

IN THE LABOUR COURT OF LESOTHO

LC/REV/81/09

HELD AT MASERU

In the matter between:

‘MALITEBOHO JANE

APPLICANT

and

**PEP STORES (PTY) LTD
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 15/03/11

Application for review of the DDPR award - Applicant claiming entitlement to severance pay on two grounds: (i) that severance pay was more advantageous than provident fund;(ii)that 1st respondent’s exemption certificate did not affect her as it was issued subsequent to her termination of employment - The issue is then whether the Arbitrator committed an irregularity in considering the said exemption certificate - Answer in the affirmative - Retrospectivity negates legality and fairness.

1. This dispute revolves around the payment of severance pay. It is common cause that the applicant had been in 2nd respondent’s employ from 28th November, 1987 to 21st June, 2007 when she tendered her resignation. She contends that she is entitled to severance pay in terms of Section 79 (1) of the Labour Code Order, 1992 (the Code) as she had completed nineteen (19) years continuous service in 1st respondent’s employ. This Section provides that:

An employee who has completed more than one year 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. The 1st respondent has declined to pay the severance pay demanded by the applicant on the basis that it has been exempted from paying severance pay in terms of Section 79 (7) of the Code as amended by the Labour Code (Amendment) Act, 1997. The Section provides that:

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

The applicant is disputing 1st respondent's contention on the ground that at the time that she tendered her resignation, the 1st respondent had not yet exempted from the effects of Section 79(1) of the Code, and she therefore qualified to be paid severance pay. It is indisputable that the exemption certificate had been issued on 27th October, 2008 when the applicant had resigned on 21st June, 2007.

3. Parties having failed to agree on the payment of severance pay, the applicant sought the intervention of the Directorate of Dispute Prevention and Resolution (DDPR). The DDPR ruled in favour of the 1st respondent. It conceded that the exemption certificate had indeed been issued subsequent to applicant's termination of employment but contended that it affected the applicant because ***"it would not be sensible to get an exemption prior to termination of employment because an employer would not be in a position to know whether pension benefit was better than severance pay or not"*** (paragraph 8 of the award).

4. The applicant is now before this Court to seek the review of this award. She has premised her claim on mainly two grounds; firstly, that severance pay due to her provided more advantageous benefits than provident fund benefits; secondly, that the exemption certificate issued by the Labour Commissioner came subsequent to her resignation and therefore did not affect her. She submitted that by entering judgment in favour of the 1st respondent in these circumstances the learned Arbitrator

"failed to apply her mind to the facts presented before her, or has failed to apply her mind to the facts presented before her that at the time that

applicant was terminating her employment there was no exemption certificate in place;

Secondly that;

The learned Arbitrator erred in law in holding that the exemption granted by the Labour Commissioner on 27th October, 2008 had any bearing/application to the applicant who resigned/terminated her services with the respondent way back in June the previous year is valid/ applicable and thereby giving it a retrospective effect.

5. In reaction, 1st respondent's Counsel raised three points *in limine*. Firstly, that the matter is not reviewable as it does not challenge irregularities in the proceedings. According to him, review proceedings could only stand if the applicant had alleged that the DDPR reached a conclusion that no reasonable Court could arrive at. Secondly, he objected to the form of applicant's papers in that she had filed a notice of motion instead of an originating application as required by Labour Court Rules. He underscored that it was highly irregular for parties to adopt High Court Rules in the Labour Court. Thirdly, that the argument that applicant's severance pay package offered more advantageous benefits than the provident fund benefit was never raised before the DDPR, and cannot be raised at the review stage, and again that it was improper for the applicant to fragment the provident fund in terms of considering only the employee's contribution in the assessment of which benefit was more beneficial. Regarding the exemption, Counsel objected that the validity of the exemption certificate was never an issue at the DDPR. He further contended that it's absurd that the applicant applies for severance pay when she had already received her provident fund benefits. He prayed that on the aforementioned grounds, the application for review be dismissed.

6. THE LEGAL POSITION

6.1 WHETHER MATTER REVIEWABLE

The Court shall commence by ascertaining whether the matter is reviewable or not as raised by the respondent's Counsel. Section 228F of the Labour Code (Amendment) Act, 2000 as amended by the Labour Code (Amendment) Act, 2006 is instructive. The Section provides in Subsection (3) that:

The Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision.

The applicant has alleged that the matter be reviewed as she felt that the Learned Arbitrator committed an error in law. The Court is therefore enjoined to look into whether there was indeed a mistake of law as envisaged by the above Section. This point *in limine* is therefore dismissed.

