IN THE LABOUR APPEAL COURT OF LESOTHO

LAC/REV/01/10

HELD AT MASERU

In the matter between:

'MAKHIBA TS'OEU APPLICANT

AND

CITY EXPRESS STORES (PTY) LTD 1ST RESPONDENT

LABOUR COMMISSIONER 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

CORAM: HONOURABLE DR K. E. MOSITO AJ

ASSESSORS: MRS M MOSEHLE

MR L.O. MATELA

HEARD: 18TH JANUARY 2011

DELIVERD: 26TH JANUARY 2011

SUMMARY

Application for review – the Labour Commissioner's exemption of 1st respondent from paying severance pay to applicant reviewed and set aside – 1st respondent to pay applicant severance pay in the sum of M36,037.40 – 1st respondent to pay costs of the application.

JUDGEMENT

1. This is an application brought by the applicant moving this court for an order in the following terms:

   1.1 Reviewing and setting aside as invalid, the 2nd respondent's decision to grant the 1st respondent an exemption from complying [sic] provisions of section 79 (1) of the Labour Code Order 1992.
   1.2 Dispensing the 1st respondent to pay to the applicant an amount of M30, 889.00 being the balance outstanding on the severance pay entitlement.
   1.3 Directing the respondents to pay costs thereof in the event of their opposition hereto.
   1.4 Granting the applicant further and alternative relief.

2. The facts giving rise to this application are that, the Applicant was an employee of the 1st respondent. On the 28th day of March 2007, the applicant resigned from the employ of the 1st respondent. Thereafter, Applicant frequented the offices of 1st respondent demanding payment of her severance pay which was due to her all in vain. On 17 August 2007, 1st

respondent wrote to 2nd respondent applying for 1st respondent's exemption from paying severance pay to Applicant under the relevant legislation. It is applicant's contention that at the time of her resignation she was entitled to severance pay in terms of section 79(1) of the **Labour Code Order 1992** (the Code) which provides:

> *"(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/her services, a severance payment equivalent to two weeks wages for each completed year of continuous service with the employer."*

3. It is further common cause that on 17 August 2007, the 1st respondent applied to the Labour Commissioner for exemption from the effect of section 79(1) of the Code. The exemption was sought in terms of section 8 of the **Labour Code (Amendment) Act 1997** (the Act) which provides:

> *"8 The Principal Law is amended in section 79 by inserting the following after sub-section (6)*
> *"(7) Where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in sub-section (1) he may submit a written application to the Labour Commissioner for exemption from the effect of that sub-section."*

4. The Labour Commissioner duly granted the 1st respondent an exemption on the 22 August 2007. By this time applicant had already served her notice and separated with the 1st respondent. Pursuant to the said exemption the

1st respondent declined to pay applicant her severance pay which he was claiming in terms of section 79(1) of the Code. Applicant's contention was that at the time that she tendered her resignation and indeed at the time that her resignation took effect, the 1st respondent had not yet been exempted from the effect of section 79(1). She contended that he thus qualified to be paid her severance pay in terms of the provisions of the Code.

5. In March 2010, Applicant filed the present application. On the 1st day of November 2010, the applicant filed a notice of amendment in terms of which she sought to have prayer 1.2 of the Notice of Motion and paragraph 7 of the founding affidavit amended by deleting the figure M30, 889.20 and inserting M36, 037.40. On the 8th day of November a further notice of amendment was filed to include a prayer in the Notice of Motion and founding affidavit that interest at the rate of 12.5% per annum be paid from the date of *mora* to date of final payment.

6. No opposing papers were filed by the respondents but at the hearing of this application advocate M.P. Motseki appeared for the respondents without papers. Both advocate M.T. Khiba (with her advocate K.S. Nkoebele)for the applicant and advocate M.P. Motseki informed the court that they had agreed on the following issues:

   (a) That the exemption given by the second respondent exempting the 1st respondent from paying severance pay to the applicant be set aside as irregular.
   (b) That the 1st respondent pay to the applicant severance pay in the sum of thirty six

thousand and thirty seven Maloti and forty Lisente (M36,037.40) and not the figure initially prayed for the in the Notice of Motion.

7. When the case commenced, the court brought it to the attention of counsel for the applicant that the amendments sought and which are detailed out above could not be properly granted in relation to the founding affidavit. The court asked counsel whether it would be proper to amend an affidavit in motion proceedings, and whether it was not best to file a supplementary affidavit rather than seek to amend the founding affidavit. In all fairness to advocate Khiba, she conceded that the court could not do that and that in any event while the court could grant the amendments sought in respect of the Notice of Motion, the prayers as amended would lack factual foundation in the founding affidavit which would then provide be containing facts that would not be able to support the prayers in the Notice of Motion. She therefore decided not to pursue the amendments.

