IN THE LABOUR COURT OF LESOTHO **LC 48/06 (B)**

HELD AT MASERU

In the matter between:

PHETHANG MPOTA **APPLICANT**

and

STANDARD LESOTHO BANK **RESPONDENT**

JUDGMENT

Date: 25/11/10

> ***Matter initially heard and determined by this Court - Dissatisfied with the judgment the applicant noted an appeal to the Labour Appeal Court - Latter remitted matter to this to be heard on amended papers on the grounds that this Court pronounced itself on the procedural fairness of applicant's dismissal when it had not been called upon to do so - Court finds itself functus officio the matter.***

1. The applicant is a former employee of Standard Lesotho Bank, a product of a merger between Lesotho Bank (1999) Limited and Standard Bank Lesotho Limited. He had risen through the ranks and on termination of employment occupied the position of Area Service Centre Manager, North.

2. The current dispute flows from his retrenchment following a merger of the two Banks. Aggrieved by this retrenchment, he lodged a claim challenging it before this Court in May, 2006. The matter was heard in 2007 and a judgment delivered on 18th May, 2007. Dissatisfied with this judgment, he noted an appeal to the Labour Appeal Court, and the latter remitted the matter to this Court with an order that it be heard afresh on amended papers to include a prayer that the Court declare the said dismissal procedurally unfair.

As it is, the applicant had in the initial application before this Court been represented by a different Counsel, Advocate Matooane, and on appeal by Advocate Sekonyela, his current lawyer. He averred in his pleadings that the matter has been referred to this Court for it to consider and determine the fairness of applicant's dismissal and to re-hear it on amended papers. He pointed out that he is asking this Court to find his dismissal to be procedurally unfair and unlawful in that ***inter alia*** respondent failed to consult with the applicant in accordance with Codes of Good Practice, on exit terms and to follow LIFO which was imported into terms of applicant's contract. He prayed for an order in the following terms;

> a) ***Declaring the dismissal of retrenchment*** (sic) ***of the applicant to have been procedurally unfair and unlawful on the papers as amended by the Labour Appeal Court and evidence adduced;***
>
> b) ***Payment of applicant's salary for 12 months as damages; and***
>
> c) ***Costs of suit.***

3. The Court having looked at the papers filed of record and having revisited the initial proceedings raised a legal concern that it could be ***functus officio*** the matter. In reply, applicant's Counsel, Advocate Sekonyela, submitted that the Court was not ***functus***. According to him, it had failed to pronounce itself on the fairness or otherwise of applicant's dismissal, and granted what was not prayed for. The Court had dismissed applicant's application after having heard submissions before it and analysed the evidence tendered in LC 48/06. In reaction, Advocate Macheli for the respondent, contended that the Court was ***functus officio*** because the issues that the applicant is now relying on are the very same issues that the Court had deliberated upon and pronounced itself on.

4. The Labour Appeal Court had held in its judgment in paragraph 3.3 that it appreciated that issues relating to the fairness or otherwise of applicant's dismissal had been fully canvassed both in the pleadings and in the evidence, but that nobody had applied for an order declaring the dismissal unfair. The Court went further to point out that ***"once there was no such prayer the Labour Court could not make a declaration of the fairness or otherwise of the dismissal."***

5. In order to address this issue, the starting point would be to ascertain what was contained in applicant's initial application ***viz.,*** LC 48/06. We found out that after

having related the events leading to his retrenchment, applicant stated at paragraph 8 of his originating application that;

The retrenchment process was flawed in the following respects:

a) There were no negotiations to explore whether there are other options rather than retrenchment;

b) The retrenchment criteria was never discussed and agreed upon;

c) The principle of <u>Last In First Out</u> was never followed;

d) The whole exercise took only a week. Annexure "C"

Thus the so-called negotiation was just a **"masquerade**." He further averred in Paragraph 11 that **"All these factors prove that the process** (in other words procedure) **was seriously flawed,"** and continued in paragraph 12 that

Wherefore Applicant prays for relief as follows:

a) Payment of salary for twelve (12) months as damages;

b) Costs of suits;

c) Further and/or alternative relief.

6. Applicant approached the Labour Appeal Court for an order to the effect that by traversing in its judgment on the fairness of applicant's retrenchment and making a determination thereon, this Court went beyond what it had been called upon to do. The Labour Appeal Court having granted the order, the applicant is now before this Court per LC 48/06 (B) seeking an order in the following terms:-

a) Declaring the dismissal of retrenchment (sic) ***of the applicant to have been procedurally unfair and unlawful on the papers as amended by the Labour Appeal Court and evidence adduced;***

b) Payment of applicant's salary for 12 months as damages;

c) Costs of suit.

7. One then stops to ponder, what was then before this Court for determination in LC 48/06? Substantive fairness was definitely not in issue as can be discerned from the pleadings and submissions in Court. Analysing the factors tabulated in paragraph 11 of applicant's initial originating application (quoted in paragraph 6 above) one discerns a challenge to the procedural fairness of applicant's dismissal. It was clearly stated in the said paragraph that ***"All these factors prove that the process*** (procedure) ***was seriously flawed."*** In line with this averment and the submissions before Court the procedural aspect of applicant's retrenchment became a subject of debate. The Labour Appeal Court itself also appreciated in paragraph 3.3 of its judgment that ***"issues relating to the fairness or otherwise of applicant's dismissal were fully canvassed both in the pleadings and in evidence,"*** but went further to point out, as per applicant's prayer, that this was not what the applicant had prayed for. It gave the applicant leave to amend his papers to include a prayer asking this Court to declare his dismissal procedurally unfair. What does this mean in practical terms? In our view, this tells us to traverse the issues that we traversed and made a determination on in LC 48/06. The question is, is this proper? We feel the answer is in the negative. As lower Courts we are bound by the decisions of superior Courts, the Labour Appeal Court in this case, but with due respect we cannot allow Courts to be misled. It would not be in the interests of justice.

