CIV/T/32/2000

IN THE HIGH COURT OF LESOTHO

In the matter between

PATRICK MOQENEHELOA KAO **PLAINTIFF**

VS

LESOTHO BANK **DEFENDANT**

JUDGMENT

Delivered by Honourable Judge M.L. Lehohla on 24 day of September, 2001

Because of the congestion on the roll the parties' respective Counsel Mr. Ntlhoki and Mr. Matooane prayed that as their matter was crowded out the court should accept their respective heads of arguments and decide the matter without hearing oral submissions. While the Court was sympathetic to their suggestion it nonetheless felt constrained that justice would not have been done if even where it required explanations surrounding a point in the issue it should be denied benefit of counsel's usual helpful assistance. In short the court while accepting the heads on the one hand, it insisted on the other that respective counsel speak to them shortly.

Meantime by consent the parties dispensed with the necessity to have oral evidence led but wished the matter to be determined on what appeared to be points of law raised in the defendant's plea.

In terms of the summons the plaintiff claims

1. Payment of the sum of M30,210.00
2. Interest at the rate of 18.5% per annum starting from 30th July 1999 to date of payment.
3. Costs of suit.
4. Further and/or alternative relief.

The plaintiff's declaration by way of seeking to establish the cause of action indicates in paragraph 4 that "at all relevant times prior to 30th July 1999 defendant (sic) was an employee of defendant and as at 30th July 1999 he held the position of Manager of Defendant's Qacha's Nek branch".

The declaration further sets out that on 30th July, 1999 the defendant, in exercise of its powers and policies formally retrenched the plaintiff and thus terminated his employment with it. The plaintiff duly accepted the termination.

The Plaintiff maintains that in being thus retrenched he placed the defendant under the necessity to pay him all terminal benefits which have accrued to him by virtue of his employment with the defendant and therefore becoming due on termination of such employment.

The plaintiff further sets out in his declaration that other terminal benefits with the exception of severance pay were duly paid by the defendant notwithstanding that severance pay was included as one of items in the calculation constituting retrenchment package due to the plaintiff. The net amount reached in the calculation was M30 210.00 due as severance pay.

Thus the plaintiff asserts that the defendant is liable to him in the amount of the above sum which it however refuses to pay despite demand.

In responding to the onslaught the defendant asserts that the matter in dispute falls within the jurisdiction of the Labour Court and as such should be removed from the High Court with costs.

The defendant further denies liability for the nature of the amount claimed (i.e severance pay) and asserts that the plaintiff was paid gratuity which is a more lucrative benefit than severance pay.

As stated earlier respective counsel submitted their heads of arguments. Mr. Matooane's heads are in broad outline addressed to two issues i.e. **the law** and **jurisdiction**.

The learned counsel for the defendant submitted that facts are largely common cause in this matter in that (a) plaintiff was employed by the defendant Bank as Manager in Qacha's Nek until 30th July, 1999 when he was retrenched and that (b) the plaintiff was given a retrenchment package which included gratuity, hence the

plaintiff's complaint that he was not given severance pay in accordance with the Labour Code Section 79.

The learned counsel indicated further that the defendant's contention is that it paid the plaintiff gratuity instead of severance pay as the latter would have been a smaller amount than the former. It appears that this assertion is not denied by the plaintiff who however contends that despite this payment of gratuity he was still entitled to severance pay.

Having set out factors which are said to be common cause above Mr. Matooane set about the contention relating to the law by reference to section 4 (a) of the Labour Code Order No 24 of 1992 as follows:

> "The standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement".

Mr. Matooane submitted that because it is not denied that the plaintiff received a higher sum than that prescribed under Section 79 of the Labour Code Order he does not have any cause to complain. He demurred at the fact that the plaintiff seems to be bent on receiving a double benefit where one is only allowed which in any case is

even smaller than the more lucrative one that he has received. Learned Counsel thus challenged that if the plaintiff was dissatisfied with the more lucrative amount granted him by the defendant he should have refused it or only accepted the amount equal to severance pay while tendering the balance back to the defendant.

Regarding severance payments the relevant subsections of section 79 of Order 24/92 provide that :

(1) "An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his.....services, a severance payment equivalent to two weeks' wages for each completed year of continuous service with the employer.

(2) .....

