IN THE LABOUR COURT OF LESOTHO **LC/70/04**

HELD AT MASERU

IN THE MATTER BETWEEN

LABOUR COMMISSIONER **APPLICANT**

AND

CGM INDUSTRIAL (PTY) LTD **RESPONDENT**

JUDGMENT

Dates of hearing ; 02/06/05, 27/09/05

Retrenchment – consultation – Employer must consult workers prior to retrenchment.
Notice – relates to timing not same as consultation.
Retrenchment unfair.

This matter initially started before the President and learned Panellists Messrs. P. K. Lerotholi and L. Mofelehetsi. Prior to its completion the learned panellist Lerotholi met an untimely death; for which we are immensely saddened. May his soul rest in peace. This explains why the judgment here is subscribed by two members of the court and not three. In the event of a vacancy Rule 25 allows the remaining members to hear the matter to finality if they constitute the majority of the original number.

This is a rather unfortunate case. The Labour Commissioner is here suing on behalf of three former employees of the respondent who were retrenched on the 1st April 2004. Initially there were ten employees involved and they were employed as internal security officers to guard against the theft of the respondent's merchandise.

According to the respondent, the company continued to experience high levels of theft of garments such that in January 2004 they suffered a loss of

two thousand two hundred and thirty five garments. In February of that year the loss stood at one thousand four hundred and thirty one pieces of clothing. In March the figure rose again to two thousand five hundred and seventy five garments. These figures added up to a total loss of six thousand two hundred and fourty one (6241) garments in three months.

The situation led the respondent to reevaluate itself and it came with the option to outsource the security function to a professional private security company. This enabled the respondent to concentrate on its key business calling of clothing manufacturing while it left provision of security to a professional security company whose key business was security. According to the evidence of the complainants they were dismissed by the respondent on the 1st April 2004 without any reason being given. They lodged a complaint at DDPR for unfair dismissal. They learned for the first time at the DDPR that they had been retrenched.

The DDPR conciliated the dispute and a settlement agreement was reached that all the ten applicants be "re-employed in any department under the respondent as to avoid far reaching consequences that retrenchment might bring upon them." According to the agreement the complainants were to be reemployed on or before 8th November 2004. It is common cause between the parties that only seven (7) of those former internal security guards were reemployed as per the agreement. Three, who form the subject of these proceedings were never reemployed. It is common cause that they went back to the DDPR which issued them with a certificate referring the dispute for adjudication by this court pursuant to section 226(1)(c)(iii) of the Labour Code (Amendment) Act 2000 (the Act).

The three complainants sought the assistance of the office of the Labour Commissioner which filed the present application in terms of section 16(b) of the Act. In their Originating Application the applicants contended that the respondent failed to consult the affected workers about the pending retrenchment. In their Answer the respondent averred as follows:

> *"contents herein are denied and applicants are put to proof thereof. Due to past experience the applicants could not be consulted as this would have caused more theft than already experienced."*

The respondent is obviously blowing hot and cold. In one breath they deny that they did not consult, in another breath they admit not consulting applicants and proffer a reason therefor.

Notwithstanding respondents lackadaisical pleading the applicant proceeded to adduce evidence to show that indeed the complaints were not consulted. Two of the three complainants, namely Leloko Serobanyane and Thabang Lenka testified as PW1 and PW2 respectively. PW1 testified that when he reported for work on the morning of the 1st April 2004, he found that his identity card had been barred from clocking. He however proceeded to his work station where he found security guards from a private security company already deployed. They (the private security) told him to go and see his supervisor but he refused. Up to this point the employer had not said anything to him about termination of his employment. He testified further that there was a heated argument between him and those security guards who had been deployed to take his duties. However his supervisor later came and told him that the Personnel Manager Mr. Bale would come and clarify the situation.