8. As far as we are concerned, what seems to be in issue is applicant's former Counsel's style of drafting. As reflected in paragraph 6 above, the applicant in his originating application started off by pointing out the procedural flaws in the retrenchment process, then went on to make consequential prayers, hence the words "***wherefore applicant prays …"*** If we were to buy applicant's approach that the Court pronounced itself on the fairness or otherwise of applicant's dismissal when it was not called upon to do so, what then would the applicant be seeking compensation for in his paragraph 12? It surely flows from paragraph 11 which stated that ***"All these factors prove that the process was seriously flawed."*** This just impinges on draftsmanship, not the substance in issue. It is just a concern with semantics. In the dispensation of justice we feel what is important is substance as opposed to form. We find applicant's approach novel and very strange. Our observation is that he wants to be unduly technical in order to have an opportunity to present the matter afresh as a new Counsel, ***albeit***, on the same grounds and on issues that have already been determined. He is styling it an amendment, and as far as we are concerned, there was not even a need for any amendment because he is raising the same issues that were initially raised, couched differently. The grounds he is raising have already been heard and determined. The proper approach was for

the applicant to have appealed against the judgment in LC 48/06, and not sought an amendment to introduce an issue that has already been determined.

9. This is not a case where the Court went out of its way to make a determination on an issue that it had not been called upon to determine as alleged by the applicant. The Court has already traversed on the procedural fairness of applicant's dismissal, and it will not be proper to do so again. The authorities cited in paragraph 3.2 of **LAC/CIV/APN/02/09** and in paragraph 20 of ***LAC/CIV/A/06/ 08*** which include ***Nkuebe v Attorney General & Others 2000 - 2004, LAC 295*** at ***301*** relate to situations where the Court granted orders which were not sought by litigants and relied on issues not raised. The Labour Appeal Court warned in paragraph 22 that ***"the Court of Appeal and this Court have more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation."*** This was definitely not what transpired in LC 48/06. The Court had determined issues that had been raised, and never considered any extraneous matter.

10. Much as we have to abide by superior Court's decisions, we do not have to lose sight of fundamental principles regulating us. The general principle, now established in our law is that ***"once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject - matter has ceased - Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 (A) at 306 F - G.*** This quotation was cited with approval in ***F.H Harrington Steel Erectors (Pty) Ltd v Metal & Allied Workers' Union (1989) 10 ILJ, 308 at 308-309.*** There is a plethora of authorities on the issue which include the case of ***West Rand Estates Ltd v New Zealand Insurance Co., Ltd 1926 AD 173 at pp 176, 178, 186 - 7 and 192***; and ***Estate Garlick v Commissioner of Inland Revenue, 1934 AD 499 at 502.*** The Court in LC 48/06 addressed itself to issues that were raised, so re-hearing the matter would be tantamount to traversing issues that have already been traversed and an opinion formed thereon, a factor which violates the ***functus officio*** principle.

11. The applicant is just aggrieved by the decision of this Court, which is his right. But we feel an appropriate relief was an outright appeal. He wants to persuade this Court to change its judgment. This is clearly reflected in paragraph 6 of his notice of motion when he pointed out that ***"it is clear that where the Court found that the suddenness with which Respondent effected my retrenchment sends shockwaves, and I am entitled to costs because it is clear that respondent acted in***

a wholly unreasonable manner under the circumstances where, inter alia, I was only given slightly more than two weeks to leave the bank …" The Court had appreciated that the notice he was given had been too short hence it used the words that it sent ***"shockwaves."*** It however felt that despite the short notice, the respondent adequately compensated the applicant for it monetarily. It was common cause that the applicant had rendered services only up to the 10th March, 2006, but was given a full salary for March; given one month's ***ex gratia*** payment; and paid one month's salary in lieu of notice, which added up to three months' wages. The Court found this to be sufficient compensation in its discretion, all in the name of fairness. It had relied on Article 7 (1) of Recommendation 119 on Termination of Employment at the Initiative of the Employer which provides that:

> ***a worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof.***

12. If Courts were to accept applicant's approach, litigation would never end. It is a trite principle of law that there should be finality to litigation. Public policy demands that the principle of finality in litigation be preserved rather than be eroded in keeping with the Latin maxim ***"interest reipublicae ut sit finis litium."*** This matter has been unnecessarily protracted, and it is not fair to all interested parties, including Courts.

13. The Court having considered all the issues that the applicant is now raising and having made a determination thereon finds itself ***functus officio***. In terms of the principle, it has no authority to correct, alter or supplement its judgment.

The application is therefore dismissed with costs.

THUS DONE AND DATED AT MASERU THIS 25TH DAY OF NOVEMBER, 2010.

F.M. KHABO
DEPUTY PRESIDENT

J. TAU **I CONCUR**
MEMBER

D. TWALA **I CONCUR**
MEMBER

FOR THE APPLICANT: **ADV. B. SEKONYELA**
FOR THE RESPONDENT: **ADV. T. MACHELI**