LAC/A/4/04

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

**MAPHOTO ELIAS MACHOLO** APPELLANT

AND

**LESOTHO BAKERY (BLUE RIBBON) PTY LTD** RESPONDENT

**CORAM**: HON MR ACTING JUSTICE K.E. MOSITO

**ASSESSORS**: MR. TAU

MR. MAKHETHA

**DATE** Heard on 27 October 2006

Delivered on 2 November 2006

***SUMMARY***

Appeal - from decisions of the Labour Court –Appellant retrenched – Appellant challenging retrenchment as unfair – Appeal dismissed.

Employment law - Retrenchment - Statutory provisions and Codes of Good Practice on fair retrenchment - Principles of equity for fair retrenchment discussed – Whether fair and objective selection criteria agreed and applied –Relevant ILO Conventions and Recommendations considered - Possible commercial rationale for retrenching employees in general - Whether decision to retrench applicant in particular reasonable, made in good faith and complying with principles of equity. - Whether retrenchment in fact dismissal whereby wrongful retrenchment will be unfair dismissal authorising court to order reinstatement –Section 66 (1)(c) Labour Code Order No.24 of 1992.

Pleadings – Applicant having not pleaded LIFO but raising it for the first time under cross-examination – Such approach improper – Labour Court's decision to reject it upheld.

Costs – Labour Court ordering costs in an unfair dismissal case – No exceptional circumstances established warranting the awarding of costs – such order improper.

Practice – Record not properly prepared –practitioners urged to follow the Court of Appeal of Lesotho practice in preparing records.

**JUDGMENT**

MOSITO AJ:

1. This is an appeal from the judgment of the Labour Court. In the Labour Court, the Applicant (now Appellant) had instituted proceedings for an order in the following terms: -

   (a) Declaring the Applicant's dismissal procedurally and substantively unfair.
   (b) Directing the Respondent to reinstate Applicant unconditionally and payment of arrears of salary.
   (c) Costs of suit.
   (d) Respondent be directed to pay the Applicant compensation in the amount of M804, 364.25 (eight hundred and four thousand three hundred and sixty four Maloti and twenty five lisente) and any other emoluments that the Applicant would in law be entitled at the time of retirement.
   (e) Interest at the rate of 18 of from date of judgment to date of payment.
   (f) Costs of suit.
   (g) Further and/or alternative relief.

2. The originating application was apposed.

3. The issues giving rise to the application before the Labour Court are that on the 2nd day of August 1999, the Respondent employed the Appellant as a van assistant. In November 1999 he was recommended to be employed on a permanent basis as "General Clerk of Transport, Engineering and Sales Department." He was further recommended for a salary increase.

4. In May 2002 the Manager wrote a letter whereby he said the Applicant's duties were being increased with immediate effect to look after stock in production, confectionary engineering and the workshop. The salary was also adjusted upwards.

5. On the 15th day of November 2002, the Manager wrote a letter to all employees of the Bakery and the Secretary of the National Union of Hotels and allied workers (NUHFAW) in which he notified them of the proposed restructuring of the company. The notice gave reasons for the said intended

restructuring, and was to be effective from the 18th November 2002, and that approximately six employees in the workshop department could became redundant with effect from the 17th December 2002. The letter further called on the Union and the shop standards committee to meet with management to discuss and consult on the structure, the timetable, selection criteria feasible alternatives etc. It is common cause that Appellant was not a member of the union.

6. On the 21st day of November 2002, management wrote to the applicant informing him of its intention to restructure and that as a consequence thereof, some positions in the workshop have became affected. It further advised him that his "…position of stock controller is redundant." The letter further stated that the company would continue consultations with him on, *inter alia*, voluntary retrenchment, early retirement, and possible transfer to another position.

7. On the 20th December 2002, Appellant was written yet another letter, which referred to, the previous correspondence and consultation meetings held with him regarding the pending retrenchments. The letter confirmed to him that "following the consultations referred we wish to confirm that we have been able to arrive at a viable alternative to the possible retrenchment. We confirm that you have accepted your retrenchment and the package paid to you as set out below." He was consequently given one month's notice from the date of the letter and the termination of his employment was to be with effect from 31st day of January 2003.

