IN THE LABOUR COURT OF LESOTHO LC/33/2007

HELD AT MASERU

IN THE MATTER BETWEEN

LIJANE MORAHANYE APPLICANT

AND

STANDARD BANK LESOTHO LTD RESPONDENT

JUDGMENT

Date: 08/11/07, 27/11/07, 28/11/07, 10/03/08, 11/06/08 Retrenchment – Respondent failing to contradict applicant's evidence that his position was not redundant as alleged – Procedure - Respondent failing to inform applicant how and why criteria used affected him – Applicant unable to defend himself in circumstances he could have, as a result – Applicant retrenched before being afforded opportunity to contest for new openings – Respondent not taking reasonable steps to avoid retrenchment in the circumstance – Retrenchment found substantively and procedurally unfair – Compensation ordered

1. The applicant issued an Originating Application out of the Registry of this Court on the 12th June 2007. This followed applicant's retrenchment on the 10th March 2006. As it can be readily seen this was after the lapse of one year and some three months. No condonation was sought for this delay in presenting the claim to Court. Counsel for the respondent did not object either.

2. It is common cause however, that the applicant had initially been part of a joint application by several former employees of the respondent who sought to challenge their retrenchment and

claimed certain monies as short payment on their severance packages. After pleadings were closed it turned out that given the diversity of their claims and the peculiar circumstances surrounding each individual's case, they could not properly join in one action. Each individual had to file their individual claim separately. However, one would have expected Counsel for the applicant to have pleaded this fact and preferable proffer it as an explanation for the ostensible delay. We infer from respondent's silence that they have no objection to the length of time that lapsed before this matter was brought to Court.

3. The applicant contends in his Originating Application and in evidence adduced before us that his retrenchment was substantively and procedurally unfair. Applicant further claimed payment of M67,655.31 as the balance due on the severance package paid out to him which he alleges was based on 14 years service instead of 24 years that he had served at the bank at the time that he was retrenched.

SUBSTANTIVE FAIRNESS

4. The applicant contended that he was employed in a managerial position of Area Service Centre (South). In that position he was effectively a Regional Bank Manager responsible for the Southern Districts of Mafeteng, Mohale's Hoek, Quthing and Qacha's Nek. He was stationed at Mafeteng.

5. Applicant contended further that his retrenchment was substantively unfair because his aforesaid regional manager's position never got redundant and that it was in effect advertised even before he left employment on the 10th March 2006. In evidence applicant stated that on the 21st February 2006, he and his northern regional manager counterpart were called to head office in Maseru. He averred that they met with, *inter alia*, Head Human Resources Mr. Manamolela and Area Business Manager Mr. Matete.

6. They were informed at that meeting that their respective positions had been declared redundant as such they would be affected by the retrenchment. He testified further that they were

further told that there would be openings in retail banking which they could apply for if they so wished. Asked to specify which section of banking is classified as retail, he said that was Mortgage Division, Retail Administration and Executive Banking and the position which he had been holding until it was declared redundant was in retail.

7. Asked why he says his position was not redundant, applicant stated that he learned shortly before he left the bank that the same position that he held was being advertised. He referred us to Annexure LMII to the Originating Application which is an advertisement for "Regional Branch Managers: Mafeteng and Leribe." The opening sentence of that notice reads: "the above listed Regional Branch Managers are newly created following the restructuring process that has just taken place." The applicant testified that it was wrong for the advert to claim that the positions were newly created because the positions were the same as that he occupied in that:

> *"….the position was responsible for the region and the terms of reference for the position are very much the same as the job description assigned to me at the time."*

8. Asked if he was ever informed about the new position and advised to apply he said he was never told about it. Asked when he learned about the advertisement he said he got the copy of the advert from his subordinates in the South region on the 7th March and this was the time they were busy negotiating terminal benefits. He stated further that even assuming he would have attempted to apply he could not do so because at the time his access to the respondent's system was already blocked.

9. The applicant was cross-examined at length on this point. However, the cross-examination centred around only two issues namely; why he did not submit his application for the position after he learned that it had been advertised? Secondly the cross-examiner was concerned whether the applicant ever lodged a grievance about his position having been declared redundant. In limiting his cross-examination to only those two aforesaid areas, Mr.Ntaote left one main aspect of applicant's

testimony namely; that the so-called new position was still his old position by another name.

