ROSE SELLO**

**APPLICANT**

AND

**PRINCIPAL SECRETARY**

**1<sup>ST</sup> RESPONDENT**

**FOREIGN AFFAIRS**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**CORAM : MOKHESI J**  
**DATE OF HEARING : 25<sup>TH</sup> FEBRUARY 2020**  
**DATE OF JUDGMENT : 26<sup>th</sup> MAY 2020**

**Summary: Employment law-** *Applicant was a Personal Aide to the Minister of Foreign Affairs engaged on a fixed term contract of three years- She was dismissed by the said Minister without following the procedures laid out in the Public Service Regulations 2008 and Codes of Good Practice 2008- measure of damages when a fixed term contract is terminated prematurely.*

## **Annotations :**

### **STATUTES :**

*Public Service Regulations, 2008*

*Codes of Good Practice Notice 2008*

### **CASES :**

*South African Post Office v Mampeule [2010] 10 BLLR 105 (LAC)*

*National Union of Metal Workers of S.A. v Vetsak Co-operative Ltd  
1996 (4) SA 577*

*Attorney General and Another v Morokole LAC (1995 – 1999) 82*

*South African Post Office Ltd v Mampeule (JA29/09) [2010]  
ZALZC 15; (2010) 31 ILJ 2051 (LAC); [2010] 10 BLLR 1052 (LAC)*

*Myers v Abramson 1952(3) SA (2) 126*

**Per Mokhesi J**

## **[1] INTRODUCTION**

The applicant was appointed as a Personal Aide to the Minister of Foreign Affairs and International Relations (hereinafter 'the Minister') on the 11<sup>th</sup> July 2017. She was dismissed from her position with effect from 05<sup>th</sup> June 2019. She instituted these proceedings seeking the following relief:

- "1. That the letter of P.S Foreign Affairs and International Relations dated 05.06.19 purporting to terminate the Appointment Contract between Applicant herein and the Government Of Lesotho be, and is hereby reviewed, reversed and set aside on the grounds that it is grossly irregular, unprocedural, in conflict with LAWS OF LESOTHO and outright unlawful
2. The Applicant be and is hereby, reinstated to her post of Personal Aide or similarly graded position of equivalent rank and responsibilities in the Government of Lesotho effective from 05 June 2019 in accordance with the AGREEMENT NO. MP/P/79115 entered into on 11 July 2017, and subject to the terms and conditions specified under the SCHEDULE OF AGREEMENT thereto.
3. That the Applicant's term of agreement DOES RUN FROM 11 July 2017 to 03 August 2022 in terms of the Schedule of Agreement aforesaid.
4. That Applicant's terminal benefits include cash in lieu of eighteen (18) working days ANNUAL HOLIDAY not utilized, counted from 11 July 2022 to 03.08.22 to 03.08.22 all computed at the rate of

M109,980.00 (one hundred and nine, nine hundred and eighty Maloti) per annum (the salary she would be earning had she not been dismissed from work unlawfully).

5. That Applicant's GRATUITY be, and must be computed at 25% (twenty-five percent) of the amount of aggregate of salary drawn (or must have been drawn (or must have been drawn) from 11 July 2017 to 03 August 2022, taking cognizance Applicant's annual salary increments to M100, 620.00 in 2018, M103, 656 in 2019, M106, 812.00 in 2020 and M109, 980.00 in 2021.

- 5.1.1. That applicant be paid Airtime allowance at M600.00 per month from July 2019 to August 2022.

6. That Applicant be awarded costs herein."

## **[2] Factual Background:**

The applicant, as already alluded, was engaged as a Personal Aide to the Minister on fixed term contract of three years running from 11<sup>th</sup> July 2017 to 11<sup>th</sup> July 2020. The terms of the said contract provided (in material respects).

" SCHEDULE OF AGREEMENT NO.: MPS/P/79115

1. Terms of Engagement (1) Subject to the provisions of this Contract, the engagement of the person shall be linked to the tenure of the office of the Honourable Minister responsible; effective from the date he/she assumes full duties and responsibilities of the post. The contract may be extended or renewed on the Minister's recommendation as provided in the Public Service Rules and Regulations in fore.

