LAC/CIV/A/06/08

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

In the matter between

STANDARD LESOTHO BANK APPELLANT

AND

LIJANE MORAHANYE 1ST RESPONDED

THE PRESIDENT OF LABOUR COURT 2ND RESPONDENT

CORAM: THE HONOURABLE JUSTICE K. E. MOSITO AJ.

ASSESSORS: MR. R. MOTHEPU

MR. L. MOFELEHETSI

HEARD: 24th October 2008

DELIVERED: 10th November 2008

SUMMARY

Appeal from judgement of the Labour Court – Concept of procedural and substantive fairness considered. Severance package having been agreed to by employer payable – Concept of redundancy discussed and applied. Appeal dismissed – Cross-appeal partly successful. Appellant to pay costs of Appeal Cross Appellant to pay two thirds of cross appeal.

JUDGEMENT

MOSITO AJ:

1. This is an appeal from the judgment of the Labour Court (per Lethobane P) handed down on the 22nd day of July 2008.
2. The facts of this case were that the respondent was retrenched on the

10th day of March 2006. The basis of the respondents complain in the court *a-quo* was that his retrenchment was substantively and procedurally unfair. He further claimed payment of M67, 655. 31 as the balance due on the severance package paid out to him which he alleges was based on 14 years service instead of 24 years that he had served at the bank at the time that he was retrenched.

3. The Labour Court heard the matter and handed down judgment on the date aforementioned in the following terms:

> The award that this court has taken into account that the respondent has implemented has a fair procedure for the retrenchment and that there was a slip in the two areas identified. We have also taken into account that the respondent consulted extensively with the employees and the union on the imminent retrenchment. Whilst the applicant has adduced evidence that he mitigated his loss by applying for jobs without success, formal employment is not the only way that one can mitigate his loss. There are other options which could still be considered. Accordingly we order as follows:
>
> i) The respondent shall pay applicant a compensation of seven (7) months salary for the unfair retrenchment.
>
> *ii)* The respondent shall further pay applicant the amount of M67, 655.31 by which his severance package was short calculated.
>
> *iii)* The compensation in (i) above shall be calculated at the rate of applicant's salary in February 2006.
>
> *iv)* All payments are subject to income tax deductions in terms of law.
>
> There is no order as to costs.

4. The appellant bank has taken an appeal to this court against the above decision of the Labour Court. For convenience I proceed in detail out

the grounds of appeal relied upon by appellant. I have reproduced the said grounds below. The appellant complains that the Labour Court erred in the following respects:

4.1 The Court erred in finding that the respondent failed to contradict applicant's evidence that his position was not redundant.

4.2 The Court also erred in finding that respondent failed to the applicant how and why criteria used affected him.

4.3 The Court further erred in finding that the applicant was retrenched before being afforded an opportunity by respondent to contest for new openings. Evidence adduced by defence witness, which was not challenged, was that there had been a meeting in the Southern region in which the applicant and his colleague, both being based in Southern Region, were informed that they were affected by the retrenchment, and further advised to apply for new openings. Subsequently, the position which the applicant claims was similar to the one held, was advertised before he left the employ of the respondent, as the Honourable Court observed in its judgement, but the applicant decide not to apply for it.

4.4 The Honourable Court a quo also erred by holding that the respondent did not take reasonable steps to avoid retrenchment. The Court a quo disregarded evidence by defence witness to the effect that employees who were affected were not given positions automatically but had to apply in order to be considered with others. The right rationale for people to apply was that right people were being put in right positions.

4.5 The Honourable Court also erred by failing to considered subjectively the evidence on behalf of the respondent which clearly reflected its intention, namely that the continuity of applicant's service was meant to be affected by the three month probation' for the applicant had been on probation because he had been re-employed in 1991 after the strike, a matter which was not disputed throughout the proceedings. To re-employ

the applicant and not reinstate him was a clear intention by the respondent that his service was meant to be affected.

4.6 The Court also erred in finding that the respondent had not intended to cap the applicant's service to 1992 when the Labour Code came into effect as was stated in the letter addressed to the applicant, simply on the basis that the said Code came into effect in April 1993. The Court relied on a manifestly clear ignorance of the exact date of the author of the letter as to when the Code came into effect, yet the intention of the respondent was obviously to cap applicant's service to 14 years.

CONLUSIONS OF LAW

4.7 The Court erred in interpreting the words *'every completed year in service'* stated in annexure 'LM4' to the originating application, to mean that applicant's service prior to 1992 should be included in the calculation of severance package, the amount and period of which was solely upon the respondent's discretion due to the respondent's exemption from the provisions of severance pay. That there was exemption was not in dispute.

4.8 Given the fact that the respondent was legally not bound to give any amount of severance package to the applicant, the Court erred in awarding the severance package beyond the fourteen years that the respondent offered to him, which offer clearly manifested the intention of the respondent.

4.9 Generally, the Court erred in awarding the applicant severance package for all the years he served since 1982 as if it was awarding severance pay. This is in the light of the fact that the respondent was legally exempted from the provisions of severance pay, a matter which was also common cause to the parties.

