

**HELD AT MASERU**

**In the matter between:**

**MABOKANG MOHAFA**

**APPLICANT**

**And**

**GOOD TRADING SUPERMARKET (PTY)  
THE DDPR**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Hearing Date: 14<sup>th</sup> November 2013*

*Claim for unfair dismissal for operational reasons. Matter not opposed. Court directing that it proceed unopposed. Court finding merit in the claim and awarding reinstatement in terms of section 73 of the Labour Code Order 24 of 1992. No order as to costs being made.*

**BACKGROUND OF THE ISSUE**

1. This is a claim for unfair dismissal for operational reasons. It was heard on this day and judgement was reserved for a later date. Application was represented by Mr. Letsie and there was no appearance for 1<sup>st</sup> Respondent. The brief history of the matter is that Applicant had referred a claim for unfair dismissal with the 2<sup>nd</sup> Respondent, challenging both the substantive and procedural fairness of her dismissal. It was 1<sup>st</sup> Respondent's defence before the 2<sup>nd</sup> Respondent that Applicant had been retrenched. The matter was duly conciliated upon and conciliation having failed, it was referred to this Court for adjudication.
2. In terms of the record of this Court, the matter had not been opposed, at least formally as neither an intention to defend the matter nor an opposing affidavit had been filed, to both the main claim and the request for default judgment. However, in the hearing, a certain Advocate Monate appeared and

purported to be representing the 1<sup>st</sup> Respondent. He sought a postponement arguing that he had just been appointed to appear on behalf of 1<sup>st</sup> Respondent in the proceedings and needed time to familiarise himself with the matter.

3. Both the application for postponement and the appearance of Advocate Monate were strongly opposed by Mr Letsie. His main contention was that Advocate Monate had no prove of authorisation to appear as he had no authority to represent. He added that the fact that no one from 1<sup>st</sup> Respondent was in attendance, to verify the appointment of Advocate Monate, further put his claim of authorisation into question. Further that the matter was not opposed and that the granting of a postponement would not be appropriate in the circumstances. He thus prayed for the exclusion of Advocate Monate and for the matter to proceed in default.
4. We then made a ruling in favour of Applicant and excluded Advocate Monate from the proceedings. We were in agreement with Mr. Letsie that the absence of both the authority to represented and anyone from the 1<sup>st</sup> Respondent was a fatal blow to Advocate Monate's claim. We further found that the absence of an authority to represent denied Advocate Monate the right to appear and any rights that flow from that right, such as the right to request a postponement of the matter. Further that given the fact that the matter was not opposed, it would only subject Applicant to an unnecessary prejudice. We also found these factors to constitute a waiver of the right to be heard by 1<sup>st</sup> Respondent, as no reason was advanced for its failure to oppose the matter or to even indicate its intention to oppose same. Having made Our ruling We directed that the matter proceed by default.
5. At the commencement of the proceedings, We raised a point of law that there had been a breach of the rules of this Court, in particular Rule 3 thereof. In raising this point of law, We were guided by the authority in *Thabo Mohlobo & others v Lesotho Highlands Development Authority LAC/CIV/A/02/2010*, where the Court relied on a quotation from *Casa v Tao Ying Metal Industries & 3 others 2009 (2) SA CC*, in the following,  
“where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what

*that law is, a court is not only entitled, but is in fact also obliged, mero muto to raise that point of law and require parties to therewith.”*

6. On the premise of the above authority, We then proceeded to explain that in terms of that Rule, trial proceedings, as *in casu*, must be by way of an originating application and not a notice of motion. Mr Letsie conceded that had been a breach but stated that it was *bona fide* mistake on their part and requested the court to condone same in terms of Rule 27 of its Rules. He further requested the court to consider the content over the form and added that the content pleaded makes out a case for the relief sought.
7. As a Court of equity and fairness, that is enjoined to ensure that substantial justice is attained, We resolved to condone the form used and concentrated on the content. We have confirmed and satisfied ourselves that the pleadings made out a prima facie case for the relief sought. We accordingly directed that the matter proceed in evidence. It was on this basis that the evidence of Applicant was heard, and Our judgment is in the following.

### **EVIDENCE AND ANALYSIS**

8. Applicant testified under oath that she was employed by 1<sup>st</sup> Respondent from the 2<sup>nd</sup> April 2007 until her dismissal on the 1<sup>st</sup> October 2012. At the time of her dismissal she earned M1, 288.00 and occupied the position of a stock packer. On the date of her dismissal, she was just summarily informed by her Chinese supervisor, known by the names of Majersy, that the 1<sup>st</sup> Respondent lawyer had given them instructions to dismiss her.
9. Subsequently to her dismissal, she had then referred the matter to the 2<sup>nd</sup> Respondent where she learned for first time that her dismissal was for operational reasons. She prayed for an order of reinstatement in terms of section 73, failing which an order for an order for payment of compensation in the amount equal to 12 months. Applicant also prayed that 1<sup>st</sup> Respondent also be order to pay her unpaid leave and severance pay. She further testified that she has made attempts to seek alternative employment but to avail.

10. Mr. Letsie submitted that Applicant had made out a case for the relief sought. He went further to submit that clearly the 1<sup>st</sup> Respondent acted contrary to the law, in that it did not follow the correct procedure for the dismissal of Applicant. It was emphasised that Applicant was not even consulted prior to her dismissal which is one of the primary requirements in a case involving a dismissal for operational reasons. It was added that the mode of termination of Applicant does not even fit within the procedural requirements of any of the other two grounds of dismissal recognised by the laws of Lesotho, other than for operational reasons.
11. For a dismissal for operational reasons to be fairly effected, there are certain substantive and procedural requirements that must be met (see section 19 of the *Labour Code (Codes of Good Practice) Notice of 2003*). of relevance to the issue at hand, are the provisions of section 19 (4) of the Codes of Good Practice (*supra*). In terms of this section, an employee must be consulted prior to her dismissal for operational reasons. We have highlighted the importance of this exercise before in a plethora of case (*see Thapelo Ntoko v Jikelele Services LC/42/2013*) and need not reiterate, safe to emphasise that the exercise determines the continuation or termination of an employment relationship of parties.
12. We have considered the manner in which the termination of Applicant was effected. We have noted that it was in total violation of the *Codes of Good Practice (supra)*, and therefore unfair. Applicant has indicated her desire to be reinstated in terms of section 73 of the *Labour Code Order 24 of 1992*, as her principal remedy. We have not found any circumstances that would make it impracticable particular given that nothing in the evidence suggest a breakdown of the employment relationship. We therefore find that Applicant is deserving of the award she prayed for.
13. We wish to comment that Applicant had referred a claim for unfair dismissal on the ground of operational reasons. As a result, it was never part of her claim that she was owed any leave or severance payment. At best, Applicant could only succeed in so far as a claim for severance payment is concerned. Even so, this Court would only consider it in

making an award for compensation *in lieu* of reinstatement, and not as a claim on its own, alongside the unfair dismissal claim. Consequently, we decline to make any orders in relation to these two claims.

**AWARD**

We therefore make an award in the following terms:

- a) That Applicant be reinstated into her former position on the 1<sup>st</sup> January 2014, without loss of her remuneration, seniority or other entitlements or benefits which she would have received but for the unfair dismissal.
- b) That the part of the award sounding in money must be complied with within 30 days of the delivery of this judgment.
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 13<sup>th</sup> DAY OF DECEMBER 2013.**

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

**Mrs. THAKALEKOALA  
MEMBER**

**I CONCUR**

**Mrs. MALOISANE  
MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENT:**

**MR. LETSIE  
NO ATTENDANCE**