2. The conduct of the person engaged, shall at all times be contained in the Public Service Regulations.

2. Duties:

(1) The duties of the person engaged shall be as reflected in the job description of the office in which he/she is engaged. The person engaged shall devote the whole of his/her time and attention to the office of the Minister. He/she shall use his/her utmost exertions to promote the interest of the office of the Minister and the Public Service.

3. Salary

(1) Salary will begin from the date of assumption of duty

(2) The person engaged will get salary increment through the recommendation of the office of the Minister that his/her performance is satisfactory.

(3) The person engaged in accordance with Financial and Procurement Regulations in force, if it happens that he/she damages/loses Government property.

(4) The Government of Lesotho shall pay to and including the last date of his/her last day of service. In addition he/she will be paid cash in lieu of leave, due to him/her at the date of termination of his /her agreement.

4. Leave entitlement

(1) The person engaged shall be entitled to annual leave as provided in the Regulations governing the Public Service.

5. Medical Examination

(1) The engagement of the person on appointment is subject to his/her satisfactorily passing a medical examination, including X-ray of the chest, by a state medical officer.

## 6. TERMINATION OF ENGAGEMENT

(1) The contract of the person engaged shall be terminated on grounds of ill-health (not caused by his/her own misconduct or negligence) on his/her being certified by a duly constituted medical board appointed by the Government that he/she is incapable by reason of any infirmity of mind or body to render further efficient service to the Public Service.

(2) If the person engaged shall at any time after the signing hereof neglect or refuse or from any cause (other than ill-health not caused by his/her own misconduct or negligence, as provided in clause 5) become unable to perform any of his/her duties or comply with any order, or shall disclose any information respecting the affairs of the office he/she occupies to an unauthorized person, or shall in any manner misconduct himself/herself, the Minister may recommend termination of his/her engagement or dismissal from the service and hereupon all rights and advantages reserved to him/her by this Agreement shall cease.

(3) The person engaged may at any time after the commencement of any service, terminate his/her engagement on giving the Government one month notice in writing or paying to the Government one month salary in lieu of notice.

## 7. Gratuity

(1) Subject to completion of the Minister's tenure of office, the person engaged shall be eligible for a gratuity of twenty-five percent(25%) of the amount of aggregate of salary drawn during the two year period of service.

(2) In case whereby the contract is terminated before completion of two (2) years, gratuity will be paid on pro rata basis.

#### TERMINAL BENEFITS

(1) At termination of appointment other than 6 above, the person engaged shall at the expiry of his/her contract be paid terminal benefits in accordance with the Regulations currently in force.”

**[3]** It would appear that the Minister was not entirely satisfied with the applicant’s performance of her duties, a dissatisfaction which necessitated him convening a meeting of his personal staff on the 08 April 2019 to raise his concerns. Present on that meeting was the Minister, his Private Secretary and the applicant. As regards the applicant, items 9 and 10 of the typed minutes reveal that:

“9. Personal Aide was given a chance to allay her contribution and perceptions on the previously discussed issues and she first appreciated the opportunity offered to her in order to address herself on the pertaining issues of her behavior as against her position and mandate in executing her daily duties. She totally disagreed on ever lacking good influence and delivering on her work and that people are falsely accusing her on that matter.

10. She promised that, going forward she is willing to execute her duties accordingly as per her job description and thanked the office for calling her to justify herself.” (sic)



**[4]** On 28<sup>th</sup> May 2019, it would seem that the applicant's behavior had not changed for the better, as her immediate supervisor wrote her a letter to the following effect (in relevant parts);

**"Re: THE LETTER OF DISCIPLINARY ACTION AT WORK**

You will remember that you were being invited to the meeting of your fellow employees on the 08<sup>th</sup> April 2019 where the Honourable Minister made it clear to you that you are still continuing working in a unsatisfactory manner.

