IN THE LABOUR COURT OF LESOTHO

CASE NO. LC/15/94

HELD AT MASERU

IN THE MATTER OF:

POTLAKO MAKOA	APPLICANT
AND	
LESOTHO HIGHLANDS PROJECT CONTRACTORS	1ST RESPONDENT
SPIE BATIGNOLLES (PTY) LTD T/A LHPC	2ND RESPONDENT
BALFOUR BEATY (PTY) LTD T/A LHPC	3RD RESPONDENT
CAMPENON BERNARD (PTY) LTD T/A LHPC	4TH RESPONDENT
L.T.A. (PTY) LTD T/A LHPC	5TH RESPONDENT
ED ZUBLIN A.G. T/A LHPC	6TH RESPONDENT

JUDGMENT

Delivered by his Honour L. A. Lethobane on 27th day of April 1995.

This case was originally filed in the High Court sometime in October 1993. On the 17th December 1993, Maqutu A. J. as he then was held that the High Court had no original jurisdiction in respect of matters provided for under the Code and consequently ordered that the matter be *".... transferred to the Labour Court or a tribunal that is presently in place of the Labour Court."* It is common cause that at that time the Labour Court had not yet been established.

On the 18th November 1994, this matter was filed in this court. Applicant wanted the court to declare that:

(a) ***".....the purported decision of the respondents through the agency of Mr.***

P. Bourgeois dated the 18th August 1993 and by which applicant would be retrenched on the 20th August 1993 be reviewed and set aside and declared null and void and of no force and effect.

(b) The decision of the respondent's site management at Muela intake one Mr. Ken Short to suspend applicant from his duties and without pay be declared null and void.

(c) The respondents be directed to pay the applicant forthwith his salary for August 1993 in the sum of M1,700-00 and arrears of salary as from the purported date of termination and/or retrenchment hitherto.

(d) The respondent be restrained from interfering with the right of the applicant to join a trade union of his own choice.

(e) Respondent be ordered to pay costs hereof as determined by the Registrar of this Honourable Court."

Alternatively applicant prayed that respondents be:

(a) Directed to pay applicant his salary for the month of August.

(b) Directed to pay applicant his arrears of salary as from the purported date of termination and/or retrenchment to date of judgment hereof and

(c) That applicant be granted further and/or alternative relief.

THE FACTS

Briefly stated the facts of this case are that applicant was employed by the respondents acting through the agency of first respondent on the 18th June 1991 for a fixed period of fourteen months. When the contract expired, it was extended for two months to 19 October, 1992. After the extended period expired in October 1992, applicant was employed on a contract that had no fixed period. Applicant avers that this meant that he was employed for the duration of respondents' contract with the Government of Lesotho which he alleges is until 1996.

On 5th August, 1993 first respondent's Project Manager Mr. Bourgeois wrote a circular memo to *"all Tunnelling Workforce"*, bearing this heading *"Re: Completion of Works - Tunnelling"*. The memo advised addressees that *"in order to assist the Management and our workforce to avoid retrenchments which are eminent, (sic) we propose to offer*

employees the opportunity to apply for other positions on concrete works." **The memo further emphasized that a transfer will only be at the request of an employee, but management reserved the right to make a final decision.**

On the 18th August, 1993 applicant was served with a letter signed by the Project Manager, advising him *that "due to the completion of the works, it is with regret that we must advise you of your retrenchment with effect from 20/08/93. (This is the date from which notice will be calculated)".* Applicant was required to sign that he had received the letter, but he refused saying that he would first want to see the author of the letter.

It is not clear if he finally met Mr. Bourgeois, but it is common cause that on the same day applicant applied for leave. There is a dispute as to the duration of the leave, but the leave was approved by the Project Manager. Applicant says he applied for leave from 19th to 26th August, 1993, but respondents say it was from 19th to 20th. However on the 26th August, applicant sought to apply for extension of his leave up to 03/09/93, but the application was refused on the grounds that applicant had been retrenched on the 20th August, 1993.

<u>STATEMENT OF CASE</u>

Applicant contends that, his retrenchment was nothing but a ploy to get rid of those of the workers who were not members of the Construction and Allied Workers Union (CAWULE). Respondents countered by pointing out that they are not averse to their workforce joining trade unions but they do not force them to join any particular union.

Respondents went further to point out that CAWULE only happens to be a majority union with which they have dealings and that of the total of sixty four workers who were retrenched with applicant, fifty two of them were members of CAWULE. It appears to the court that applicant only threw in this argument to try to boost his case, but he never substantiated it in any way that would persuade the court to believe his story. There is no reason for us to disbelieve respondents that infact of the total retrenchees, only a fifth were non-union members. Applicant's allegation in this respect is clearly unfounded.

