

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/20/2013

IN THE MATTER BETWEEN

THABANG ESAIA MARLEY THITE

APPLICANT

AND

MINEWORKERS DEVELOPMENT AGENCY RESPONDENT

JUDGMENT

Claim for unfair dismissal for operational requirements. Applicant claiming that he was unfairly dismissed both procedurally and substantively, Court finding in favour of Applicant and awarding compensation. Court taking into considerations the provision of section 73(2) of the Labour Code Order 24 of 1992. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal for operational requirements of the employer, in particular economic conditions. The brief background of the matter is that Applicant was employed by Respondent as the Nursery

Production Manager. He was on a two year contract which commenced on the 15th March 2010 to the 14th February 2012.

2. Applicant was however terminated on the 31st July 2012, which was about 5 months later. Unhappy with his termination, he referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated upon but did not get resolved. A report on non-resolution was then issued, referring the matter to this Court for adjudication.
3. Applicant's case is that he was unfairly dismissed in that he was not consulted before he was retrenched, and further that Respondent did not have economic problems, as it had funds to run the project and pay his salaries. He wishes to be paid compensation *in lieu* of reinstatement, and in terms of section 73 of the *Labour Code Order 24 of 1992*. His case was strongly opposed by Respondent.
4. We wish to note that in its answer, Respondent had raised a *point in limine* that Applicant had failed to observe Rule 3 of the *Rules of this Court*, in that he had approached this Court by way of a Notice of Motion instead of an Originating Application. The point was later withdrawn as parties agreed that this Court condone the breach by excusing the form and concentrate on the content. This was duly noted and accepted by the Court.

5. However, before the proceedings could commence, Respondent raised yet another *point in limine*, this time from the bar. It was argued that the claim referred by Applicant fell under section 226 (2) of the *Labour Code (Amendment) Act 3 of 2000* instead of section 226 (1) thereof, at least per its reading from the Notice of Motion. It was argued that such claims fall within the jurisdiction of the DDPR and not this Court. It was prayed that the matter be remitted to the DDPR for arbitration for want of jurisdiction.
6. Applicant answered that it has always been its case that the claim fell within section 226 (2) of the *Labour Code (Amendment) Act (supra)*. It was submitted that the matter was referred to this Court by the DDPR because Respondent had raised the defence of operational requirements. The Court was referred to the report of non-resolution, marked annexure TT5 to the Notice of Motion. Having considered the submissions of parties and references made, We ruled that this Court had jurisdiction and directed that parties proceed to lead their cases. In the light of all the above background, Our judgment follows.

EVIDENCE AND FACTS

Applicant's case

7. Applicant's evidence is that by the time he was dismissed by Respondent, he was then employed on a permanent and pensionable basis. According to him, the circumstances that led to his dismissal are that, sometime in March 2012 there was a robbery at the Respondent's nursery department, where he was the Production Manager. Following the robbery, he was arrested by the Lesotho Mounted Police as a prime suspect to the incident. He was later suspended from work by Respondent Country Director, one Mr. Puseletso Salae. The suspension did not last long, as he was soon recalled back to work.

8. After reporting to work, he was called to a meeting by the Country Director, where an attempt was made to coerce him into resigning from work. He was threatened that if he did not resign, he would lose all his benefits as a result of the robbery at the nursery department, where he was responsible for. He however resisted the attempt and continued working for Respondent. He added that about two weeks later Mr. Salae, the Country Director, called a staff meeting for the nursery department staff, to tell them that Respondent had financial problems. They were informed that they should all expect to be retrenched if the situation continued. This was on the 19th June 2012.

9. Following that meeting, Applicant was given a letter of termination informing him that his contract was to end at the end of July 2012. In terms of the letter, his termination was

by mutual agreement. The content of the letter was later changed to retrenchment, after he had refused to sign to acknowledge its receipt. Documents marked TT1 and TT2 were tendered as evidence of this. Later on in August 2012, he was given yet another letter which showed the calculations of his terminal benefits. He similarly refused to sign it as it suggested by its heading that his termination was by mutual agreement. It was later altered to read retrenchment. Documents marked TT3 and TT4 were tendered as evidence of this.

