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IN THE INDUSTRIAL COURT OF BOTSWANA

HELD AT GABORONE

CASE NO. IC. 64/98

IN THE DISPUTE BETWEEN

JOEL SEBONEGO **APPLICANT**

AND

NEWS PAPER EDITORIAL AND MANAGEMENT SERVICES (PTY) LTD **RESPONDENT**

CONSTITUTION OF THE COURT

D.J. de VILLIERS JUDGE PRESIDENT, INDUSTRIAL COURT

F.T. LESETEDI NOMINATED MEMBER (UNION)

C.S.M. DAMBE NOMINATED MEMBER (BOCCIM)

FOR THE APPLICANT

MR. S.M. SIKHAKHANE OF SIKHAKHANE & COMPANY GABORONE

FOR THE RESPONDENT

MR. H. RUHUKYA OF ARMSTRONGS ATTORNEYS GABORONE

PLACE AND DATE OF PROCEEDINGS

GABORONE 3 & 4 DECEMBER 1998

14, 15 AND 23 APRIL 1999

J U D G M E N T

BACKGROUND

The Respondent company is the publisher of two local newspapers, the Botswana Guardian and the Midweek Sun. It employs staff to run both these newspapers.

By letter dated 16 August 1991 the Respondent offered the Applicant the position of Deputy Editor Designate of the Midweek Sun with effect from 8 August 1991. The Applicant accepted the said offer of employment by signing the said document.

On 5 September 1991 the Applicant received a letter from the Respondent's Managing Director which inter alia stated:

> *"It gives us great pleasure to confirm your appointment as Editor Designate of the Midweek Sun and, in addition, as Editor Designate of the Guardian due to Mr. B. Ndaba's resignation.*
>
> *As such you will be expected to take editorial responsibility for the two newspapers and to guide the reporters of both newspapers in their reporting tasks."*

By letter dated 1 December 1991 the Respondent confirmed the Applicant's appointment as Editor of the Botswana Guardian and the Midweek Sun with effect from 1 December 1991. He remained editor for both newspapers till 1996, from when on he was editor of only the Botswana Guardian.

It is not disputed by the Respondent that prior to the Applicant's appointment as editor of both newspapers, each newspaper had its own editor each with a separate salary package.

The Applicant was off on sick leave for several periods without informing the Respondent what the cause of his ill-health was. During June 1997 the Applicant was on sick leave again and was booked off till 26 June 1997.

Whilst still so on sick leave, management terminated the Applicant's contract of employment because of *"continued absence from duty due to ill health."* The Applicant was paid all his terminal benefits including one month's notice pay in lieu of notice, his full pay for June 1997 and a severance benefit of P17 770-91.

The Applicant now avers that his dismissal was wrongful and unfair. He asked the Court to make an order reinstating him as editor of the Botswana Guardian and/or payment of compensation. He further avers that for the period 1991 to 1996, when he was editor of two newspapers, he was entitled to payment of a double salary, but was only paid a single salary. He now wants an order for

payment of a second salary for the said period as well as payment of accrued leave.

Although this hearing lasted 5 days only three witnesses testified. It was the Applicant, the present editor of the Midweek Sun and the Respondent's Managing Director. The Court will deal with further aspects of their evidence under specific headings here below.

DISMISSAL BECAUSE OF ILLHEALTH

There is no provision in the Botswana legislation for termination of a contract of employment due to ill-health. The only sections dealing with medical examination is Section 101 of the Employment Act (Cap. 47:01), which only deals with sick leave and sick pay and Section 47 which deals with medical examination before a contract of employment is entered into.

The Court must therefore look elsewhere for guidance in this respect. As dismissals because of ill-health are so closely related to dismissals for incapacity to perform, the Court will now set out the international principles of equity regarding dismissals for incapacity to perform.

As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice, or rules of equity as they are some times called,

when determining trade disputes. These rules of equity are derived from the common law as well as from Conventions and Recommendations of the International Labour Organisation (ILO). The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are succinctly stated in Article 4 of ILO Convention No. 158 of 1982, which provides as follows:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."* (The Court's underlining)

The reason for saying that ILO Convention No. 158 is also applicable to incapacity due to ill health is because of the aforesaid underlined word *"capacity,"* which in the said context also includes incapacity.