PW2 says that he was at work at 5.00 am on the 1st April 2004, when Right Security Guards personnel came and asked him to give them the keys. When he enquired from them why they are asking for factory keys, they told him they were ones who were now in charge of the security. As it would be expected PW2 says he refused, because his supervisors had not said anything to him about that. He testified that the Right Security personnel became rude and he decided to look for his supervisor. He did not find him, but at 7.00 am the supervisor came and took away the keys without saying a word. Both PW1 and PW2 say that it was around that time i.e. 7.00 am when Mr. Bale came with the rest of their colleagues. The two witnesses said further that Mr. Bale had a brown envelope which contained their terminal pay cheques. He told them that as each of them received their cheques they should hand over their ID cards to him. The complainants say they did as they were told but asked Mr. Bale what was happening. He replied that he was carrying out instructions as given by his boss and that he was infact being kind to them because the instruction was that he should give them their cheques outside the factory premises. He then asked them to leave which they did.

The respondent did not challenge this testimony. They instead called Mr. Reddy (DW2) who is the respondent's Factory Manager. He testified that

when the decision to retrench complainants was taken they did consider the retrenchment guidelines as developed by the courts over time. He testified further that management 'felt that giving advance notice to the security personnel of their pending retrenchment might lead into an increased theft and loss of garments." (emphasis added). We have emphasized the words "advance notice" to underscore that it was the prior notice that the company was fearful of and not consultation itself as the two are different. We will revert to this issue in due course.

The applicants had further complained that the respondent had failed to reemploy the three complainants in accordance with the DDPR settlement agreement of 8th October 2004. The applicants sought to draw an inference from the conclusion of the agreement that it showed that respondent had alternative employment for the retrenched workers. It is our view that the inference is unjustified in as much as the agreement was concluded in good faith and not as admission of any previous wrong doing. In answer to the main contention of failure to implement the settlement agreement, the respondent averred that the three complainants were not reemployed because they "…..refused to take up alternative employment."

PW1 and PW2 testified to this issue by saying that after the signing of the agreement, Mr. Bale who represented the respondent indicated that he had places for the four women in the group right away. He asked others to leave their contact numbers so that they could be contacted once space is found for them. Both PW1 and PW2 say on Monday 11th October they each received calls informing them that Mr. Bale had said they should report to work. PW1 says he was in Mapoteng and the call he received was from one Matamane who is one of the original ten retrenched workers. PW2 says the call he got was from one Manyakallo and he was in Leribe when he received the call. Both witnesses say they indicated to the callers that they would not be able to report immediately as they were out of Maseru. They further testified that the callers made second calls later in the afternoon – 5.00 pm to be precise, to tell them that Mr. Bale had said they could still report at 7.00 am the following day which they did. PW1 said Mr. Bale took them to DW2 whom he says was angry and rude to them because he said some fools had been reemployed the previous day i.e. 11th October when he failed to report, and that he (Mr. Bale) was bringing him more. He testified further that Mr. Bale showed him the settlement agreement and he said it was not an order and that they should leave his office as that was Mr. Bale's problem.

He testified further that Mr. Bale said he would look for some supervisors to help and asked them to wait. They waited until 5.00 pm when the rest of the workers knocked off. Mr. Bale said they should leave and come back the following day. When they arrived the following day he told them to be patient as he was sorting out the matter. At the end of the day nothing had yet been achieved and he again asked them to come back the following week. Even that week nothing worked out and Mr. Bale said they should come back beginning of the following month i.e. November. They reported several times but still not making any headway as Mr. Bale kept telling them to come back the following day. In the end the security prevented them from going inside the factory and Mr. Bale had to come and meet with them at the Gate. He testified that Mr. Bale's assistant who was not cooperating with him (Mr. Bale) was employing new staff and bypassing them. Mr. Bale finally advised them to go back to the DDPR on Monday 8th November as this was the last day for the implementation of the settlement agreement.