8. On the 20th day of May 2003, the Appellant instituted originating application proceedings in the Labour Court for the prayers outlined in paragraph 1 above. The grounds for this application were that, the dismissal of Appellant on the grounds of redundancy is unlawful in the circumstances for thee were other options which the Respondent ignored. The Appellant also stated that some two or three other people were employed is his department either immediately before or after his purported dismissal. He further contended that it was not possible far for the Respondent to survive without some of the tasks

he had been employed to perform. He further alleged that at the time he was dismissed, the structure of the Respondent in the workshop was as reflected in annexure is an organogram of the Respondent at time.

9. Annexure "M" also reflected some of the benefits, which would accrue to Appellant on the day of his retirement in 2030 for which Appellant hold Respondent Liable therefor.

10. The Respondent answered in opposition to the claim. The Respondent answered that during and after the retrenchment process, it became necessary, as part of that process to employ qualified professional mechanics with qualifications Appellant did not possess. It further answered that annexure was the organogram resulting from restructuring after which qualified mechanise were retained and six employees of the workshop retrenched reducing the workforce of the workshop by 50 % from twelve (12) to six. It also answered that prior to restructuring outsourcing also became necessary for economic reasons. The Respondent further denied that Annexure "M" entitled Appellant to the sum that he contended for, which would be consequent upon his retirements in 2030. It was just a projection. The Respondent consequently denies the liability thereon.

11. The matter came for trial before the Labour Court and witnesses were called.

12. The Labour Court consequently heard counsel's addresses and dismissed the application with costs.

13. The Appellant appealed against the decision of the Labour Court on the following grounds:

(a) The judgment is not consistent with and/on supported by the evidence tendered in Court,
(b) The judgment is selective in that all the evidence in support of the Appellant's case doctrine was deliberately ignored by the court.
(c) An award of costs was contrary to the legal provisions in respect of disputes where the cause of action is unfair dismissal. No exceptional circumstances existed (or were stated by the Court) which justified an award of costs against the Appellant. The Court a quo totally misdirected itself.

(d) The learned President misdirected himself in holding that "there is no duty placed on the employer by the law to find alternative work for the would be retrenched.
(e) The learned President further erred in law in holding that "such thing as giving employees offs to look for employment is extra measures that an employer may make but there are no obligations."
(f) The Court *a quo* misdirected itself in failing to declare the said retrenchment as constituting an unfair dismissal regard being had to the peculiar circumstances of this case.

14. The resolution of this case depends ultimately on the application of the principles relating to the law on retrenchment.

15. The resolution of this case ultimately depends on the application of the principles relating to the law on retrenchment.

16. The court will now set out the statutory requirements and the principles of equity (guidelines) for a fair retrenchment and then test the respondent's actions and the procedure it followed against such requirements and principles (guidelines) to see if it was really necessary to retrench the applicants in this case.

17. Section 66 of the Labour Code Order No.24 of 1992 provides in part as follows:

> *(1) An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is*
>
> *(a)* …
>
> *(b)* …
>
> *(c) Based on the operational requirements of the undertaking, establishment or service.*
>
> *(2) Any other dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment.*

18. Section 4) of the Labour Code Order No. 24 of 1992 provide as follows:

> *The following principles shall be used in the interpretation and administration of the Code:*
> *(a)* …
> *(b) no provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to*

> *derogate from the provisions of any international labour Convention which has entered into force for the Kingdom of Lesotho;*
> *(c) in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.*
> *(d) 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*