Le Roux and van Niekerk, The South African Law of Dismissal, deal with incapacity arising from ill health or injury. At page 228 they quote from an English case to show the approach of the English Employment Appeal Tribunal to cases of incapacity on account of ill health. This quote then sets out certain factors to be taken into account and to be observed by employers before making the *"difficult decision"* to dismiss in such cases. This quote ends as follows:

"------- the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding. ....'

The above quote is not based on English legislation, but on principles of equity.

The said authors then continue as follows at page 229:

"The South African industrial court has developed a similarly empathetic approach in what appears to have crystallized into the following test:

(a) the employer is obliged to ascertain whether the employee is capable of performing the work for which he was employed;

(b) if the employee is unable to perform the work, the extent to which he is able to perform his duties should be ascertained;

(c) the employer is thereafter obliged to ascertain whether the employee's duties can be adapted;

(d) if the employee cannot be placed in his former position, the employer must ascertain whether alternative work, at a reduced salary if necessary, is available.

The court has not specifically and separately imposed a requirement of procedural fairness. As we have noted, ILO Convention 158 refers specifically to the 'capacity' of a worker as a valid reason for dismissal. In Division B of the Convention, concerning procedure prior to, or at the time of, termination, procedural requirements extend only to instances where the reasons are related to 'the worker's conduct or performance'. This raises the question of whether, in terms of ILO norms, fair procedure is a requirement where incapacity assumes the form of ill health. The Convention does make reference to temporary absence from work because of illness or injury, which in terms of its provisions is not a valid reason for termination. There are instances of incapacity which will have the consequence of absence from work, but these need not be so. The answer probably lies in the close relationship between substantive and procedural fairness which exists in cases of incapacity. Substantive requirements necessitate an assessment and a prognosis. To satisfy either of these requirements entails the participation of the employee in some form" (The Court's underlining)

The abovementioned factors are also based on principles of equity, but they have now been included in the South African Labour Relations Act.

In this regard see also Rycroft and Jordaan, A Guide to South African Labour Law, Second Edition at page 93, John Brand et al, Labour Dispute Resolution (1997) at page 227, du Plessis et al, A Practical Guide to Labour Law, Second Edition at page 146 and John Grogan, Workplace Law, Third Edition at page 155.

Article 6 of the said ILO Convention No. 158 deals with temporary absence from work because of illness or injury and provides as follows:

> *"Temporary absence from work because of illness or injury shall not constitute a valid reason for termination."*

As the above factors to be taken into account and to be complied with are based on principles of equity, this Court will also apply such principles in this dispute.

To sum up these principles, there must first and foremost be a valid medical reason for an employee's incapacity to perform, i.e. the illness must be such that the employee can no longer, as a result of the said illness, perform the duty for which he was employed. Temporary absence from work because of illness is not a valid reason for termination of a contract of employment. The employer must first assess what the illness is, then the seriousness of such illness and then he needs to make a prognosis. This must be done in consultation with the employee and if possible also with a medical practitioner. If the employer is thereafter satisfied that the employee is not capable of performing the work for which he was employed and there is no available alternative work, the employer will be justified in dismissing the employee for incapacity to perform his duties. That would be a valid reason for dismissal.

The next question is how should such dismissal take place?

DISMISSAL ON NOTICE

In terms of Section 26 (1) of the Employment Act an employee may be dismissed summarily, i.e. without notice where such employee is guilty of serious misconduct in the course of his employment.

An employee who is incapable of performing his duties due to illness, is not guilty of any misconduct, let alone serious misconduct. Such an employee may therefore not be dismissed without notice.

In terms of Section 18 (1) of the Employment Act an employer may terminate a contract of employment by giving the employee the required notice. This means that if an employee is paid weekly he must be given at least one week's notice, if he is paid fortnightly then 14 days notice and if he is paid monthly then he must be given one month's notice.

