IN THE LABOUR COURT OF LESOTHO

LC/35/2007

HELD AT MASERU

IN THE MATTER BETWEEN:

LEKHOA PITSO APPLICANT

AND

STANDARD BANK LESOTHO LTD RESPONDENT

JUDGMENT

Dates: 24/06/08, 25/06/08, 09/09/08
Retrenchment – applicant complained he was not consulted – Evidence shows applicant was an integral part of the consultation as representative of the rest of the workers – Applicant alleges he was not afforded opportunity for redeployment – Evidence which is corroborated by applicant is that he rejected a lower position offered to him – Election – A party must accept the consequence of its election – Application dismissed with costs.

1. This matter arises out of the retrenchment process carried out in the respondent bank which started in September 2005. The retrenchment of the applicant herein occurred on the 14th July 2006. The retrenchments were necessitated by the restructuring which was brought about by the merger of two large banks in Lesotho namely; the Standard Bank Lesotho Ltd and the Lesotho Bank 1999.

2. According to the evidence of DW1 Mr. Lehlohonolo Manamolela, both banks were owned by Standard Bank Group.

The banks were doing the same job and they were operating adjacent to each other. Necessarily this created duplication of roles and functions. Accordingly the bank had to restructure. In doing so it (the bank) adopted a three phased strategy.

3. The first phase dealt with the restructuring and consequent retrenchment of the bank's non-core functions and staff. While both sides agree that the bank adopted a three phase approach, they disagree on the period that it took. The evidence of the applicant (PW1) who was the President of the Staff Representative Committee and later the President of the Bank Staff Union, is that, Phase 1 was implemented in one day. DW1 on the other hand says it was implemented from September to December 2005.

4. Applicant's own exhibit 1 which is a circular addressed by the Managing Director's office to all staff dated 23rd September 2005, does indicate that the bank had kick started the Phase 1 process on the 22nd September 2005, by meeting with line managers, staff representatives and staff. It further undertook to engage with the affected workers in the next few days. It further said consultations with affected staff were still to be pursued. This exhibit is a clear evidence that applicant's testimony that Phase 1 was carried out in one day cannot possibly be true.

5. Phase II of the restructuring was designed to start in December 2005 and to end in March 2006. This phase dealt with the review of applicability of all head office staff and the managerial positions in the two banks due to be merged. The process was kick started on the 15th December 2005. It was finalized with the retrenchments and early retirement of affected managers around the 10th March 2006.

6. Phase III was going to deal with the restructuring and rationalization of the branch functions and positions. Its primary focus was said to be to place the right people in the right jobs. According to DW1 this meant that technically all positions fell vacant and staff had to apply afresh for placement. He testified further that it was expected already that branch staff were all

going to be affected either vertically or horizontally. This process was started in April 2006 and it was concluded on the 12th July 2006.

7. It is common cause that the applicant was one of the four managers who were affected by the Phase III process and accordingly got retrenched. The applicant launched an application in this court in which he challenged the substantive and procedural fairness of the Phase III process. Substantively the applicant says his retrenchment was unfair because his position was not redundant as it still appears in the new structure. On the procedural side, applicant contended that the respondent failed to follow its own procedure on the consultation process. He contended that in particular he was not consulted on the selection criteria in accordance with the respondent's laid out procedure. He contended further that he was not given an opportunity for redeployment as promised in Annexure LP1. He contended further that respondent failed to follow the consultation process as laid out in the Recognition Agreement. Finally, applicant averred that despite the fact that he was a very senior employee holding a managerial position the respondent gave him only two days notice to leave the bank.

8. In his testimony the applicant started with the procedural fairness of his dismissal. In other words he did not follow the order of presentation laid out in his Originating Application as summarised in paragraph 6 above. He averred that as far back as 2003 the bank undertook road shows which essentially carried the message of bank business to the staff. In particular he averred that the message was to inform staff about the bank's performance in relation to its annual budget. Asked if the road shows addressed the merger of the two banks he said it was only mentioned in passing.

9. This evidence was clearly meant to counter respondent's evidence in the case of Molefi Nena .v. Standard Lesotho Bank LC32/07, (unreported) in which it was said consultation with staff about the merger and how staff is likely to be affected, started through road shows which were embarked upon from as

far back as 2003. It is common cause that the present applicant testified in that case as PW2, as he had been the representative of staff in the consultation process. He represented staff as the President of the Staff Representative Committee and later as the President of the Union which later replaced the Staff Representative Committee.

10. That case involved an individual who was affected by the Phase II restructuring process. This court found as a fact that the present applicant had in his evidence as PW2 confirmed the respondent's witness's testimony that part of the consultation with staff was done through road shows. (See page 4 paragraph 11 and page 9 paragraphs 24-25 of the typed judgment.). The evidence of the applicant in the present matter is a veiled attempt at contradicting his own testimony in the 'Nena case supra. This cannot be permitted.

