

LAC/CIV/09/2008

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LEKHOOA PITSO

APPELLANT

AND

STANDARD LESOTHO BANK

1<sup>ST</sup> RESPONDENT

THE PRESIDENT OF THE LABOUR COURT

2<sup>ND</sup> RESPONDENT

CORAM: HONOURABLE MR K.E.MOSITO A.J.

ASSESSORS: MR M. MAKHETHA

MR L. MATELA

Heard: 07<sup>th</sup> July 2009

Delivered 14<sup>TH</sup> July 2009

### **SUMMARY:**

*Appeal from judgment of the Labour Court – Appellant Dismissal procedurally unfair for failure to observe Recognition Agreement considered. – Compensation under section 73 of the Labour Code 1992 – How assessed – factors to be considered – Appeal succeeds – Respondent to pay costs of Appeal.*

## JUDGMENT

MOSITO AJ:

1. This is an appeal from judgment of the Labour Court (per Lethobane P) handed down on the 2<sup>nd</sup> day of October 2008. The facts of this case are similar to those in *Standard Bank Lesotho v Lijane Morahanye & Another LAC/CIV/A/O6/08* as well as those in *Standard Bank Lesotho vs Molefi 'Nena & another LAC/CIV/A/06/08*. (It is strange that these cases bear the same citations). In the former case, this Court handed down judgment on the 10<sup>th</sup> day of November 2008. Judgment in the 'Nena case was handed down on the 19<sup>th</sup> day of January 2009.
2. This case arises out of the retrenchment process carried out in the respondent bank which started in September 2005. The present appellant's retrenchment occurred on the 14<sup>th</sup> day of July 2006. This was therefore a dismissal due to operational requirements as contemplated by section 66 (1) C of the *Labour Code Order No. 24 of 1992*. The retrenchments were said to have been necessitated by the restructuring which was brought about by the merger of the Standard Bank Lesotho and the Lesotho Bank 1999.
3. The appellant's complaint in the court a quo was that his retrenchment was both substantively and procedurally unfair. He pleaded in his originating application that he was employed by the Standard Bank Lesotho on a permanent and pensionable basis at a managerial position as a Regional Manager of the

branches of the respondent in the northern districts of Leribe and Butha-Buthe. He points out that as a result of his good performance he was promoted to the position of Head: Services Support at the respondent's Headquarters in the Maseru City. As a result of the said permanent and pensionable appointment, appellant pleads that he entered into huge and exorbitant loans and financial commitments with the respondent and other institutions pertaining *inter alia*, to home loans and personal loans under the legitimate expectation that he would be employed until his retirement age.

4. On or about December 2005, the respondent issued a general notice to all head-office staff informing them that they were going to consult with staff in the light of the right-sizing of their company's planned merger to form the Standard Lesotho Bank which is the present 1<sup>st</sup> respondent. As a member of a Trade Union named Standard Bank Lesotho Workers Union, appellant was also invited to represent the Union's members in the consultation process.
5. In February 2006, the appellant was elected the President of the Union and he became directly involved with the respondent in the aforementioned consultations on all matters pertaining to retrenchment of staff including matters of selection criteria exit benefits etc. On 2<sup>nd</sup> March 2006, the Union entered into a Recognition Agreement with the respondent. A copy of the Recognition Agreement was annexed to the Originating application as ANNEXURE "LP2". The Union lodged a protest against the inadequacy of the consultation process and the

appellant attended meetings with the respondent including that of the 3<sup>rd</sup> March 2006. Notwithstanding the agreed dispute resolution procedure contained in the Recognition Agreement, the appellant contends that the respondent went ahead to retrench Phase 2 staff where appellant's union launched a protest to DDPR all in vain

6. The appellant further indicated that on or about the 20<sup>th</sup> day of June 2006 he was offered a new position of "Float" without telling him that his position was redundant or that he was considered for retrenchment. He complains that he was never told why and how he was considered for such a position. He rejected the position because according to him he had not been consulted in respect of the redundancy of his position. He however complaint that in any event, his position was not redundant because it remained on the new *organogram* and was allocated to another staff member. He was informed that his position of Float was to be a grade below the original position that he had held. He complained that he did not know why he had to be demoted because he had just been rewarded handsomely for best performance for the previous year of 2005.
7. The respondent on its side responded by filing an answer. It contended that it is in law entitled and permitted to retrench its employees on account of operational requirements. It further indicated that it has complied with the procedural requirements relating to retrenchment and that the disagreement between the appellant and the respondent only came into existence when the parties could not agree on the termination package. It further

contends that in any event, the appellant was informed that he was due for retrenchment at a meeting held with Retail and Human Resources Management. It contends that appellant knew of the selection criteria and how his position was affected. It further contends that appellant was found not to be suitable for the position of Head: Service Support. He was offered a new post which was slightly lower than the one he had been holding but he rejected it. It therefore contended that appellant was the author of his own misfortune so to speak.

