IN THE LABOUR COURT OF LESOTHO

CASE NO LC 26/95

HELD AT MASERU

IN THE MATTER OF:

MAMPATO MAJARA **1ST APPLICANT**
'MAMAKASE MAKAE (duly assisted by her husband)
2ND APPLICANT
'MALEBOHANG MOLAPO (duly assisted by her husband)
3RD APPLICANT
'MALEBALLO LARA (WIDOW) **4TH APPLICANT**
'MALEFA MOKHALI (WIDOW) **5TH APPLICANT**
'MAMOTSOARI MOTSOANE (duly assisted by her husband)
6TH APPLICANT
'MATLALI RAMOREBOLI (duly assisted by her husband)
7TH APPLICANT
'MAMELLO MOFOKA (duly assisted by her husband)
8TH APPLICANT
'MAKHAHLISO 'MOLOTSI (WIDOW) **9TH APPLICANT**
'MASAMUEL TAELI (duly assisted by her husband)
10TH APPLICANT
EANG MOKHELE **11TH APPLICANT**
MPHO QABALATSANE (duly assisted by her husband)
12TH APPLICANT
MOTHETSI SEKILA **13TH APPLICANT**
'MATUMELO METSING (duly assisted by her husband)
14TH APPLICANT
MOSEBETSI MAPAPE **15TH APPLICANT**

AND

NATIONAL ABATTOIR & FEEDLOT COMPLEX **1ST RESPONDENT**
THE HONOURABLE MINISTER OF AGRICULTURE
2ND RESPONDENT
THE ATTORNEY GENERAL **3RD RESPONDENT**
THABO MOEKETSI (GENERAL MANAGER) **4TH RESPONDENT**

J U D G M E N T

Applicants herein are former employees of the first respondent. They were retrenched by first respondent in January 1995, following an announcement by second respondent to that effect. The retrenchments were according to the answer of the respondents necessitated by adverse economic circumstances which were caused, inter alia, by such factors as:

(a) Withdrawal of financial backing of first respondent by the Central Government.
(b) Overstaffing of the first respondent by 70%.

(c) Poor debt management procedures which resulted in first respondent losing an estimated one million maluti in bad debts.

The bad financial situation started to have a grave impact on the business of the first respondent in 1993, when the latter was not able to honour its salary obligations to staff or to purchase stock and sales came to a halt. During the second half of 1993 the staff had been consulted and informed about the problems facing the first respondent. At one point the staff had suggested that the first respondent should pay them a bonus as compensation for the impending closure of first respondent. The proposal was not accepted by the first respondent since it entailed a lump sum payment which the first respondent could not afford. In another meeting with the Principal Secretary, still in 1993, the staff proposed that the first respondent be transformed into a cooperative of which they would be members. Apparently this proposal was also not accepted by respondents, for nothing turned out of this suggestion.

In 1994, it became clear to the management of the first respondent that the first respondent was doomed to collapse unless something was done to safe the situation. The respondents contend in paragraph 8 of Moeketsi's answering affidavit that they thought that the retrenchment of the staff was the only best way out of the disturbing situation. They go further that more importantly;

> ***"....it was found fit and proper that before a decision on retrenchment can be made, the staff must be appraised again of the general business situation as explained herein....and that they must also be made to contribute as to what can be done and more specifically that they have to be informed that it was the thinking of respondents to effect retrenchments."***

According to respondents these consultations started again in July 1994. A series of meetings were held with staff, their union and the Labour Office. The Principal Secretary of the Ministry of Agriculture held a meeting with staff to solicit their

proposals as to what could be done. This time the staff reportedly refused to make proposals saying that *"....they did not want to dismiss themselves."*

In the meantime, the first respondent's financial situation continued to deteriorate, with business operations coming to a virtual standstill. In September 1994, workers were asked to stay home whilst still getting full pay, because first respondent's business had come to a minimal point. This situation continued for about three months and in November 1994 respondents decided that retrenchments must take place. Thus on 1st December 1994, the individual applicants were served with letters of termination of their contracts with effect from 1st January 1995. The notices of terminations were later extended to 1st February 1995.

At the start of the hearing of the application both counsel agreed that the respondents abandon their points in limine which they had earlier indicated they would raise. The applicants on the other hand abandoned the prayer for payment of terminal benefits in the form of:

- **(a) notice pay;**
- **(b) severance pay;**
- **(c) leave pay to those entitled thereto;**
- **(d) refund of pension to those who contributed;**
- **(e) payment of compulsory savings to those who were members of the scheme.**

The reason for abandoning this claim is because all the terminal benefits have been paid and are ready for collection by those who may not have collected the same.