Secondly applicant submits that his purported retrenchment was carried out in accordance with the agreement between respondents and CAWULE which is not binding on him because he is not a member of CAWULE. He further submits that he is only bound by the provisions of the Labour Code with regard to the termination of contract or those of his contract of employment with the respondents. Respondents admit that in terms of the recognition agreement with CAWULE where retrenchment becomes necessary, the respondents have to consult with CAWULE which is a recognized majority union. Counsel for applicant had promised to file heads of argument to substantiate his arguments but this did not happen until at the time of the writing of this judgment.

This argument brings into play the unresolved debates about defining the ambit of collective bargaining. The debate on who the legitimate parties to collective bargaining process are, is currently raging between the advocates of Majoritarianism and those who dismiss it as an inroad into freedom of association. (See Brenda Grant, in Defence of Majoritarianism: Part I - Majoritarianism and Collective Bargaining (1993) 14 ILJ 305). Those who attack Majoritarianism do so on the premise that it infringes on workers right to associate, since the effect of bargaining with only one union deprives other employees who do not belong to that union of their right to associate. The author of the above article contends in Part II at p.1147 that *"freedom of association generally relates to the notion that individuals will be free to convene with others who have similar goals, free from unwarranted interference to achieve these common goals."* He goes further at page 1148 that freedom of association *"..... involves freedom to organize so that unions are effective in representing their members. This does not however mean that it includes a right or freedom for every group of workers who have associated together to bargain with the employer."*

Having formed a union of their choice, employees are entitled to bargain, through their union with their employer. Lesotho is a signatory to ILO Convention No.98 on Collective Bargaining and Right to Organize Convention. In terms of the provisions of that Convention, countries that ratify the Convention undertake to take measures to promote collective bargaining.

It seems to me that to uphold applicant's contention that he is not to be bound by provisions of a product of collective bargaining which Lesotho has undertaken to take measures to promote would amount to stabbing ourselves in the back.

Moreover it seems impractical that over and above bargaining with a majority union, the employer can be expected to bargain with the individual employees who are non-union members. Indeed in Part 2 of his article *"In Defence of Majoritarianism - Majoritarianism and Freedom of Association"* (1993) 14 ILJ 1145 at 1148, Brenda says that

> ***"What is envisaged in the freedom to bargain is the situation where employees, once accepted as a bargaining unit, will be entitled to bargain with the employer free from undue interference and bad faith bargaining. The freedom to bargain therefore attaches to a recognized union rather than individual employees..... In this manner it is limited to unions which have succeeded in the quest for the holy grail of recognition."***

Having struck a deal with the recognized union the employer is entitled to regard the agreement as applying generally to his employees including those who may not be members of the union. This is more so when the non-union members have in the past benefited without being discriminated from the gains negotiated by the recognized union like in the form of wage increases and other improvements to their conditions of employment. In my view this would be a legitimate case of estoppel that non-union members must not be allowed to selectively enjoy the fruits of collective bargaining when it suits them and try to claim non-membership of the union when what has been agreed is not entirely in favour of the union. In Luthuli & Others .v. Flortime (Pty) Ltd & Another (1988) ILJ 287 at 291, John A. M. had this to say:

> ***"There may well be circumstances, as suggested in the African Products case, when it might reasonably be expected of an employer that he should negotiate with a union which has substantial though not majority representation. Where, however, there is a majority union which has concluded a recognition agreement, including retrenchment procedures, with an employer and the parties have agreed that the provisions of the agreement, including those procedures, be made a condition of employment of each employee, it would in the view of this court go too***

far to impose on the employer a duty to consult separately a minority group of the employees and their union...."

It is common cause that both counsel admitted that since the term "retrenchment" has not been used in the Code, there is confusion as to whether under the Code an employee's contract of employment can be terminated on grounds that he is being retrenched. Section 66(1) provides circumstances under which an employee's contract may be lawfully terminated. It reads as follows:

"An employee shall not be dismissed whether adequate notice is given or not, unless there is a valid reason for termination of employment which reason is:-

(a) connected with he capacity of the employee to do the work the employee is employed to do...

(b) connected with the conduct of the employee at the workplace; or

(c) based on the operational requirements of the undertaking, establishment or service."

The issue is whether Section 66(1)(c) can be interpreted to mean that an employee's contract can be terminated on the grounds of retrenchment.

