IN THE LABOUR COURT OF LESOTHO

LC/32/2007

HELD AT MASERU

IN THE MATTER BETWEEN

MOLEFI RAPHAEL 'NENA APPLICANT

AND

STANDARD LESOTHO BANK RESPONDENT

JUDGMENT

Dates: 18/10/07, 28/11/07, 03/04/08, 22/04/08
Retrenchment – consultation – evidence show that employer consulted with employees and their union – There is no duty on the employer to go further and engage in individual consultations – Insufficient notice of retrenchment compensated by generous cash payment in lieu of notice – Selection criteria – Respondent complied with criteria it proposed to the staff.

1. The applicant in this matter was retrenched by the respondent on the 10th March 2006. He has approached this court claiming that his retrenchment was procedurally unfair. He further complains that the severance package to which he was entitled as part of the retrenchment package was short calculated by twenty years.

2. It is common cause that the respondent is a company born of the merger between two major banks in Lesotho namely; Standard Bank Lesotho Ltd and the Lesotho Bank 1999

Ltd. The merger necessitated reorganization which resulted in the need to right size the staff complement to meet the needs of one bank instead of two banks.

3. Evidence led on behalf of the respondent is that in preparation for the merger the two banks identified three phases. The first phase was to deal with the non-core staff, such as cleaners, carpenters, drivers and others. The retrenchment process relating to this group started in September and it was completed in December 2005. See evidence of PW2, Mr. Lekhooa Pitso. It follows that it took approximately three months.

4. Phase two was going to deal with the rationalization of staff at head office. DW1 Mr. Lehlohonolo Manamolela stated that since the two head offices of the two banks had already been integrated, duplications had already manifested themselves and it was not necessary to wait for the actual merger before this group could be rationalized. The third phase was going to deal with staff working in the branches where duplication would only be evident upon the actual merger itself.

5. The present case deals with a former member of the head office staff. He is therefore a phase two rationalization victim. It is common cause between the parties that the phase two process was kickstarted with a meeting of all staff that was held at the Victoria Hotel on the 15th December 2005. A letter headlined "Notice of the start of Phase II Consultation Process for All Head Office Staff" was issued to all members of the head office staff.

6. It is important to quote the first two paragraphs of this letter. They read:

> *"This letter confirms the earlier road shows and other communication modes by the Managing Director on different phases the bank will be undertaking as part of its right sizing strategy. The*

letter further gives in attached documents direction on how the process is expected to be followed. In pursuance of sections 19 to 21 of the Labour Code (Codes of Good Practices) Notice 2003, the bank will be consulting with you and the other staff members on general. (sic) Should you be one of the affected staff member the bank will write to you on negotiating exit terms as outlined in attached ANNEXURE 1 which is a guideline of activities, phases, timelines and legal framework."

The applicant averred that he never received this letter. He also said that he did not attend the meeting of the 15th December 2005 either.

7. The witness for the respondent did confirm that when he did his checklist, he realized that the applicant did not sign for his letter. He consequently had to call him subsequent to the meeting to serve him with his letter. In his evidence however, the applicant was very conversant with the proceedings of that meeting which brings into question his testimony that he did not attend that meeting.

8. It appears from the evidence of PW2 and DW2 that the meeting of the 15th December was a part of the series of meetings that were being held with staff of the respondent in order to consult with them on the imminent retrenchments. This is also evident from the part of annexure "MN1" quoted above. PW2 testified that they were consulted as far back as the middle of 2005, even though he did not mention the exact date of the month. He stated in his evidence that at the time they were told that fourty five (45) positions were going to be affected.

9. DW1 on the other hand testified that the consultation process started as far back as June 2003, when they organized regional road shows. Asked what the role of the applicant was and whether he was infact involved in the road shows, he answered that though he could not say for a fact, the applicant would have been involved because

everybody used to be invited. Furthermore, before the birth of the bank workers' union, management used to liaise and interact with the Staff Representative Committee which represented bank workers at the time.

10. It is common cause that on the 17th November 2005, the bank staff registered a staff union called Standard Bank Lesotho Workers' Union. PW2 was at the time the Deputy President of the union. He stated in his testimony that they as the union were invited to the consultation meeting of the 15th December. All witnesses, PW1, PW2 and DW1 are agreeable that the meeting of the 15th December was going to outline the phase two retrenchment process to the staff and the procedure that would be followed. They are again speaking in one voice that the procedure which was already outlined in the ANNEXURE 1 to the letter of the 15th December, was further explained at the meeting. However, PW2 says the meeting was very tense and staff just listened. He testified further that at the end of management's presentation the then president of the union was invited to address the meeting which he did.

