

HELD AT MASERU

In the matter between:

KHAUHELO MOENO

APPLICANT

And

SECURITY LESOTHO (PTY) LTD

RESPONDENT

JUDGMENT

Date: 7th May 2013

Claim for unfair dismissal for participation in an unlawful strike. Respondent failing to oppose the claim – Applicant filing an application for default judgment. Application not being opposed – Court proceeding on the basis of the unchallenged evidence of Applicant – Court finding merit in the matter and granting judgment. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This dispute involves a claim for unfair dismissal for participation in an unlawful strike. It was heard on the 7th May 2013 in default and judgement was reserved for a later date. Facts surrounding this matter are basically that Applicant referred a dispute with the DDPR, in terms of section 227(5) of the *Labour Code (Amendment) Act 3 of 2000*. Conciliation having failed, the matter was then lodged with this Court for determination. A copy of the conciliation certificate forms part of the record as “NP3”
2. In this application, Applicant seeks to have her dismissal declared unfair on both procedural and substantive grounds. She is asking for compensation of 24 months wages from the time of her dismissal. Respondent having failed to file its intention to oppose the originating application and the time limits having lapsed, Applicant filed an application for default

judgment. This application has similarly not been opposed and was as such heard on this basis.

SUBMISSIONS AND ANALYSIS

3. Advocate 'Nono submitted on behalf of Applicant that she was employed on the 21st January 1998 in the position of a Security Guard, until her dismissal on the 22nd February 2011. A copy of the letter of dismissal is annexure "NAP1" to the originating application. At the time of her dismissal, she earned a monthly wage of M1,193.00.
4. Circumstances leading to her dismissal are that sometime in December of 2010, they were informed, as staff, that they would not be paid their December wages in time. In reaction to this notice, all employees arranged to meet the Respondent management to both seek clarity on the matter as well as to demand immediate payment of their wages. On the appointed day, she could not join her fellow employees as she was on duty. A copy of the clock sheet was annexed to the originating application as "NAP4."
5. Notwithstanding her non-participation in an attempt to meet Respondent management, she was called to a hearing on charges of participation in an unlawful strike. A copy of the charge letter was annexed to the originating application as "NAP2". When the letter was handed over to her, she indicated that certain issues were not clear and requested that they be clarified. However, her request was ignored as the matter proceeded in her absence and a decision was taken to dismiss her. On the day of the hearing, she had been placed on duty and thus could not attend her hearing. In view of her situation, a recommendation was made by an unnamed person at the hearing that it be postponed. However, the recommendation was unfortunately rejected by the chairperson. A copy of the recommendation is annexed as "NAP6."
6. Advocate 'Nono submitted that the dismissal of Applicant was unfair as she was clearly dismissed for something she had not done. Further, that she was denied the opportunity to defend herself as on the date of hearing she was placed on duty. Furthermore, Advocate 'Nono submitted that the person who presided over Applicant's case and the person who charged her

were one and the same as annexure “NAP2” and “NAP5” bear reference. He argued that this is irregular and unfair.

7. It is trite law that where one of the parties has not challenged the evidence of another, then the unchallenged evidence is to be taken as true and an accurate narration of what took place (see *Theko vs. The Commissioner of Police & another* 1991 – 1992 LLR-LB 239 at 242). From the unchallenged evidence of Applicant, it is clear that it could not be valid to conclude that she was part of the group that downed tools to compel the employer to pay their wages. The uncontroverted evidence shows that she was on duty at the time of the incident.
8. Further, Applicant could have been expected to attend her hearing as Respondent had placed her on duty on the said day, at a post at Evergreen. This is reflected in “NAP6”. It is clear from the conduct of Respondent that its intention was not to afford Applicant a hearing. Applicant’s failure to attend was wholly attributable to Respondent and as such Applicant cannot be held to acts not of her making or those beyond her control.
9. Furthermore, it is trite law that a man cannot be a judge in his own cause. This is commonly known as the *Nemo iudex in causa sua* (see *Lesotho Evangelical Church vs. John Matšaba Bokako Nyabela CIV/APN/150/1980*). This essentially means that one complaining cannot be the trier in their own complaint. *In casu*, We have satisfied ourselves that the person who signed as the charging officer and the presiding officer in the actual hearing are one and the same person. The signatures on “NAP2” and “NAP5” bear proof. That being the case, a breach of the above principle occurred as the complaint in Applicant’s case was also the trier. In Our opinion, this also explains the keenness on the part of the presiding officer in Applicant’s case to have the matter proceed in her absence despite the fact that she was on duty. Consequently, this was indeed an irregularity on the part of the Respondent.

