LAC/ REV/26/09

IN THE LABOUR COURT OF APPEAL

HELD AT MASERU

In the matter between:

SEESO LECHE	APPLICANT
AND	
TELCOM LESOTHO (PTY) LTD	1ST RESPONDENT
LABOUR COMMISSIONER	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

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

ASSESSORS: Mr. L. Matela

Mr. R. Mothepu

Heard on: 26th JANUARY 2010

Delivered on: 5th FEBRUARY 2010

SUMMARY

Application for review of administrative action – Review of the decision of the Labour Commissioner to exempt 1st respondent from paying severance pay – whether such exercise by the Labour Commissioner involves the need for the Labour Commissioner to hear the employees of an employer applicant before the Labour Commissioner can exercise her discretion to grant an exemption under sections 79 (8) and (9) of the Labour Code (Amendment) Act 1997 – The section does not exclude the Audi principle – the Labour Commissioner is obliged to grant such an opportunity to the employees. – The review is granted with costs.

JUDGEMENT

MOSITO AJ:

1. This is an application for an order in the following terms:

   1.1 Condoning the delay in the filing of this application

   1.2 Reviewing and setting aside as invalid, the 2nd Respondent`s decision to grant the 1st Respondent an exemption from complying with provisions of Section 79(1) of the Labour Code Order 1992

   1.3 Dispensing the 1st Respondent to pay to the Applicant an amount of M44,217.99 being the balance outstanding on the severance pay entitlement

   1.4 Directing the Respondents to pay the costs thereof in the event of their opposition hereto

   1.5 Granting the Applicant further and alternative relief

2. At the hearing of this application however, the parties agreed that only prayer 1.3 above be determined.

3. Before I proceed to consider the said issue, it is convenient to begin by outlining the material facts relevant to the determination of the said point. The applicant was employed by the 1st Respondent on 26th February, 1992.

He resigned from his employment on 18th December, 2007. At the time of his resignation, he was earning M9, 442.43 gross. He deposes in his founding affidavit that at the time of his resignation his withdrawal pension benefits stood at M77, 846.82 gross or M60, 644.87 net. He further avers that his severance pay was M57, 143.08. He further deposed that he was paid an amount of M12, 925.09 gross of his severance pay as the 1st Respondent claimed that it had been granted exemption by the 2nd Respondent. The said exemption from payment of severance pay is dated 24th January, 2005. According to Applicant this implied that 1st Respondent was at liberty either not to pay severance pay in some cases, or to pay it however it wished and not as it ought to be calculated in terms of the law. He further avers that other fellow employees have been paid their severance pay in full. This satisfied with the 1st Respondent's conduct, the Applicant approached it for amicable settlement and when that failed, he approached the DDPR to have the dispute conciliated. The dispute was however not resolved.

4. The Applicant avers that it is wrong in law for the 1st Respondent to rely on the purported exemption for the following reasons;

> a) The exemption itself is invalid in that it was granted without affording me and other employees of the 1st Respondent any hearing and yet we stood to be adversely affected thereby. The 2nd Respondent was obliged to observe rules of natural justice in dealing with the application for exemption;
>
> b) The purported exemption was not granted by a the Labour Commissioner herself, and it is consequently invalid on that ground as well.
>
> c) the 1st Respondent has not adhered to the exemption as it has paid severance pay together with benefits under its pension scheme to other employees as evidenced by annexures "E" hereto collectively which are calculations of

benefits paid out to some of the 1st Respondents employees in the past.

d) Given the 1st Respondent1s conduct set out at paragraph c) above, I legitimately expected to be afforded treatment equal and or similar to that accorded to my fellow employees.

e) The 1st Respondent acted unreasonably in giving me my full severance pay.

5. Furthermore, the Applicants avers that the said exemption purportedly granted to the 1st Respondent in terms of Section 79(1) of the Labour Code Order 1992 (as amended) should be reviewed and set aside. He says this because he avers that he is entitled to payment of his full benefits including severance pay like all other employees of the Respondent in terms of Section 79(1) of the Labour Code Order of 1992 (as amended).

