

IN THE LABOUR COURT OF LESOTHO

LC/24/03

HELD AT MASERU

IN THE MATTER BETWEEN

LINEO NKETU

APPLICANT

AND

**SECHABA CONSULTANTS
DAVID HALL**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Dates : 02/09/03, 25/03/04, 13/04/04, 3/05/05, 01/06/05, 02/06/05

Whether employee resigned or retrenched – Evidence – employee resigned – Forum shopping – severance pay – Employee not completed one year – No evidence employer promised to pay. Application dismissed with costs.

The applicant was employed by the 1st respondent as General Manager on the 1st August 2002. She was to serve a three (3) months probation; which she successfully completed end of October 2002. The 2nd respondent was at the time of the applicant's employment and termination, the Managing Director of the 1st respondent.

It is common cause that in January 2003 a Management Meeting was held between the 2nd respondent and one of the Directors Mr. Thuso Green on the one hand and the applicant on the other hand. The two Directors presented the applicant with a list of what they called "expectations for the General Manager." According to the evidence of DW2 Mr. David Hall, the list showed the expectations the company had from the applicant in terms of

performance. DW3, Mr. Thuso Green said the purpose of the meeting was to present a list of areas that required improvement in order for her to do her work more effectively and efficiently. Clearly the two versions of the two witnesses are complimentary of each other.

It is also common cause that on the 30th April 2003 another meeting was held between the two Directors and the applicant. In their evidence both directors say the purpose of the meeting was to review progress against the list of expectations. In evidence PW1 (the applicant) also confirmed the January meeting and that she was presented with a list of expectations. She went further to say that after being presented with the list she asked for time to study them and compare them with her job description. She further said she promised to respond after she had studied the list.

PW1 testified further that she did respond even though it was not in writing. She testified that she suggested that there be training for all senior management and that she proposed commissioning of a consultancy for such matters as research methodology. She handed in "exhibit 1" which she said is the training plan she had set out. This testimony was closely tested by Mr. Mathaba for the respondents under cross-examination. In particular it was denied that applicant ever asked for time to go and study the list of expectations and to compare them with her job description as she claimed. Further it was denied that "exhibit 1" was drawn in response to the meeting of January 2003 or that it was in any way related to the list of expectations presented at that meeting. DW2 confirmed the denial in his testimony and said exhibit 1 was made some time in 2002.

As would be expected the applicant stuck to her guns and said the events are as she narrated them in her evidence in chief. The thing that lends credibility to the respondents' denial of the aspects of applicant's testimony is that those things that they denied are not alluded to, even if slightly in the applicant's statement of case. If anything they appeared a convenient addition to fill in gaps in applicant's own statement of case occasioned by the respondents' answer. As for the meeting of April 30th 2003, applicant also confirms it expect that she gives a completely different purpose from that given by DW2 and DW3 for it (the meeting).

According to applicant's testimony when she got to the meeting which was chaired by DW2, the latter informed her that the Board of Directors had met two days previously and decided that she should be retrenched. The reasons

advanced were that the responsibilities that the position of General Manager was meant to relieve the Managing Director of were not in fact getting transferred as they should. Secondly, she was informed that 1st respondent was not making profits as expected and that the position of General Manager was proving costly on the company. She testified that the 2nd respondent further said that although she had not completed a year of service the company would arrange to pay her one year severance pay.

Applicant testified further that she told the meeting she would require the record of the proceedings of the meeting even though she was aware that a record was not being kept. She testified further that on the 23rd May 2003 she went back to the Managing Director to ask for the minutes but she did not get them. She testified further that she made two requests for minutes that week but still did not get them. She stated further that she left end of May 2003 without either the minutes or a formal letter of termination. In June when she had already left the respondent she made two telephone calls seeking letter of termination from the Managing Director, and his response was always that he would see.