19. There is therefore need to examine the relevant provisions of the Conventions adopted by the Conference of the International Labour Organisation (I.L.O), and of Recommendations adopted by the Conference of the I.L.O. The general principles or guidelines mentioned in the preceding paragraphs should therefore be based on international labour norms, which are derived from I.L.O. Recommendations and Conventions. Thus, as to retrenchments, the I.L.O. **Recommendations Nos. 119** and 166 and Convention No. 158 are of note. It is worth mentioning from the outset that, the I.L.O. Recommendation No. 119, has since been superseded by the I.L.O**. Recommendation No. 166** and its Convention. The two Recommendations are however not inconsistent with each other, and to the extent that Recommendation No. 119 has been used as one of the guiding international labour standards in retrenchment matters, it remains an important instrument.
20. Article 13 of the **Termination of Employment Convention, (ILO Convention No. 158) 1982** provides that, when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to

minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

21. Article 1 of this Convention, provides that, the provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations. The view that this Court holds therefore is that, section 4 (b) and (c) of the Labour Code has the effect of giving effect to the provisions of the aforementioned Convention. The applicability of paragraph 1 of Article 13 of this Convention may however, be limited by the methods of implementation referred to in the said Article, to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

22. The Convention further provides that, for the purposes of the said Article 13, the term, *"the workers' representatives concerned"* means the workers' representatives recognised as such by national law or practice, in conformity with the **Workers' Representatives Convention, [No.135] of 1971**. . Article 3 of the latter Convention provides that,

> *For the purpose of this Convention the term **workers' representatives** means persons who are recognised as such under national law or practice, whether they are--*
>
> *(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or*
>
> *(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.*

23. Paragraph 13 of the **Termination of Employment Recommendation, [ No.119] of 1963** provides that:

> *(1) When a reduction of the work force is contemplated, consultation with workers' representatives should take place as early as possible on all appropriate questions.*
>
> *(2) The questions on which consultation should take place might include measures to avoid the reduction of the work force, restriction of overtime, training and retraining, transfers between departments, spreading termination of employment over a certain period, measures for minimising the effects of the reduction on the workers concerned, and the selection of workers to be affected by the reduction.*
>
> *(3) As and when consultation takes place, both parties should bear in mind that there may be public authorities which might assist the parties in such consultation.*

24. Paragraph 7 of the Termination of Employment Recommendation, [ No.119] of 1963 provides in part as follows:

> *(2) During the period of notice the worker should, as far as practicable, be entitled to a reasonable amount of time off without loss in pay in order to seek other employment*.

25. Paragraph 10 to the **Termination of Employment Recommendation, [ No.119]** provides that, the question whether employers should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation set out in Paragraph 1 of the Recommendation. The said Paragraph 1 provides that, effect may be given to the Recommendation through national laws or regulations, collective agreements, works rules, arbitration awards, or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions. (Emphasis is added).

26. The **ILO Termination of Employment Recommendation, [166] of 1982** also addresses the subject of retrenchment. Paragraph 1 of the Recommendation provides that, the provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions. (Emphasis is added). Subject to exclusions that may be made by the legislature, paragraph 2(2) of the

Recommendation provides that, this Recommendation applies to all branches of economic activity and to all employed persons.

27. Paragraph 19(1) the Recommendation provides that, all parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

28. Paragraph 20 of the Recommendation provides that, when the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, *inter alia,* the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes. To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

29. For the purposes of this Paragraph the term ***the workers' representatives concerned*** means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971. Paragraph 21 of the Recommendation provides that, the measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, *inter alia,* restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work. In terms paragraph 22, where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be

given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

30. The Recommendation further provides in paragraph 23 that, the selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers. These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation [ which include the courts).

31. Paragraph 24 of the Recommendation provides that, workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired. Such priority of rehiring may be limited to a specified period of time. The criteria for the priority of rehiring, the question of retention of rights -particularly seniority rights- in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation. Paragraph 25 provides that, in the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned. Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

32. In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the **Human Resources Development Convention and Recommendation, 1975.**

33. Paragraph 26 provides that, with a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

34. It follows therefore that this Court is one such method of implementation set out in Paragraph 1 of the Recommendation.

35. This Court, like the Labour Court, is a Court of equity. And in keeping with the decision of the Industrial Court of the Republic of Botswana **in J. B. Mbayi v. Wade Adams - Case No. IC. 30/94**, dated 11 May 1995 at pp. 4, 5 and 6 of the typed record :

> *As the Industrial Court is also a court of equity, which therefore places a lot of emphasis on fairness and reasonableness to both employer and employee, this court … also applies principles well established by other Industrial Courts, which are based on I.L.O. principles, when dealing with retrenchment procedures. These principles have already been set out by this court in its judgment, dated 27 September 1994, in the case of Mokaya v. Morteo Condotte (Pty.) Ltd. [1994] B.L.R.[Botswana Law Reports] 394* .