10. According to Applicant, one Makoena Ramakoro, Robert Sekupa, Seisa and Mpho got similar letters to his, but to his dismay, they continue to work at Respondent to date. He stated that he is aware that Respondent claims that he volunteered to be retrenched, but that it is not true. He stated that he could not volunteer for that after he had struggled to secure a job, and had just had a child, and a personal loan recently taken with Standard Lesotho Bank.

11. He stated that since his termination he was only able to secure a 7 months contract with CARE Lesotho, from September 2013 to April 2014. He has since then been without employment, despite solid efforts. His salary at the termination of his employment was M11,340,00. He asked to be paid compensation *in lieu* of reinstatement to his permanent and pensionable position, as he no longer wished to be reinstated. He claimed to have been on a permanent

contract beyond the lapse of his two year contract because he was told so by the Country Director. He further stated that this was also confirmed when the Respondent management signed a loan application form which indicated that he was permanent. A document marked TT6 was tendered as evidence.

Respondent's case

1st Witness : Puseletso Salae

12. He is country director at Respondent. He knows Applicant in that he was Respondent's employee until his contract of employment was terminated. A document marked MDA1 was tendered in support. He stated that Applicant was on a two year contract, which was tied to the two year funding contract between respondent and the Anglo American. A document marked MDA2 was tendered and it is the funding agreement between Respondent and Anglo American . Another document MDA3 was tendered as proof of employment between Respondent and Applicant.

13. Witness testified that prior to Applicant's retrenchment, Respondent management wrote to Anglo American, the funder, to seek the extension of the project. This was sometime in 2011. They made the proposal which they then went to the Anglo American offices in South Africa, to present it. Applicant was part of the delegation. In that mission they did not get the funds, but came back with a promise that they would.

14. When they realised that the funder was not delivering on its promise, and the funds were drying, management called a staff meeting at the nursery department to inform them of the financial situation. It was in this meeting that Applicant suggested that himself and one Makoena Ramakoro, be retrenched to keep the nursery department running, because they took a huge toll of funds through their salaries. It was as a result of Applicant's suggestion that he was retrenched at the end of July 2012.
15. Witness testified that from February 2012 when his contract ended, he was kept with the hope that funds would be secured so that he could continue with his employment as the Nursery Production Manager. It was denied that Applicant was permanent or even the suggestion that he was told so. It was also denied that Applicant was ever coerced into resigning after the robbery incident. It was said that the notification of termination, TT1, was altered after into TT2, Applicant suggested that it should read retrenched to shield him against the bank as he had a loan.
16. It was stated that Applicant is the only one that was terminated and that other employees were maintained and continue to work for Respondent to date. It was said that this has been possible because Respondent was later able to secure funding from its Head Office. It was stated that

before Applicant left several efforts had been made to secure funding but without success.

17. During cross examination witness testified that he became aware of the need to retrench in February 2012 and that he immediately started consultations. He however stated that he had no minutes to prove this. He stated that he could not recall when Applicant suggested to be retrenched. Witness further testified that since the termination of Applicant, Respondent has hired new employees, on a short term basis though. He added that Respondent management did not consider reducing salaries, or applying the LIFO principle in respect of those who were hired after Applicant, in making its decision to retrench him.

2nd Witness : Maatlehang Kamoli

18. She is the Finance and Administration Manager at Respondent and is part of the management of Respondent. She stated that Applicant was hired on a two year contract from March 2010 to February 2012. His contract was aligned to the contract between Respondent and Anglo American. She stated that sometime in 2011, but before April, Respondent realised that it had financial problems. As a result sometime in April 2011, Respondent management, including Applicant, went to Anglo American to ask to be allowed to vary the budget so that they may be able to fund projects. Their request to vary the budget was approved, and they were able to continue with operations.

