IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/51/2012**

In the matter between:

FACTORY WORKERS UNION (FAWU)
(O.B.O MATŠEPO MOHALE AND OTHERS **APPLICANT**

And

TZICC CLOTHING
MANUFACTURERS (PTY) LTD **RESPONDENT**

JUDGEMENT

Date: 6th and 20th June 2013
Claims for discrimination as a species of unfair labour practice. Respondent neither opposing the claims nor attending the hearing on the scheduled date. Court proceeding with the matter in default of Respondent. Court proceeding on the basis of acceptance of the unchallenged evidence of Applicants. Court finding that Applicants have failed to establish a case for discrimination in terms of section 196(2). Court further finding that Applicants are not entitled to remedies flowing from section 196(2), on account of failure to establish their claim. Applicants claims being dismissed. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. These are claims for discrimination in employment in terms of section 196(2) of the *Labour Code Order 24 of 1992*. On the first date of hearing, Applicant union made an application for its substitution by Applicants in their personal capacities. The application was duly granted, in default of Respondent who had failed to attend. The matter was thereafter postponed to the 20th June 2013 for hearing in the merits. Still on this day, Respondent failed to attend and in the same manner the matter proceedings into the merits in its default.

2. At the commencement of the proceedings, Applicant indicated that they would only lead the evidence of one witness, by the

names of Nthabiseng Monkhe, as they had filed on record affidavits in terms of which the rest of the Applicants have undertaken to be bound by the evidence of the said Monkhe. Having accepted proposed approach of Applicants, We heard the matter and Our judgment is therefore in the following.

EVIDENCE

3. Applicants testified under oath that prior to their discrimination, they had initiated proceedings with the DDPR wherein they had claimed, against Respondent, payment of their wages while on a lay off. The DDPR had then made an award in their favour and directed Respondent to pay the said wages. Respondent had then promised Applicants that it would pay them the awarded amounts on the 3rd August 2012. However the monies were not paid as promised.

4. On the 9th August 2012, employees of Respondent were all told that they would be required to work both overtime and on rest days beginning the 11th August 2012. On the 10th August, Applicants approached the Respondent personnel to follow up on their awarded amounts, as payment had still not been made. The concerned issue was not addressed by the personnel officer, as the Applicants were rather accused of playing at the personnel offices.

5. When Applicants reported for work on the 11th August 2012, as earlier directed, they were refused entry into the workplace and told to return to their homes, while the rest of the Respondent employees were admitted into the workplace. It was explained to Applicants that they had been returned for both initiating unpaid lay off proceedings with the DDPR against Respondent and further demanding the awarded wages on the 10th August 2012. They were informed that they would not be allowed to work both overtime and on rest days as their punishment. The punishment only spanned for a month as they were then allowed to work both overtime and on rest days from the 10th September 2012.

6. Applicants claim that the conduct of Respondent in the period between the 11th August to the 10th September 2012 was a discriminatory unfair labour practice in terms of section 196(2) of the *Labour Code (supra)*, as they were unfairly denied the right to work both overtime and on rest days, without

justifiable cause. They thus claim remedies in terms of section 202(2)(b) of the *Labour Code (supra)*, that Respondent be ordered to discontinue from engaging in such discriminatory acts and to treat its workers equally, that Respondent be committed and punished for an unfair labour practice by being ordered to pay Applicants the money that they would have accrued in overtime and rest days, during the period in issue.

7. Applicants alleged that they earned monthly salaries of M980.00 per month for which they worked for 8 hours a day. Further that in the period in question, they would have worked for 8 weekly rest days and overtime of 8 hours on Saturdays and 7 hours on Sundays, for the entire period in issue.

ANALYSIS

8. It is undoubtful that Applicants were unfairly treated by the Respondent in excluding them from working both overtime and rest days in the period in issue. This is clear from the unchallenged evidence of Applicants, which as a matter of principle, this Court is obliged to accept as true and conclusive of the factual position of events of the days in issue. The question is whether Applicants were discriminated against in terms of section 196(2) as they claim and whether they are entitled to remedies under section 202 (2) (b) of the *Labour Code (supra)*. We will deal with these issues in the succeeding part of Our judgment.

9. Section 196(2) of the *Labour Code (supra)* provides as follows,

"196. Discrimination against union members and officials,

…

(2) Any person who seeks, by intimidation, threats, dismissal, imposition of a penalty, giving or offering to give a wage increase, or any other means, to include an employee to refrain from becoming or to refrain from continuing to be a member, officer or trustee of a trade union shall commit an unfair labour practice."

10. It is clear from a simple reading of the section in issue that an unfair labour practice in the form of discrimination applies in respect of issues involving discriminatory acts against union members and officials, to compel them to disassociate from unionisation. In Our view, this is not the case of Applicants as their claim has nothing to do with the intend on the part of the

Respondent to compel them to disassociate from their union. Consequently the Applicants have failed to prove a case for discrimination in terms of section 196(2).

11. In view of Our finding above, the right of Applicants to a remedy under section 202(2)(b) of the *Labour Code (supra),* also falls off for a simple reason that a remedy under this section is depend upon there being a breach in terms of section 196. The provisions of section 202(2)(b) are as follows,

"202. Power of Court to make orders

…

(2) Where the Court finds that a person has engaged in an unfair labour practice under section 196 of the Code which involves the termination of employment of an employee or the alternation of his or her employment or of conditions of employment, the Court may, if it thinks fit, make an order requiring the employer –

(a) …

(b) to pay the employee such sum as the Court considers just and equitable in all the circumstances.

AWARD

We therefore make an award in the following terms:

a) That Applicants claims are dismissed; and
b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 17th DAY OF APRIL 2014.

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

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

Ms. P. LEBITSA **I CONCUR**
MEMBER

FOR APPLICANTS: **ADV. RASEKOAI**
FOR RESPONDENT: **NO ATTENDANCE**