8. Respondent Bank further contended that it had valid reasons for retrenching its employees which were right-sizing and rationalisation. It contends that appellant was offered a job in the new structure and he chose to be retrenched voluntarily, probably because he could negotiate a higher termination package. It consequently disputed appellant's claim and prayed that his application be dismissed with costs. I must mention that before the Labour Court, oral evidence was led in support of the respective versions of the parties. As a result the Labour Court handed down judgment in which it dismissed the appellant's application with costs. The Labour Court held that the dismissal was both substantively and procedurally fair.
9. The appellant was dissatisfied by the decision of the Labour Court and he noted an appeal to this Court on the following grounds:

*“(1) the dismissal of Appellant is both substantively and procedurally fair.*

- (2) *The incumbents of positions not positions became redundant.*
- (3) *Respondent's retrenchment procedure laid in LP1 did not apply to Phase III and to the appellant.*
- (4) *Appellant was consulted as promised by the respondent per EXH2.*
- (5) *That the appellant was consulted on feedback of staff profiling.*
- (6) *The respondent's failure to abide by and follow Recognition Agreement was res judicata".*

10. When the matter was called before us on the date of hearing, both counsel informed the court that regard being had to the decisions in the Morahanye and 'Nena cases (*supra*), this court should decide this case in line with the aforementioned decisions most specifically in respect of procedural fairness. Both counsel informed this court that they had agreed that in the light of the above two decisions, the present case falls to be decided on the basis that the appellant's dismissal was procedurally unfair. In our view, this concession was commendable. In particular the court's attention was drawn by the counsel to this court's comments in paragraph 9 in Morahanye's case in which this court pointed out that:

*"Where there is a Recognition Agreement between the parties, the agreement must be given effect to without fail. Failure to do so will affect the retrenchment process on the basis of procedural impropriety. Once the Court has found that the procedure as detailed out in the Recognition Agreement was not followed, that has the effect of nullifying the process."*

11. As we pointed out in Morahanye's case and in paragraph 5 of 'Nena's case, the parties accepted as common cause that there

had been failure by the respondent to follow the provisions of the Recognition Agreement between the parties. We also held that such failure rendered the dismissal procedurally unfair. We also pointed out in ‘Nena’s case that the Labour Court and this court are obliged to order compensation in terms of section 73(2) of the Labour Code Order 1992 in which it is provides that:

### **73. Remedies**

*(1) .....*

*(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.*

12. There are therefore two situations in which the Court may order compensation, namely:

- (a) if it is practicable in light of the circumstances for the employer to reinstate the employee in employment, or*
- (b) If the employee does not wish reinstatement.*

13. The Learned Counsel for the parties asked this court to decide the case in line with the ‘Nena’s and Morahanye’s cases but they differed on the quantum to be ordered. Mr. Sekonyela for the appellant contended that this court should order the

respondent to pay compensation in the nature of salary for a period of 12 months. Mr. Ntaote for the respondent contended that the court should order compensation for a period of nine months now that they have agreed that there was procedural unfairness in this matter.

14. We have already discussed the principles relating to the assessment of compensation in these kind of cases in the ‘Nena’s case (See paras 12-19 of the judgment). In the present case we are unable to find any compelling reasons bearing those principles in mind and applying them to the identical facts of this case, as to why we should deviate from the approach we adopted in ‘Nena’s case. In our view there must be an endeavour to reach uniformity in similar cases so as to try and achieve consistency and predictability. We therefore agree with Mr. Ntaote that it will be in the interest of these principles that this court should treat like cases in the like manner.

15. In the result the following order is made:

- (a) The appeal succeeds with costs on the basis that there was procedural unfairness in the dismissal of the appellant.
- (b) The respondent is directed to pay to the appellant as compensation the sum equivalent to appellant’s nine months salary as at the time of dismissal in terms of section 73 (2) of the Labour Code Order 1992.
- (c) The judgment of the Labour Court is altered to read that:



“The application succeeds with costs on the basis that there was procedural unfairness in the dismissal of the applicant.”

16. My assessors agree.

.....

K.E.MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellant: Mr. Sekonyela

For the respondent Bank: Mr. Ntaote