19. When Applicant's contract ended, he was advised that though his contract had ended, he should continue to work while Respondent awaited funding from the donors. However, the events did not turn out as expected, as by April 2012 there were serious signs of coffers drying out. After several failed efforts to get funding from the Respondent headquarters, as management, they called a staff meeting to inform staff of the status of events. In this meeting, employees were invited to suggest alternatives to save Respondent nursery project.

20. Witness testified that it was at this meeting that Applicant suggested that himself and one Makoena Ramakoro be retrenched. It was said there were other suggestions that were made which proved untenable. Since this meeting witness was only involved in Applicant's termination affairs when told to calculate and pay out his terminal benefits. The rest of the processes were between him and Mr. Salae, the Country Director.

21. It was denied that applicant was permanent but that he had a two year contract. It was said that at the time of his termination he was on a month to month contract. Witness said that she signed TT6, which reflects applicant as permanent, only to assist him to secure a loan from the bank. She stated that she even wrote a letter marked MDA5 and

MDA6 to confirm applicant's employment, which made no reference to him being permanent.

22. During cross examination witness testified that she held a General Accountant qualification with a degree in Bachelor of Laws. When she signed TT6, she had full knowledge of what that meant. She knew that she had a right to refuse to sign it if she disagreed with its content. Witness also confirmed that Applicant was only paid his terminal benefits in August 2012, following his termination by way of retrenchment in July 2012. She further stated that the condition at Respondent is still the same as when Applicant left and that in addition thereto, Respondent has hired more employees, who are still there to date. She added that had Applicant not insisted on being retrenched, he would still be employed at Respondent like the rest of the employees.

3rd Witness : 'Makoena Ramakoro

23. She is the Administrator at Respondent and has been in its employ since May 2010. She was on a two year contract from May 2010 to April 2012. She testified that in January 2012, Respondent told staff that its project funding was nearing an end, and that it was negotiating the extension of funding with the donor. There was another meeting, around June 2012, where staff was told that funding was drying out and that Respondent was anticipating closing the project. They were informed that whereas the donor had promised to extend funding, it had not.

24. In the meeting, all staff was invited to suggest alternatives to save the Respondent project. It was at this stage that Applicant then suggested that himself and witness be retrenched. She testified that later on, all nursery department staff was given retrenchment letters similar to TT1 in content. She added that at the end of July 2012 when Applicant left, herself and others stayed behind and continued to work. They continued to work to date on a month to month contract.

25. During cross examination witness stated that her salary has not been affected in any way since Applicant left. She stated no one has told or suggested to her that she is on a month to month contract, but that it is only her opinion. She stated that she does not know how many consultations were made, or when they started, or even when the first meeting was held. She stated that although she was present in the meeting of the 14th June 2012, she did not comment when Applicant suggested that she together with himself be retrenched. She stated that she does not recall if staff was ever told that Respondent would not be able to pay their salary or not, or the time that Applicant went with management to seek funding. She stated that although Applicant was her immediate supervisor, she however, was unaware that he was ever suspended.

SUBMISSIONS

Applicant's submissions

26. It was submitted on behalf of Applicant that he was a permanent employee of Respondent. It was said that factors demonstrative of this were, that he was told by the Country Director, one Puseletso Salae that at the end of his contract he would be so. Further affirming this was the conduct of the Respondent Finance and Administration Manager, who had qualifications in General Accounting and a Bachelor of Laws, when she signed a bank form presenting Applicant to be a permanent employee of Respondent.

27. It was stated that further incidents included the evidence of Respondent 3rd witness, 'Makoena Ramakoro who still works with Respondent beyond her contract, but not on the basis of the initial contract. It was added that her contract with Responded which ended in May 2012, was not renewed but then she worked from then to date. It was submitted that this is a sign that all contractual employees contracts were made permanent when they lapsed, including that of Applicant.