11. The evidence of the respondent has however been consistent that the road shows which started around June 2003, were informing staff about the merger and how the staff was likely to be affected. Applicant's own exhibit 1 which is the notice to staff about the proposed 3 phased right sizing strategy start by referring to the previous road shows which were informing staff that the bank requires to take "appropriate steps to ensure that it remains competitive and efficient in its operations." This message is clearly much wider than simply telling staff about the bank's performance in relation to its annual budget. Clearly therefore, applicant was not being honest with the court to say the road shows were limited to carrying the message about bank business. Previous cases of which the present case is a part show clearly that the road shows did inform staff about the process of restructuring which would be brought about by the proposed merger.

12. This is confirmed by applicant's own evidence that in the same year i.e. 2003, the bank abolished Branch Managers' positions in the Districts. According to the evidence of DW1 in the 'Nena case supra, this was part of ongoing restructuring in anticipation of a merger which was only awaiting government's approval. It is common cause that applicant, who was Branch Manager

Butha-Buthe and also responsible for the Northern Branches including Thaba-Tseka was affected. According to his own testimony he lost his job and was offered a lower post which he declined. The bank however subsequently offered him another post of Head-Services support which he held until the 2006 restructuring which again affected him.

13. Applicant further testified that subsequent to the abolishing of the Branch Manager's positions, staff was invited to opt for early retirement. He declined the option hence the bank offered him the lower position. All these point to ongoing restructuring as early as 2003/2005 which the applicant himself was a part of as part of the management of the bank.

14. The applicant also complained that the respondent failed to follow the procedure it laid for itself in Annexure LP1 of the Originating application. He testified that Annexure LP1 outlined the procedure which was to apply to both Phase II and Phase III and that he expected it to have been followed in his case. Annexure LP1 clearly states in its headline that it is:

> *"Notice of the start of Phase II consultation process for all Head Office Staff."*

Applicant's own evidence in chief was that he held a position at Standard Bank main branch. He was therefore not head office staff hence why he was not retrenched with the head office staff who were affected by Phase II.

15. Applicant stated in evidence that staff were told that what happened in Phase II would also happen in Phase III. There is no evidence to support this allegation other than applicant's own say so. He was involved in all the phases as the representative of the workers. This claim he is making today does not feature anywhere during their various consultations with the respondent. It is clearly a fabrication, more so when regard is had to the fact that the respondent developed a clear procedure for dealing with each of the three phases. If the intention was there to incorporate phase II process into Phase III restructuring, exhibits 1 and 2 which laid out the procedure for Phase III would have said so. If the promise was made verbally and was subsequently not honoured, the affected staff

who included applicant would have raised it at the meeting of 6th July 2006 with the MD. Exhibit 6, which is the minutes of that meeting, does not show that it was ever raised. We therefore dismiss this complaint as a fabrication.

16. It was further argued on behalf of the applicant that he was not consulted on the essential elements especially on the selection criteria. Applicant's own testimony is that there were extensive consultations with the union representing staff. It is to be recalled that applicant was himself the President of the Union and as such an integral part of the consultation process. This explains why in his own testimony the applicant was so conversant of the process and the procedure adopted.

17. He testified that on the 10th April 2006, the Head-HR issued exhibit 2 which kick started Phase III restructuring exercise. Paragraph 2 of that exhibit is informative about the consultation process. It would be helpful to quote from it.

> *"I am glad to mention that following the Level 1 profiling done by filling the questionnaire last year we have been assisted by Head Office to get hold of the services of Skills SA through their leading consultant Mr. Richard Marinus who joined us today. We have had several meetings with EXCO and other stakeholders. Tomorrow at 11h00 we shall be meeting with the our union (sic) – SBLWU to position the process. From there we shall be meeting with the union from time to time to agree on the full consultation process on placements process as well as minimizing exit and dealing with exit where it occurs."*

This quotation totally dispels any notion that the applicant was not consulted since even placements procedures were going to be consulted on and agreed with the union.

18. In his own testimony the applicant confirmed that the meetings between the union and management took place. In particular he agreed that the meeting with Skills South Africa took place on the 11th April as promised; to present to them the Phase III restructuring process. He stated that Skills South Africa's presentation was on staff profiling level 2.

19. In applicant's own words "the presentation showcased a professional approach whereby staff had to fill a questionnaire where four behavioural patterns based on Dominance, Intelligence, Steadiness and Compliance (DISC) were assessed." He stated that skills South Africa explained the approach to them very well and concluded by saying "it (the approach) was very professional." After the presentation Skills South Africa issued exhibit 3 which further explained in a written form the DISC and it was circulated to staff.

20. Applicant testified that following the exercise of level 2 profiling a feedback was given to staff. He averred that the feedback was verbal and that no reports were given to staff. He stated that he too was given a feedback on his profiling. It was put to him during cross-examination that since the DISC was explained to their satisfaction he knew the selection criteria that the respondent used. He conceded that he knew. However, when it was suggested that it was therefore, incorrect for him to allege in his Originating Application that he did not know the selection criteria, he sought to dispute the statement, thereby contradicting himself.

