IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/REV/06/13**

In the matter between:

'MALETSIE MAKOANYANE **APPLICANT**

AND

LESOTHO FLOUR MILLS LTD & 2OTHERS **RESPONDENT**

AND

HELD AT MASERU LAC/REV/05/13

In the matter between:

'MAKHOTHATSO LIPOLI APPLICANT

AND

LESOTHO FLOUR MILLS LTD & 2 ORS RESPONDENTS

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

ASSESSORS : MR R. MOTHEPU

MRS M. THAKALEKOALA

Heard on : 31 OCTOBER 2013

Delivered on : 7 NOVEMBER 2013

SUMMARY

Application for review of the decision of the Labour Commissioner to exempt the 1st respondent from paying severance pay on the exclusive basis that because severance pay is a statutory right of an employee, and because the employee was not given a hearing prior to the exemption being granted, then the exemption was invalid – court holding that such a construction is incorrect. – The applicant has to show in addition that the Labour Commissioner did not find that the employer operated a separation benefit scheme which provides more advantageous benefits for an employee than severance pay would.

Counter-application that the employer and employee had entered into a pre-provident fund agreement to establish a provident fund. – That when such agreement was entered into the parties were not of the same mind therefore court being asked to nullify the agreement.

Court rejecting the counter application on ground of non-joinder of the provident fund administrator.

JUDGEMENT

MOSITO AJ

1. INTRODUCTION

1.1 The two cases were heard on the same day. The cases involved an application for review. In the case of the first case, the Makoanyane's case, the applicant sought an order in the following terms:

> "1. 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 Act 1992 as amended.
> 2. Directing the 1st respondent to pay to the applicant an amount of M49, 607.23 being the balance outstanding on her severance pay entitlement.
> 3. Directing the respondents to pay the costs hereof in the event of their opposition hereto.
> 4. Granting the applicant further and alternative relief."

1.2 In the second case, the Lipoli's case, the applicant sought an order in the following terms:

> "1. 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 Act 1992 as amended.

2. Directing the 1st respondent to pay to the applicant an amount of M41, 619.21 being the balance outstanding on her severance pay entitlement.
3. Directing the respondents to pay the costs hereof in the event of their opposition hereto.
4. Granting the applicant further and alternative relief."

1.3 At the hearing of these matters, the parties agreed that these cases be heard together and that the arguments presented in respect of the one case be *mutatis mutandis* be taken to have been made in respect of another with minor variations in respect of detail. The corollary of the agreement was that a combined judgment be issued inasmuch as the outcome of both cases revolved around substantially the same question of law and fact as will appear herein below. In the result, the present judgement is issued as a result of the aforesaid agreement.

2. COUNTER-APPLICATION

2.1 The parties agreed that since there is a counter-application filed by the first respondent, the counter-application should be argued first and then the merits be argued later but in the same proceedings so that judgment should be handed down on both the counter-application and the main application. The counter-application had been brought by Lesotho Flour Mills for an order in the following terms:

"1. That the applicant in the main reimburse the 1st respondent in the main an amount of M135, 621.00.

2. That the provident fund scheme agreement entered into by the applicant in the main and the 1st respondent in the main be declared null and void *ab initio* and of no binding force or effect.

3. Costs of suit.

4. Further and/or alternative relief as the Court may deem fit."

2.2 It is important to mention that the proper adjudication of this counter-application should revolve around the determination of the second prayer, as in our view, once that second prayer has been determined, all other prayers will follow suit. The argument advanced for the first prayer in this counter-application is that before the parties entered into the agreement to enter into a provident fund with Sanlam which was a provident fund administrator in this matter, the parties had agreed verbally that a provident fund should be established. Consequent upon the agreement Lesotho Flour Mills approached Sanlam to establish a provident fund which was duly established and under which the applicants in the main had benefited.

2.3 It was common cause between the parties that the parties contributed to the provident fund and Sanlam obtained benefit from the agreement which resulted in the provident fund. This court asked counsel for the counter-applicant as to what the consequences of declaring the agreement between the applicant in the main and the respondent in the main which resulted in the establishment of the provident fund would be. This was asked in the light of the fact that the nullification of the verbal agreement presiding the establishment of the provident fund would have the consequence of nullifying the provident fund itself to which Sanlam was a party. The court asked counsel whether the counter-applicant would not be non-suited for failure to join Sanlam as clearly the provident fund would be affected by the nullification sought. The learned counsel insisted that Sanlam would not be affected because the contract had already been discharged. The problem with this argument is that the

declaratory sought would itself be academic if it is accepted that Sanlam had already discharged its obligations under the contract.

