

IN THE LABOUR COURT

LC 141/95

HELD AT MASERU

IN THE MATTER OF

NATIONAL UNION OF RETAIL & ALLIED WORKERS (NURAW)  
APPLICANT

AND

A.C. BRABY LESOTHO (PTY) LTD.

RESPONDENT

## ***JUDGMENT***

The applicant union has filed this application on behalf of its member Mrs Mamoeketsi Makhasane, who was employed by the respondent as a receptionist / administration assistant. Applicant's originating application failed to disclose the material facts which are required in a pleading, thus leading the respondent in its answer to join issue on the evasive statement of case, stating that the respondent was entitled to terminate the services of the complainant in terms of section 63 of the Labour Code Order 1992 (the Code).

The respondent later obtained the services of the Association of Lesotho Employers which applied for the amendment of the answer to enable it to disclose the material facts. This application was granted and it was in the amended answer that it first surfaced that the complainant was allegedly insolent towards the Manager and that “ *she was dismissed for her intolerable performance...* ” It must again be stated that the answer also did not disclose detailed averments. It only made brief general statements of the facts. Needless to emphasize at the hearing hereof both sides led evidence which then went into the details of facts which had not been pleaded. However, neither side objected thereby obliging the court to decide the issues before it on the basis of the evidence adduced by the parties.

In papers before the court the complainant contends that she was dismissed without a hearing. In submissions before court Mr. Putsoane contended further that on the basis of the evidence the applicant was dismissed by a person who had no authority to dismiss her.

The complainant gave evidence in which she stated that the person who dismissed her namely; Ms. Leanya was a Sales Manager, in charge of Sales Representatives. She said as administration assistant she was directly answerable to one Mrs Wade of the Head office, not to the respondent. She handed in “NURAW 1 ” which is her job description and stated that nowhere in that job description is she said to be answerable to Ms. Leanya.

Complainant testified further that before purporting to dismiss her Ms Leanya did not give her a hearing. She stated further that in an attempt to try to get Ms Leanya to afford her a hearing she wrote “NURAW 4” which she handed in as part of her evidence. The applicant union also wrote to the respondent bringing to their attention that the provisions of section 66(4) of the Code concerning a hearing had not been complied. According to the complainant none of these steps elicited any response from the respondent.

Respondent lined up three witnesses to show that:

- (a) Ms Leanya had the authority to terminate the complainant;
- (b) the complainant was afforded the opportunity to be heard prior to her dismissal; and
- (c) that the complainant was insubordinate to the manager and insolent towards other staff members and the customers.

Regarding the authority to dismiss, Mrs Wade testified that she is the Director of the respondent’s Botswana, Lesotho, Swaziland and Zambia operations. She averred that the running of the Lesotho office is her responsibility, but since she is based in South Africa, the day to day running of the Lesotho Branch is delegated to the Sales Manager, Ms Leanya. She denied that the complainant was answerable to her. She averred that complainant was answerable to Ms Leanya and that the latter had the right to terminate her services.

Regarding a hearing the respondent contended that its Lesotho office is a very small operation with a staff of only eight people. It contended that complainant was in fact called to a disciplinary committee of staff members whereat she was charged with alleged acts of insolence and insubordination. The evidence of one of the Sales Representatives Mr. Khali was actually to confirm that the complainant appeared before the committee of staff as aforesaid on at least three occasions. One occasion was when she had insulted Mr. Khali himself. On another occasion she had insulted Ms Leanya and on the third she had spoken rudely to a customer on the phone. Mr. Khali said the fourth meeting that

concerned the complainant was when the Sales Manager had written her a letter of final warning. Ms Nthoto Nqoko who is the Senior Sales Consultant also said she remembered the meeting which concerned the letter of warning which had been written to the complainant by the Sales Manager. The other meeting was when she and the complainant had insulted the Sales Manager and they were brought before the aforesaid committee of staff. Both these witnesses' evidence also showed that the complainant was insolent to other staff members, disruptive at the office, insubordinate towards the Sales Manager, whom she did not regard as her Manager and rude to customers on the phone.

In his submissions Mr. Putsoane argued that the court should dismiss allegations of insolence against the complainant because they have not been substantiated. He contended that these allegations were not disclosed to the complainant whilst she was in the witness box to enable her to confirm or deny them. This much is true. In his cross-examination of the complainant Mr. Van Tonder never suggested to her that the type of evidence as was given by Khali and Nqoko would be called. He however, put it to the witness that the papers before court namely; the amended answer, allege that she insulted and threatened the Sales Manager and other members of staff even after her dismissal. She only denied continuing to insult and threaten staff after her dismissal, but not before the dismissal.