Applicants do not dispute the foregoing facts. Their only contention is that the retrenchment does not comply with Clause 12.3 of the Collective Bargaining Agreement between the first respondent and applicants' trade union (National Union of Hotels, Food and Allied Workers Union)(NUHFAW); in that the principle of *"Last in First out")(LIFO)* was not followed by the respondents. To support their contention, the applicants pointed out that;

- **(a) In a meeting with the Labour Commissioner, the fourth respondent had in answer to a question as to what criteria had been used to select those who were to be retrenched, said that *"....they just cut the number."***
- **(b) Some people who were employed after the applicants have not been retrenched.**

In response Mr. Makhethe for the respondents contended that applicants have accepted their termination by accepting their terminal benefits. He contended further that in any event the LIFO criteria is not absolute. There are other factors such as educational qualifications and skill which still have to be taken into account when carrying out retrenchment.

It has been held that whilst a civil claim in a court of law might be compromised by an employee's acceptance of an amount tendered in full and final settlement, an employee is nonetheless entitled to challenge the fairness of his/her dismissal before the Labour Court despite his or her acceptance of offer of terminal benefits. (See Paper, Printing, Wood and Allied Workers Union & Others .v. Delma (Pty) Ltd (1989) 10 ILJ 424 at 431). In the instant matter however, the first respondent's tendering of the terminal benefits did not purport to be in full and final settlement. The benefits were offered because the first respondent assumed that it had properly terminated the applicants. That assumption does not necessarily make the terminations proper and fair. The applicants are not precluded from challenging the fairness of their dismissal simply because they accepted the money paid by the respondents on the understanding and believe that they have lawfully and fairly terminated applicants' contracts.

There is, however, substance in Mr. Makhethe's submission that the LIFO criteria is not absolute. Article 12.1 of the Collective Bargaining Agreement (Annexure "C" of the Originating Application) between the first respondent and NUHFAW provides as follows:

> ***"12.1 Seniority is measured by length of service within a specific section or category of work and will be treated as paramount consideration for purposes of promotion and retrenchment, within that section or category, unless it is overwhelmed by other factors such as education qualifications, skills."*** **(emphasis added).**

Article 12.3 on which the applicants relied in support of their argument provides:

> ***"12.3 while the employer has the right to lay-off where necessary, the probationers must go first and as for others, employees with the less seniority shall be the first to go and the last to be recalled unless they are highly qualified, highly skilled."***

A recurring theme in both of these clauses of the Collective Bargaining Agreement is that the LIFO criteria shall be used subject to such other factors as where the employee with the least seniority is more skilled and has better academic qualifications than a senior employee. Secondly, the seniority is, according to Clause 12.1, not an absolute consideration but a paramount consideration. Thirdly, Clause 12.1 makes it clear that seniority is not measured across the board, but *"...within a specific section or category of work."*

In their submission the applicants have not alleged that they are more qualified, or better skilled than those of their colleagues who have not been retrenched. Neither have they specified whether their alleged seniority over those employees who have not been retrenched is within the sections or categories in which they were each employed. However, the respondents have for the benefit of the court attached Annexure "NA10" in which all the fifteen applicants together with the five persons who they allege are less senior and yet have not been retrenched, have been listed.

The list gives the name of an employee, his or her motivation at work, the section in which he or she is employed and the qualifications, or the highest standard he or she reached at school.

One thing which comes out clearly from the list is that with the exception of the 11th applicant, none of the fourteen applicants is working in the same section as those five employees who have not been retrenched. The 11th applicant was employed as a skinner and this is the job which is done by Bokang Thamae who has not been retrenched. However, Thamae's highest standard at school is Standard 7 while the 11th applicant is illiterate. The selection of the 11th applicant was therefore still within the letter and spirit of the provisions of the Collective Bargaining Agreement. As for the other fourteen applicants they have clearly not been able to show how their selection has contravened the provisions of the Collective Bargaining Agreement especially the conditions attached to the LIFO criteria.
In his answering affidavit Mr. Moeketsi vehemently denied the words attributed to him at the meeting called by the Labour Commissioner where he allegedly said the criteria used in retrenching was to just cut the number. He contended that Annexure "NA10" shows the procedure followed in effecting the retrenchments. It does indeed sound highly unlikely that a company in the bleak position in which first respondent found itself could in effecting retrenchments just cut the number as Annexure "D" purports. In a situation like that of the first respondent the main priorities are to cut costs and to achieve maximum efficiency and productivity. This objective cannot be achieved by retrenching simply through cutting the number. An employer in that situation would invariably use such yardsticks as efficiency, productivity and good discipline in deciding who to retain and who to retrench. The fourth respondent says he used inter alia, motivation and resourcefulness which are very close to the foregoing considerations.

