

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/23/2011

IN THE MATTER BETWEEN

KOALEPE MAKATSELA

APPLICANT

AND

ECONET-TELECOM LESOTHO

RESPONDENT

JUDGMENT

Claim for unfair dismissal on the ground of operational requirements of the employer. Applicant challenging both the procedural and substantive aspect of his dismissal. Applicant asking for reinstatement as a principal remedy and compensation in lieu of reinstatement in the event that reinstatement is not possible. Court finding that the dismissal was fair both substantively and procedurally. Court however finding that Applicant is owed his pension from commencement of his employment to date of merger. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal on the ground of operational requirements. The brief background of the matter is that Applicant was an employee of Respondent until his retrenchment. Unhappy with the retrenchment, he filed a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated upon but conciliation failed to resolve same. It was then referred to this Court for adjudication.
2. In his opening statements to the claim, Applicant stated that he challenged both the procedural and substantive aspects of his dismissal. Substantively, he stated that there was no need for him to be trained as he had the necessary skills. Procedurally, he stated that he was not consulted prior to his retrenchment. Respondent case was that it had a valid reason for retrenching Applicant as he had suggested to be retrenched and further that he was consulted on the issue. It is against this background that the matter was heard. Our judgment follows.

FACTS AND EVIDENCE

3. Applicant testified on his own behalf and did not have any witnesses beyond his own evidence. Respondent led the evidence of two witnesses namely Kuleile Thekiso and Elia Madondo. The evidence is summarised in the following.

Applicant's case

4. Applicant testified that he is an engineer with qualifications from three universities. He is the founder of Econet Ezi Cell Lesotho. He did his engineering in the United Kingdom at the University of Liverpool. In his studies at Liverpool University, he did subjects in both mobile and fixed telecommunications. He also did a number of courses in different aspects of telecommunications, while in the employ of Respondent.

5. He further testified that he lectured on a part time basis at the National University of Lesotho, due to his skills and knowledge in telecommunications studies. He has also designed and provided a mobile solution to the Lesotho Highlands Development Authority, in its phase 2 project. He added that he was trained in China on converged networks, where he also did mobile communications. Owing to his skill and knowledge, he designed a technology master plan for Respondent.

6. He also testified that his skills and knowledge are sufficient for the operations of Respondent and do not need to be developed. He stated that in 2009, a skills audit was conducted within Respondent and he was found to have adequate skills and knowledge. Further that even the Respondent performance management system bore prove of this, as he always scored beyond the target.

7. He stated that the secondment that led to his retrenchment was not genuine but meant to disadvantage him, and possibly force him out of Respondent employ. He added that he is led to believe this by the fact that, not only did he not lack skill and knowledge, but that the terms of his secondment contract were inferior to those of the initial contract with Respondent. He stated that his initial contract had pension, medical aid and more leave days than the new one.

8. He testified that after being told that he was going on secondment, he tried to appeal the decision to the Respondent Chief Executive Officer. He stated that rather than to address his appeal, the Chief Executive Officer diverted his attention to the ending of the employment relationship between parties. He added that thereafter he was terminated by way of a retrenchment, which he only learnt of in his letter of termination.

9. Applicant asked to be reinstated into his former position in terms of section 73 of the *Labour Code Order 24 of 1992*, as it still existed. In the alternative, he asked to be paid an amount equivalent to his 2 years which was the remaining period up to the end of his contract, his severance payment in the sum of M678,510-00, from 1989 when he joined Respondent to date of end of contract. He also claimed his pension from 1989 up to 2008, as he was only paid pension

from 2008 to date of termination. His pension claim is M100,585.16.

10. He also asked for his performance bonus for the years 2010, 2011, 2012 and 2013. His claims are M105,007, M118,407, M133,515 and M150,552 respectively. He also claimed payment of his membership to the South African Institute of Electric Engineers, which has since lapsed due to non-payment of the membership fee by Respondent, which was also part of his benefits under his contract.

11. During cross examination, witness stated that he is the one that initiated the severing of the employment relationship between parties. He stated that he first raised the issue when asked why he had not proceeded to Zimbabwe as directed. He stated that at this time, Respondent refused to accept his invitation to end the relationship. Applicant added that even in the appeal hearing before the Chief Executive Officer, he raised the issue of severing the relationships, if Respondent insisted that he be seconded to Zimbabwe.