In the matter of B. Motsumi v. First National Bank of Botswana, Case No. IC. 36/95, dated 29 September 1995, this Court analysed the provisions of the said Section 18 (1) and made the following finding. An employer cannot just give an employee notice because he feels like it or because Section 18 (1) authorises him to do so. He must have a good or valid reason for giving an

employee notice of termination of his contract of employment.

Support for this finding as to a valid reason, can be found in the aforesaid Article 4 of ILO Convention No. 158 and support for this finding as to notice can be found in Article 11 of ILO Convention 158, which provides as follows:

> *"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."*

SUBSTANTIVE FAIRNESS

The Court agrees with the view expressed by le Roux and van Niekerk, op. cit., at page 229 that there is a close relationship between substantive and procedural fairness which exists in cases of incapacity. The Court also agrees with the following views of the said authors, as set out above:

> *"Substantive requirements necessitate an assessment and a prognosis. To satisfy either of these requirements entails the participation of the employee in some form."*

The Court will now set out the relevant evidence as regards the ill-health of the Applicant and then test the Respondent's actions and re-actions thereto in the light of the aforesaid equitable guidelines.

According to the Applicant's sick leave record he was off sick in 1993 for 1 day and again for 3 days, for reasons unknown as the medical certificates do not give any reasons for him being "unfit for duty". He apparently had no sick leave during 1994. Thereafter his sick leave record indicates as follows:

Exhibit I	1 day	20 July 1995
Exhibit J	7 days	31 July 1995 – 6 August 1995
Exhibit K	2 days	7-8 October 1996
Exhibit L	2 days	9-10 March 1997
Exhibit M	1 day	17 April 1997
Exhibit N	1 day	21 April 1997
Exhibit O	10 days	27 April 1997 – 6 May 1997
Exhibit O	6 weeks	12 May 1997 – 27 June 1997

All the aforesaid medical certificates merely state that the Applicant is unfit for work without stating any reasons for such incapacity. The Applicant conceded that the above correctly reflects his sick leave record.

Under cross-examination the Applicant tried to explain that he was off duty due to stress as he was overworked because of the two jobs he had to do and he also suffered a stroke. He conceded that none of the medical certificates mention the reasons for his incapacity. He could give no acceptable explanation why he did not ask the doctors to mention the reasons for his incapacity so that his employer could also know what was going on with him.

The Court finds the Applicant's explanation that the reasons for his incapacity was due to stress because he had to do two jobs, improbable for the following reasons:

(a) As from 1 February 1996 each of the said two newspapers again had its own editor. From 1 February 1996 the Applicant was only responsible for the Botswana Guardian as the Midweek Sun from then on had its own editor until the time the Applicant was dismissed in June 1997.

(b) The Respondent's Managing Director was concerned about the Applicant's absenteeism due to ill-health, not knowing what the cause of such incapacity was. He therefore appointed a deputy editor as from 1 October 1996 to assist the Applicant and to be able to take over in future should the Applicant be unable to continue.

(c) The Managing Director's concern about the Applicant's ill-health manifested during 1997 when he was off sick from March to June at an alarming rate. The Court finds it improbable that the Applicant could still have been stressed because of overwork doing two jobs in May and June 1997 when he was doing only one job since 1 February 1996 and had a deputy editor to assist him with this one job since 1 October 1997.

The Court finds that there is more behind the Applicant's ill-health than he would let on. He was very secretive about the cause of his ill-health to management and to the Court, which can be gleaned from the following:

(a) In cross-examination it was put to him that his sick leave was not only due to stress but for some other reason as well and when asked what this other reason was, he said, "It is confidential matter". When asked if it was not reasonable for his employer to know what was wrong with him, he replied, "No, he is not a doctor." When asked how his employer was to determine whether he was capable of staying on in the job he was employed for because of his ill-health, he replied, "I don't know, I can't answer that question."

(b) One of the terms and conditions of the Applicant's employment is set out as follows in Clause 3 of his letter of appointment:

> "3. You will be a member of the non-contributory Guardian Group Life Scheme under which your dependant(s) will receive a sum equivalent to two times your annual salary in the event of your death whilst a member of the scheme."

