

IN THE LABOUR COURT OF LESOTHO**HELD AT MASERU****LAC/REV/01/12**

In the matter between:

NTAHLI MATETE**APPLICANT****AND****MALUTI MOUNTAIN BREWERY (PTY) LTD****1ST RESPONDENT****THE LABOUR COMMISSIONER****2ND RESPONDENT****THE ATTORNEY GENERAL****3RD RESPONDENT**

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

ASSESSORS: MRS. M. MALOISANE

MRS. M. THAKALEKOALA

Heard on: 24TH June, 2013Delivered on: 03RD July, 2013**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

INTRODUCTION

1. The present application was filed on 10 May 2012 by the applicant before the Registrar of this court. In the original Notice of Motion, the applicant sought an order directing the Labour Commissioner to dispatch to the Registrar of this court the record of proceedings (if any) that culminated in her issuing to the 1st respondent, an exemption certificate under section 79 (1) of the **Labour Code (Amendment) Act of 1997**. The applicant further sought a review of the decision of the Labour Commissioner to exempt the 1st respondent from complying with the provisions of section 79 (1) of the **Labour Court Order 1992**.
2. The applicant further sought an order directing the 1st respondent to pay certain amounts being her severance pay entitlement, as well as costs. Later on 1 November 2012, the applicant amended the prayers in the Notice of Motion and sought an order in the following terms:
 1. Directing the 2nd Respondent to dispatch the record of proceedings (if any) that culminated in her issuing to the 1st Respondent, an exemption certificate under section 79 (9) of the Labour Code as amended;
 2. Calling upon the 2nd Responded to show cause (if any) why her decision to grant an exemption certificate to the 1st Respondent shall not be reviewed and set aside;
 3. Reviewing and setting aside as invalid, the 2nd respondent's decision of 8th October, 2007 to grant the 1st Respondent an exemption from complying with the provisions of section 79 (1) of the Labour Code Order 1992;

4. Calling upon the 2nd respondent to show cause why her decision to grant an exemption certificate to the 1st respondent shall not be reviewed and set aside;
5. Calling upon the 2nd Respondent to deliver to the Registrar within 14 days of service of this application, any reasons that she wishes to give;
6. Directing the 1st respondent, and the other Respondents, only in the event of their opposition hereto, to pay the costs hereof.
7. Granting the Applicant further and alternative relief.

THE FACTS

3. The facts that led to the present application are in a nutshell that, the applicant was employed by the 1st respondent with effect from the 1st day of December 2001. He resigned from the 1st respondent's employment on 31 December 2011. Thus, when he resigned, he had served the 1st respondent for 10 years. He informs the court that since his resignation he demanded payment of his severance pay from the 1st respondent. However, the 1st respondent refuses to pay it out claiming that it had been exempted by the Labour Commissioner from paying severance pay.
4. He avers in his application that he had always believed throughout his tenure in employment that he would receive both pension benefits and severance pay when his employment with the respondent terminated or at least that he would be afforded a hearing before the position of his expected terminal benefits was altered to his disadvantage. He informs the court that he was accordingly shocked to learn from the 1st respondent's manager that his severance pay would not be paid to him

because the 1st respondent had been exempted from paying it out in terms of section 79 (9) of the **Labour Code (Amendment) Act of 1997**.

5. His complaint therefore is that, the exemption certificate issued to the 1st respondent by the second respondent is invalid and of no legal force or effect because it was granted by the 2nd respondent without affording him any hearing before it was issued. He complains that it was accordingly issued in violation of the rules of natural justice requiring a public official to afford a person a hearing if a decision likely to prejudicially affect a person is to be made. This was essentially the complaint before us; this was also the complaint pursued by Advocate Mohau KC for the applicant.
6. The Labour Commissioner filed an affidavit in opposition of the matter. She informs the court that she issued the exemption certificate in terms of section 79 of the **Labour Code (Amendment) Act 1997** on 8 October 2007 after she had duly considered all the relevant facts underlying the application for such a certificate. She informs the court that having considered the Pension Fund Rules of the 1st respondent; she came to the conclusion that clearly, the pension fund provided more lucrative benefits than severance pay.
7. The learned Labour Commissioner further deposes that at the time of the request by the 1st respondent for the exemption, i.e on 1 October 2007, the applicant served as a member of the executive management of the 1st respondent with the result that he was fully aware of the request and he obviously associated himself with the consequences thereof. She therefore expresses her surprise that the applicant wants the exemption set aside on the basis that he was not heard before the exemption was given.