6.2 FAILURE TO OBSERVE LABOUR COURT RULES

6.2.1 On the point that applicant's pleadings infringe upon Labour Court Rules by styling her review application a "***notice of motion***" as opposed to an "***originating application***": Institution of proceedings before the Labour Court is by an originating application (Form LC1) as prescribed by Rule 3 of the Labour Court Rules, 1994. The applicant therefore ought to have filed her papers in accordance with Form LC 1. As officers of this Court we are enjoined to uphold its Rules. However, the Court has been granted a discretion to condone any violation of the Rules. Rule 7(2) provides that:

Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Court otherwise directs.

6.2.2 As with any judicial discretion, it has to be exercised judicially and fairly. Having heard 1st respondent's Counsel's submissions on the issue, and having considered the circumstances surrounding this case the Court finds itself inclined to condone the breach. Among factors that influenced it were that the 1st respondent failed to show what prejudice it has suffered by applicant's failure to adhere to this Rule. Generally, we do not find the infringement to have been so grave as to warrant the invalidation of these proceedings. As mentioned in a number of our cases, Labour Courts have been established as Courts of equity, enjoined to dwell more on substantive justice than on legal technicalities. We drew inspiration from cases such as ***Society of Bank Officials v First National Bank of Southern Africa (1996) 17 ILJ, 135 at 139*** in which the Court held that:

Equity will be ill-served if this Court was to allow its quest for the promotion of fairness, indeed its statutory duty to advance fairness under its equitable jurisdiction to be frustrated by a narrow legalistic approach to matters before it. Only in extreme cases should the Court permit technical hurdles to block its pursuit of fairness.

6.2.3 This case was quoted with approval in a number of our decisions including; *Econet - Telecom Lesotho (Pty) Ltd v Seqao Phenya & the DDPR LC/REV/10/10 (unreported)*, and *Tebello Thandazo & 6 Others v Nien Hsing International LC/39/10*. In determining whether or not to condone a breach of the Rules, the Court is cautious not to condone flagrant disregard of its Rules. Each case is considered on its merits. The point *in limine* in respect of the non - observance of Labour Court Rules is dismissed. The Court will now consider the merits of the case. It will not consider the point raised by applicant's Counsel on the that severance pay offered more advantageous than provident fund, on the basis that only the employee's contribution should be taken into consideration. It is irrelevant, and will lead to the Court losing focus on the salient points of the case.

6.3 WHETHER THE APPLICANT IS ENTITLED TO SEVERANCE PAY

6.3.1 Entitlement to severance pay was initially regulated by the now repealed Wages and Conditions of Employment Order, 1978 in terms of which only persons earning less than Two Hundred and Forty Maloti (M240.00) were entitled to severance pay. This limit was raised to One Thousand Maloti (M1,000.00) in 1991 through the Wages and Conditions of Employment (Amendment) Order, 1991. When the Code came into operation on 1st April, 1993 it dispensed with these ceilings. To this end, Section 79(1) of the Code provides that:

An employee who has completed more than one year 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.

It had no conditions, hence the Court in *Ntahli Matete and Another v Lesotho Highlands Development Authority and Another LC 131/95(unreported)* had to resort to the ILO Convention No.158 on Termination of Employment in determining whether the applicants were entitled to both gratuity and severance pay. This gap was filled through an amendment to the Labour Code - the Labour Code (Amendment) Act, 1997. It introduced Subsections (7) (8) and (9) to Section 79 of the Code. The amendment provided, to the extent relevant to this case, that:

(7) Where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in subsection (1) he may submit a

written application to the Labour Commissioner for exemption from the effect of that subsection.

(8) ...

(9) If upon considering an application under subsection (7) the Labour Commissioner is satisfied that the scheme operated by the employer offers better advantages to the employee, the Labour Commissioner shall exempt the employer from the effect of subsection (1).

In a nutshell, if the applicant qualifies for severance pay by virtue of having more than one year's continuous service, her entitlement becomes conditional upon whether the employer had an exemption certificate issued by the Labour Commissioner and whether it affected the particular claimant. The test is two tiered.

