

IN THE LABOUR COURT OF LESOTHO

LC/REV/69/10

HELD AT MASERU

In the matter between:

ECONET TELECOM LESOTHO (PTY) LTD

APPLICANT

and

DINAH RAMONA  
DIRECTORATE OF DISPUTE PREVENTION  
AND RESOLUTION

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

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## ***JUDGMENT***

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***Date: 9<sup>th</sup> August, 2012***

***Severance payment - Review of an arbitral award - Where the Arbitrator had ordered payment of both severance pay and proceeds from a pension scheme in circumstances where the employer had been granted an exemption certificate by the Labour Commissioner in terms of Section 79 (7) of the Labour Code(Amendment) Act, 1997 - The employer deemed this irregular and contended that the employee is only entitled to severance pay and her own contribution to the fund to the exclusion of the employer's contribution thereto- Court finds the award irregular and sets it aside.***

1. This review application raises the question whether an employee is entitled to receive both severance pay and pension in circumstances where an employer has been exempted from payment of severance pay in terms of ***Section 79 (7) of the Labour Code (Amendment) Act, 1997.***

2. Facts surrounding this case are common cause, and may briefly be summarised as follows: 1<sup>st</sup> respondent's services were terminated by mutual arrangement between the parties in 2009 on grounds related to operational requirements of the company. The 1<sup>st</sup> respondent had seized an offer by the applicant for voluntary retirement. Upon

termination of her services she received *inter alia* proceeds from a pension scheme operated by the applicant comprising:

**M87, 244.00** being the employer's contribution to the fund; plus

**M 61, 076.35** representing the employee's contribution to the fund.

3. It is also common cause that the 1<sup>st</sup> respondent had continuously been in the employ of the applicant for twenty-eight (28) years, a period which *prima facie* entitled her to severance pay in terms of **Section 79 (1) of the Labour Code Order 1992**, which provides that:

***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.***

Her severance pay was calculated at One Hundred and Forty-Five Thousand, Nine Hundred and Sixty-Six Maloti, Fifteen Cents (M145, 966. 15).

4. It however emerged that the applicant company had been granted an exemption certificate sought in terms of **Section 79 (7) of the Labour Code (Amendment) Act 1997** by virtue of which it was exempted from paying severance pay where the pension fund it operated appeared to offer a higher benefit than severance pay. The said Section reads:

***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 exemption certificate had been obtained on 24<sup>th</sup> January, 2005 prior to 1<sup>st</sup> respondent's termination of employment.

5. The applicant submitted in its papers that upon realising that the severance package offered higher benefits than those offered by the pension fund, it decided to pay the 1<sup>st</sup> respondent the severance pay due but deducted its own pension contribution from the amount which as aforementioned was equivalent to Eighty - Seven Thousand, Two

Hundred and Forty- Four Maloti (M87, 244.00). Responding to the Court's enquiry why they in the first place paid out the whole pension benefit only to come back and deduct their contribution, it was explained that upon being informed that the employment relationship had been severed, the Pension Fund Administrator had been quick to remit the pension proceeds paid directly to the 1<sup>st</sup> respondent.

6. It is applicant's case that the amount payable for severance pay exceeded the pension benefit, thereby offering a higher benefit. Hence, they contend that the 1<sup>st</sup> respondent is entitled to the payment of severance pay. They however argued that with the 1<sup>st</sup> respondent having already received her pension, they are entitled to deduct a portion representing the company's contribution to the pension fund from the total amount of the severance pay due. It is this deduction that is the bone of contention between the parties.

7. The 1<sup>st</sup> respondent insists that she is entitled to the full pension fund package as well as severance pay. Dissatisfied with the deduction by the employer of its contribution, she lodged a claim before the Directorate of Dispute Prevention and Resolution (DDPR) claiming that she qualified for both severance pay, the employer's contribution to the fund together with the employee's. The learned Arbitrator upheld this contention and ordered the applicant to pay the 1<sup>st</sup> respondent its own contribution to the fund which it had deducted from the severance package. In a nutshell, the learned Arbitrator ruled that the 1<sup>st</sup> respondent was entitled to both severance pay and all the monies that accrued from the pension fund.

8. The learned Arbitrator made this finding on the basis that the two benefits *viz*, pension and severance pay were separable and **"cannot be mixed."** The applicant is before this Court to have this ruling reviewed, corrected and set aside arguing that the 1<sup>st</sup> respondent was not entitled to receive the company's contribution over and above severance pay because the latter had proved to offer more advantageous benefits. They submitted that the learned Arbitrator had committed a reviewable error in that by paying both pension and severance pay to the 1<sup>st</sup> respondent, it exposed the employer to a double payment of benefits thereby unfairly enriching her. As far as they were concerned the latter was entitled to her own contribution to the fund plus full severance pay only. As aforementioned, they had been granted an exemption certificate. The letter read;

**LABOUR DEPARTMENT  
PRIVATE BAG A116  
MASERU 100**

**24<sup>TH</sup> JANUARY, 2005**

**LB/F/12**

***The Chief Human Resource Officer  
Telecom Lesotho  
P.O. Box 1037  
Kingsway  
Maseru 100***

***Dear Sir/Madam,***

**RE: APPLICATION FOR EXEMPTION FROM THE EFFECTS OF  
SECTION 79 OF THE LABOUR CODE 1992**

***Reference is made to your letter dated 17<sup>th</sup> January, 2005 in which you requested to be exempted from complying with the provisions of Section 79 (1) of the Labour Code Order, 1992.***

***We have looked at the regulations of the pension fund scheme and have satisfied ourselves that it offers more advantageous benefits than severance pay.***

***Telecom Lesotho is therefore exempted from the effects of Section 79 (1) of the Labour Code Order 1992 subject to the condition that should in any event severance pay prove to be more advantageous than benefits under the scheme the provisions of Section 79 (1) shall be invoked and the exemption shall not apply. In such events (sic) therefore, the employees shall be entitled to severance pay and their contribution to the scheme (emphasis mine).***

***Yours faithfully,***

**B.Bitso  
LABOUR COMMISSIONER a.i**

The last sentence of this letter is telling. The applicants had actually been guided by the office of the Labour Commissioner on how the scheme operated.

