**IN THE LABOUR COURT OF LESOTHO**

**LC/8/05**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

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| **MOEKETSI RALIENGOANE** | **APPLICANT** |
| **AND** | |
| **ATTORNEY GENERAL** | **1ST RESPONDENT** |
| **PRINCIPAL SECRETARY (MINISTRY OF AGRICULTURE AND FOOD SECURITY)** | **2ND RESPONDENT** |
| **THE MINISTRY OF AGRICULTURE AND FOOD SECURITY** | **3RD RESPONDENT** |

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# JUDGMENT

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**Dates of hearing : 05/10/06, 10/10/06**

*Retrenchment – Employee must be consulted about the pending retrenchment – Notice – Employee must be given reasonable notice of the retrenchment – Retrenchment procedurally unfair – Substantive fairness – Decision to retrench is a managerial prerogative – The function of the court is to oversee the fairness of the process and not to second guess the economic rationale of the decision – Termination substantively fair.*

## 1. INTRODUCTION

1.1 The applicant filed this application following failure of the Directorate of Disputes Prevention and Resolution (DDPR) to reconcile the parties. The applicant was issued with a

certificate referring the dispute for adjudication by this court in terms of section 227(5) of the Labour Code (Amendment) Act 2000 (the Act) on the 12th January 2005. On the 15th February 2005 applicant filed this application claiming that:

(a) his purported dismissal be set aside as it is contrary to the provisions of the Code;

(b) he be paid salary from date of purported dismissal to the date of judgment.

## 2. STATEMENT OF CASE

2.1 It is common cause that the applicant was employed by the third respondent as a temporary month to month employee on the 17/08/90. It is also common cause that applicant's employment was terminated on the 1st February 2004.

2.2 It is again common cause that the letter terminating the applicant's services was dated 22/01/04, but it was only served and received by the applicant on the 4th February 2004. This means that applicant's employment effectively terminated on the 4th February when he received his letter of termination.

2.3 The letter of termination which is annexed to the Originating Application as "MR2" read in part as follows:

> *"The Government of Lesotho has decided to terminate appointments of all public servants who are employed on temporary month to month terms and are over Fifty-five years (55) of age. You will consequently be affected by this decision as you fall within the criteria here above specified as you will be Fifty-five (55) on the 02/02/04."*

2.4 Following receipt of this letter, the applicant lodged a complaint with his union which took up the issue with the 2nd respondent specifically demanding that he be reinstated. The 2nd respondent's response was that the applicant had been terminated in accordance with Ministry of Public Service

Circular Savingram, the spirit of which was and still was, to implement Cabinet decision of terminating the service of all Government employees who have attained the age of fifty-five years. She went further to state that on that basis applicant would not be reinstated as the union had requested.

2.5 On the 23rd March 2004 the applicant referred the dispute to the DDPR. On the 19th May 2004, the DDPR per Arbitrator Malebanye referred the dispute to this court without stating why she was of the opinion that the dispute could not be determined by arbitration if conciliation had failed.

2.6 On the 3rd June 2004, applicant filed an Originating Application in this court, under Case No. LC30/04. On the 9th November 2004, this court referred the matter back to the DDPR so that the reasons for its referral to this court could be clarified. On the 12th January 2005 Arbitrator Malebanye furnished brief reasons for referral of the dispute for adjudication. In her reasons she stated that the reason for applicant's termination was stated by the respondents as "restructuring of government ministries." This means that the termination of applicant's contract is for operational reasons.

2.7 On the 15th February 2005 the applicant reissued the Originating Application under a different case number even though the grounds for relief remained exactly the same.

## 3. APPLICANT'S CASE

3.1 The applicant is seeking relief on the ground that the termination of his contract is both substantively and procedurally unfair.

3.2 Substantively applicant averred that the termination of his contract was unfair because as a temporary month to month employee he was not subject to the 55 years compulsory retirement age.

3.3 He testified further that at the time that he was employed he was told that as a non-pensionable employee he had no official retirement age and that he would remain in employment until

such time that his condition of health would no longer permit him to continue to work.

3.4 Applicant referred to paragraph 8 of his contract of employment (Annexure "MR1" to the Originating Application) which provides that:

> *"in other respects you will be governed by Employment Act 1967 (now Labour Code Order 1992) and other regulations in force from time to time."*

3.5 Procedurally; the applicant contended that the respondents did not follow the established procedures for retrenchment. In particular he averred that he was not consulted about the pending retrenchment.

3.6 Applicant averred further that the respondent failed to give him proper notice of termination in terms of the law and the contract between the parties namely; "MR1".

## 4. PROCEDURAL FAIRNESS

4.1 Brassey et al, The New Labour Law at p.292 avers that "the principle that consultation must take place prior to the decision to retrench is fundamental." See also Labour Commissioner .v. CGM Industrial (Pty) Ltd LC70/04 (unreported).

