

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.6/2014

In the matter between:-

MALUTI MOUNTAIN BREWERY (PTY) LTD

APPELLANT

and

NTAHLI MATETE

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

THE ATTORNEY-GENERAL

3RD RESPONDENT

CORAM: FARLAM, J.A
THRING, J.A
LOUW, A.J.A

HEARD: 15 OCTOBER 2014
DELIVERED: 24 OCTOBER 2014

SUMMARY

*Exemption in terms of s 79 (9) of Labour Code Order, 1992 –
Whether Commissioner of Labour should afford employees a
hearing before granting exemption to employer.*

JUDGMENT

LOUW A.J.A

[1] This is an appeal against the final judgment and the orders made by Mosito, AJ in the Labour Court of Appeal, sitting as a court of first instance, reviewing and setting aside as invalid the decision by the Labour Commissioner on 8 October 2009 to grant the appellant an exemption from complying with the provisions of s 79 (1) of the Labour Code Order, 1992 – (the Labour Code).

[2] The respondent, Mr. Ntali Matete, was the applicant in the court a quo. He was employed by the appellant since 1 December, 2001 in various managerial positions until he resigned after ten years with effect from 31 December, 2011.

[3] The respondent said in his launching affidavit that he always believed that upon termination of his employment he would receive both his pension benefits and his severance pay. The appellant employer refused to pay out his severance pay on the termination of the respondent's employment and relied on the exemption, granted to it on 8 October, 2007 by the Labour

Commissioner (the commissioner), in terms of s 79 (9) of the Labour Code, exempting it from paying severance pay to employees leaving its employment.

[4] The relevant parts of s 79 of the Labour Code Act (as amended) read as follows:

“79 (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 or her services, a severance payment equivalent to two weeks’ wages for each completed year of continuous service with the employer.

(7) Where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in subsection (1), he may submit a written application to the Labour Commissioner for exemption from the effect of that subsection.

(9) If upon considering an application under subsection (7) the Labour Commissioner is satisfied that the scheme operated by the employer offers better advantages to the employee, the Labour Commissioner shall exempt the employer from the effect of subsection (1).”

[5] The exemption granted by the commissioner reads as follows:

“Re: Exemption from the Provisions of s 79 of the Labour Code Order, 1992.

Your letter dated 01 October 2007 refers. Pursuant to the provisions of s 8 of the Labour Code Amendment Act 1997, the Lesotho Brewing Company is exempted from the provisions of s 79 of the Labour Code Order

1992, i.e. payment of severance pay. The exemption is provided on the understanding that the company has a pension fund which provides more lucrative benefits than severance pay. Should it turn out at any time upon the termination of employment of any employee that the severance pay be more than the pension due, then exemption shall cease to apply and the provisions of s 79 shall be invoked.”

[6] The respondent contends that the exemption granted to the appellant is invalid and of no force or effect because it was granted to the appellant without the respondent having been granted a prior hearing. The court a quo held that the respondent was entitled to a prior hearing and set aside the exemption and made an order for costs against the appellants.

[7] At the time the exemption was granted on 8 October 2007, the respondent had by then been employed by the appellant for more than one year and would therefore have been entitled to receive both the severance pay provided for in s 79 (1) of the Labour Code and the pension provided by the employer. The facts of this case are therefore on all fours with the facts in the decision of this court in Telecom Lesotho (Pty) Ltd v Seeiso Leche LAC (2009-2010) where Ramodibedi, P stated at 514 E-H:

“[9] For my part I desire only to add that whether or not a hearing is necessary will depend on the facts of each case. On the facts of the instant case I have not the slightest

hesitation in concluding that a hearing was necessary before an exemption was granted. Indeed it was common cause that before the exemption in question the respondent stood to get both pension and severance pay. It follows that the exemption in question meant that he was now worse off. Following the exemption he would have been paid M57 143,03 plus his contribution under the pension scheme of M33 628,06 (including interest), amounting to M90 77,14 in total. In other words, he would have been paid M27 061,81 less than he would have been paid prior to the granting of the exemption (M117 789,95 less M90 771,14). What this means is that the exemption in question prejudicially affected the respondent in his property rights ...