(3) In no case, regardless of an employee's length of service, may the amount of severance pay payable to an employee exceed a sum which may be prescribed by the Minister from time to time after consultation with the wages Advisory Board.

(4) For the purpose of subsection (1) the two weeks' wages referred to shall be wages at the rate payable at the time the services are terminated.

(5) .....

(6) The right to severance pay in accordance with this section shall apply as from the date of entry into force of this part of the code. Rights to severance pay accrued under the Wages and Conditions of Employment Order 1978 shall be enforceable under the terms of that Order, notwithstanding its repeal".

For purposes of completeness I wish to also place in view provisions of Section 80 relating to penalty as follows:

"An employer who fails to make a severance payment in accordance with section 79 shall be guilty of an offence and shall be liable on conviction to a fine of six hundred Maloti or imprisonment for six months or both".

I have been informed by both counsel that for purposes of subsection (1) the plaintiff qualified to receive severance pay as he has been in continuous service for more than the minimum period stipulated coupled with the fact that he was not dismissed for misconduct; further that for purposes of subsections (3) and (4) calculations, for the amount a party in his boots is entitled to, have been made and are determinable.

Reading from section 6 set out above it appears to me that payment of

severance pay is obligatory in that it is specified that rights to severance pay accrued under the Wages and Conditions of Employment Order 1978 **shall be enforceable** under the terms of that order, **notwithstanding its repeal**" (emphasis supplied)

But can it seriously be contended that the provision referred to immediately above applies in all circumstances without exception? While at first blush it may seem the answer is in the affirmative, it becomes doubtful whether the situation could be said to remain the same even in circumstances where so-called severance pay has been effected under the guise of gratuity which exceeds in extent the amount of severance pay the party was entitled to on the one hand while on the other hand the Code makes no provision for the species of benefit known as gratuity whatsoever.

All that remains, if I am correct in assuming from the view point of the defendant that the plaintiff has been paid more than was due to him had what he received been properly been viewed as severance pay, is to determine whether what he was paid in this connection can be ignored. I think circumstances under which it can be ignored would be if it could properly be said that the money which the plaintiff received was a form of a bonus. But a bonus is payable at the end of every year where applicable. In the present case what has been calculated and determined is the exact amount of the severance pay whose extent was exceeded in paying to the plaintiff an amount constituting a species of payment that is unknown and therefore would never have been enforceable if it was not paid i.e. gratuity.

This being the case the provisions of section 4 (d) become of immense importance as guidance and in my view should be applicable when read as follows:

"Where under the provisions of any other legislation a person may have a remedy as provided for in that legislation, that remedy shall be in addition to and not in place of any remedy provided for by the Code.

However, *in no case may there be double monetary recovery by the same person based on the same set of facts*". (Emphasis supplied by me)

It stands to reason that on the application of the above provision, and once by judicial interpretation part of what was paid constitutes an amount equal to severance pay, though labelled gratuity by the party paying it, then the defendant should be freed from liability to pay severance pay as this would amount to condemning it to effecting double pay, a factor emphatically frowned upon by the code which lays down that ".....in no case may there be double monetary recovery.....".

With regard to jurisdiction Mr. Matooane relying on sections 24 and 25 (1) as amended contended that payment of severance pay falls within the purviews of section 24 (1) saying:

"The Court shall have power, authority and civil jurisdiction:

(a) to inquire into and to decide the relative Rights and duties of employers, employees and their respective organizations in relation to any matter referred to court under the

provisions of the code". (Court here refers to Labour Court). Section 25 (1) as amended reads as follows :

"The jurisdiction of the Labour Court shall be exclusive as regards any matter provided for under the code including but not limited to trade disputes.

No ordinary courts shall exercise civil jurisdiction in regard to any matter provided for under the Code".

Mr. Matooane thus submitted that bringing this action before the High Court infringes not only provisions of section 4 of Labour Code (Amendment) Act 9/97 but Section 6 of the High Court Act 1980. He buttressed his submission by referring to the important decision by Freidman J.A. in **CGM Industrial (Pty) Ltd vs LECAWU & OTHERS** C of A (CIV)No 10 of 1999 (unreported) at page 7 to the following effect :

"The existence of such specialist courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of administration of justice, of creating structures to the exclusion of the ordinary courts".