Mr. Mahao contended on the other hand that if the respondents used Annexure "NA10" as a criteria, the procedure they followed was flawed in that the applicants were not given a hearing. According to "NA10" one of the considerations in selecting those who were to be rentrenched was their motivation and resourcefulness. These factors impinge on the capacity of the applicants to perform. In terms of Section 66(4) of the Code if the reason for dismissal of an employee is, inter alia, his or her capacity to do the work he or she is employed to do, the employee must be given a hearing prior to the termination. In Potlako Makoa .v. LHPC & Others LC/15/94 (unreported) this court upheld the contention that if the applicant had been retrenched because of reasons connected with his capacity to do his work he ought to have first been given a hearing. The decision in Makoa supra has since been confirmed by another decision of this court in Lesotho Clothing and Allied Workers Union .v. Indi Ocean (Pty) Ltd LC/166/95 (unreported).

Mr. Makhethe's argument that the retrenchment of the applicants did not fall within the perview of discipline, hence they did not have a right of hearing cannot succeed. The principle is that whenever a decision founded on some perceived

wrong or weakness of the employee is to be taken and that decision is prejudicial to the rights of the employee, the latter must be given a hearing before that decision is taken. Mr. Makhethe contended further that the assessment of the performance of the applicants was done over a period of time. If that was so there ought to be evidence to show that as the assessment was being carried out the applicants were warned over the period to improve their motivation and resourcefulness in order to enhance their competitiveness. There is no such evidence. The irresistible conclusion is that the applicants have infact not been afforded an opportunity to defend their performance, or improve it or even to challenge the motivation and resourcefulness of those who have been retained. (See Mthembu & Others .v. Zululand Truck Maintenance (Pty) Ltd (1989) 10 ILJ 1165 at 1168).

Mr. Makhethe's further contention was that, even if the first respondent did not give applicants a hearing, Moeketsi's affidavit shows that the respondents' uppermost consideration in effecting the retrenchments was the economic problems facing the first respondent. There is no doubt that the retrenchments were necessitated by unfavourable economic situation faced by the first respondent. The applicants do not dispute this. Their argument is that in effecting the retrenchment the respondents did not act fairly because they did not given them a hearing in a case where the *audi alteram partem* rule was applicable. "NA10" has been prepared by the fourth respondent and it outlines the criteria used in carrying out the retrenchments. This much is admitted by the fourth respondent in paragraph 16 of his answering affidavit. In so far as the applicants' performance was going to be used as an additional factor in determining which persons were to be retrenched, the applicants ought to have been given a hearing on that point, to enable them not only to defend their performance but also to challenge the performance of the so-called good performers.

In the circumstances we find that whilst the applicants have failed to show that their retrenchment violated the Collective Bargaining Agreement, the process of retrenchment is however procedurally defective in that applicants were not given a hearing where they ought to have been afforded a chance to be heard. It matters not whether the hearing would not have made a difference to the situation in which applicants now find themselves. The right to a hearing is a fundamental principle of fairness which cannot be overlooked under any circumstances.

AWARD

1. The court notes that due to the economic downturn and the virtual standstill in the business of the first respondent, the retrenchment of the workers was inevitable. This fact is not disputed by the applicants.

2. The court notes further that from the beginning the process of retrenchment was conducted with such open minds as is evidenced by the numerous consultation that respondents had with the workforce as to minimise possible dishonesty and

unfairness on the part of the respondents. Generally the retrenchments have been carried out honestly.

3. Furthermore, the respondents have to a large measure sought to comply with the Collective Bargaining Agreement in their selection criteria. However, having complied with the agreement, the respondents failed to act fairly and equitably in not affording applicants a hearing where they were entitled to be heard, thereby resulting in a procedural irregularity.

4. In the circumstances of this case especially in the light of paragraphs 1-3 above and the degree of guilt of the respondents, reinstatement cannot be a proper remedy for the procedural unfairness. Payment of one month's salary to each of the applicants should in the circumstances adequately compensate them for the procedural unfairness. The first respondent is accordingly ordered to pay one month's salary to each of the fifteen applicants as compensation.

There is no order as to costs.

THUS DONE AT MASERU THIS 16TH DAY OF APRIL 1996

L. A. LETHOBANE
PRESIDENT

M. KANE I CONCUR
MEMBER

A. T. KOLOBE I CONCUR
MEMBER

FOR APPLICANTS : MR. MAHAO
FOR RESPONDENTS : MR. MAKHETHE