35. This Court adopts the aforesaid approach by the Courts of Botswana, and also finds itself in the comfortable company of the said Courts in their previous decisions on this subject of retrenchment as collected and adopted in **Green Industrial Enterprises Corporation (PTY) LTD v Ben and another 1997 BLR 99 (CA), Tlhoiwa v Tswana Construction (PTY) LTD 1996 BLR .[Botswana Law Reports] 461 (IC)**. In the latter case De Villiers J. collected and reviewed

the authorities on the subject, and extracted the following principles, which we respectfully adopt herein.

36. The learned judge pointed out at pages 463-469 that, when an employer decides to economise he takes a commercial decision to achieve that result. Such a decision is one of exclusive managerial prerogative and the court will not normally interfere with such decision because an employer can manage and control his business as he deems fit in what he perceives to be in the best interest of the business. After all he is, more often than not, the originator and financier of the business. The courts have even accepted the approach that it is commercially justifiable for an employer to retrench workers in an effort to increase profits, see for example, the South African Industrial Court decision in **Food & Allied Workers Union & others v Kellogg SA (Pty) Ltd (1993) 14 ILJ 406 (IC) at 413A**. The employer must, however, be able to demonstrate that its decision to dismiss was aimed at effecting savings, see the South African Labour Appeal Court case in **Môrester Bande (Pty) Ltd v National Union of Metalworkers of SA & another (1990) 11 ILJ 687 (LAC) at 688J-689B** .The employer can therefore set the norms and decide what he wants to do with his business or the way he wants to run his business. An employer has the right to want to remain economically viable and therefore he has the right to try and keep his expenses within the limits of his income and also has the right to try and increase his profits. The South African Labour Appeal Court in **Kotze v Rebel Discount Liqour Group (Pty) Ltd (2000) 21 ILJ 129 (LAC**) at 133 stressed that the court's function was not to 'second guess the commercial and business efficacy of the employer's ultimate decision, but to pass judgment on whether such a decision was genuine and not merely a sham'. Although operational dismissals are more frequently a reflection of an employer's need to stem financial losses, academics accept that an employer is entitled to retrench staff to increase profits even though the enterprise is still profitable, see Brassey M's comments in **Employment and Labour Law** vol. 3 *'Commentary on the Labour Relations Act'* where he said that underlying the category of dismissal for operational reasons there is:

> *a recognition that employers must be permitted to react to circumstances, respond to developments and make innovations if the enterprise is to remain competitive and prosper*.

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37. In **NCBAWU & others v Natural Stone Processors (Pty) Ltd (2000) 21 ILJ 1405 (LC)** the court indicated, however, that when an employer retrenches staff because of a desire to increase profits, the employer will be judged by a stricter standard if it fails to offer alternative employment, in-service training or better severance benefits.

38. After having taken this initial decision to economise, the next step is for the employer to investigate ways and means of achieving the result, in other words how he can best implement that decision. Possible ways of achieving such a result are to reorganise, to subcontract certain work, to switch to mechanisation or automation, to close or sell a portion of the business, to reduce staff, etc. It is at this juncture that so many employers slip up; thinking that it is still part of managerial prerogative to finally decide unilaterally which means it is going to adopt to achieve the end result it has in mind. Should an employer decide in principle that retrenchment or any other method which will or is likely to affect an employee is a possible way of achieving that result, then he must forthwith notify all such employees (or their representatives) of the possibility of retrenchment and the reasons for it.

39. The employer must consult with such employees or their representatives at the earliest opportunity. The reason for such consultation is three-fold, firstly, for the parties to seek ways of avoiding or averting the need to terminate the employee's employment. Secondly, if retrenchment proves unavoidable, then the parties should consult on a fair selection criterion and thirdly consult on ways of alleviating the hardships caused by such retrenchment, e.g. a reasonable severance package, possible alternative employment elsewhere, time off to seek alternative employment, etc.