10. Having failed to challenge that evidence by cross-examination Mr. Ntaote for the respondent was left with only one option namely; to controvert applicant's evidence by leading evidence of a witness who would directly contradict the evidence applicant had given. This he sought to achieve by leading the evidence of DW1 Mr. Lehlohonolo Manamolela, who is the Head of Human Resources Department of the respondent.

11. DW1 testified that applicant's position became redundant because unlike the previous one where applicant was overseeing branches, the new position was going to be in charge of a branch. He stated that applicant and his counterpart in the north were called to a meeting where they were told this fact. According to DW1 the process started with each position being assessed and once it had been determined that the position was going to be duplicated, then the incumbents were secretly scored on the basis of experience, qualification, job knowledge, performance and disciplinary record for the past year.

12. Following that exercise, applicant and his counterpart in the north were called and told the results. They were further told that their positions would be changed to Area Service Centre Manager and that they were encouraged to apply for it. DW1 testified further that both applicant and his counterpart declined and said they wanted to move on. DW1 went further to say that he persuaded the applicant even outside the meeting to apply because the applicant stood a better chance in terms of age and score level. Applicant allegedly insisted he wanted to try something else.

13. Under cross-examination the witness was told that in his testimony the applicant said he was just told to apply for a suitable opening in retail. The witness did not deny, but remarked in apparent confirmation that, "that would be a good message that he got." Counsel went further to put it to the witness that they did not tell the applicant that the position was

going to be a managerial position. He said they did, but applicant insisted he wanted to leave. He was asked if they told applicant how his position had become redundant. He said they told him that his position was going to fall under branches where there were already people and he had to apply as his suitability for the new position would have to be considered together with those people.

14. This evidence is fraught with difficulties. First it dismally failed to contradict applicant's testimony that the new position was his old position by another name. DW1's testimony that the position was going to fall under a branch and not a region is not confirmed by annexure LMII. On the contrary that annexure confirms applicant's testimony that the position was a Regional Manager's position just like the one he occupied.

15. The second difficulty with this witness's testimony is that it is contradictory and clearly creative. First a lot of things that DW1 said about the alleged redundancy of applicant's position were novel. They were never put to the applicant to admit or deny them. For instance, the allegation that the applicant was told at the meeting about their position being transferred to branch level was not put to the applicant. Equally new is the witness's claim that applicant was told his score and that they were persuaded to apply but that they said they wanted to move on. "SB3" which is the copy of the minutes of the meeting of the 21st February 2006, does not support these innovations either. At best it confirms applicant's own evidence that they were bluntly told that their positions were redundant as such they were going to be retrenched but they could apply for a suitable opening in retail.

16. This witness's evidence displays contradiction in a number of areas. Under cross-examination DW1 confirmed that applicant was told to apply for a suitable opening. When it was again suggested to him that he did not tell the applicant the specifics of the job, he recoiled and said they did. Such bellowing of cold and hot ash as DW1 clearly did is not a sign of a reliable witness. Furthermore, DW1 has given two versions of why applicant and his counterpart had to be retrenched. In chief he

said applicant and of course his north colleague, were scored on a number of factors and that it was the result of their score that put them out. Under cross-examination he came with a different reason.

17. The reason he advanced under cross-examination was that since the applicant's position was going to fall under a branch where there were already incumbents, his suitability had to be considered together with those incumbents. Whilst this is something which ought to have been put to the applicant, his response to the invitation to apply for suitable opening in retail cannot be faulted. According to "SB3" they said they did not see a point of applying as they were already being retrenched. In other words, they were not given the opportunity to contest for those positions first and only be retrenched in the event of their failing to make it. Respondent's first move was to retrench them. Respondent cannot be said to have taken reasonable steps to avoid retrenching the applicant in the circumstances.

18. Having failed to deny in chief that applicant's position and job description were similar to those of the new post, DW1 was afforded the opportunity under cross-examination to deny that evidence. With regard to the position he made a bare denial that the positions are similar. It was put to him that even the respondent's Answer has failed to deny that the positions are similar. He said that is an omission. If it is indeed an omission, it is a dangerous and fatal omission. However, it would appear that he is also part of that omission, because he has failed to contradict that evidence in his own testimony in chief.

19. With regard to the similarity of job descriptions, his answer was that applicant should produce his own job description to prove what he is saying. However, the fact is that the prove is being sought belatedly when the applicant is no longer in the witness box to produce proof. His evidence passed unchallenged in this regard. The evidentiary burden had by this time shifted to DW1 to produce applicant's old job description to rebut applicant's evidence that it is pretty much the same as that of the so-called new position.

