

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 26/98

HELD AT MASERU

IN THE MATTER OF:

NATIONAL UNION OF RETAIL & ALLIED WORKERS

APPLICANT

AND

PEP STORES (PTY) LTD

RESPONDENT

JUDGMENT

This is a case in which the applicant has applied for judgment to be entered against the respondent by default. The Originating Application was filed out of the Registry of this Court on the 17th April 1998. On the 4th May 1998 the respondent entered an intention to oppose and appointed Messrs. Webber Newdigate & Co. as their attorneys of record in this matter. Thereafter nothing was heard from the respondents. On the 17th December 1998, the applicant filed an application for default judgment as the respondent had failed to file its answer.

On the 27th January 1999, the respondent filed its answer. The matter was set down for hearing of the default judgment on the 2nd March 1999. The Registrar caused a letter to be delivered by hand to the Maseru Manager of the respondent's store notifying him about the date of hearing of this matter. This was in addition to the usual notice of hearing which the Registrar sends to parties notifying them of the date of hearing of their cases.

The matter was duly heard on Tuesday 02/03/99. However, neither the Manager of the respondent nor their Attorneys were present. The hearing continued in their absence. Mr. Putsoane on behalf of the applicant contended correctly that the court should entertain the default judgment application as the respondent has not filed any opposition to it. He contended correctly further that the court should ignore the

respondent's answer as it is hopelessly out of time and no condonation of late filing had been prayed for.

The applicant union is suing on behalf of five of its members who were employed at the TY branch of the respondent. The five employees were dismissed on the 20th October 1997 for "poor work performance and/or negligence which led to high stock losses and to financial loss to the company." The applicant union attached the record of the disciplinary proceedings of the alleged misconduct of the five union members. The union seeks an order in the following terms:

1. A declaration that the dismissal of the union members was unfair.
2. The said union members be reinstated in their positions.
3. The said union members be paid their salaries from the date of dismissal to the date of reinstatement.

In the event of not being reinstated:

4. Each member be paid compensation equivalent to six months salary.
5. Further and/or alternative relief.

In its statement of case the union contends that the stock taking which revealed the loss was unreliable because there were casual workers who were unfamiliar with stocktaking procedures and were bound to make mistakes. In the first place it must be noted that there were at least three stock takings that were done. Each of them showed a huge loss. The union does not state which of these three stock takings was done with the help of casual workers. Furthermore, according to the record of the disciplinary hearing, the employees were counselled for each stock loss and asked for the possible causes of the loss. The employees gave what they thought were the causes and the management acted to rectify whatever they pointed out. At one point a casual worker was dismissed because they said she was the cause but the stock loss did not stop. There is no evidence that thereafter more casual workers were employed. The authenticity of this excuse is therefore doubtful. In the second place at p.54 of the record of the disciplinary proceedings, Manthethe Mohapi was asked who did the counting of stock and she said it was the staff themselves. Clearly, therefore the excuse of casual workers being used in the stock count is a fabrication.

The union contends further that the employees were dismissed for the loss notwithstanding that there were indications that there were shoplifters who could have accounted for the stock shortage. This is a very absurd excuse because it is the responsibility of the employees and in this case applicant's members, to ensure the safety of the respondent's stock from shoplifters. During disciplinary hearings several of the employees were asked if they were aware that the stock of the store was responsible to them and they all agreed.

If the stock continued to be stolen when they were the ones in charge of it, then clearly the charge of poor work performance and/or negligence which was levelled against them was well founded.

Mr. Putsoane argued that no remedial action such as training, supervision, seminars or other measures were undertaken to remedy the problem of stock loss. It is however, evident from the record of the disciplinary proceedings that the employees were counselled on numerous occasions by senior management of the respondent. It seems to us that the respondent did what could reasonably be expected of them to assist the employees to improve their performance. To impute any additional obligation as in the form of training and seminars, in the absence of any legal or contractual clause imposing such an obligation would amount to blatant legislation by this court, a function which clearly does not belong to it.

It was argued further that the respondent has not established the guilt of each of the employees for the stock losses or financial loss. In particular Mr. Putosane submitted that the respondent ought to have shown in what manner each employee was negligent and that it never showed what portion of the loss each of the employees is responsible for out of the total loss.

This seems like splitting hairs. The respondent never at any stage said it had allocated each of the five employees a portion of the stock for which he or she was responsible. Everytime there was a stock loss the employees were called en masse to explain the loss because they were by their own admission jointly responsible for the safety of the stock. When a loss is occasioned it follows that they are jointly responsible. In the same way they are jointly responsible for the total financial loss that is occasioned by the stock loss. There is therefore no merit in this argument.

It is common cause from the record of the disciplinary hearings that at least one employee Ms Malerato Thibiri pleaded guilty to the charge. The other four namely; Manthethe Mpiti, Teboho Ramabaleha, Matanki Mafereka and Mapapali Neko, while pleading not guilty, could not deny that the stock of the store was their responsibility and that they were the right people to be asked about its loss. The record shows that at one point the staff said the loss was caused by casuals. A casual employee was fired, but the loss persisted. When they were again asked, they said the Branch Manager was responsible. He was dismissed on the 14/08/97. When the stock taking was done again on the 27/09/97 well over a month after the departure of the manager, and a loss of 35% was discovered, the employees could not find anybody else to hide behind. They had to themselves face up to their responsibility, hence their admission that there were no other persons to be blamed for the loss other than themselves. In the premises we fail to find any unfairness in the dismissal of the five employees. The application is accordingly dismissed.

Costs shall be costs in the suit.

THUS DONE AT MASERU THIS 25TH DAY OF
FEBRUARY, 1999.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER

I AGREE

P.K. LEROTHOLI
MEMBER

I AGREE

FOR APPLICANT :

MR PUTSOANE