8. After hearing counsel for both parties on the admitted issues, the only issue that remained was one as to costs. The court was urged to grant costs of the application to the applicant, while the 1st respondent opposed the granting of costs. After hearing argument from both parties, the court granted the following orders:

    1. That the exemption by the Labour Commissioner was hereby reviewed and set aside.

2. That the 1st respondent is to pay to applicant severance pay in the sum of M36, 037.40.
3. That 1st respondent is to pay costs of suit.

9. The Court then undertook to provide brief reasons for its aforementioned decision on the 26th day of January 2011. The following are its reasons.

10. In relation to the first paragraph of the order, the parties themselves agreed (and quite correctly so) that the exemption be set aside as irregular on the basis that the applicant had not been afforded the benefit of *audi* principle and yet she was to be prejudiced by the decision of the 2nd respondent. Further that the purported exemption was retrospective. These concessions were made in the light of the judgment of this court in **Leche v Telcom Lesotho (Pty) Ltd and Another LAC/REV/26/2009** as well as the Court of Appeal judgment which confirmed the said decision in **Telcom Lesotho (Pty) Ltd v Seiso Leche C of A (CIV) NO. 20/2010**. The court agreed with the concession. It is difficult to understand why the Labour Commissioner is continuing to exempt employers in these circumstances despite a catina of decisions of this Court and the Labour Court. The Labour Court has been singing the song that this is wrong for a long time to no avail (See for example, **Kunene v JD Group Lesotho (Pty) Ltd and Another (LAC/REV/98/05, LC/REV/386/06**. The exemption was even retrospective. This is clearly wrong. It is clear from this section of the Interpretation Act that statutes are meant to apply prospectively (See **Heqoa v Browns Cash and Carry (LC/REV/331/06)**. As L. A. Lethobane P. correctly put it, “[t]hat is

irregular in as much as it is contrary to the enabling statute which does not authorize retrospectivity"(See .**Metro Cash and Carry v Molikoe and Another (LC/REV/62/2007).**

11. The second paragraph of the order was granted on the basis that the parties had agreed that it be so granted once the exemption had been set aside. Apparently the parties had agreed on the figure of M36, 037.40 pursuant to the amendment mentioned above. The Court granted the said paragraph of the order as agreed by the parties and at their own request.

12. The last issue related to the issue of costs. On this subject the parties disagreed. The applicant insisted on her costs as prayed in the Notice of Motion, while the 1st respondent opposed (albeit without opposing papers) the granting of the set prayer. The Court has to determine this issue.

13. The traditional principle applicable to costs orders is that an award of costs is in the discretion of the court. The two principles which have governed costs orders in our law since the earliest time are, firstly, that the court of first instance has a judicial discretion to award costs and secondly, that costs follow the event in that the successful party is usually awarded costs. There is an extensive body of precedent in support of the rule that the second principle yields to the first. The requirement is that the court's discretion be exercised judicially. (See ***Fripp v Gibbon*** **1913 AD 354, at 357**). The nature of the judicial discretion has been described as "very wide" (See ***K & S Dry Cleaning Equipment v South African Eagle Insurance*** **2001 (3) SA**

652 (W) at 668G), or "overriding"(See **Griffiths *v Mutual & Federal Insurance*; 1994 (1) SA 535 (A)**). The discretion is, of course, not unfettered.

14. Bearing the above principles in mind, we proceed to consider the issue of costs *in casu*. In the first place the Court considered that the 1st respondent had not filed opposing papers and it was inappropriate to allow the said respondent in motion proceedings to oppose the granting of the order from the bar. Secondly, the court took into account the fact that during the last session of this Court the parties had requested the Court to give them an opportunity to negotiate settlement, but the Court had been informed that the 1st respondent was not cooperative thereafter.

15. Advocate Motseki informed the court from the bar that it was not because the 1st respondent was not cooperative, but that the true position was that the 1st respondent is run from the Republic of South Africa and that its Board of Directors could not sit expeditiously to come to a decision settling the dispute. This explains why there was a delay in resolving the matter until the matter was brought again on the roll for hearing before this Court during the present session. The Court took into account the fact that this explanation was given from the bar in motion proceedings which in effect amounted to the learned counsel testifying from the bar. This was unacceptable. No explanation had been given as to why the explanation given by the learned counsel was not reduced to writing and contained in an affidavit.

16. Another consideration was that the applicant had employed counsel to represent her who had not only filed the founding papers, but had also filed Heads of Argument while the respondent's counsel had filed nothing. In all the circumstances and bearing in mind that the applicant had substantially succeeded in what she wanted before this court, the court granted the order that the 1st respondent pay costs of this application.

17. These are the reasons that we furnish for our order of the 18th day of January 2011.

18. This is a unanimous decision of the Court.

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DR K.E.MOSITO AJ

FOR APPLICANT: Advocate M.T. Khiba and Advocate K.S. Nkoebele

FOR 1ST RESPONDENT: Advocate M. P. Motseki

FOR 2ND TO 3RD RESPONDENTS: No appearance