8. The Labour Commissioner further deposes that as far as the right to be heard is concerned, there is no rule or court judgment which requires a hearing of the employees in each and every case before an exemption may be given. She therefore submits that such a hearing was not necessary because the Pension Fund obviously provided more lucrative benefits than severance pay for all the employees.
9. Finally, the learned Labour Commissioner deposes that she does not agree with the applicant that there should be consultations with employees before an exemption is granted. She therefore does not support the granting of the application by this court. In this case the contentions by the respondent also revolved on the above contentions. I may say that the answering affidavit of the 1st respondent deposed to by one Mpedi Dawn Mpedi was filed in opposition to the application by the applicant. Deponent Mpedi (I say so because it is no clear from the affidavits whether Mpedi is a male or a female) deposes that the application is opposed because the applicant could not have believed that he would receive both his pension and severance pay because that would simply mean receiving double benefits which would be unfair and unjustified from the point of view of the 1st respondent or any other employer. Mpedi goes on to depose that the applicant was far better off by the payment of his pension than with the payment of severance pay.
10. It is clear therefore that there is no dispute on the papers on the issue whether or not the applicant was granted a hearing before the Labour Commissioner made a decision that would prejudicially affect his entitlement to severance pay. The question that now remains for consideration is whether there is such an entitlement.

CONSIDERATION OF THE LAW ANTS APPLICATION TO THE FACTS

11. In the first place we are of the view that there is no general rule that an employee is entitled to a hearing in all cases before an exemption can be made by the Labour Commissioner. However, whether or not a hearing is necessary will depend on the facts of each particular case. (See: **Telecom Lesotho (Pty) Ltd v Leche (C OF A (CIV) NO.20/2010)**).
12. 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.**
13. It is common cause that the Applicant had continuously been in the employ of the 1st Respondent for twenty-eight (28) years, a period which

prima facie entitled her to severance pay in terms of **Section 79 (1) of the Labour Code Order 1992**, which provides that:

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.

14. The Labour Code (Amendment) Act, 1997 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).

15. In a nutshell, if the applicant qualifies for severance pay by virtue of having more than one year's continuous service, her entitlement

becomes conditional upon whether the employer had an exemption certificate issued by the Labour Commissioner and whether it affected the particular claimant. The test is two-tiered.

16. Entitlement to severance pay was initially regulated by the now repealed Wages and Conditions of Employment Order, 1978 in terms of which only persons earning less than Two Hundred and Forty Maloti (M240.00) were entitled to severance pay. This limit was raised to One Thousand Maloti (M1,000.00) in 1991 through the Wages and Conditions of Employment (Amendment) Order, 1991. When the Code came into operation on 1st April, 1993 it dispensed with these ceilings. 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.

17. Adv P.J. Loubser, contended on the basis of paragraph 9 in **Telecom Lesotho (Pty) Ltd v Leche (C OF A (CIV) NO.20/2010)** that the facts in this case, did not justify interference with the exemption. In that case, 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.

18. 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. This is not the basis of this application.
19. 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.**
20. The Applicant was already entitled to be heard by reason that when his entitlement to severance pay was curtailed by the exemption, the right had already come into existence. 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".

21.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 Sibiyi 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**).

22. In our view, the Labour Commissioner in this case, was enjoined to make a decision on exemption which is sure to affect the Applicant's right that was already accruing since the Applicant's completion of his first year of continuous service with the first respondent. The Labour Commissioner is a public official. She was required to make a decision likely to affect the correctness of the outcome.

23. As a court of law we are obliged 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***.

CONCLUSION

24. To sum up, as a matter of general principle an employee is entitled to be heard before an exemption can be granted to an employer to pay severance pay provided there is either, an accruing or existing right. 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.
25. The Application is therefore granted in terms of prayers 3, 4 and 6 of the Notice of Motion.
26. This is a unanimous decision of the Court.

K.E. MOSITO AJ.
Judge of the Labour Appeal Court

For the Applicant Adv. KK Mohau KC

For the Respondent Adv. P.J. Loubser