

IN THE LABOUR COURT OF LESOTHO

LC/02/08

HELD AT MASERU

IN THE MATTER BETWEEN

EVODIA SEPHOKO

APPLICANT

AND

QALO HIGH SCHOOL

RESPONDENT

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## JUDGMENT

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*Dates : 04/06/08, 13/08/08, 12/11/08*

*Retrenchment - Applicant disputes that she was retrenched and says she has been dismissed - If that is the case the court lacks jurisdiction to deal with the matter - Disguised employment - Court found employer of the applicant was the respondent school - Dismissal - Employer denies it dismissed applicant and avers she opted to leave after being shown that she has problems with teaching as she is not a qualified teacher - Evidence - Applicant's testimony on the alleged dismissal is uncorroborated and in itself contradictory - Respondent's witnesses evidence on the other hand is consistent and corroborated - Court found applicant resigned as testified by respondent's witnesses.*

1. The applicant is the former computer teacher at the respondent. She is represented in these proceedings by the Labour Commissioner in terms of section 16(b) of the Labour Code Order 1992, (the Code). This application arises out of the alleged dismissal of the applicant on the 28<sup>th</sup> August 2007.

2. According to the Originating Application, the applicant was employed by the respondent as a computer and Biology teacher on the 7<sup>th</sup> February 2005. On the 28<sup>th</sup> August 2007, applicant was allegedly *“called to the office of the respondent in which she was told verbally that she was dismissed from work with immediate effect on the grounds of insubordination, poor work performance and lack of qualifications for teaching.”* (See paragraph 6 of the Originating Application).
3. Applicant referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and Resolution (DDPR). At conciliation the respondent allegedly denied that applicant was dismissed for any of the aforementioned reasons. It went further to aver that applicant had been terminated due to operational reasons. The DDPR then issued a certificate referring the dispute to this court. The alleged operational reason was that the respondent said it needed a teacher with higher qualification.
4. Applicant issue an Originating Application out of the Registry of this court alleging that the respondent unfairly dismissed her substantively; because she was not retrenched, but dismissed on the allegations she was not notified of. Applicant contended further that she was not given a hearing before dismissal. She prayed the court to reinstate her or order that she be paid compensation of six months salary amounting to M8,400-00. She further prayed for notice of one month and payment of leave due but not taken.
5. In terms of section 226(1)(c)(iii) *“the Labour Court has the exclusive jurisdiction to resolve the following disputes:*  
*“(c) unfair dismissal if the reason for dismissal is:*
  - (i)*
  - (ii)*
  - (iii) related to the operational requirements of the employer.”*

The arbitrator referred the matter to this court because she had formed the opinion that the dismissal related to the operational

- requirements of the employer in as much as the employer allegedly said it required a better qualified incumbent.
6. From the statement of the case it is apparent that the applicant does not agree with the arbitrator that her termination was related to operational requirements of the employer. Paragraph 9 of the Originating Application states clearly that the applicant *“was not retrenched but dismissed on the allegations she was never notified of.”*
  7. The above statement deprives this court of the jurisdiction to deal with this dispute. The jurisdiction of this court arises only where the termination is for operational reasons. If the applicant disagreed with the arbitrator as would seem to have been the case, she ought to have brought the referral of the dispute to this court on review before this court as an irregularly made referral. We however, take this point no further because Mr. Khauoe for the respondent did not raise it.
  8. In their Answer the respondent denied that applicant was employed by it since 7<sup>th</sup> February 2005. They averred that when applicant first started to work for the respondent she was employed by a contractor who leased computers to the school called Multi-Pro-Consult (Pty) Ltd. They averred further that applicant was assigned to teach Biology from the beginning of 2007. Before then she had only been teaching Computer.
  9. The respondent denied dismissing the applicant for insubordination or at all, but admitted that applicant’s work performance was poor and that she lacked qualifications to teach either subject, hence the poor work performance. Respondent averred further that on the 28<sup>th</sup> August 2007 applicant was called to a meeting with the Principal, Deputy Principal, Head of Department of Mathematics under which applicant fell and teacher’s representative in the School Board. The meeting discussed *“the question of getting a qualified teacher...to enable the school to register the computer studies as due to her qualifications the school could not register the subject with Exam Council.”* (See paragraph 5.4 of the Answer). Respondent avers further that it was applicant who

opted to leave as she said she was aware that teaching is not her line.

