

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/47/2012

IN THE MATTER BETWEEN

BOKANG MOKUENA

APPLICANT

AND

STALLION SECURITY

RESPONDENT

JUDGMENT

Claim for unfair dismissal on the ground of the employers operational requirements. Applicant challenging both the procedural and substantive aspects of his dismissal – that he was not consulted as anticipated by law; and further that the reason for his dismissal is invalid as it not legally justified. Court finding in favour of Applicant and awarding compensation. Court considering the mitigation of loss and breach of contract on the part of parties in making the compensatory award. Other principles discussed – admissibility of documentary evidence in labour cases. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal for operational reasons. The brief background of the matter is that Applicant was an employee of Respondent in the position of Development Manager. He was dismissed on account of a change in structure which is alleged to have led to the redundancy of his position.
2. Unhappy with his dismissal, Applicant referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated upon but without success. A certificate was then issued on 29th October 2012, referring the matter before this Court. It is against this background that the matter proceeded before. Applicant alone testified on his behalf while Respondent had two witnesses. Having considered the evidence presented as well as parties submissions, Our judgment follows.

EVIDENCE AND FACTS

The case of Respondent

1st witness: Nkhasi Lehloenya

3. Witness testified that he is the Industrial Relations Officer at Respondent. According to him, Applicant was retrenched because his position had become redundant, as a result of change in structure. He then narrated a series of incidents that transpired before the termination of Applicant.

4. Witness testified that Applicant was called for polygraph test by the management of Letšeng Diamonds. He explained that Letšeng Diamonds is a company that mines diamonds and Respondent offers security services at its mining compound in the Mokhotlong district, and that this is where Applicant was based. BM1 was tendered as proof that Applicant was called for a polygraph test. Witness further testified that following the polygraph examination, Applicant was told that he had failed the polygraph test. He was further told that Letšeng Diamonds management had demanded that Respondent remove him from its premises.
5. Following the polygraph incident, Letseng then informed Respondent that it was going to abolish Applicant's position as it had no money to pay it. This was communicated through a letter dated 30th April 2012. The letter was tendered and marked SS1. Witness added that the contents of the letter of the 30th April 2012, had on an earlier occasion been hinted to Respondent by Letšeng Management in one of their meetings.
6. Witness further testified that upon receipt of the hint, they informed Applicant that there was possibility that he would be retrenched. BM2 was tendered as proof. By the time that the letter, SS1 came they started to engage Applicant in consultative negotiations. During this process, Respondent had communicated to Applicant the options that it had considered as alternative to retrenchment. These were to

offer him employment in its posts in South Africa, which proved untenable as Applicant was not a South African citizen. Secondly, they offered him employment at Mothae Mine, where they also offer security services, which also could not work as his position was not available within the structures at that mine.

7. Witness added that a decision was then taken to retrench Applicant when all the options that it had considered proved untenable. The decision was communicated through a letter. The letter was tendered and marked BM4. It was said that when the decision to retrench Applicant was taken, Respondent had explored all options short of termination, from April 2012 to July 2012, when the dismissal took effect. It was claimed that in this period several consultative meetings took place.

8. During cross examination witness stated that in terms of the agreement, that is contract between Letšeng Diamonds and Respondent, Letšeng could not demand that an employee of Respondent be removed or dismissed. Witness further testified that he only joined Respondent in May of 2012, and could not deny if it was suggested to him that consultations did not take place at least before his time. Witness also accepted that he had no evidence that consultation took place either before he joined and after he had joined Respondent.

2nd witness: Johan Van Wyk

9. Witness testified that he was the General Manager of Respondent based in Lesotho until March 2012, when he was transferred to Bloemfontein in South Africa. He left Mr. Nkhasi Lehloenya, 1st witness, in charge of operations. He stated that he engaged with Applicant in consultative negotiations before the decision to retrench him was taken. He also narrated a series of the events that led to the retrenchment of Applicant.