Before accepting an employee as a member of the said insurance

scheme the Insurance Company needed a medical report on the employee. The Applicant refused to undergo this medical examination. When it was put to the Applicant that the reason for his refusal was because he did not want his employer to know the cause of his ill-health, he denied it. He first said he refused the medical examination because the aforesaid Clause 3 did not require a medical examination. When pressed on this point he changed his story and said he did not require this insurance as he had his own insurance policy. When pressed further he changed his story again and said that he was not interested in this policy as he did not intend staying with the Guardian till he died.

The Court finds this attitude of the Applicant very strange and his aforesaid reasons improbable. The medical examination and all the policy instalments would have been paid by the Respondent. It would not have cost the Applicant a single thebe. When the Applicant refused this scheme, the policy had been changed to a cover equal to 3 year's salary. At his last salary it would have meant an additional amount of approximately P176 000 for his wife and children if he had died. This is not an amount to be sneezed at especially if you could get it for free.

The Court therefore agrees with Mr Ruhukya's submission that it is more probable that the reason for the Applicant's refusal to undergo a medical examination is because he did not want the Respondent to know what was wrong with him. This is especially so where the Applicant had applied to join this free life cover scheme and later declined it when he heard he had to go for a medical examination.

(c) The Applicant said his doctor in Gaborone referred him to a doctor in Johannesburg for a check-up. The Respondent paid his air fair to Johannesburg to go for this check-up round about April or May 1997. Yet on his return he does not tell any member of management, not even the Respondent's Personnel Manager, who was a friend of the Applicant, what the check-up was for or the result of it. When asked why not, he replied that he did not tell anyone because no one asked him.

(d) A further aspect which shows how secretive the Applicant was about his leave of absence was the vacation leave forms he completed. Save for one, he filled in on all the other leave forms under the heading, Reason for leave, the words "Private, personal and confidential."

The Managing Director testified that the Applicant was very good worker till his health started deteriorating, but the Applicant never once told him what the cause of his ill-health was – he never even mentioned stress. He said an editor of a newspaper has a very important leadership role to play as he is responsible for the content of the newspaper. If he is not there then things can go wrong.

He further testified that whenever the Applicant was off sick for a few days the Personnel Manager would go and visit him at home. He also went once and noticed that the Applicant looked extremely ill. He did not stay long as the Applicant was unwell. He was never told what was the cause of the Applicant's ill-health. He also did not ask as he felt it was up to the Applicant to inform him.

He said the Applicant's regular absence from work due to ill-health was causing him concern because of the important day to day roll an editor has to play at the office. He therefore appointed a deputy editor in October 1996 as a standby editor to supervise the work when the Applicant was absent and to generally assist the Applicant, because he could see the Applicant was a sick person. The Court accepts the reason for the appointment of a deputy editor to assist the Applicant, because no deputy editor was appointed to assist the editor of the Midweek Sun.

On 28 April 1997 the Managing Director wrote to the Applicant expressing

concern at the Applicant's continued absence due to ill health and the effect thereof on the newspaper. He requested the Applicant to meet with the Personnel Manager "to ascertain to what extent the state of your health will enable you to continue in a full time position". ,

The Applicant agreed that in June 1997 he was very sick and said that he was so sick that there was no way he could have returned to work at the end of his sick leave on 27 June 1997. He said at that stage he was also still in a wheelchair because of a stroke. The Court finds that these long absenteeisms cannot be classified as temporary absence from work

The Court has already set out above that substantive equitable requirements for a fair dismissal necessitate an assessment and a prognosis by the employer which entails participation by the employee.

The Respondent was aware that the Applicant was a sick person, which is not denied by the Applicant. Although the Managing Director did not ask the Applicant outright what the cause of his illness is, he nevertheless did attempt to find out what was wrong with the Applicant. This he did by requesting the Applicant to meet with the Personnel Manager to discuss his health problems and his ability to continue working as editor.

This the Applicant refused to do as he thought the request was unreasonable.

The Managing Director gave him two months, from 28 April 1997 to 24 June 1997, to comply with this request and when the Applicant made no attempt to discuss his health problems, his contract of employment was terminated on notice with effect from 30 June 1997, in the sense that he was paid one month's notice pay in lieu of notice.