21. Applicant's testimony of the DISC methodology was corroborated by DW1 Mr. Lehlohonolo Manamolela, who testified that individual staff member's profile was the one that would determine the position one was suitable to occupy. He stated further that it had been agreed initially that at the end of the profiling session individuals would be given feedback. This was done through branch restructuring committees which were set up in each branch. DW1 was a member of the branch restructuring committee that informed the applicant about the results of his profiling. He did not dispute applicant's version that the feedback was not in writing. However, the fact that the feedback was given is what is important, because that is what according to evidence had been agreed. There was no further agreement that written reports would be made available.

22. Applicant's further complaint was that he was not given the opportunity for redeployment. Evidence tendered by the applicant which is corroborated by DW1 directly contradicts this

allegation. To show that people were offered alternatives DW1 testified that when the branch restructuring committees carried out the feedback of the profiling exercise, they consciously started with managers because if a staff member failed to qualify for the position they had been occupying, they were considered for the next lower position, until the lowest position. He stated that this ensured that job losses were minimized.

23. Evidence which is common cause to both parties is that the applicant herein failed to retain the position that he had been holding. Evidence which is again common to both sides is that the applicant was offered the position of Float (Manager). This position was according to the letter of offer written to applicant, going to be one grade below his previous job. The applicant, by letter dated 23/06/06 emphatically rejected the offer and stated that he preferred to be retrenched.

24. How on earth anyone can say he was not afforded an opportunity for redeployment in the face of evidence narrated in the above paragraphs is not only mind boggling but is a clear example of a frivolous claim. As if the above is not enough, the applicant continued to be frivolous even during cross-examination. It was put to him under cross-examination that he cannot claim that the respondent was hell bent on getting rid of him when it offered him an alternative position. He said he was not told that it was an alternative. It took Mr. Ntaote an unnecessary further step to have to put it to the applicant that the letter of offer says you are offered the position short of retrenchment. It was only then he conceded.

25. The applicant further sought to argue that the respondent did not follow the Recognition Agreement between the union and the respondent as the employer. In particular applicant contended that when they failed to agree on the exit packages the respondent refused to suspend the process of retrenchment to allow the dispute settlement procedure laid out in the Recognition Agreement to be exhausted. This issue is *res judicata* in as much as a dispute to this effect was correctly referred to the DDPR on the 13th July 2006. On the 16th August 2006 the learned Arbitrator Mosisidi issued an award in which

she held, *inter alia*, that; "there was no indication from the parties that their Collective Agreement provided that the employer will not dismiss during the negotiation period, and in the absence of anything to the contrary, I do not find anything which could have prevented parties from terminating the contract of employment at anytime upon satisfying the requirements of the law." In the premises we conclude that this ground of complaint has no merit just like those that preceded it.

26. Applicant's last procedural issue was that despite being a senior member of staff respondent gave him only two days notice to leave the bank. This was a bare allegation as the applicant did not proffer alternative period of notice which would be suitable for a senior member of staff. However, it is factually incorrect that applicant was given only two days notice because all along the staff were aware of the timetable for restructuring which already showed the dates when those affected by the restructuring would be expected to leave. Over and above that applicant was paid two months salary in lieu of notice which compensated any period not served. Once more this ground is devoid of merit as such it cannot succeed.

27. Coming to the substantive fairness, the only ground relied upon is that applicant's position is not redundant as it still exists in the new structure. This much may well be so factually. However, it looses the tenor of DW1's evidence which is that the exercise in Phase III was about placing right people in the right jobs. In the words of (DW1), technically positions fell vacant and incumbents had to reapply. What this means was that it was the incumbents and not the positions who became redundant as a result of the exercise. Respondent never said it abolished applicant's position. It instead sought to place him in a job that the level 2 profiling proved him to be suited.

28. To make matters worse for the applicant, when the profiling exercise disqualified him for the position he had been holding, he refused the alternative he was offered and made an election that he be retrenched; which election the respondent respected and implemented. It is therefore, an afterthought for him to come back and claim that his position is after all not redundant.

Indeed it never was said to be redundant. Applicant had a choice at the time to seek to hold the respondent to the previous contract. He did not do so, but chose to be retrenched which was done. In the circumstances we are of the view that there is no merit in this ground as well.

29. The applicant is a former senior employee and senior most member of the union, who should be rightly expected to know when to complain and when not to complain. He has been involved in the thick of things from the very beginning as President of the Staff Representative Committee. All the consultations were done with him representing himself and other staff. In the end he chose that he would rather be retrenched than accept a lower position. Despite all these he still came to court to allege unfairness in the process he has been a part of and he exited from by choice. This is clear frivolity which warrants punitive costs order as a punishment. However, since this is the first case involving this counsel we will order costs on the ordinary scale. Accordingly, this application is dismissed with costs.

THUS DONE AT MASERU THIS 2ND DAY OF OCTOBER 2008.

L. A. LETHOBANE
PRESIDENT

D. TWALA — I CONCUR
MEMBER

L. MOFELEHETSI — I CONCUR
MEMBER

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