

IN THE LABOUR COURT OF LESOTHO

HELD IN MASERU

LC/87/13

IN THE MATTER BETWEEN

KALI MOFOSI

APPLICANT

AND

FORMOSA TEXTILE CO. (PTY) LTD

RESPONDENT

JUDGMENT

Claims for unfair dismissal allegedly for participating in a strike. Court mero motu raising a point in limine on its jurisdiction over the Applicant's claim. Court finding that the circumstances of Applicant are not within section 226(1) but are infact within section 226(2) of the Labour Code Amendment Act 3 of 2000. Court declining jurisdiction and remitting the matter to the DDPR for arbitration, with specific terms. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal allegedly for participation in a strike. The brief background is that Applicant took part in a strike at the Respondent place of employment. It is alleged that during the strike he engaged into acts of intimidation against his fellow employees. He was charged, found guilty and dismissed.
2. Unhappy with his dismissal, Applicant referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated upon at the end of which it remained unresolved. The learned Arbitrator, upon the advice of parties that the dismissal was for strike related misconduct, issued a certificate of non-resolution and referred the matter for adjudication by this Court.
3. At the commencement of the proceedings, and having earlier conscientised parties, We *mero motu* raised a *point in limine* regarding this Court's jurisdiction over the Applicant's claim. Applicant's claim is that he was dismissed for intimidating his fellow employees during a strike action. He specifically challenges both the substantive and procedural fairness of his dismissal. We were addressed on the *point in limine* and Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. Applicant's case is that this Court has jurisdiction over his claim in terms of section 226(1)(c)(1) of the *Labour Code*

(Amendment) Act 3 of 2000. He states that he was dismissed for his role in the strike action. He submitted that participation means taking part or a role, and that his alleged role of intimidation falls within the scope of section 226(1)(c) (1).

5. He specifically submitted that it is alleged that he conducted himself contrary to the strike rules. This being the case, the conduct he is charged with relates to a strike action and that as such the dispute falls within the exclusive jurisdiction of the DDPR. He added that the Rule in issue is Rule 10 of the Strike Rules, and it provides that striking employees shall not intimidate the employees who are not striking.
6. When asked about the status of the strike rules *vis-à-vis* the terms and conditions of employment, Applicant conceded that strike rules are part of the terms and conditions of employment of the striking employees and that they become binding on them. It was added on behalf of Applicant that in taking a role in a strike with rules, Applicant was bound by those rules.
7. Respondent answered that strikes are either lawful or unlawful and that where an employee has taken part in an unlawful strike, his/her dismissal is fair, while it is unfair if the strike in which he/she participated was lawful. It was argued that this is the scope of section 226(1)(c) and no more.

8. It was further argued that the word participation relates to taking part in a strike, as Applicant has stated and not what he did in the act of taking part in the strike. It was submitted that *in casu*, Applicant is not complaining about being dismissed for taking part in a strike action but for his misconduct during the strike and that this is not contemplated by section 226(1)(c)(1).

9. It was argued that any conduct against the strike rules amounts to misconduct, and that it therefore entitles the employer to take action. It was added that for the conduct of Applicant to constitute misconduct, it did not need to be contained in the rules of employer. It was prayed that this Court dismiss the Applicant's claim for want of jurisdiction.

10. The provisions of section 226(1)(c)(1) of the *Labour Code (Amendment) Act (supra)* are as follows:

“(1) The Labour Court has the exclusive jurisdiction to resolve the following disputes:

(a) ...

(b) ...

(c) an unfair dismissal if the reason for the dismissal is

(i) for participation in a strike;”

11. Central to the determination of this *point in limine* is what subsection (c)(i), that is, ‘*for participation in a strike*’, means. In essence, We need to first interpret the said subsection if

We are to determine the jurisdictional authority of this Court over Applicant's claim.

12. In Our view, the interpretation given by both parties is correct, at least to the extent that it relates to taking part or playing a role in a strike. This therefore means that We only have a jurisdiction where an employee has been dismissed for taking part or playing a role in a strike. In that type of dispute the issue to be determined is if it was proper for an employee to partake in that strike.
13. As a result, where an employee is dismissed for acts done during a strike, the circumstances of the dispute no longer satisfy what is anticipated by section 226(1)(c)(1). This is the case *in casu*, as Applicant is not complaining about his dismissal for taking part in a strike, but acts committed during a strike. This clearly not in line with section 226(1)(c) (i).
14. In Our view, if the legislature had intended for the scope of section 226(1)(c)(i) to include conduct during strike action, the statute would have expressly stated so. That is, it would have provided not only for participation in a strike but also for other reasons related to a strike. As a result by expressly mentioning '*for participation in a strike*', the legislator expressly excluded other reasons other than participation in a strike (see *Lead Melding Company vs. Richardson 1962*

BLLR 341; Hlatwayo and Others vs. Hein (LCC31/96) [1997] ZALCC).

15. We are fortified in Our finding by the fact that where the legislature intended to expand that scope of the provisions of the law, in the same section, it expressly said so. Evident of this is section 226(1)(c)(iii) which reads as thus:

“(c) an unfair dismissal if the reason for the dismissal is –

(i)...

(ii)...

(iii) related to the operational requirements of the employer.”

16. Clearly in the above provisions, the legislature did not intend to limit the scope of operational reasons to either those economic, technological or structural, but to leave that open to any operational requirements that may compel an employer to terminate an employee.

17. Secondly, We are fortified in Our view by the provision of section 226(2)(d) which reads as thus:

“(2) The following disputes shall be resolved by arbitration

–

(a)...

(b)...

(c)...

(d) an unfair dismissal for any reason other than a reason referred in subsection (1)(c).”

18. Clearly, any reason other than one based on participation in a strike or any other reason under subsection 1(c) does not fall within the jurisdiction of this Court. Therefore, given Our finding that Applicant's dismissal is not based on subsection (1)(c), it follows therefore that it falls within the jurisdiction of the DDPR in terms of section 226(2)(d).

19. We also wish to comment that, as Applicant has accepted, the rules of the strike once drawn and agreed upon, form part and parcel of the terms and conditions of employment of the striking employees. As with any other terms of the contract of employment an employee who acts contrary to them, commits an act of misconduct.

AWARD

In view of this said above, We find as thus:

- 1) That this Court has no jurisdiction over Applicant's claim.
- 2) That Applicant is at liberty to proceed with his claim in terms of section 226(2)(d) of the *Labour Code (Amendment) Act 3 of 2000*.
- 3) That should Applicant elect to have the matter arbitrated, then he must approach the DDPR within 30 days of issuance herewith.
- 4) No order as to costs.

THUS DONE AND DATED IN MASERU ON THE 11th DAY OF MAY, 2015.

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

MRS. MOSEHLE

I CONCUR

MRS. THAKALEKOALA

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:
RAFONEKE**

**ADV. KOTO
ADV.**