IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/28/2015**

IN THE MATTER BETWEEN

TEBOHO MAEMA **APPLICANT**

AND

THE ROSEHIP COMPANY **RESPONDENT**

JUDGMENT

Claim for unfair dismissal on grounds of operational requirements of the employer. An attorney seeking postponement of the matter without proof of authorisation. Court finding that attorney has no right of appearance and rejecting the application for postponement. The principle Court directing that the matter proceed in the merits. Court finding in favour of Applicant. No order as to costs being made. Principles considered – importance of authority to represent; and principle of ignorance of the law.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal borne by an alleged retrenchment of Applicant. The matter has been duly conciliated upon but without success. It has been brought before this Court pursuant to section 227 (5) of the *Labour Code (Amendment) Act 3 of 2000*.

2. The brief background of the matter is that Applicant was an employee of Respondent until his retrenchment. He referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). Conciliation having failed, he initiated the current proceeding with this Court. The matter was duly set down for this day.

3. On this day, Respondent representative, allegedly one Mr. Mosuoe of Mosuoe and Associates, appeared before Court to seek a postponement of the matter. The postponement application was strongly opposed by Applicant representative, Adv. 'Nono. We then directed parties to address Us on same, and thereafter delivered a ruling. Our ruling was to dismiss the postponement and directing that the matter proceed into the merits.

4. We wish to note that when the matter was set down for hearing, the idea was to have it heard in default of Respondent, at least on the part of the Applicant. On the date of hearing, Mr. Mosuoe filed an answer and proceeded to apply for a postponement. The answer addressed the

merits of the main claim and not the application for the matter to be heard in Respondent's default. Below are Our reasons for refusing to grant the application for postponement and the making of the subsequent order.

SUBMISSIONS AND ANALYSIS

Application for postponement

5. Mr. Mosuoe applied for a postponement of the matter for three main reasons. Firstly, he stated that his client, who was to lead evidence, had not been able to attend on account of unforeseen business meetings. Secondly, that his client wanted to reconsider its position to see if it could settle the matter. Thirdly, that the fact that an appearance had been made, showed an intention to defend the matter. It was added that if the application for postponement would not be granted, it would offend the rules of natural justice, particularly the right to be heard.

6. Adv. 'Nono for Applicant answered that Mr. Mosuoe had no authority to appear on behalf of Respondent as none had been filed. He argued that the Rules of this Court require the filing of an authority to represent, where a legal practitioner appeared on behalf of a party. Further reference was made to the case of *'Mamatšeliso Tšoana & 61 Others v Nien Hsing International (Pty) & Another LAC/REV/0r/2011*, at para 23 on page 8.
7. It was submitted that in the above authority, the Labour Appeal Court emphasised the purpose and importance of an

authority to represent. It was submitted that the Court stated that an authority to represent is not just a formality, but a document that determines the legal standing of a legal representative. It was prayed on this note that the application for postponement be rejected, as Mr. Mosuoe has no legal standing to appear and make same.

8. It was added that assuming that Mr. Mosuoe was properly before Court, the answer filed on behalf of Respondent is contrary to Rule 5 of the *Rules of this Court*. It was stated that Rule 5 states that an answer shall be in accordance with form LC2, which appears in part A of the schedule to the *Rules of this Court*. It was added that form LC2 requires that a Respondent party sign the answer and not the representative.

9. It was submitted that contrary to Rule 5, the answer *in casu* has been signed by the alleged representative, Mr. Mosuoe of Mosue and Associates, whom Applicant contested that he has been authorised to appear. It was added that worse still, was the fact that even the intention to oppose did not make reference to either Mr. Mosuoe or even Mosuoe and Associates, but to one Herman Nieumoud, as the one who would attest to the answer. It was submitted this is further evidence of lack of authorisation to appear.

10. It was further argued that even assuming that Mr. Musuoe was to be found to be properly before Court, and that the

answer was properly signed, it had however been filed out of time. It was stated that in terms of Rule 5 of the *Rules of this Court*, an answer must be filed within 14 days of receipt of the Originating Application. It was stated that 14 days from date of receipt have since lapsed and this was assuming the Originating Application was received on the 9th June 2015. The 9th June 2015 is the date on which the intention to oppose was filed, while the answer was only filed on the 13th August 2015.