[10] The Court a quo appeared to decide the matter in the employees favour on the assumption that in all cases it would be necessary for the Commissioner to afford the employee a hearing before granting an exemption. It is not necessary for us to decide that point in this appeal. It is sufficient for us to conclude that in this case, in as much as the respondent's membership of the pension fund had preceded the grant of the exemption, the order of the Court a quo should be confirmed."

[8] This should then be the end of the appeal. Mr. Loubser, who appeared for the appellant at the appeal, submitted, however, that the first respondent's case is in effect based on a wrong understanding of the ratio in the Telecom case. In that case this court left open and did not decide whether it would be necessary in all cases for the commissioner to afford an employee a hearing before granting an exemption to an employer (at 515 B).

[9] Mr. Loubser submitted that the respondent had failed to show why the pension fund did not offer better advantages to the employees of the appellant and consequently that this was a case where the decision of the commissioner was not potentially prejudicial to the employee and therefore that this was a case where a prior hearing was not required. This contention is based on a misconception of what this Court held in Telecom. The question whether the pension benefit was more beneficial to the employee than the severance pay is what the commissioner must be satisfied about before granting the exemption in terms of s 79 (9) of the Labour Code. Where an employee is entitled to receive both the pension and the severance pay and the severance pay stands to be removed through the exemption being granted, the result would necessarily be prejudicial to the employee. It is then that the employee is entitled to a prior hearing.

[10] The later decision of the Labour Appeal Court in Makoanyane and M Lipoli v Lesotho Flour Mills (case no. LAC/REV/06/13) relied upon by Mr. Loubser in argument was decided on a misinterpretation of what was said in the Telecom

case. In paragraph 3.17 of the judgment of Mosito, AJ the following is said in regard to what this Court said in para [9] of the Telecom case:

“It is clear that from the above quotation that the Court of Appeal was there dealing with monetary prejudice as opposed to prejudice based on the existence of a legal entitlement that had accrued at the time exemption was made.”

This is a wrong statement. This Court pointed out in the Telecom case that before the exemption was granted, the employee in that case (as indeed also in this case) stood to get both the pension and the severance pay and that the employee was worse off after the exemption had removed his entitlement to the severance pay. The court proceeded to demonstrate by reference to the actual figures, the extent to which the employee was worse off. The fact is that the employee was worse off. The calculation of the extent of the loss based on the actual figures does not affect the principle.

[11] The commissioner was joined as a party to the proceedings in the Labour Appeal Court and she filed an affidavit in which she stated that in this case, she granted the exemption after considering all the relevant facts underlying the appellant’s

application for exemption and *“Having considered the Pension Fund Rules ... as underwritten by Metropolitan Life Limited, I came to the conclusion that, clearly, the pension fund provided more lucrative benefits than severance pay.”*

[12] S 79 (1) of the Labour Code requires the commissioner to be satisfied that the scheme operated by the employer offers better advantages to the employee. This is a jurisdictional fact which, if established, gives rise to her power and, indeed it seems, the duty to grant the exemption.

[13] The terms of the exemption granted in this case are set out in para [5] above and contain the statement that the exemption is granted “on the understanding that ... [the pension fund] provides more lucrative benefits than the severance pay” and that if it should at any time upon the termination of employment of any employee appear not to be the case, the exemption shall cease to apply.

[14] Having regard to the conclusion to which I have come on the failure to grant the respondent a prior hearing, it is not necessary to decide whether the exemption is not in any event void because

the commissioner appears not to have been satisfied that the pension fund indeed offers better advantages to the employee.

[15] It follows that the appeal must be dismissed. Costs must follow the event.

[16] The following order is made:

“The appeal is dismissed with costs.”

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

I.G. FARLAM
JUSTICE OF APPEAL

I agree:

W.G. THRING
JUSTICE OF APPEAL

For Appellant : P.J. Loubser
For Respondents : K.K. Mohau