12. Applicant also stated that in his discussions with Respondent management about his secondment, he never complained about the terms of secondment contract being inferior to his then current contract with Respondent. Witness furthermore testified that he was informed that the Respondent's operational requirements required that he be seconded to Zimbabwe to acquire skills in mobile

communications. He accepted that the telecommunications industry is dynamic and thus requires regular training. He further accepted that his contract provided for his secondment for such purposes.

Respondent's case

1st witness: Kuleile Thekiso

13. Witness works for Respondent since 2001. He was in Zimbabwe on a secondment to acquire skills when Applicant was retrenched. They had earlier been informed, as employees of Respondent, that there would be exchange programs between Econet Zimbabwe and Econet Lesotho. The reason was stated to be to acquire skills and to prepare for expansion of Respondent network in Lesotho.

14. Himself and Applicant had been nominated for the said exchange program to be in Zimbabwe. He stated that Applicant never took his position in Zimbabwe. He has since come from the exchange programme and that he heads a new department. He added that his salary has since increased owing to his newly acquired skills and experience in mobile networks, which he did not have before.

2nd witness: Elia Mandondo

15. Witness is the Finance Director in Respondent and a member of the Board of Directors. He is originally from Zimbabwe. He stated that from time to time there are exchange programs between Respondent and Econet Ezi Cell

in Zimbabwe. He stated that the purpose is to exchange skills in the two companies, as they are sister companies.

16. He stated that before a recommendation that an employee be sent on an exchange program, the employer first determines the need for acquisition of new skill. He added that whereas the performance management is one of the ways, there are many other ways that the employer uses to make the determination. He stated that where a need has been identified, a candidate is nominated for skills acquisition under the secondment program. He stated that this was done with Applicant.

SUBMISSIONS

Applicant

17. Applicant's case is that he was unfairly dismissed, in that the evidence led clearly shows that he was dismissed for refusal to obey a lawful instruction, and not for operational requirements of the employer. It was argued that Respondent should have subjected Applicant to a disciplinary hearing instead of the route taken. It was further argued that assuming that the reason was redundancy, as Respondent has suggested, that argument cannot stand. It was argued that the Applicant's circumstances do not fall within the requirements for redundancy as a reason for dismissal.

18. The court was referred to the case of *Standard Lesotho Bank v Lijane Morahanye & another LAC/CIV/A/06/08*. It was
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submitted that a paragraph 11 of the judgment, redundancy of an employee arises,

“.....if the dismissal is wholly or mainly attributable to : (a) the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.”

It was argued that on this basis, the Respondent’s argument of redundancy is misconceived.

19. It was further argued that there was no need to train Applicant. It was submitted that Applicant evidence has shown that Applicant did not need training, as he had already received it and had performed beyond target, according to the performance management system of Respondent. It was argued that this evidence was not contradicted and should be accepted as such. The Court was referred to the case of *Standard Lesotho Bank v Morahanye & Another (supra)*, at paragraph 12, in support of this proposition. It was submitted that this is evidence that there was no reason to train Applicant, and therefore that the reason for his dismissal was invalid.

20. It was further argued that Applicant was not consulted. It was stated that the importance and purpose of consultation has been stated in the cases of *Standard Lesotho Bank v*

Morahanye (supra), at paragraph 9 of the judgment, and in the authority of *Mocholo v Lesotho Bakery (Blue Ribbon) (Pty) Ltd LAC/A/04/04*, at paragraph 23 of the judgment.

21. Regarding the remedies sought, it was submitted that Applicant desires to be reinstated in terms of section 73 (1) of the *Labour Code Order 24 of 1992*. It was further submitted that in the event that reinstatement is not practical, Applicant be compensated by being paid the remainder of his contract, which is 2 years, his severance payment and pension benefits, as claimed.

Respondent's case

22. Respondent case was that there is a valid reason for the dismissal of Applicant. It was submitted that following the merger of the two companies, Lesotho Telecommunications Corporation, whose business was fixed line communications, and Econet Ezi Cell, whose business was mobile communications, new skills were needed. This is why Applicant needed to be seconded to Zimbabwe to acquire skills in mobile communications.

23. It was further submitted because before the merger, Applicant had been working in the fixed line business under the former Lesotho Telecommunications Corporation. It was argued that in refusing to be seconded to Zimbabwe, Applicant rendered himself redundant within the new and

emerging operations of Respondent, and not that the operations of Respondent had ceased or diminished.

