

# IN THE LABOUR COURT OF LESOTHO

LC/38/04

HELD AT MASERU

IN THE MATTER BETWEEN

MALERATO MOTSEKI

APPLICANT

AND

TZICC TEXTILES (PTY) LTD

RESPONDENT

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## JUDGMENT

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*Dates: 01/09/05; 30/09/05; 11/10/05*

*Contempt proceedings – DDPR award granting reinstatement to employee – Employee not presenting himself on date of reinstatement – No evidence that Managing Director aware of award – Employee not accepting work and asking for sewing work. Reinstatement to a different job – Private organisations not same as government – They have no positions to claim as of right – Employer in compliance with reinstatement order – Ill-health – Employee not accepting work due to incapacity – employer not in contempt – Application dismissed.*

### INTRODUCTION

When this matter started initially, it was before the President sitting with learned panellists Messrs Kolobe and Twala representing management and labour respectively. At the resumed hearing on the 30<sup>th</sup> September 2005, it turned out that Mr. Kolobe would not be able to attend. The matter had already been previously postponed. To avoid any further inconvenience that would result from yet another postponement the court consulted, and secured the agreement of counsel that the matter proceed in terms of rule 25(2) of the rules of the court which provides:

*“Where during the course of (the) hearing a vacancy arises or vacancies arise in the membership of the court, provided the remaining members constitute a majority of the original membership of the court, the decision of the remaining members shall be the decision of the court, provided further that where there is no majority decision the hearing shall be commenced de novo before the court composed of other members.”*

This is an application for contempt in terms of section 228E(5) read with 24(2)(j) of the Labour Code Amendment Act 2000. The applicant herein was employed by the respondent as a machinist. She was dismissed on the 23<sup>rd</sup> May 2003. She filed a Referral with the Directorate of Dispute Prevention and Resolution challenging the fairness of her dismissal. The Referral was heard on the 23<sup>rd</sup> September 2003.

### **STATEMENT OF CASE**

It is common cause that the respondent did not attend the hearing at the DDPR. As a result the applicant obtained judgment by default which directed that she be paid for lost wages for the period that she had been out of work. It was further ordered that she be reinstated with effect from 1<sup>st</sup> December 2003. It is alleged in the founding papers that the respondent duly paid the applicant for lost wages up to February 2004, but failed to reinstate her as ordered. It is further alleged that the applicant approached the respondent several times for the implementation of the award but the respondent refused to comply with the award. The applicant has thus approached this court for relief as follows:

- (a) Respondent be ordered to implement the DDPR award dated 12<sup>th</sup> November 2003.
- (b) Respondent be committed and punished for contempt of court in terms of section 8(2)(i) of the Labour Code (Amendment) Act 2000.
- (c) The respondent be ordered to pay the accumulated costs from February 2004 to date.
- (d) Further and/or alternative relief.
- (e) Costs of suit.

The contempt proceedings were filed on the 7<sup>th</sup> July 2004.

The respondent duly answered in terms of the rules. The thrust of their Answer was that the applicant made compliance with the DDPR award

impossible by her conduct. They stated that applicant was "...told to wait a while since it was necessary to adjust certain current staff positions so that she could be properly reinstated." They averred further that "...applicant went away in defiance and never reported for duty, ...." (See para 5 of the Answer). Respondent denied that applicant approached them several times for the implementation of the award or that they refused to comply with the award.

## **EVIDENCE**

In her evidence applicant stated that even though the DDPR award was made on the 12<sup>th</sup> November 2003, she only received a copy for herself on the 8<sup>th</sup> January 2004. It follows that she did not present herself for reinstatement on the 1<sup>st</sup> December 2003 as the award had directed. She testified further that on the 9<sup>th</sup> January she delivered the copy of the award to the respondent by giving it to a certain David Molai whom she said was the Personnel Manager. The Personnel Manager allegedly promised to bring the award to the attention of the Managing Director Mr. Chen. He further asked the applicant to check on the progress.

