

HELD AT MASERU**In the matter between:**

**SHAHID HASSAM
SEMAKALENG LIPHAPANG
MAMMUSA MAEMA
MOTSEKO MOTSEKO
'MAMOSEMBO MPHEPHOKA
MOHLALEFI KHASU**

**1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT
5th APPLICANT
6th APPLICANT**

And

LEGAL VOICE (PTY) LTD

RESPONDENT

JUDGEMENT

Date: 4th September 2013

Claims for unfair dismissal based on retrenchment, in respect of all Applicants. Additional claims for underpayments based on unfair demotion, unlawful deductions, unpaid leave and unpaid severance payment, in respect of 1st Applicant only. Court mero muto raising two preliminary points of misjoinder and want of jurisdiction. Parties making their addresses on the matter and Court finding a misjoinder and ordering the separate referral of 1st Applicant's claim. Court directing parties to have the matter set down in respect of 2nd to 6th Applicants claims. Court finding it unnecessary to pronounce itself on its jurisdiction over claims that are no longer for its determination. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. Applicants have referred claims for unfair dismissal occasioned by their retrenchment from employment. In addition to the retrenchment claim, 1st Applicant has also referred claims for underpayments occasioned by an alleged act of unfair demotion, unlawful deductions, unpaid leave and unpaid severance payment. In view of these additional claims, the

Court then raised two preliminary points. Firstly, that 1st Applicant had been improperly joined in these proceedings. Secondly, the lack of jurisdiction in respect of 1st Applicant's claims for unlawful deductions, unpaid leave and unpaid severance payment, as they did not comply with section 227 (5) of the *Labour Code Order 24 of 1992*, as amended.

2. In raising these points, We relied on the authority in *Thabo Mohlobo v LHDA LAC/CIV/A/02/2010*, that a court does not only have a right, but is in law obliged, to raised a point of law where it is apparent on the pleadings. Both parties were given the opportunity to make representation on the issue. Applicants were represented by Advocate Mosuoe while Respondent was represented by Advocate Nyapisi. Our ruling is thus in the following.

SUBMISSIONS AND ANALYSIS

3. On the issue of misjoinder, it was submitted on behalf of 1st Applicant that he had been properly joined as an applicant to these proceedings. It was stated that the main claim is that of unfair dismissal due to an act of retrenchment and that the rest of the Applicant's claims are ancillary thereto. It was added that these claims arose simultaneously with other applicant's claims and are between the same Respondent, which is the employer of all Applicants. It was maintained that on these premises, the joinder is proper.
4. In reply, Advocate Nyapisi submitted that in terms of the originating application, 1st Applicant referred two different claims. It was said that the first claim is the unfair dismissal claim while the second one is unpaid monies claim, which relates to underpayments, unlawful deduction, unpaid leave and unpaid severance payment. It was argued that it cannot be accurate that these additional claims are ancillary to the retrenchment, as they do not arise from the retrenchment of applicants. The Court was referred to paragraphs 4 and 10, of the originating application, where the claims have been explained. It was argued that it is thus improper to join 1st Applicant in these proceedings, even if the respondent party is the same.

5. On the issue of jurisdiction, Advocate Mosuoë submitted that the claims must be taken holistically and not individually. On this premise, he argued that having referred the main claim with the DDPR for conciliation, it was not necessary to refer the other claims, particularly because they are ancillary to the main claim. In reply, Advocate Nyapisi submitted that the it was clear that section 227 (5) had not been complied with. He submitted that in the circumstances, 1st Applicant can apply for a separation of his claim from the rest of the Applicants. He added that this will not be prejudicial to Applicant in any way, as his claims will still be entertained.
6. In law, there are three scenario in which applicants may be joined in the same proceedings and these are,
 - Where their claims arise out of the same transaction or occurrence; or
 - Where a common question of law or fact may arise in the proceedings; or
 - If it appears that their joining in the same proceeding may promote the convenient administration of justice.
7. We agree with Respondent that the 1st Applicant has referred two distinct and independent claims, namely those of retrenchment and unpaid monies. If these claims are both distinct and independent, it cannot be accurate that the unpaid monies claims are ancillary to the main claim of retrenchment. A claim is said to be ancillary to another if it arises out of that other claim or is a consequence of the same claim. In essence, it is a claim that is dependent upon the primary claim. In Our view, these circumstances are not present *in casu*.
8. We say this because, it is reflected in the originating application, in particular, at paragraphs 4 and 10, that the two claims are distinct and independent of each other. While, paragraph 4, on the one hand, relates to all applicants claims for retrenchment, paragraph 10, on the other hand, relates to 1st Applicant's claims for unpaid monies. Clearly, these are two different claims whose basis is also different. A retrenchment claim arises out of the termination of an employment contract due to the operational requirements of the employer, while an unpaid monies claim arises out of failure on the part of the

employer to pay the monies to an employee, when due. These claims arise out of dissimilar causes of action.

9. Further, even the questions of law or fact that may arise in the proceedings are different in both claims. In respect of a claim for retrenchment, the issue would relate to the fairness or otherwise of the termination of the contract of employment, while in respect of a claim for unpaid monies, the issue would related to the entitlement of the concerned employee to the monies claimed. Given the distinct nature of the two claims, it would not only be improper to join 1st Applicant to the current proceedings, but also inconvenient on the part of the Court to hear and determine claims arising from different occurrences in one suit. Consequently, We find that 1st Applicant has been improperly joined in these proceedings.

10. According Jones and Buckle in *Civil Practice of the Magistrates Court in South African*, Vol. 1, 9th Ed., at page 180, “*when a plea (of joinder/misjoinder) is upheld the main action is not dismissed, but is stayed until the proper party has been joined. In the case of misjoinder the court strikes out the unnecessary party or cause.*”

In view of this authority, and Our finding above, 1st Applicant has been misjoined in these proceedings and he must be separated from the proceedings *in casu*. Given Our decision in the first preliminary point, it is not necessary for us to consider the preliminary point of jurisdiction. We say this because the 1st Applicant’s claims are no longer before Us for determination.

AWARD

We therefore make an award in the following terms:

- a) That the 1st Applicant has been improperly joined in these proceedings; and
- b) That 1st Applicant is hereby removed as a party to these proceeding;
- c) That this matter will proceed in respect of the 2nd to 6th Applicant’s claims on the scheduled date of hearing; and
- d) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 23rd DAY OF
SEPTEMBER 2013.**

**T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO**

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MOSUOE
ADV. NYAPISI**