40. The employees should be given a fair chance to participate meaningfully in such discussions and be invited to propose reasonable alternatives to retrenchment, e.g.

reduction in wages, short time, etc. In such consultations it is the duty of the employer to "consult" and not necessarily to "negotiate". If after fair and adequate consultations the parties still cannot reach agreement and they remain intransigent in their attitudes, then the employer is free to make the ultimate decision, as long as he acts fairly. **In NUMSA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC)** the South African Labour Appeal Court held that the evaluation of fairness goes beyond an enquiry into whether the employer demonstrates a bona fide and commercial justification for the decision to retrench; the termination of employment must be shown to have been the only reasonable option in the circumstances. The courts have equated substantive fairness with the employer not only having a bona fide reason to retrench but also that the retrenchment was 'operationally justifiable'. Davis AJA in the South African Labour Appeal Court case of **BMD Knitting Mills (Pty) Ltd v SACTWU (2001) 22 ILJ 2264 (LAC)** stated that in determining if the reason for dismissal is fair the starting point is whether there is a commercial rationale for the decision. The court should not take this at face value but is -

> *entitled to examine whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational reasons is predicated ... to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.*

41. The South African Labour court in **NEHAWU v The Agricultural Research Council [2000] 8 BLLR 1081 (LC)** echoed this approach by stating that the court must determine whether the retrenchment is properly and genuinely justified for operational requirements in the sense that it was a reasonable option in the circumstances. It must also be fair. In **N.U.M.S.A. v. Atlantis Diesel Engines (Pty.) Ltd., (1993) 14 I.L.J. 642 (L.A.C.)** it was pointed out that, fairness in this context goes further than bona fides and commercial justification for the decision

to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operation reasons.

42. Paragraph 15 of the **Termination of Employment Recommendation, [No. 119]** provides that

> *(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.*
>
> *(2) These criteria may include--*
>
> *(a) need for the efficient operation of the undertaking, establishment or service;*
>
> *(b) ability, experience, skill and occupational qualifications of individual workers;*
>
> *(c) length of service;*
>
> *(d) age;*
>
> *(e) family situation; or*
>
> *(f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to national customs and practice.*

43. These guidelines are fair and just labour standards of conduct expected of employers, as laid down by various courts and which are also in line with international labour standards. These are however only guidelines and not binding rules and they may, where justified, be departed from. That will however be the exception to the general rule that an employer is not entitled to take the

final decision to retrench without prior consultation with his employees or their representatives, which will normally be the trade union.

44. From the above it is clear that the most important guideline is prior consultation with employees who will be or are likely to be affected by such decision to economise or with their union. In the said judgment the court also pointed out that in such prior consultations it is the duty of employers to "consult" and not necessarily "negotiate" with such employees or their union. As to the difference between these two concepts, the court repeats what it said in the case of **Barclays Bank of Botswana Ltd. v. Botswana Bank Employees' Union and Others [1995] B B.L.R. 10 at p. 22F-H**

> *Management and labour are often confused as to what the difference is between consultation and negotiation in the context of labour relations. The difference is succinctly expressed as follows by Cameron et al, The New Labour Relations Act (1989) at p. 33, footnote 134: 'Consultation conveys the notion that the employer seeks the advice and views of his employees, but retains the final decision.*
>
> *Negotiation on the other hand is in general a method of joint decision-making involving bargaining between representatives of workers and of employers, with the object of establishing mutually acceptable terms and conditions of employment. Negotiation implies an effort to reach agreement by the parties concerned.*

45. Retrenchment is dealt with at p. 279 et seq in **The New Labour Law** by Brassey et al set out these general principles or guidelines at p. 286 as follows:

> *The guidelines are not hard and fast rules and should an employer deviate from the principles laid down, it will not mean that the employer has necessarily acted unreasonably. All that will be required of the employer is to justify the deviation.*

46. These principles or guidelines are summarized as follows in **A Guide to South African Labour Law** (2nd ed.), by Rycroft and Jordaan at p. 233 ET Seq:

> *(1) The employer must consider ways to avoid or minimize retrenchment.*

*(2) The employer must give sufficient prior warning to a recognised or representative trade union of the pending retrenchment, and to the employee selected for retrenchment.*

