IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/03/2012**

IN THE MATTER BETWEEN

MOTHAE MOLETSANE	**1st APPLICANT**
METSING TŠEHLA	**2nd APPLICANT**

AND

POPULATION SERVICES INTERNATIONAL	**RESPONDENT**

JUDGMENT

Claims for unfair dismissal for operational requirements of the employer. Applicants challenging both the procedural and substantive aspect of their dismissals. Respondent settling claims of 2nd Applicant and proceeding into evidence and arguments in respect of 1st Applicant claims. Court finding that 1st Applicant was not consulted and that no valid reason has been stated for his retrenchment. Court awarding compensation and making no order as to costs.

BACKGROUND OF THE DISPUTE

1. These are claims for unfair dismissal for operational reasons of the employer. Applicants, initially, two in number, claimed to have been unfairly dismissed in that they were not consulted on this decision.

2. The brief background of the matter is that Applicants were employees of Respondent until they were terminated by way of retrenchment. Unhappy with their terminations, they referred a dispute with the Directorate of Prevention and Resolution (DDPR). The matter was duly conciliated upon but without success. Conciliation having failed, the matter was then referred to this Court for adjudication.

3. However, prior to the commencement of these proceedings, parties announced that a settlement agreement had been reached between the 2nd Applicant and Respondent and sought for it to be made an order of this Court. The settlement was accordingly noted and made an order of court, and the matter was heard in the merits only in respect of the 1st Applicant.

4. In his opening statements, Applicant stated that he challenged both the procedural and substantive aspects of his termination. He specifically claimed not to have been consulted when the new structure, which led to his retrenchment, was made. Further that the operational reasons were not real as funding had been secured by Respondent. Respondent's reaction was that consultations

had been duly held and that applicant was involved. Further that funding which came did not have Applicant’s position in its structure. It was on these bases that the matter was heard. Our judgment therefore follows.

EVIDENCE AND FACTS

5. The evidence of three witnesses was led on behalf of Applicant, including himself, while only two witnesses were led on behalf of the Respondent. Applicant and his two witnesses Metsing Tšehla and Thato Mxakaza testified, while Fumane Tšehlana and Mampe Mohale testified for respondent. The evidence is summarised in the following.

Applicant’s evidence

6. Applicant testified that sometime in February 2011, all Respondent staff was called to a meeting where they were told that Respondent had financial problems. They were told that the remaining funds would only carry them halfway through the year. They were asked to come up with solutions to stretch the available funds to the end of the year, when funding would be available.

7. Out of that meeting, a committee was set up to act as a link between management and the employees on suggestions. Through the committee, it was suggested that employees work on a two week rotational basis in which case, they would only be entitled to half pay. The suggestion was then accepted and adopted by Respondent management. This

practice was to go on until August 2011, and it came to be known as the stretch option. There was also a condition to the practice, namely that by the 31st July 2011, all staff would be informed if the expected funding would result in continuity, competitive retrenchment or termination of jobs, which however, did not happen.

8. Thereafter all staff was invited to the Respondent headquarters to come and celebrate the availability of funds, as well as the extension of the Respondent project life. This was sometime in August 2011. At the celebration assembly, staff was told that the structure of Respondent had changed and that some of the old positions had been phased out. The new structure was shown to all staff and all those whose positions had been phased out, were told to apply for positions in the new structure.

9. Applicant added that before this day, the issue of the structure was never discussed with them as employees and that for this reason, their retrenchment, which was influenced by this change, was unfair. He prayed for compensation of an amount equal to 12 months salaries, being 6 months for substantive and 6 months for the procedural aspect. He was dismissed on the 31st September 2011. He stated that since his dismissal, he looked for alternative employment and only succeeded in April 2012, at the Transformation Resource Centre where he works to date.

He stated that he currently earns the salary of M14,000-00. He was therefore out of employment for only 7 months.

Applicant 1st Witness

Metsing Tšehla

10. He was employed by Respondent at the time of the incidents in question. He was the 2nd Applicant in these proceedings until his claim was settled. He knows the incidents that led to the termination of Applicant. According to him sometime in February 2011, Respondent management held a meeting with staff where they were all informed that Respondent had financial problems. In that meeting, sub-committees with staff representatives were established to come up with ways to stretch the available funds, until Respondent was able to obtain new funding.

