IN THE LABOUR COURT OF LESOTHO **LC/15/10**

HELD AT MASERU

IN THE MATTER BETWEEN

LELOKO SELEBALO **APPLICANT**

AND

STALLION SECURITY LESOTHO (PTY) LTD **RESPONDENT**

JUDGMENT

Dates: 26/10/10, 12/04/11, 16/06/11
Retrenchment held substantively unfair as the alleged reason for retrenchment was a deliberate misrepresentation of the true facts – Settlement agreement between the parties that retrenchment was the only option cannot be relied upon by respondent as it was entered into by misrepresentation – Offer of post at reduced salary – Change to terms and conditions must not be unilateral. There must be full consultation – Compensation ordered and no order of costs made.

BACKGROUND

1. Applicant was employed by the respondent as a junior assistant in the Operations Department on the 1st October 2004. His employment was on permanent and pensionable terms subject to a successful completion of a four months probation. He was based at Letseng Diamond Mine.

2. On the 2nd July 2009, applicant received a letter of notification of possible retrenchment. The notification was based on the fact that the applicant had failed three (3) polygraph tests which were conducted at the request of the client of the respondent,

namely, Letseng Diamond Mine (Pty) Ltd, which had a suspicion that applicant was involved in illicit diamond smuggling. As a result of failing the said three tests, respondent stated that client had refused to allow applicant further access to the mine premises. The respondent averred that it was consequently faced with a situation where the company was unable to utilize applicant's skills at Letseng Mine.

3. The respondent averred that they had considered numerous alternatives to avoid retrenchment which included transfer, lay off and early retirement, but none of them had proved viable. They accordingly invited applicant to a consultation meeting to be held in Bloemfontein on the 3rd July 2009 at 10.00am. Due to the plainly short notice, applicant requested an extension of the date for the consultation meeting. It was granted and the meeting was rescheduled for the 7th July 2009.

4. The meeting was chaired by Mr. Francois Oostehuizen who also recorded the proceedings. He reminded those present of the purpose of the meeting which he said was "to look at all possibilities and to consider any representations Mr. Selebalo wish to make to avoid dismissal or to mitigate the adverse effect of a possible retrenchment."

5. It is questionable how genuine the statement that the meeting was going to look at all possibilities was. We say this because the meeting turned out to be a forum where only the applicant was going to make suggestions. From the record of the proceedings, nothing in the form of practical suggestions came from the two gentlemen who represented the company. The record reflects only the proposals and concerns raised by the applicant and the representatives of the employer seemed to have been there to listen and convey the proposals to another forum which would furnish answers at a future meeting.

6. As indicated Mr. Oosthuizen chaired the meeting and present with him on behalf of the respondent was Mr. Richard Young. Minutes show that applicant requested to be furnished with written confirmation that Letseng Diamond Mine wanted him removed from the site. He was promised a feedback after the issue had been discussed with client. Applicant suggested further that he would be prepared to be redeployed to Mothae Mine under his current contract and salary. He stated that he was not prepared to work for a lower salary or to work outside Lesotho. A feedback was promised at the next meeting. Finally applicant raised a concern that employees of other contractors of Letseng who had also failed their polygraph tests had not been removed and yet he was being singled out and being barred from the mine. Again the company representatives promised a feedback after they would have discussed the matter with the client.

7. The response to applicant's representations at the meeting of 7th July 2009, came in the letter written to applicant on the 28th July 2009. The letter was signed by Mr. Oostehuizen. Regarding redeployment to Mothae Mine he was told that the company could place him there at the significantly reduced salary of M3,500-00 per month. With regard to the confirmatory letter from Letseng Mr. Oostehuizen stated that the client had indicated his unwillingness to furnish the company with the letter of the nature he requested. He went further:

> *"you should be well aware that we contract our security services out to clients and cannot possibly expect clients to become involved in the company's internal affairs."* (emphasis added).

