IN THE LABOUR COURT OF LESOTHO LC/16/2004

HELD AT MASERU

IN THE MATTER BETWEEN:

NATIONAL UNION OF RETAIL AND ALLIED WORKERS — APPLICANT

AND

TELECOM LESOTHO — RESPONDENT

JUDGMENT

Date: 22/05/08
Restructuring – Consultation – Employer consulting with employees directly to the exclusion of the Union because the Union had not fully complied with provisions of the Recognition Agreement – Codes of Good Practice recommend consultation with the Union even if Recognition Agreement is not fully complied with by the Union – The employer was found to have substantially complied with the requirement to consult – Evidence – Union pleading issues on which it failed to produce evidence – Application dismissed.

1. This is a case in which the applicant union approached the court for relief in the following terms:

(i) Nullification of the respondent's restructuring process.
(ii) Ordering the respondent to reopen the whole process.
(iii) Reinstatement of all employees who have been retrenched and are willing to return.
(iv) Ordering respondent to pay damages to affected employees as an alternative to prayers (i), (ii) and (iii) above.

(v) Costs of suit.

2. The Originating Application initiating this application was one of the most inelegantly drawn I have seen. I will however attempt to summarize what the union puts across as its grounds for relief. These appear in paragraphs 22-24 of the Originating Application.

3. The union contents that the whole process of restructuring was marred with irregularities in that:

(i) There was no consultation with the Union.
(ii) Some former temporary employees namely Malehlohonolo Motsoeneng, Makhoapha Seahle, Mabokang Sephelane and Mponang Thaele were employed ahead of previous permanent employees in contravention of the principle of LIFO.
(iii) Respondent would advertise a post and when applications have been submitted and interviews completed the respondent would abolish the post without consultation.
(iv) Respondent appointed a Secretary to a managerial post without any qualification and ahead of more qualified personnel.
(v) Throughout the whole process the respondent withheld information without good cause.
(vi) Throughout the process the respondent company made unilateral decisions which were contrary to agreements made with the Union.

4. A brief summary of the background to this dispute will suffice as most if not all the facts are common cause. On the 24th September 2003 the Union and the Respondent entered into a Recognition Agreement. On the 17th October 2003, the respondent issued a communiqué to all staff informing them about a Board decision to restructure the company. The restructuring would "entail the process of streamlining of the exco, voluntary retrenchment and staff placements for all staff level 2 and below." The communiqué was not copied to the Union.

5. On the 4th November, the respondent issued another communiqué to the staff in which they were informed that the Chief Executive

Officer and his team would be conducting road shows regarding the restructuring. The road shows were going to be on the 5th, 6th and 7th November 2003 for the South, North and Maseru regions respectively.

6. Another communication was issued on the 5th November. This one informed the staff about the background to the restructuring exercise, why it was deemed necessary to embark on the exercise. It further informed them of the structural changes the process was going to bring about. The number of staff was going to be reduced from 367 staff members to 289. Steps to be taken in the exercise were outlined. First staff would be invited to opt for voluntary separation. Second stage was placement where each staff member would have the opportunity to apply for three positions of their choice. As the last resort, employees who would not be able to get a placement would be retrenched.

7. It would appear from the above that all went smoothly with the respondent liaising directly with the staff without the involvement of the Union. It was only on the 12th November when for the first time the Union wrote to the management complaining that the respondent has not consulted them about the restructuring process. In response the management emphasized that both sides must apply the terms of the Recognition Agreement and avoid going counter to any of its provisions.

8. On the 27th November the Union and the respondent met with the agenda proposed by the Union. At the start of the meeting a brief introduction was made that despite the parties having signed the Recognition Agreement on the 24th September 2003, the Union delayed to elect shop stewards by two months and that this delayed "the involvement of the Union in the restructuring process." The Union did not challenge that statement but went ahead to request to be updated with the process thus far. This was done.

9. After the briefing the meeting adjourned to allow the Union to consult. Upon their return the Union recorded that the process was flawed and that they should have been consulted earlier. The respondent is recorded to have requested the Union to also take note of the following:

"(a) Consultations with staff had long been ongoing.
"(b) The Union took time before it could reach the 51% threshold and negotiations on the Recognition Agreement took a long time.
"(c) The election of shop stewards took a long time and in its consultative roadshows with staff, management even had to piggyback the Union to facilitate election of shop stewards which was completed only in the last week.
"(d) All earlier consultations with staff cannot justifiably be considered to have been of no purpose and consequence." (See Annexure "TL1" to the Answer).

10. In the meantime the processing of applications for voluntary retrenchment had begun. The Union contended that despite its registering of dissatisfaction with the process the respondent continued to process the voluntary retrenchments. However, the Union pointed to no authority for the proposition that the respondent had to suspend the restructuring process while disagreement with the Union about the process persisted.

11. The parties met again on the 10th December. The Union still insisted that it had been given inadequate time for consultation. The meeting resolved to continue with negotiations in good faith with the Union being promised to be briefed in writing on the progress thus far. The Union would submit its inputs and it would be allowed to audit the process. The meeting ended with the two parties agreeing that the respondent would "momentarily halt the process for those members who fall within the bargaining unit." The process was to go ahead for those falling outside the unit. (See Annexure "TL3" to the Answer).

