

IN THE LABOUR COURT OF LESOTHO LC/21/10

HELD AT MASERU

IN THE MATTER BETWEEN

SEKHONYANA SEEMAHALE

APPLICANT

AND

SUPERKNITTING (PTY) LTD

RESPONDENT

JUDGMENT

Date : 18/06/10

Contempt proceedings - Application for an order of contempt to be granted by default - strict rules of civil procedure on default are not applicable as contempt has criminal element that can result in imprisonment - Evidence - No evidence of deliberate intention to disregard the court order - Respondent's explanation that it thought it had an option either to pay or reinstate is plausible especially because the Managing Director is not literate in either English or Sesotho - Evidence - Arbitrator ought to have ordered compensation instead of reinstatement - Order set aside and matter remitted to DDPR to assess compensation.

1. Applicant has approached this Court for an order of contempt and prayed as follows:
 - (a) The respondent to show cause why he failed to comply with DDPR award A0057/10.
 - (b) This Honourable Court enforce the DDPR award.
 - (c) Respondent be ordered to pay the accumulated amount of M830-00 to date of enforcement.
 - (d) The respondent be ordered to pay costs of suit.

2. The applicant was a successful party in referral A0057/10 which was delivered on the 23rd March 2010. The award itself was a sequel to the dismissal of the applicant from the employ of the respondent in or around December 2009. In the award, the learned arbitrator found the dismissal of the applicant to have been substantively unfair. The arbitrator ordered that the applicant be reinstated with effect from 15th April 2010. She further ordered payment of lost wages for 4 months and imposed M2000-00 costs for frivolity. In all applicant was to be paid M5,320-00.
3. Applicant duly presented himself for reinstatement on the 15th April 2010 but was turned away. He reported to the office of the union (FAWU) which sent Mr. Mokhele to accompany him back to work the same day. The respondent still failed or refused to reinstate the applicant.
4. On the 19th April applicant issued an Originating Application praying that the respondent be found in contempt of court and that he be granted prayers outlined in paragraph 1 hereof. The respondent did not file any Answer, leading to the applicant filing an Application for Default Judgment on the 19th May 2010.
5. Whilst awaiting enrolment of the contempt application, the applicant moved to enforce payment of the M5,320-00 for lost wages and costs. Enforcement was executed by warrant of detention and payment was duly made on the 15th June 2010. Meanwhile the contempt application was enrolled for hearing on Thursday 17th June 2010.
6. On the date of hearing of the default application the respondent appeared represented by a lawyer. Mr. Mabula's instruction was brief and it was that his clients do not understand why they are being hauled before court for contempt when they have complied with the order and paid the applicant. It was then that the court explained to Mr. Mabula that, there were two orders. One for reinstatement and the other for payment of lost wages and that the respondent had only complied with the latter order. Mr. Mabula asked for a postponement to enable him to consult

with client. The hearing was accordingly postponed to Friday 18th June 2010.

7. When the hearing resumed Mr. Mabula, reported that following consultation with client he has confirmed that an order of reinstatement has been made which respondent has not complied with. He put it on record that his clients are of Taiwanese origin and that they do not understand the labour laws. He recorded further that his clients did not intentionally refuse to comply with the order to reinstate. They had thought that they were given two options either to reinstate or pay compensation. When they made payment on the 15th June they had thought they had fully complied with the award.
8. Mr. Mabula went on to state that clients ask him to apologise to the court on their behalf and that they propose to purge their contempt by asking the court to reformulate the award and exercise the discretion to order compensation in terms of section 73(2) of the Labour Code Order 1992. He stated further that his instruction is that reinstatement is no longer viable because the relationship between the parties has badly deteriorated. Furthermore, the position of the applicant has since been filled.
9. Mr. Mokhele for the applicant sought to show that the matter before court is one of default and that the respondent cannot be represented by Mr. Mabula an advocate when he is not a lawyer. The court put two scenarios across to Mr. Mokhele; first that although this are civil proceedings they have a criminal content since conviction can result in imprisonment. In the circumstances the strict rules of civil procedure regarding default judgment cannot apply since a person cannot be deprived of their liberty without being allowed to be heard.
10. On the issue of representation Mr. Mokhele was asked if he is prejudiced by Mr. Mabula's appearance given that he is not disputing the substantive case, but is essentially mitigating on behalf of the respondent, which is admittedly run by a Taiwanese who can neither express herself in English or Sesotho. In fact to order as he i.e. Mr. Mokhele seeks would be

as good as condemning the respondent unheard, because the Managing Director cannot say a word in her defence due to language barrier. Mr. Mokhele accordingly withdrew his objections.

11. In reaction to Mr. Mabula's submission, Mr. Mokhele submitted that the respondent has intentionally decided not to comply with the court order. Attempts were made after the award was issued to have applicant reinstated, but they were spurned by the respondent, he argued. He disagreed that reinstatement has become impractical given that the award was issued just 3-4 months after applicant was dismissed.
12. Other than through inference drawn from respondent's refusal to reinstate applicant when he presented himself on the 15th April, there is no evidence of intention to disregard the order to reinstate. It is significant that it emerged at the arbitration that the respondent's Managing Director was opposed to the reinstatement of the applicant (see paragraph 7 of the award). The learned arbitrator ordered it (reinstatement) nonetheless. The position of the Managing Director on reinstatement, backs Mr. Mabula's argument that the relations between the parties are such that reinstatement should not have been ordered.
13. The very fact that applicant was turned back on the 15th April, could well be evidence that the position he held was already filled. Neither does that detract from the submission that the respondent thought it had an option to pay compensation or reinstate. At the material time, the respondent had this award which ordered reinstatement and payment of a certain amount of money. It is not unlikely that an employer with serious language barrier such as the Managing Director of respondent can be confused and misconceive the order as she claims to have done.
14. The mere fact that the award was issued 3-4 months after dismissal is no guarantee that the position of applicant was still available. Infact 3 months is a long time for a position in an organization such as the respondent to be still open. It is clear from these that we are unable to find deliberate and intentional

disregard of the order of the DDPR as alleged. A perception in that regard is immediately dispelled by the explanation advanced on behalf of the respondent by Mr. Mabula.

15. Mr. Mabula urged the court to consider awarding applicant compensation instead. This is clearly what the learned arbitrator should have done when she learned that the Managing Director no longer liked to work with the applicant. The learned arbitrator did the opposite of what she should have done and ordered reinstatement. In so doing she lost sight of the fact that the organization she is dealing with is not public entity but a private one and personal feelings go a long way to determine whether an employment relationship between the parties is still viable.
16. It is common cause that when the matter was postponed on the 17th June 2010 parties undertook to go and negotiate a settlement that would obviate the need for reinstatement of the applicant in accordance with the order of the DDPR. This the parties agreed to do because they admittedly could see that there is a problem with reinstatement. Unfortunately parties could not reach agreement especially on the quantum. Failing such agreement it cannot be fair or just to substitute a conviction. Justice demands that parties be assisted to find each other. Accordingly, the order of reinstatement ordered on the 23rd March 2010 is set aside. The DDPR is ordered to assess fair and equitable compensation payable to applicant in lieu of reinstatement.

THUS DONE AT MASERU THIS 16TH DAY OF JULY 2010

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. MOKHELE
MR. MABULA