6. In reaction to the above complaint, the Respondent answered thereto materially as follows;

AD PARA 9 THEREOF

(a) THEREOF

It is denied that the exemption has any adverse effect on the employees. It is in fact intended to benefit the employees. It is however denied that a hearing is contemplated when an exemption is applied for or is granted. National justice has no place in the arrangement at all.

(b) **THEREOF**

The exemption was duly granted by the appropriate authority namely the office holder for the time of the office of Labour Commissioner and that is sufficient to make the exemption lawful.

It is disputed that the exemption was not granted by the Labour Commissioner in the circumstances.

(c) **THEREOF**

It is admitted that applicant was the first to be affected by the implementation of the exemption but it could have been anyone. Since then the exemption has been uniformly applied. It is denied that a mere fact applicant was the first to be affected by a lawful exercise of a right that makes the exercise questionable.

(d) **THEREOF**

It is denied that the applicant had any legitimate expectation in the matter or that was entitled to be heard before a lawful exercise of a right by the company.

(e) **THEREOF**

The contents are denied. There is no unreasonableness involved in this mater.

7. I must indicate that when the hearing commenced before us, the Learned Counsel for the parties informed the Court that they had agreed that the Court should only determine the issue whether or not the exemption was invalid. The first contention was that the purported exemption was not granted by the Labour Commissioner herself, and it is consequently invalid on that ground. However it is clear from the exemption itself that it was granted by an officer who was acting as the Labour Commissioner at the material time. There is therefore no substance in this contention. The next complaint was that the 1st Respondent has not adhered to the exemption as it has paid severance pay together with benefits under its pension scheme to other employees as evidenced by annexure "E" hereto collectively which are calculations of

benefits paid out to some of the 1st Respondents employees in the past. As indicated above the parties agreed at the commencement of the hearing in this matter that the only issue that had to be determined relates to the validity of the exemption. This issue therefore does not fall for a determination by this court. The third basis for complain was that given the 1st Respondent's conduct set out, applicant legitimately expected to be afforded treatment equal and or similar to that accorded to my fellow employees. Again we have fortunately been relieved of expressing an opinion on this point. The same goes for the basis that the 1st Respondent acted unreasonably in giving applicant his full severance pay. We make no determination on this issue as well.

8. It is clear therefore that the only issue that we need to determine is whether the exemption itself is invalid in that it was granted without affording applicant and other employees of the 1st respondent any hearing and yet they stood to be adversely affected thereby, and whether the 2nd respondent was obliged to observe rules of natural justice in dealing with the application for exemption. This hinges on the law relating to severance pay in Lesotho. The law relating to severance pay in Lesotho, and especially as far as relevant to this case stands as follows:

> **79. Severance payments**
>
> (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.
>
> (2) An employee who has been fairly dismissed for misconduct shall not be entitled to a severance payment.
>
> (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) Where the termination of employment has been at the initiative of the employee, the employer may either make the severance payment immediately or may hold it in trust for a maximum period of 12 months. When the employer has held the severance payment in trust, the employer shall, immediately upon expiry of the period for which it has been held, pay the employee the sum of the severance payment plus interest at the fair market rate prevailing in the period in question. The placement of any severance pay in trust shall be subject to the provisions of section 89 regarding security from the employer.
>
> (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.

9. The Labour Code was amended in 1997 by means of the ***Labour Code (amendment Act) 1997***. Section 8 of the **Labour** ***Code (amendment Act) 1997*** introduced further sub-sections, Section 79(7), empowers the Labour Commissioner to exempt an employer, upon application, from the effect of the provisions of Section 79)1). Section 79(7) provides:

> 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.

Section 79(9) in turn provides:-

> 9) If upon considering a 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).

10. Advocate KK Mohau KC submitted on behalf of the Applicant that the powers conferred by Section 79(7) are administrative in nature, calling for the exercise of discretion by the Labour Commissioner likely to adversely affect employees in their property rights to severance pay. He further submitted that it is trite that where a public body or authority exercises administrative powers likely to affect the rights of the individual, the presumption is that rules of natural justice apply unless the law giver has expressly or by necessary implication provided to the contrary. For the above proposition, the Learned Counsel referred to ***R v NGWEVELA* 1954(1) SA 123 (A) AT 131 and *A-G EASTERN CAPE v BLOM & ORS* 1988(4)SA 645 (A).** He went on to submit that the Labour Commissioner's decision to grant the 1st Respondent an exemption from paying the Applicant and fellow employees severance benefits without affording them a hearing is impeachable and should indeed be invalidated as contrary to principles of fairness, especially the *audi alteram partem* rule. He referred the Court ***Herbet Porter & ANO v Jo`burg Stock Exchange 1974 (4) SA at 789F; Brits Town Council v Pienaar NO. 1949(1) SA 1004(t) at 1020-1021.***

