

IN THE LABOUR APPEAL COURT OF LESOTHO**HELD AT MASERU****LAC/CIV/REV/04/2013****LC/REV/69/10****In the matter between:****DINAH RAMONA****APPLICANT****AND****ECONET TELECOM LESOTHO (PTY) LTD****RESPONDENT****CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.****ASSESSORS : MRS P. E. LEBITSA****MRS L. RAMASHAMOLE****Heard on : 31 JANUARY 2014****Delivered on : 05 FEBRUARY 2014****SUMMARY**

*Application for review of the Labour Court 's decision – Applicant complaining that the Labour Court had erred in law in ordering the deduction of eighty seven thousand, two hundred and forty four Maloti (**M87, 244.00**) from **M145 966.16** which left the applicant with a payment of **M58, 722.15** from the respondent company.*

Held that the Labour Court had erred in giving the said order and, the prayers contained in the Notice of Motion granted as prayed.

JUDGMENT**MOSITO AJ****1. INTRODUCTION**

1.1 This is an application for review of the decision of the Labour Court. The prayers have been couched in the following terms:

1. That the decision of the Deputy President of the Labour Court under case No.: LC/REV/69/10 be reviewed, corrected and set aside;
2. That the award of the DDPR be reinstated, confirmed and that the remaining amount of severance pay amounting to eighty seven thousand, two hundred and forty four Maloti (M87,244.00) be paid to applicant by the respondent;
3. That the Deputy President be ordered to dispatch the record of proceedings in Case No: LC/REV/69/10 before the above Honourable Court within 14 days of receipt;
4. That the respondent be ordered to pay costs only in the event of opposing this matter;
5. Granting the applicants further and/or alternative relief as the Court may deem just and equitable in the circumstances.

1.2 The grounds upon which it is sought to have the decision reviewed are contained in paragraphs 4 and 5 of the founding affidavit of the applicant and they are as follows:

- 4.1 The Labour Court allowed itself to be influenced by irrelevant and immaterial issues. Such as the provisions of section 79(7) of the Labour Code (Amendment) Act No. 9 of 1997 which were not applicable to the applicant's matter;
- 4.2 The court below disregarded the relevant material presented before it. Such as *Seeiso Leche v Econet Telecom Lesotho (Pty) Ltd* LAC/REV/26/09. Which case declared such exemption given to the same company invalid.
- 4.3 The Labour Court consolidated the two separate benefits without any authority to do so. And thereby committing a gross irregularity;
- 4.4 The learned Deputy President has failed to take into account or take into account adequately the principles

enunciated in *Ben Heqoa v Browns Cash & Carry LC/REV/331/06*.

5. The Labour Court erred in law in ordering the deduction of Maloti eighty seven thousand, two hundred and forty four (**M87, 244.00**) from **M145 966.16** which left the applicant with a payment of **M58, 722.15** from the respondent company. The said **M87, 244.00** was the applicant entitlement arising from her terminal benefit. It is submitted that such deprivation is not supported by any authority. Hence this application.

1.2 The grounds may be collapsed into one main ground, namely; whether the Labour Court erred in law in ordering the deduction of Maloti eighty seven thousand, two hundred and forty four (**M87, 244.00**) from **M145 966.16** which left the applicant with a payment of **M58, 722.15** from the respondent company. I may remark in passing that, regard being had to the grounds aforementioned, they are a mixture of grounds of appeal and review grouped together. However, since the Respondent did not make an issue out of this and, since this Court has jurisdiction in respect of both and since a review is wider than an appeal, we are entitled to assume jurisdiction in this application. Thus, this review application raises the question whether an employee is entitled to receive both severance pay and pension in circumstances where an employer has been exempted from payment of severance pay in terms of section 79 (7) of the *Labour Code (Amendment) Act, 1997*.

1.2 The facts giving rise to this case are common cause, and may briefly be summarised as follows: The Applicant's services were terminated by mutual arrangement between the parties in 2009 on grounds related to operational requirements of the company. The Applicant had seized an

offer by the respondent for voluntary retirement. Upon termination of her services she received *inter alia* benefits from a “pension scheme” operated by the respondent comprising: **M87, 244.00** being the employer’s contribution to the fund; plus **M 61, 076.35** representing the employee’s contribution to the fund.