11. Mr. Sekonyela for the applicant sought to discredit the consultation process as a non-starter; because DW1 who is the Human Resources Manager of the respondent, had failed to produce the record or minutes of the road shows which they (respondent) say constituted consultation. This was clearly an extravagant demand on the part of Mr. Sekonyela when regard is had to the fact that the roadshows and the message they carried are not disputed by applicant's witnesses. There is therefore no need for the record as what it is intended to prove is admitted by both sides.

12. It is again not disputed by the respondent that as applicant alleges in his testimony staff never heard from the management again until the 21st February 2006, when the applicant was called to the Human Resources Manager's office to be told that he was directly affected by the process and that he would be considered for early

retirement as he was only three years short of retirement age. On the 22nd February he was served with annexure "MN2" which confirmed the previous day's discussion. He was also served with exhibit 4 which was a schedule of meetings to finalize exit benefits, settlement of loans and preparation for final exit of those affected by the 10th March 2006.

13. According to the evidence of the applicant which is confirmed by PW2 and DW1, the meeting on exit packages got underway on the 3rd March 2006. It was convened by DW1. He only noted the concerns of the applicant and his colleagues. It is worth mentioning that even at these meetings the union was involved in order that it could help its members negotiate a better package. (See evidence of PW2).

14. PW2's testimony in this regard is very clear and helpful. He testified that by this time he had become the president of the union and he led the union team to the talks. He testified that they complained to the Human Resources Manager about three things. First, they noted that the notice period to 10th March 2006 was too short. Secondly, they complained that the package was not attractive. The bank was offering two weeks wages for each completed year while they demanded seven weeks for each completed year. Thirdly, they complained that the time frame for the settlement of loans and for such loans to remain on staff concessionary interest rates was too short. They were supposed to settle their loans by June 2006 and the concessionary rates were to be applicable up to then.

15. The meeting reconvened on the 6th March 2006, with the Managing Director as the chair. At that meeting they were able to resolve all but one of the complaints they raised. The period of settlement of loans and enjoyment of staff concessionary interest rates were extended to July 2006. The inadequate period of notice was compensated by payment of three months salary in lieu of notice. Only the

issue of severance package was not able to be agreed. The bank insisted on payment of two weeks wages for each year completed in service.

16. The bank went further to declare a deadlock and advised the union to invoke other suitable mechanisms for the resolution of the outstanding dispute. In the meantime the bank would "proceed to process final letters of retrenchment to affected staff members, reflecting the exit benefits as presented to the meeting, including the two weeks pay for every year in service which is currently in dispute." (see Annexure "MN5" to the Originating Application).

17. Pursuant to the conclusions of the meeting of the 6th March 2006, the union wrote "MN5" to the Originating Application in which they confirmed to have had amicable discussions which led to the striking of agreement "on most issues discussed…." Despite this statement they proceeded in the same letter to accuse the bank of:

    (a) Not negotiating in good faith but only prone to imposing its unilateral decision on the matter.
    (b) Unilaterally deciding on the retrenchment and only presenting the staff with the finalized decision that some of them are being retrenched, the rest of staff remain in darkness as to the criteria used to identify those selected for retrenchment.

    The union concluded by asking the bank to suspend the process of retrenchment while they submit the issue of disagreement for conciliation by the Labour Commissioner.

18. It is evident from the testimony of PW1 and PW2 that the union wrote the complaint pursuant to clause 15 of the Recognition Agreement between the respondent and the union. The bank was of the view that the involvement of the Labour Commissioner was "not relevant in this particular dispute." It was however still amenable that

"other avenues of dispute resolution may still be used…" (see Annexure "MN6"). The view of the bank in this regard may not be faulted in the light of the fact that the relevant clause of the agreement mandate that whomever is chosen as the mediator must be mutually agreed by the parties. There is nothing to suggest that the bank's agreement that the Labour Commissioner be used as a mediator or conciliator was sought and obtained by the union.

