

HELD AT MASERU

In the matter between:-

**CENTRAL BANK OF LESOTHO**

**APPLICANT**

and

**MOSELI SHAMPENE**

**1<sup>st</sup> RESPONDENT**

**MAHLOMOLA LEHLOENYA**

**2<sup>nd</sup> RESPONDENT**

**NKHAHLE MOSOTHOANE**

**3<sup>rd</sup> RESPONDENT**

**MOEKETSI MOTHABENG**

**4<sup>th</sup> RESPONDENT**

**SEELE LESEFA**

**5<sup>th</sup> RESPONDENT**

**MAHLOMOLA TSIANE**

**6<sup>th</sup> RESPONDENT**

**LILLO PITSO**

**7<sup>th</sup> RESPONDENT**

**TLALI PINDA**

**8<sup>th</sup> RESPONDENT**

**MOLISE RAMASHAMOLE**

**9<sup>th</sup> RESPONDENT**

**PUSETSO MOISA**

**10<sup>th</sup> RESPONDENT**

**DIRECTORATE OF DISPUTE PREVENTION AND  
RESOLUTION**

**11<sup>th</sup> RESPONDENT**

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## JUDGMENT

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DATE: 08/02/16

*Breach of contract - Working Hours - Complainants alleging that they were made to work for seventy - two (72) hours per week contrary to their employment contracts and provisions of the law - They contended that they were not engaged as watchmen but as Security Officers and could therefore only work for a maximum of forty - five (45) hours in a week - They therefore claimed overtime for the excess hours - They further claimed compensation for night work - The Court finds that complainants were correctly classified as watchmen and night workers but were not entitled to compensation because already worked reduced hours.*

### **FACTS IN BRIEF**

1. 1<sup>st</sup> to 10<sup>th</sup> respondents (referred to as complainants for ease of reference) started working for the Central Bank of Lesotho in May, 2004 when it took over security services from the Army. It is common cause that prior to 2004 the Bank's security services were undertaken by the Army. This dispute arose out of a referral by the complainants of a dispute to the Directorate of Disputes Prevention and Resolution (DDPR) over an alleged breach of their terms of employment

contracts and an infringement of the law in that the Bank made them to work in excess of the forty - five (45) hours per week prescribed by law.

2. Complainants' claim revolved on two issues, namely,

- i) Working hours - they claimed that the Bank was in breach of their employment terms and the law in that it required them to work in a three shift system for twenty - four hours a day for seven days a week thereby making them to work for seventy - two (72) hours per week in excess of the forty - five (45) hours prescribed by law and in contravention of their individual employment contracts. This, they contended, constituted a unilateral variation of their terms of employment. As far as they were concerned, they were engaged as Security Officers to work from Monday to Friday from 0800 Hours to 1630 Hours and not in terms of a shift system. It was their case that they worked overtime and must accordingly be paid; and
- ii) compensation for night work - They further claimed that their working time at night ought to be reduced or they be compensated accordingly in terms of the law.

The shift system was broken down into three shifts, namely,

Morning shift - 0500 am to 0100 pm;

Afternoon shift - 0100 pm to 0900 pm;

Night shift - 0900 pm to 0500 am.

#### ***APPLICANT'S CASE***

3. The applicant, in defence before the DDPR, retorted that there was neither a breach of complainants' terms of employment nor any provision of the law. It argued that the complainants fell under the category of watchmen and therefore worked hours that fell within the framework of the law and even worked far less hours than the maximum prescribed by law. The DDPR upheld applicant's argument in this regard. It however ruled that complainants were night workers and were therefore entitled to reduced working hours or compensation *in lieu* thereof in terms of ***Section 130 (1) (c) of the Labour Code Order, 1992*** which provides that:-

***Night workers shall be granted reduced working time without loss of earnings or shall receive extra pay for performing night work, in an amount determined by collective***

*agreement or, in its absence, by the Minister in consultation with representative organisations of employers and employees on that committee, where the circumstances so justify.*

4. It therefore ordered compensation *in lieu* of the reduced working time and that once a determination of the extra pay had been done in terms of this Section, the applicant pay the complainants the compensation due within thirty (30) days of the handing down of its award. The applicant was not satisfied with this ruling and approached this Court to seek its review, correction and setting aside. The complainants in turn filed a counter - claim.