- 1.3 It is also common cause that the Applicant had continuously been in the employ of the 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: ‘[a]n 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’. Her severance pay was calculated at One Hundred and Forty-Five Thousand, Nine Hundred and Sixty-Six Maloti, Fifteen Cents (**M145, 966. 15**).
- 1.4 It however emerged that the respondent company 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. The said section reads that: “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.” The exemption certificate had been obtained on 24th January, 2005 prior to the termination of employment.

- 1.5 The respondent submitted in its papers that upon realising that the severance package offered higher benefits than those offered by the “pension fund”, it decided to pay the Applicant the severance pay due but deducted its own pension contribution from the amount which as aforementioned was equivalent to Eighty - Seven Thousand, Two Hundred and Forty- Four Maloti (M87, 244.00). Responding to the Court’s enquiry why they in the first place paid out the whole pension benefit only to come back and deduct their contribution, it was explained that upon being informed that the employment relationship had been severed, the Pension Fund Administrator had been quick to remit the pension proceeds paid directly to the 1st respondent.
- 1.6 It is respondent’s case that the amount payable for severance pay exceeded the pension benefit, thereby offering a higher benefit. Hence, they contend that the Applicant is entitled to the payment of severance pay. They however argued that with the Applicant having already received her pension; they are entitled to deduct a portion representing the company’s contribution to the “pension fund” from the total amount of the severance pay due. It is this deduction that is the bone of contention between the parties.
- 1.7 The Applicant’s case is that the respondent is not in law, entitled to deduct its alleged contribution entitlement from her severance pay without authorisation. Dissatisfied with the deduction by the employer of its contribution, she lodged a claim before the Directorate of Dispute Prevention and Resolution (DDPR) claiming that she qualified for both severance pay, the employer’s contribution to the fund together with the employee’s. The learned Arbitrator upheld this contention and ordered the respondent to refund the Applicant the severance pay money which it

had deducted from the severance pay. In a nutshell, the learned Arbitrator ruled that the Applicant was entitled to both severance pay and all the monies that accrued from the pension fund.

- 1.8 The learned Arbitrator made this finding on the basis that the two benefits *viz*, pension and severance pay were separable and “*cannot be mixed.*” The respondent went to the Labour Court to have this ruling reviewed, corrected and set aside arguing that the Applicant was not entitled to receive the company’s contribution over and above severance pay because the latter had proved to offer more advantageous benefits. They submitted that the learned Arbitrator had committed a reviewable error in that by paying both pension and severance pay to the 1st respondent, it exposed the employer to a double payment of benefits thereby unfairly enriching her. As far as they were concerned the latter was entitled to her own contribution to the fund plus full severance pay only. As aforementioned, they had been granted an exemption certificate.
- 1.9 The Labour Court came to the decision that in its view, the learned Arbitrator failed to apply his mind to the case that was before him and that rendered his award reviewable. Had he applied his mind to the case so found the Labour Court, he could have ascertained that it was distinguishable from the two judgments which he had relied upon for his determination. The Labour Court found the award irregular on grounds of unreasonableness. The Court found the applicant only liable to pay severance pay and the employee’s contribution to the fund. In the result, there was no order as to costs.

2. CONCEPTUALISATION OF THE PROVIDENT FUND, PENSION FUND AND SEVERANCE PAY

2.1 Both provident fund and pension fund benefits are a result of a contract between the employer and/or the employee on the one hand and a pension or provident fund administrator on the other. The main difference between a provident fund and pension fund is that if a pension fund member retires, the member gets a fraction of the total benefit in a cash lump sum and the other fraction is paid out in the form of a pension over the rest of the member's life, while a provident fund member can get the full benefit paid in a cash lump sum.

2.2 A pension is a contract for a fixed sum to be paid regularly to a person, and its objective is to provide employees with a regular pension classically on retirement. Pension fund members must buy an annuity with at least two-thirds of their retirement fund. There are various types of pensions, including defined benefit plans, defined contribution plans, as well as several others. I must say in passing that pension funds differ according to their rules as to when a member would be entitled to benefits under the fund. They differ on the age and eventualities that will inform entitlement to pension fund benefits. This is governed by the rules of a given pension fund.

