

IN THE LABOUR COURT OF LESOTHO

LAC/REV/98/05  
LC/REV/386/06

HELD AT MASERU

IN THE MATTER BETWEEN

CALVIN KUENENE

APPLICANT

AND

JD GROUP LESOTHO (PTY) LTD  
DDPR

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

---

## JUDGMENT

---

*Date : 30/09/09*

*Review - Gross unreasonableness renders an award reviewable - Exemption from effect of sec. 79(1) of the Code cannot be applied retrospectively - By its nature retrospectivity undermines legality - Award giving exemption retrospective effect reviewed and set aside as being grossly unreasonable.*

1. The applicant was employed by the 1<sup>st</sup> respondent on the 30<sup>th</sup> September 1983. On the 4<sup>th</sup> June 2004 he resigned. By the time of his resignation, applicant had completed 21 years of dedicated service to the 1<sup>st</sup> respondent. He thus claimed entitlement to payment of severance pay in terms of section 79(1) of the Labour Code Order 1992 (the Code) which provides:  
  
*“(1) An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his or her services, a severance payment equivalent to*

*two weeks' wages for each completed year of continuous service with the employer."*

2. Section 79(1) was amended by the Labour Code (Amendment) Act in 1997, by the insertion of a new sub-section (7) which now provides:

*"(7) where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in sub-section (1) he may submit a written application to the Labour Commissioner for exemption from the effect of that subsection."*

Pursuant to this amendment, the employer applied for exemption from the effect of section 79(1) as it operates a contributory pension scheme for its employees. The exemption was applied for in May 2004, while applicant was already serving his notice. It was granted in October 2004, some 5 months after applicant's resignation.

3. It is common cause that the 1<sup>st</sup> respondent declined to pay applicant severance pay citing the above exemption. The position of the 1<sup>st</sup> respondent was put thus by Mr. Ngonyama who represented it at the arbitration:

*"(Applicant) was not forced to termination and he is entitled to severance pay, but I am saying at the time he resigned the company had already applied for exemption. So it was in this case that upon his termination, severance pay was not paid."* (P.7 of the record of arbitration proceedings).

Mr. Letsie who represented the applicant at the arbitration asked Mr. Ngonyama if it is correct that since the exemption was granted in October it (the exemption) became effective in October? He said he did not know if that was right or wrong. He asked him further whether at the time applicant left employment the company had an exemption? His response

was that *“there were no documents in at that point in time.”* (See p.8 of record of arbitration proceedings). The documents that Mr. Ngonyama concedes were not in at time of applicant’s resignation are none other than the exemption.

4. The applicant made a referral to the DDPR. Evidence and arguments were presented before the arbitrator on the 26<sup>th</sup> January 2005. On the 2<sup>nd</sup> February 2005, an award was handed down. The arbitrator found that the exemption was rightly applied to the applicant as such he was not entitled to be paid severance payment. In arriving at the conclusion the learned arbitrator motivated it as follows:

*“whether the exemption has a retrospective effect on applicant who left respondent’s employ before the exemption was granted is not voiced by the statute. However it is apparent that respondent applied for exemption before applicant left his employ. This to me suggests that respondent had applicant’s case in mind when the application was made. But it is not for respondent to set a deadline for the Labour Commissioner to give a reply. Although the exemption was granted in October 2004, it is my feeling that it had a retrospective effect at least in as far as the date of application is concerned.”*

5. The applicant applied for the review and setting aside of the award on the ground that the award makes the exemption retrospective which *“leads to a very absurd and unreasonable situation that was never contemplated by the legislature.”* The 1<sup>st</sup> respondent did not file any Answering Affidavit, even though at the hearing it was duly represented by counsel who filed written heads and motivated them before us.
6. At the hearing Mr. Matooane contended that the learned arbitrator failed to apply his mind to the legal issue before him, instead he expressed his feelings. He further attacked the arbitrator’s approach when he said he found on a balance of probabilities that the 1<sup>st</sup> respondent was exempted from paying severance pay to its staff including that of the applicant. His

contention was that the issue facing the learned arbitrator was one of what the law says. There was no need therefore to balance the probabilities he argued.

7. Indeed the issue that stuck out like a sore thumb for the determination of the learned arbitrator was whether, given the time that the applicant resigned and the time that the exemption was granted, the exemption could lawfully be applied to the applicant. To determine that issue the learned arbitrator had to decide whether the exemption granted by the Labour Commissioner applied retrospectively.
8. The issue whether an exemption granted by the Labour Commissioner can be applied retrospectively was decided by this court in the case of *Ben Heqoa .v. Browns Cash and Carry & Another LC/REV/331/06* (unreported). It was decided in that case that, section 79(7) of the Code as amended does not empower the Labour Commissioner to grant exemptions retrospectively. An employer who is a beneficiary of an exemption certificate issued by the Labour Commissioner cannot apply it going backwards either. It can only be applied prospectively.
9. This court ruled that there is a strong presumption in law that legislation and legislation that authorizes administrative action are not intended to operate retrospectively. By its nature retrospectivity undermines the principles of the rule of law and legality. It follows that by interpreting the exemption certificate as applying retrospectively the learned arbitrator committed a serious mistake of law which has materially affected his award to the extent that the award is grossly unreasonable.
10. Section 228F(3) of the Labour Code (Amendment) Act 2000 empowers this court to:

*“set aside an award on any ground permissible in law and any mistake of law that materially affects the decision.”*

As it was held in *Lesotho Electricity Corporation .v. Ramoqopo & Ors. LAC/REV/121/06* the phrase *“any grounds permissible in*

*law*” should be interpreted as to include the various grounds of common law review. Under the common law a decision is reviewable on the ground that it is grossly unreasonable. The award of the learned arbitrator is unreasonable to the extent that it purports to give the exemption a retrospective effect. That is totally against the principal law as it does not empower the Labour Commissioner to grant retrospective exemption. For these reasons the award of the learned arbitrator is irregular and it falls to be reviewed, corrected and to be set aside.

11. The obvious order which the learned arbitrator would, but for the misdirection have made; is that applicant is entitled to be paid severance pay in terms of section 79(1) of the Code as the employer was not exempted at the time that the applicant resigned. It was held in the case of Liakae Mamosa Ramothamo & 3 Others .v. PEP Store & 3 Others LAC/REV/02/07 (unreported) that where an employer has not been exempted in terms of section 79(7), employees are entitled to severance pay under section 79(1) as well as full benefits under the provident fund established for them by the employer.
12. It follows that it is not unheard of that an employee can be paid severance pay and the benefits of a pension scheme even if the latter provides more advantageous benefits to an employee. The employer is only protected from paying both where he has applied and been granted exemption at the time of separation with the employee. In the premises the award of the arbitrator is reviewed, corrected and set aside and in its place substituted the order that the 1<sup>st</sup> respondent shall pay applicant his severance pay in terms of section 79(1) read with section 79(6) of the Code. There is no order as to costs.

THUS DONE AT MASERU THIS 11TH DAY OF NOVEMBER, 2009.

**L. A. LETHOBANE**  
**PRESIDENT**

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**M. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. MATOOANE**  
**MR. MOILOA**