It is your responsibility to align yourself directly in all matters that connect the office of the Honourable Minister and the constituency. It is also your responsibility to work on personal errands of the Honourable Minister and to keep his residential in an acceptable condition. You seem not doing all these things and all other things which are in your responsibility. Therefore, you are expected to show in writing within the period of seven days the reasons why the disciplinary action cannot be taken against you.

Signature

NUNU Khampepe

MINISTERIAL SECRETARY" (sic)

The applicant responded to the above letter on the 03 June 2019, and said (in relevant parts);

**"Re: REPLY TO THE DISCIPLINARY LETTER**

I received your letter dated 28 May 2019. I am always surprised that you give me instructions, and for that reason I don't think disciplinary action should be taken against me.

I give Mr Heqoa the reports as Honourable Minister has directed.

Thank you

Yours Servant

Ms Rose Sello"

**[5]** On the 05 June 2019 Principal Secretary for the Ministry wrote a letter to the applicant informing her that her contract had been terminated, and the following is the tenor of that letter (in relevant parts);

"DEAR MISS. SELLO

RE: **TERMINATION OF YOUR CONTRACT APPOINTMENT AS PERSONAL AIDE TO THE HONOURABLE MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL RELATIONS.**

The above matter bears reference.

This is to acknowledge receipt of your response to the show-cause letter dated 03<sup>rd</sup> June, 2019 regarding your misconduct. Your explanation did not satisfactorily convince or persuade the Honourable Minister, because your misconduct continues to badly compromise his image, trust and security.

**Therefore, kindly be advised that a decision has been made by the Honourable Minister of Foreign Affairs and International**

**Relations to terminate** your Contract Appointment as his **Personal Aide**, Grade E, with effect from **05<sup>th</sup> June, 2019**.

You shall be paid **Gratuity** on pro rata basis and a **One Month Salary as cash in lieu of Notice**.

Yours Sincerely

Signed

'MAMONYANE BOHLOKO

P.S FOREIGN AFFAIRS AND INTERNATIONAL RELATIONS.”(emphasis provided)

**[6]** Following termination of the Applicant’s contract, the Public Service Commission at its 8923th meeting held on 02<sup>nd</sup> July 2019,“... resolved to terminate the officer’s appointment on contract, with effect from 05-06-19”, and this was communicated to the Ministry. In effect what this resolution communicates is that the Commission resolved to endorse the Minister’s termination of applicant’s appointment on contract. This resolution was communicated to the applicant on the 12<sup>th</sup> July 2019 by the Principal Secretary of the Ministry of Foreign Affairs.

**[7]** Dissatisfied with termination of her appointment contract, the applicant launched this application for the relief outlined above. In essence the applicant says her dismissal was irregular and therefore, reviewable for the following reasons:

- a) The Minister did not have authority to dismiss the applicant from work.

- b) The Principal Secretary of the Ministry lacked authority to communicate the Minister's dismissal of Applicant from work.
- c) There was no valid reasons for Applicant's dismissal
- d) The provisions s.40 of the Public Service Regulations were not complied with as the applicant was not "afforded the opportunity for a fair hearing in accordance with the Disciplinary Code, Sections 5, 6, 7 and 8, together with the opportunity to be heard in terms of section 9."

On the one hand, the respondents are arguing that the applicant's contract was terminated in accordance with its provisions and therefore, the dismissal was '**lawful**', and further that she was afforded a hearing before her contract was terminated.

**[8] The issues for determination in this matter are:**

- a) Can an employer raise the defence that an employee was dismissed 'lawfully' when that decision is challenged for being unfair?
- b) Whether the Minister had legal authority to terminate the applicant's contract.
- c) Whether the applicant was afforded a hearing before her contract was terminated.
- d) Measure of damages

**[9]** I turn to consider the legal position in respect of each issue which falls to be determined.

**a) Can the respondents raise a defence that dismissal was lawful.**

It is the respondents' case that the applicant's dismissal was "lawful" because she was dismissed in terms of the contract of engagement between herself and the 1<sup>st</sup> respondent. It is generally accepted in labour law that there is a huge difference between lawfulness and fairness, and therefore, it is not open to an employer when fairness of employee's dismissal is called into question to raise a defence that it was lawful to do so, what instead has to be determined is whether the dismissal was fair divorced totally from whether it was lawful to do so. The distinction between 'lawfulness' and 'unfairness' of dismissal was clearly articulated in the ***National Union of Metal Workers of S.A. v Vetsak Co-operative Ltd 1996 (4) SA 577*** where Nienaber J.A (as he then was) said, at 592 F – I:

