IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/03/2010**

In the matter between:

KULELILE LEPOLESA	1ST APPELLANT
DANIEL SEKOKOTOANA	2ND APPELLANT
KENALEMANG MOLIKENG	3RD APPELLANT
LIMPHO SENYANE	4TH APPELLANT
JOHANNES MOKOMA	5TH APPELLANT
MOSHOESHOE MOHONO	6TH APPELLANT
DAVID THOKOANE	7TH APPELLANT
LIMAKATSO LEBONA	8TH APPELLANT
LISEMELO SEEMA	9TH APPELLANT
BLANDINA MOTSAMAI	10TH APPELLANT
'MALETHOLA LERATA	11TH APPELLANT
'**MATS'EBO WILLIAMS**	12TH APPELLANT

ANNA TSEMANE 13TH APPELLANT

HILDA NTISA NKHETHOA 14TH APPELLANT

AND

SUN INTERNATIONAL OF LESOTHO (PTY) LTD

t/a MASERU SUN AND LESOTHO SUN (PTY) LTD RESPONDENT

CORAM: HONOURALE DR K.E.MOSITO A.J.

ASSESSORS: MRS. M. MOSEHLE

MR. J. M. TAU

Heard: 26TH January 2011

Delivered: 2ND February 2011

SUMMARY

Appeal from the Labour Court – a dispute of right subject to adjudication by the Labour Court having not been referred to the DDPR for conciliation – appellants relying on a report which shows different parties, different subject matter and a

premature date of dismissal being referred to the DDPR for conciliation – no merit in the appeal and appeal dismissed.

Costs- neither party having asked for costs of the appeal and there being no reason to award costs in this dismissal matter – there is no order as to costs of this appeal

JUDGMENT

MOSITO A.J:

1. The appellants are all former employees of Sun International of Lesotho (Pty) Ltd t/a Maseru Sun (Pty) Ltd and Lesotho Sun (Pty) Ltd and the current dispute arose out of the dismissal of the said employees around February, 2008 on grounds of operational requirements. The appellants came before the Labour Court to challenge the fairness of these dismissals.
2. The appellants asked for an order in the Labour Court in the following terms:

    (a) Declaring the retrenchment of applicants both substantively and procedurally unfair and unlawful.
    (b) Payment of compensation equivalent to 12 months salary for unlawful retrenchment of the applicants.
    (c) Payment of applicants' severance pay.
    (d) Payment of costs of suit.
    (e) Further and alternative relief.

3. Appellants alleged that they were unfairly dismissed by respondents on the grounds of operational requirements. They alleged further that such

dismissals were both substantively and procedurally unfair. They further allege that they were not paid severance pay due to them notwithstanding that they were entitled thereto.

4. In its answer, the respondent raised a point *in limine* to the effect that the Labour Court has no jurisdiction to determine this dispute as it was not preceded by conciliation before the Directorate of Dispute Prevention and Resolution (DDPR) as envisaged by section 227 (5) of the **Labour Code (Amendment) Act, 2000** (hereinafter referred to as the Act). The section reads:

> *If the dispute is the one that should be resolved by adjudication in the Labour Court, the Director* ***shall*** *appoint a conciliator to attempt to resolve the dispute by conciliation* ***before the matter is referred to the Labour Court****.[emphasis mine].*

5. The respondent for its part admitted that the appellants were dismissed on the basis of operational requirements. It however disputed the unfairness of the alleged dismissals. Respondent further alleged that it had a commercial rationale for effecting such dismissals and that it had negotiated in respect of all the issues that it was required to negotiate on. Respondent further denied that appellants were entitled to be paid severance pay. It alleged that appellants were not entitled to such severance pay because respondent had been given exemption from paying the said severance pay by the Labour Commissioner pursuant to section 8 of the **Labour Code (Amendment) Act No. 9 of 1997**.

6. In response to such point *in limine* appellants maintained that the Labour Court does have jurisdiction to hear the matter because they had fully complied with the aforementioned sections. In support of their contention that they had complied with the relevant statutory provisions, appellants relied on annexure "LK1" which was attached in reply to the challenge.

