LAC/CIV/A/010/08

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

PHETHANG MPOTA APPELLANT

AND

STANDARD LESOTHO BANK RESPONDENT

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

ASSESSORS: MR. R. MOTHEPU

MR. O.T. MATELA

Heard on: 20TH JUNE 2011

Delivered on: 1st JULY 2011

SUMMARY

Appeal from Labour Court – Inadequate notice leads to Procedural unfairness - Whether Labour Court erred in not awarding compensation – Nature of judicial discretion necessary in awarding compensation for unfair dismissal – Appeal succeeding with costs.

JUDGEMENT

MOSITO AJ

1. This is an appeal from the judgment of the Labour Court handed down on the 25th day of November 2010.

2. The facts that led to the institution of the application before the Labour Court were that the parties had entered into a contract of employment on 5th August 1999. The Appellant rose through the echelons of the respondent until he became a branch manager. He was subsequently promoted to a position of Area Service Centre Manager (ASCM) on February 2004. In December 2005, the Appellant and some employees of the respondent were informed that there would be some staff retrenchment due to operational requirements of the respondent's bank. However, no further steps were taken by the respondent until the 22nd February 2006 when Appellant was informed that he was going to be retrenched. Appellant was informed that *negotiations* for retrenchment would commence on the 1st day of March 2006. The purpose of the said negotiations was to reach "a mutual agreement on exit benefits".

3. It was in consequence of the said negotiations that Appellant was dismissed purportedly in terms of section 66(1) © of the **Labour Code Order 1992**. The Appellant complained thereafter that the retrenchment process undertaken in consequence of the rationalization process undertaken by the respondent was flawed in the following respects:

> *(a) There were no negotiations to explore whether there are other options rather than retrenchment.*
> *(b) The retrenchment criteria was never discussed and agreed upon.*
> *(c) The principle of **Last in first out** was never followed.*

(d) The whole exercise took only a week. Annexure "C". Thus the so called ***negotiation*** *was just a* ***"masquerade".***

4. For its part the respondent contended that the Appellant had been informed prior to the 22nd day of February 2006 about the retrenchment. It contended that Appellant was a senior member of management and was aware that the retrenchment exercise was underway. The respondent further disputed that the retrenchment process was flawed, and it contended that all possible options were explored and retrenchment was the last option. It also contended that the principle of LIFO (last in first out) could not be followed as Appellant held a senior position. It contended that other forms of selection criteria were used. It indicated that the selection criterion used in the case of Appellant was one where certain posts were being phased out and suitable posts were advertised to match skills with the posts. It further contended that the negotiations were handled properly as per the requirements of the law. Respondent further pointed out that Appellant was informed that a new post was going to be advertised and he should indicate his intention to apply but he declined. Respondent further pointed out that the new position available at the respondent is not the same as the one that was held by the Appellant. For the above reasons the respondent asked the court to dismiss the claim of the Appellant with costs.

5. The learned Deputy President first dismissed the Appellant's first application on the 18th day of May 2007. On the 17th day of June 2008, the

Appellant filed a notice of appeal against the said decision. It was clear that the Appellant was out of time in respect of filing the notice of appeal. On the 22nd day of September 2008, Appellant filed an application for condonation for the late filing of the appeal. On the 7TH day of August, 2009 the condonation application was dismissed for lack of essentials thereof. And appeal struck off. Appellant brought a fresh condonation application later on properly motivated and sought reinstatement of his appeal. The prayers were duly granted together with an amendment introducing the prayer for a declaration that the dismissal was procedurally unfair for lack of adequate notice.

6. The matter was referred to the Labour Court to determine whether the dismissal was procedurally unfair for lack of adequate notice. The Labour Court held that, when it said that the notice "sent shockwaves", it meant that it was too short. This meant therefore that the Appellant was given inadequate notice thereby rendering the dismissal procedurally unfair as the purported termination became a nullity.(See **Khotle v Attorney General LAC (1990-1994) 502 at 504 E-I** where the court of appeal of Lesotho held that while the notice was insufficient the purported dismissal was a nullity.(See also **Tsotang Ntjebe and Others v Lesotho Highlands Development Authority LAC/ CIV/A/12/2004** at pg 15 para. 22 of the Judgment) and we accordingly so find**.**