In as much as we have said that the facts in the answer are not specific and detailed enough, however, in paragraph (f) of the answer the respondent does mention that the complainant was insubordinate and insolent. The respondent further attached "*annexure 1*" to the answer which is the letter of warning that Ms Leanya wrote to the complainant in which she had accused her of the "*..... use of insulting or insolent language.*" True enough in her evidence complainant denies ever insulting the sales manager. However, she does not deny the truthfulness of the contents of "*annexure 1*" to the answer. She simply says "*annexure 1*" was unofficial because it was allegedly written at home and not on the company's letter heads, a thing which would not change the truthfulness of the contents of the letter. Furthermore, "*annexure 2*" to the answer which is the complainant's letter to the Sales Manager is clear evidence that there was great disharmony at the workplace. It is written in a rude and dismissive tone, which cannot be tolerated among workmates, especially of a small company like that of respondent; because they have to meet daily and work very closely. On the balance of probabilities we are convinced that applicant was rude and insolent towards the Sales Manager. There is however, nothing to lead us to the inference that she was also rude and insolent to other members of staff and the customers. Indeed other than Khali's evidence that the complainant insulted him, which has not been put to the complainant to comment on it, there is no evidence of any other employee of the respondent that she was also insulted by the complainant.

On the question of the hearing, we agree with Mr. Putsoane's contention that Mr. Khali's evidence as well as that of Ms Nqoko should have been suggested to the complainant to enable her to comment and to enable the court to formulate an opinion on her demeanor as a witness. On the contrary, this evidence, which

directly implicated the complainant was kept a closely guarded secret of the respondent and was only released when the complainant could no longer comment on it. Other than in her testimony where she denied ever being given a hearing, the complainant was asked by Mr. Van Tonder under cross-examination how many times she appeared before the meetings of staff as the accused. The complainant stated that the only meeting where issues relating to her were discussed was the staff meeting at which she raised the issue of the final written warning that she had been given by the sales manager. Even then the complainant says the issue of the letter was raised by her at the meeting. That meeting resolved that the letter of notice should not be passed to Mrs Wade. It had not come as a complaint against her by anybody.

In the light of the defect in respondent's evidence relating to the hearing which was allegedly given to the complainant, which renders it inadmissible, it follows that there has not been any hearing afforded to the complainant. Her first letter of dismissal, annexure "A" to the originating application referred to the notice letter (*annexure 1 to the answer*) and "*..... several warnings regarding your acts of misconduct, insolence, use of insulting language and nasty insinuations during working hours ....*" Nowhere does it refer to a hearing regarding these alleged acts of misconduct. The answer in paragraph (h) changes the above reason and says "*the complainant was not dismissed for misconduct ... she was dismissed for her intolerable performance.....*" a thing which would not be permissible in terms of section 69 (3) of the Code if it were not because that first letter of dismissal was later withdrawn. According to Mrs Wade's evidence the intolerable performance arose out of complainant's treatment of clients in a rude manner over the phone thereby giving the company a poor image. As we have already held not only has this allegation not been proven against the applicant because evidence seeking to establish it is inadmissible, but also the evidence trying to show that a meeting in which the complainant was present was held to address the alleged rudeness is equally inadmissible. In the circumstances it is clear that there is no evidence to show that the complainant was given a hearing as the respondent alleges.

It is clear from the letter (*annexure 2 to the answer*) which complainant wrote to Ms Leanya, that she never regarded her as a person who had authority over her. Even in her evidence she made it abundantly clear that as far as she was concerned they were colleagues with Ms Leanya. Mrs Wade in her evidence corroborated the complainant's evidence by saying that she was infact the person who had the overall responsibility for the running of the Lesotho office. She only said she had delegated her powers of the day to day running to Ms Leanya. She could not, however, produce proof of this delegation. When she was asked under cross-examination if the Board of Directors of the respondent ever passed a resolution to delegate the day to day running of the Maseru Branch to Ms Leanya she said no.

Evidence before court does seem to support complainant's averement that she was not answerable to Ms Leanya and that the latter had no authority to dismiss her. Firstly, the complainant's letter of appointment is signed by Mrs Wade, which shows she is the appointing authority. It is trite law that he who has

power of appointment also has power to terminate the appointment. Secondly, the applicant submitted “NURAW 1” which they said is the complainant’s job description. This was confirmed by Mrs Wade in her evidence that “NURAW 1” is the complainant’s job description. The respondent on the other hand, handed in EXH.1 which was also said to be the job description of the complainant in the position of Accountant/Administration Assistant. This job description also had the signature of Mrs Wade. However, Mrs Wade in her evidence denied that she signed EXH.1. She also denied that the complainant was an accountant. Accordingly therefore, we will take “NURAW 1” as the job description of the complainant.