28. It was added that even the decision to retrench Applicant is full of signs that he was permanent. It was argued that if he was not permanent but on a month to month contract as Respondent suggests, it was not necessary to either consult or retrench him. It was submitted that Respondent could have waited for his contract to end, at the end of June 2012, rather than to give him notice to the end of July 2012.

29. It was further submitted that Applicant was retrenched primarily because clause 9.3 of the Respondent Human Resources Manual provides for the retrenchment of permanent full time employees of Respondent. It was added that even the failure to release Applicants terminal benefits when his contract ended in February 2012, showed that he was permanent as they were carried over into his permanent contract, and only paid at the alleged retrenchment.

30. Regarding the substantive aspect, it was argued that the fact that all nursery staff, despite having earlier been issued termination letters along with Applicant, continue to work at respondent shows that funding was never the issue. It was argued that Applicant was clearly the target of retrenchments as the issue only came up after the robbery at the nursery. It was stated that further adding to the view is the fact that evidence has shown that four more people were employed, including one who was on a part time basis, during the alleged time of financial difficulties. Furthermore, the evidence of Respondent 2nd witness that had Applicant not insisted on being retrenched he would still be working for respondent, further fortifies the view. It was concluded that all facts show that Applicant was dismissed for something else and not lack of funding.

31. It was further submitted that the facts and circumstances of Applicant go against the claim that he volunteered to be

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retrenched. It was said that firstly, it took him almost two years to get employment after the completion of his studies, due to the rarity of his qualifications. Secondly, he had just taken a loan from standard Lesotho Bank and had just had a child. Lastly, that if Applicant had volunteered both himself and Ramakoro, 3rd witness, Ramakoro ought to have reasonably reacted to Applicant's suggestion. It was stated that this is hard to believe mostly because the evidence has been fabricated.

32. Regarding the procedural aspect, it was stated that no meaningful consultation was made. The so called consultation was made on the 14th June 2012 and it did not consider Applicant suggestions or even the alternatives to retrenchment. It was submitted that evidence has shown that Respondent management did not consider reducing salaries or even applying the last in first out criteria in retrenching, but rather the most senior officer who ran and drove the project was retrenched.

33. It was argued that the claim that consultations were made as far as in January 2012 was an afterthought. It was stated that this only came after he had testified that they started in June 2012. It was added that further fortifying this, is the fact that the 3rd witness could not say when they started and did not even have the minutes of those consultations except for the 14th June 2012. It was said that even the result of these alleged consultations has not been stated in evidence.

It was submitted that there was no consultations except the meeting of 14th June 2012, for which there are minutes.

34. It was prayed that Applicant be found to have been unfairly dismissed and that he be compensated. It was added that in determining the compensatory award, the Court consider Applicant's salaries from date of dismissal to date of judgment being his actual loss and an award of costs. It was said that costs be awarded because Respondent unnecessarily defended a case in which it had no defence. It was submitted that Applicant has complied with section 73 (2) of the *Labour Code Order (supra)* by mitigating his loss, in that he sought alternative employment. It was further submitted that Applicant had shown that Respondent breached his contract of employment by unjustly and unfairly terminating him.

Respondent submissions

35. Respondent's case was that Applicant was not a permanent employee at Respondent. It was said that he had a two year contract at the end of which he was put on a month to month contract. It was added that the document that he relied on to claim permanency is a Standard Bank document, which does not have Respondent letterhead, and also has dates of employment captured wrongly. It was signed by the finance and administration manager to help Applicant to get a loan and no more. It was said that the document did not make Applicant permanent in as much as

the Finance and Administration Manager had no such powers. Applicant was clearly on a two year contract which he hid from the Court to simply mislead it. Applicant's evidence is nothing but a fabrication.

36. Regarding the substantive aspect, it was submitted that Applicant knew that Respondent depended on funding. He knew that it lacked as he was even on a delegation to source same. While he claims that they got funding, he has not been able to prove same. The truth is that no funding was secured. After the termination of his contract, he was on a month to month contract, as is the case with others to date, while awaiting funding.