5. The respondent cross-appealed against the judgement of the learned President of the Labour Court on the following grounds:

5.1 Not awarding Applicant full 12 months salary in accordance with the Originating Application.
5.2 Not awarding Costs of the Application in the court *a quo*.
5.3 That the learned President erred in ordering that all payment are subject to income tax deductions in terms of the law.

Distinction between procedural fairness and substantive fairness

6. In the Labour Court, the respondent complained of both procedural and substantive unfairness of his dismissal. Thus, it is necessary to begin by drawing a distinction between the concepts of procedural and substantive fairness in relation to a dismissal. In so doing, the remarks of Zondo JP of the Labour Appeal Court of South Africa in **Unitrans Zululand (Pty) Ltd v Cebekhulu [2003] ZALAC 5** in para 25 of the judgement are apposite here. He pointed that, in relation to a dismissal, procedural fairness relates to the procedure followed in dismissing an employee. Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, on the evidence before the Court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure. The result hereof is, therefore, that, if the evidence placed before the court establishes a fair reason to dismiss which was

present at the time of the dismissal, the dismissal is substantively fair. It does not matter, for purposes of determining the substantive fairness of the dismissal, that such reason was not the subject of discussion during the consultation process. The fact that the reason for dismissal was never a subject of consultation matters only at the level of procedure because in terms of sec 189 of the Act, it should be a subject of consultation.

7. As Du Plessis AJA pointed out in para 3 of his judgement in the **Unitrans** 's case, the aforementioned distinction does not justify an inference that substantive fairness and procedural fairness will always fall into separate, impermeable compartments. There may however be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure. He points out that, the critical question, as far as the procedural fairness of the dismissal is concerned, is whether the consultation a fair procedure.
8. Bearing the above conceptual distinctions in mind, we now proceed to consider the merits of this appeal and the cross-appeal.

Procedural fairness

9. The convenient starting point is to consider Appellant's complaint regarding the procedural fairness of his dismissal. The Appellant's complaint in this regard is that, this court has on several occasions

emphasised the need for proper prior consultations in cases of retrenchment. See for example **'Malereng Phokojoe v Lesotho Brewing Company LTD and Anor LAC/CIV/APN/3/03 at para 8: Mocholo v Lesotho Bakery (Blue Ribbon) (Pty) LTD LAC/A/4/04 AT p 17: Tsebo Monyako v Lesotho Tourist Board and Others LAC/CIV/A/11/02 at para 14: CGM Industrial (PTY) (LDT) v Molefi Teleki LAC/A/07/05**. It is therefore clear that prior consultation is essential in cases of retrenchment in our law. The Appellant's grounds of appeal 4.1 to 4.6 boil down in essence to the issue of legal propriety of the retrenchment process. The question is whether the process followed the legally recognised guidelines for a proper process of consultation.

10. It was common cause before us that there was a Recognition Agreement between the parties (the Bank and the Union of which Appellant was a member). The Agreement made provision for how consultations should be conducted). It was common cause before this Court that this Agreement was never followed. This was not the issue of the interpretation and application of the Agreement. It was the issue of compliance or otherwise with the Agreement. The non- compliance with the Agreement was, in our view, fatal to the process of consultation.

<u>Substantive fairness</u>

11. Appellant contends that the Court erred in finding that the respondent failed to contradict applicant's evidence that his position was not redundant. Put differently, this ground means that the Labour Court

ought to have found that Respondent was redundant. The term *redundant* is not defined any where in our pieces of legislation. However, in employment law, an employee is taken to be dismissed by reason of *redundancy* if the dismissal is wholly or mainly attributable to: (a) the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish. See ***Croner's Employment Law Bulletin***, April 1994, at D160. According to this definition, an employer must be able to show that: (i) the business has ceased or diminished either permanently or temporarily or intends to cease or diminish; (ii) the employee cannot perform the work at the place where s/he was so employed; (iii) requirements of the business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;(iv) the employee was supposed to perform work of a particular kind which must cease or diminish or expected to cease or diminish.

12. In the case before us, the labour Court did consider the pertinent issue whether the employee's post had been abolished. As the Labour Court correctly held, the employee was not cross-examined on this issue. His evidence therefore stands on this point of substantive unfairness as well. In other words, the Appellant did not only fail to show that requirements of the business for the employee to carry out work of a

particular kind have ceased or diminished or are expected to cease or diminish, but also that, the employee was supposed to perform work of a particular kind which must cease or diminish or expected to cease or diminish. In our view, the Labour was correct in its finding on this point as well.