#### **GROUNDS OF REVIEW**

5. i) Applicant contended that the learned Arbitrator misdirected himself in holding that the complainants were night workers and therefore regulated by the provisions of **Section 130 of the Labour Code Order, 1992** which entitled them to reduced hours of work or to extra payment *in lieu* thereof. It was the Bank's case that the complainants were not night workers and were thus not covered by **Section 130**.

ii) The complainants filed a counter - review in which they argued that the learned Arbitrator erred in finding that they were watchmen and hence covered by the **Labour Code (Exemption) Regulations, 1995** which regulated watchmen. As aforementioned, they maintained that they were engaged as Security Officers to work from Monday to Friday from 0800 Hours to 1630 Hours and not in a shift system as was happening.

The issue before this Court therefore centres on whether or not in arriving at this decision the learned Arbitrator misdirected himself in any manner.

#### **WATCHMEN VERSUS SECURITY OFFICERS**

6. It was applicant's case that complainants were watchmen. Complainants' Counsel did not buy this argument because he felt that applicants failed to tender evidence to prove that complainants were watchmen. He submitted that the learned Arbitrator ignored material evidence that there was no reference in either complainants' letters of appointments, their job descriptions or the staff handbook to prove that complainants were watchmen and that they were expected to work a shift system. He further pointed out that there was no indication anywhere that the Bank would deviate from the normal hours of work of 0800 Hours to 1630 Hours.

7. Complainants were indeed engaged by the applicant Bank as security officers. There is, however, no mention of the word security officers in the employment laws of this country. The DDPR established that by definition complainants fitted into the category of watchmen which is unfortunately not defined in the law as well. Applicant's Counsel resorted to a number of definitions from various Dictionaries for guidance in motivation of his argument that complainants fitted into the definition of watchmen. According to the various definitions he advanced a watchman is:-

*“a man or body of men charged with patrolling streets at night,”*<sup>1</sup>

*“a guard whose job is to protect a building, especially at night,”*<sup>2</sup>

*“a member of a military guard, a sentinel, a sentry, a look-out,”*<sup>3</sup>

*“a man who keeps watch; guard”*<sup>4</sup>

8. In our view, what is crucial and a determining factor in ascertaining complainants' position is the nature of the functions they carried out as opposed to the title ascribed to them. Complainants' functions as contained in their job descriptions were:-

*To protect life and property plus information through effective operation of security and safety systems; implementation and compliance with laid down rules and procedures.*

*Principal Accountabilities*

- 1. Processes and issues access cards to staff, visitors and contractors;*
- 2. Escorts visitors and contractors in and out of the Bank;*
- 3. Mans the control room, other security stations and operates various security systems;*
- 4. Carries out security spot checks as directed and in accordance with the search procedures;*
- 5. Carries out detailed checks of the premises, investigates and reports in writing all unusual occurrences.*

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<sup>1</sup> The Concise Oxford Dictionary of Current English 5<sup>th</sup> ed., p. 1471

<sup>2</sup> The Penguin Pocket English dictionary , Penguin Books p. 590

<sup>3</sup> Shorter Oxford English Dictionary, 6<sup>th</sup> ed., Vol., 2 p.585

<sup>4</sup> The World Book Dictionary., P. 2362

9. Basically, what complainants were doing was to guard. It is common cause that they were engaged by the Bank to meet its security needs. From the foregoing job descriptions as reflected in “**Exhibit 2**” and the definition of watchmen, it appears that complainants discharged duties of watchmen at the Bank. As far as we are concerned, the use of the title “**security officers**” was just a question of semantics. There find nothing amiss in the learned Arbitrator’s finding that complainants were covered by the regulations governing watchmen, namely, the **Labour Code (Exemption) Regulations, 1995**. These Regulations provide that the normal working hours for watchmen shall be sixty (60) hours per week.