The questions to be answered now is did the Managing Director act reasonably in the circumstances and did he have a valid reason for terminating the Applicant's contract of employment on notice?

The Court finds that the Applicant frustrated attempts by Respondent to try and find out what the cause of his illness was to assess the situation and to make a decision on his continued employment in the job he was employed for to do. This was largely due to his secretiveness about his illness. He conceded that he told nobody, except his family, what was wrong with him. He did not even tell his close friend, the Personnel Manager, who visited him regularly at home when he was off sick.

His reason for not telling management, according to him, was because no one asked him. The Court rejects this explanation. It is improbable that he would have told anyone even if they had asked him, in the light of his refusal to meet with the Personnel Manager to discuss his health, which was a written request.

By so frustrating management's efforts, the Court finds that the Respondent could not even get out of the starting blocks, because the starting point is always, what is wrong with the employee's health. By being unable to establish this, the Respondent could not, without the assistance of the Applicant, go to phase two to ascertain whether his duties could be adapted or he be given alternative work.

All that Management could establish by just looking at the Applicant, was that he was a sick person. Management could also see that his absenteeism was affecting his work because the deputy editor had to do all his work during his absence. So why keep him on if someone else has to be paid to do his work and also where, through the secretiveness of the Applicant, it could not be established for how long this situation was going to last.

In the circumstances the Court finds that the Respondent had a valid reason for terminating the contract of employment of the Applicant. The dismissal of the Applicant was therefore substantively fair.

The Court further finds that the dismissal was not wrongful as the Respondent, having had a valid reason to dismiss the Applicant, was entitled to dismiss him on one month's notice in terms of Section 18 (1) of the Employment Act or to pay him one month's notice pay in lieu of notice in terms of Section 19 (a). This notice of termination was given with effect from 30 June 1997.

PROCEDURAL FAIRNESS

Having found that the termination of the Applicant's contract of employment was not wrongful nor substantively unfair, is not necessarily the end of the enquiry. The Court must still ascertain whether such termination was procedurally fair. If it was unfair, it will entitle the Applicant to an award of some compensation.

Unlike dismissals for misconduct which generally require a fair disciplinary enquiry prior to dismissal, dismissal on account of ill-health does not require a disciplinary enquiry prior to dismissal because there is no fault on the part of such employee as regards his health.

As stated above the first phase is for the employer to establish the cause of the employee's illness, preferably by obtaining a medical report on the employee or, depending on the circumstances, through meaningful consultations with such employee.

Should an employee refuse to submit to medical examination or meet for meaningful consultation, he will be frustrating the employer's efforts to proceed to the second phase. In such a case the employer must warn the employee that if he persists in his refusal to co-operate his job could be in jeopardy. The

employee should then be given a final opportunity to co-operate in regard to the cause of his ill-health.

Should an employee still remain stubborn and uncooperative after such a final opportunity to cooperate, he has only himself to blame if the employer then decides to terminate his contract of employment, which the employer will be entitled to do, if he is satisfied that the employee is no longer capable of performing the duties he was employed for to do.

The Court has already found that the Managing Director was quite entitled to come to that decision on the facts he had at his disposal at that time.

How did the Managing Director thereafter handle this situation? He quite correctly wrote to the Applicant in April 1997 requesting him to meet with the Personnel Manager to discuss his health problem. For some reason, best known to the Applicant, the Applicant refused to meet for such discussions.

It is from here onwards that the Managing Director went wrong. He waited for 2 months, during which period he did nothing further and then out of the blue he presented the Applicant with a dismissal letter. When he saw that the Applicant was making no attempt to meet the Personnel Manager, he should have given him a final written ultimatum, telling him that this is his last opportunity to cooperate and to warn him that any failure to do so, may result

in his dismissal as management is unable to find out what the cause of his ill-health is. It should also have been mentioned in the letter of termination that management has decided to dismiss him also because of his unwillingness to cooperate.

Although the Court has found that the Applicant's dismissal was not wrongful and also substantively not unfair, the Court finds that the dismissal of the Applicant was nevertheless procedurally unfair.