7. In its judgment dated 31 May 2010 the Labour Court upheld respondent's point *in limine* and concluded that the Labour Court did not have the authority to deal with the matter.

8. On 21 June 2010 the appellants noted an appeal to this Court against the judgment of the Labour Court. The appellants annexed grounds of appeal and further supplementary grounds of appeal which were later on filed. In their grounds of appeal , appellants complained that:

> The Learned Deputy President erred and or misdirected herself in holding that:
> (1) The matter relating to the procedural and substantive fairness of appellants retrenchment was not conciliated.
> (2) The application of the appellants in the Labour Court related to a difference subject matter from the one that was conciliated in the DDPR in the circumstances of the case.

9. The appellants further filed a supplementary ground of appeal which reads thus: *"(3) that the Labour Court erred in upholding the point in limine".*

10. When the matter was to be heard before this Court, respondent raised a number of preliminary issues in its heads of argument. First, it complained that the appellants had failed to deliver the record of proceedings as required by Rule 7 (1) of the ***Labour Appeal Court Rules of 2002***. It further complained that appellants had failed to comply with Rule 7 (2) of the Rules of Court. It complained that appellants had failed to deliver a record of proceedings which is contemplated by rule 7(3) of the rules of the Labour Appeal Court. Consequently, respondent argued that in terms of rule 7 (14) of the ***Labour Appeal Court Rules of 2002***, appellants should be deemed to have withdrawn their appeal.

11. This was not the only preliminary complaint. The other complaint was that appellants had failed to deliver their Heads of Argument within the required 14 days before the hearing so required in terms of Rule 11(1. Consequently respondent submitted that it was unable to deliver in response its Heads of Argument within the time frames required by Rule 11 (2) of the ***Labour Appeal Court Rules of 2002***.

12. This Court however, exercised its discretion to condone the said breaches of the Rules and gave directions in terms of Rule 19 of the Rules of Court that the parties proceed into the merits of the case.

13. In respect of the merits respondent submitted that in terms of section 226(1) paragraph c (iii) of the **Labour Code Order 1992** as Amended by

section 25 of the **Labour Code (Amendment) Act 2000**, the Labour Court has exclusive jurisdiction to resolve unfair dismissals relating to operational requirements. It submitted further that it is apparent from section 226 of the **Labour Code Act 1992** as amended by section 25 of the **Labour Code (Amendment) Act 2000** that a dispute concerning an unfair dismissal relating to operational requirements of an employer is regarded as a dispute of right. It was further submitted for the respondent that an analysis of section 227 (1)(a), section 227 (5) and section 227 (9) of the Code as Amended by Act No 3 of 2000 indicates clearly that the following four statutory requirements must be met before the Labour Court can assume jurisdiction in a case concerning an unfair dismissal related to operational requirements of an employer as is the case *in casu*: first, that any party to the dispute must refer the dispute in writing to the DDPR within six months of the date of dismissal; and, second that the DDPR's director must appoint a conciliator; and, third that the said conciliator must attempt to resolve the dispute by means of conciliation before the matter is referred to the Labour Court; and lastly if the dispute remains unresolved after thirty days from the date of referral, the conciliator must issue a report that indicating that the dispute remains unresolved.

14. In all the circumstances, so it was submitted the Labour Court had no jurisdiction to entertain the matter as the mandatory provisions contemplated in the above sections had not been complied with. In the past, this court held that disputes that are subject to resolution by the Labour Court must first be referred to the DDPR for settlement before

being taken to the Labour Court for adjudicative resolution (See ***Lesotho Highland Development Authority v 'Mantsane Mohlolo & 10 Others LAC/CIV/ 07/2009***). Failure to do so renders the Labour Court to lack jurisdiction to entertain the matter. In our respectful view therefore, this contention by the respondent is well taken.

15. In an endeavour to meet this challenge, the appellants sought to rely on annexure "LK1". Annexure "LK1" is a report of an outcome of a dispute referred to conciliation in terms of section 227(5) of Act No. 3 of 2000 under Referral No. A0149/08. The parties to that dispute are reflected as ***National Union of Hotels Food and Allied Workers V Lesotho Sun (Pty) Ltd and Sun International of Lesotho***. It will be realised from the word go as correctly submitted by Dr B. Van Zyl that the parties in that referral were different from the parties before the Labour Court. They were indeed different from the parties before us. On this ground alone it could not be convincingly argued that the present appellants ever referred a dispute to the DDPR.

