**IN THE LABOUR COURT OF LESOTHO**

**LC/05/04**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**LETHIBELA LETHIBELA** **APPLICANT**

**AND**

**PHASEMANE HOLDINGS (PTY) LTD** **RESPONDENT**

# JUDGMENT

*Retrenchment – Consultation – Evidence – Court must hear direct evidence – Judicial notice – court will take judicial notice of well known facts – Test whether facts notorious is objective – Outsourcing – choice whether to outsource or increase staff is an administrative commercial decision – court will not interfere as it is the prerogative of employer – Consultation – Uncontroverted evidence is that applicant was consulted – Application dismissed.*

The applicant was employed by the respondent company as a security guard with effect from 1st March 2001. He was a sole guard with no one to change shifts with. As it would be expected, the respondent had problems of how to replace applicant when he had proceeded on his weekly rest days as stipulated in the law. According to applicant's own testimony he had to find a person to take his place when he was off.

Respondent led the evidence of DW1 Maseeta Leuta who said she was a supervisor of the applicant. She confirmed that they had serious security function problems whenever applicant had to take his days off. She as the supervisor had to find a person who would substitute applicant during his off days. However on or about two occasions she failed to secure the services of the person whom she had used to replace applicant. She accordingly had to ask applicant himself to help them find such a person. It happened that on

other occasions when applicant himself had tried to help find the temporary replacement, the person concerned failed to turn up as well. The respondent found itself having to engage a private security company to come to its rescue, obviously at short notice.

DW1 testified that she finally reported to the Managing Director, the problems she as a supervisor faced whenever applicant had taken his days off. Consequent upon that report the Managing Director asked her to call the applicant. She did and while she was within hearing distance the Managing Director told the applicant what she had reported to him. He further told him that since his offs were causing the company a problem he would have to engage a private security company to completely take over the security function from the applicant. In cross-examination she was asked if the applicant said anything in response she said she did not recall. It was further put to her that may be the Managing Director was not seeking applicant's views he was instead telling him a *fait accompli*. Her response was yes he was telling him like he would his employee. It was DW1's testimony that following that conversation applicant was written a letter that informed him of his retrenchment.

The Managing Director also gave evidence in which he corroborated DW1's testimony especially that the company had a problem of having to engage private security companies at high cost whenever applicant had taken his days off. He averred that he had to engage private security companies because his tenants at the premises were dissatisfied with the stick wielding guards they used to engage when applicant was away. It must be mentioned that evidence is that applicant himself had a gun for doing his work but that gun was not available to persons they used to recruit to replace him. DW2 testified that after consulting with DW1 he asked her to call applicant for him. She did and he informed applicant that he had a problem retaining him as an employee for the reasons already advanced by DW1.

He was asked when it was when he called the applicant to inform him as aforesaid; he said it was around May/June 2002. He was asked what applicant's response was. He said he responded by taking the company to the Directorate of Dispute Prevention and Resolution (DDPR) to claim payment for off days that he had previously not taken while the company was being run by the late brother of the present Managing Director. The matter went to conciliation at DDPR and DW2 says he indicated the dilemma the company was facing and that it would have to terminate

applicant for operational reasons. The DDPR advised him on how best to go about the retrenchment. However, a settlement agreement for the payment of an amount of M5,094.96 representing weekly rest days was reached and signed on the 23rd September 2002.

The amount was duly paid at the DDPR. On the 29th October 2002, the applicant was written a letter giving him a one month notice. The reason was that during his off days the company was forced to engage private security companies at exhorbitant cost to replace him. He was promised to be paid his terminal benefits in due course. On the 7th January 2003 applicant was duly paid his terminal benefits in the amount of M2,408.02. On the 8th January applicant wrote back to the respondent acknowledging receipt of the benefits and detailing what he considered to be short- payment. It is not clear what response came from respondent on that but on the 5th February 2004 the applicant initiated the present proceedings with the assistance of the National Union of Retail and Allied Workers.

The claim of the applicant is that his so-called retrenchment is nothing but an unfair dismissal. He avers that the codes of Good Practice were not followed in particular he was not consulted. His own testimony was that prior to being served with the notification of termination nothing was communicated to him concerning the problems the company could be facing. Briefly put applicant's case is that the respondent has failed to follow the now established guidelines for effecting a fair retrenchment. It was firstly suggested that the court should take judicial notice of the fact that respondent is a very small employer which employs only three people with the applicant included. The court heard no evidence to that effect, neither does it (the court) have any knowledge of the respondent's size. As Schwikkard et al, Principles of Evidence 1997, Juta & Co. put it at page 331:

> *"Facts which are judicially noticed are either well known to all reasonable persons or to a reasonable court in a specific locality. It is not sufficient for a presiding officer to act on his personal knowledge of facts."*

The test is objective as opposed to subjective. Respondent is just but one of many companies that are registered and operate in this country. There is nothing peculiar to it that would make a reasonable person or court to know the size of its work force. We therefore cannot in the circumstances take judicial notice of its size as an employer. Direct evidence ought to have

been adduced to show that it is a small employer/business and it would be for the applicant to confirm or rebut the same as the case may be.

There is however uncontroverted evidence that applicant was a one man security guard. When respondent experienced problems associated with applicant's statutory entitlements as to weekly rest, it decided to outsource the security function. Mr. Makakole sought to show that the respondent should have employed a second person to change shifts with applicant. That is indeed an option that may have been considered; but that is not a legal option. It is an administrative commercial decision whether to outsource or increase the staff compliment. As this court held in Tseliso Shelane .v. Mohale Dam Contractors LC25/03 (unreported) per Khabo D.P. courts of law will not interfere in such a domain. At page 4 of the typed judgment the following remarks are made by the learned Deputy President;

> *"where the decision to retrench is based on economic considerations, the court will not impose its view of the most appropriate commercial decision in the circumstances of the employer."*

It was contended that the applicant was not consulted in accordance with the codes of Good Practice clauses 17 and 19 thereof. Clause 17 specifically requires that an employee must be consulted and be advised of all alternatives considered. Evidence before this court is that the applicant was duly consulted and told that the respondent considers outsourcing the security function to a private security company. This evidence has not been controverted. Even under cross-examination both DW1 and DW2 could not be shaken on their stand that the applicant was verbally consulted and was later written a letter (annexure "LLP1") confirming the verbal discussion previously held with applicant. Evidence is further that applicant never made any counter-proposal.

A suggestion was made that the applicant was confronted with a *fait accompli*. It may sound like that was so, but there is no evidence that applicant sought to suggest reasonable alternatives which the respondent unreasonable disregarded. It can only be a speculation at this juncture to say that the respondent confronted applicant with a *fait accompli*. In the circumstances we are of the view that the retrenchment of applicant did comply with the guidelines in particular with regard to consultation. The application is accordingly dismissed and there is no order as to costs.

**THUS DONE AT MASERU THIS 1ST DAY OF DECEMBER 2005**

**L. A. LETHOBANE**
**PRESIDENT**

**M. MOSEHLE** **I CONCUR**
**MEMBER**

**M. THAKALEKOALA** **I CONCUR**
**MEMBER**

**FOR APPLICANT:** **MR. S. MSETI**
**FOR RESPONDENT:** **MR. T. MAKAKOLE**