37. On the procedure, it was submitted that all requirements were met. There were consultations that started as far back as in January 2012. This is clear from the Country Directors evidence and that of the 3rd witness, the Administrator. Evidence has shown that in the consultation meeting of 14th June 2012, Applicant suggested to be retrenched and this was done. Although, all nursery staff had been given retrenchment letters, but Applicant was retrenched because he wanted to leave. His retrenchment had nothing to do with the robbery, but was based on the economic circumstances of the Respondent. It was denied that applicant was unemployable as he was employed by respondent and after he left he was employed by CARE Lesotho.

38. Regarding the remedies, it was submitted that an award of costs be made against Applicant for claiming an unreasonable amount in excess of M3 million. Further that he attempted to mislead the Court by hiding his contract of employment. It was added that he has failed to show how he mitigated his loss. It was prayed that the claims be dismissed.

ANALYSIS

39. We have considered the submissions of parties, the evidence led and the authorities cited in support. We will address the issues by order of the submissions, starting with the status of Applicant's employment at the time of his termination by retrenchment.

40. We are satisfied by both the evidence of Applicant and his argument that he was a permanent employee. While Respondent has attempted to discredit the evidence of Applicant, but the attempt has only been to the extent of annexures TT6, MDA3 and Applicant's claim that the Country Director told him that he was permanent. Annexure TT6, on the one hand, is a bank document that was signed by the Finance and Administration Manager which reflected Applicant as a permanent employee of Respondent. Annexure MDA is a contract of employment between Applicant and Respondent.

41. However, Respondent has not been able to satisfactorily explain why it continues to keep and maintain its employees, on the same unaffected terms, as at the time that retrenchments were anticipated, yet they had all been issued with retrenchment letters. Further, Respondent had not been able to explain the need to consult with employees who were on a month to month contract. This has led us into concluding that Applicant's contract was more than on month to month terms. Adding to this is the fact that Applicant's terminal benefits were only released after his retrenchment. All the above factors led Us to conclude that it is more probable that Applicant had become a permanent employee of Respondent at termination.

42. On the substantive aspect, We find it odd that Respondent could claim to maintain to hold its staff to date with the hope of acquiring funding. Almost 3 years have lapsed since it complained of lack of funding. Not only is Respondent waiting in anticipation, but evidence has shown that it has grown in terms of its human resource base. We are doubtful that this could be the reaction of an entity that is economically struggling.

43. We are fortified in Our view by the evidence that Applicant was retrenched only because he volunteered to be. It is the evidence of Respondent 2nd witness, the Finance and Administration Manager, that if Applicant had not elected to be retrenched, he would still be working for Respondent to

date. We are equally doubtful that this could be the reaction of an entity that is economically struggling.

44. We also agree with Applicant that his circumstances demonstrate that there is very little, if any at all, likelihood that he could have volunteered to be retrenched. While We admit that following the completion of his studies, he found employment, but we cannot ignore that it took him almost two years to do so. He had also taken a loan and had just had a child. These facts negate the alleged likelihood that he volunteered to be retrenched.

45. While Respondent has witnesses who claim that Applicant did volunteer to be retrenched, We find that odd and hard to believe. Respondent 2nd witness, the Finance and Administration Manager, agrees with Us in her testimony that it was odd that the volunteering of Applicant was not reduced to writing. The evidence of Respondent 3rd witness, 'Makoena Ramakoro that she did not react when Applicant suggested that they be retrenched, raises doubts and concern. We find it quite remote, if not impossible, that Applicant could have volunteered her termination and yet she had nothing to say about it. If indeed a suggestion of this nature was made, then she would have reasonably reacted to it. We are therefore of the view that no one suggested that anyone be retrenched.

