

IN THE LABOUR COURT OF LESOTHO

LC 47/10

HELD AT MASERU

In the matter between:

MASILO MABITLE

APPLICANT

and

UNITRANS LESOTHO (PTY) LTD

RESPONDENT

RULING

Date: 26/05/11

Review of arbitral proceedings - Whether the defence that the dismissal was through the influence of a third party (the subcontractor) and not the employer per se rendered the dismissal an operational requirement dismissal and therefore determinable by the Labour Court and not the DDPR - meaning of operational requirement considered - Court finds claim to be an unfair dismissal case that falls within the jurisdiction of the DDPR.

1. The applicant is before this Court to seek the review of arbitration proceedings that were held before the Directorate of Dispute Prevention and Resolution (DDPR) in A 0938/09.

2. The applicant had been engaged by the respondent as a Depot Manager on 1st June, 2006 and was dismissed on 30th November, 2009 on allegations of theft of fuel. He approached the DDPR to challenge the fairness of this dismissal. Respondent's defence to the claim was that the respondent, that is Unitrans, was subcontracted by Exel Petroleum, Lesotho (Exel) for the courier of its fuel and was even operating from its premises. Unitrans claimed that it terminated applicant's employment because his "***presence at***

[Exel] *would threaten the very existence of [the] contract with Exel*". According to the respondent, the employment contract was terminated for operational reasons as opposed to misconduct.

3. It is common cause that the dismissal was a reaction to Exel's letter to the respondent dated 21st October, 2009 which read in part that;

Exel hereby request (sic) that employees of Unitrans and G4S involved in irregularities such as for example theft or knew about such and did nothing to prevent or report it, not to be on the premises of Exel or carry out work for Exel.

4. Respondent's Contract Manager in his letter to the applicant wrote on 16th November, 2009, to the extent relevant to this case, that;

The fact of the matter is that the relationship between you and the employer has irretrievably been damaged beyond repair and your presence at our workplace would threaten the very existence of our contract with Exel. Under these circumstances we would like to terminate your services with us on the ground of operational requirements as we cannot utilize your services on these premises anymore and shall provide you with your normal terminal benefits.

The DDPR referred this matter to this Court on the basis of it being an operational requirement dismissal and therefore falling within the jurisdiction of this Court. The issue then becomes whether the dismissal can be classified as an operational requirements dismissal envisaged by Section 226 (1) (c) (iii) of the Labour Code (Amendment) Act, 2000.

5. The question can best be answered by a determination of what constitutes the employer's operational requirements. According to Article 4 of ILO Convention 158 on Termination of Employment; termination of employment based on operational requirements refers to "***termination of employment for economic, technological, structural or similar reasons***".

6. PAK Le Roux & André Van Niekerk in The South African Law of Unfair Dismissal, Juta & Co., 1994 give an illuminating description of what economic, technological and structural reasons entail. According to them,

technological reasons refer to the introduction of new technology which affects work relationships by either making existing jobs redundant or by requiring employees to adapt to the new technology even where this may necessitate a change in their terms and conditions of employment. Structural reasons, similarly, would incorporate a termination of employment in circumstances where posts become redundant consequent on a restructuring of the enterprise. Economic reasons would appear to mean reasons relating to the financial well being of the enterprise.

7. With this analysis, it is my considered opinion that the averment by the respondent that the dismissal was for operational reasons just because it desired to save its working arrangement or subcontract with Exel is not reason enough to render the dismissal an operational requirement dismissal anticipated by Section 226 (1) (c) (iii) of the Labour Code (Amendment) Act, 2000. Applicant's claim of unfair dismissal is not based on operational requirements of the employer nor on any of the grounds that fall within the jurisdiction of the Labour Court. It is an unfair dismissal that falls squarely within the jurisdiction of the DDPR. A determination has to be made whether the respondent in effecting applicant's dismissal met the tenets of substantive and procedural fairness.

The matter is accordingly remitted to the DDPR for its determination.

THUS DONE AND DATED AT MASERU THIS 26TH DAY OF MAY, 2011.

F.M. KHABO
DEPUTY PRESIDENT

L.MOFELEHETSI
MEMBER

I CONCUR

R.MOTHEPU
MEMBER

I CONCUR

FOR THE APPLICANT:

**MR. SEMOLI -TRANSPORT,
SECURITY AND ALLIED
WORKERS' UNION (TSAWU)**

FOR THE RESPONDENT:

**ADV. MABULA - ASSOCIATION
OF LESOTHO EMPLOYERS &
BUSINESS (ALE).**