In terms of Section 4(c) of the Code, ***"in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions... and of recommendations adopted by the Conference of the International Labour Organisation."*** **It will be noted that Section 66(1) and (3) owe their provisions from Part II paragraphs 2 and 3 of Recommendation No.119 concerning Termination of Employment at the initiative of the employer. In terms of this Recommendation, termination for operational requirements of the establishment involve scaling down the size of the workforce. Thus Part III of the Recommendation provides guidelines regarding steps that should be followed when reduction of the workforce is contemplated. The measures that are recommended are those that have been ruled by the Industrial Court in South Africa as fundamental pre-requisites to retrenchment. Indeed the term** ***"retrench"*** **is defined in the Oxford Dictionary as meaning;** ***"reduce the amount of, cut down expenses, introduce economies."***

I am therefore satisfied that termination of a contract for operational requirements means the same thing as what is commonly referred to as retrenchment. An employee's contract can therefore be legally terminated on grounds of retrenchment.

Applicant's counsel submitted that even if applicant may have been legally retrenched, the retrenchment is nullified by inadequate notice. He argued that applicant was given only two days notice from the 18th to the 20th August. Mr. Sekake for the respondents argued on the contrary that respondents made workers aware of their retrenchment by the Memo of 5th August 1993. With respect, I cannot agree with this argument. The Memo of the 5th August was merely advising the tunnelling workers that retrenchments were imminent. It cannot, therefore, be regarded as a notice, as it was never specific as to the date of the impending reduction of the workforce. Secondly, the memo did not say who was going to be retrenched and who was not. The people who were finally retrenched cannot be said to have been notified by this Memo which did not say who had been or who were going to be selected.

Mr. Sekake further said applicant did not only refuse to sign for and accept his letter of termination, but he also refused to collect his severance pay, leave pay, notice pay and salary for the month of August. The notice of retrenchment letter which applicant refused to accept read in part as follows:

> ***"Due to the completion of the works, it is with regret that we must advice you of your retrenchment with effect from 20/08/93. (This is the date from which notice will be calculated)" (my emphasis).***

Clearly therefore applicant's notice did not run from 18th to 20th as Mr. Mosito suggests. The 18th was a date on which applicant was advised that as of the 20th he will no longer be in the employ of the respondents. His pay in lieu of notice was going to be calculated from the 20th. We, however, do not know how much notice applicant had been given as he has refused to receive his notice pay together with other terminal benefits. The court is not therefore in a position to say if applicant had been given inadequate notice or not.

Applicant further argued that he was employed for the duration of respondents'

contract with the Government of Lesotho which he alleges is to run until 1996. Mr. Mosito said that the court should take judicial notice of the fact that even though the tunnelling is complete, work at Muela intake is not complete. In its answer the respondent denied that applicant had been employed for the duration of respondents contract with the Lesotho Government and averred that applicant had been employed for as long as his services were required. It is common cause that applicant was initially given a contract of fixed duration of fourteen months, which was extended for a further two months and thereafter left open-ended as it no longer had a termination date. This latter contract is the one that is referred to as *"....a contract without reference to limit of time..."* in the Code. Respondents' contract with the Government of Lesotho has a definite date of completion. If applicant's contract was for the duration of respondents' contract with Government, it would have contained that date of completion of the works, and as such it would be a contract for a fixed duration of time. It seems to the court that a contract cannot take two forms simultaneously. It is either one type or the other. Applicant's contract being one without reference to limit of time, is determinable at anytime either before or upon completion of the works.

Mr. Mosito further said that since applicant was an administrative clerk, completion of the tunnel should not have affected his work as the office clerk. Mr. Sekake countered this argument by arguing that, respondents had to do a staff cut back. Applicant found himself in the same job with one Monyane and respondent required the services of only one of them. When applicant was assessed with Monyane, the latter outclassed him. Mr. Mosito replied that if that was the case, then applicant was terminated in terms of Section 66(1)(a) relating to the capacity of the employee to do the job he is employed to do. I agree with Mr. Mosito, and if the respondent had decided to terminate applicant because of reasons connected with his capacity to do his work, he ought to have first given him a hearing in terms of Section 66(4) of the Code. It is, however, common cause that in terms of Section 69(3), the employer cannot in the absence of reasonable excuse be allowed to contradict the written statement of reasons for termination in proceedings before the court. Since the reason advanced by respondents for termination of applicant's contract was retrenchment they cannot now be allowed to contradict that reason. Mr. Sekake's argument therefore is dismissed.

