IN THE LABOUR COURT OF LESOTHO **LC/REV/54/10**

HELD AT MASERU

IN THE MATTER BETWEEN

MPATUOA ELIZABETH MOEKETSI **APPLICANT**

AND

LESOTHO STEEL PRODUCTS (PTY) LTD **1ST RESPONDENT**
THE MANAGING DIRECTOR **2ND RESPONDENT**

JUDGMENT

Dates: 16/02/2011, 01/06/2011
Dismissal – Applicant allegedly terminated for operational reasons but employer pleaded termination by mutual agreement – applicant allegedly employed by respondent for absorption by a company in the process of being formed – Held that the employer of applicant is the respondent with whom she entered into a written contract – Held further that circumstances of the termination of applicant's contract were not of a nature to be classified as one for operational requirements – Even assuming it was operational requirements termination as alleged by respondent the termination was not preceded by consultation – Held that in terms of the termination letter written to applicant, the termination was clearly an unfair dismissal both substantively and procedurally – Quantum and costs reserved.

INTRODUCTION

This case has been dealt with in terms of rule 25(2) of the Rules of the Court which provides that:

> "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….."

In the course of these proceedings, the labour panelist Mr. Makhetha was unable to attend one of the sittings of the court. In consultation with the representatives of the parties the court resolved to proceed with the case in his absence in order to avoid any further delays in finalizing the case.

THE CASE OF APPLICANT

1. The applicant was an employee of the respondent from 2008 to 2009, when she was retrenched. In February 2010 she was again employed by the respondent in terms of a written contract dated 22nd February 2010. Applicant testified that her duties were to assist the Managing Director's Secretary as well as to work as a receptionist. She testified that in May 2010 she was told that a stationary store to be called Pioneer Office National was going to be opened and she was going to be its Manageress.

2. It turned out that the owners of Pioneer Office National were the daughter of the Managing Director of the respondent and her husband. Applicant averred that after she learned that she was going to work for the new office when it commenced operations, she was occasionally requested by the owners to help them do some assignments for the new company. She was however, still being accommodated at Lesotho Steel and still being paid by them. However the owners of the new company promised her that she would formally sign a contract with them in July.

3. Applicant averred further that she completed her four months probation on the 21st June 2010. On Friday 25th and Saturday 26th June, she took two days off to attend to private matters in Johannesburg. She reported back on Monday 28th June and went straight to the new office at the Pioneer Mall as it had started to operate the previous week. She got a phone call from one Dannie Bothma, the son of the Managing Director, who asked where she was. She responded that she was at the new office and he told her to report at Lesotho Steel immediately.

4. On arrival she found him with his sister Barbra who is the co-owner of the office for which she was about to be its employee. She averred that he told her in the presence of customers that she seemed to have too many commitments which put her seriousness with her work into question. He then told her that for this reason she was dismissed and that she should immediately return all property of the company issued to her.

5. Applicant averred that she was surprised and embarrassed why the respondent did not confront her if she was not doing the right thing. She further felt insulted to be confronted and dismissed in the full view of the customers. She stated that she went home to collect the mobile phone and uniform she had been issued and gave them back to Dannie in the afternoon. That same day she was given a letter which confirmed her dismissal. The reason given was that the respondent had no space for her because the management of Office National for whom she had been employed were not happy with her general seriousness when it came to her duties.

6. The letter sets the tone for what later became the defence of the respondent to applicant's claim of unfair dismissal which resulted in the DDPR referring the dispute to this court for adjudication. It is common cause that following her dismissal the applicant referred a dispute of unfair dismissal by the respondent to the DDPR. Applicant's complaint was essentially that the respondent never investigated the accusations leveled against her by her would be employer. She complained further that the alleged lack of seriousness was never communicated to her to enable her to respond.