"The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them – and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair – and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances

in which it would not), a lawful dismissal will not for that reason alone be fair (citation omitted). Nor is there an exact correlation between the lawfulness of the strike and the unlawfulness of the strike and the unlawfulness and/or unfairness of the dismissal of a striking employee. Because a strike is lawful it does not follow that the dismissal of a striking employee will be unlawful or unfair; conversely, because the strike is not lawful or legitimate it does not follow as a matter of course that the employer is free to dismiss his striking workers....” See also: ***South African Post Office v Mampeule [2010] 10 BLLR 1052 (LAC)***

#### **[10] Propriety of Dismissal by the Minister.**

In terms of clause 6 (2) of the Contract of employment, if the employee engages in misconduct ***“the Minister may recommend termination of his/her engagement or dismissal from the service.”*** It is common cause that after the applicant was requested to make written representation showing why she should not be hauled before disciplinary hearing, the applicant chose not to respond issuably to the said letter, but instead, complained that her supervisor improperly issues instructions to her. Following this unsatisfactory response, the Minister terminated the applicant’s contract of employment, and his decision was communicated by the Principal Secretary in the Ministry of Foreign Affairs (see para.5 above). The issue for determination is whether the Minister acted properly in terminating the applicant’s contract. In order to answer to this question, the

meaning of the words “the Minister may recommend *termination*” as appear in clause 6 (2) of the contract of employment must be deciphered. The word “termination” has been held to have a wide purport as to embrace even disciplinary hearing (***See Attorney General and Another v Morokole LAC (1995 – 1999) 82 at 86 F – G***).

[11] What is clear is that in terms of the contract, the Minister may *only* recommend disciplinary hearing against the applicant, not himself to carry out the dismissal as happened in this case, because in terms of Regulation 40 of **Public Service Regulations 2008** an employee may only be dismissed “by the Head of Department by way of dismissal for misconduct after a fair hearing instituted in accordance with the Disciplinary Code.” The tone of the letter the Principal Secretary Foreign Affairs wrote to the applicant makes it plainly clear that she simply rubber – stamped the Minister’s decision to dismiss the applicant. The decision of the Minister to dismiss the applicant instead of recommending that disciplinary action be taken against her, is irregular, as the former clearly acted outside the scope of his powers. In short, the minister acted improperly. What is disturbing is that the Principal Secretary abdicated her responsibilities in terms of the Regulations as she did not ensure that the applicant was dismissed after a fair hearing was conducted.

**[12] (b) Was the applicant afforded a hearing before being dismissed?**

It is apposite to quote from the respondents' answering affidavit to determine what they say regarding the issue whether the applicant was afforded a hearing.

At para. 8.1 P.S Foreign Affairs says:

"8.1 Contents herein are denied. I aver further that the Applicant was afforded a hearing before she could be dismissed. On the 08<sup>th</sup> April 2019, she was invited at the meeting where the Honourable Minister and Mr. Heqoa (Minister's Private Secretary) were present. The Applicant was made aware that she is no longer performing her duties as expected in accordance with her employment contract and in terms of her job description."

It will be observed that the meeting to which the P.S is referring was a meeting which the Minister had convened to give his political appointees a wake-up call to perform their duties diligently. It is also at this meeting where the Minister raised his concerns about the applicant's conduct. This was not a disciplinary enquiry into the applicant's misconduct. The procedure for holding disciplinary inquiry into the employee's misconduct is provided for in the Codes of Good Practice Notice, 2008 Part III, and Disciplinary Code section 8 which provide that:

"8.1 If a public officer commits a misconduct after being issued a written warning, or commits a misconduct that warrants a disciplinary inquiry, the supervisor shall –