10. The unrefuted evidence tendered on behalf of the applicant Bank before the DDPR was that complainants worked for forty - eight (48) hours per week with six shifts of eight hours per week with an interval of twenty - four hours in - between, well within the permissible hours in the law. In the circumstances, the learned Arbitrator did not misdirect himself in finding that they did not work any excess hours. Even from a logical perspective, if we were to conclude that complainants were entitled to work from 0800 Hours to 1630 Hours, and for five days per week, we wonder how the Bank’s security needs would be met when it is an institution of such strategic importance to the nation.

11. In its regulation of human resources, the Bank has in place the **Central Bank of Lesotho Staff Rules and Regulations** (called the “**black book**” - last revised in 2003) which are of a general nature, the **Security Policy Manual for the Central Bank of Lesotho** used in conjunction with the **Security Operational Guidelines for the Central Bank of Lesotho** which directly impinge on security services and the **Standard Operating Procedures Manual** dated 12<sup>th</sup> January, 2004. Complainants conceded that they were taken through an induction course through which they were familiarised with the requirements of their job. Mr `Nyane, the Senior Security Officer, testified on behalf of the Bank that the basis of the induction course was the Bank’s Security Policy Manual. Article 7 thereof provides:-

#### **Security Guard Duties**

***There shall be guard duties which will involve keeping the premises or property of the Bank under constant watch for 24 hours round the clock. This is in order to prevent crime, intrusion, fire and damage to the Bank’s assets. These duties will be***

*accomplished in four shifts namely, Day Shift (0800 - 1630 hours), Morning shift (0600 - 1400 hours), Afternoon Shift (1400 - 2200 hours) and Night Shift (2200 - 0600 hours).*

12. Clearly, the complainants were made aware from the outset that they would be operating under a shift system. According to Mr `Nyane different shift systems were experimented with until the Bank settled on the current one. It therefore cannot be said that the DDPR misdirected itself in concluding that the complainants were engaged from the onset on a shift system. Complainants' ground of review in this respect cannot be sustained. It is therefore dismissed.

#### ***HOURS OF WORK - GENERALLY***

13. The regulation of working time is a fundamental component of a safe and humane working environment. Already in the 19<sup>th</sup> Century it was recognised that excessive working hours posed a danger at work. The International Labour Organisation (ILO) has a number of Conventions on working hours. ***Convention 1 on Hours of Work (Industry) 1919*** was the first ever ILO Convention and set the basic principle that normal weekly working hours shall not exceed forty eight (48) hours per week. The subsequent ***Convention 30 on Hours of Work (Commerce and Offices) 1930*** reinforced this position. Both Conventions, however, allow for some departure from these limits in defined circumstances. There are exceptions for categories of employees whose work is by nature intermittent or must be done outside the limits laid down for other employees. There are also exceptions for work that must be carried out continuously by a succession of shifts.

14. It was in the spirit of this basic principle laid down by the International Labour Organisation that provisions regulating working hours were enacted. ***Section 118 (1) of the Labour Code Order, 1992*** provides that the maximum normal hours of work an employee may be required to work in a week shall not exceed forty - five (45) hours which translates into nine hours per day for an employee who works for nine hours a day and eight hours of work for five days and five hours on one day for an employee who works a six day week.

15. There are exceptions to this fundamental statutory provision in respect of certain job categories or industries. To this end, ***Section 119 (3) of the Labour Code Order, 1992*** gives the Minister responsible for the administration of the Code, currently, the Minister of Labour and Employment power to make regulations prescribing exceptions to the normal hours of work prescribed by ***Section 118 (1)*** above. It was pursuant to this Section that the ***Labour Code***

*(Exemption) Regulations, 1995* were promulgated. In terms of these Regulations the normal hours of work for a watchman are set at a maximum of sixty (60) hours per week divided into twelve hours per day for five days. In terms of this Section, watchmen are entitled to a weekly rest period of at least 48 continuous hours.

