

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/143/20

In the matter between:

MOLEBOHENG ‘NEKO

APPLICANT

AND

**MINISTRY OF PUBLIC WORKS AND
TRANSPORT**

1ST RESPONDENT

MINISTRY OF PUBLIC WORKS

2ND RESPONDENT

THE ATTORNEY-GENERAL

3RD RESPONDENT

Neutral Citation: Moleboheng ‘Neko v Ministry of Public Works and Transport
& 3 Others (CIV/APN/143/2020) [2021] LSHC 77 (17 JUNE 2021)

JUDGMENT

CORAM: MOKHESI J
DATE OF HEARING: 03 JUNE 2021
DATE OF JUDGMENT: 17 JUNE 2021

SUMMARY

EMPLOYMENT LAW: *Applicant claiming salary arrears for the period of her absence from work on account of having been dismissed unfairly- Held, applicant entitled to salary arrears as her absence from work was attributable to the employer's conduct.*

ANNOTATIONS:

Legislation:

Public Service Regulations 2008

Cases:

Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC)

National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (Pty) Ltd [2017] ZACC 9

[1] **Introduction**

These are the written reasons for a judgment which was delivered *ex tempore* on the 03rd June 2021. The applicant had approached this court seeking the following reliefs:

“1. Directing and ordering the 1st respondent to pay applicant’s salary ad all benefits accrued to the applicant from the date of the purported dismissal 12th July 2012 to the date of reinstatement being 03rd May 2019 with 12.5% interest per annum thereof.

2. Directing and ordering the 1st and 2nd respondents to re-calculate the applicant’s pension to accordingly include the purported duration of her dismissal;

3. An order declaring the Applicant was employed on the 15th May 2000 and not around 2008 as claimed by the 1st respondent.

4. Directing and ordering the 1st and 2nd respondents to pay interest at the rate of 18.5 per annum a tempore morae;

5. Directing and ordering the 1st and 2nd respondents to pay the applicant costs on attorney and client scale.”

[2] **Factual background**

The applicant is a public servant employed as such in the Ministry of Public Works and Transport since the year 2000. She was charged with arson which took place at her workplace. The disciplinary inquiry was undertaken consequent to which she dismissed from work with effect from 29th November 2011. Following this dismissal, she launched review of the said disciplinary inquiry, in application in CIV/APN/07/2018. In addition she sought a prayer that she be reinstated to her work without loss of

benefits. This review application was successful, and the review order was couched as follows: (in relevant parts).

“IT IS HERBY ORDERED THAT

1. *That 1st Respondent be and is hereby directed to reinstate Applicant to her position/work forthwith;*
2. *The 2nd Respondent be and is hereby directed to pay to Applicant or arrange and cause to be paid to the Applicant her salary upon reinstatement;*
3. *Costs of suit in the event of opposition;*

BY ORDER OF COURT

*SIGNED
THE HONOURABLE JUDGE”*

- [3] The applicant was reinstated to her position on the 18th June 2019 after an apparent contemptuous disregard of the order for ten months. Upon the applicant resuming her duties, she expected to be paid salary arrears for the period of her absence, but the respondents’ main contention was that the above order does not order/direct that she be paid salary arrears for the period of her absence, hence her decision to launch the current application. Despite being duly served with originating papers, the respondents only filed (through Adv. P. T. Thakalekoala from the Attorney General’s Chambers) their Notice of Intention to oppose on the 15th June 2020. To date no answering affidavit has been filed. The respondents’ indifference to this application led the applicant’s counsel to serve Notice in terms of Rule 8(13) upon Adv. Thakalekoala setting the matter down for hearing as uncontested 03rd June 2021. On that day Adv. M. ‘Musi – Mosae for the applicant appeared before court, and after hearing counsel and after reading

papers filed of record, as already said, i delivered an *ex tempore* judgment granting the application, and promised to deliver written reasons in due course.

- [4] It is trite that in terms of Public Service Regulations 2008, a public officer will only be entitled to payment of salaries for services actually rendered by her, and where she absents herself from duty without the employer's authorization she will not be paid salaries (see Sections 46 and 49 (1) of Public Service Regulations, respectively). It is common ground that in the present matter the applicant could not render services for the period in issue because she had been dismissed unfairly as was determined by the court on review. Upon the order of court directing that she be re-instated, the applicant was entitled to salary arrears for the period of dismissal because the applicant's absence from work was attributable to the employer having dismissed her unfairly (**Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para. 36**). Non-rendering of services by the employee was therefore attributable to "impossibility" of performance brought about by the employer's conduct ((**National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (Pty) Ltd [2017] ZACC 9 at para. 29**).

- [5] In the result the following order is made:

- (i) The 1st respondent is directed to pay Applicant's salary arrears and benefits which accrued to her from the date of the purported dismissal 12th July 2012 to the date of reinstatement being 3rd May 2019 with 12.5% interest per annum thereon.

- (ii) The 1st and 2nd Respondents are directed and ordered to re-calculate the applicant's pension to include the purported duration of her dismissal;
- (iii) It is declared that the applicant was employed on the 15th May 2000.
- (iv) The 1st respondent is to pay the costs of suit.

MOKHESI J

For the Applicant:

**ADV. M. 'MUSI-MOSAE Instructed by
T. Matooane & Co. Attorneys**

The Respondent:

No Appearance