7. At the DDPR the respondent contended that the applicant was not dismissed and that she was terminated for operational reasons. For that reason the DDPR referred the matter to this court for adjudication. Before this court, respondent contended that they employed applicant for Pioneer Office National an independent entity in the process of being formed. They contended that annexure “MEM1” the applicant’s contract of employment, was never intended to serve as a contract between applicant and the respondent. It was merely intended to record applicant’s personal data and facilitation of salary. Otherwise applicant was to be absorbed by Office National once it became operational.

8. Respondent contended that applicant knew this arrangement, full well. They averred that when management of Office National declined to engage applicant even before they could absorb her, respondent had no alternative but to call her to discuss her affairs. They averred that they informed her of the cancellation of her absorption into the new office and she accepted the cancellation. Respondent went further to say applicant was also “informed that there was no available alternatives as she had just been retrenched….a few months in the past. Applicant accepted this termination and proceeds derived from it in the form of notice money without any quarrel whatsoever.” (see paragraph 2(d) of the Answer).

9. It is apparent from the answer of the respondent that the termination was neither a dismissal nor a retrenchment. That is if the respondent’s answer is to be believed. It was, in their version a mutually agreed separation. If that was the case, one would hardly see the need for the respondent to even bother about alternatives, for the question of alternatives only arises where the termination is for operational reasons.

10. DW1 Barbra Bothma testified that applicant was introduced to her by her father and brother who had both previously worked with her. She testified that according to their schedule they would have conducted her interview between the 15th and the 19th February 2010. She was not however, saying they did the interview on those dates. She testified that the interview was

conducted by her father and her husband in her presence. She averred that she was not enthusiastic about her but her dad and husband convinced her that she should be appointed.

11. She testified that it was agreed that during the time that they would be setting up the business, applicant would work for them from Lesotho Steel which would also pay her salary as the new business did not even have an account at the time. During her spare time she would be requested to assist with secretarial work and other duties of Lesotho Steel. During cross examination it was put to her that the alleged interview was an afterthought as it neither appeared in the founding papers nor was it put to the applicant during cross examination, she could not deny.

12. She was asked if she was aware that applicant signed a contract with Lesotho Steel. She initially said it was not a full contract and that she just filled information to facilitate her payment. When it was put to her that what applicant signed was a contract of employment with Lesotho Steel she said she did not know. It was put to her that to show that applicant was an employee of Lesotho Steel she signed a contract with it (Lesotho Steel), she was paid her salary by Lesotho Steel and her letter of dismissal was written on Lesotho Steel letterhead. She insisted she was employed by her company. She was asked to produce evidence to back her statement and she said she had none.

13. DW2 was Mr. Bothma senior who testified that he and his son Andre approached applicant to come and work for his daughter. He averred that he, his son and daughter interviewed the applicant after which they agreed to employ her for the stationary store. Since the store was not yet functioning it was agreed that she would in the meantime work from Lesotho Steel and that she would be paid by it. When the stationary store commenced operation it would reimburse Lesotho Steel the salaries paid to the applicant.

14. DW2's testimony is in clear contradiction to that of DW1 with regard to the alleged interview held for the applicant in respect of the employment for the stationary store. While DW1 said the interview was conducted by her father and her husband in her presence, DW2 says it was with his son and daughter. That contradiction is material. DW1 ought to know if it was her husband or brother who was present at the interview. In the same way DW2 ought to know if it was his son or son in law who was present. The conflict in the two witnesses' evidence in this regard can only confirm what was put to DW1 by advocate Lesaoana that the whole story about applicant being interviewed for the stationary store job is a fabricated afterthought.

15. To further show that the respondent is trying every trick in the book to evade its contractual obligation towards applicant, DW2 came with yet another innovation and said the arrangement was that Office National would reimburse the respondent the wages paid to applicant before it started to function. Given that the whole arrangement of the alleged employment of applicant for office National is denied and challenged, respondent ought to back its verbal averrements with concrete evidence of the alleged arrangement, especially given that we are here dealing with corporate governance and not mere family relationship.