46. Regarding the procedure, We find it more probable that there was only one consultative meeting that took place before the retrenchment was effected. Evident of this is the fact that there is only one set of minutes of consultations namely that of the meeting of the 14th June 2012. Further, even the evidence of the Respondent 3rd witness that she does not recall when the meetings took place further affirms this. Adding to Our attitude is the fact that the 1st witness stated that consultations started in June but later changed to say in January 2012. This made her evidence inconsistent and unbelievable that there were ever consultations prior to June 2012 (see *Factory Workers Union v Ever Unison Garments (Pty) Ltd LC/07/2004*).

47. Having found that Applicant did not volunteer to be retrenched, Respondent was in law under an obligation to engage with Applicant in a joint problem solving exercise. Section 19(4) of the *Labour Code (Codes of Good Practice) Notice of 2003*, is clear on what entails this exercise. It provides that in the exercise, parties must attempt to reach agreement on the following,

- a) Alternatives to dismissals,
- b) criteria for selecting the employees for dismissal,
- c) steps to minimize the dismissals,
- d) conditions on which dismissals take place, and
- e) steps to avoid the adverse effects of the dismissals.

The evidence of Respondent has shown that none of these mention above were explored. We therefore find that on account of this, the procedural requirements were not met.

48. Applicant has asked that Court consider his actual and future loss in awarding him compensation. These prayers have not been challenged except that Respondent has argued that Applicant has failed to show how he mitigated his loss. In determining the quantum of compensation, several criteria has been laid out both in the *Labour Code Order (supra)* and in case law. While the *Labour Code Order (supra)* only makes reference to mitigation and the breach, case law has extended the considerations beyond just the two.

49. In the case of *Standard Lesotho Bank .v. 'Nena & Another LAC/CIV/A/06/08*, the Court states that actual loss is one of the considerations, as well as the future loss likely to be suffered. The first aspect relates to the wages from date of termination to date of judgment, while an award for future loss relates to the salaries that a dismissed employee is likely to lose as a result of the dismissal. These are subject to the two factors contained under section 73 (2), namely mitigation of loss and the breach by either party.

50. Applicant has shown to Our satisfaction that Respondent has breached his permanent employment by unfairly terminating him. Further, he has shown that he mitigated his

loss by seeking employment which resulted in him obtaining same with CARE Lesotho, and attempts to run his own business. About the award for cost, where a claim relates to unfair dismissal, an award for costs is not normally made. To be made, parties must show that one acted in a wholly unreasonable manner. No such circumstances meet the criteria from the reasons given by both Respondent and Applicant. We therefore decline to award costs.

FORMULATION OF THE AWARD

Lost earnings

51. From evidence, Applicant was terminated in July 2012. From July 2012 to August 2015, three years and one month have lapsed, which makes 37 months. However, Applicant was employed by CARE Lesotho for a period of 7 months. He will thus not be entitled to any award for the 7 months period. The amount awarded will be only for the months out of employment and they are 30 in number (37 - 7). The loss earnings computation is thus as follows,

30 months X M11,340.00 (salary at termination) =
M340,200.00

Future loss

52. Applicant has shown that the prospects of finding employment are very low. At one instance he took almost 2 years to secure employment, while at some point, it took him

slightly over a year. We are of the view that given the trend, he is likely to take a year out of employment with hard and solid efforts of seeking employment made. His future likely loss is thus as follows; $M11,340-00 \times 12$ (1 year) = M136,080-00.

Applicant's total award is thus $M340,200-00 + M136,080-00 = \mathbf{M476,280-00}$.

53. In making this award, 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.

AWARD

We therefore make an award as follows;

- 1) That the dismissal of applicant is unfair.

- 2) Applicant is awarded compensation in the sum of **M476,280-00.**
- 3) Compensation to be paid within 30 days of issuance herewith.
- 4) No order as to cost.

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. MOTHEPU

I CONCUR

MISS LEBITSA

I CONCUR

FOR APPLICANT:

ADV. NTABE

FOR RESPONDENT:

ADV.

SEKONYELA