11. The committees made suggestions to management which included the option for staff to work for two weeks in a month and get paid half salary, that is, the stretch option. This practice was to be adopted from April 2011 to August 2011, which was the anticipated date of award of funding.

12. On the 22nd August 2011, witness was called to a meeting at the headquarters where a new structure was presented to him. He was told at this stage that his position had been affected by this change and that he would have to apply for new positions. He was called to this meeting after being earlier invited to a celebration assembly for both the award

of funds and the extension of the respondent project, which was to proceed on the day following the day of his meeting.

13. On date of the celebration, the new structure was presented to all the employees, who were all very stunned at their new discovery. Witness added that they were particularly stunned because the structure was never discussed with them and no employee inputs were solicited when it was made. He stated that what had only happened, was that Respondent had hinted that new funding could lead to either competitive retrenchment, continuity or termination. Employees had been promised direction on either of three options not later than 31st July 2011, which did not happen.

Applicant 2nd Witness

Thato Mxakaza

14. Witness was Site Manager at Respondent from 1st November 2010 to 31st October 2011. According to witness, all Respondent staff was invited to a meeting sometime in February 2011 where they were told that Respondent had financial problems. A decision was later taken to adopt the stretch practice, with the view to stretch the funds until new funding had come.

15. Sometime in August 2011, all staff was informed that funds were available and that Respondent project would go on for another five years. All staff was invited to celebrate

this achievement at the Respondent headquarters. At the ceremony assembly a new structure was presented to staff. In terms of the structure some of the positions had been phased out and all those affected employees were advised to apply for new positions. The new structure was never discussed with employees and they were only seeing it for the first time at the celebration.

Respondent case

1st witness: Fumane Tšehlana

16. She was the Deputy Country Representative at Respondent until June 2012. She stated that in February 2011, they held a staff meeting to inform all Respondent employees that Respondent had financial problems as funds were running out. In that meeting, sub-committees were set and they were made up of staff representatives. The purpose was for them to come up with suggestions to stretch the available funding, and to come up with suggestions on a way forward, when funding came.

17. Suggestions were that the stretch practice be adopted and that staff should expect either continuity, competitive retrenchment or termination, when funding came, and depending on its conditions. When funding came the structure had also changed and that it affected some of the old positions including that of Applicant. She stated that Applicant was told to apply, which he did but did not succeed to get a position in the new structure.

18. She further testified that the new structure was designed by Respondent management, when it made proposals for funding with the donor. Further that applicant and his former colleagues were not consulted on the structure. She stated that this was because the final decision on the structure rested with the donor. She added that this is why all staff only learnt about it on the 23rd August 2011, in the celebration assembly. She also testified that the termination of Applicant's position was suggested by Respondent management in their proposal for funding. Annexures A – J were submitted in support of the Respondent's case.

2nd Witness: Mampe Mohale

19. Witness testified that she is the HTC Programme Manager at Respondent. According to her, sometime early 2011, Respondent realised that it was running out of funds. As a direct consequence, all staff was then called to a meeting where they were appraised of this, and given a chance to suggest solutions.

20. Out of that meeting, there were suggestions that Respondent adopt the stretch practice. It was further communicated to staff that, when funding comes later, they should expect to either competed for position, to continue with employment of termination of their employment, depending on the terms of the expected funding.

Respondent management was to give all staff feedback on one of the three expectations, not later than 31st July 2011.

21. Witness added that when funding came, some of the old positions were phased out. Those affected were told to apply for positions in the new structure. She stated that the structure which affected those positions, had been designed by Respondent management and the donor, and that no employees were involved in the exercise, except those in management. She stated that the Respondent management is the one that suggested the changes in the structure.

22. Witness further testified that employees learnt at the ceremony assembly about the new structure, as it was never discussed before. She stated that in her opinion, it was unfair for Respondent to have treated its employees in this fashion, particularly because staff was attending the assembly to celebrate the award and the extension of the Respondent project.

SUBMISSIONS

23. Applicant's case, on the one hand, is that in terms of section 19(1) of the *Labour code (Codes of Good Practice) Notice of 2003*, a retrenchment is defined as follows,

"....a dismissal arising from a redundancy caused by the re-organisation of the business or the discontinuance or reduction of the business for economic or technological reasons."