Viewing this important dictum from a broad spectrum one would be readily tempted to say the above decision marked a crucial departure from earlier decision of **Makhutle vs Lesotho Agricultural Bank** C of A (CIV) No 1 of 1995 where Browde JA said

"It is a well established principle of our law that there is a strong presumption that the legislature does not intend to oust the jurisdiction of courts of law and that a provision in a statute which is to be construed as ousting such jurisdiction must be clear and unambiguous in that regard".

He goes on to say :

"Interference with the High Court's jurisdiction can only be effected by express provision or by necessary implication and any provision which purports to limit the jurisdiction of the High Court will be strictly construed . See **Minister of Law & Other vs Hurly** 1986(3) SA 5568 (A) AT 584 A-B, **Lenz TOWNSHIP** (Pty) Ltd vs LORENZ N.O. 1961 (2) SA 450 (A) at 455 B".

Needless to say the above comments were buttressed in C of A (CIV) No. 29 of 1995 **ATTORNEY-GENERAL vs LESOTHO TEACHERS TRADE UNION.**

It is while one was blissfully extolling the welcome remarks of Friedman in LECAWU above for sounding the last word on the issue that the purpose for the existence of the Labour Court should not be side-stepped as that would often amount to the demurred phenomenon of forum-shopping that by subsequent legislation i.e. Labour Code (Amendment) Act 2000 all that had been achieved in LECAWU was swept aside by the repeal of section 24 (1) (f) which was to beneficial effect insofar as concerns the plaintiff that :

"The Court shall have the power, authority and civil jurisdiction to determine any dispute arising out of the terms of any contract of employment or the breach of any such terms and if so, to award appropriate relief".

Needless to say section 25 as to Labour Court's exclusive civil jurisdiction has been amended by section 9 which in my view re-affirms that jurisdiction by employment of different wording which happily does not violate or do violence to the letter and spirit of the original text.

But the fact remains that the repeal of section 24 (1) (F) leaves the plaintiff without a remedy which was available to him prior to that repeal. It affords him no relief that penalties are exacted on a defaulting defendant.

Thus Mr. Ntlhoki's argument has merit that with the demise of section 24 (1) (f) the Labour Court's usefulness in affording relief to an aggrieved plaintiff has been emasculated and since, like nature justice countenances no vacuum, any other competent court can therefore presently

"determine any dispute arising out of the terms of any contract of employment or the breach of any such terms and if so, to award appropriate relief".

I am inclined to accept Mr. Ntlhoki's submission that the Appeal Court decision in LECAWU above is not apposite to the present case because :-

(a) the remedy sought in the present case is not prescribed in the Labour Code - i.e. enforcement of judgment sounding in money by issue of a writ of execution.

[the Labour Court can only deal with the matter criminally and exact a fine or penalty upon an employer]

To this extent it would seem that resort to the High Court by way of action was justified because if successful, the plaintiff would be able to enforce his claim by a writ of execution which is lacking in the Labour Court.

(b) the matter is not provided for under the Labour Code. The Code does not deal with gratuity nor that where gratuity and severance pay are in issue, the higher of two is payable to the exclusion of the other.

[I accept submission (b) subject to what I have already determined in regard to it earlier in this judgment.]

(c) the propriety of paying the higher of the two between gratuity and severance pay gives rise to a determination of the dispute arising out of the terms of a contract of employment. This is no longer provided for under the Labour Code.

Having considered what I regard as of relevance for purposes of deciding the matter before me I find on the one hand that the plaintiff has been more than adequately paid what would be due to him as severance pay. If he is not satisfied with the gratuity which was paid to him he can either return it to the defendant so that the latter can disburse out of it the severance pay, or the plaintiff can himself pay back to the defendant the amount over and above the severance pay the exact amount of which has already been determined and calculated. On the other hand I find that the plaintiff has been successful in making a good case for coming to this Court notwithstanding quality wisdom that is above rubies in LECAWU.

The plaintiff's claim for unpaid severance pay is dismissed.

The defendant's objection to this Court's jurisdiction over this matter is dismissed.

Since each party has been successful to a substantial degree each party will accordingly bear its own costs.

M.L. LEHOHLA

JUDGE

For Plaintiff : **Mr. M. Ntlhoki**

For Defendant : **Mr. T. Matooane**