8. On the issue of employees of other contractors who have not been barred from the mine the alleged response of client was even more dismissive and arrogant. The response went thus:

> *"pertaining to employees of Letseng Mine who failed polygraphs tests but were not removed from the site, the client has informed the company in no uncertain terms that those employees are the clients own internal issues*

and he does not have to answer to the company in that regard. The company agrees with that view point." (emphasis added).

Mr. Oostehuizen's responses to the two last issues would seem to suggest that applicant's removal from the mine is not the matter for Letseng Mine, but respondent's own internal matter, while the non-removal of those others who had also failed their lie detector tests is the internal business of Letseng Mine. This message sounds contradictory to the suggestion that it is Letseng Mine that wants applicant out.

9. The next meeting was scheduled for the 1st August 2009. At this meeting it was again only the applicant who had to come with alternatives Mr. Oostehuizen and Mr. Young were simply spectators who only furnished feedback and thereafter sat back while applicant struggled to identify alternatives. At this meeting applicant indicated that he had changed his attitude about working outside Lesotho, however it should be on the same contract and salary. At the next meeting held on the 6th August 2009, applicant was told that the available post outside Lesotho was at Oote mine in Kimberly at the salary of M5,000-00 per month. The reduced salary was again not acceptable to applicant. In the circumstances parties agreed that the remaining option was that applicant be retrenched. Accordingly, the applicant was by agreement signed on the 11th August 2009, retrenched with effect from the 14th August 2009.

STATEMENT OF CASE

10. On the 12th November 2009, applicant referred a dispute of unfair retrenchment to the DDPR in Mokhotlong. The referral was set down for the 3rd December 2009. The respondent did not show up at the hearing, as such the dispute could not be conciliated. However, we are of the view that this was a proper case where the arbitrator could have exercised his discretion in terms of section 227(8) of the Labour Code (Amendment) Act 2000 (the Act) to postpone the hearing to secure the attendance of all parties in order that a conciliated solution could be attempted. It is common cause, however, that the arbitrator

decided to refer the dispute to this court for adjudication pursuant to section 227(5) of the Act.

11. Applicant only issued an Originating Application out of the Registry of this Court on the 13th September 2010. Applicant contended that his purported retrenchment was unfair and that it amounted to an unfair labour practice on one or all of the following grounds:
    (a) No valid reasons in law existed for the retrenchment.
    (b) Respondent was not justified to dismiss applicant on the mere fact that a demand had been made for applicant's dismissal.
    (c) The demand for applicant's dismissal from the site had no good or sufficient foundation.
    (d) There was no threat that Letseng Mine would really act against respondent if the demand was not met.
    (e) Respondent had other options save dismissal.
    (f) Respondent did not take steps to dissuade Letseng Diamond from persisting with its demand.
    (g) Respondent did not investigate nor did it consider alternatives sufficiently during consultations with the applicant.
    (h) The extent of the injustice to applicant was not considered by the respondent.
    (i) Respondent failed to consider that no wrongdoing was proved against the applicant.

12. In their Answer respondent acknowledged and recognized that the dispute ought to have first been conciliated. However, respondent stated that it waived its rights in regard to conciliation and endorsed the jurisdiction of this court to hear the merits of the case notwithstanding that conciliation was not held. As regards applicant's grounds for the court's intervention respondent answered them generally and not point by point as applicant had raised them. The only point that respondent sought to address directly was the one that said there was no threat either real or serious of action by Letseng Diamond if the demand was not met. Mr. Oostehuizen denied that averrement and said if the respondent did not comply with client's requirement, its contract with client was in itself at risk.

EVIDENCE

13. Following agreement by counsel, the first side to lead viva voce evidence was that of the respondent. The sole witness of the respondent was Mr. Oostehuizen the General Manager. He testified that he wrote applicant the letter notifying him of possible retrenchment, because Letseng Diamond Mine wanted him removed from the mine. He stated that it is in their general agreement with Letseng that if the latter wants a particular person removed from the mine, they had to comply. Failure to comply might result in the client cancelling the contract.

