IN THE LABOUR COURT OF LESOTHO

CASE NO LC 137/00

HELD AT MASERU

IN THE MATTER OF:

MOFO NKHELOANE APPLICANT

AND

HOU LEI SHOP RESPONDENT

JUDGMENT

This matter was heard on Tuesday 11th September 2001. At the close of the hearing a finding in favour of the applicant was orally pronounced but the reasons for that finding were reserved. These are now the reasons.

The applicant assisted by the National Union of Retail and Allied Workers issued the Originating Application on the 1st November 2000. The Originating Application was served on Mr. Zhou Y. M. personally who is said to be the proprietor of the respondent on the 2nd November 2000. Mr. Zhou duly signed as an acknowledgment of receipt. An official of the union Mr. Letlala who had effected the service also filed return of service confirming that he had served the Originating Application on Mr. Zhou. The Registrar of the this court also caused to be sent by registered mail another copy of the Originating Application to the respondent on the 1st November 2000. There is nothing to suggest that this was not received by the respondent as it was never returned to the sender by the post office. Our conclusion is therefore, that even this other copy of the Originating Application was received by the applicant.

The respondent never filed its Answer in terms of rule 5 of the rules of the court. Consequently, the applicant filed a request for default judgment in terms of rule 14 of the rules. According to the letter written to the Registrar by Mr. Thamae of the National Union of Retail and Allied Workers dated 18th December 2000 Mr. Zhou

refused to accept receipt of the application for default judgment when it was served on him. As a result the Registrar asked that the request for default judgment be

returned so that the court can assist the union in effecting its service. It is not clear from the record if the Registrar's office was able to serve the request for default judgment or not. We are however, satisfied that the respondent was aware of the applicant's move to have judgment entered against him in default of appearance, even though he chose not to accept the process.

The matter was enrolled for hearing of the application for default judgment on the 11th September 2001, where the respondent's manager was in attendance accompanied by his legal representative. Mr. Thamae on behalf of the applicant, in motivating the application for default judgment, brought to the attention of the court the foregoing facts. In response Ms Ndumo on behalf of the respondent said that their client only came to their offices on Thursday 6th September with only the copy of the notice of hearing. She said further that the respondent's manager may not have appreciated the Originating Application and its implications because he has difficulty with the English language. Finally, she showed us a piece of paper where it had been recorded that the applicant had been paid in lieu of notice and leave and said, because of that Mr. Zhou thought the matter was closed, especially because the payments were made at the instruction of the Labour Office.

The first contention that the manager of the respondent came only with the notice of hearing cannot hold. The applicant was served with two copies of the Originating Application. One by hand and the other one by post. The court asked if the manager of the respondent was disputing the signature on the Originating Application, the answer was that he confirms that the signature is his. Now if he came to the office of his attorneys without the Originating Application which he clearly received he is the one to shoulder the blame, not the court or the applicant.

With regard to the second one that Mr. Zhou does not fully understand English, as such he may not have understood the Originating Application, this was clearly speculation because this was neither deposed to in an affidavit nor given under oath. Secondly, as it will appear later in this judgment he infact dismissed applicant herein for allegedly not knowing English which was supposed to be the medium of communication between them (applicant and the manager). We are convinced therefore, that the respondent does not only understand English, he also fully appreciated the contents of the Originating Application and its implications, hence why he rejected further processes when they were served on him.

Lastly, it was said that the applicant might have thought that the matter was closed because he had paid applicant notice and outstanding leave. Again this being

tendered from the bar, cannot constitute a valid and admissible reason for not complying with the rules of the court. Furthermore, even if it may be true that the respondent thought the matter was closed he should have filed the Answer and therein averred that as far as he is concerned the matter is closed. In other words that would constitute a defence to the applicant's claim not an excuse for non-compliance with the rules. For these reasons the applicant's request for the default judgment was granted.

However, the applicant still had to get into the witness box to substantiate his claim. His case was that he was unfairly dismissed by the respondent on the 31st July 2000. He had gotten into the section of the shop where Mr. Zhou was . He was looking for something, but due to inadequacy of expression he had a problem communicating with Mr. Zhou. There and then the latter said he must leave and go to school and learn English. Ms Ndumo had no cross-examination to make and as such the applicant's case was closed with his evidence uncontradicted.

In terms of section 66(1) of the Labour Code Order 1992 (the Code);

> ***"An employee shall not be dismissed whether adequate notice is given or not unless there is a valid reason for the termination of employment..."***

The Code goes further to say, for such reason to be valid, it must be connected with the capacity of the employee to do the work he is employed to do, the conduct of the employee or the operational requirements of the undertaking. The employer bears the onus to prove that he acted reasonably in treating any other reason as sufficient ground for dismissal.

The applicant has not been dismissed for any of the reasons listed in section 66(1) of the Code. The employer has not discharged the onus to show that he acted reasonably in treating applicant's inability to express himself in English as sufficient ground for dismissal. Similarly, there does not seem to have been any semblance of compliance with section 66(4) of the Code which requires that an employee must be given the opportunity at the time of dismissal to defend himself. Accordingly we found that applicant's dismissal was unfair in as much as it contravened section 66(1) and (4) of the Code.

The applicant averred that he was no longer interested in reinstatement. He sought payment of eight months salary as compensation and payment of salary from date of dismissal to the date of judgment. No evidence was led as to the size of the respondent, but from the look of things it is a relatively small enterprise which we must be careful what kind of monetary award we make against it. Furthermore, no evidence was lead nor any indication made as to what steps the applicant took to mitigate his loss. Accordingly we ordered that the respondent pays four months salary as compensation and no order was made in regard to costs.

THUS DONE AT MASERU THIS 12TH DAY OF SEPTEMBER, 2001.

L.A LETHOBANE
PRESIDENT

G.K. LIETA
MEMBER **I AGREE**

M.S. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANT : **MESSRS THAMAE & LETSIE OF NURAW**

FOR RESPONDENT: **MS NDUMO**