24. Further that section 19(4) of the *Codes of Good Practice (supra)*, provides that an employer contemplating to retrench its employees has obligations which are both procedural and substantive. It was added that the purpose of the obligation is to get parties to engage in a joint problem solving exercise towards the problems that face them both. It was said that the exercise is called consultation. The Court was referred to the cases of *Atlantis Diesel Engines (Pty) Ltd v Numsa 1995 1 BLLR 1 (AD); Standard Lesotho Bank v Morahanye LAC/CIV/A/06/2008; Madibeng v Lesotho Bank 1999 (Pty) Ltd LC/34/2005; and Mokhisa & Others v Lesotho College of Education LC/59/2005*, in support of the above proposition.

25. It was argued that Respondent was under a duty to consult Applicant on the structure, when it became aware that it could change and affect his position. It was said this was particularly so because the structure was designed by Respondent at which point, it already did not have Applicant's position. It was prayed that the Court award 6 months salaries as compensation for the breach of procedure.

26. It was further argued that Respondent failed to show the substantive fairness of the retrenchment. It was submitted that Respondent has among others not shown that the retrenchment or elimination of Applicant's position was necessary, and the reason behind that necessity. Applicant further asked for 6 months compensation for the substantive aspect. It was added that the absence of a valid reason shows a breach on the part of Respondent. It was also submitted that Applicant has complied with section 73(2) of the *Labour Code Order 24 of 1992* by seeking alternative employment and alternatively finding one with the Transformation Resource Centre.

27. Respondent's case, on the other hand, was that they conceded that Applicant was not consulted on the structure. It was argued that the final determination of the structure lies with the donor and that it would have been an academic exercise to have consulted on something in respect of which they had no final say. It was argued that it not trite law that consultation must only be made where they would be meaningful.

28. The Court was referred to the case of *Mirabel & Others v Manchu Consulting CC (1999) 20 ILJ 1718 (LAC),* for the proposition. It was argued that in this authority the Court stated that courts must not intervene in the decisions of the employer merely because, there was an alternative option or approach, but that approach must have been capable of

avoiding a dismissal. It was submitted that *in casu*, consultation could not have avoided dismissal, as there was no funding and the applicant's position was not in the new structure.

29. It was submitted that, that notwithstanding, Applicant was consulted both directly and through sub-committees, hence the decision to adopt a stretch practice and the promise by the Respondent to communicate if the employees would continue to work, be on a competitive retrenchment or be terminated. It was argued that Respondent has in its conduct complied with the criteria agreed upon, which involved one of the three possibilities mentioned. It was maintained that no procedure has been breached.

30. It was further argued that Applicant is an unreliable witness and that his evidence be approached with caution. It was stated in amplification that Applicant denied obvious facts merely to advance his case. It was said that he claimed not to have been consulted on the three options, that is, continuity, competitive retrenchment or termination. It further said he denied that it was his region that suggested the stretch practice when other witnesses suggested that it was. It was added that Applicant further painted a picture that he was not offered employment in the new structure when he was.

ANALYSIS

31. We wish to comment that We note and accept the authorities cited by both Applicant and Respondent in support of their cases, including the principles highlighted therein. We confirm that it is common cause that Applicant was not consulted on the new structure which phased out his position. Clearly, this conduct of the Respondent was in breach of both the dictates and the spirit of section 19 of the *Codes of Good Practice (supra)*. Rather than to engage in a joint problem solving exercise contemplated therein, the Respondent unilaterally addressed the problem that was common to parties and this resulted in injustices. A similar view is shared by Respondent witness, one Mampe Mohale.

32. While Respondent has attempted to argue that consultation was unnecessary *in casu,* as it would have been merely academic, We hold a different view. In fact, We agree that it would have been fruitful particularly because the structure in issue was suggested by Respondent to the donor. This however, is not to be construed to mean that where the structure is the exclusive determination of the donor, then consultations are not necessary. Consultations will always be a prime requirement in retrenchments as these types of dismissals are no fault of employees. It is thus Our view that the principle in *Mirabel & Others v Manchu Consulting CC (supra),* does not apply *in casu*.

