IN THE LABOUR COURT OF LESOTHO

LC/98/95

HELD AT MASERU

IN THE APPLICATION OF

MOTEMOKA MOKABE APPLICANT

AND

SECURITY LESOTHO (PTY) LTD RESPONDENT

JUDGMENT

Counsel for the applicant herein approached this Court on Wednesday 26th July on ex parte urgent basis for relief in the following terms:

(a) Immediate release and payment of applicant's June salary cheque.

(b) Prohibiting respondent from withholding applicant's subsequent cheques while applicant remains employed with the respondent.

(c) Interdicting the respondent from discriminating against the applicant in any manner whatsoever for as long as applicant remains employed with the respondent.

(d) Prohibiting and interdicting the respondent from pretending in any manner whatsoever that applicant has been dismissed from its

employment.

As this is an ex parte application, the facts are not common cause. The applicant's last pay was apparently on the 26th May, 1995. After receiving his salary the applicant's supervisor one Mr. Lesako had allegedly told applicant to be off duty for three days and report back to work on 29th May. By the applicant's own implied admission he did not report for duty on Monday, 29th May, because it was his normal off-duty day. He instead reported on 31st May *"..... but because he was not feeling well and therefore not fit for duty he asked for permission to absent himself from his supervisor, Mr. Mosuoe, who allowed him."* (See page 2 of Annexure "MMI"). Annexure "MMI" is a copy of the letter written by the applicant's legal representative to the respondent company's Managing Director.

It is not necessary for me to burden this judgment with a series of other alibis pleaded by the applicant in his letter to the respondent's Managing Director, save to record that the applicant contents that he continued to report for duty as usual during the month of June but he was not paid his June salary. In his short reply to the applicant's letter, the respondent's Managing Director stated, inter alia, that following his investigations into the applicant's claims he had the following comments to make:

> ***"your client was instructed by his supervisor on the 26th May 1995, subsequent to the incident of that day in question to present himself at the office of the Personnel Officer on the 29th May 1995, so that a departmental inquiry could be instituted into the matter. Instead of him obeying the said order, your client chose to malinger for the whole of the month of June and never presented himself at the office of the Personnel Officer as aforesaid. It was at that stage when his supervisor during the course of the month reported these findings that the Personnel Officer regarded Mr. Mokabe as having initiated the termination of his contract with the company of his own volition and as a result your client was struck off the roll."***

There is nothing in the principal legislation that empowers this court to grant urgent reliefs. Rules 22 and 23 of the Labour Court Rules however provide for the granting of interlocutory relief and interdicts. These reliefs are available to a party in a matter which is deemed to be urgent. The onus is on the party making the application to show

why the matter is urgent. Under paragraph 5 of the originating application the applicant states that the matter is urgent because *"respondent's withholding of my cheque threatens my whole life. I am apprehensive that he will again withhold my July 1995 cheque and subsequent ones."* It seems from this statement that applicant does not know why his cheque for the month of June has not been paid to him hence the use of the term *"withhold"* and the alleged apprehension that subsequent cheques may be withheld. This however is not the true state of affairs. The true position was made known to the applicant through a letter written to his lawyer by the respondent's Managing Director which stated that the respondents regarded applicant as having terminated his contract with the respondent. The purport of the Managing Director's letter is very clear and that is that the applicant has not been paid his June salary because he is no longer regarded as an employee of the respondent and has been removed from the pay roll as the result.

In the view of the Court this is a clear case of termination or alleged termination. The applicant must not pretend he is not aware of it because the Managing Director's letter makes it clear. If he challenges the termination of his contract or the alleged termination of his contract that is a separate matter for which there is a clearly stipulated procedure to be followed when launching such proceedings. If they are launched on an urgent basis the applicant will have to show why the normal times as to service must be abridged, because as Coetzee J. stated in Luna Meubel Vervaardigers .v. Makin & Another 1977 (4) SA 135:

> ***"Urgency involves mainly the abridgement of times prescribed by the Rules and secondarily, the departure from established filings and sitting times of the court."***

Indeed contrary to Section 23 (5) of the Code regarding the composition of the court when hearing any matter, which must be tripartite, urgent ex parte applications are to be heard immediately by the President in Chambers.