COMPENSATION

Although the Court has found that the dismissal of the Applicant was not wrongful and was substantively fair; it was nevertheless procedurally unfair. This will entitle the Applicant to some form of compensation. The Court finds that reinstatement is not an appropriate award where the court has found that a dismissal was substantively fair and also not wrongful.

Section 24 (2) of the Trade Disputes Act (Cap. 48:02) sets out the following seven factors the Court may (my underlining) take into account in assessing an appropriate amount of compensation:

> *"(2) In assessing the amount of compensation to be paid under subsection (1), the Court may take the following factors into account -*
>
> *(a) the actual and future loss likely to be suffered by the*

employee as a result of the wrongful dismissal;

(b) the age of the employee;

(c) the prospects of the employee in finding other equivalent employment;

(d) the circumstances of the dismissal;

(e) the acceptance or rejection by either the employer or the employee of any recommendations made by the Court for the reinstatement of the employee;

(f) whether or not there has been any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee;

(g) the employer's ability to pay."

The Court of Appeal of Botswana dealt with the said Section 24 (2) in the matter of Botswana Building Society v. Samuel Bolokwe, Civil Appeal No. 15 of 1999, dated 23 July 1999 and Lord Allanbridge said the following at page 15 of the typed record:

"This Court, as a Court of Appeal, can only interfere with the exercise of the discretion of an Industrial Court in making an award of compensation under Section 24, if this Court is satisfied that the Court a quo misdirected itself as a matter of law in making the award it did. This Court cannot

substitute its own view of what an appropriate amount should be in the whole circumstances of the case.

Section 24 [2] sets out seven factors which the Court may take into account in the assessment of compensation. The permissive word "may" does not mean that it can select some and ignore others but lists those that may be taken into account. It is for the Industrial Court to decide which of the factors it is appropriate to take into account in the circumstances of any particular case.

In a given case the Industrial Court should therefore, on the facts decide:

[i] which of the seven factors are applicable and relevant;

[ii] give its reasons for deciding why each of the selected factors are applicable to the case and also give its reasons for ignoring each of the remaining factors;

[iii] weigh up the selected factors favouring the employee against those, if any, favouring the employer, and then

[iv] make what it deems to be a fair award."

This Court finds that by using the underlined permissive word *"may"*, the legislature did not intend the said seven factors to be exhaustive. This means that there could be other relevant factors as well, not mentioned in the said Section 24 (2), which the Court may also take into account in assessing an appropriate amount of compensation.

In the present case the Court finds that the factors mentioned in sub-paragraphs (a) and (c) of Section 24 (2), actual and future loss and the Applicant's prospects of finding other employment, are closely related and are relevant. These two factors favour the Applicant to some extent. He said when he was dismissed he was still very ill and there was no way that he could have returned to work at the end of his sick leave on 26 June 1997. He testified that he has been unable to find other permanent employment since his dismissal. He has been doing some free lance reporting for other newspapers and from November 1997 he has had a part-time appointment with the Gaborone Television Company. He did not say when he was able to start part-time work again, but it must have been within 4 months of his dismissal as he started working for the Television Company in November 1997.

The Court finds that the age of the Applicant, mentioned in sub-paragraph (b), is not relevant. The Applicant is a middle aged man, whose age, depending on his health, should not stand in his way in finding permanent employment.

Factor (d), the circumstances of the dismissal, is a factor which can count in favour of both parties. The fact that the Respondent had a valid reason for dismissing the Applicant on notice, favours the Respondent. The fact that the Respondent did not follow the correct procedure prior to dismissing the Applicant favours the Applicant.

The Court finds that the factors mentioned in sub-paragraphs (e) and (f) are not relevant in this case. The Court will assume that the Respondent is in a financial position to pay compensation as the Managing Director did not testify otherwise. The factor mentioned in sub-paragraph (g) therefore favours the Applicant.

Another factor, not mentioned in Section 24 (2), which the Court finds relevant and which the Court will take into account in favour of the Respondent, is the Applicant's secrecy about the nature of his illness. He frustrated the Respondent's efforts in trying to establish what the nature or cause of such illness was, which was affecting his work.