Indeed as the complainant said in her evidence, nowhere in her job description has it been alluded that she is in any way responsible to the Sales Manager. Instead, all the things that she had to report about were to be reported direct to the Head office, either to Mrs Wade herself or to one J. Wink. According to her job description she also had dealings with sales representatives, but these dealings were completely independent of the Sales Manager. The only seeming connection between their two offices seems to be when the Sales Manager is absent when the complainant is required to *“assist in checking Reps’ Reports, contracts and copy forms..”*

Thirdly, the respondent handed in EXH.2 which purports to be the contract of employment of the Sales Manager. This contract is dated 20th November 1996, more than a year after the dismissal of the complainant. However, Mrs Wade in her evidence said it was simply an update. Indeed paragraph 1.1 of the contract does state;

*“your employment commenced on 1 February 1993 in the position of Field Sales Manager and previously as Sales Consultant on 21 January 1987.”*

It does seem correct therefore that this was only a confirmation of an already existing position. A job description is attached to that contract of employment. Nowhere in that job description is the Sales Manager vested with the powers of hiring and dismissing. Among the duties for which she is responsible is *“general administration.”* But it is not stated how in that responsibility she would relate with the complainant. However, she like the complainant also reports to Mrs Wade at the Head office.

Fourthly, the complainant testified that to show that they were colleagues with the Sales Manager, even their salaries were not very much different. She stated that Ms Leanya’s salary might be slightly higher simply because of her length of service and the sales commission she earned. Indeed there seems to be some element of truth in this because Ms Leanya’s gross salary is reflected in EXHIBIT 2 i.e her contract of employment as M975.00. It must be noted that this is her salary as at November 1996. The complainant had started to work for the respondent in February 1995. In August 1995, when she was dismissed her salary had just been raised to M869.00 per month. If she had not been

dismissed most probably her salary would have been reviewed again a year later which might have placed her in the vicinity of Ms Leanya's salary range. Again if Ms Leanya was only earning M975.00 in November 1996, it is likely that in August 1995, she was not very much far from the complainant. All in all the difference in salary between the two is too insignificant to support the contention that one was the other's Manager.

During her evidence in Chief Mrs Wade was asked for the reason why the complainant could be saying that she is on the same level with Ms Leanya. Her answer was that; *"I have no idea. There was never anything misleading which could lead her to regard herself as equal to Ms Leanya."* But as we have shown in this judgment there was a lot that must have given the complainant that understanding. There was nothing in her job description to suggest that Ms Leanya was her superior. Neither was there any such indication in Ms Leanya's job description that the complainant was answerable to her. Their salaries did not reflect that much difference in responsibilities and both reported direct to the Head Office. In the view of the court the respondent's Maseru Branch seem to be directly responsible to Mrs Wade who is the one who appoints staff, and the two apparent senior staff namely; the complainant and Ms Leanya reported directly to her. None of the two had the authority to terminate the other's services. Only Mrs Wade could. Even Mrs Wade's evidence that she had delegated her powers to Ms Leanya cannot change the position this court has taken because the respondent themselves submitted Ms Leanya's job description which failed to support Mrs Wade's evidence, as it is dismally silent on whether Ms Leanya has supervisory powers and disciplinary control over the staff.

Clearly therefore, the purported dismissal of the complainant on or around 20th August 1995 and / or 28th September 1995, was a terribly flawed exercise which cannot in any way stand the test of legality and / or fairness. It is illegal because the person who purported to dismiss the complainant had no authority to do so. She acted ultra vires her powers. It was unfair because the complainant was not afforded the opportunity to be heard prior to her purported dismissal.

It is admitted that Mrs Wade stays far and she needs to have a locally based person who will carry out the day to day managerial functions including staff supervision. But if the intention is there to delegate Mrs Wade's supervisory and managerial powers of disciplinary control to Ms Leanya, this must be done transparently and it should be capable of being enforced legally. Mrs Wade's testimony was clearly an attempt to cover the wrongs that have been committed already. As for the delegation it does not exist. A manager who has control over other staff must stand distinctly above such staff in all respects so that she/he can enjoy the necessary recognition. There has not been such a thing between the complainant and Ms Leanya. This we leave to the management of the respondent to sort out for the purposes of the future.

**AWARD** \_

A person who has not been dismissed by a properly authorised officer has an unqualified right to reinstatement irrespective of his or her degree of guilt. The respondent have opposed reinstatement on the grounds, inter alia, that the position has been filled. That is understandable. However, the respondent must now bear the full financial loss suffered by the complainant as a result of the unlawful dismissal. The respondent shall therefore, pay the complainant her full salary from the date of purported termination to date of this judgment plus one month's salary in lieu of notice.

There is no order as to costs.

**THUS DONE AT MASERU THIS 23RD DAY OF APRIL 1997.**

**L.A.LETHOBANE**  
**PRESIDENT**

**K.G. LIETA**  
**MEMBER**

**I CONCUR**

**N/B** Mrs Motseta who sat in this matter as Labour Panellist could not complete the case due to ill health. The two of us proceeded to dispose of the case in accordance with Rule 25(2) of the rules of Court as we did not know how long she would remain indisposed.

**SIGNED. L. A. LETHOBANE**  
**PRESIDENT**

**K.G. LIETA**  
**MEMBER**

**I CONCUR**