It appears to me that respondents' Memo of the 5th August categorically singled out that class of employees who were to get ready for retrenchment, as a result of the impending completion of the works. Those were the tunnelling workforce. Indeed what has been completed is the tunnel and not the work at 'Muela intake. It seems the onus is on the respondents to show why the completion of the tunnel has affected even the office workers and yet generally work is still continuing at the intake. The precise nature of the Memo with regard to the addressees and the department in which work was nearing completion, created an expectation among employees of the other departments that the forthcoming retrenchments were not going to affect them. The notices of retrenchments must have come as a surprise to them as applicant's reaction to the letter shows. At what stage then did it become necessary for the retrenchments to be extended to other departments? The onus of proof is on the respondents and I am not satisfied that they have discharged it.

In terms of Article 7.3.4 of the addendum to the Recognition and Procedural Agreement between CAWULE and the respondents,

> ***"both the employee and his trade union, works council or equivalent, if any shall be consulted, in advance, on the need to retrench and shall be given the opportunity to make representations on the proposed retrenchment."***

The Recognition Agreement goes further that the employer will provide the employees and/or their trade union with information relating to:

- **(a) Reasons for the retrenchment.**
- **(b) The timing thereof.**
- **(c) Method of selection of those who will be retrenched.**
- **(d) The steps considered or taken to avoid or minimize retrenchment.**
- **(e) The total number of works affected and their departments.**
- **(f) The financial or other benefits applicable upon retrenchment.**

There is no doubt in my mind that if respondents had followed the Recognition Agreement, they would have satisfactorily discharged the onus as to how the retrenchment that originally affected the tunnelling department came to affect even employees of the administration department. The employees were not consulted nor

given chance to make representations. This is confirmed by applicant's response when he refused to sign for and accept his letter of retrenchment. The handwritten minute at the bottom of that letter reads:

"Refused to sign and said he would first see the Project Manager."

If the workers had been consulted and given the chance to make representations, comments like the one quoted above would not have arisen.

If the employer had observed his agreement with CAWULE, we would not be asking how the administration department came to be affected by workforce reduction that ex facie the state of the works, had to affect the tunnelling department. The agreement unequivocally says information should be made available both to the union and the workers regarding, inter alia, method of selection of would be retrenchees, steps taken to avoid or minimise retrenchment and the number of works affected and their departments. Because of the respondents' failure to observe the agreement applicant is now complaining that his retrenchment has been unfair. This court has in the past held that it shall give effect to employers' self imposed codes or codes negotiated and agreed with trade unions. (See Edith Mda .v. NUL, Case No.LC/14/94 (unreported), Ts'eliso Shao .v. C.C. Tsai & Another, Case No.LC/17/94, National Education, Health & Allied Workers Union & Others .v. Director general of Agriculture & Another (1993) 14 ILJ 1488).

There is, therefore, no reason why this court should not give effect to the Recognition Agreement between respondents and CAWULE as to the steps that should be followed in carrying out retrenchment. Non-observance of that procedure suffices to nullify the purported retrenchment. Even though this would normally dispose of this case there is, however, another aspect of this case which should not escape our comment.

SECTION 65(2) - EFFECT OF ALLOWING EMPLOYEE TO REMAIN IN EMPLOYMENT BEYOND THE DATE OF TERMINATION

It is common cause that after refusing to sign for his retrenchment letter on 18th August, 1993, applicant applied for leave of absence with effect from the following day, 19th August,. When he later tried to apply for its extension, the extension was refused

on grounds that he had been retrenched. In his originating application, applicant said he had applied for leave of absence from 19th August to 26th August.

Respondents denied this and said the leave of absence was for two days from 19th to 20th August. Respondents' assertion that applicant applied for two days leave is not supported by the facts of this case. According to the leave form which was signed by applicant on 18th August and approved by the Project Manager, Mr. Bourgeois on 19th August, applicant applied for leave of absence from 19th August to 26th August 1993 and it was approved as such. Respondents only queried a request for extension on the basis that applicant had been retrenched on the 20th August. The leave of absence had clearly been approved beyond the 20th, which was the date on which applicant's contract was to have terminated.

It is further common cause that applicant was notified on 3rd September, to appear before a disciplinary enquiry of the respondents on 6th September, 1993 on a charge of *"missing wages from July payout."* Applicant duly attended the enquiry and he alleges that he was subsequently suspended from employment. Respondents admit that applicant was called to appear before the enquiry *".....as an opportunity for applicant to clear his name.... before respondent decided whether the matter should be handed to the police or not. In the light of applicant's retrenchment from respondents' employ, the respondents made no findings as to steps that respondents would take internally against he applicant and merely decided to refer the matter to the police."* There does not exist any evidence to support applicant's allegation that he was suspended and I, therefore, agree with respondents that no steps were taken against the applicant. On the issue of disciplinary hearings, I do not agree with respondents playing around with the words and the hard to find reason, as to why applicant was called before a disciplinary enquiry when he was already allegedly retrenched. The long and short of it is that only employees can be subjected to the company's disciplinary procedure.