The Luna decision has been followed in several other South African Supreme Court decisions. In Aroma Inn .v. Hypermarkets & Another 1981 (4) SA 108 at pp 110-111 the court stated that *"..... applicants .....had to show good cause why the times should be abridged and why applicants could not be afforded substantial redress at a hearing in due*

course." **In Makhuva .v. Lokoto Bus Service (Pty) Ltd 1987 (3) SA 376 at pp 389-390 the court held:**

> ***"I am not persuaded that the matter was so urgent that anything more drastic than enrolment on the motion roll even in the ordinary way, even if that were on short notice, was required. The case of Luna has been followed in many divisions and the latest case to which I wish to refer is that of I.L. & B Marcow Caterers (Pty) Ltd .v. Hypermarkets (Pty) Ltd & Another 1981 (4) SA 108. In the present case some financial loss to applicants is alleged, albeit faintly, but there is no suggestion that it would be irrecoverable. Certainly the reasons which Fagan J. gave in Aroma Inn case cannot rescue the present applicants in the sense that they would be sustaining losses which they could not possibly recover by 'remedy in due course'."***

The Makhuva case is clearly very similar to the instant matter in that inconvenience resulting from non-payment of salary is alleged to be the basis of the urgency.

In the case of Textile Workers Union (TVL) .v. Alice Manufacturers (Pty) Ltd t/a General Sewing & Embroidery Co., (1989) 10 ILJ 299, the industrial court held at p 304 of the judgment per Ehlers P. that :

> ***"It is probably debatable whether this court should follow the approach as to urgency adopted by the Supreme Court in the above judgment."***

At pp 304-305 the court went further to say that it can probably be accepted that when considering whether to grant urgent interim relief, "urgency" ought to be the main factor but went further to say the concept of *"irreparable harm"* could possibly be the most important aspect of such an approach. It is important to note that the court's views in the Textile Workers' case were <u>obiter</u> and as such they are not to be given the same weight as in the case of a <u>stare decisis</u> in determining the requirements for an interim relief. Secondly our Rules clearly state under Rule 22 (1) that when launching an application for interim relief prior to the institution of the proceedings, the applicant will have to show why the matter is urgent. In my view therefore, in our case *"urgency"* is without doubt, a requirement or a factor to be taken into account when considering <u>ex parte</u> interim reliefs.

In the light of my earlier decision that this is a pure case of termination, which if applicant wishes can challenge in the normal way, I am not persuaded that there is any urgency involved. It is no different from all the other dismissal cases that have been launched in accordance with the usual procedure laid in the Rules. The respondent must therefore be served and be allowed to file his answer in accordance with the time limits provided by the Rules.

Moreover, the nature of the relief, which the applicant is seeking ex parte, is clearly not interim. If granted it will be tantamount to giving final judgment against the respondent without hearing them. It is for this reason that the court will under all circumstances, be slow to grant ex parte interlocutory reliefs, until it has given full weight to all the practical realities of the situation to which the relief will apply. (See NWL .v. Nelson & Laughton 1979 IRLR 479 - House of Lords). Applicant contends that he has not been dismissed by the respondent. If he succeeds in this contention, the recovery of the allegedly unpaid salary for June and maybe for July, will follow as a matter of course. There is therefore justifiable reason for seeking an urgent ex parte relief in this case. In the circumstances the applicant's prayer for ex parte interim relief as claimed in the originating application is refused. The usual procedures pertaining to times, filings and allocation of dates for hearing shall apply in the normal way.

Costs shall be costs in the suit.

THUS DONE AT MASERU THIS 28TH DAY OF JULY,1995.

L. A. LETHOBANE

PRESIDENT