FORMULATION OF AWARD

10. In view of our findings above, We shall now deal with the remedy sought. Applicant had requested payment of her 24 months wages for both the procedural and substantive

unfairness of her dismissal. In justification of her prayer, it was submitted that she struggled to secure employment which she was only able to secure after May 2011. Even then, in her new employment, she is earning below what she earned with the Respondent as she is being paid at a minimum wage rate for security officers. It was further submitted that this Court order payment of the full compensation amount in four instalments commencing July, and payable on or before the end of every month until the whole amount is fully paid up. The rationale behind this requests was that the 24 months wages may be too much for Respondent to pay in full within 30 days, given its current financial status.

11. The 24 months period claimed runs from the date of dismissal, which is February 2011 to February 2013. It is clear from the submissions of Applicant that she was fully out of employment for at least 2 months from February to April 2011. This being the case, We award her the full wages for this time. From May 2011 to February 2013, We will only award her the difference between her current wages and the wages that she earned while in the service of Respondent, if any. The intention in awarding the difference is that, in terms of section 73 of the *Labour Code Order 24 of 1992*, compensation is not intended to unfairly enrich either party, but rather to restore a party to their initial position but for the dismissal.

12. Our computation of the Applicant's entitlement for the unfairness of her dismissal is as follows,

2 month's salary = M1,193 X 2 = M2,386.00

In terms of the *Labour Code (Wages Order) of 2012*, the current minimum wage rate for security officers is M1,474.00. This amount is far above the Applicant's last wages with the Respondent. This being the case, it is clear that Applicant has not lost out on any income save for the two months period between February and April 2011. Consequently, We make an award of 2 months wages in the sum of M2,386.00.

13. It is the obligation of this Court to ensure that the rules of procedure are followed in dealing with labour disputes. Failing to do so would be tantamount to condoning a breach of both the labour laws as well as the rules of natural justice. These rules are intended to guide proceedings of this nature. As a

result, We find it imperative to punish those who contravene the procedural requirements. The aim is to discourage that behaviour from continuing.

14. From our analysis above, We have found that the Respondent has acted in breach of the procedural rules in dismissing Applicant. This has been clearly reflected by evidence in two instances, that is denying her the right to be heard and acting contrary to the principle of *Nemo judex in casu sua*. As We have already indicated, the intention behind awarding compensation for procedural irregularity in an unfair dismissal claim, is preventative in nature.
15. In Our view, the observance of the rules of natural justice is paramount to the attainment of fairness and equity which this Court jealously protects. As a result, failure to recognise the right to a hearing and the observance of the *nemo judex* principle is an obstruction to the attainment of fairness and equity. Consequently, We find that an award of 3 months' salary would be sufficient punishment to discourage Respondent from ever contravening the procedural requirements imposed by law in cases of this nature. The computation of the 3 months salary is as follows,
 $M1,193.00 \times 3 = M3,579.00$.
16. Although Applicant had prayed that the judgment amount be payable in four instalments, We direct that it be paid in full within 30 days of receipt of this judgement. Our conclusion is based on the fact that a request for instalment payment was made in anticipation of the Court making an award of 24 months wages which would have been about four times the amount ordered in favour of Applicant. Having refused to award 24 months compensation, We feel that it would be fair and equitable if payment is made as directed.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

- a) That the dismissal of Applicant is unfair both substantively and procedurally;
- b) That Respondent pay Applicant an amount of M2,386.00 being compensation for lost earnings;
- c) That Respondent pay Applicant an amount of M3,579.00 being compensation for the procedural unfairness of his dismissal;
- d) That this order be complied with within 30 days of receipt of the judgment; and
- e) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF MAY 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (AI)
THE LABOUR COURT OF LESOTHO**

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**ADV. 'NONO
NO APPEARANCE**