

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 128/95

HELD AT MASERU

IN THE MATTER OF:

LABOUR COMMISSIONER

APPLICANT

AND

ITEKENG SECONDARY SCHOOL
MOKOAI QHOAI

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

In this application, the Labour Commissioner is suing on behalf of one Ramating Selebalo who alleges to have been employed by the 1st respondent as a night watchman between 28th February 1994 and 8th November, 1994. The Labour Commissioner is claiming that the complainant be paid;

- (a) overtime, under payments and notice pay;**
- (b) for worked public holidays, and weekly rest days.**

The respondents vehemently deny that they ever employed the complainant.

The applicant adduced the evidence of two witnesses namely the complainant himself and the Labour Officer, who investigated the case. Complainant's evidence was that he requested for permission to sell fruits to pupils at the school in 1992, which was granted. In February, 1994 the school was attacked by robbers, which led the second respondent to ask him to work with the night watchman who guarded the school. He was paid M264.00. In June his salary was raised to M290.40. He was dismissed in November, 1994 following misunderstanding between him and the 2nd respondent.

Mr Mohami who investigated the case confirmed that the complainant came to the office to lay a complaint. He then wrote a letter to the employer inviting him talks. At the meeting which they held, the employer informed him that the complainant was not its employee. The employer went on to say that the complainant was requested to stay at the school after it was attacked by robbers so that he could lend help to the school night watchman, should the attack happen again. He stayed at the school for three months free and during that period he was paid (plus or minus) M260.00 per month as a token of appreciation. Asked if he secured the school records to satisfy himself if the complainant was or was not an employee, he replied that the employer told him that the complainant does not appear in the records because he was not an employee.

Under cross-examination, Mr Mohami was asked what steps he took to establish who was telling the truth between the complainant and the school regarding his employment status. He replied that he tried to locate Motumi, who was the night watchman who was to be kept company by the complainant, he could not find him. Asked further why he did not use the transport which the department has to look for Motumi, he replied that as a matter of fact he did not look for Motumi because he accepted the school's explanation that the complainant was not their employee, but he was forced to prosecute the case.

The respondent led only the evidence of the 2nd respondent who denied that the school employed the complainant. He confirmed Mr Mohami's evidence that following an attack at the school by robbers, they offered the complainant a place at the school to stay with a view to strengthening the security of the premises as robbers would be less likely to attack when they know that there is more than one person on the premises. During the day the complainant continued to sell his fruits. He testified that the complainant was informed that the school had sought the services of a younger and trained security guard, who was serving notice and that when he completed it the complainant would no longer be required to keep the elderly night watchman company. He testified further that complainant slept with Motumi for three months and that during that time the school thanked him with an allowance of M260.00 per month.

It was Mr Qhoai's further evidence that all employees of the 1st respondent sign "Offer of Appointment" forms in duplicate. One copy is kept by the school and another copy is kept by the employee. He stated that the complainant did not sign such a form because he was not employed. Two samples of these forms were handed in and marked Exhibit "1" and "2".

Quite correctly in our view, during arguments both counsel concentrated their effort on establishing whether a contract of employment existed between the complainant and the 1st respondent. Mrs Matsoso contended that it is clear from the evidence that the respondents engaged the services of the complainant although

the respondents want that to appear as if the complainant was only helping. She contended further there was no provision for helpers in the law.

Mr Makeka on the other hand submitted that there was no evidence that the complainant was employed. He submitted further that Mr Mohami's evidence should not be considered because he withdrew it and dissociated himself from the applicant's claim. We fully agree that as soon as Mr Mohami dissociated himself from the claim which was based on his investigations, there was no longer a claim for the applicant to pursue. Even assuming Mr Mohami did not dissociate himself from the claim, he had already admitted in his evidence that he had not carried out enough investigations to establish the existence or otherwise of a contract between the complainant and first respondent as he had neither secured the records nor located Motumi to corroborate whether complainant was employed or not.

In argument Mrs Matsoso submitted that the Court should find that a contract existed because the employer failed to keep the necessary records in terms of the law, on the basis of which a determination could be made if the complainant was or was not its employee. It was however, never Mr Mohami's evidence that he asked for records and found that they did not exist. His evidence was that when he asked for the records he was told that none existed in respect of the complainant because he was not employed. Faced with that answer he never asked for the records of the other employees to see if they existed or not.

In the view of the Court there is no evidence to support the applicant's claim that a contract of employment existed between the complainant and the 1st respondent. Not only were the investigations insufficient but even the applicant's key witness turned hostile, when he stated in Court that the employer's explanation that complainant was never employed was acceptable to them and that they would not have continued with the case, but for the insistence of their superiors. It is quite possible to ask somebody to stay on one's premises in order to enhance the security of the premises, without employing or intending to employ such a person. Such an arrangement should not in the absence of clear intention to enter into an employment relationship be used to infer existence of a contract of employment. Indeed Mr Qhoi's evidence that all employees of first respondent sign "Offer of Appointment" forms, which applicant did not sign was not only admitted by the complainant when it was suggested to him by Mr Makeka, but it was also never challenged by counsel for the applicant.

In the absence of a contract of employment between the parties there is clearly no basis for the claim as contained in the applicant's originating application. In the premises the application ought not to succeed and it is accordingly dismissed.

This is a suitable case for imposition of costs against the applicant, in the light of the clear evidence that this case was steamrolled through against the respondents despite investigators' conviction that there was no case to take to Court. The

investigators clearly had to be so convinced because they had no been able to find the necessary evidence. But somebody who is not mentioned, who was not part of the investigations forced that the case be proceeded with. That was without doubt grossly unreasonable conduct on the part of the applicant. Counsel for the respondent was right to have asked for costs and there is no reason why he should not get them. In the circumstances the applicant is ordered to pay the costs of this application.

THUS DONE AT MASERU THIS 7TH DAY OF MAY, 1997.

L.A LETHOBANE
PRESIDENT

K.G LIETA
MEMBER

I CONCUR

P.K LEROTHOLI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MRS MATSOSO
MR MAKEKA