*(3) The employer must consult with such a trade union prior to the retrenchment.*

*(4) If no criteria are agreed the employer must apply fair and objective criteria.*

*(5) The employer must consult with the affected employee and consider any representations made on his behalf by the trade union.*

*(6) The decision to retrench must be reasonable, made in good faith and there must be a commercial rationale for the retrenchment.*

47. Other important guidelines worth mentioning on retrenchment in the law of Lesotho are contained in section 20 of the **Labour Code (Codes of Good Practice) Government Notice No.4 of 2003.** The Codes provide firstly that, if one or more employees are to be selected for dismissal from a number of employees, the criteria for their selection should be agreed with the trade union. If criteria are not agreed, the criteria used by the employer must be fair and objective. Secondly, criteria that infringe a right protected by the Labour Code, when they are applied can never be far. These include selection on the basis of union membership or activity, pregnancy or other discrimination ground. Thirdly, selection criteria that are generally accepted as fair include length of service, skills, affirmative action and qualifications.

48. We should hasten to point out that, a Code of Practice is a distillation of good industrial relations practice. It is not law in itself, but decision-makers are enjoined to take into account the provisions of the Code when making their decisions. The persuasive but non-binding nature of the Code of Practice is its strength. Decision-makers are able to use the Code of Practice as a guideline as to what is expected, but may permit deviations and variances where circumstances dictate. The provisions of a Code of practice must therefore always be considered in the light of the facts of a particular case.

49. While deviation from a Code of Practice will not always expose a party to liability, it is generally true to say that compliance with a code of practice will invariably guarantee against a charge of unfair or irregular conduct. The authority to draw up a code of practice emanates from an Act of parliament. In our view, the Labour Court was in the present case also enjoined to have regard to section 20 (3) of the Codes of Good Practice, more so to ascertain whether there had been an agreed criterion for retrenchment.
50. This Court adopts all the aforementioned guidelines for retrenchment discussed hitherto, and will usually refer to them in establishing whether an employer acted fairly in retrenching employees.
51. We now turn to the present case to see whether the Labour Court observed the above principles. In the Labour Court, Mr Mohaleroe for the respondent asked the General Manager Mr Mpeake Sekhibane whether he was aware of LIFO, and he answered in the affirmative (see page 21 of the record). On page 37 of the record, it appears that under cross-examination, the General Manager testified that "when we restructured we used LIFO, which works on the basis when one was employed in the company not in the Department." In re-examination, Mr. Mohaleroe asked the General Manager whether regarding the issue of Mr. Phelanyane LIFO applied as between Appellant and Mr. Phelanyane. The answer was that it was applied (see page 41 of the record). In his address, Mr. Nteso (see page 43 of the record, submitted that the Appellant was the first one to be in the department wherefrom he was to be retrenched, and that Mr. Phelanyane came after Appellant. It appears that Mr. Phelanyane was brought to the workshop where Appellant was working to be trained by Appellant. The evidence reveals that, that notwithstanding Appellant was subsequently retrenched leaving Mr. Phelanyane in the work previously done by Appellant. It was Appellant's contention that this was unfair as he was the first to go into that department and should be the last to get out of it. Assuming without deciding that there was merit in this contention, it seems to us that there was a preliminary which Appellant had to pass first, whether the issue had been raised in the papers.

52. In our view, the principal procedural obstacle on the road to addressing the issue is that, the Appellant had not pleaded this issue of LIFO, and it would have been improper for the Court to allow him to rely on it. This is moreso because it came out for the first time under cross-examination of the respondent. It would be wrong to decide the issue when it had not been pleaded. ( See **Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd LAC (1995-1999)698 of 702)** A party seeking to rely on a point must plead it. Failure to do so is fatal to his case. As the Court of Appeal said **in Frasers Lesotho Ltd's** case *(supra*):

> It is wrong to direct the attention of the other party to one issue and then attempt to canvass another (Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107-108). This respondent was permitted to do, and at great length, in the Court below.