- a) arrange for a disciplinary inquiry to be conducted;
- b) give the officer adequate notice of at least 48 hours or 2 working days before a disciplinary inquiry is held;



- c) allow the public officer to have representative who shall be a colleague within the officer's department or ministry.
- (2) The right to representation under this Division does not include the right to a legal practitioner.
- (2) The following persons shall attend a disciplinary inquiry –
  - a) the public officer's Head of Section who shall be the chairperson;
  - b) the public officer's immediate supervisor (complainant)
  - c) the public officer (defendant);
  - d) the representative of the Human Resource Department who shall be the secretary and advisor on policy issues at the hearing;
  - e) the public officer's representative (a colleague or ministry); and
  - f) witnesses, if any
- (3) The public officer and his or her representative have a right to cross-examine.
- (4) At the end of the inquiry the Head of section shall decide on a penalty which may be –
  - a) a final written warning, which shall be signed by the officer, and be recorded in his or her file and is valid for a period of twelve months from the date of issue;
  - b) any other sanction that may be reasonable in the circumstances.
- (5) Where dismissal of a public officer is being contemplate, the Head of section shall recommend such dismissal to the Head of Department who shall after adequate investigation confirm the dismissal."

The above procedures are tailored to ensure fairness in the process of disciplinary inquiry and to curb arbitrariness on the part of the employer; to ensure good administration and to treat people with dignity and not just as chattels which can be discarded whenever the owner feels like they have past their utility days. In the present

matter, it will be observed that none of the above procedures were not followed at all in dealing with the complaints against the applicant. In short, no hearing was held at all. The Minister dismissed the applicant even though he was not in law entitled to do so, and the Principal Secretary in a disturbing abdication of her duties simply rubber-stamped such an irregular act. On this ground the decision to dismiss the applicant falls to be reviewed and set aside for being irregular and unfair.

**[13] Applicant be reinstated to her position as a Personal Aide or similarly graded position of equivalent rank in the Public Service?**

When Mr. Thabane, for the applicant, was before me I put a question to him whether the position was still vacant after the applicant was dismissed, his answer was that he did not know, however, I caused the office of Attorney General to find out whether the position was still vacant. The answer I got was that it was filled in. Now, what remains is whether in view of this, this court can order that the applicant be posted to a similarly graded position within the public service. This prayer is untenable given that the applicant was appointed to what is known as a political position which is linked or pegged to the tenure of the appointer (the Minister). It is specifically provided in Reg.19 of the Public Service Regulations that a public officer who wishes to be appointed to a political position must first vacate his/her position

in the public service. This presupposes that a political appointee cannot be placed anywhere within the public service except the position for which she was appointed. Regulation 19 provides:

“19(1) A public officer who wishes to be appointed to a political position (including that of a private secretary or personal aide) in the office of a government minister shall vacate his or her position by resignation or retirement before assuming responsibilities of the government minister’s personal staff position.

(2) The appointment of an officer to any government minister’s tenure of office and the officer’s engagement shall be terminated along with that of a minister.”

Even where the appointee, as can be seen from Reg.19 above was not formerly a public officer the same position still applies as his/her appointment is pegged to the appointer’s political life as the minister.

#### **[14] Measure of damages:**

It is the term of contract that the applicant’s appointment as the minister’s personal aide is pegged to the minister’s tenure of office. Clause 1 echoes what is provided under section 19(2) of the **Public Service Regulations**, that:

“(2) The appointment to any government minister’s personal staff is upon the minister’s tenure of office and the officer’s engagement shall be terminated along with that of a minister.”

What then should be made of the current situation where the applicant's contract was terminated prematurely, what should be the measure of damages? It is common cause that the minister who appointed the applicant and when this application was heard was still the minister. While it is true that the applicant's appointment was linked to the Minister's tenure of office, it is important to recall that the applicant was appointed under what is known as a Local Contract under the Public Service Regulations 2008, the duration of which is specifically provided for in Reg.9. The said Regulation provides that:

9(1) A contract of appointment shall be for a period not exceeding 3 years and shall only be made if the position has unique occupational terms and conditions or the position is associated with projects that have a specific ending date.

