

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/76/2013

IN THE MATTER BETWEEN

‘MAKAMOHELO MAKAFANE

APPLICANT

AND

**ZHONGTIAN INVESTMENT (PTY) LTD
DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Claim for unfair dismissal based on the employer’s operational requirements. Respondent representative withdrawing in the course of the proceedings – Court finding withdrawal to be malicious and directing that the matter proceed uncontested. Court finding that dismissal of Applicant to have been unfair and ordering reinstatement in terms of section 73(1) of the Labour Code order 24 of 1992. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal based on the operation requirements of the employer. The claim was initially referred to the Directorate of Dispute Prevention and Resolution (DDPR) for resolution. Conciliation having failed the matter was referred to this Court for resolution by adjudication. On the first date of hearing, the matter was postponed to make room for the subpoena of witnesses to come and testify on the real reason for the dismissal of Applicant. It had appeared that whereas Respondent had claimed operational requirements, Applicant claimed to have been dismissed due to her pregnancy.
2. On the next date of hearing, neither of parties nor the witnesses turned up. As a result, We dismissed this matter for

want of presentation. Subsequent thereto, Applicant filed an application for reinstatement of the matter, and had the matter set down for hearing on this day. Both parties were in attendance and they presented their agreement to the effect that the reinstatement application be granted and that the Court hear the matter in the merits. Having considered the application, We found merit in it and granted same. Thereafter, We directed parties to proceed to address the merits.

3. At the commencement of the hearing in the merits, Advocate Monate for Respondent indicated that he would be withdrawing from these proceedings as Respondent representative, if Applicant was no longer going to call his witnesses from the Labour Department in Qacha's Nek. He stated that he only came prepared to deal with the evidence of these witnesses and nothing further.
4. Mr. Letsie for Applicant, responded that the Labour officers were not his witnesses and as such he did not need them for his case. He indicated that if Advocate Monate withdrew his representation, he insisted on the matter proceeding mainly for two reasons. Firstly, that Applicant, who is still unemployed to this day, travelled all the way from Mokhotlong to attend these proceedings. Secondly, that Respondent had failed to attend these proceedings yet they are trial proceedings.
5. On the strength of the submissions of Applicant We noted the withdrawal and directed that the matter proceed into the merits. We also concluded that the withdrawal was malicious and only meant to frustrate the proceedings. The reason behind the withdrawal was that because Applicant would no longer call witnesses from Labour Offices in Qacha's Nek, Advocate Monate was withdrawing. The reason was not that Respondent needed those witnesses and/or their testimony in its defence. If this had been the case, We may have been influenced to postpone the matter, which in this case was not even the Respondent's wish. In view of this said the matter proceeded unopposed in the merits.

MERITS

6. Applicant testified that she was employed by Respondent on the 1st November 2007 until her dismissal on the 24th October 2012. At the time of her dismissal, she earned M1,366.00 per month. She claims that she was unfairly dismissed on account of her pregnancy. She testified that prior to her termination, she had handed over to Respondent a letter from the Qacha's Nek Hospital. The contents of the letter were that Applicant had been diagnosed pregnant and that she would be required to attend monthly clinics until she delivered. The letter was handed in and marked A1.
7. Thereafter, on the 24th October 2012, Respondent dismissed her, claiming that it would not work with her on account of her pregnancy. Since her employer dismissed her, she has remained unemployed to date. She asked for reinstatement without loss of earnings or alternatively compensation of 12 months wages, in the event of the Court finding her reinstatement impractical.

SUBMISSIONS

8. Mr. Letsie submitted that the evidence had established that the dismissal of Applicant was unfair, in that she was retrenched on account of her pregnancy and not on account of the operational requirements of the business, as the Respondent has attempted to suggest. He argued that the laws of Lesotho prohibit termination of employment on account of pregnancy. He prayed that the dismissal of Applicant be found to have been unfair and that she be reinstated or compensated as she had prayed.

ANALYSIS

9. The Labour Code Order 24 of 1992, provides for circumstances under which an employee may be dismissed. Section 66(1) thereof provides that,
“(1) An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination, which reasons is –
(a) Connected with the capacity of the employee to do the work the employee is employed to do (including but not

- limited to an employee's fraudulent misrepresentation of having specific skills required for a skilled post);*
- (b) Connected with the conduct of the employee at the workplace; or*
- (c) Based on the operational requirements of the undertaking, establishment, or service.”*

10. The above notwithstanding, subsection (3)(d) thereof provides that,

“The following shall not constitute valid reasons for termination of employment –

(a)...

(b)...

(c)...

(d) Race, colour, sex, marital status, pregnancy, ...”

11. In essence, section 66(1) r/w (3)(d) provide that whereas an employer may terminate an employee due to operational requirements of its business, but such reasons should not be premised on the pregnancy of an employee. In other jurisdictions, this type of dismissal is tagged an automatically unfair dismissal and is equally shunned upon. The reason is not hard to find as this type of dismissal carries an element of discrimination, the freedom against which is protected by the supreme law of this Kingdom, the Constitution of the Kingdom of Lesotho. In view of this said above, We find that the dismissal of Applicant was unfair.

12. Applicant has asked to be reinstated back to her former position without loss of earnings, entitlements, seniority or other benefits, which she would have received had there been no dismissal. She has therefore asked for a remedy in terms of section 73(1) of the *Labour Code Order (supra)*. This remedy is awarded,

“... if the employee so wishes, The Court or arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.”

In casu, Applicant wishes to be reinstated. Further no evidence has been presented by Respondent to show impracticality of reinstatement. Consequently, We award reinstatement without loss of earnings.

COMPUTATION OF AWARD OF LOST EARNINGS

Salary per month: M1,366-00
Date of termination: 24/10/2012
Date of reinstatement: 01/09/2014
Period of lost earning: 22 months
Entitlement: M1,366.00 X 22 = M30,052-00

AWARD

We therefore make an award as follows:

- (1) The dismissal of Applicant is unfair;
- (2) The Applicant be reinstated back to her former position, with effect from 1st September 2014, without loss of earnings, entitlements, seniority or other benefits she would have received had there been no dismissal.
- (3) Respondent to pay Applicant lost earnings in the sum of M30,052-00 within 30 days of receipt herewith.
- (4) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF JULY 2014

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

MISS. LEBITSA

I CONCUR

MRS. RAMASHAMOLE

I CONCUR

**FOR APPLICANT :
FOR RESPONDENT :**

**MR. LETSIE
ADV. MONATE**