6.3.2 In this case before us, the applicant passed the first test of Section 79 (1) of the Code, as she had accumulated a nineteen years' continuous service with the employer. Then the second leg of the test is whether the employer possessed an exemption certificate that exonerated him from paying applicant severance pay. If we may remind ourselves, the 1st respondent was granted an exemption certificate against the payment of severance pay on 27th October, 2008, and the applicant had resigned on 21st June, 2007. The issue faced by the learned Arbitrator then was whether a claim for severance pay that arose before 27th October, 2008 before the exemption certificate was issued to the employer affected the applicant. Was it proper for her to have ruled that ***"it would not be sensible to get an exemption prior to termination of employment because an employer would not be in a position to know whether pension benefit was better than severance pay or not"***? Applicant's Counsel contends that this was an error of law on the part of the learned Arbitrator.

6.3.3 We agree with applicant's Counsel. 1st respondent's Counsel had argued that it was irrelevant whether the exemption was granted prior or subsequent to the termination of employment. The applicant was by this time no longer 1st respondent's employee and the exemption could not apply to her. Again, it would only be fair for employees to know whilst in employment what benefits would accrue to them in the event of termination of employment. It only makes economic sense in terms of preparing oneself for eventualities such as retirement or any other form of termination of employment. The application of these statutory guidelines regarding severance pay has been widely traversed by both the Labour Court and

the Labour Appeal Court. It was held by this Court in ***Ben Heqoa v Browns Cash and Carry and Another LC/REV/331/06*** (reported in www.saflii.org/ls) that Section 79 (7) of the Code (as amended) does not empower the Labour Commissioner to grant exemptions retrospectively, and further that by its nature retrospectivity undermines the principles of legality.

6.3.4 This ruling was confirmed in ***Kunene v JD Group Lesotho (Pty) Ltd and Another LC/REV/386/06*** (reported in www.saflii.org/ls), with facts similar to the case before us. In that case, the applicant had been employed by the 1st respondent on 30th September, 1983. He resigned on 4th June, 2004 after an effective service of twenty-one (21) years. He then claimed severance pay in terms of Section 79 of the Code. The employer declined to grant same citing an exemption certificate issued in October, 2004, some five (5) months after applicant's resignation. The Court held that the applicant was entitled to the payment of severance pay because when she resigned the exemption was non-existent. The Court viewed this to be a mistake of law that materially affected the learned Arbitrator's decision rendering the award grossly unreasonable. As envisaged by Section 228F (3) of the Code (as amended). In a recent decision, the Labour Appeal Court took exception to exemption certificates that are purported to operate retrospectively - See '***Makhiba Ts'oeu v City Express and 2 Others LAC/REV/01/10*** (unreported).

6.3.5 On the basis of the authorities cited above the Court finds the learned Arbitrator to have misconstrued the provisions of Section 79 of the Labour Code, thereby committing a mistake of law that materially affected her decision. The exemption granted to the 1st respondent on 27th October, 2008 could not affect the applicant as she had resigned on 21st June, 2007 prior to it coming into effect. At the time the applicant resigned the 1st respondent did not possess an exemption certificate. The Court confirms the principle that an exemption certificate issued subsequent to an employee's termination cannot affect that particular employee as doing otherwise would give the said certificate a retrospective application. Retrospectivity as confirmed in the cases cited above negates legality and fairness.

6.3.6 The Court has duly taken cognizance of the fact that the applicant has already received the proceeds from the provident fund, but on the basis of the legal principles aforementioned have no alternative but to order that the applicant be paid severance pay. The employer is only protected from paying both where he/she has applied and been granted an exemption. It may sound unfair, but it is the legal position. The Legislature repealed Section 10(2) of the Wages and Conditions of Employment (Amendment) Order, 1991 which provided that;

Where the employee receives a lump sum payment from a contributory scheme, to which both the employer and employee contributed, over and above his own contributions, that amount will count towards and be offset against the redundancy, severance or long service payment...

It is unfortunate that the 1st respondent had an exemption certificate dated 4th August, 2003 declared invalid on the ground that it had been signed by an official other than the Labour Commissioner - *See Liakae 'Mamosa Ramothamo and 3 Others v Pep Stores and 3 Others LAC/REV/02/07 (unreported)*.

6.3.7 The award of the DDPR in E 024/09 is reviewed and set aside. The 1st respondent is ordered to pay the applicant severance pay due, subject to the determination of whether she qualified for it under the Wages and Conditions of Employment Order, 1978. As it is, the applicant had not shown how she had arrived at the amount of severance pay claimed. Payment to be effected within thirty (30) days from the handing down of this judgment.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 15TH DAY OF MARCH, 2011.

F.M. KHABO
DEPUTY PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR THE APPLICANT : MR. P.M. MOSUOE
FOR THE RESPONDENT: ADV. L. MOLETE