14. During cross-examination DW1 was shown exhibit 2 which is the Security Service Agreement between Letseng Diamonds (Pty) Ltd and the respondent and asked if it is correct that the agreement constitutes the entire agreement between the parties in relation to "the provision of security services and personnel in the production area" (see clause 1.7 read with clause 9.1). He agreed that was so. He was asked to point out a clause that empowers him (respondent) to remove a person that Letseng wants removed from the site. He said he had not studied the agreement, but Letseng Diamond had acted in terms of it. When he was pinned down to confirm if it is his evidence that Letseng diamond acted in terms of the service agreement he changed and said:

> *"it was made in terms of our general agreement. There are a lot of other agreements between us and Letseng Diamonds."*

Not only is this answer vague, it also contradicts not only his earlier evidence, but it further conflicts with clause 9.1 of the service agreement which says in part *"this agreement constitutes the entire agreement between the parties in relation to the services and cancels and supercedes all prior negotiations or agreements whether written or oral between (the parties)."*

15. The witness was referred to the clauses of the agreement that regulate the removal of employees of a contractor from the site. The first was clause 4.2 which provides in part:

> "4.2 The mining company shall:
> "(a) Be entitled to give reasonable instructions to the contractor's security personnel but shall not be entitled to alter their job description, dismiss them or to demand that the said security personnel leave the premises save in the circumstances as set out in this agreement." (emphasis added).

> "6.1.2 In the event of an employee of the contractor being found in possession of a diamond or diamonds, without a reasonable explanation therefor, the contractor shall immediately report this to the mining company, the Lesotho Mounted Police and the Commissioner of Mines and thereafter immediately remove the employee from the Production Area and not allow the employee to return to the Production Area until such time as proceedings to be brought against the employee have been terminated in favour of the employee."

16. The question that then followed was whether applicant was found in possession of diamond(s) which would empower the respondent to remove him forthwith in terms of clause 6.1.2? The answer was in the negative. He was asked what then was the basis for Letseng's demand for applicant's removal? He said Letseng said it had investigated the claims of applicant's involvement and carried out polygraph tests which applicant failed. Asked if any further investigations were done he said polygraph tests were part of the investigations and Letseng said it had reason to believe applicant was involved. We will return to this issue of polygraph tests later.

17. In an advance of coming to clause 18 which also deals with removal of persons from the Production Area, it is apposite to start with Mr. Ratau's earlier questions to DW1. It was put to him that he had failed to furnish applicant with a letter from Letseng confirming that Letseng wanted him removed from the

site. He agreed that he had not furnished the letter. It was further put to him that he had not disclosed to applicant or the court for that matter, who the person who wanted applicant removed was. He responded that "I am afraid to disclose the name of client but I received an email communication to that effect."

18. The witness was referred to clause 18 of the agreement which provides:

> *"18 The contractor shall employ in and about the execution of works only such persons as are careful, competent and efficient in their several trades and callings and the Security Manager of Letseng shall be at liberty to object to and require the contractor to remove from the works forthwith any person employed by the contractor in or about the execution of works who, in the opinion of the said Security Manager, misconducts himself or is incompetent or is negligent in the proper performance of his duties and such person shall not be again employed upon the works without the permission of the said Security Manager."*

It was put to him that the removal of the applicant was not done in terms of this clause because applicant had neither misconducted himself nor been incompetent, negligent or improperly performed his duties as is required by this clause. He responded that as far as he was concerned allegation of illegal dealings in diamonds was a misconduct. He was asked if he, as the employer verified the allegations. He said he did not.

19. It was suggested to him that he cannot attest to the accusations because he had no proof of them apart from the polygraph tests he talked about. He conceded that he had no other proof apart from the results of the polygraph tests. The court put to him that since clause 18 is clear that the Security Manager is the one who has the power to order removal of an employee from the mine there is really no reason for him to be reluctant to disclose his identity, if it is him who gave the order. His response was

that this was an Exco decision and the Security Manager is only part of the management.