#### ***HOURS OF WORK IN THE CONTEXT OF THIS CASE***

16. The main issue in context is whether complainants were night workers and therefore entitled to reduced working time or compensation thereof. Complainants argued that they were made to work for eight hours at night without a break. Clearly the complainants operated under a shift system which included night work. Special provision is made for night workers. Night Work is a concept on its own and does not necessarily relate to security officers or watchmen. The word “*night*” has been defined as<sup>5</sup> :-

*the period from 6 p.m. to 6 a.m. However, the Minister may, after consultation with the organisations of employers and employees representative of the interests concerned, prescribe by notice in the Government Gazette for the purposes of a particular provision of the Code either generally or for particular categories of industrial undertakings, some other specified period of 12 hours, which shall include the interval between 10 p.m. and 5 a.m.*

17. Our interpretation of this Section is that the Bank’s staff that worked at night constituted night workers. The night shift runs from 0900 p.m. to 0500 a.m. and therefore falls within the framework of the above definition of “*night*” which covers employees who work from 1800 Hours to 0600 Hours the next day. Twelve hours is the maximum hours that an employee may legally be allowed to work at night, and not that an employee necessarily has to work a total number of twelve hours in order to qualify as a night worker. To this extent, we feel that the learned Arbitrator was correct in holding that complainants were night workers in terms of *Section 130 (1) (c) of the Labour Code*. The Section provides that:-

*Night workers shall be granted reduced working time without loss of earnings or shall receive extra pay for performing night work, in an amount determined by collective agreement or, in its absence, by the Minister after consultation with representative organisations of employers and employees.*

18. We, however, do not agree with his ruling that the complainants were entitled to compensation. As watchmen they may work for sixty (60) hours per week.

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<sup>5</sup> Section 3 of the Labour Code Order, 1992

**Regulation 3 (1) of the Labour Code (Exemption) Regulations, 1995** provides that:-

*The normal hours of work for a watchman shall not be more than 60 hours per week, divided into 12 hours per day for five days.*

As it is, as and when complainants were required to work the night shift, they worked for eight hours, a time far less than the working time limit of twelve hours per day prescribed by **Regulation 3** above. They therefore already worked reduced hours and were not entitled to any compensation. We find fault in the learned Arbitrator's award in ordering compensation in complainants' circumstances.

19. It was argued in the course of proceedings that complainants worked continuously without a break. This is an issue that impinges on rest hours and should be resolved separately as it did not form part of the subject of the current dispute.

#### **CONCLUSION**

In light of the analysis above, we come to the following conclusion:-

- i) That the nature of complainants' work fell squarely within the work undertaken by watchmen. The learned Arbitrator therefore correctly categorised them as watchmen. Complainants' counter-claim is therefore dismissed;
- ii) Evidence tendered showed that complainants actually worked six shifts of eight (8) hours in a week with an interval of a twenty-four hour break in between. They therefore worked in accordance with their contractual terms of 48 hours per week contrary to their claim that they worked 72 hours per week;
- iii) The learned Arbitrator appropriately classified complainants as night workers in terms of **Section 3 of the Labour Code Order, 1992**. The Court, however, found that they already worked reduced hours regard being had to **Regulation 3(1) of the Labour Code (Exemption) Regulations, 1995, Section 130 (1) of the Labour Code Order, 1992** and their working hours as reflected in applicant's shift system. We therefore find the learned Arbitrator to have erred in concluding that complainants were entitled to compensation *in lieu* of reduced time. The

learned Arbitrator's award is therefore reviewed and set aside in this respect. Applicants review application is upheld; and

iv) There is no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 08<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**F.M. KHABO**  
**PRESIDENT OF THE LABOUR COURT**

**P. LEBITSA**  
**ASSESSOR**

**I CONCUR**

**R. MOTHEPU**  
**ASSESSOR**

**I CONCUR**

**FOR THE APPLICANT : MR. H. WOKER - WEBBER NEWDIGATE**

**FOR THE 1<sup>st</sup> TO THE 10<sup>th</sup> RESPONDENT : MR L. LETSIKA - MEI & MEI ATTORNEYS**

**ANNOTATIONS**

**STATUTES**

Section 3 of the Labour Code Order, 1992

Section 119 (3) of the Labour Code Order, 1992

Section 130 (1) (c) of the Labour Code Order, 1992

Regulation 3(1) of the Labour Code (Exemption) Regulations, 1995.

**INTERNATIONAL INSTRUMENTS**

Convention 1 on Hours of Work (Industry) 1919

Convention 30 on Hours of Work (Commerce and Offices) 1930.