20. He sought to underscore the difference between the two positions by saying applicant's position oversaw the branches while the new position was going to oversee sales. Once again this was a new story that does not appear in the Originating Application. It was also not put to the applicant and DW1 did not advance it in chief either. It was clearly a story invented to get him out of the difficult situation he was in. In any event Mr. Sekonyela for the applicant went further to put it to him that overseeing sales had also been part of applicant's job description. He agreed that was the case. This answer is a concession that the job descriptions are similar. This is also evident from LMII that overseeing sales is just part of the responsibilities of the new position not that it was solely for it (sales). Against the backdrop of this evidence it is clear that the applicant's challenge to the substantive fairness of his retrenchment must be upheld.

PROCEDURAL FAIRNESS

21. Applicant claimed that his retrenchment was procedurally unfair on a number of grounds. The first ground was that the respondent had failed to follow the procedure it set for itself namely that the respondent would consult with the applicant on the selection criterion. This in our view is precisely what the respondent did. Exhibit 2 dated 25th November 20005, was a notification of Phase II consultation process which clearly indicated the head office positions that were going to be affected and the number of incumbents in those positions.

22. The exhibit further outlined the timetable for the Phase II process which was expected to be from 7th December 2005, to mid February 2006. It is common cause however, that the process started on the 15th December 2005. All head office staff were issued with "LM2" to the Originating Application headlined:
"Notice of the start of Phase II consultation process for all head office staff."

23. Evidence which is common to both parties is that there was attached to LM2 an annexure which outlined the selection

criteria. Evidence further indicates that all head office staff were called to a meeting at Victoria Hotel on the 15th December 2005 where annexure LM2 was presented to them and explained. This included the selection criteria annexed thereto.

24. The meeting of the 15th December to which even the union was invited was not a futile exercise. It was a process of consultation among others on the selection criteria, which was explained to the staff. None of the staff challenged the criteria. Indeed in cross-examination, the applicant was asked if he ever lodged any grievance or dispute concerning the selection criteria which the respondent presented to them. He said they did not. It was put to him that they did not refer a dispute concerning failure to consult or that they were not informed of the selection criteria because they did not have any disagreement with the respondent on those issues. He had no comment to make. We conclude therefore that there is no merit in this ground or complaint.

25. Applicant contended that the respondent took no further steps after the 15th December to inform him that he would be personally affected by the retrenchment. There is no merit in this complaint as well, because on applicant's own testimony, he was informed on the 21st February that he was going to be affected. The letter of the 15th December 2005, informed staff that those affected by retrenchment would be written letters to come and negotiate exit terms as outlined in Annexure 1. It did not say when such letters would be written. It is common cause that it was written on the 22nd February 2006, following a one on one meeting informing applicant that he was affected on the 21st February.

26. Applicant contended further that the retrenchment consultations commenced on the 1st March 2006 for 5 to 6 days which was hopelessly insufficient notice. Evidence before court is that the Phase II consultations on retrenchment was kick started through exhibit 2 dated 25/11/05 which was from the Managing Director written to all staff. This was followed by "LM2" and a meeting of all staff on the 15th December 2005. It cannot therefore be correct for applicant to say that the retrenchment

consultation started on the 1st March 2006, which was infact already after the applicant had been told he was going to be retrenched.

27. It was further contended on behalf of the applicant that the respondent did not consult with the applicant on how and why he was selected for retrenchment and that the respondent failed to follow the LIFO principle. The selection criteria was presented to the staff on the 15th December 2005. It was clear from Annexure 1 to LM2 that LIFO was not going to be used. There is no evidence that the staff, applicant included called for it to be used as the criteria. The staff failed to raise a concern in this regard despite being given the opportunity to present any grievance they might have with the process to the Human Resources Department. If applicant felt his long service needed to work in his favour, he was free to approach the Human Resources even after the meeting of the 15th December to register that concern. He did not do so and accordingly cannot seek to raise a complaint in that regard so belatedly. Infact, as he said in cross-examination he was happy with the criteria presented. It follows that he had no reason to complain about LIFO not being used.