The applicant avers that she checked daily for the next three weeks arriving at 8.00 in the morning and leaving at 4.00 pm. She averred further that those weeks that she was going to the respondent to get a response, she never saw the Managing Director. She testified that she finally went to the office of the Factory Workers Union (FAWU) to report her dilemma. She testified further that the union officials went with her to the respondent. She averred that she met with the Managing Director in the presence of the Personnel Manager Mr. Molai, apparently to the exclusion of the union. The Managing Director verified from a Chinese supervisor whom applicant worked with that she was indeed respondent's employee. After verification the Managing Director ordered her (applicant) to come back after three days.

Three days later she reported and the Managing Director told her to wait outside, but promised to find a place for her. She averred that she again went several times reporting herself at the office, but she was always told to wait for the Managing Director. The Personnel Manager Mr. Molai left the respondent and his place was taken by Mr. Mpho Ramonyatsi DW1 herein, who also said she should wait. She testified that one afternoon DW1 came and told her that the Managing Director had said she should go and work at washing section. She testified that she told DW1 that she could not do washing because she had been operated upon. She averred that DW1 then

asked her to write down that she could not do washing. He also said she should leave her contact numbers so that they could contact her when sewing work became available. She duly wrote exhibit 1 and left. When respondent failed to contact her as promised she approached FAWU which helped her to file these proceedings.

The applicant does not say when she wrote exhibit 1. It however has two dates. At the top its written 04/05/04. At the bottom it bears respondent's date stamp of 14/05/04. It seems to this court that this is most probably the date on which exhibit 1 was received by the respondent. It is written in Sesotho and loosely translated this is what it says:

*"I Malerato Motseki, aged 23 years I was supposed to start work at TZICC on the day of 4<sup>th</sup> May 2004. I cannot afford to do the work that I am given. I request to remain out of work until the work I can afford to do is available. I can be contacted at the following numbers:*

*Phone: 62717766  
63086263  
Malerato Motseki."*

Under cross-examination applicant was asked if it is correct that she agreed with her employer that she be out of work until the employer can contract her at the numbers she had supplied. She agreed that was so. She further conceded that they agreed with the employer to suspend the implementation of the order to reinstate her until such time that the employer could contact her. Asked if it was appropriate that she proceeds by way of contempt when she admittedly got reinstated on the 4<sup>th</sup> May 2004 she conceded that it was not appropriate.

Counsel for applicant called Mr. Sam Mokhele an official of FAWU who had accompanied the applicant to the respondent to enquire about her reinstatement. His testimony was that when they got there DW1 told them that he had not been aware of the reinstatement order as the case was new to him. He checked the file and found that it had the DDPR award which ordered applicant's reinstatement. He immediately asked to be allowed to go and meet with the Managing Director. When he came back he told them that the Managing Director said he was seeing the DDPR award for the first time. He then told the applicant there and then to report on the 4<sup>th</sup> May

2004. He averred that they enquired whether the applicant would be starting work that day and the Answer was yes. They then parted ways.

PW2 was shown exhibit 1 and asked if she knew it, he said he did not know it. He however, read it and afterwards he was asked to comment whether it is not correct that according to the letter applicant was the one who had asked to stay at home. He agreed that was so. It was put to him that it was impossible for the employer to reinstate the applicant on 1<sup>st</sup> December 2003 per award because applicant did not present herself. He agreed that was so.

The respondent led evidence of DW1 who sought to show that applicant was not reinstated because she refused to use any machine other than the one that she used prior to her purported dismissal. This evidence can be cast aside in one line as a clear fabrication. If this was the reason the respondent would have surely raised it in the Answer. On the contrary the answer alleges that applicant defiantly walked away after she was asked to wait a while to enable certain adjustments to be made to staff positions so that she could be properly reinstated. These two explanations are clearly contradictory of each other.