20. He was asked if when he said he received an email he meant that the person who sent him the email was giving him the resolution of the Exco. He said the email was simply a correspondence which did not purport to be a resolution. It was put to him that infact no demand for the removal of the applicant was ever made by Letseng. He repeated that it was done by email. When he was pressed as to who it was in the Exco who made him the email to remove applicant, he said it was infact the Security Manager, even though he had all along been reluctant to say so. He however, said he would be reluctant to produce the email that demanded applicant's removal.

21. The court made it clear to him that it will be necessary that the email be produced and the implications of inability to produce it will be far reaching on the respondent as the evidence will leave a void. He then promised to go back to Letseng to explain to them the implications if the email is not produced. At the request of Mr. Loubser the matter was stood down to allow him time to consult with the witness about the email. When the court reconvened the witness still did not have the email. Accordingly the hearing was postponed to 29th October 2010 to enable him to go and obtain the email.

22. The case however, did not proceed on the 29th October and only proceeded on the 12th April 2011, when Mr. Ratau had to complete his cross-examination of DW1. He reminded him of the past exchange regarding the email and asked him if he had been able to print a copy for the court's perusal. His response was that his system on which he received the email had crashed and Tsepo Mokotjo who is the Security Manager of Letseng Diamond Mine refused to resent it when he learned that he was going to use it in court. He did not mention why Tsepo was against the use of the email in court.

23. Assuming this was an indication that Letseng wanted to keep out of the saga, the witness could himself retrieve the email from the internet using any machine. The court put it to him that his reason for not being able to produce the email does not make IT sense and it was of course a clear evidence that he was lying all along. He sought a further time to go and engage IT specialists to help him retrieve the email. However, at the resumed heading there was still no email and Mr. Loubser made it clear that he was closing his case and that he had no further documentation that he intended to hand in.

24. With the help of the office of the Registrar, Mr. Tsepo Mokotjo the Security Manager of Letseng Diamond Mine was subpoenaed to come and testify on the meeting of the Exco which resolved that applicant be removed from Letseng Diamond Mine and bring minutes evidencing same. He was further required to bring the copy of the email that he sent to Stallion Security Lesotho demanding the removal of applicant from Letseng Diamond Mine. Finally he was to bring evidence if any that would show that applicant was ever found in possession of diamonds.

25. Mr. Mokotjo testified that as Security Manager he was part of the Exco. He testified further that he was not aware of a meeting of the Exco that resolved that the applicant be removed from Letseng Diamond Mine. It follows that he could not produce any minutes to that effect. He testified further that he as Security Manager never sent an email to Stallion Security Lesotho demanding the removal of the applicant from Letseng Mine. He accordingly could not produce a copy of such an email because it did not exist.

26. On the question of involvement in illegal diamond dealing he testified that Letseng Diamond did have a rumour that applicant was involved in illegal diamond dealings off the mine. He testified that Letseng Diamond Mine failed to verify the rumour, but shared the information with Stallion Security and asked them to help with investigations. The respondent and not Letseng Diamond Mine took applicant to Bloemfontein where they put him through lie detector tests.

27. Following the tests Mr. Young, the Regional Manager, sent him an email which said:

> *"Hi Ntate Tsepo*
> *How is everything on the mine.*
> *Please see attached polygraph report. Deception was detected. I have given instruction that he is not to return to the mine until further notice."*

He went on to avail the copy of that email and it was marked "exhibit 1". This witness's testimony was not challenged in the slightest under cross-examination. It therefore stood intact and it would seem, put to an end to DW1's lies about Letseng Diamond Mine having demanded the removal of the applicant whether at the meeting of the Exco or by email allegedly sent to him.

28. This witness's testimony shows in no uncertain terms that Oostehuizen lied to applicant when he said Letseng demanded his removal therefore he had to be retrenched. He continued to lie before this court about Letseng having conducted polygraph test on applicant when it was the respondent that carried out the tests. He lied about Letseng Mine being the cause of applicant's dismissal when it was the respondent itself which decided to bar him from the mine basing themselves solely on polygraph test results.