## **SEVERANCE PAY IN CONTEXT**

9. Severance payment as a concept derives from the *ILO Convention 158 Concerning Termination of Employment at the Initiative of the Employer* which provides in Article 12 (1) that;

*A worker whose employment has been terminated shall be entitled, in accordance with national law and practice to -*

*(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund...*

Nowhere in the DDPR record did the 1<sup>st</sup> respondent challenge the validity of applicant's exemption certificate. It therefore follows that as far as this case is concerned, it is alive. The case is therefore distinguishable from *Ben Heqoa v Browns Cash & Carry and the DDPR LC/REV/331/06 (reported in SAFLII)*; *Maliteboho Jane v Pep Stores (PTY) Ltd LC/REV/81/09*; *Kunene v JD Group Lesotho (PTY) Ltd & Ano., LAC/REV/98/05 - LAC/REV/386/06 (reported in SAFLII)*; *Telecom Lesotho (PTY) Ltd v Seeiso Leche C of A (CIV) No. 20 /2010 (reported in SAFLII)*; *Seeiso Leche v Telecom Lesotho(PTY) Ltd LAC/REV/26/09 (reported in LESLII)* where the validity of the exemption certificate was an issue. We wish to underscore the principle that each case is assessed on the particular circumstances surrounding it.

10. In *Ben Heqoa (supra)* this Court reviewed the decision of the DDPR where it had taken into consideration an exemption certificate obtained subsequent to the employee's termination of services. The Court held that this was irregular as retrospectivity undermined the principle of legality. The exemption certificate was therefore ruled to have been invalid and of no force or effect in respect of this employee's circumstances. Hence, the Court ordered that the applicant be awarded **both** payment of severance pay which had been withheld by the employer and his pension benefits. The learned Arbitrator relied on this very same judgment in reaching his decision that the 1<sup>st</sup> respondent was entitled to both severance pay and her full pension benefits. He quoted my learned brother the late Lethobane P., (then President of the Labour Court) when he pointed out that ***"In the absence of an express exemption, the legal relations between applicant and 1<sup>st</sup> respondent as of 8<sup>th</sup> January, 2005, when they parted were that the applicant qualified for both severance pay and benefits payable in terms of the provident fund."*** With all due respect to the learned Arbitrator, this judgment was cited out of context.

11. The case is clearly distinguishable. The exemption certificate was being applied retrospectively as it had been issued subsequent to the employee's termination of services. In *casu*, the exemption certificate had been obtained on 24<sup>th</sup> January, 2005 when 1<sup>st</sup> respondent's services were terminated in 2009. Of significance is the fact that the exemption certificate was never an issue before the DDPR. The learned Arbitrator further relied in support of his award on the Labour Appeal Court decision of *Seeiso Leche v Telecom Lesotho (Pty) Ltd (supra)*. In this case, the applicant had challenged the validity of the exemption certificate granted to the respondent on the basis that he had not been consulted prior to its issuance. As far as he was concerned, this violated the *Audi Ulteram Partem Rule*. The Labour Appeal Court upheld this contention which was further confirmed by the Court of Appeal in *Telecom Lesotho v Seeiso Leche (supra)*. The decision was based on the particular circumstances of the case at the time. As aforementioned, the validity of the exemption certificate was never an issue before the DDPR in *casu*.

12. If exemption certificates are undermined, the amendment to the Code *viz.*, the *Labour Code (Amendment) Act, 1997* would be a futile exercise. It is significant to note that as far back as 1996 this Court found it inappropriate to order both gratuity and severance pay in the case of *Ntali Matete & Lebohang Bosiu v Lesotho Highlands Development Authority LC/131/95*. The Court ruled that the applicants could not be paid severance pay having already been paid gratuity which offered better benefits than severance pay. In interpreting *Section 79 of the Labour Code Order, 1992*, the Court read the principle of fairness into it. This was prior to the promulgation of the *Labour Code (Amendment) Act, 1997* which amended the Labour Code Order, 1992 to make provision for exemption certificates in order to bring in the element of equity between the employer and the employee in the award of terminal benefits.

### **IS THIS AWARD REVIEWABLE?**

13. In our view, the learned Arbitrator failed to apply his mind to the case that was before him and this renders his award reviewable. Had he applied his mind to the case he could have ascertained that it is distinguishable from the two judgments of *Telecom Lesotho (PTY) Ltd v Seeiso Leche (supra)* and *Ben Heqoa (supra)* which he had relied upon for his determination. We find the award irregular on grounds of unreasonableness. Gross unreasonableness has been held to constitute a ground for inference by the Court that the person on whom a discretion was conferred did not apply his mind to the matter – see *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa, 1997 Juta & Co., at p. 939*. The review application succeeds and the DDPR award in AO902/09 is reviewed and set aside. The Court finds the applicant only liable to pay severance pay and the employee's contribution to the fund.

There is no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 9<sup>TH</sup> DAY OF AUGUST, 2012.**

**F.M. KHABO**  
**DEPUTY PRESIDENT**

**L. MATELA**

**I CONCUR**

**MEMBER**

**R. MOTHEPU**

**MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR THE 1<sup>st</sup> RESPONDENT:**

**ADV., S. RATAU  
ADV., P.M MOSUOE**