11. The Learned Counsel for the 1st Respondent Advocate M E Teele KC countered the aforegoing argument by pointing out that the rule of natural justice as a rule applies only where the act complained of is to the prejudice of the litigant (applicant *in casu*). He relied on ***Moselane & Others v the Manager Bonhome School & 3 Others 1991 -1992 LLR & LB 132 AT 142***; ***Pages Stores (Lesotho) (PTY) LTD v Lesotho Agricultural Development Bank and Others 1993 -1994 LAR & LB P. 492 at 503***; ***Rakhoboso v Rakhoboso 1197 -1998 LLR & LB 1***; ***Noka-Nts`o Primary School & Others v Khoboliso & Anor 1999 – 2000 LLR & LB*** *190* He further

submitted that the Labour Commissioner's administrative action in the present matter was not prejudicial to the interest of the applicant. He contended that severance pay is payable to an employee at separation with his or her employer at a scale fixed by statute. He contended further that this payment is one contributed to the employer alone. He further argued that the 1997 amendment to Section 79 of the ***Labour Code Order 1992*** recognised that there are employers who invest in schemes that provide a better separation package than severance pay provided for in the Code. He contended further that in the present case, there is no dispute that the scheme run by the 1st Respondent rewards that Applicant more than the severance pay. The Applicant cannot therefore be prejudiced in the circumstances. He contended further that the test for prejudice would be whether the Applicant gets less than the amount he would otherwise get as severance pay in the absence of the scheme. His further contention was that the Applicant gets more and therefore that he cannot be prejudiced. If he cannot be prejudiced, so argued the Learned Counsel then natural justice in the nature of the *audi* principle is not applicable. The Learned Counsel argued further that the philosophy behind the legislation is to relieve the employer of payment of the double contribution which will in turn encourage other employers to invest in separation schemes better benefits for the employees.

12. The Learned Counsel, Advocate Teele KC contended that in any event, even if it could be held that there were interests of the Applicant prejudiced by the exemption, a hearing was not required in any event in the peculiar circumstances of this case because , since section 79 (as amended), in the context of the 1st Respondent, sought to regulate the affairs of a number of people at once and to operate over a period of time, the exemption

constituted a legislative act, to which the rules of natural justice does not apply. For this proposition he relied on ***BAXTER, Administrative Law Juta p 580-581***. He contended further that the basis of the approach is to found in the case of ***Pretoria City v Modimola 1966 (3) SA 250 at 261H – 262B.*** Bothe JA explained that where the decision affects more or several member of the community whose rights are prejudicially affected the public authority.

> "in exercising its powers under such enactment, the public authority is guided solely by what is best for the community as a whole and the peculiar conduct or circumstances of any individual member of that community is a completely irrelevant consideration".

13. The learned Counsel then posed a question whether the community of employees in the country should suffer as a result of employers abandoning schemes that pay better than severance pay for fear that they would have to pay double contribution, because one employee insists this should be done. He answered this rather rhetorical question by saying that the answer is a resounding No!! His circumstances and conduct are irrelevant, the goal is to achieve interest of the majority and he need not have been heard. The Learned Counsel then submitted that in all circumstances the application be dismissed with costs.

14. We now proceed to consider these arguments. The starting point is that, whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem*

principle (**Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 661A-B; S A Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 10J-11B:*Sachs v. Minister of Justice 1934 AD 11 at 38; Minister of Home Affairs & Ors v. Mampho Mofolo C of A (CIV) No. 2/2005 at para 11*.**The right to be heard (henceforth "the audi principle') is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions. The right to *audi* is however infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation (Blom, supra at 662H-1 and Baxter ***Administrative Law*** (1984) 569-570). (Thus in appropriate instances fairness may require only the submission and consideration of written representations. It is not necessary to be equated with an entitlement to judicial - type proceedings, with their full attributes. While a statute may not *per se* exclude the operation of the rule, it may confer an administrative discretion which permits that result. Or the operation of the rule may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively. The *audi* principle is underpinned by two important considerations of legal policy. The first relates to recognition of the subject's dignity and sense of worth. As the leading United States constitutional writer Lawrence Tribe ***Constitutional Law*** (2nd Ed 1988) at 666 explains:

> "the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome: these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one".