28. With regard to the first leg of the argument that the applicant was not informed how and why he was affected, the applicant did not give evidence on it to enable the respondent to challenge it by cross-examination. The claim is covered by paragraph 10 of the Originating application. In their Answer the respondent did not deal with this issue specifically either. They however sought to deal with it in evidence.

29. To this end the respondent adduced the evidence of DW1. He said that they did behind the scenes exercise of looking at the whole head office staff structure and positions. They identified where duplication would occur. Once duplication was identified they would assess which position had to go and which one would remain. Thereafter they would pass their recommendations to the Head Office in Johannesburg.

30. When that had been done, the next step would be to score individuals on the basis of experience, qualification, job knowledge, performance and disciplinary record for the past year. After the scoring the individuals concerned would be notified. He testified that the applicant and his colleague in the north were duly notified of the result and further told that they could apply for the new position of Area Service Centre Manager. If the applicant was told the result of the scoring that would satisfy the concern that he was not told how and why he was selected for retrenchment.

31. When DW1 was asked if he told applicant how and why he was affected he said he told him because he already knew the procedure and that it was just the question of telling them that they were affected. This is not the same thing as saying that I told him the score, which as we said would constitute a valid response to the concern. DW1 was further challenged to produce the score, he could not. It was put to him that annexure "SB3" which is the Minutes of the meeting of the 21st February with applicant does not support his testimony that result were communicated to the applicant. He confirmed. In our view the cross-examination successfully discredited the testimony of DW1 that the applicant was ever informed how and why the criteria affected him, thereby leading to his retrenchment. In our view he was entitled to know.

32. Finally on procedural fairness the applicant argued that the respondent failed to consult in accordance with the provisions of the Recognition Agreement entered into between the bank and the union which he was a member of. This is an issue which this court had occasion to deal with in the case of Molefi 'Nena .v. Standard Lesotho Bank LC32/07 (unreported). We noted in that judgment that the issue of interpretation and application of the Recognition Agreement is one that ought to have been referred to the Directorate of Disputes Prevention and Resolution (DDPR) in terms of section 226(2)(b)(i) of the Labour Code Order 1992. The applicant and his union had the opportunity to do so but elected to refer a dispute of interest concerning disagreement on a severance package. This court

is not the proper forum for such an issue to be raised and dealt with in exercise of its original jurisdiction.

MISCALCULATION OF SEVERANCE PACKAGE

33. The applicant adduced evidence that his severance package was inappropriately calculated at 14 years completed service when he had completed 24 years service with the bank. Counsel for the respondent sought to counter this evidence by suggesting to the applicant that he got dismissed following a strike in 1991 and that he was subsequently reemployed. The applicant conceded this was so. It was suggested to him that he cannot claim continuity of service when the dismissal represented an interruption in his service.

34. In reply applicant referred to annexure "SB1" to the respondent's own Answer which is the letter of his confirmation dated 15th January 1992. It read:

> *"Dear Mr. Morahanye,*
> *You have now completed three months probation since reemployment. I am pleased to advise that, following recommendations of your manager, you have now been confirmed to the Bank's service.*
> *You will be required to sign fresh Article of Agreement but previous service with Barclays in Lesotho will continue to be recorded and honoured.* (emphasis added).
> *I take this opportunity to congratulate you on your confirmation and wish you all the luck for the future.*
>
> Yours sincerely,
>
> K. Mojaje
> Personnel Manager"

Mr. Ntaote for the respondent then asked "does that say that your service is considered to be continuous?" Applicant's response was a quick "definitely." Clearly Mr. Ntaote could not take it any further and indeed he did not. This was a fair concession for him to make because the underlined words in

the above quoted phrase make it abundantly clear that despite the reemployment, the previous service would still be honoured.

35. DW1 on the other hand sought to advance a theory that the severance package was a sweetner which the employer gave to the exiting staff and that the employer capped it at 14 years. This testimony is not consistent with either annexure LM3 or LM4 to the Originating Application. The two annexures are not consistent with each other either.

36. Annexure LM3 is a letter that was written to the applicant informing him of the proposed exit package for him. With regard to the termination package it stated that,

> *"you will be paid an amount equivalent to 2 weeks for every year in service capped back to 1992 when the Labour Code Order came into effect."*

It is common cause that the Code came into effect on the 1st April 1993. If the intention was indeed to calculate the years of service from the date of entry into force of the Code, it would have been counted from April 1993 and that would give applicant 13 years of service. Clearly therefore the reason for capping applicant's service to 1992 is factually incorrect and therefore not justifiable.