## **CONCLUSION**

It must be said however, that it was not even necessary for respondent to have called that witness because the applicant had dismally failed to make out a case for the relief claimed. There is absolutely no proof that the respondent ever refused to comply with the award. Applicant's own evidence is that she did not present herself on the day that she was supposed to be reinstated i.e. 01/12/03. She only presented the award to respondent on the 9<sup>th</sup> January 2004 and was told that it required to be acted upon by the Managing Director. According to her own evidence she checked for three weeks and she never once saw the Managing Director. Similarly, there is no proof that the Personnel Manager had succeeded to bring the award to his attention by that time. In the absence of proof that the Managing Director was aware of the order there simply cannot be talk of contempt.

It is clear from applicant's evidence that even at the point when she chose to go to FAWU office she had still not seen the Managing Director. What is surprising is why she did not approach the union from the beginning for help of which she was a senior member in as much as she was a shopsteward. Quite clearly help would have long been obtained as is evidenced by the fact that the very first day that she went with officials of the union she was able

to meet with the right people. However, there is material conflict between what she says transpired and the version of PW2 Mr. Sam Mokhele. According to her, she met with the Managing Director, the Personnel Manager and a Chinese supervisor she worked with. For that matter she says the Personnel Manager was one David Molai. The version of PW2 is that they met with Mr. Mpho Ramonyatsi i.e. DW1 and he is the one who shuttled between the Managing Director's office and them. They never personally met the Managing Director.

A further conflict is as regards what is said to have happened after the applicant was told to report after three days. According to applicant even after the three days she still frequented the respondent's place many times without being reinstated. On the other hand PW2 says they were told there and then that the applicant shall start work on the 4<sup>th</sup> May 2004. Applicant is inclined to manufacture the frequency of her visits to respondent in order to back her claim in papers that she went to the respondent many times. The question that arises is why would she have to again take weeks going to the respondent when the easiest thing was to go back to the union which had already proved quite helpful to her, in that the first time they went with her to the respondent she got the answer she wanted? It is unlikely she would not go back to them if respondent was not being cooperative. Accordingly her version is not convincing. PW2's version is simple and straightforward that the applicant was promised reinstatement on the 4<sup>th</sup> May 2004.

That version is supported by exhibit 1 which is in applicant's own handwriting. She admits as much that she was reinstated on the 4<sup>th</sup> May, but decided herself not to accept the job she was being given. Mr. Mohaleroe for the respondent asked the applicant several times under cross-examination if she still insisted on the contempt proceedings even after she wrote exhibit 1 asking to be at home because she could not do the work she was allocated. At one point she conceded it was not necessary to proceed. But on another occasion she said it was necessary. Notwithstanding her response to these questions this is a clear abuse of court process.

Miss Ranthithi for the applicant sought to argue that there was no reinstatement because applicant was not given a sewing job which she previously did. The court asked her for an authority to support this proposition and none was forthcoming. If that were to be the approach, it would be virtually impossible to enforce in private organisations such as the respondent where they do not have clearly delineated structure such as in

government organisations. In these private organisations they have work for people to be assigned to do, but not necessarily positions. Few people, usually in administration, are ones who hold positions to which they can claim a right. We are of the view that in giving the applicant the work of washing the respondent was in compliance with the reinstatement order.

Applicant sought to show that she could not do the washing work for reasons of ill-health. It is significant to note that the applicant did not mention this as a reason when she wrote exhibit 1. At that time she merely stated that she could not afford to do the work she was being given, which could well mean she wanted sewing work specifically. At the hearing hereof respondent sought to establish the alleged incapacity of the applicant. Respondent went to the extent of undertaking to bear the costs of applicant's medical examination. However, on the agreed date they did not find a doctor. If it be true that applicant failed to take up the work she was given for medical reasons, she cannot then claim that the respondent is in contempt. For these reasons this application ought not to succeed and it is accordingly dismissed.

**THUS DONE AT MASERU THIS 27<sup>TH</sup> DAY OF OCTOBER 2005**

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

**D. TWALA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MS RANTHITHI**  
**MR. MOHALEROE**