IN THE LABOUR COURT OF LESOTHO **LC 58/06**

HELD AT MASERU

In the matter between:

'MAMORAPELI NTS'INYI	**1ST APPLICANT**
'MATHABANG SELLO	**2ND APPLICANT**
'MALEKHOOA MAIEA	**3RD APPLICANT**
MOTLALEPULA MAFIKENG	**4TH APPLICANT**
NTHABISENG RAMOTSOTSO	**5TH APPLICANT**
NTABEJANE MOHAPI	**6TH APPLICANT**

and

MOPHATO OA MORIJA ECUMENICAL YOUTH CENTRE	**RESPONDENT**

JUDGMENT

Date: 31/08/09

Retrenchment - applicants alleging termination to have been unfair because the retrenchment had not been justified and the retrenchment process infringed on basic legal requirements such as consultation, fair selection criteria, LIFO - Union could not establish these factors and the application was dismissed.

1. This matter rather has a protracted history as it was filed on 25th July, 2006 and initially heard on 19th September, 2006, again on 24th July, 2007 and finally on 1st July, 2009.

2. It is common cause that all the applicants had been engaged by the Mophato oa Morija Ecumenical Youth Centre in the cleaning and kitchen sections. It is also indisputable that the applicants individually received letters dated 3rd May, 2006 in which they were informed that the management committee of Mophato oa Morija in its sitting of 21st April, 2006 had resolved to terminate their services due to a

deteriorating financial situation of the Centre. They were to serve notice from 2nd May, 2006 to 31st May, 2006 which was essentially one month. It however, emerged during the course of proceedings that the notice was later amended to the effect that the notice would run from 2nd May, 2006 to 9th June, 2006. The respondent is in the business of providing accommodation and meals during conferences and meetings, and the applicants were all engaged in the kitchen and for cleaning.

3. The union, the National Union of Hotels, Food & Allied Workers (NUHFAW) challenged the said termination on behalf of the six applicants on a number of grounds including that the respondent did not give the them sufficient prior warning on the impending retrenchments; secondly, that the respondent failed to seek alternative ways of avoiding or minimizing the retrenchments; thirdly, that there was no fair selection criteria, and lastly, that they were not paid a ***"reasonable"*** severance pay. Actually, a lot of grounds were raised ***albeit*** in a scattered fashion such as lack of consultation and failure to follow the LIFO (Last In, First Out) principle. Basically, applicant's representative challenged both the substantive and procedural fairness of the said dismissals.

4. The respondent denied any impropriety in effecting applicants' dismissals. They contended that they could not retain the employees due to financial constraints as the number of visitors going to the youth centre had dwindled, and further that they tried to ameliorate the effects of the retrenchments by embarking on a broiler rearing project and the resuscitation of the tuck shop which they indicated turned out to be unprofitable.

RELEVANT PRINCIPLES

5. It is trite that every dismissal must meet both the tenets of substantive and procedural fairness. Substantive fairness relates to the reason behind an employee's dismissal, such reason must be justifiable or operationally rational, whilst procedural fairness dictates that retrenchment be effected in accordance with a fair procedure.

SUBSTANTIVE FAIRNESS

6. In Lesotho, it is regulated by Section 66 (1) of the Labour Code Order, 1992 (as amended). It provides that no employee shall be dismissed, unless there is a valid reason for dismissal. Quoted verbatim, it provides;

Unfair dismissal

66.(1)An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is -

(a) connected with the capacity of the employee to do the work the employee is employed to do (including but not limited to an employee's fraudulent misrepresentation of having specific skills required for a skilled post);

(b) connected with the conduct of the employee at the workplace; or

(c) based on the operational requirements of the undertaking, establishment or service.

Since the respondent has advanced restructuring as a reason for applicants' termination of employment, it falls under the last category of the forms of dismissal.

7. It was respondent's case that its main source of income was the provision of accommodation which is naturally dependent on visitors who come to the Centre to hold either meetings or conferences. It was contended on behalf of the respondent that with a reduction in the flow of visitors, it was unable to pay its employees, and found itself with no alternative but to lay off some of its staff members. It was submitted that the respondent could not even consider transfer of the applicants to other sectors of the Centre such as Administration as an alternative due to their level of education.