2.4 In my opinion, it would not be proper to grant an application of nullification where Sanlam had not been joined as a party. It follows therefore that the counter-applicant is non-suited for non-joinder of Sanlam in respect of the nullification of the agreement upon which the provident fund is based. In the result the counter-application cannot succeed.

3. **CONSIDERATION OF THE MERITS OF THE MAIN APPLICATIONS**

3.1 Turning to the merits of the applications, in both cases, the first respondent is the Lesotho Flour Mills Ltd, while the second respondent is the Labour Commissioner. In her founding affidavit Mrs Maletsie Makoanyane deposes that she was employed by the 1st respondent as a Distribution Clerk on 1 July 1992 until 9 July 2010 when she resigned. At the time of her resignation, she was earning M4, 648.89 gross. She avers that her severance pay calculated in terms of the law was M49, 607.23 whereas her withdrawal pension benefit stood at M122, 965.18 gross or M91, 117.19 net. She avers that she was however paid the sum of M122, 965.18 gross or M91, 117.19 net.

3.2 As for the case of 'Makhothatso Lipoli she deposes that she was employed by the 1st respondent as a Senior Amenities Cleaner on 16 June 1989 until 30 April 2012 when she retired. At the time of her retirement, she was earning M3, 920.65 gross. She avers that her severance pay calculated in terms of the law was M41, 619.21 whereas her withdrawal pension benefit stood at M177, 240.00 gross or M157,

984.43 net. She avers that she was however paid the sum of M177, 240.00 gross or M157, 984.43 net.

3.3 The applicants then approached the 1st respondent for an amicable settlement relating to their entitlement but could not agree with the said respondent. The matters proceeded to the Directorate of Dispute Prevention and Resolution (DDPR) but could not be resolved as the 1st respondent claimed that it had been granted exemption by the 2nd respondent. The DDPR issued a certificate of non-settlement in terms of section 225(7).

3.4 As pleaded in their affidavits, the respondents aver 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 the Labour Commissioner herself, and it is consequently invalid on that ground as well."

3.5 The applicants aver further that there is no lawful reason why this court shall not review and set aside the exemption purportedly granted to the 1st respondent in terms of section 79(1) of the Labour Code (Amendment) Act of 1997. They aver further in this regard that they are entitled to

payment of their full benefits including severance in terms of section 79(1) of the Labour Code Act 1992 as amended.

3.6 The applicants aver that this court has jurisdiction to determine this matter as it has been brought in terms of section 38A (b) (iii) of the Labour Code (Amendment) Act of 2000. We aver that it is only proper that the principal review application be dealt with together with the application for ancillary relief.

3.7 For their part the 1st respondent contends that the applicants were never adversely affected by the granting of the exemption because a substitute benefit was far higher in value than the severance pay. They further aver that the requirement for a hearing before granting of the exemption would only arise if indeed the applicants were to be or were actually adversely affected as they alleged. They averred further that the relevant law did not make a provision for a hearing but that the new scheme was more beneficial. They obliquely argue that to read an entitlement to a hearing when the legislation does not expressly say so amounts to amending the law. The respondent further argues that the exemption was granted by the Labour Commissioner's office which is statutorily empowered to grant same. It therefore argues that the Labour Commissioner is anybody who lawfully occupies that office at any given time not any specific individual.

3.8 The respondents further argued that the 1st respondent's decision has not proven reviewable regard being had to the facts before court and the contends that the applicants are not entitled to severance pay on account

of the certificate of exemption and the fact that the pension benefit is more favourable than the severance pay.

3.9 It is important to note that as pleaded in the papers, the applicants in both cases did not fore-shadow the reasons why they contend that the exemption was not justified in this case. In other words the applicants did not specifically plead or aver in their papers that the reason why they were challenging the validity of the exemption given by the Labour Commissioner was that such exemption was given without their having been given a hearing by reason of the fact that they already had an emergent or accruing right to severance pay upon termination of their contract. In paragraph 8 of their founding affidavit the applicants merely averred that they were not given a hearing prior to the exemption but it was not clear in respect of what. Needless to say, this serves to underscore the importance of pleadings. The resultant failure to specify this aspect is that the respondents then pleaded relying on the comparative advantage in order to rebut the issue of prejudice. They argued that the Labour Commissioner was entitled in the circumstances of the case to exempt the 1st respondent because the provident fund scheme that the 1st respondent was operating, afforded the applicants a better deal than ought severance pay. It was along these lines that the cause of action and the answer thereto were pleaded.