2.3 As for a provident fund, it differs in some respects from a pension fund. The objective of a *provident* fund is to provide employees with a lump sum benefit at retirement. A provident fund is thus more flexible, as employees can still purchase an annuity with their fund. The provident fund is usually more flexible than the pension fund. Only the employer can claim a tax deduction for provident fund contributions. Therefore, if the employment contract provides that the employee pays a part of the contribution, a pension fund is more tax-efficient for the employee. However, the main aim of a pension or provident fund is to provide benefits for its members

when they retire from employment. The fund also usually pays benefits when a member dies while still working, or is unable to work because of illness, or is retrenched. Provident fund contributions are invested in a fund that earns interest for its members.

2.4 It is clear therefore that there is a distinction between a provident fund and a pension fund. In the present case, we are of the view that although the judgment of the Labour Court uses the word *pension fund* through, the alternative separation benefit that obtained in this case appears to have been a provident fund. This explains why the applicant was paid the whole benefit due and not a fraction of the percentage as would have been the case with regard to pension fund.

2.5 Unlike a provident fund and/or pension fund benefits, severance pay is a statutory right. According to Maqutu J in **Lesotho Amalgamated Clothing and Textile Workers Union and Textile Workers Union v Lesotho Apparel (Pty) Ltd and Another CIV/APN/214/94**, “we in Lesotho do not know the history of severance payments.” In his discussion, Maqutu J concludes that, since the English see it as compensation for loss of accrued rights in the job, while the South Africans see it as financial assistance to tidy employees who suddenly lost employment over the period of possible unemployment, then severance pay cannot be deemed to be wages.

2.6 However, section 3 of the **Labour Code 1992** defines “wages” as meaning—“remuneration or earnings, however designated or calculated, capable of being expressed in terms of money, fixed by law or by a mutual agreement made in accordance with the Code, and payable by virtue of a written or unwritten contract of employment for work done or to be done or for service rendered or to be rendered.” Regard being had to the foregoing interpretation of the word “wages”, I am unable to agree with Maqutu J that

severance pay cannot be deemed to be wages. To my mind, as the Court *a quo* correctly points out, *severance payment* as a concept derives from the ***ILO Convention 158 Concerning Termination of Employment*** at the Initiative of the Employer which provides in Article 12 (1) that; “[a] worker whose employment has been terminated shall be entitled, in accordance with national law and practice to - (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund...”

2.7 In Section 79 of the **Labour Code 1992** employees are given a right to severance payments. Section 79 (1) of the **Labour Code Order 1992**, “[a]n 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.” However, section of the **Labour Code Amendment Act of 1997**, employers to apply for exemption from the provisions of section 79 of the **Labour Code Order 1992**. The exemption can be granted by the Labour Commissioner on the understanding that the employer provides a more advantageous separation benefit such a pension or provident fund for its employees, that severance pay. Lesotho has with section 79 of the **Labour Code 1992** made such severance payments compulsory. Workers of long standing acquire a vested interest in their jobs, that because they lost employment through no fault of their own they are deserving of assistance to tide them over a period of possible unemployment, and that the payment of severance pay was the norm in the industries concerned.

3 WAS THE RESPONDENT ENTITLED TO DEDUCT FROM THE SEVERANCE PAY THE AMOUNT THAT IT CONSIDERED ITSELF ENTITLED TO?

3.1 The issue that we have to determine is whether the employer in this case was entitled in law to deduct the sum of **M87, 244.00** as the employer's contribution to the provident fund which was given to the employee by the provident fund administrator. The applicant contends that the Labour Court erred in law in ordering the deduction of Maloti eighty seven thousand, two hundred and forty four (**M87, 244.00**) from **M145 966.16** which left the applicant with a payment of **M58, 722.15** from the respondent company. The said **M87, 244.00** was the applicant entitlement arising from her terminal benefit. It is submitted that such deprivation is not supported by any authority. Hence this application.

3.2 In order to answer this issue, we have to mention that the Labour Commissioner had been approached for exemption of the employer from paying severance pay. The Labour Commissioner then gave the following exemption which we quote in part herein below.

Telecom Lesotho is therefore exempted from the effects of Section 79 (1) of the Labour Code Order 1992 subject to the condition that should in any event severance pay prove to be more advantageous than benefits under the scheme the provisions of Section 79 (1) shall be invoked and the exemption shall not apply. In such events (sic) therefore, the employees shall be entitled to severance pay and their contribution to the scheme (emphasis added).

3.3 It will be realised that the exemption was purported to be made under Section 79 (7) of **Labour Code (Amendment) Act 1997** which provides that 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.