8. Testimony on behalf of the respondent revealed that its problems started when it fell out with the Lesotho Evangelical Church culminating in the latter issuing out a circular sometime in 1998 in which it indicated that it would no longer use the facility for its activities, which covered activities of all Church structures, including the Churches' youth movements from both Lesotho and the Republic of South Africa upon which the Centre was heavily dependent for its survival.

9. Both witnesses who testified on behalf of the applicants ***viz.,*** 'Mamorapeli Nts'inyi, PW1 and, Nthabiseng Ramotsotso PW2, acceded that at times they were only given half of their monthly earnings or worse still even went for months

without their monthly salaries. They also indicated that the management engaged them on a casual basis from time to time.

10. From the foregoing analysis, it appears that the respondent's decision to retrench the applicants was based on the operational requirements of the Centre. From the evidence led, it was clear that the viability of the Centre was at stake. The function of the Court is to oversee the fairness of the retrenchment process and not to second guess the economic rationale of the decision.

11. The test for substantive fairness in dismissals for operational requirements remains whether the dismissals were operationally rational. In ***Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ 129 (LAC) at 133*** the Labour Appeal Court of South Africa stressed that the Court's ***"function is not to second-guess the commercial and business efficacy of the employer's ultimate decision, but to pass judgment on whether such a decision was genuine and not merely a sham. A decision to retrench could be exposed as a sham if, for example, the dismissed employee is immediately replaced with another in the same position."*** In ***casu,*** it emerged that all cleaning and kitchen staff was dismissed, and there was no allegation that they were immediately replaced. It was testified that the Centre would engage the dismissed employees as and when it had visitors. This went a long way in proving that the respondent had a bona fide operational/commercial reason to dismiss. The Court finds the reason advanced for applicants' retrenchments to have been acceptable.

PROCEDURAL FAIRNESS

CONSULTATION

12. In reacting to the allegation of the failure to consult either the applicants or their union prior to the termination, respondent's counsel brought to the attention of the Court that the letter of the 3rd May, 2006 in which the applicants were informed of management's decision to terminate their services was a culmination of a long drawn out process of consultation that began around June, 2005. Indeed, annexure ***"MN1"*** to the originating application which was a letter to the 1st applicant (PW1) read in part that;

"the Committee of Mophato oa Morija in its sitting of 21/04/06 resolved that your services be terminated, this is a follow-up to the discussions we had (the Mophato Committee and the employees) of 25/03/2006. Our financial situation does not seem to be improving" (loosely translated).

The law requires that employees be notified of a likelihood of retrenchment prior to the final decision being taken which occurred in the meeting of 25th March, 2006.

13. It is common cause that there was no recognition agreement between the union and the management of Mophato oa Morija, however, this notwithstanding, the latter engaged the union after receipt of a letter from it dated 17th May, 2006. Much as it was subsequent to the issuance of dismissal letters. This reflects that the respondent kept an open mind. The letter read;

17TH May, 2006

The Manager
Mophato oa Morija
P.O. Box 6
MORIJA 160

Dear Sir,

RE: URGENT MEETING

Reference is made to our letter pertaining to on going restructuring at Mophato oa Morija.

We therefore kindly request an urgent meeting with your good office to address this matter on the 23rd May, 2006 at 10.00am at your offices.

We trust that you will find this in order.

Yours faithfully,

E.T. MATETE
GENERAL SECRETARY

14. The meeting took place on 27th May, 2006, and it was resolved that the union comes up with a proposal on the restructuring process. The union submitted a proposal dated 30th May, 2006. Subsequent to this a meeting was convened on 3rd June, 2006. The negotiations, however, broke down. It is our considered opinion that there was consultation but the negotiations between the union and respondent's management reached a deadlock. This is borne out by Paragraph 7 of the originating application in which the union acceded that in the meeting of 3rd June, 2006 ***"the Union did not agree on the approach of restructuring and termination of the employment of the employees"***. Clearly, there was consultation but no agreement.