11. It was argued that in the circumstances, the answer should have been accompanied by an application for condonation for its late filing, failing which this Court had no jurisdiction to even consider it. The Court was referred to the case of *Lesotho Highlands Development Authority v Motumi Ralejoe & Others LAC/CIV/A/03/2006,* in support of the proposition. It was stated that in this case, the Court stated that a condonation must be made for any step taken against the Rules, as soon as that is known.

12. Applicant further submitted that even if both the answer and appearance were to be accepted, the granting of a postponement is at the discretion of the Court, which discretion must be exercised judiciously. It was said that the requirements in such application are why the proceedings should not go on and if it would be wrong to proceed with the matter without hearing both parties. It was submitted that because there is no answer, no injustice would be done to

Respondent, which essentially meant that it would not be wrong to proceed without hearing Respondent. It was added that the approach finds support under Rule 14 of the *Rules of this Court*.

13. It was further submitted that should the Court grant the postponement, that it should be with costs at a punitive scale of attorney and own client scale. It was submitted in amplification that Respondent had broken every rule of Court, and that it had caused Applicant to unnecessarily come to Court and incur costs from his representative for appearance.

14. Regarding the alleged desire to settle the matter, Applicant submitted that the conciliating process was tried but that it failed. Further that the claim about conciliation was not genuine but purely raised to influence the Court to postpone the matter. Further that Applicant was not interested in going over the process again.

15. Respondent replied that in the initial conciliation process, Respondent was not legally represented. It was argued that owing to the present legal representations, there were good prospects of settlement. About the case of *Lesotho Highlands Development Authority v Motumi Ralejoe & Others (supra)*, it was argued that the Court made reference to knowledge on the part of the party that has breached a rule. It was submitted that Respondent did not know that it had

breached the Rules and therefore that the authority was not applicable to the matter.

16. Regarding the authority to represent, it was argued that Respondent appointed one Thesele Leshota, who is the General Manager at Respondent. Reference was made to the authority to represent filed of record on the 9th June 2015. It was argued that Respondent having appointed its General Manager to represent it, it was not necessary for the Respondent or even the General Manager to further file an authority appointing Mosuoe and Associates. It was submitted that there is no breach of any Rule, in that sense.

17. About the costs, Mr. Mosuoe simply replied that Respondent was not willing to pay any, particularly after Applicant refused to accept costs for the day on an ordinary scale, earlier when voluntarily offered by Mr Mosuoe. It was added that costs are not even necessary in this case.

18. We will start by addressing the technical arguments of parties before addressing the merits of the application for postponement. It had been argued that Mr. Mosuoe had no legal standing to appear. We do confirm that the Rules of this Court require that where a party is represented by a legal practitioner, an authority to represent that complies with form LC6, should be filed.

19. The provisions of Rule 26 of the Rules of this Court, which Rule is on representation of parties, are mandatory. They are couched as follows,

"Where a party is represented by a legal practitioner, or any of the persons specified in section 28 (1) (a) of the Code, that party shall file in court a written authority for such representation in or substantially in accordance with form L6 contained in part A of the schedule."

20. We have also considered the authority of '*Mamatseliso Tsoana & 61 Others v Nien Hsing International (Pty) Ltd & another (supra)*. At para 23 of the judgment, the learned Musi AJA is recorded as follows,

"The need for and importance of a proper authority to represent cannot be over emphasised. It is not merely a formality that must be complied with. It determines whether a person has standing to represent another. In the absence of a proper mandate to represent, one cannot say that FAWU was authorised..."

In essence, We agree with Applicant that without an authority to represent, Mr. Mosuoe has no legal standing to appear on behalf of Respondent.

21. Regarding non-compliance with Rule 5 of the *Rules of this Court*, We agree and confirm Applicant's arguments. Rule 5, which is couched in mandatory terms, provides that once a party has elected to defend a claim, an answer be filed within 14 days of receipt of the Originating Application and in

accordance with Form LC2. As rightly alleged by Applicant, form LC2 requires that a Respondent party and not its representative attest to the answer.

22. The provisions of Rule 5 are couched as follows:

"A respondent may within 14 days of receipt by him of a copy of the Originating Application, enter appearance to the proceedings by means of presenting, or delivering by registered post, to the Registrar and to the applicant an answer to the Originating Application, which shall be in writing in or substantially in accordance with Form LC2 contained in Part A of the Schedule and which shall set out the grounds on which the respondent intends to oppose the application."