29. Applicant's own testimony was essentially to confirm the common cause facts surrounding the termination of his contract and the consultation that followed. He testified that he decided to sue the respondent because it failed to provide him with the letter from Letseng Diamond confirming its demand that he be removed from the mine. He averred that he signed the agreement that all options had failed and that the only option remaining is retrenchment because of respondent's misrepresentation that it was Letseng which demanded that he be removed from the mine. If he had known the true facts as stated by PW1 (Tsepo Mokotjo) he would not have signed the agreement, he testified.

30. He testified further that since he was employed on permanent and pensionable terms he had expected to serve the company for as long as his health permitted. He has applied for jobs at Kao, Mothae and Liqhobong diamond mines but the reason for his departure at Letseng has made getting a job very difficult. He remains unemployed today. He prayed for 18 months salary as compensation as he considers that a reasonable time within which to look for and hopefully find a job.

SUBMISSIONS AND CONCLUSIONS

31. Mr. Ratau submitted that he had no challenge to the procedural aspect of applicant's retrenchment as he considered a fair procedure to have been followed. He concentrated his energy and effort on the substantive fairness which he said is lacking because the respondent has failed to prove existence of valid reason for the applicant's retrenchment. Indeed the unfairness of applicant retrenchment on substantive ground sticks out like a sore thumb when regard is had to the fact that clause 4.2(a) clearly provides that the mining company may not require the contractor to remove an employee from the mine otherwise than in terms of the service agreement between the parties.

32. Clauses 6.1.2 and 18 provide circumstances in which an employee may be debarred from the mine. Respondent's key witness failed to establish that applicant's case fell under any of the clauses that may entitle the contractor to remove him or the Security Manager to require that he be removed. Instead Mr. Oostehuizen sought to fabricate a lie that the mining company acted in terms of a general agreement. This was a transparent lie because clause 9.1 clearly says the agreement constitutes the entire agreement between the parties and that it cancels and supercedes all prior agreements.

33. Counsel for applicant submitted further that the agreement entered between the parties that they agree that retrenchment is the only option was entered into as a result of misrepresentation as such it cannot help the case of the respondent. He referred to the case of Bandach .v. United

Tobacco Co. Ltd (2000) 21 ILJ 2241, where the Supreme Court of Appeal of South Africa accepted appellant's cancellation of a settlement agreement into which he was induced to enter by intentional misrepresentation of his employer that his position had become redundant when it infact had not. In his words the learned Judge of Appeal stated from pp2246-2247 J-AB:

> *"In the light of the finding of the Industrial Court that the misrepresentation was committed intentionally, he was entitled so to do (i.e. to resile from the settlement agreement) and his claim was rightly upheld in the Industrial Court. (see also for analogons cases Unilog Freight Distributers (Pty) Ltd .v. Muller 1998 (1) SA581 (SCA) esp. at 591 I – 592 B (1998) 19 ILJ 229; Mediterranean Wollen Mills .v. SA Clothing & Textile Workers Union 1998 (2) SA1099 (SCA) Esp at 1103 D-J (1998) 19 ILJ 31*
> *It follows that the alleged settlement agreement could not validly be raised by UTC as a defence."*

The above quoted case is in all fours with the present matter. Clearly the applicant cannot be held to the agreement that he was intentionally misled to sign in the believe that the mining company had ordered his removal when that was not the case.

34. Mr. Loubser for the respondent submitted correctly that he agrees with all that had been said by Mr. Ratau save that he wanted the court to find as a fact that Letseng Diamond Mine did make a demand that applicant be removed from the mine. He contended that Mr. Mokotjo's denial is a convenient strategy to save his company from possible claims by the applicant. There would be no evidential basis to conclude as Mr. Loubser suggested that a demand was made by Letseng for applicant's removal.