19. The bank was further of the view that the invocation of the provisions of the Recognition Agreement was not proper because when it was signed "it was made clear that it was not aimed at being used for phase II rather phase III". (see paragraph 5 of "MN6"). No evidence was adduced by either side to either confirm that this was the agreement or deny that any such agreement was made. This however, is a clear case that involves the application and interpretation of a collective agreement namely, whether the agreement was applicable in the circumstances of this case. In terms of section 226(2)(b)(i) of the Labour Code (Amendment) Act (the Act) this is an issue which must be resolved by arbitration at the DDPR.

20. It would have been expected that the union would refer that disagreement on whether the Recognition Agreement applied or not, to the DDPR for conciliation or arbitration if the former failed. It is common cause that the union referred a dispute concerning the bank's alleged failure to negotiate in good faith, by insisting on two weeks salary and not acceding to the union's demand for payment of seven weeks wages per year as an exit package.

21. The referral was dismissed, because the Arbitrator found that the dispute was a dispute of interest and as such not justiciable. Furthermore, the Arbitrator could not take it any further when conciliation failed as the persons covered by the dispute had since ceased to be employees. If they were still employees the DDPR would

naturally have had jurisdiction in that if conciliation failed the persons concerned would be entitled to adopt a strike as a means of adding further pressure on the respondent. Correctly the DDPR declined to have anything further to do with the complaint as any further involvement with it would only serve an academic purpose; unless both parties agreed to submit the disagreement to arbitration in terms of section 226(2)(a) of the Act.

22. It is common cause that on the 8th March 2006, the applicant and his colleagues were served with letters of termination which also outlined the benefits due to them. The applicant was going to be paid severance package based on 2 weeks for every year completed in service up to 14 years. He was also paid pension fund benefit based on early retirement, three months salary and outstanding leave days. His last day at work was to be the 10th March 2006.

23. The applicant approached this court for relief claiming that:
    (c) He was given insufficient time for consultation as the consultation started on 1st March and ended on 6th March 2006 in accordance with exhibit 4.
    (d) Applicant was given less than three (3) days notice to leave the bank as if he was a criminal or an undesirable element.
    (e) Applicant was not consulted on selection criteria outlining why and how applicant was selected for retrenchment.
    (f) Respondent failed to follow LIFO principles notwithstanding that applicant is one of the longest serving employees spanning a period of 34 years from 1972.
    (g) The respondent failed to consult in accordance with Recognition Agreement.
    (h) The respondent did not take steps to minimize the effect of retrenchment.
    (I) Applicant was not given opportunity for redeployment, bonuses, early retirement package as promised.

(j) Applicant's severance pay was miscalculated in as much as it was based on 14 years instead of 34 years which applicant worked at the bank.

24. Applicant's contention that he was given insufficient time for consultation is consistent with the union's attack on the respondent that the bank was imposing its unilateral decision and that it had unilaterally decided on the retrenchment (see Annexure "MN5"). This contention is however, not supported by evidence led by both the applicant and the respondent. We have already found that evidence before the court shows that consultations on the process were conducted through road shows.

25. This is confirmed by the applicant and his witness PW2 and DW1 for the respondent. This is further confirmed by "MN2" which in its opening paragraphs says it confirms "….earlier road shows and other communications by the Managing Director…" Evidence of DW1 is that these consultations started as far back as June 2003. Applicant confirms that road show consultations occurred and that he participated, save that he says it affected everybody and that it should have taken a different dimension when it came to individuals like him.

26. It seems to me that that would be placing an onerous duty on the respondent. The bank has consulted with the general staff duly assisted by the Staff Representative Committee which they had freely chosen to represent them. Upon the demise of the Staff Representative Committee a union was born which though no formal relationship existed between it and the bank, the respondent involved it in the consultation process so that it could help and advise its members about the process.

27. This would seem to be consistent with relevant international labour standards and Lesotho's national practice. Article 13 of the termination of Employment Convention No.158 of 1982 enjoins an employer who contemplates

terminations for reasons of economic, technological, structural or similar nature to:

> *"(a) Provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.*
>
> *"(b) Give, in accordance with national law and practice, the workers representatives concerned as early as possible an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."*

28. We are unaware of the additional duty on the employer to also engage in individual consultations. Neither has any authority for such a proposal been brought to our attention. The Labour Code (Codes of Good Practice) Notice 2003, envisages in clause 18 that such consultations are to be conducted with the workers' representatives. DW1 testified on behalf of the respondent that this is what they did. He is gainsaid by PW2 who said they were even informed of the numbers that would be affected, which was 45. PW2 who is the president of the union also confirmed that as soon as they were born as the union the respondent involved them in all the processes. "MN1" which applicant annexed to the Originating Application went a step further and informed staff that the process is expected to take three months. We therefore find no merit in this complaint.