This Court has in addition pointed out in **Pascalis Molapi v Metro Group Limited and Others LAC/CIV/R/09/03** at p. 10 in line with the **Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd**'s case that, it is true that a cross-examiner has a wide latitude to cross-examine a witness, but such latitude itself is always confined by the fact that cross-examination must be directed either to facts relevant to the issue, or facts relevant to the witness's credibility.

53. The third complaint is that Appellant ought not to have been ordered to pay costs as this was a case of unfair dismissal. It is common cause that the Labour Court dismissed Appellant's case with costs. Section 74 of the Labour Code Order No. 24 of 1992 provides that:

> (1)….
> (2) No costs shall be awarded in favour of either party in proceedings for unfair dismissal unless the Court decides that the party against whom it awards costs has behaved in a wholly unreasonable manner.

53. In the present case, there is no indication in the judgement of the Labour Court that, it considered that Appellant has behaved in a wholly unreasonable manner, and/or at all. There is simply no indication of the basis upon which the Labour

Court granted costs in this matter. It follows therefore that, there is merit in this submission and that, and this ground of appeal should succeed.

54. The fourth complaint is that, the Labour Court erred in holding that there is no duty on the employer to find an alternative job for the retrenched employee. At the hearing of this appeal, the Court asked Mr. Nteso whether it was his client's case that the employer failed to find him an alternative employment to do within the employer's company, or whether his case was that, the employer ought to have gone out of his organization to find a job for Appellant. Quite surprisingly, Mr. Nteso strenuously argued for the latter. This was despite an attempt on the part of the court to draw his attention to the former position as the one contemplated by the ILO conventions. We have already indicated earlier on in paragraphs 20 and 31 above that, an employer has a duty to find alternative employment for a retrenchee within his own undertaking, and not to go and hunt for a job for him outside his establishment. In our view, there is no such a duty on the employer to go out of his establishment in search of a job for a retrenchee. This argument was correctly rejected by the Labour Court.

55. We were not addressed on the issue of the so called "peculiar circumstances of the present case covered by the sixth ground. Even if we were, such "peculiar" circumstances are not borne out by the papers before this court.

56. In advance of making an order, there is one other issue on which we have to comment, it is this that: At the hearing of this appeal, Mr. Letsie for the respondent, contended that Appellant had withdrawn his prayer for unfair dismissal in this matter, and that, there was therefore no reason why he was pursuing this appeal. Our attention was indeed drawn to the relevant portion. We asked Mr. Nteso to address us on that subject. He informed that the record was not correct on the issue. He argued that the fact that the Labour Court proceeded with the case to finality showed that it did not understand Appellant to be withdrawing the prayer, which would have had the effect of putting the matter to rest. We then asked both counsel to furnish us with authorities that we could properly ignore the record in favour of the proposition advanced.

57. Realising the difficulty reposing on them, Counsel got hold of the Labour Court file in which the notes of the President of the Labour Court were recorded. They were to the effect that Appellant had said that he was not withdrawing the prayer, but that of reinstatement. The audio tapes from which the transcription of the appeal record had been made were obtained. We were surprised that the transcribed record before us had omitted a lot of evidence, which we had to listen to in order to be able to do justice. This exercise was highly inconvenient and time consuming.
58. We therefore found it necessary to issue a warning to practitioners, especially Appellants to ensure that this does not repeat itself in the future. The Appellant or Applicant in review matters has the responsibility to ensure that the records are complete; otherwise, untold injustice might result. Such records should be certified as correct by the relevant practitioners. We would strongly urge legal practitioners to follow the practice of the Court of Appeal of Lesotho in preparing records for the Labour Appeal Court.
59. Regard being had to all the foregoing discussions in this judgment, it is obvious that we are bound to make the following order:

    (a) The appeal is dismissed in respect of grounds 1,2, 4,5 and 6.
    (b) Ground 3 succeeds.
    (c) The order of the Labour Court is set aside and replaced by an order that "*the application is dismissed*."
    (d) There will be no order as to costs.

60. My Assessors agree.

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**K.E. MOSITO AJ.**

**JUDGE OF THE LABOUR APPEAL COURT**

For Appellant : **Mr. T. Nteso**

For Respondent : **Mr. K. Letsie**