7. It should suffice to mention *en passent* that**,** there was no prayer when the matter came before the Labour Court in the first place to find that the dismissal of the Appellant was unfair. This Court then directed that:

> The Labour Court did not consider whether or not to grant the prayer on the fairness or otherwise of the dismissal as the prayer did not exist in the papers before it. The primary repository of the discretion on whether or not to grant that prayer is the Labour Court. We are therefore inclined to accede to the argument by Advocate Macheli that should we grant the reinstatement and amendment, we should refer the case to the Labour Court to consider the issue of the fairness or otherwise of the dismissal. The case is accordingly referred to the Labour Court for rehearing on the papers as amended.

8. The case was duly presented before the Labour Court and argument was heard by that court. The Labour Court was clearly not impressed with the argument presented before it. It amongst others commented in its judgment that it had dealt with the matter and that it was *fanctus officio.* This remark it made notwithstanding the fact that there had not been any prayer before it on the basis of which it could have made the pronouncement of the fairness or otherwise of the dismissal. We however need not be detained by a controversy on this issue as the parties have asked this court to determine the fairness or otherwise of this matter in the light of the comments made by the Labour Court in relation to the directive. The starting point is that, the appellant appealed against the above decision on the grounds that, the learned Deputy President erred and/or misdirected herself in:-

> (a) holding that she was ***functus officio*** in this matter.
> (b) dismissing Appellant without affording Appellant a hearing on the merits.
> (c) failing to pronounce herself that the dismissal of Appellant was procedurally

> unfair and thus failing to award compensation as prayed in papers despite the fact that it was not contested on pleadings.
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> (d) refusing to comply or abide by decision or directed of the Labour Appeal Court being a Superior Court and actually challenging decision already made by such a Superior Court.

9. We wish to address the above grounds together as in our view the central question is whether the dismissal was procedurally unfair and if so whether appellant is entitled to compensation and in what amount. When the matter was heard by the Deputy President of the Labour Court pursuant to the above directive, the Labour Court held that it had considered all issues contained in the quotation above and that the Court having considered all the issues that the Appellant was raising and having made a determination thereon found itself *functus officio*. In terms of that principle, it considered that it had no authority to correct, alter or supplement its judgment. It consequently dismissed the application with costs. This Court had not understood that by saying that the notice "sent shockwaves", the Learned Deputy President meant that the dismissal was procedurally unfair. It would perhaps have been much more useful to have used a less flowery phrase such as that the notice was too short so as to avoid linguistic misunderstandings, moreso when no prayer to the effect that the dismissal was unfair had been included in the papers.

10. Returning to the case at hand when his employment was terminated, the Appellant was a Branch Manager of the bank. That notwithstanding he was still an employee of the bank and entitled to the procedurally fair

termination of his employment. As Cameroon puts it in his article, **The Right To A Hearing Before Dismissal (1988) (ILJ 147 at page 171 E:**

> "It has now been authoritatively established that there is no jurisdictional bar preventing the Industrial Court from adjudicating the claims of unfairly dismissed senior executives, including directors of companies. Their claims to procedural fairness before dismissal must therefore be assessed in the same way as those of other employees, namely with the consideration to all the relevant circumstances."

11. Appellant on the authority of the above article by Cameroon has no less claim to procedural fairness, prior to dismissal than lower class employees. (See also **Oosterhuis v Mokuku LC/2/94**). Our view is that (and this is also common cause) there was inadequate notice given to the appellant by the respondent. As indicated above, the notice being inadequate rendered it a nullity within the decision in **Khotle's case** (supra).

12. Having found in the present case that, there was inadequate notice which rendered the purported termination procedurally unfair, one has to turn to the issue of the granting of the consequential reliefs contemplated by section 73 of the **Labour Code Order 1992.** Section 73 (1) of the **Labour Code Order** prescribes that reinstatement is the preferred remedy in cases of unfair dismissals where the employee desires it. If the employee does not desire reinstatement or reinstatement is not practicable in all the circumstances of the case, then the next available remedy in terms of section 73 (2) of the Code is that of compensation. It is common cause that

the Appellant did not ask or did not desire reinstatement before the Labour Court. Section 73 of the Labour Code reads that:

> **73. Remedies**
> (1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.
> (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.