10. Applicant was the sole witness to testify in support of her claim. She disputed that she was employed by a company called Multi-Pro-Consult. She produced annexure "A1" to her Reply which was a letter of introduction written on her behalf by the Principal "*to whom it may concern.*" The letter certified that applicant "*is a full time teacher at Qalo High School offering computers.*" She testified further that even her salary was paid to her by the School.
11. The principal of the school Mr. Senekal admitted in his testimony that the letter was written by him. He went further to state that the time the letter was written was after the applicant was inherited by the school from Multi-Pro-Consult. He stated that the salary of applicant came from Multi-Pro-Consult, which gave it to the school to pay it to the applicant. He conceded that infact the school used to pay applicant because the contractor used to delay to send the salary. However, what they paid remained a loan to the contractor to be repaid when it finally transferred funds for the payment of the salary.
12. Applicant's testimony was that she was never introduced to this company called Multi-Pro-Consult. She only knew the school as her employer. Other than simply saying applicant knew that she was employed by the contractor, the principal brought no evidence to show that applicant knew her employer as Multi-Pro-Consult. Infact the concession that even the salary was indeed paid by the school, is more than enough prove that the employer of the applicant was respondent. Even assuming we are wrong in arriving at this conclusion, it really serves a theoretical purpose, as the school admits it took over applicant only six months after she started working for the school as employee of the Multi-Pro-Consult. Mention of the contractor as one time employer of the applicant only serves an historical purpose, but none whatsoever for our present purposes.
13. Testifying about her dismissal, applicant said her woes started on the 7<sup>th</sup> August 2007, when the principal evicted her from the

- school house that she occupied. She averred that she rented a flat outside school premises and commuted to work from there. She averred further that on the 28<sup>th</sup> August she was called to the office and verbally told that there was no more work for her.
14. She averred that the principal accused her of insubordination in that after he evicted her from the school house, she went to stay out of the school premises without his knowledge. Applicant stated that that was the only reason the principal communicated to her at the time. She testified that she lodged a referral at the DDPR. She averred further that in response to her claim the principal informed the DDPR that her work was not satisfactory. She stated further that the principal further told the DDPR that he had not dismissed her; he had laid her off because he wanted a more qualified teacher.
  15. Under cross examination, applicant was referred to paragraph 6 of the Originating Application where she alleges that on the 28<sup>th</sup> August 2007, she was told that she was being dismissed for insubordination, poor work performance and lack of qualification. This contradicts applicant's evidence in chief that the only reason she was given on the 28<sup>th</sup> August was that she was insubordinate.
  16. Applicant was further referred to paragraph 4 of the her Founding Affidavit where she avers that she was called to the office in the presence of the Deputy Principal and told that she *"was dismissed with immediate effect on the grounds of misconduct, poor work performance and lack of qualifications."* As it can be seen all the three versions differ. Applicant was called upon to account for the discrepancy between what she said in chief and what she has alleged in the Originating Application and in the Founding Affidavit.
  17. In particular she was asked to note that in both the Originating Application and the Founding Affidavit she does not say she was not given the reason for dismissal at the meeting of the 28<sup>th</sup> August. Neither does she say she knew of the reason for her dismissal for the first time when she got to the DDPR. Applicant's response was that the contents of the Originating

- Application and the Founding Affidavit are wrong and that the correct version is what she told the court in her evidence in chief.
18. Applicant's response does not save her credibility as a witness, because she was asked further under cross-examination whether it is correct that even before the 28<sup>th</sup> August 2007, the Principal and her Head of Department had informed her about her unsatisfactory performance. Whilst she denied that she was confronted even prior to 28<sup>th</sup> August, she however, significantly conceded that on the 28<sup>th</sup> itself the Principal and her Head of Department did raise the issue of her performance which they said was not satisfactory.
  19. Evidence on behalf of the respondent was led by firstly the principal, who said on the 28<sup>th</sup> August 2008, he called applicant to a meeting where the Deputy Principal, Head of Department of Maths, Science and computer Studies and teachers' representative in the Board were present.
  20. He averred that the purpose of the meeting was to inform the applicant about the school's intention to employ another teacher who would help with the teaching of computer so that the subject could be registered with the Examinations Council of Lesotho. He testified that they brought to applicant's attention that they were aware that she was having a lot of problems in teaching the subject. He testified that it was at that meeting that applicant undertook to leave owing to the problems that she had with teaching which she admitted that it was not her line.
  21. The Principal testified further that they did not dismiss the applicant, but they parted with her on the basis of her own request to leave. He stated further that the school paid applicant one month's salary in lieu of notice and her severance pay. With regard to leave he testified that applicant was not owed leave as she used to take her paid leave during winter and December school vacations.
  22. Evidence on the meeting of the 28<sup>th</sup> August and its purpose was corroborated by the Deputy Head Teacher Mrs. Mafiloe Evelyn