15. According to ***"MN1" supra***, there were talks between the affected employees on 25th March, 2006 and the respondent's management. The letters of termination in respect of the applicants read in part that the termination was a culmination of talks held on 25th March, 2006. PW2, Nthabiseng Ramotsotso, 5th applicant herein, attested that they had discussions with respondent's management and she personally came up with a number of suggestions including the resuscitation of defunct projects such as rearing of broilers and the running of a tuck shop. She however felt the respondent's management was not doing enough to see the projects bearing fruit. This is a very difficult domain for the Court to venture into as these are business decisions. For one, there was no tangible evidence to show that the respondent was not in dire straits as claimed. Both PW1 and PW2 merely pointed out that there were still visitors. The respondent did not deny that visitors still came, but they contended they had dwindled.

16. Regarding other grounds such as failure to observe a fair selection criteria in retrenchment, applicant's representative failed to substantiate his averments. He could not show from who these employees were selected. LIFO principles also did not apply as the applicants were not being compared to any other. These principles call for a comparative analysis. There must always be a comparator.

17. The Court has satisfied itself that respondent's management took steps to avoid the retrenchments through the broiler and tuck shop projects which according to the respondent's acting Managing Director Mr. Sid Mabeya they were small scale projects whose turnover was not sufficient to meet the Centre's expenditure. Hence, they took a decision to lay-off some of its employees. This is an area that falls within managerial prerogative, and the Court is not qualified to pronounce itself on the options that could have been exploited. In ***Mobius Group (Pty) Ltd v***

Corry (1993) 2 LCD, 193 (LAC), the Court held that where the decision to retrench is based on economic considerations, the Court will not impose its view of the most appropriate commercial decision in the circumstances of the employer.

18. On the averment that the respondent failed to give the applicants sufficient prior warning, we feel this requirement was satisfied regard being had to the fact that the applicants were notified on 3rd May, 2006 of their termination of employment with a notice ending on 9th June, 2006. Applicant's representative could not substantiate what he meant by the allegation that the applicants were not given a ***"reasonable"*** severance pay. In their testimony PW1 and PW2 merely pointed out that the severance pay was not enough. They alleged that their severance pay was paid off at some stage during the tenure of their employment, but was again deducted from their salaries. This was not borne out by any evidence whatsoever, and therefore falls off. Severance pay is a statutory right of every employee who has completed more than one year service with the same employer, and it has an entrenched statutory formula.

CONCLUSION

19. This is a clear case of employees who are aggrieved by their dismissals and were clutching on everything to find the respondent at fault. This is understandable, given the hard financial times that we are all plunged in, and retrenchments are more painful as they are no - fault dismissals. At some stage the applicants' representative suggested that the engagement of applicants on a casual basis was illegal in terms of Section 62 of the Labour Code Order, 1992. The Court discerned nothing illegal in the arrangement. The Section describes the forms of contracts that an employment relationship may take, and includes ***"a contract to perform some specific work"***. This reflects how much at pains the union representative was to convince the Court that the retrenchment was unfair.

20. There is very little that the Court can do where it considers the reasons for the dismissals to have been commercially justifiable and where the employer has followed a fair procedure in effecting the said retrenchments. If a company is not profitable, the employer has a right to take steps to ensure that the business remains viable which could prove to be a very painful experience to employees who face retrenchment.

On the foregoing grounds, the application is dismissed.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 31ST DAY OF AUGUST, 2009.

F.M. KHABO
DEPUTY PRESIDENT

MR. R. MOTHEPU ***I CONCUR***
MEMBER

MR. L. MATELA ***I CONCUR***
MEMBER

REPRESENTATION:

FOR APPLICANTS: MR. E.T. MATETE - OFFICIAL OF THE NATIONAL UNION OF HOTELS, FOOD AND ALLIED WORKERS (NUHFAW)

FOR RESPONDENT: ADVOCATE K.K MOHAU