

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 40/99

HELD AT MASERU

IN THE MATTER OF:

BERENG MOLAPO

APPLICANT

AND

GOOD LUCK WUS (PTY) LTD

RESPONDENT

JUDGMENT

Applicant herein launched the present application on the 20th September 1999 seeking relief in the following terms:

1. An order declaring applicant's dismissal by respondent as unfair dismissal.
2. An order directing respondent to pay applicant salary for the month of August 1999 in the sum of M3,700.
3. An order directing respondent to pay applicant a sum of M3,700-00 being an equivalent of one month's salary in lieu of notice.
4. An order directing respondent to pay applicant a sum of M1,423-00 being leave pay for ten(10) days.
5. An order directing respondent to pay applicant a sum of M11,100-00 being an equivalent of three months salary as compensation in lieu of reinstatement.
6. An order directing respondent to pay costs hereof, including consultant's fees.
7. Further and/or alternative relief.

Fourteen days lapsed without the respondent filing its Answer in terms of the rules, which prompted the applicant to file an application for default judgment on the 26th October 1999. On the 4th November the respondent filed its authority to represent thereby indicating its intention to defend the action. On the 10th November an Answer combined with an application for condonation were filed by the respondent.

On the 8th March 2000 the parties appeared before Mr. Mapetla Adhoc Deputy President as he then was assisted by Messrs Poopa and Makhetha. In that brief appearance the parties agreed that leave for condonation of respondent's late filing of the Answer be granted. They further agreed to proceed by way of discovery of documents in terms of rule 11(2)(a)(b)(d) and (f) of the Court rules in order to determine whether the applicant was employed by the respondent. This agreement was made an order of the court.

On the 10th May 2001 the parties appeared before us. While confirming the Order of Mapetla Ad hoc Deputy President, Counsel for the parties informed the court that they had decided to narrow the issues to the question whether there was an employment relationship between the applicant and the respondent. The determination of this issue will, the parties reported, rest the case.

To prove his case the applicant led an evidence of himself. He was the sole witness assisted by some documents which he handed in court to corroborate his evidence. Applicant testified that he met a Chinese man by the name of Mr. Wu, who asked him to help him to form a company and to become an employee of that company. He testified further that he contacted a lawyer who helped him to register a company. He went further to say that he subsequently registered the company with the Ministry of Trade for purposes of issuance of a licence to manufacture.

Applicant relied on a form he submitted to the Ministry of Trade as evidence that he was employed by the respondent as the Chief Executive of the company. That form was handed in and was marked "BM1". Applicant further testified that he earned a salary of M3,500-00 a month and a housing allowance of either M1,400-00 or M1,500-00. He was not sure he said. Applicant further relied on a letter written by his lawyer to the commissioner of Income Tax in compliance with Section 41 of the Income Tax Act 1981 as further proof that he was employed by the company. In the last paragraph of that letter it had been stated "the Secretary and Public Officer of the company shall be Bereng Molapo, P.O. Box 0720, Maseru West."

In their answer the respondents denied that applicant was an employee as alleged. They averred that "applicant was merely rendering services to the respondent in applying for a trading licence and attended Government institutions to set up its business in Lesotho." They said further that for those services they remunerated applicant with a fixed amount of M2,500-00 which was given to him on a monthly basis; but not as a salary. They denied that any contract of employment ever existed between the parties.

Under cross-examination Mr. Buys alerted the applicant to the fact that his Originating Applicant does not say anything about housing benefit. His answer was that he did not know maybe the lawyer would know. He was asked if it was correct that he said his salary was M3,500-00 per month. He answered evasively by saying

“thereabout.” Cornered to say exactly how much it was he said M3,500-00. It was then brought to his attention that his originating application says he was earning M3,700-00. His answer was again “I don’t know.”

In our considered view, applicant’s claim that he earned a housing allowance is an afterthought. This is why the claim has not been pleaded. Furthermore, his uncertainty as to how much it was goes further to show that he was engaging in a fishing expedition. Similarly, applicant’s uncertainty coupled with downright contradiction of his claim on the papers regarding the salary he earned, leaves much to be desired about his credibility as a witness.

Applicant was further asked to prove his Chief Executive status with the company. To this end he was asked if he was one who was giving instructions, his answer was “yes with Mr. Wus”. This evidence could not in our view possibly be true because in his evidence under cross-examination the applicant stated that the company was at the stage of formation and it had not at that time employed staff. He was further asked who appointed him as Chief Executive he said it was Mr. Wu. He was asked further if he ever saw the resolution of the Board of Directors appointing him as the Chief Executive his answer was in the negative. When he was asked if he was one of the Directors of the respondent he said he was not; but he was in charge of the executive operations of the company.

Mr. Buys for the respondent referred the applicant to the letter “BM2” which had been written by his lawyer informing the commissioner of Income Tax that he (the applicant) would be the Secretary and Public Officer of the company. He then asked him if in that capacity he ever attended to any of the statutory requirements regarding this company in compliance with the law. His answer was the company was still at the formation stage. Machinery was yet to be imported and staff still had to be employed he said. Mr. Buys became specific and said company secretary is supposed to keep the company register. Did this company have a company register that you kept? His answer was we had not yet done that. When he was made aware that according to his evidence he had worked for the company for nearly a year, ten months to be exact and that he can’t be heard to say the company had not yet had a company register, he said this was supposed to be a very big company and it was as such taking off slowly.