35. Mr. Oostehuizen who had to furnish the court with such evidence told lies from the beginning to the end. The worst was when he purportedly could not produce the email allegedly sent to him by Mr. Mokotjo because his laptop had allegedly been stolen or crashed. If indeed he was sent such an email he did

not have to rely on Mr. Mokotjo to be able to produce it. On the other hand Mr. Mokotjo was evidently a truthful witness who had nothing to hide but to tell the truth of what he knew and what he did not know.

36. There is no doubt that the termination of applicant was substantively unfair as it was based on respondent's witness's deliberate falsehood that Letseng Diamond Mine had demanded his removal. Mr. Ratau contended that the applicant is justified in praying as he has done for 18 months salary as compensation in view of his long term employment which was unfairly and unlawfully disrupted. Mr. Loubser on the other hand conceded that if the retrenchment is found to be unfair as has been the case compensation ought to be assessed. He submitted that whatever compensation is ordered must be reduced by the M5,000-00 salary for the post at Oote Mine which applicant refused to accept. He averred that had applicant accepted that position he would have mitigated his loss by that amount.

37. Mr. Loubser's submission is in our view only arithmetically correct. It however lacks legal validity for the reason that the offer at Oote mine is all part of the illegal misrepresentation which we have found that applicant is rightly rejecting whatever terms or arrangements were made under it. By the same token the respondent cannot rely on anything it sought to do under the guise of that deception for to do so would be continuing the deception and the misrepresentation.

38. It is significant however that Mr. Loubser did not seek to challenge the proposed compensation of 18 months' salary except to argue that the quantum awarded should be reduced by the monthly M5,000-00 proposed salary for the Kimberly post. In his submissions Mr. Ratau submitted correctly in our view that the applicant was justified to refuse the reduced salary. As Francis A.J remarked in La Vita .v. Boymans Clothiers (Pty) Ltd (2001) 22 ILJ 454 at 461:

> *"…..a change to terms and conditions must be consensual. An employee whose position is rendered redundant and*

whose terms and conditions are changed may not be interested in the changed position.
Therefore he cannot be forced to accept the position. The prohibition on changing terms and conditions of employment unilaterally means that where such a change has to occur it must be by agreement and full and proper consultation must have taken place."

39. The history of this case in respect of offer of alternative positions to applicant is coloured with non-consultation with applicant on the change to his contract and the remuneration package offered. From Mothae to Oote the management never once consulted with him on the changes to his contract. They simply unilaterally imposed the drastic changes as well as reduction in salary. This court cannot help them perpetuate that unilateralism by seeking to hold applicant bound by the terms imposed without consultation with him. In short we agree with Mr. Ratau that applicant was justified to refuse to accept the unilaterally imposed reduced salary. (see also Makhobotlela Nkuebe .v. Metropolitan Lesotho Ltd. LC79/06 (reported in Lesotho Labour Court SAFLII cases: December 2009.)

40. Applicant has testified that he took steps to mitigate his losses by applying for security jobs at neighbouring mines to Letseng Diamond Mine. He has not succeeded due to the reason for leaving Letseng Diamond Mine. Asked why he only applied for security work he said that was his profession. He was not controverted in any way whatsoever. In the circumstances this court has no reason not to order that he be compensated as he requested.

41. One final comment is that this court is not at all pleased with DW1's blatant lies under oath. Even when he realized that he had been exposed he offered no apology. This is a case where the court would have no hesitation to make a costs order for what I consider to have been clear frivolity on the part of DW1. We are constrained by the fact that Mr. Ratau did not place such a prayer on record at the close of his submissions which might suggest that he abandoned the prayer for costs. Accordingly, it is ordered that the;

(a) The purported retrenchment of applicant constitutes an unfair retrenchment.
(b) Respondent pay 18 months' salary as compensation for the unfair retrenchment.
(c) The order in (b) above must be complied with within 14 days of the handing down of this award.
(d) There is no order as to costs.

THUS DONE AT MASERU THIS 25TH DAY OF AUGUST 2011

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RATAU**
FOR RESPONDENT: **ADV. LOUBSER**