29. The consultations that kicked off on the 1st March 2006, were clear as to what they were for. They were for specific purposes, which are well articulated in exhibit 4.

They were for instance for counseling and consultations on exit benefits. It is therefore not correct to label them as the consultation on the retrenchment process itself. That part of the retrenchment as we said started way back and staff and their representatives were involved in them as they ought to have been.

30. The second complaint is that the applicant was given a short notice of less than three days to leave the bank as though he was a criminal. PW2 testified that the issue of insufficient notice was raised at the meeting to consult on exit benefits on the 3rd June 2006. Both the applicant and his union were at that meeting and they are the ones who raised the complaint. PW2 testified further that at the meeting with the Managing Director on the 6th March, this is one issue that was amicably resolved by the bank agreeing to compensate insufficient period of notice by paying three months salary in lieu of notice. When it was put to him in cross-examination that he cannot be heard to complain about insufficient notice when that issue was resolved by paying three months salary as notice, applicant did not deny, save to say "it has been properly paid to me I believe." Clearly therefore this complaint is without merit as well. (see NURAW .v. Frasers Lesotho Ltd LC5/2000 (unreported).

31. Applicant complained further that he was not consulted on selection criteria outlining how and why applicant was selected for retrenchment. In arguments Mr. Sekonyela for the applicant submitted further that the respondent failed to follow the selection criteria it laid out in "MN1" and that contrary to the Codes of Good Practice the selection criteria was not agreed with the applicant.

32. Clearly applicant is blowing hot and cold, such that it is not clear exactly what the mast on which he seeks to pin his colours is. Be that as it may on the argument that the selection criteria was not agreed with the applicant in accordance with the Codes of Good Practice; Mr. Ntaote for the respondent correctly pointed out that clause 20 of

the Codes require that selection criteria be agreed with a union.

33. The selection criteria was hatched by the management and it was presented to the consultative meeting of 15th December 2005. By applicant's own admission the management presented to them at that meeting how the process would be implemented. Clearly therefore the applicant was consulted on the selection criteria, but as PW2 said in his evidence nobody said anything. However, it is significant that the letter "MN1" permitted any one who had a complaint about the process to present it through the company's grievance procedure. Furthermore, it opened doors for anyone who required further clarification to approach the Human Resources Department for assistance. These overtures permitted anyone who may have not been able to respond to the proposals due to shock and tension that allegedly prevailed at the meeting, to raise whatever queries they might have had about the process when they had recovered from the shock. Nobody did that.

34. The argument that the management failed to follow the procedure it laid out in "MN1" is not supported by evidence. One of the proposed criteria was to consider people who are 55 years and above for early retirement. The applicant who was 57 years was placed on the early retirement package. It is therefore not correct to say the respondent has failed to follow the procedure it laid for itself.

35. It was contended further that the applicant was not consulted on how and why he was selected for retrenchment. ANNEXURE 1 to "MN1" which each employee was served with and was orally presented at the meeting of the 15th December 2005, stipulated that one of the criteria will be early retirement package. It further stated that "VERP offer may only be made to <u>all</u> employees above 55 and above." (sic) I believe they wanted to say "employees who are 55 and above." The

word “all” already suggested to the applicant who was 57 years at the time that he was going to be affected. In addition DW1 testified that he also called him to inform him on a one on one basis on the 21st February 2006 that he had been placed on early retirement. Clearly applicant’s age was the basis for his selection and he ought to have known this at least from the 15th December 2005 when “MN1” was issued to all staff.

36. It was contended further that the respondent failed to follow the principle of last in first out (LIFO) despite the fact that applicant was one of the longest serving employees. ANNEXURE 1 to “MN1” made it abundantly clear that LIFO was not a criteria that was going to be used. The purpose of presenting the criteria to the work force and the union in advance was to enable them to suggest alternatives if they had any. It is common cause that they did not. The applicant and his union must therefore be taken to have accepted the procedure the respondent proposed. They cannot subsequent to its implementation seek to challenge it.