12. In paragraph 14 of the Originating Application the Union avers that despite agreement to halt the process the respondent unilaterally decided to continue with the process. Now this is a bare allegation. It does not specify in respect of which group the respondent failed to suspend the process agreed by the parties. Annexure "TL3" makes it clear that there was a group in respect of whom the process was halted and that was the group composing of applicant union's membership. The suspension of the process did not affect people falling outside the bargaining unit. The process was resumed on the 19th December 2003.

13. The Union sought to raise an objection that those of the members of staff who voluntarily opted for retrenchment may have been coerced. The respondent rightly saw this for what it was namely; speculation. It therefore called for evidence which was not produced. The Union also complained that contrary to Clause 19(5) of the Labour Code (Codes of Good Practice) 2003, staff opting for voluntary retrenchment were barred from being eligible for employment with the respondent company for two years from the date of taking the package.

14. Clause 19(5) of the Codes of Good Practice deals with negotiations/consultation process prior to retrenchment. It does not deal with eligibility for employment. Reference to it is therefore misplaced. Furthermore, in the absence of a specific individual who alleges to have been refused employment on the basis of the clause, it is an academic exercise to make any pronouncement on it. In short the complaint is not in our view justiciable.

15. We come now to the grounds of review as outlined in paragraph 3 above. Mr. Mohau for the applicant contended that the respondent does not dispute that it did not consult the Union. Indeed in paragraph 3 of the Answer the respondent concedes that it did not involve the Union in the process because the latter had not yet complied with the provisions of the Recognition Agreement.

16. The respondent's excuse may well be well founded especially when regard is had to the fact that the respondent started to consult with staff to the exclusion of the Union on the 17th October 2003. It was approximately a month later when the Union first surfaced and raised an objection to its exclusion.

17. The question is where was it all along. It cannot possibly be correct that the employees of the respondent sat on their letters without informing the Union of the restructuring process and that they only informed it around the 12th November, approximately a month later. In their Answer the respondent say the Union only fully complied with its obligations under the agreement on the 11th November and wrote the letter of complaint a day thereafter. In our

view it is a reasonable inference to make that the Union kept quite because it was aware of its inadequacies under the agreement governing its relationship with the respondent.

18. Mr. Mohau's contention is however, that whether the Union fully complied with its obligations or not under the agreement, it had to be consulted because it was there anyway. Indeed Clause 19(5) of the Codes of Good Practice would seem to recommend consultation with the Union of which employees likely to be affected by retrenchment are its members. Whether the Union concerned complies with the provisions of the agreement governing the relationship between the parties, is not something that should in terms of the Codes absolve the employer from consulting with the Union.

19. Be that as it may, it is worth noting that, the employer did consult directly with the employees. From the tone of the Union's letter (Annexure F to the Originating Application), it is evident that the employees approached the Union for advise. As to why the Union did not respond to its non-involvement earlier can only be a matter of speculation. Suffice to say, the Union was ultimately involved, albeit rather late. They complained that the time for consultation was inadequate. Consequently the process of restructuring was suspended, specifically to allow them more time for consultation. In our view the respondent has substantially complied with the requirement, for consultation by involving the employees whose duty it was to inform their Union and ultimately the Union itself.

20. The second ground on which the conduct of the respondent is being challenged is that certain temporary employees were employed ahead of previously permanent employees in contravention of the last in first out principle. This is one of the principles that are normally applied when effecting staff deductions. The applicant adduced no evidence to establish the relevance of the principle in hiring of staff. Furthermore, the respondent vigorously denied that any such thing as alleged ever happened, thereby shifting the evidentiary burden to the applicant. It is trite the applicant Union chose not to lead any evidence. Accordingly, we find that the complaint is not proven.

21. The Union complained further that the respondent would advertise a position only to unilaterally abolish it after people have

been interviewed for the post. The justiciability of this issue, coming as it does from the Union acting alone not jointly with an individual alleging prejudice as a result of the alleged act of the respondent is highly questionable. At best the complaint of the Union in this regard could relate to bad faith on the part of the respondent and possible breach of the agreement, if such an issue is covered by the Recognition Agreement. In that event the matter would fall squarely under the jurisdiction of the DDPR to arbitrate. Accordingly we find no merit in this complaint.

22. It was further contended that the respondent appointed a secretary to a managerial post for which she or he lacked qualifications and left out more qualified personnel. Once again this is a hollow complaint which was not substantiated by evidence. Even assuming evidence was duly led one fails to see on what basis this court would have the jurisdiction to right the situation. Issues of appointment are matters of managerial prerogative on which courts normally have no power to interfere except in few clearly specified instances, such as discrimination and unfair labour practices. It is our determination that even this complaint is misplaced.

23. Regarding the issue of violation of agreements, we were not referred to specific instances that violated agreements that were reached by the parties. The ostensible area of disagreement on what was the really intention of the parties is that following from the meeting of 10th December 2003, where parties agreed to suspend the process until the 19th December. However, even that disagreement was explained to the apparent understanding of all sides at the meeting of the 19th December 2003. The explanation being that the process was agreed to be suspended only in respect of employees falling within the bargaining unit. In the premises we have concluded that this application ought not to succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 13TH DAY OF AUGUST 2008

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA — I CONCUR
MEMBER

J. M.TAU — I CONCUR
MEMBER

FOR APPLICANT: MR. MOHAU
FOR RESPONDENT: MR. TEELE