16. Quite clearly, the applicant was employed by the respondent as annexure "MEM1" shows. The suggestion that the contract form was only filled to obtain personal details and to facilitate salary payment was rebutted by applicant's own testimony that the form was a standard employment contract for all employees of the respondent. She was never contradicted either by cross-examination or any other evidence to the contrary. Our finding does not go to negative respondent's possible noble intentions to transfer applicant to its newly established sister company Office National. But what we are clear about is that up to the time of her termination the applicant was an employee of the respondent.

17. After the close of evidence the court invited the parties to address it on whether this was indeed an operational requirements termination which necessitated the case to have been referred to this court. Respondent's case has been that this was a mutual termination of contract which the applicant had accepted. Of course, the applicant disputes it, but at what point would the mutual termination be a retrenchment if respondent's version is to be believed? Mr. Lebone for the respondent conceded correctly that the alleged operational requirements did not arise. Indeed applicant had already been working for the respondent and was on its payroll for four months. Why would a single weekend expression of dissatisfaction with applicant, by her would be new employers suddenly trigger the need for termination.

18. Even assuming that indeed the exercise was necessitated by operational requirements the manner in which it was approached was primitive. As applicant correctly averred she was not confronted with the allegations to enable her to respond let alone consultation. In her evidence she pointed out that she had for the last four months been gainfully employed as an assistant to the Managing Director's office and serving as a front desk officer. She said she was of the view that she could have still continued in that role as the secretary was overworked. This may or may not be so, but these are the options that ought to have been explored during consultation had it been carried out.

19. I had initially been of the view that this matter be referred back to the DDPR for arbitration. However, I have considered that this court has heard full evidence of both parties and has sufficient material to decide this case either way. To refer it back at this stage of the proceedings will clearly prejudice both sides as they've given their full testimony. The evidence we have heard shows that the applicant's dismissal by the respondent did not follow proper procedure of consulting with her on the concerns raised and affording her the opportunity to rebut the allegations. The letter of termination does not support the respondent's case that the separation was mutual agreement either. It is clearly a dismissal, which we find on the

basis of the evidence led that it was unfair both procedurally and substantively given that the allegations against applicant were not tested.

20. I asked the representatives of the parties to address us on the issue of costs in the light of the fact that this matter ought to have been disposed of at arbitration. Mr. Lebone for the respondent contended that each party ought to bear its own costs. He contended that they ended up raising the defence of retrenchment because applicant refused to join Office National in the proceedings and insisted on suing the respondent alone. The court asked him if it is his submission that the whole issue of operational requirements was only coined simply because applicant insisted she was an employee of Lesotho Steel and not Pioneer Office National. He agreed that was the reason. It is unfortunate that, this case had to be removed from the proper jurisdiction simply to satisfy respondent's false and misleading interpretation of a clear document which employed the applicant to say that she was employed by some other company.

21. Ms. Lesaoana argued that applicant followed a proper procedure from the beginning. She contended that infact the respondent misled the DDPR to believe that this was a case of operational requirements which they have since failed to substantiate. She averred that respondent ought to bear the costs applicant had had to incur through instructing counsel when this matter was referred to this court. We are of the view that she is correct. Moreover the court ought to take measures to arrest the rot of parties evading the appropriate forum for deciding their claims by raising deliberately false and misleading grounds that place the dispute outside the jurisdiction of what is in fact an appropriate forum.

22. The termination of applicant's contract totally violated all the principles of fair dismissal. If she had sought reinstatement she would be entitled to it, unless it was found to be impracticable. She has however sought compensation of 12 months. She did not however give any evidence of mitigation which she is in law obliged to do. For this reason the court reserved the question of quantum until it has heard evidence of steps taken to mitigate

applicant's loss. Equally reserved is the question of costs now that the matter is no longer going to be remitted to the DDPR which was the main driving reason for the consideration of costs.

THUS DONE AT MASERU THIS 9TH DAY OF AUGUST 2011

L. A. LETHOBANE
PRESIDENT

J. M. TAU **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MS. LESAOANA**
FOR RESPONDENT:	**MR. H. LEBONE**