37. Applicant contended further that the respondent failed to consult in accordance with the Recognition Agreement. Mr. Sekonyela in his submissions contended that the respondent had not followed Clause 16.3 of the Recognition Agreement on Retrenchment/Redundancy Procedure: This clause provides:

> *“The parties agree in principle that there may be circumstances that are economical technological or operational, in which it will be necessary to reduce its workforce. That a procedure will be determined by agreement where it becomes necessary to reduce any number of employees.”*

38. We have already observed in paragraphs 19 and 20 of this judgment that since the view of the bank was that the Recognition Agreement was not applicable in this phase of the retrenchment, the union ought to have referred that

conflicting interpretation to the DDPR. The union did not do so and instead referred a dispute of interest which the DDPR could not upon conciliation failing arbitrate.

39. Apart from the above, DW1's testimony when he was asked about the same under cross examination is that, at the end of Phase II the union was not yet recognized. This is confirmed by the testimony of PW2 who testified that the Recognition Agreement was signed on the 2nd March 2006. By this time the process of consultation and selection had already been completed. It follows that the argument of counsel for the applicant cannot stand because to accept it would be applying the Recognition Agreement retrospectively.

40. It was contended further that the respondent did not take any steps to mitigate the effects of retrenchment like possible redeployment or early retirement packages which were promised. This argument falls to be dismissed outright because the applicant herein was placed on early retirement and over and above that was still paid severance package as though he was retrenched. With regard to redeployment, it is clear that the respondent would not be able to do that when it retrenched because it was faced with duplication of roles due to the merger. Infact DW1 said in his testimony that from June 2004, they encouraged people to take early retirement packages to minimize retrenchment. Thereafter the positions of those people who retired, or resigned, or died were not filled. It would seem therefore, that the respondent substantially did what was expected of it in this connection.

41. Finally, it was argued that the applicant's severance package was short calculated by 20 years in as much as he had served the bank for 34 years and yet his severance package was based on only 14 years of service. Applicant testified that he started to work for the then Barclays Bank PLC on the 11th December 1972. He had been inherited by its successors until his early

retirement in March 2006. This gave him a total of 34 years service.

42. In Answer the respondent stated that applicant's service was broken in 1992 following a strike in the bank which resulted in all the employees involved being reemployed after the strike. They annexed applicant's own letter in which he enquired when his three month probation would come to an end as it was a condition of his rejoining the bank after the strike.

43. Applicant countered this by saying that the reemployment was only a condition of rejoining the bank, but his service was never affected. Indeed the respondent adduced no evidence to show that the continuity of applicant's service was meant to be affected by the three month probation. Accordingly we find no merit in the defense.

44. Respondent contended further that the termination package did not contain severance pay as the respondent is exempt from paying severance pay. They contended that what the applicant was paid was severance package which was capped at 14 years. To support their claim they referred to ANNEXURE 1 to "MN1". Counsel for the respondent put these averrements to the applicant and he confirmed that what they negotiated with the respondent was a severance package and not severance pay. He also confirmed that the respondent is exempted from the obligation to pay severance pay.

45. Annexure "MN1" to which we were referred does not support the evidence that the package was capped at 14 years. It instead says 13 years plus one month. This is found in phase 3 of ANNEXURE 1 to MN1. Furthermore, it does not say the years paid are ex gratia. It says "every completed year in service." The 13 or 14 years awarded would seem to be consistent with the respondent's defence that applicant was rehired in 1992 following the strike. We now know that the evidence is that continuity of service was not disturbed.

46. "MN3" goes further to say applicant's "service is calculated on 14 years." Applicant's contention that if his payment is based on his years of service, the calculation of those years is wrong cannot be faulted. All indications are that the respondent calculated the package on the basis of the years that applicant served. To calculate that service at 14 years is plainly wrong. Applicant's testimony that he started to work in 1972 and that that service was never broken until his early retirement in February 2006 has not been controverted. It follows that applicant's claim that his service with the bank has been short calculated by 20 years must succeed. Accordingly the respondent is ordered to pay applicant the balance of his service as claimed in the Originating Application in the amount of M81,534.00. There is no order as to costs.

THUS DONE AT MASERU THIS 10TH DAY OF JUNE 2008

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI — **I CONCUR**
MEMBER

M. MAKHETHA — **I CONCUR**
MEMBER

FOR APPLICANT: — **MR. SEKONYELA**
FOR RESPONDENT: — **MR. NTAOTE**