- Kopo and the Head of Department of Maths, Science and Computer Studies Mr. Khauda Joshua Chenene. The applicant too conceded under cross-examination that the meeting of the 28<sup>th</sup> August was attended by the persons mentioned in the Answer and repeated in the evidence of the Principal. What she does not agree with is the respondent's alleged purpose of the meeting and the allegation that she opted to quit the teaching job.
23. Applicant's version of what the purpose of the meeting was is fraught with problems in as much as she has given the court three different accounts which are not necessarily complementary. In the Originating Application she said she was called to the office and verbally told she was being dismissed for insubordination, poor work performance and lack of qualifications. In the Founding Affidavit she said she was called to the office of the Principal and told in the *"presence of the Deputy Principal that she was dismissed for misconduct, poor work performance and lack of qualifications."* There is no longer mention of the insubordination which she alleged in chief that it was the only reason the Principal verbally told her about. Furthermore, for the first time applicant says the Deputy Principal was present.
  24. In evidence before this court she said she was called to the office and told there was no more work for her. She said the Principal accused her of insubordination in that she had gone to live outside school premises without his knowledge. She stated further, *"this is the only reason I got from him at the time."* This testimony contradicts applicant's averments in paragraph 6 of the Originating Application and paragraph 4 of the Founding Affidavit.
  25. In short applicant's account of what the meeting of 28<sup>th</sup> August was meant for, is contradictory. Furthermore, her account leaves out significant details of who participated in the meeting. She only conceded under cross-examination that the persons mentioned by the Principal in his evidence were indeed in attendance at the meeting. Respondent's account however, is consistent and is corroborated in material respects by two of the

- witnesses who were present at the meeting. It follows that this court accepts the respondent's account of what the purpose of the meeting of the 28<sup>th</sup> August was.
26. The next issue to determine is whether the applicant was dismissed or she resigned as the respondent alleges. Applicant's version is that she was dismissed and this is denied by the respondent who says applicant opted to resign. The resolution of this dispute of fact lies in credibility.
  27. This court has found that applicant's credibility has been tainted by the contradictory nature of her testimony. Furthermore, her version is a lone voice against the more consistent and well corroborated version of the respondent. Applicant conceded that the Deputy Principal and the Head of Department of Maths were present at the meeting of the 28<sup>th</sup> August. Both these persons confirmed the Principal's version of the account of the proceedings of the meeting of the 28<sup>th</sup> August, including that applicant opted to leave when she was made aware of the difficulties she confronted in teaching and dealing with children.
  28. Other than simply denying that she opted to leave and sticking to her version that she was dismissed applicant made no effort to discredit respondent's version that she is the one who chose to leave. Furthermore, she could not even suggest that the three people who testified had any plot against her and if so why they would plot against her. In any event, there is the teacher's representative in the Board, who was not called by the respondent and yet he or she was admittedly present at the meeting.
  29. Teacher's representative in the Board is by law (Education Act 2005) a teacher. He or she would probably have been more sympathetic to applicant as a colleague. Applicant would have been more readily inclined to call him or her to come and corroborate her version of events if it was indeed a reflection of the true position of what transpired at the meeting. She failed without explanation to do so. The court is left with her unsupported story which unfortunately is riddled with inconsistencies. For these reasons the court comes to the



conclusion that applicant was not dismissed but she resigned as the respondent's witnesses testified.

30. This leaves us with the issue of leave, notice and severance pay. The Principal testified that in terms of the Teaching Regulations teachers take their annual leave during winter and Christmas vacations. In answer to a question under cross-examination whether she ever took leave between July 2005 and August 2007, applicant said she took days off work, when schools had closed, but she did not know whether that was leave. Asked if she got paid during the vacations she said she was paid. Clearly therefore, applicant has had days off with full pay which constitutes her leave as envisaged by Part VIII section 120 of the Code.
31. With regard to notice applicant conceded under cross-examination that she was paid September salary in lieu of notice. Asked whether it is not correct that she was also paid severance pay applicant said she could not deny that because her September pay was more than her usual monthly pay. Evidence of the Principal was that even severance pay was paid to the applicant. It follows from applicant's responses to questions under cross-examination that she does not deny that severance pay has also been paid to her. In the circumstances this application ought not to succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 22nd DAY OF SEPTEMBER, 2009.

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

**M. MAKHETHA**  
**MEMBER**

**I CONCUR**

**M. THAKALEKOALA**  
**MEMBER**

**I CONCUR**

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

**MR. SETLOJOANE**  
**MR. KHAUOE**