Severance package

13. The Appellant contends that, the Labour Court erred in interpreting the words *'every completed year in service'* stated in annexure 'LM4' to the originating application, to mean that applicant's service prior to 1992 should be included in the calculation of *severance package*, the amount and period of which was solely upon the respondent's discretion due to the respondent's exemption from the provisions of severance pay. Section 79 of the **Labour Code Order 1992** as amended by section 8 of the **Labour Code (Amendment) Act of 1997** provides for severance pay. This is a statutory right of every employee entitled to it under the terms of the Code. It is true that *severance pay* is not the same thing as the *severance package* (what I would choose to call *retrenchment package*, in order to avoid confusing it with severance pay) that Appellant contemplated to give to its employees who were to be retrenched. The *retrenchment package* that Appellant contemplated to give to its employees who were to be retrenched was not a statutory entitlement, but one volunteered to be given by Appellant in terms of 'LM4.' We therefore do not agree that the amount and period of the *retrenchment package* was solely upon the Appellant's discretion simply because Appellant

had an exemption from paying *severance pay*. The appellant had itself undertaken to give *retrenchment packages* to its retrenches. It was therefore bound by the instrument in terms of which it had so bound itself. We are therefore unable to find fault with the Labour Court's finding on this issue. The complaint therefore that, the Court erred in awarding the respondent the retrenchment package for all the years he served since 1982 as if it was awarding severance pay is without substance in as much as this is in line with the clear words of annexure 'LM4'. As for the words *'every completed year in service'* stated in annexure 'LM4', we are again of the view that the Labour Court applied its mind correctly in applying them. There is no magic to these words in the circumstances of this instrument. It follows therefore that the grounds of Appeal contained in 4.7 to 4.9 above cannot succeed.

Cross- Appeal

14. The respondent cross-appealed against the judgement of the learned President of the Labour Court on three grounds. Firstly, that the Court erred in not awarding Applicant the full 12 months salary in accordance with the Originating Application. In the Originating Application, the Appellant prayed for a 12 months salary as fair and reasonable compensation for the said unlawful retrenchment while the Applicant is trying to look for alternative employment or to assist him to re-establish himself considering his age and the unlikelihood of finding any alternative employment as well as considering the Bank's "affordability factor" (by which Counsel for the Applicant said is meant that the Bank has a lot of money). Section 73(2) of the **Labour Code Order 1992** provides that:

> (2) If the Court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses.(underlining added for emphasis)

15. As clearly appears from the above section, the issue of compensation is within the discretion of the Labour Court. In **Mats'eliso Matsemela v Naledi Holdings (PTY)LTD LAC/CIV/A/02/07,** this Court did consider the terms of section 73(2) of the **Labour Code Order 1992** *in extensor* and how it should be applied**.** We reiterate our views as expressed in that judgment. Although it did not say so in so many words, the Labour Court did follow the views expressed in the above case *in casu*. The Labour Court did, and quite correctly so in our view, consider whether there had been any breach of contract by the Bank and whether the employee had failed to take such steps as may be reasonable to mitigate his or her losses (See paragraphs 40 to 43 of the judgment of the Court a quo). There is therefore, no basis for interfering with the judgment of the Labour Court on this point.

16. The second ground is that, the Court erred in not awarding Costs of the Application in the court *a quo*. Section 74 (2) of the **Labour Code**

Order 1992 provides that, "[n]o 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." The Labour Court did not make a finding that the Appellant had behaved in a wholly unreasonable manner. There is nothing in either the pleadings or judgement of that Court to indicate that this issue ever received the attention of the Labour Court. The mere fact that a party opposes proceedings or takes them on appeal does not mean that he behaved in a wholly unreasonable manner. This ground cannot succeed.

17. The third ground is that, the learned President erred in ordering that all payments are subject to income tax deductions in terms of the law. None of the parties had asked for that order from the Labour Court. The Court of Appeal has more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation. See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449.** In this Court, we have also disapproved of this practice. See for example **Pascalis Molapi v Metro Group Limited and Others LAC/CIV/R/09/03 Para 15, 16 AND 17; Fetohang Letsola v Lesotho Nissan and Anor (PTY) LTD LAC/REV/33/02** (delivered on the same date as this present case).We again reiterate in this case

that it is not acceptable for a Court to grant orders which are not sought for by the litigants. This has also been the trend in the Court of Appeal. See for example **The Presiding Officer N.S.S.(L. Makakole) v Malebanye Malebanye C of A (CIV) 05/07 at par 9;Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354.** In the latter case the Court (per Grosskopf JA) said the following at page 360:-

> *The relief which a court may grant a litigant in terms of such a prayer[further and alternative relief] cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent.*

18. It is clear therefore that, the third ground is that, the learned President erred in ordering that all payment are subject to income tax deductions in terms of the law was not properly made as nobody had asked for that order.

Conclusion

19. In conclusion, we hold that the dismissal of the respondent employee was both procedurally and substantively unfair.
20. The Appellant Bank's Appeal is dismissed with costs.
21. The cross-appellant's appeal that the Labour Court erred in not

awarding Applicant full 12 months salary in accordance with the Originating Application and in not awarding Costs of the Application in the court *a quo* is dismissed, the cross-appeal's ground that the learned President erred in ordering that all payments are subject to income tax deductions in terms of the law is upheld.

22. The cross-appellant is to pay two thirds of the costs of the Appellant Bank's costs resulting from his loss of the cross-appeal.

23. The Appellant Bank is to pay the costs of the main appeal.

24. My assessors agree.

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K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellant Bank Mr. Ntaote

For the Respondent (Cross Appellant) Mr. Sekonyela