Having weighed up the aforesaid factors in favour of each party, the members of the Court are agreed that a fair and an appropriate award of compensation merely for procedural unfairness in the circumstances of this case would be compensation equal to two months salary.

It was not disputed that at the time of his dismissal, the Applicant's salary was P4 887 per month.

The amount so to be awarded to the Applicant is compensation and not salary.

The full amount must therefore be paid to the Applicant without any deductions.

ACCRUED LEAVE PAY

One of the Applicant's claims is for payment of leave pay for accrued leave. He said in terms of his contract of employment he was entitled to 20 working days leave per year. He was in the employ of the Respondent for 5 years and 11 months, during which period he said he only took 28 days leave because he was so busy doing two jobs, that there was just no time for taking leave. He now wants payment for all his leave days which have accumulated during this period.

In terms of Section 99 (6) (a) of the Employment Act, when a contract of employment is terminated, the employer shall pay to an employee his basic pay in respect of all leave legally accumulated.

An employee is entitled to 15 working days paid leave in any one year in terms of Section 99 (2). This is the minimum number of days an employee must be granted per year. The parties can however agree to more leave days but not less. In the present case the parties had agreed to 20 days, which is therefore perfectly in order.

Of the said 15 or more working days leave an employee is entitled to in respect of any period of 12 months, in terms of Section 99 (3), not less than 8 working

days leave must be taken not later than 6 months after the end of such period of 12 months. If the said 8 days compulsory leave is not taken as aforesaid, the employee forfeits it, which means that an employee can later also not claim leave pay in respect of leave so forfeited.

In terms of Section 99 (4) any balance of leave not taken as compulsory leave, may be accumulated year by year but such leave shall not be accumulated for longer than 3 years after the said first year which gives you a cycle of 4 years. At the end of such 4 years period all the accumulated leave, together with all the leave earned in respect of the immediately preceding period of 12 months shall be taken. That means that if leave is accumulated over a period of 4 years, all such accumulated leave must be taken at the end of each period of 4 years or else it is also forfeited. That further means that at the beginning of every 5th year of continuous employment, an employee starts with a clean slate, ie. he starts with no accumulated leave.

The reason for saying that all accumulated leave not taken shall be forfeited, is because of the use of the mandatory word "shall" in the aforesaid two subsections.

When the aforesaid provisions are applied to the Applicant's case we find the following. The Applicant started working for the Respondent on 8 August 1991. His first 4 years of continuous employment would therefore have ended on 7

August 1995, on which date he would have forfeited all accumulated leave and he would have started on 8 August 1995 with no accrued leave at all.

On 7 August 1996 he would have earned 20 days leave, of which he should have taken 8 days compulsory leave on or before 7 February 1997. If he had not, he would have forfeited the said 8 days leave, leaving him with 12 days accumulated leave, plus the leave earned for the period 8 August 1996 to 30 June 1997, which is for 11 months. 20 days leave earns 1.66 days leave per month and for 11 months it will be 18.26 days. At best for the Applicant he could therefore have had only 30.26 days accrued leave when he was dismissed, that is if he had taken no leave during his last one year and 11 months of service. He did not state when he had taken the said 28 days leave.

Under cross-examination he was shown leave forms showing that he had taken at least 44½ days vacation leave during his service period. When this was pointed out to him he said he could be mistaken about the vacation leave he had taken.

He conceded that he had attended certain seminars and conferences but said it was not necessary to apply for leave for such occasions. This was disputed by the present editor of The Sun, who was called as a witness by the Respondent. He also testified that the Respondent had a shutdown for 10 days each year at Christmas time. All staff would then take 10 days leave, which would be

deducted from their annual leave. This was not disputed under cross-examination. In the case of C. Nettey v. Kgalagadi Resources Development Co. (Pty) Ltd., t/a Solar Power, Case No. IC. 6/96, dated 6 November 1998, this Court held at page 15 of the typed record; that unless it is contained in an employee's contract of employment, the work days during the Christmas shutdown may not be deducted from an employee's annual leave days.

As the Applicant was not sure how many days vacation leave he had taken and as he failed to mention when he had in fact taken leave and in view of the said editor's evidence, the Court finds that the Applicant has failed to prove his case as to accrued leave pay.