16. We are not certain on the basis of annexure "LK1" whether the Union represented the present appellants who were applicants before the Labour Court or not. It was incumbent upon the applicants/appellants to convince the Labour Court and this Court on the basis of written evidence that the union represented the present appellants before the DDPR. It was contended on behalf of the appellants by advocate Sekonyela that in the letter written to Ms Idlett Seema dated 1 February 2008, it is indicated that

"*we hereby confirm that over the last seven months extensive consultations between the company and the National Union of Hotels Food and Allied Workers have taken place regarding the possible need to undergo a retrenchment/restructuring exercise at Lesotho Sun and Maseru Sun."* Mr. Sekonyela argued that on the basis of this paragraph this court should assume that the Union had referred the said dispute to the DDPR for conciliation on behalf of the present appellants. The difficulty with this contention is first that, there is nothing in annexure "LK1" to indicate that fact. Second, there is nothing in the originating application in the nature of an allegation establishing that fact, let alone indicating that appellants are members of the Union.

17. Nor do the problems of the appellants end there; annexure "LK1" indicates that the issues presented by the applicant in the referral were "*failure to negotiate in good faith".* However, in the case before the Labour Court the appellants/applicants did not challenge the respondent's *failure to negotiate in good faith.* What they challenged was the *unfairness of their dismissal.* In our view this are two completely different cases, the issue of unfair dismissal was never referred to conciliation on the basis of annexure "LK1". Annexure "LK1" further indicates that the issue that was not settled before the conciliator was that of *failure to negotiate in good faith*. It is in respect of this issue that both the applicant and respondent signed for on "LK1". This clearly indicated that they accepted that the issue that was before the conciliator was the matter relating to failure to negotiate in good faith not unfair dismissal.

18. As it is usually the case, it never rains but it pours! The referral date to the DDPR reflected on the Referral Form is 06/02/08. The referral date on"LK1" is 12 day of February 2008 and yet the dismissal of the applicants according to the letter written to Seema was to take effect on the 29th day of February 2008. In other words if Mr. Sekonyela's argument were to be accepted, the appellants referred a dispute on "unfair dismissal" for conciliation before they were actually dismissed. They referred it on two separate and different dates. It is difficult to see how that could have happened. The conciliator could only have jurisdiction to entertain the unfairness of a dismissal once the employee had been dismissed and not before. It is true the letter of dismissal is dated the 1st date of February 2008, but it is indicated in that letter that the addressee was thereby given one month's notice period effective from the 1st of February 2008 to the 29th day of February 2008. The question is when then can it be said that the addressee was dismissed?

19. It is clear that the employee was not dismissed on the 1st of February 2008, but on the 29th of that month. The addressee was dismissed on the 29th day of February 2008 not when the letter of notice was written. In all the circumstances we are of the view that, it could have not on a balance of probabilities, been possible for the appellants to have referred a dispute of unfair dismissal to the DDPR before they were dismissed. We are therefore unable to agree with advocate Sekonyela that the Labour Court erred in upholding the point *in limine* raised by the respondent.

20. The upholding of this point in favour of the respondent thereof effectively puts the entire appeal to rest. Once the Labour Court had no jurisdiction to entertain an unconciliated matter, I do not see how it could have gone into the determination of the merits of the alleged procedural and/or substantive unfairness of the appellants' retrenchments.

21. In all the circumstances I am of the view that there is no merit in this appeal and it must be dismissed. It is accordingly ordered that the appeal is dismissed.

22. Neither of the parties asked that costs should be awarded to them> This was presumably in line with the well established principle that in dismissal cases courts should not lightly award costs. There will therefore be no order as to costs.

23. This is a unanimous decision of this court.

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DR. K.E.MOSITO AJ

Judge of the Labour Appeal Court

For the Appellants: Adv. B. Sekonyela

For respondents: Dr. B. Van Zyl