Asked if anything was said about notice she said nothing was said. Asked further if there were discussions about alternatives she said she had requested two weeks off to prepare for her examinations at the Institute of Extra Mural Studies (IEMS) and the Managing Director said since her job was going to come to an end he would give her free afternoons to enable her to look for alternative work. In stark contrast with this evidence, in her originating papers applicant seeks payment of six months salary to enable her to find alternative employment.

The respondents for their part deny all that has been said by applicant that seeks to make her case one of retrenchment either for the reasons she gave or at all. DW2 and DW3 say they called the meeting to review the progress made in achieving the expectations. They support each other that as soon as the agenda of the meeting was tabled and it was indicated to her that the progress was not satisfactory, the applicant expressed her relief that the management had taken the initiative to approach her, as she has been struggling to meet the requirements of the position. They testified that she expressed a desire to resign and apologized to the two Directors for having disappointed them. DW2 says he was very concerned as he knew that applicant was a single parent and inquired from her how she was going to cope. The applicant responded that they should not worry as she had other

opportunities. DW3 says upon being asked how she would cope without a job she said that they should not worry because she had poultry business from which she produced eggs and that she had found a job at IEMS. It is common cause that she did proceed to join IEMS at the beginning of June 2004.

The applicant approached this Court for relief on the 27th June 2003, approximately one month after she left the respondent. She sought relief as follows:

- (a) That the so-called retrenchment be declared unfair and illegal.
- (b) That the respondent be ordered to pay six (6) months salary with effect from June 2003 to enable her to look for alternative employment.
- (c) That respondent be ordered to pay her one year severance pay in terms of the verbal agreement to pay her same.
- (d) That respondent be ordered to pay all outstanding leave days due to her.
- (e) That respondent be ordered to pay three (3) months salary as redundancy pay in terms of respondent's policy.
- (f) That respondent be ordered to pay her full mileage claim she submitted in terms of respondent's policy.
- (g) That the Honourable Court grants her further and alternative relief.

The court heard the evidence of both parties which turned out to be directly contradictory of each other. The court then reached agreement with counsels for both sides that they should first address it on the question whether the applicant herein was retrenched or she resigned. It was further agreed that the jurisdiction of this court in respect of all the other claims with the exception of severance pay shall only arise if the court finds that the applicant was retrenched. If on the other hand it turned out that the applicant resigned, this will be the end of the story as it will mean that the applicant is on a forum shopping spree about matters which should have been referred to the Directorate of disputes Prevention and Resolution (DDPR). Only the

issue of entitlement to severance pay as a question of law would in that even remain to be decided.

The issue falls to be decided on evidence. The court heard the testimony of the applicant against that of three witnesses who testified on behalf of the respondent. DW2 and DW3 corroborated each other about what took place at the meeting of the 30th April 2004. In effect they say the applicant offered to resign. The two witnesses for the respondent further supported each other that on or around 31st May a staff meeting was called which was addressed by the 2nd respondent and the applicant. DW1 Thato Letsatsi is one of the staff members who attended that meeting. She told the Court that at that meeting, 2nd respondent reported that, at the meeting of management, the applicant had indicated a desire to leave the company. He gave the applicant a chance to address the staff. She thanked staff to have worked with them although it was a short time. Asked if she denied the report that she was leaving the company DW1 said she did not.

Under cross-examination DW1 said the applicant never repeated the words that she was resigning but she confirmed to the meeting that she was leaving the company. She is supported by DW3 in this regard. DW2 says the applicant had actually attended the meeting at his request that since she was leaving the company, she did not have to stay throughout the meeting, she could just come in to bid the staff goodbye. He categorically denied that the company ever said it was retrenching her. He supplemented his answer by saying in the sixteen years of its operation the company has never been in the red and it has never had to ask for a bank loan. As for the position of General Manager both DW2 and DW3 insisted that the need for it has never gone away.