24. It was submitted that in addition to this, Applicant was the one who initiated his own termination, which in the end Respondent had no option but to accept, hence his ultimate termination by retrenchment. It was added that in the period between December 2009 and September 2010 when Applicant was eventually dismissed, there had been a series of consultations on both the secondment and his self-initiated termination. It was said that all these serve as proof that Applicant was consulted.

25. Regarding both the performance bonus and membership to the South African Institute of Electrical Engineers, it was submitted that they depended on the existence of the employment relationship, which has since stopped with the termination. About the severance payment, it was submitted that Applicant had conceded under cross examination that it had been paid.

26. About his reinstatement, it was submitted that it was not possible for the reason that his position had already been taken by one Banda, since 2010. It was said that, to this, he also conceded during his cross examination. It was added that given that there is also a valid reason for his termination and that he was consulted, he is not entitled to either

reinstatement or compensation but that his case be dismissed.

27. It was said the requirements for a dismissal for retrenchment had been complied with as provided for by section 19(1) of the *Labour Code (Codes of Good Practice) Notice of 2003* and the authorities of *Atlantis Diesel (Pty) Ltd v Numsa 1995 (1) B4R (1) AD*; *Standard Lesotho Bank v Morahanye (supra)*; *Madibeng v Lesotho Bank 199 (Pty) Ltd LC/34/05*; and *Mokhisa & Others v Lesotho College of Education LC/59/2005*.

ANALYSIS

28. We wish to note that We accept the content of the authorities and principles highlighted. We wish to note that a single conduct by an employee, can give rise to a number of charges that may lead to his/her dismissal. That is, such conduct may give rise to a single reason or a combination of the reasons for dismissal recognised under section 66 (1) of the *Labour Code Order (supra)*. This means that from a single conduct, an employer can be charged of either incapacity, misconduct or operational requirements of the employer. This in essence means that Respondent was not bound in law to charge and/or dismiss Applicant on the ground of misconduct for refusal to obey an instruction, even if his conduct amount to that.

29. Further, We note and accept the definition of redundancy as shown by Applicant from the authority of *Standard*

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Lesotho Bank v Lijane Morahanye (supra). However, We are satisfied that it was not used in the context that Respondent suggests. The legal definition is focused on the circumstances of the employer, while *in casu* it has been used to refer to the circumstances of the employee. The reason is not hard to find as normally, retrenchment is at the instance of the employer while *in casu* evidence has proven it to have been at the instance of the employee, being Applicant.

30. While it has not been disputed that Applicant performed beyond targets, the Respondent has been able to satisfy Us that with the merger, there was a need for new skills hence the need to second Applicant to Zimbabwe. We say this because it has also not been disputed that Respondent initially offered fixed line communications, and that mobile communications only came with the merger. We are further fortified in this view by the Applicant's acceptance that the communications industry is dynamic and that it requires constant training.

31. Regarding consultations, evidence has shown that there were meetings and correspondence in the form of letters where both the secondment and termination were discussed. This is Our view was consultation contemplated by the *Codes of Good Practice (supra)*, and the authorities cited by parties. The decision to terminate Applicant was borne by the meetings and correspondence, which according to evidence

started immediately after Applicant was eventually terminated.

32. About the performance bonus and membership fees, We agree with Respondent that they depended on the continued employment relationship. This in essence means they can only be due beyond Applicant's termination, if we uphold his claim of unfair dismissal. About the severance payment claim, We confirm that during cross examination, Applicant conceded that it was paid. However, what has not been disputed is the payment of Applicant's pension from 1989 to 2008. This thus means that Respondent accepts it as claimed. We are persuaded by the authority in *Standard Lesotho Bank v Morahanye (supra)* to this view.

33. About reinstatement and compensation, these remedies are only awarded where the dismissal is found to be unfair. On the strength of the reasons advanced above, We find the dismissal of Applicant to have been fair both substantively and procedurally. The employer determined that he needed to be trained in order to fit within its new structure. His refusal to be trained rendered him redundant. He was consulted from the time that he was told to on a secondment until his ultimate termination. He is however, in Our view entitled to his pension from 1989 to 2008, in the sum of **M100,585-16**, which has not been disputed by Respondent.

AWARD

We therefore make an award in the following:

- 1) That the dismissal of Applicant is fair both substantively and procedurally.
- 2) Respondent is ordered to pay Applicant his pension in the sum of **M100, 585-16**.
- 3) Payment to be made 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**

MRS. MALOISANE

I CONCUR

MR KAO

I CONCUR

FOR APPLICANT:

ADV. PHEKO

FOR RESPONDENT:

MR.

LETSIKA