

**HELD AT MASERU**

**In the matter between:**

**THABO MOLEKO**

**APPLICANT**

**And**

**JIKELELE SERVICES**

**RESPONDENT**

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**JUDGMENT**

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*Date: 16<sup>th</sup> October 2013*

*Claim for unfair dismissal. By agreement of parties, Court holding that Applicant's claim falls within arbitrable disputes before the DDP in terms of section 226 (2). By agreement of parties, Court finding that Applicants were dismissed for poor work performance. Court further directing that Applicant's claims be determined by the DDP in terms of section 226 (2). Applicant requesting an award of costs against Respondent – claim being based on alleged misrepresentation of a defence. Respondent also claiming costs of frivolity in bring this claim. Court not finding any misrepresentation on the part of Respondent – Court also not finding any frivolity on the part of Applicant. No order as to costs being made.*

**BACKGROUND OF THE ISSUE**

1. This dispute involves a claim for unfair dismissal. It was heard on this day and judgment was reserved for a later date. Applicant as represented by Ms. Maneo Mosola from CMQ, while Respondent was represented by Adv. Hlalele Tšolo from the Association of Lesotho Employers. The background of the matter is that Applicant had initially referred a claim for unfair dismissal with the DDP. Among his claims was that he did not know the reason for his dismissal. After a futile conciliation process of the matter, a report was issued in terms of section 227(5) of the *Labour Code Order 24 of 1992* as amended, referring the matter for adjudication before the Labour Court.

2. During the adjudication process, it became apparent that the actual reason for the dismissal of Applicant was for poor work performance. Consequently thereto, parties agreed that this matter should be remitted back to the DDP, as the claim falls squarely within its jurisdictions, in terms of section 226 (2) of the *Labour Code Order (supra)*. However, Applicant insisted on an award of costs being made against Respondent, on the ground that it was their misrepresentation of facts, in defence, that led to the matter being referred before this Court. The suggestion was rejected by Respondent who claimed that the learned Arbitrator misinterpreted their defence.
3. The following facts were common cause and as constitutive of what took place before the DDP. Firstly, that Respondent was represented by Mr. Billie Horn, its Manager, who is not trained in law. Further, that in the conciliation/arbitration process, he had indicated that Applicant was on probation at the time of his dismissal. Furthermore, that Applicant was dismissed because he had performance poor and that at the time of his dismissal, Respondent was undergoing the processes of retrenchment. On the basis of these common cause facts, We now proceed to deal with the issue of costs.

### **SUBMISSIONS**

4. Applicant argued that an award of costs must be made against Respondent. It was submitted that this matter was referred for adjudication because, Respondent had created an impression that the dismissal of Applicant was occasioned by the employers operational requirements, hence the report of the learned Conciliator. It was argued that clearly, this matter would not have been before this Court if it were not for the impression created. It was added that by creating the said impression, Respondent caused Applicant to incur costs of having the matter lodged with this Court.
5. In reply, Respondent argued that an award of costs should instead be made against Applicant for bringing this claim before the Labour Court. He argued that clearly, the learned Conciliator misinterpreted the defence raised by Respondent. It was added that Respondent did not allege that the dismissal was based on operational requirements but rather stated that Applicant was dismissed for poor work performance at the time

that the Respondent was also engaged in the retrenchment process. It was further argued that it would thus be unfair to punish Respondent for an error on the part of the learned Conciliator.

6. We have often stated that the Labour Court is a court of equity and fairness that strives towards the advancement of economic development, the attainment of social justice and labour peace as well as the promotion of workplace democracy. Owing to these said, the Labour Court only makes an award of costs in circumstances of extreme abuse of its processes. *In casu*, it is clear from the common cause facts that Respondent never claimed operational requirements as the reason for the dismissal. Rather, Respondent went further in explaining the reason for Applicant's dismissal to add that his termination coincided with the retrenchment process.
7. This above, does not in any way suggest that Applicant was dismissed for operational reasons. The issuance of the report of non-resolution and referral for adjudication was a clear error on the part of the Conciliator. Therefore an award of costs against Respondent would be inappropriate, in the same manner as would be an award of costs against Applicant. Having been served with the report in terms of section 227 (5) of the *Labour Code Order (supra)*, Applicant had no option, as there are no procedures laid down in law, save to refer his claim with this Court in line with the report.

### **AWARD**

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

- a) That by agreement, Applicants were dismissed for poor work performance;
- b) That Applicants claim is remitted back to the DDPR to be determined in terms of section 226 (2); and
- c) No order as to costs is made.

**THUS DONE AND DATED AT MASERU ON THIS 28<sup>th</sup> DAY OF  
OCTOBER 2013.**

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

**Mr. S. KAO  
MEMBER**

**I CONCUR**

**Mrs. M. MALOISANE  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**MS. MOSOLA - CMQ  
ADV. TŠOLO - ALE**