33. We wish to add that, to this end, it has not even been suggested that the suggested structure was modified by the

donor, which further fortifies Our attitude that consultations would not have been academic but meaningful. This suggests to Us that the structure proposed by Applicant was taken, accepted and implemented by the donor in awarding funds to Respondent, as sought. Evidently, Respondent bears the full responsibility for what befell Applicant, for the results were of its own making.

34. We wish to further add that We note that Respondent has attempted to avoid the breach of procedure by conducting consultations as soon as it realised that it had funding problems. This however does not exonerate them from liability for breach of procedure, but will only count in its favour towards the determination of the compensation amount to be awarded to Applicant.

35. It has been suggested that Applicant was an unreliable witness. The basis of the claim is unfounded in law. We say this because, according to Respondent, Applicant must be taken to be unreliable merely because his evidence disagrees with that of his witnesses. This cannot make a case for that claim. To succeed, one must show among others that a witness gave contradicting versions of his evidence, or that he left gaps in his evidence that can only render it to be judged as lies. This is not the case *in casu*.

36. It has been suggested by Applicant that he has complied with section 73(2) of the *Labour Code Order (supra),* by

mitigating his loss. This requirement of law has been endorsed by this Court in the case of *Moleko Electrical Contractors v Labour Commissioner o.b.o Mokete Tšoeu LC/REV/20/08.* In this authority, the Court had the following to say in relation to mitigation of loss,

"The duty to mitigate entails that the party who has suffered damages as a consequence of the breach of the contract is under a duty to take reasonable steps to ensure that his original loss is contained."

37. Applicant has shown that he mitigate his loss by seeking alternative employment. He has shown to Our satisfaction that as a result of his efforts, he was only out of employment for 7 months as he was able to obtain employment by April 2012. We accept the claim readily more so because, it has not even disputed by Respondent. It is trite law that what has not been disputed must be accept as a true and accurate position of events (see *Lenka Mapiloko v Pioneer Seed (RSA) and others LAC/A/08/08; Theko v Commissioner of Police and Another LAC (1990-94) 239 at 242; Small v Smith 1954 (3) SA 434 (SWA) at 438E-F)*

38. Applicant has also claimed that Respondent breached his contract by retrenching him without a valid reason. He has argued that no reason has been shown that his position was no longer needed and why. We agree with Applicant because the reason given by Respondent does not address this aspect. It merely speaks to unavailability of funds which was no longer the case when Applicant was retrenched.

Respondent further speaks to the new structure, which was its design without justifying why it had to do away with Applicant's position. We therefore find that Respondent acted in breach of the contract.

FORMULATION OF THE AWARD

39. Applicant has asked for 6 months compensation for procedural breach and 6 months for substantive breach. While We concede that both the procedure and substance have been breached, We have taken into consideration an attempt by Respondent to comply at least, with the procedural aspect. However, because the intention is not to encourage parties to breach rules by merely attempting to comply with them, We will award compensation, with the intention among others to discourage such behaviour.

40. We have found satisfactory justification in the request for an amount equivalent to 12 months salaries as compensation. We find it befitting for the circumstance of the Applicant's termination. However, We have resolved to make an award of 10 months' salary, instead of the 12 months sought, in favour of Applicant for both the substantive and procedural aspect of the dismissal. We are driven by the considerations which We will explain hereunder.

41. We are aware that Respondent is donor funded. However, this does not in any way exonerate it from its legal

obligations as an employer in dealing with affairs of its employees. It must at all times comply with the legal requirements in its trade. We are of the view that We would be setting a very ruinous precedent if We were to refrain from making this order, merely on the ground that Respondent is donor funded. In spite of its circumstances, Respondent must dance to its own music.

42. The ten months award is not meant to unfairly enrich Applicant, but to compensate him and discourage unlawful conduct on the part of not only the current Respondent but employers even in future. The 10 months award is computed as follows:
M11,111,00 (Applicant's salary at termination) x 10 = **M111,111,00.**

AWARD

We therefore make an award as follows:

1) The dismissal of Applicant is unfair.
2) That Respondent pay an amount of ***M111,111-00*** to Applicant as compensation.

3) The amount to be paid within 30 days of issuance herewith.
4) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 10th DAY OF AUGUST 2015.

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

MR. MATELA **I CONCUR**

MRS. MOSEHLE **I CONCUR**

FOR APPLICANTS: **MR. LETSIKA**
FOR RESPONDENT: **ADV. MOSHOESHOE**