It is applicant's contention that, his leave was approved beyond August 20th, the date on which he would have been retrenched, because the respondents accepted his refusal to accept his retrenchment. Furthermore, applicant argued that he was subjected to a disciplinary enquiry because he had refused to accept his purported retrenchment, and

his employers regarded him as still their employee. Section 65(2) of the Code provides as follows:

> ***"If upon termination as provided under Section 63 and 64 the employer suffers the employee to remain, or the employee without the express dissent of the employer continues in employment after the day on which the contract is to terminate, such termination shall be deemed to be cancelled and the contract shall continue as if there had been no termination, unless the employer and the employee have agreed otherwise."***

There is no doubt in my mind that by approving applicant's leave beyond August 20th, 1993, the respondents caused applicant to continue in an employment relationship with respondents. The purported decision by which applicant would have been retrenched on the 20th August was in law cancelled by the leave being extended beyond 20th August.

Even if the leave had not been approved beyond the 20th August, the purported retrenchment of applicant would still have been cancelled by respondents' decision to cause applicant to appear before a disciplinary enquiry on 6th September 1993. Respondents sought to argue that in any event *"....the hearing was within the period of one month of the retrenchment date for which month respondents had tendered payment in lieu of notice to applicant."* Termination of contract can either be done under Section 63, of the Code, in terms of which the employee would be allowed to serve his notice, or under Section 64 where the employee's contract is terminated forthwith and is paid money in lieu of notice. If the employer opts for the latter arrangement, the relationship between him and the employee ceases forthwith. There is nothing in the law to support the argument that because an employee has been paid money in lieu of notice, the employer may continue to regard him as his employee during the period that he would have served his notice had he not been paid in lieu thereof. If the employee is terminated today and is paid one month's salary in lieu of notice, he is free to start with a new employer tomorrow if he would have already found another job.

For the former employer to require him to come to work to continue with his normal

duties or to answer charges in terms of the employer's disciplinary code will, unless there is an express agreement as to why that happens, in law be taken to have annulled the previous termination.

RULING

The court therefore makes the following award:

(a) **The purported retrenchment of applicant on the 20th August 1993, is declared null an void for non-compliance with the Recognition Agreement.**

(b) **Assuming that the retrenchment had been done in accordance with the Recognition Agreement, the retrenchment is declared cancelled by approval of applicant's leave from 19th to 26th August 1993, and by applicant's appearance at a disciplinary enquiry of 6th September 1993. Applicant's contract is therefore taken to have continued as if there had not been any termination by way of retrenchment.**

(c) **In retrenchment situations, the court will normally not order reinstatement, unless the merits of the particular case dictate otherwise. Invariably, monetary compensation will be ordered. Applicant is, therefore, awarded monetary compensation as follows:**

(i) **Applicant shall be paid his terminal benefits in the form of salary for the month of August 1993, one month's salary in lieu of notice, leave pay, which the court understands have all along been ready and merely awaiting collection by applicant.**

(ii) **Since it is not of the respondents' making that this case is only being heard by the Labour Court in 1995, but rather because the court itself was not yet in place, respondents are ordered to pay applicant his arrears of salary from September 1993 to 17th December 1993, which was the date of the High Court Judgement that referred this matter to this court.**

Respondents are ordered to pay applicant one year's salary as compensation for the unfair retrenchment and for having allowed the purported retrenchment to continue despite being rendered

cancelled by the subsequent approval of applicant's leave beyond the date of retrenchment.

(d) **There being no evidence that respondents are interfering with applicant's right to join a union of his choice, there is no order with regard to the prayer that respondents be restrained from interfering with applicant's right to join a trade union of his choice.**

(e) **No costs may be imposed in proceedings for unfair dismissal unless the court believes that the party against whom it awards costs has behaved in a wholly unreasonable manner. (Section 74 of the Code refers). I am not of the view that respondents fit this description. Accordingly therefore, there is no order as to costs.**

THUS DONE AT MASERU THIS 11TH DAY OF APRIL 1995

L. A. LETHOBANE

PRESIDENT

A. T. KOLOBE I CONCUR

MEMBER

M. KANE I CONCUR

MEMBER