3.10 However when the matter was argued before us, it emerged that advocate Tlhoeli was not arguing the issue of comparative monetary advantage of the provident fund over severance pay. What he was arguing was that there was an emergent or accruing right to severance pay and that his client were entitled to be heard in respect of the such a

right. He did not dispute that his clients were awarded a better deal under the provident fund. It was therefore common cause that his clients had been given a better deal in respect of monetary advantage in other words the separation benefit that the employer was operating offered a more favourable entitlement to the applicants than the severance pay.

3.11 The law applicable in this regard is clearly detailed out in the **Labour Code (Amendment) Act, 1997** which introduced subsections (7) (8) and (9) to section 79 of the Code. The amendment provided, to the extent relevant to this case, that:

> (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.
>
> (8) …
>
> (9) If upon considering an 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).

3.12 In this case, it emerged that the 1st Respondent had been granted an exemption certificate sought in terms of ***Section 79 (7) of the Labour Code (Amendment) Act 1997*** by virtue of which it was exempted from paying severance pay where the pension fund it operated appeared to offer a higher benefit than severance pay. In the absence of anything to the

contrary, and if we were to go by the pleadings, the applicants' case on the pleadings and to which they replied by means of replying affidavit was fore-shadowed as based on monetary advantage.

3.13 The issue whether the applicants were entitled to be heard in respect of the accruing or emergent right was never pleaded in the papers. It appeared for the first time in argument when advocate Tlhoeli was arguing that his clients were entitled to be afforded a hearing in respect of the statutory right. His argument appeared to be this, that because severance pay is provided for under the Act, and because the applicants would be entitled to be paid severance pay upon termination of their contracts in terms of the Act regard being had to the length of service that they had rendered, they were therefore entitled to be heard before an exemption could be given by the Labour Commissioner.

3.14 In fact in his written Heads of Argument, Mr Tlhoeli submitted that 'it is accordingly submitted 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 parterm* rule'. In our view the issue formulated in this way, cannot succeed. It gives the impression that what the learned counsel or the applicants are trying to achieve is that in every case in which an exemption is to be given, an employee would be entitled to a hearing without anything more. That cannot be correct in principle.

3.15 For our part, we accept that in principle, where a public body or authority exercises quasi-judicial powers likely to affect the rights of individual, the presumption is that rules of natural justice apply unless the legislature has expressly or by necessary implication provided to the contrary. What we

do not however agree with, is that such a principle would apply even where a public body or official is likely to give a decision which is not potentially prejudicial to the complainant or applicant *in casu*.

3.16 In **Telecom Lesotho (Pty) Ltd v Leche (C OF A (CIV) N0.20/2010)** the Court pointed out that:

> [9] For my part I desire only to add that whether or not a hearing is necessary will depend on the facts of each particular case. On the facts of the instant case I have not the slightest hesitation in concluding that a hearing was necessary before an exemption was granted insofar as the respondent is concerned. Indeed it is common cause that before the exemption in question the respondent stood to get both pension and severance pay. It follows that the exemption in question meant that he was now worse off. Following the exemption he would have been paid M57, 143.08 plus his contribution under the pension scheme of M33, 628.06 (including interest), amounting to M90, 771.14 in total. In other words, he would have been paid M27, 016.81 less than he would have been paid prior to the granting of the exemption (M117, 787.95 less M90, 771.14). What this then means is that the exemption in question prejudicially affected the respondent in his property rights. In any event, I consider that the appellant supported the respondent's case in paragraph 5 of the answering affidavit of 'Matli Lesitsi.

3.17 It is clear from the above quotation that the Court of Appeal was there dealing with monetary prejudice as opposed to prejudice based on the existence of a legal entitlement that had accrued at the time exemption was made. The starting point is that, whenever a statute empowers a public official or body to do an act or give a decision likely to prejudicially affect 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*.

3.18 In all the circumstances of this case, it being common cause that an employer operated some other separation benefit scheme which provided more advantageous benefits for an employees' than those in respect of severance pay, the employer was entitled to submit a written application to the Labour Commissioner for exemption from the effect of that having to pay severance pay. It follows therefore that the contention by the applicants cannot succeed.

4. **CONCLUSION AND ORDER**

4.1 In all the circumstances of this case, and for the reasons given above, the following order is made:

1. The counter application is dismissed with costs.
2. The main application is dismissed with costs.

4.2 This is a unanimous decision.

DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the applicant : Advocate K. Tlhoeli

For the Respondent : Advocate M. Mabula