23. We have also considered the intention to oppose the Originating Application. We do confirm that it makes no reference to Mousoe and Associates, or even Mr. Mosuoe. Rather it makes reference to one Herman Nieumoud. In Our view, had the intention to oppose mentioned Mosuoe and Associates, We may have been influenced into accepting it as proper signs of authorisation.

24. We note and accept that filing the answer after 14 days, as Respondent has allegedly done, is contrary to the Rules. While Mr. Mosuoe has attempted to claim ignorance on the part of Respondent officers, the claim cannot sustain. We say this because the answer has been prepared and filed by

Mosuoe and Associates Attorneys, and not Respondent officers. Mr Mosuoe cannot therefore claim to have been ignorant of this legal position, particularly because ignorance of the law is not an excuse, over and above the fact that Mr. Mosuoe is an attorney at law. We also note and accept the authority of *Lesotho Highlands Development Authority v Motumi Ralejoe & Others (supra),* as referenced by Applicant on this point.

25. Regarding the merit of the postponement application, We agree that it is granted at the judiciously exercised discretion of the Court. We wish to add that a postponement is not a right but an indulgence that the court gives to parties, which is dependent on there being a good reason for its granting (see *Chun Chu Enterprises (Pty) Ltd v Seqokofa & Another LC/REV/532/2006*).

26. Respondent has given three reasons for the request. The second reason, by order of narration, falls off on the basis of the fact that Applicant is not interested in attempting conciliation, a process that he cannot be compelled into. The first reason would lead to a ruinous precedent if a postponement were to be granted on its basis. Respondent has shown that it places most of the priority on its personal affairs, over the call of the Court. The situation should be *vice versa,* for if not, it would mean that the business of the Court can be suspended on account of personal reasons of litigants, which are not even *vis major*. The third reason for

postponement also falls of primarily because the appearance is not even authorised. There is nothing that connects Mr. Mosuoe with Respondent, at least in the documents before Court, that would influence Us to finding that his appearance is as good as that of the Respondent officials.

27. For the above reasons, with each sufficient to individually dispose of the application for postponement, We refused same and directed that the matter proceed in the merits. However, because the application for default judgment was not opposed We granted it and directed that the matter be heard in default of Respondent. We were satisfied by the grounds raised in the application. Our judgment in the merits of the matter follows.

THE MERITS

Applicant's evidence

28. Applicant testified under oath that he was employed in July 2013 in the position of Production Manager, until this dismissal. He was dismissed allegedly for operational reasons of the employer, on the 25th March 2015. At the time of his dismissal, he earned a monthly salary of M9,000-00. He stated that on the 7th February 2015, all staff was called to a meeting. In that meeting, the Managing Director informed them that Respondent company was experiencing financial problems and was thus anticipating retrenchments. Staff was also told that management would consider the criteria to be used, which would be communicated to staff.

29. On the 17th February 2015, another meeting was called where they were informed that the Quality Assurance Manager had been dismissed. Staff was told that he had been dismissed for poor work performance and that anyone that would perform poorly, would meet the same fate. The General Manager and Applicant were told to keep a look out for poor performers and to report on them to management by the 27th February 2012. On the 27th February, the anticipated reporting meeting did not materialise, but rather on the 3rd March 2015, all staff was told that the financial position of the Respondent company had gone back to normal, due to good staff performance. Staff was informed that there would not be any retrenchments anymore.

30. On the 20th March 2015, in another staff meeting, Applicant indicated to the Managing Director that the dismissal of the Quality Assurance Manager was heavy on him. He stated that this was so because he was doing both his job and that of the Quality Assurance Manager. Applicant recommended that the position of Quality Assurance Manager be filled, or that the dismissed Quality Assurance Manager be reinstated. The recommendation angered the Managing Director who told Applicant that he was disloyal and that he deserved to be dismissed like the Quality Assurance Manager. Later in that day, Applicant was served with a letter requesting him to state why he should not be

retrenched. A copy of the letter was tendered and marked TM1.

31. Applicant wrote a letter to explain, which letter was discussed in the meeting of the 24th March 2015. TM2 was tendered as evidence of Applicant's response to TM1. In that meeting, Applicant was told that although he had valid reasons why he should not be dismissed, but that management of Respondent had already made its decision that he should be dismissed. He was then given a letter of retrenchment marked TM3. In terms of TM3, Applicant was to leave immediately with the condition that he was the employee of Respondent until the 25th April 2015, for which period he would be paid.

