

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/41/2013**

**IN THE MATTER BETWEEN**

**RETŠELISITSOE MAKHOOANE**

**1<sup>st</sup> APPLICANT**

**TOKELO LIPHABA**

**2<sup>nd</sup> APPLICANT**

**‘MAKHOTSO MONYEKE**

**3<sup>rd</sup>**

**APPLICANT**

**‘MATISETSO RAMOJAPOHO**

**4<sup>th</sup> APPLICANT**

**NAPO CHABELI**

**5<sup>th</sup> APPLICANT**

**MOLEFENG MOLEFENG**

**6<sup>th</sup> APPLICANT**

**KHOABANE MAKOTOKO**

**7<sup>th</sup>**

**APPLICANT**

**MATHULA HLEHLISI**

**8<sup>th</sup> APPLICANT**

**LEPAE HLEHLISI**

**9<sup>th</sup> APPLICANT**

**POLAKI MOSOLA**

**10<sup>th</sup> APPLICANT**

**AND**

**JIKELELE SERVICES (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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*Claim for unfair dismissal for operational requirements. Applicants challenging both the substantive and procedural aspects of their dismissals. Applicants only leading evidence in respect of the procedure. Court finding merit in the claim for procedural unfairness. Quantum of Applicant's claims for compensation not challenged. Court awarding Applicants their claims.*

### **BACKGROUND OF THE DISPUTE**

1. This is a claim for unfair dismissal based on operational requirements of the employer. The brief background is that Applicants were all employees of Respondent until their retrenchment, allegedly on account of the closure of some part of the job. Subsequent to their dismissals, Applicants referred claims for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated but without success.
2. Pursuant to section 226(3) of the *Labour Code (Amendment) Act 3 of 2000*, the matter was referred to this Court for adjudication, and was duly opposed. On the date of hearing Respondent raised an argument that Applicants had a duty to begin as they had alleged a dismissal that was unfair. We refuted the argument on the ground that a party cannot be required to prove the negative, but that he who makes the bears the evidentiary burden and must begin.

3. In their opening statements, Applicants submitted that they would show that they were not consulted prior to their retrenchment and further that there was no valid reason as there was still work to be done. Respondent submitted that it would show that it consulted with Lesotho Workers Association (LEWA) and that Applicants were also aware of the retrenchments. In the light of these said above the matter was heard.

### **FACTS AND EVIDENCE**

4. Respondents' case was that where it became apparent to them that some parts of the job were nearing an end, they consulted with a union called LEWA. Out of the consultations was an agreement to retrench Respondent employees. Thereafter the retrenchments started in groups, in December 2012. At the time of the retrenchments, employees signed a memorandum, in terms of which they agreed to be retrenched and to be paid their terminal benefits. The Court was referred to annexure "R1" in support.

5. Applicants' case was that they were not consulted as they only learned on the date of termination that they were being retrenched. They were not members of LEWA and as such they never knew about the retrenchments. They added that Respondent thus dismissed them unfairly. They prayed for 10 months compensation in the sum of M27,000.00 to each Applicant. They have sought alternative employment but

without success. The 10 months claimed is their period of unemployment to the day of filing this matter.

6. The *Labour Code (Codes of Good Practice) Notice of 2003*, states the procedure that must be followed where a dismissal is contemplated, as a result of the operational requirements of the employer (also see *SA Commercial Catering & Allied Workers Union and Another v ETA Audiovisual (1995) 16 ILJ 925 at 930 E*). In terms of the procedure outlined, there has to be consultation with the affected employees. Evidence *in casu* has shown that Applicants were not consulted as Respondent only consulted with LEWA.

7. The *Codes of Good Practice (supra)*, do not limit the consultation process to unions, irrespective of whether they hold a majority or not. The expectation in law is that all concerned must be consulted. Having failed to do so, Respondent has breached the procedure. Therefore the dismissal of Applicants is procedurally unfair.

8. Applicants had also claimed the substantive unfairness of their dismissal. However, their evidence has not addressed the issue and therefore the claims fail to sustain. This leads Us to form a conclusion that the substantive aspect of the Applicants dismissal is unchallenged. In Our view, this means that Applicants accept the substantive aspect of their dismissals for it is trite law that what has not been challenged is taken to have accepted (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239*

at 242). This thus renders the principal remedy of reinstatement impractical.

9. That notwithstanding, Applicants are clear in their claim that they want to be compensated by 10 months wages, which is the period of their unemployment, at least as at the day of filing this matter. This has not been opposed by Respondent and We see no reason not to award same. We thus award each Applicant as prayed in the claims.

### **AWARD**

Having considered the evidence of parties, We make the following award:

- 1) That the dismissals of Applicants are unfair procedurally.
- 2) Respondent must compensate them with an amount of M27,000.00 each.
- 3) The said amounts be paid within 30 days of issuance herewith.
- 4) No order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 11<sup>th</sup> DAY OF MAY, 2015.**

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

**MRS. THAKALEKOALA**

**I CONCUR**

**MRS. MALOISANE**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:  
TŠOLO**

**MS. M. MOSALA  
ADV. H.**