15 As Donaldson LJ put it in **Cheall v Association of Professional. Executive Clerical and Computer Staff [1983] QB 126**, "natural justice is not always

or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'". Secondly, there is the pragmatic consideration that the application of the *audi* principle is inherently conducive to better administration. As Milne, JA summarised both considerations in ***South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 13B-C:***

> "the *audi* principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power"

(See also **Administrator. Natal and Another v Sibiya and Another 1992 (4) SA 532 (A) at 539C-D and Minister of Education and Training and Others v IMdlovu 1993 (1) SA 89 (A) at 106C**).

16. In our view, the Labour Commissioner is enjoined to make a decision on exemption which is sure to affect employees. The Labour Commissioner is a public official. She is required to make a decision likely to affect the correctness of the outcome. As a court of law we are entitled to resist accepting that there is no right to a hearing when it is unlikely to affect the correctness of the outcome. Why courts resist accepting that there is no right to a hearing when it is unlikely to affect the correctness of the outcome was elucidated in ***Administrator Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A) at 37C-F where Hoexter JA said***:

> "It is trite...that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry

whether he is entitled to a prior hearing. Wade Administrative Law {6th Ed) puts the matter thus at 533-4:

> 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly'.
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> The learned author goes on to cite the well known dictum of Megarry J in John v Rees [1970] Ch 345 at 402:
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> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion , suffered a change'".

17. In essence, Advocate Teele KC sought to urge upon us was that the employee's circumstances and conduct are irrelevant, the goal is to achieve the interest of the majority and applicant need not have been heard. In other words, it would make no difference whether or not he is heard. The "no difference" argument has been rejected in many cases.(see for example ***Friedland and Others v The Master and Others 1992 (2) SA 370 (W) at 378A-C; Muller and Others v Chairman. Ministers' Council. House of Representatives, and Others 1992 (2) SA 508 (C) at 514F-G; Yates v University of Bophutatswana and Others 1994 (3) SA 815 (BG) at 838A-E; Fraser v Children's Court. Pretoria North and Others 1997 (2) SA 218 (T) at 231H-233B; Yuen v Minister of Home Affairs and Another 1998 (1) SA 958 (C) at 969J-970G***. In our view in the circumstances of the present case, the *audi rule* in principle applies.

18. The question is then whether the statute excludes it, expressly or impliedly, or if not, whether it permits its exclusion in appropriate circumstances, and accordingly whether in the circumstances of this case it has been excluded. In my view, there can be no doubt that the terms of section 8 which introduced 79(7), (8) and (9) of the ***Labour Code (Amendment) Act 1997*** do not themselves the operation of the *audi* principle *ex lege*. While the provisions of the Act lay down no express procedure for hearings, there are several *indicia* which make it plain that a form of hearing appropriate to the circumstances is to take place. For example, the Labour Commissioner is to satisfy herself that the scheme operated by the employer offers better advantages to the employee. There is nothing that excludes the Labour Commissioner from inviting the employee to make representations so as to enable herself to be satisfied as required by the section. Obviously this does not relieve the Labour Commissioner from ensuring that this state of affairs indeed exists, as a jurisdictional fact for the exercise of the discretion, and materially so.

19. To sum up. As a matter of general principle an employee is entitled to be heard before being an exemption can be granted to an employer to pay severance pay. That is so at common law, and it has not been excluded by the present statute. The statute does not itself oust the operation of the audi principle. In the present case, it was common cause that the applicant was not afforded such a hearing prior the said exemption. We would have no difficulty in reviewing and setting aside the exemption as invalid on this basis alone, and it is accordingly so reviewed and set aside with costs payable by first respondent.

20. This is a unanimous decision of the Court.

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K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Applicant: Advocate K.K. Mohau KC

For the Respondent: Advocate M.T.Teele KC