32. He stated that since his dismissal, he looked for employment by applying to various places, but without success. He stated that Respondent breached his contract by dismissing him without a valid reason and due processes. He asked for 12 months salaries as compensation, and payment of his salary for April 2015, as they were not paid yet he remained an employee up to that time. He also asked the Court to consider his severance payment in awarding compensation.

Analysis

33. In terms of the laws of Lesotho, there are only three recognised grounds of dismissal. These are stated under section 66 (1) of the *Labour Code Order 24 of 1992*, as follows,

(a) Incapacity to perform work employed for;

(b) Misconduct; and

(c) Operational requirements of the employer, which relate to restructuring; financial difficulties; and introduction of technology in place of workers (see *Labour Code (Codes of Good Practice) Notice of 2003*.

34. Clearly, at least from the evidence of the Applicant, none of the above recognised reasons was the basis of his dismissal. While at the start, the Respondent claimed financial difficulties, that latter changed when employee performance improved, and management of Respondent announced that retrenchments had become a thing of the past.

35. Evidently, although Applicant was allegedly terminated for operational reasons, his termination was motivated by his recommendations to reinstate the dismissed Quality Assurance Manager. This reason cannot stand as it does not fit within the categories spelled out under section 66 (1) of the *Labour Code Order (supra)*. Consequently, there is no valid reason for the dismissal of Applicant.

36. Regarding the procedure, the *Codes of Good Practice (supra)*, lays it out in simple terms. Section 19 thereof, provides that there has to be a joint problem solving exercise where the following must be discussed:

1) Alternatives to dismissal;
2) Criteria for selecting employees;
3) Steps to minimise dismissals;
4) Conditions of dismissals; and
5) Steps to avoid adverse effects of dismissal.

37. Evidently, this procedure was not followed. Rather Applicant was directed to justify why he should be kept in employment, which he did through TM3. Evidence has shown that TM3 was not even given weight, as the management informed him that a decision had already been taken to dismiss him. In any event, the basis for which Applicant was to justify why he should stay in employment, was not operational requirements of the employer, but rather something else. In view of this, the procedure was also flawed in terminating Applicant.

38. Applicant has asked to be paid the equivalent of 12 months salaries as compensation. He has satisfied Us that he complied with the provisions of section 73 of the *Labour Code Order (supra),* by mitigating his loss and establishing a breach on the part of Respondent. We therefore see no reason not to award him the 12 months wages asked for. We wish to add that the circumstances of Applicant's

termination, are extremely offensive to the principles of natural justice. As a result, We would have awarded more if given the discretion by Applicant. However, We will only award what he has asked for.

39. Applicant has also satisfied Us that he is worthy of one month's salary in addition, being his salary for April, which could presumably be taken to have been his notice period. Further, the termination of employment gives rise to an entitlement of severance payment. We accordingly award same. The computation of the Applicant's award therefore follows.

COMPUTATION OF AWARD

40. Salary at termination
M9,000-00

a) 12 months' salary is therefore,
M9,000-00 x 12 = M108,000-00

b) Notice pay is therefore,
M9,000-00

c) Severance pay is therefore,

$$\frac{2 \text{ years} \times 90 \times 9{,}000\text{-}00}{195} = \text{M}8{,}307\text{-}69$$

41. We wish to note that We have calculated severance payment up to the date of judgment, and in that period there are only 2 completed years. We have done so because finalisation of this matter concludes the existence of the employment relationship between parties, at least formally. The total entitlement is thus M108,000-00 + M9000.00 + M8,307-69 = ***M125,307-69.***

We therefore make the following award.

1) The dismissal of Applicant is unfair both procedurally and substantively.
2) Respondent is ordered to pay Applicant the sum of ***M125,307-69***, comprising of compensation, unpaid notice and severance payment due but not paid.
3) The order is to be complied with within 30 days of issuance herewith.
4) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st DAY OF AUGUST 2015.

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

MR. MOTHEPU **I CONCUR**

MISS LEBITSA **I CONCUR**

FOR APPLICANT: **ADV. 'NONO**
FOR RESPONDENT: **MR. MOSUOE**