PW2 testified that on Tuesday 12th October he reported for work at 7.00 am as directed by Mr. Bale. He testified that Mr. Bale came and took them to Mr. Mokone who is the Assistant to Mr. Bale. He testified that he left them with Mr. Mokone as he said he had a meeting to attend. The Witness said Mr. Mokone said to them that he could not say anything because they were Mr. Bale's people. By this it could be safely inferred that Mr. Mokone meant that he would not reemploy them. He testified further that a Chinese supervisor later arrived and asked if they were the fools that Mr. Bale employed the previous day and Mr. Mokone agreed. The said supervisor told Mr. Mokone not to have anything to do with them because they were Bale's people. He stated further that Mr. Bale asked them to come back the following day.

When they reported Mr. Bale took them to Mr. Reddy who told Mr. Bale that the settlement agreement was not an order and as such he was not bound to reemploy the complainants. He like PW1 said they came several times and each time Mr. Bale told them he was still looking for space for them. Finally Mr. Bale said they should come the week beginning 18th October 2004. That week they again reported without being successfully placed until when Mr. Bale told them to come early November because it was now month end. He testified that they reported on the 1st November as directed and several times thereafter without anything happening. He testified that the security ended up refusing them entry at the gate and that during that time Mr. Mokone was continuing to employ people but bypassing them as

he was saying they were Bale's people. On the 8th November Mr. Bale told them he had done all he could without success and told them to seek redress at the DDPR. The latter made a certificate which formed the basis of the initiation of these proceedings.

Under cross-examination Ms. Sephomolo did not challenge the correctness of the evidence of these two witnesses. All she did with regard to PW1 was to ask him if he ever showed the Managing Director of the respondent the settlement agreement which Mr. Bale was having a problem implementing and he said he did not. She suggested to PW1 that he was offered a job which he refused to accept which suggestion the witness flatly refuted. When it came to PW2 she asked him if it was not true that he refused to be deployed in the buttons and sandblast sections. The witness categorically denied that. She asked him what his attitude would be if he were told that there was place for him in the sandblasting section. The witness unhesitantly said, "I would take the job." She suggested that the witness refused to be placed at the dispatch but again the witness denied.

Respondent adduced the evidence of DW1 Mr. Mokone and DW2 Mr. Reddy in this regard. DW1 testified that he offered complainants work at sandblasting but they refused it because they said the place is dusty. He went further to say that he agreed with them that he would find a suitable alternative place for them. A place was later found in dispatch but they said they did not know how to operate the button machines that are used in that section. He testified further he again found a place for them in packaging section. They still said the job was not suitable for them. He agreed that he was continuing to employ people right in front of the three applicants who were queuing for reemployment.

DW2 who is the Factory Manager said Mr. Bale brought the settlement agreement to his attention as he was not involved at the DDPR. He testified that he made arrangements with Mr. Bale to accommodate the ten individuals covered by the settlement agreement. He testified further that he instructed Mr. Bale to bring the ten individuals to the factory for reemployment but Mr. Bale later told him that only seven persons presented themselves for reemployment. Asked what happened with the three who were not reemployed he again stated a hearsay that Mr. Bale told him that the three complainants refused to be placed in dispatch and in sandblasting. Asked if the company still has space for the three he said if they are interested they still have space in sandblasting section.

There are two clear problems associated with the testimony of these two witnesses. First they do not refute complainants' testimony which shows that Mr. Bale's efforts to have them reemployed were frustrated by them i.e. DW1 and DW2. Secondly, Mr. Bale was part of the management and if they were going to rely on his averrement as DW2 sought to do, they should have subpoenaed him to come and say exactly what management did or did not do. I venture to add that in all probabilities these two witnesses' testimony is a fabrication. It is highly unlikely that the three applicants could have refused the various opportunities which Mr. Mokone purports to have availed to them to be accommodated. Indeed when PW2 was asked what his attitude would be if he is told that there is a space in sandblasting department he said he would take up the job.