13. As was pointed out by the Labour Court in **Labour Commissioner v Lesotho Carton) Pty) Ltd LC/64/04,** the **Labour Code (Code of Good Practice) Notice 2003** define retrenchment as a "dismissal arising from a redundancy caused by the reorganization of the business or the discontinuance or reduction of the business for economic or technological reasons." Termination of an employee's employment for operational reasons is called a retrenchment. No doubt therefore that the definitions of the two

concepts coincide because they are essentially two sides of the same coin. At Clause 19(3) the Codes of Good Practice provide as follows:

> *"(3) Because retrenchment is essentially a "no fault" dismissal and because of the adverse effect on the employees affected by it, the courts will scrutinize a dismissal based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to dismissal before the dismissal is effected."*

14. The Learnt Court President proceeded in **Labour Commissioner v Lesotho Carton) Pty) Ltd LC/64/04** that in sub-clause (4) the code proceeds to list the procedural and substantive obligations placed on the employers who anticipate retrenching their employees.

15. Regarding compensation, whether or not the Labour Court ought to have awarded the Appellant compensation depends upon whether or not its decision to award compensation was the result of the exercise of a true discretion within the terms of section 73 of the Labour Code because, if it was, then this Court would only be entitled to interfere with the exercise of such discretion on very limited grounds. However, if it was not, then this Court would be at large to decide the issue according to its own judgement. A true discretion is also referred to as a narrow discretion. (see **EM Grosskopf JA in MWASA v Press Corporation of SA Ltd 1992(4)SA 791 (A) at 800 D-E**. In the MWASA case the Court referred to a quotation from an article by Henning: **Diskresie uitoefening** in 1968 THRHR 155 at 158 where the author said:

> "A truly discretionary power is characterised by the fact that a number of courses are available to the

> repository of the power (Rubinstein Jurisdiction and Illegality (1956) at 16)".

After this quotation in the MWASA case EM Grosskopf JA said at 800 E – F:-

> "The essence of discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

16. In our view, the Labour Court misdirected itself in not awarding compensation in the light of the clear peremptory provisions of the Act as to what should be done where there is unfair dismissal. We are entitled to intervene on appeal.

17. The starting point is that, in the context of compensation, a decision of the Court pursuant to the provisions of section 73(2) of the Labour Code provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions. Against what has been said above, the question arises then whether deciding whether the power given by sec 73(2) of the Labour Code Act, to the Labour Court or an arbitrator to award or not to award compensation in a case where it has found the dismissal of an employee unfair involves the exercise of a true discretion (i.e. the narrow discretion).

18. There are various factors that have been taken into account in other jurisdiction in this connection. The first considerations are included in section 73(2) of the Act. It provides that:

> 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.

19. In our view, the amount the court considers just and equitable in all circumstances of the case will differ from case to case. We agree with the remarks in **Dr D.C. Kemp t/a Centralmed v Rawlins [2009] 11 BLLR 1027 (LAC)**, of the South African Labour Appeal Court that it would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

> (a) the nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case;
> (b) whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;
> (c)in so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the

> procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation;
> (d) in so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal;
> (e) the consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded;
> (f)the need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.
> (g)in so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.
> (h)any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.

20. The above factors are in addition to those specifically mentioned in section 73(2) of the Act, namely, 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.

21. In the present case, the giving of an inadequate notice amounted to a breach of contract by the employer. There is also evidence that Appellant took the trouble to mitigate his loss by getting employment with Boliba for some five months even though he earned a meager salary. The nature of the reason for dismissal was one due to operational requirements, that is, retrenchment. The unfairness of the dismissal was procedural grounds. The nature and extent of the deviation from the procedural requirements was one of a sudden nature. The Appellant would be adversely affected by the wrongdoing of the respondent in failing to observe notice periods. There is need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation such as the present.

22. Weighing all the foregoing circumstances, we would award compensation to appellant in the sum equivalent to ten (10) months' salary.

23. The appeal therefore succeeds with costs.

24. This is a unanimous decision of this court.

K.E.MOSITO AJ

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Judge of the Labour Appeal Court

For Appellants: Adv. B. Sekonyela

For 1st respondent: Adv. M. Mabula