3.4 It is clear that that Section 79 (7) of the Code does not authorise the Labour Commissioner to insert the portion that we have underlined above. It is not clear where the Acting Labour Commissioner got the underlined words from. In particular, the problem arises from the inclusion of the words that the employees shall be entitled to “their contribution to the scheme”. This gives the impression that the employees are not entitled to the contributions of the employer and also the interest that arises from the contributions of both the employer and the employee.

3.5 I am of the view that when the Acting Labour Commissioner included this portion, he was giving his own opinion of what the position should be. He was in effect interpreting Section 79 (7) of the **Labour Code (Amendment) Act 1997**. However, it may be argued that there is nothing in that section that gives the impression that the Acting Labour Commissioner should have included in his exemption certificate a condition to that effect. None of the parties had apparently not asked for such a condition. To my mind, he ought not to have gone that far. Be that as it may, we make no determination on that issue as it is not before us.

3.6 In any event, the Acting Labour Commissioner indicates that “Section 79 (1) shall be invoked and the exemption shall not apply. In such events (sic) therefore, the employees shall be entitled to severance pay and their contribution to the scheme”. It is clear therefore that where the severance pay is more advantageous than the provident fund benefit involved in this case, the exemption did not have the application. It is also common cause that in the present case, the severance pay was more than the provident fund benefit. It means therefore that the certificate granting exemption

was not effective in the sense that the employer remained as good as having not been exempted.

3.7 That been the case, the severance pay was due to the employee in full. There is no provision in the Labour Code as amended as to what should happen where the severance pay is more advantageous for an employee than the provident fund. The Parliament did not deem it fit to make such a provision. It is not for the courts to introduce their own provision in this regard. It was argued before us that it was the intention of Parliament that employers should be exempted from paying both severance pay and an alternative separation benefit that the employer may be operating. We agree with this interpretation with the rider that this argument is good so long as the separation benefit is more advantageous than severance pay. Otherwise, it seems to us that there would be no basis for holding that only a contribution of the employees would be payable to the employees in such a case. There is no legal basis for such a contention in the law as it now stands.

3.8 Be that as it may and the above notwithstanding, the question is whether the employer was entitled to deduct the sum of M87, 244.00 from the severance pay of the employee under the guise that the said amount represented the employer's contribution to the provident fund. There was no evidence before either the DDPR, the Labour Court or before this court that there was a provision of a fund to the effect that where an employer has paid severance pay or is bound to pay severance pay because it is more advantageous to the provided fund benefits, then only the employee's contribution has to be paid to the employee. The Labour Code itself does not provide for deductions from the wages of the employee in circumstances where the employer is of the view that there is some

amount of money which the employee has been unfairly paid by a provident fund and which ought to have been paid to the employer itself. In fact the Labour Code specifically prohibits deductions not provided for in the Code.

3.9 Section 84 (1) of the **Labour Code 1992** in every case in which employment has been terminated for a reason other than dismissal, all wages, including overtime pay and allowances additional to basic pay, shall be due on the last day of employment and shall be payable not later than the following working day. If the employer none the less requires the employee to attend on a day other than the last day of employment for the purpose of being paid such wages, the employer shall pay to the employee any travelling expenses or subsistence reasonably incurred for this purpose. Section 85 (1) of the **Labour Code 1992** provides that, subject to the limitations prescribed by the Code and sections 45 and 46 of the Subordinate Courts Order 1988, an employer may make the deductions from wages authorised by this section; no other deductions shall be permitted.

4 CONCLUSION

4.1 In conclusion it is clear that the employer had no power or authority in law to deduct the sum of M87, 244.00 from the severance pay of the employee under the guise that it represented the employer's contribution to the fund. The employer still had other ways of recovering such money if it considered it was entitled to it, short of an agreement with the employee or an authorisation by law or an order of court.

4.2 In the result the following order is made:

- a) The decision of the Deputy President of the Labour Court under case No.: LC/REV/69/10 is hereby reviewed, corrected and set aside;

- b) The award of the DDPR is hereby reinstated, confirmed and that the remaining amount of severance pay amounting to eighty seven thousand, two hundred and forty four Maloti (M87,244.00) be paid to applicant by the respondent;
- c) The respondent is ordered to pay costs of this application.

5. This is an unanimous decision of the court.

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

For the Applicant : Mr. P. M. Mosuoe
For the Respondent : Adv. S. Ratau