4.2 In the case of Refiloe Mokhisa and 7 others .v. Lesotho College of Education LC59/05 (unreported) Khabo DP had this to say at p.9 of the typed judgment:

> *"The virtue of consultation cannot be over emphasized. Consultation gives the affected employees an opportunity to understand fully the rationale behind their likely dismissals and to express views prior to the final decision to retrench being taken by management. Its main objective is to avoid retrenchment altogether and where it appears inevitable as in respondent's case, mitigate or minimize its consequences, what is often referred to as soft-landing."*

4.3 In other respects consultation has been said to fulfil the sacred principle of *audi alteram partem* in as much as it enables those who are to be affected the opportunity to be heard on the proposed retrenchment. (See NUMSA .v. Atlantis Diesel Engines Ltd. (1993) ILJ 642 (LAC) and Mathapelo Tlahali & Another .v. Mochachos Chicken Villages LC15/02 (unreported).

4.4 With regard to notice Article 7 of the Termination of Employment Recommendation No. 119 of 1982, the Convention for which Lesotho has ratified provides that:

> *"A worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof."*

4.5 Article 5 of applicant's contract of employment ("MR1") provides that the contract may be terminated "…. By one month's notice on either side…." Section 63 of the Code provides that in the case of contracts without reference to limit of time, which applicant's contract was, such contracts may be terminated on one month's notice or payment of a month's salary in lieu thereof. Viz. sec. 64 of the Code.

4.6 There can be no argument that the termination of applicant's contract failed to comply with the above standards. The notice of termination came two days after the intended last day of employment and it was with immediate effect. No consultation with the applicant was made to warn and prepare him for the impending exercise i.e. retrenchment on account of old age.

4.7 Counsel for the respondents conceded that there were procedural improprieties as outlined above. Counsel however picked up the point which arose under cross examination where the applicant conceded that he had known since 2001, when the circular in terms of which he was terminated was issued that employees who have attained 55 years of age have to stop working.

4.8 Granted applicant made such a concession. However, applicant made it clear that as far as he was concerned that circular was not to apply to the likes of him namely; non-pensionable employees. He believed that as people who are governed by the Labour Code which prescribes no retirement age they would not be retired in terms of the said circular. This shows that the Ministry had even more onerous task to consult with the employees in order to clear misconceptions such as those held by the applicant.

## 5. SUBSTANTIVE FAIRNESS

5.1 We have already shown that the applicant laboured under misconceptions, inter alia, that because he was subject to the regime of the Employment Act he could work until such time that he himself felt that his health could no longer allow him to work.

5.2 Retrenchment is a managerial prerogative. The decision whether to retrench is made by the employer upon consideration of economic or structural requirements of the organisation. As a general rule the courts would not "second-guess" the commercial and business efficacy of the employer's decision to retrench. The function of the courts is to oversee the process that it has been carried out fairly in accordance with the law and the guidelines governing retrenchments. (See Mamabolo & Others .v. Manchu Consulting cc (1999) 20 ILJ 1826, Kotze .v. Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ 129, Tseliso Shelane .v. Mohale Dam Contractors LC25/03 (unreported)).

5.3 The decision to retrench having been made and requirements of fairness and legality having been observed, that would normally be the end of the story; unless it can be shown that the decision to retrench was not genuine and that it was merely a sham. As John Grogan puts it in his book Workplace Law 2003, Juta & Co. p.199

*"A decision to retrench could be exposed as a sham if, for example, the dismissed employee is immediately replaced with another in the same position."*

5.4 In hoc casu the applicant was asked several times in chief as well as under cross-examination whether new people were engaged after his retirement. He answered in the affirmative. When he was asked the age of those people in relation to his own, he honestly replied that they were young people.

5.5 It seems to this court therefore that the second respondent's decision to retrench the applicant for the reason connected with his age cannot be faulted. That was their organizational structural requirement the merits of which no court is qualified to delve into. Accordingly the substantive fairness of applicant's termination cannot be brought into question.

## 6. AWARD

6.1 As pointed out in paragraph 4.7 above, counsel for the respondents correctly conceded that there were procedural improprieties in implementing the restructuring which necessitated that the applicant be retired. Again counsel for the respondents correctly disputed that there was any substantive unfairness in the termination of the applicant's contract.

6.2 As we observed the impropriety arose as a result of lack of consultation and failure to give the applicant necessary notice of the termination of his contract. Such notice is mandatory in terms of the law, the Code, applicant's own contract ("MR1") to the Originating Application) and the established guidelines that are to be followed in order for a retrenchment to be adjudged fair.

6.3 For these reasons the applicant is awarded compensation for the procedural unfairness as follows.

(a) Five months salary for failure to consult applicant and prepare him for the impending retrenchment. (Soft landing).

(b) One month's salary in lieu of notice.

6.4 The respondents are thus ordered to pay applicant compensation of six months salary calculated at the rate of his emoluments at the time of his termination.

6.5 There is no order as to costs.

**THUS DONE AT MASERU THIS 2ND DAY OF NOVEMBER 2006**

# L. A. LETHOBANE
# PRESIDENT

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

**M. MOTHEPU** **I CONCUR**
**MEMBER**

**FOR APPLICANT:** **MS TAU-THABANE**
**FOR RESPONDENT:** **MS MOKITIMI assisted by MS LETHUNYA**