It is clear that applicant’s only evidence that he was employed as secretary, public officer and chief executive of the respondent is based on exhibits “BM2” and “BM1” respectively. He however, dismally failed to show a single executive or secretarial function he performed in fulfillment of his employment as such. “BM1” on which he places his reliance that he was appointed as Chief Executive by Mr. Wu expressly states that apart from the name and address of the Chief Executive, the authority must be enclosed. This can only mean the authority of appointment as Chief Executive. No such authority could be shown to have been enclosed, for when applicant was asked if he enclosed it he said may be the lawyer could know. This

inability to produce the authority, fits hand in glove with the question that was asked whether applicant ever saw the resolution of the Board of Directors appointing him Chief Executive, which he answered in the negative. Such resolution would in our view be a loud and clear authorisation of the applicant which paragraph 10 of “BM1” required.

As regards the appointment as secretary again “BM2” cannot constitute an authority of appointment into such an important and powerful statutory position as company secretary. The same goes for appointment as Chief Executive. Better authority than annexure “BM1” would be required for the appointment into such senior executive position. But all in all we are of the view that if applicant’s testimony when under the pressure of cross-examination is to be believed, he could not be employed in either of the two capacities claimed because the company was only at a formation stage. Indeed he was asked by one of the members of the court why in paragraph 2 of “BM1” where he had to provide the name of the applicant enterprise, he did not also provide the number under which the company was incorporated. He could not provide an answer. Indeed the applicant could not even prove that the company was at the material time already incorporated.

Mr. Mohaleroe submitted in argument before us that there was an employment relationship between applicant and respondent because “BM1” which gives his name under the paragraph requiring particulars of the Chief Executive is signed by the Managing Director Mr. Wu. We have already shown that “BM1” cannot be an authority for applicant’s appointment as claimed. A more direct form of evidence is necessary to prove this status. Secondly, there is no authority authenticating his appointment as such. Thirdly, the authenticity of “BM1” itself is questionable. Though the handwriting is consistent, it is however, filled in at least three different pens. It has been tippexed in certain places instead of merely striking out the error and signing for it. Above all it bears no governmental stamp to show that it is an official Government document. Mr. Mohaleroe averred that it could not be stamped because the official who gave it to them had no authority to release it. There is no explanation why they did not go to the appropriate authority who would have the authority to release the document. But even if there was a sustainable reason why they could not approach the appropriate authority Mr. Mohaleroe’s averment cannot possibly be true. This is so because as a practice as soon as a document is received at a government department, it is rubber stamped to evidence receipt and the date thereof. Accordingly, if the document was ever received at the Ministry of Trade where it is alleged to have been retrieved from, it would bear that Ministry’s rubber stamp of the date of receipt even if in a secondary form.

He submitted further that “BM2” should be acceptable as it has been certified as the true copy of the original. The question that arises is still the same. If it was ever received at the office of the Commissioner of Income Tax it would bear his office’s rubber stamp. He would then himself have had the power and authority to certify it as a true copy of the original he received. The likelihood is that in casu the office

file copy signed in the original signature of the author of the letter was photocopied and presented to the commissioner of oaths to certify. This leaves the question open whether the commissioner did receive the letter "BM2" or whether it was sent after all. We cannot in the circumstances say that applicant's appointment as secretary of the company is established in terms of the Income Tax Act.

Mr. Mohaleroe argued further that applicant was employed because he was being paid a monthly salary. It is common cause that the respondent denies paying applicant a salary. It says it remunerated him for services rendered by way of contacting Government institutions in pursuit of the registration requirements of the respondent company albeit on a monthly basis. In evidence under cross-examination regarding the salary he earned applicant crashed badly. His contradictory evidence regarding what his salary was cannot sustain his claim that he earned a salary. In the circumstances this point fails as well.

Mr. Mohaleroe contended further that the questions regarding applicant's fulfillment of statutory requirements of the company were not fair to the applicant as they are legal questions as such they should not weigh against him. The applicant is no ordinary lay person. He clearly has some comfortable level of education as he was even able to conduct his testimony in the English language. Indeed he could not be considered for such high positions as he claims he had been appointed to, but for his diligence in matters connected therewith. If he was employed in a statutory position surely he should be versed with the statutory requirements of the position. Accordingly, we find no unfairness in the questions and his inability to answer them satisfactorily has indeed had an influence on our decision whether he was in fact employed in the capacity alleged. We are of the view that the applicant has failed to prove that an employment relationship existed between him and the respondent. This application is accordingly dismissed with costs.

**THUS DONE AT MASERU THIS 18TH DAY OF
MAY, 2001.**

L.A LETHOBANE
PRESIDENT

C.T. POOPA

MEMBER

I AGREE

M. MAKHETHA

MEMBER

I AGREE

FOR APPLICANT :

MR MOHALEROE

FOR RESPONDENT:

MR. BUYS