The evidence of the complainants is consistent and reliable. They corroborated it by calling Lefu Poonya and Makhotso Mohlouoa both of whom had been retrenched with them but were reemployed in terms of the settlement agreement. Both these witnesses stated that they used to meet with the complainants during the time that they were seeking reemployment at lunch time and at 5.00 pm when they knocked off. They knew that the complainants were being asked to report and they stated in cross-examination that the three complainants never disclosed to them that they had been offered positions which they turned down. If it be true that the complainants were refusing to be absorbed into particular sections as suggested it is unlikely that they would have hidden that from the two witnesses who were their colleagues who had interest in seeing to it that they were reengaged. We have no doubt that the respondent deliberately frustrated efforts to have the three complainants reabsorbed.

The reabsorption of the complainants was of course an attempt at correcting their previous retrenchment which the complainants contend was unfair. The DDPR settlement agreement had not considered the fairness or otherwise of that retrenchment. If the complainants had been re-employed in terms of that agreement, the fairness or otherwise of their retrenchment would not come into play. It is now approximately sixteen months since the complainants were retrenched. Even though the respondent in their evidence have shown willingness to reemploy the three complainants if they are willing to work in sandblasting, the court is bound to consider the fairness or otherwise of their retrenchment in the light of the time that the complainants

have spent out of work essentially because respondent's officers were making it impossible for them to be reemployed.

As we have indicated, the respondent do not contest the averrement that they did not consult the applicants prior to retrenchment. The importance of consultation in situations of retrenchment cannot be overstated. The Labour Code (Codes of Good Practice) Notice 2004 (the Order) which seek to provide guidelines on good practice in applying the labour law or exercising any rights in terms of the labour law (see clause 1(1)(b) of the Codes) is regrettably not quite in point on the issue of consultation. The Codes instead speak of negotiations which must not be confused with consultation as the two are not synonymous.

Consultation has been established by judicial precedence as a fundamental requirement in situations of retrenchment. It therefore forms part of the common law. Consultation with the affected employees serve to fulfil the audi alteram partem principle. Brassey et al The New Labour Law at 292 avers that "the principle that consultation must take place prior to the decision to retrench is fundamental." (Emphasis added). We have emphasized the word "must" to show that the learned author expresses the principle in mandatory terms. The importance of the principle has been emphasized in several other decisions of the courts. This is understandable because retrenchment is a no fault dismissal. It is therefore absolutely necessary that it is handled fairly and humanly.

We have heard in evidence that in casu the complainants were never consulted at all about their pending retrenchment. They were infact treated worse than people who are guilty of proven misconduct because such people will invariably be given a hearing unless the circumstances do not permit the holding of an enquiry. Complainants were told to hand in their ID cards and leave the company premises once their name was read and they had accepted their terminal benefits. When they sought to understand what has happening, Mr. Bale told them he was being kind to them, as he was supposed to have given them their letters outside the company premises. The only reason the respondent could give for this type of treatment was that proffered by DW2; who said experience in the past had taught him that if he gave the workers advance notice of their retrenchment the theft of the merchandise would get worse. Consultation is not prior notice. To consult is to allow the two sides to jointly consider the way forward and assess how the business climate can be improved. Even if the employer has made a

decision in principle but a final decision whether to retrench or not can only be made after consultation with the workers. (See SA Commercial Catering & Allied Workers Union and Another .v. ETA Audiovisual (1995) 16 ILJ 925 at 930 E. Notice goes with the timing of the retrenchment and it can only come once the final decision to retrench is taken. There is no doubt that the retrenchment of complainants was done in the most callous manner. It cannot pass the test of fairness.

AWARD

According to the DDPR settlement agreement the complainants ought to have been reemployed by the 8th November 2004. We are convinced that the respondent are responsible for the failure to implement that agreement. This court now orders that the respondent reemploys the three complainants on a date not later than the 21st November 2005. It is further ordered that the three complainants be paid the wages they would have earned from 8th November 2004 to the date of reemployment. Such payments are to be made to the office of the Labour Commissioner not later than 21st November 2005. There is no order as to costs.

THUS DONE AT MASERU THIS 18TH DAY OF OCTOBER 2005

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

FOR APPLICANTS: **MS NTENE**
FOR RESPONDENT: **MS SEPHOMOLO**