As we indicated, there was nothing to corroborate the applicant's testimony. Not even minutes were produced in support of her version. In her evidence in chief she sought to place the blame for the absence of the minutes on the respondents. She testified that after the meeting of the 30th April she told the two directors that she would expect a record of what had been discussed from them. She went further to say on the 23rd May she went to DW2 to ask for the record of the proceedings of 30th April 2003 and that she went to DW2 twice that week to ask for minutes. The originating papers come nowhere near alleging this type of a case. It is essentially a new case that the applicant is seeking to found in evidence.

In paragraphs 16 and 17 of her Originating Application the applicant says on 22nd May 2003, the second respondent called a staff meeting at which he announced without any prior consultation with her that she would be leaving the company for reasons of redundancy. Second respondent's version is that he invited her to that meeting to say some farewell words to the staff. Under cross-examination, the applicant admitted for the first time that she addressed that meeting and that she told staff she would be working at IEMS. She however conveniently refrained from saying at whose invitation she addressed that meeting.

In paragraph 17 the applicant says she called the office of the second respondent on the 23rd and 28th May 2003 to discuss the issue i.e. unilateral announcement at staff meeting that she would be leaving the company. This contrasts with her evidence in chief where she told the court that on the 23rd May she went to ask for the minutes of the 30th April. When she was asked under cross-examination if it was not her duty to keep minutes of meetings she accepted it was. How then could she seek to have the minutes reproduced by the Directors?

If she is genuine in saying she expected the record of these meetings to come from the office of the second respondent, it confirms their concern that the applicant was not relieving the Managing Director of the duties she should have as expected. However, it is clear to this Court that there is no consistency in the story of the applicant. She has three versions, one in the founding papers, the other proffered in her testimony in chief while the third emerges when she is cross-examined. All these inconsistencies the applicant seeks to hide away by alleging the absence of the records which she should have kept in the first place.

It is particularly significant that the evidence of the three witnesses for the respondents regarding the circumstances of the applicant's separation with first respondent was not shaken under cross-examination. If anything it was confirmed by the questions put by applicant's counsel to the witnesses. For instance it was repeatedly suggested to DW1 that the applicant never said to the staff meeting that she was resigning but that she said she was leaving the company. DW1 agreed with this suggestion. DW3 confirmed that PW1 (applicant) never used the word resign and that what she said was that she was leaving the company. To DW2 and DW3 it was suggested that the applicant opted to resign because the company had put pressure on her as a result of the unfair treatment it meted out to her. In particular it was

suggested that the company unfairly confronted the applicant about poor performance when it neither offered her training to improve nor disciplined her in terms of its disciplinary procedure. All these are questions that confirmed respondents' witnesses' testimony except they sought to deny that the word resign was used and that they sought to establish a justifiable reason for applicant's decision to decide to leave. It is immaterial whether the word used is "leave" or "resign" the effect is the same; end of employment relationship at the initiative of the applicant.

Applicant's performance as a witness was dismal. She was according to evidence of both sides responsible for all staff matters as General Manager. She however, is not able to produce a single record to corroborate her claims and yet such records ought to have been made, produced and kept by her office. She contends herself with relying on what she terms verbal promises and agreements. No attempt was made by her as a beneficiary of the alleged promises/agreements to commit to writing those promises in order to confirm the agreement and to straighten the record for future purpose.

She relies on her own testimony which is in itself highly contradictory. On the other hand the evidence of respondents witnesses is consistent and corroborated not only by respondents own witnesses but even by the questions put under cross-examination to those witnesses. We accordingly have no hesitation in finding that the applicant herein resigned the position of General Manager. The claim that she was retrenched is an afterthought which was clearly meant to justify the bypassing of the DDPR as the proper forum for applicant's claim and bring it to this court. Equally there is no evidence to support applicant's claim that she was promised to be paid severance pay even though she resigned before she completed a year's service. As a measure to show its disapproval of forum shopping the Court dismisses this application with costs.

THUS DONE AT MASERU THIS 30TH DAY OF JUNE 2005

L. A. LETHOBANE
PRESIDENT

C. MOTHEPU
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

ADV SEKONYELA
ADV MATHABA