DOUBLE SALARY

As stated above, the Applicant avers that he was entitled to a double salary for the period that he was editor of both newspapers. As he received only one salary for the "two jobs" he is now claiming a second salary for the period 1 December 1991 to 1 February 1996 when another person was appointed as editor of the Midweek Sun. From then on he was editor of only the Botswana Guardian and on 1 October 1996 a deputy editor was appointed to assist the Applicant with the Botswana Guardian.

The Applicant said in evidence, "I say I am entitled to a double salary because I was editor of two newspapers but received only one salary".

Entitlement to a salary is not a question for speculation nor is it a question of what an employee thinks he is entitled to. It is a question of agreement between the parties.

To establish what agreements the parties entered into, the Court will briefly repeat the sequence of events, set out at the commencement of this judgment.

By letter dated 16 August 1991 the Respondent offered the Applicant the position of Deputy Editor Designate of the Midweek Sun with effect from 8 August 1991 at a salary of P19 200 per annum which is P1 600 per month. The Applicant accepted the said offer of employment by signing the said document.

On 5 September 1991 the Applicant received a letter from the Respondent's Managing Director confirming his appointment as Editor Designate of the Midweek Sun and in addition as Editor Designate of the Guardian. As to salary the said letter stated:

> "Your salary has been increased to P2 000 a month from August 21, 1991. And from September 1, 1991 it gives me pleasure to inform you

that it has been increased from P2 000 to P2 500".

These terms and conditions were also accepted by the Applicant.

By letter dated 1 December 1991 the Respondent confirmed the Applicant's appointment as Editor of the Botswana Guardian and the Midweek Sun with effect from 1 December 1991. His basic salary was increased by P6 000 per annum (P500 per month) from 1 December 1991. These terms and conditions were also accepted by the Applicant.

It was pointed out to the Applicant that from 1 September 1991, when he assumed responsibility for both newspapers till 1 December 1991, which is a period of 3 months, he received two salary raises, which increased his initial salary of P1 600, when he was editor of one paper, to P3 000 per month. This was an increase of P1 400 per month, almost double his initial salary.

The Applicant denied that these substantial increases in so short a period was because of the fact that he was then editor of two papers. He said these increases were in appreciation of the good work he was doing.

The Court does not agree with this view of the Applicant. The letter of 1 December 1991 clearly states that because of his promotion to editor of the two newspapers, his salary will consequently be increased by P6 000 per annum.

The Applicant said he accepted the said promotion and also accepted the salary raise, although he was not satisfied with it because it was inadequate.

That is however not the point. There were undisputed valid legal agreements between the parties as to the Applicant's job description and to his remuneration for such job. Both parties are therefore bound by such agreements.

If the Applicant was dissatisfied he could have complained about his remuneration, which he said he did verbally to the previous Managing Director. The Applicant conceded that he only complained in writing for the first time on 16 August 1994, which is 3 years after he started working for the Respondent. In the said letter the Applicant does not claim that he has a legal right to a double salary, he merely asks for more money. The letter starts off as follows:

> "As per our last week's discussion, I strongly feel that my employment package needs to be reviewed".

He continues as follows further on in this letter:

> "I have no doubt in my mind that, given the amount of responsibility that I'm charged with, I should be getting no less than P6 000 per month. I

strongly believe that I'm worth twice, if not thrice, what I'm presently getting".

The Court is inclined to agree with him, but the question still is, what is he legally entitled to in terms of their agreements. The answer is plain and simple. He agreed to do the said two jobs at an agreed salary, which salary was paid to him until his contract of employment was terminated on 30 June 1997.

The Court therefore finds that the Applicant has failed to prove his claim for a double salary for the said period.

DETERMINATION

In the premises the Court makes the following determination:

(a) The termination of the contract of employment of the Applicant, Joel Sebonego, by the Respondent on 30 June 1997, was not wrongful and was also substantively not unfair but it was nevertheless procedurally unfair.

(b) In terms of Section 24 (1) (b) of the Trade Dispute Act, the Respondent is hereby directed to pay to the Applicant the amount of P9 774 (2 x P4,887), being compensation.