37. Seeking to cap the service to 1992 when the Code allegedly came into force is an attempt to give a legal content to the calculation of the applicant's years of service. However, the testimony of DW1 presents the years awarded as a discretion. Indeed the respondent has during cross-examination of the applicant made it clear that what applicant was awarded was not a statutory severance pay but a negotiable severance package. It is inconceivable therefore, that the respondent can claim that he pegged applicant's service to a statutorily determined formula, when they have said what they offered was not in accordance with the Code. Their evidence which was not denied by the applicant was that they are infact exempt from the obligation to pay severance pay.

38. Annexure LM4 puts the record straight, and accordingly clear the confusion. It says that applicant:

> *"will be paid a severance package based on 2 weeks for every completed year in service. Your service adds up to 14 years."*

After the uncontroverted evidence that this court heard that applicant was employed in the bank in 1982, the respondent's calculation of his years of service as 14 years cannot be correct. What is clear is that the respondent is capping applicant's service to 1992 because applicant was dismissed following the strike in the bank and got reemployed in January 1992. That has infact been the respondent's defence to applicant's claim throughout. However it failed because in the letter of confirmation dated 15th January 1992, the bank committed itself to continue to record and honour applicant's previous service notwithstanding the reemployment. For these reasons we find ourselves having to agree with applicant that his service has been wrongly calculated.

CONCLUSION

39. It is evident from what we have said above that applicant's retrenchment was substantively unfair in as much as respondent has failed to contradict applicant's claim that the so-called new position was in all respects still his position but only given a different name. There was again evidence of procedural unfairness in two respects. First, the respondent did not take reasonable steps to avoid retrenching applicant. They retrenched him before affording him the opportunity to compete for the so-called new position. Secondly, the respondent has failed to inform the applicant how the criteria used affected him. An otherwise objective criteria was reduced to subjectivity by hiding from the applicant his perceived weaknesses that rendered him eligible for retrenchment. Indeed if he was told he might well have been capable of defending his performance and disciplinary record among others which might lead to the change of attitude about him.

40. These shortcomings in how the applicant's case was handled have resulted in his retrenchment being unfair. The applicant has not sought reinstatement. He seeks compensation of 12 months instead. In terms of section 73 of the Code this court can only order reinstatement where the employee desires to be reinstated. Since the applicant has made his choice reinstatement is out.

41. This leaves us with considering compensation in place of reinstatement. In that case section 73(2) of the Code provides that:

> *"the amount of compensation…..shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses."*

42. No evidence of breach of contract by either party was adduced. We do not discern any either. Applicant was asked if he took any steps to mitigate his losses. He said he applied for work at the FNB and at Boliba Banking Society. DW1 also confirmed that they had his application at the respondent bank as well. Having not got a response from any of those banks, he still remained unemployed. He was not challenged any further about mitigation. We conclude therefore that respondent conceded that the applicant took reasonable steps in the circumstances to mitigate his losses.

43. Mr. Ntaote for the respondent contended that even if the court finds that there was unfairness in the retrenchment, the court should take into account that the applicant has adequately been compensated. This is a fallacy. Applicant has not yet been compensated. What he has been paid is a separation package which was effected on the assumption that the retrenchment has been fairly handled. Now that this court has found that it has not been fairly handled we are enjoined by section 73 of the Code to award compensation.

AWARD

44. The award that this court makes has taken into account that the respondent has sought to implement a fair procedure for the retrenchment and that there was a slip in the two areas identified. We have also taken into account that the respondent consulted extensively with the employees and the union on the imminent retrenchment. Whilst the applicant has adduced evidence that he mitigated his loss by applying for jobs without success, formal employment is not the only way that one can mitigate his loss. There are other options which could still be considered. Accordingly we order as follows:

    (i) The respondent shall pay applicant a compensation of seven (7) months salary for the unfair retrenchment.
    (ii) The respondent shall further pay applicant the amount of M67,655.31 by which his severance package was short calculated.
    (iii) The compensation in (i) above shall be calculated at the rate of applicant's salary in February 2006.
    (iv) All payments are subject to income tax deductions in terms of the law.

There is no order as to costs.

THUS DONE AT MASERU THIS 22ND DAY OF JULY 2008

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE — I CONCUR
MEMBER

M. MATELA — I CONCUR
MEMBER

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