(2) Notwithstanding (1), where the minister considers it necessary to award a contract of more than 3 years term, the minister shall make a proposal to the commission or any other person so authorized by the commission,"

**[15]** The approach to the measure of damages in a case of wrongful dismissal of an employee was stated in the famous decision of ***Myers v Abramson 1952 (3) SA (2) at 126 C – E*** where Van Winsen J said:

"What is the measure of such damages? Mr Bloch contends that he is entitled to surrogate damages, i.e. damages which are substitutional for specific performance and which in the circumstances of this case would

amount to the same sum as would be awarded on a claim for specific performance. I have found no precedent for wrongfully dismissed employee. The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum earned or could reasonably have earned during such latter period in similar employment...”

A word of caution, was, however, issued with regard to this dicta in ***South African Football Association v Mangope (2013) 34 ILJ 311 (LAC) at paras 43 –***

“There is a tendency among lawyers practicing in the field of labour law to rely on these dicta to contend that the unlawful premature termination of a fixed term contract of employment entitles the wrongfully dismissed employees to be paid the balance of the unexpired portion of his or her contract.....

[44] The standard in **Myers v Abramson** intimates that an employee will be entitled to his proven actual damages reduced by collateral benefits or other justifiable deductions. In an action for damages the onus of proving damages rests on the plaintiff. The litigation rule requires the defendant to prove that the amount claimed by the plaintiff does not represent the true amount because of a failure to take reasonable steps to mitigate; the evidentiary burden shifts to that extent. The remains nonetheless a duty on a plaintiff to prove general principles, a plaintiff claiming damages for a prospective loss of future salary must adduce evidence enabling a fair approximation of the loss even though it is of uncertain predictability and exactitude. It is no competent for a court to embark upon conjecture or guesswork in

assessing damages when there is inadequate factual basis in evidence....”

In **Stolte v Tietze 1928 SWA 51** at 52 the court made it plain that:

“[I]f there is evidence that some damages have been sustained, but it is difficult or almost impossible to arrive at an exact estimate thereof, the court must endeavour with such material as is available, to arrive at some amount, which in the opinion of the court will meet the justice of the case.”

**[16]** It emerged during arguments that the applicant is still unemployed since her dismissal. Given that the contract was to endure until 12<sup>th</sup> July 2020, being the end of a three-year period to which Local Contracts are subjected in terms of the Public Service Regulations, and further given that the respondents have not suggested in any way that the applicant should have mitigated the damages, my view is that the applicant should be paid damages for the remainder of the contract. In terms of Clauses 7 and 8 of the contract, the applicant would be entitled to the following benefits upon the contract running its full course;

#### 7. Gratuity

- (1) Subject to completion of the minister’s tenure of office, the person engaged shall be eligible for gratuity of twenty-five (25%) of the amount of aggregate of salary drawn during the two-year period of service.

- (2) In case whereby the contract is terminated before completion of two (2) years, gratuity will be paid on pro rata basis

8. Terminal Benefits:

- (1) At termination of appointment other than 6 above, the person engaged shall at the expiry of his/her contract be paid terminal benefits in accordance with the Regulations currently in force."

Clause 6 refers to dismissal for misconduct or infirmity of mind or body. The applicant is also claiming cash in lieu of eighteen "(18) working days annual holiday not utilized." However, in terms of Regulation 77 of the Public Service Regulations "No payment in lieu of leave shall be made except in the case of the officer's death." So, this claim is totally unfounded and is accordingly rejected.

**[17]** In the result the following order is made:

- a) The applicant should be paid gratuity in the amount of twenty-five (25%) of the amount of aggregate salary drawn during the two-year period of service.
- b) The applicant should be paid terminal benefits calculated in terms of the Public Service Regulations 2008, as if the contract had run its full course.
- c) The applicant is awarded the costs of suit.

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**M. MOKHESI J**

**FOR APPLICANT : ADV. B. THABANE ASSISTED ADV.H  
SEFAKO INSTRUCTED BY K.M. THABANE AND CO.  
ATTORNEYS**

**FOR 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS: NO APPEARANCE**