10. Witness testified that they had earlier received a hint from their client, Letšeng Diamonds, that it was considering abolishing Applicants position. Following the hint, witness informed Applicant about his possible retrenchment. This was communicated to Applicant on the 23rd April 2012. On the 30th April 2012, Respondent received a letter from Letšeng Diamonds, which formally communicated to Respondent management, its decision to abolish Applicant's position. The Court was referred to annexure SS1. Witness testified that this was not uncommon in the security industry as the client is the one that determines the structure.

11. Applicant was thereafter called to the offices of witness to discuss both letter and possible alternatives. They talked about the Mothae Mine position, as well as the South African posts, which in the end proved untenable. Witness stated that at the end of the meeting, Applicant asked to be given an opportunity to consult his legal representative on the

issue. Witness added that thereafter, he spoke to Applicant on several occasions over the telephone, and Applicant even visited him at his Bloemfontein office.

12. Witness however stated that both the telephone conversations and visits at his Bloemfontein offices, were purely social and had nothing to do with the retrenchment. He stated that since the first meeting when he communicated the possibility of retrenchment, no further meetings took place between himself and Applicant, until on the 27th July 2012, when he informed him about his termination and handed over to him his letter of termination, annexure BM4. Witness testified that he is of a strong belief that consultative meetings took place after he left, between Applicant and Mr. Nkhasi Lehloenya, 1st Witness. He added that while he is strongly of this belief, he never received a report of such meetings from Mr. Nkhasi Lehloenya.

13. Witness further testified that, after Letšeng had taken the decision to abolish Applicant's position, Respondent took over to pay it until it eventually retrenched him. SS2 was handed in as evidence that Applicant was at all times, prior to his position being abolished, paid by Letšeng Diamonds and not Respondent. SS3 was tendered as proof that after the decision to abolish his position had been taken by Letšeng Diamonds, his salary was then paid by Respondent.

14. Witness testified that the contract that Applicant relied upon, to suggest that Letšeng Diamonds had no right to change the structure of Respondent, was illegally obtained. It was stated that Applicant did not have a legitimate and authorised access to it. It was stated that this same contract has expired and that Respondent and Letseng are no longer operating on its basis, but on the basis of a different arrangement altogether.

15. During cross examination witness stated that Letšeng Diamonds had no right to change the structure in terms of the existing contract between the parties. He further stated that when the possibility of retrenchment was first communicated to Applicant, it was said to be due to the dissatisfactory result of the polygraph test. Regarding consultations, witness stated that he could not recall if the consultations did take effect on the 30th April 2012, as he had earlier suggested. Witness also stated that whereas the letter of termination stated that the retrenchment was due to structure change, nothing had been placed before Court to show that Applicant was consulted on the change in structure.

Applicant's case

Applicant

16. Applicant testified that he started working for Respondent on 1st October 2004. At the time of his termination he was Development Manager earning a salary of M26,600-00. He

stated that circumstances leading to his termination are that on or around the 2nd March 2012, he was called to Letšeng Diamonds, where he was based, by the General Manager, one Keller. Upon arrival, he was told to take a polygraph test, which he did take. On the following day he was called to the office of the Mr. Keller, where he was given a suspension letter, annexure BM1. He was told that he was being suspended because he had failed the polygraph test, and was directed to vacate the premises of Respondent immediately.

17. Sometime in April 2012, he was called to Mr. Van Wyk's office, 2nd witness, where he was handed a letter, annexure BM2, informing him of a possible retrenchment. He was then invited for a consultative meeting on the 30th April 2012. He stated that he did attend the consultative meeting but that it never took place as it was postponed by Mr. Van Wyk. He stated that this was after he had handed over to him a letter from his lawyer wherein he was demanding a copy of the results of the polygraph test undertaken at Letšeng Diamonds earlier. Applicant stated that he was never given the opportunity to engage with Respondent on issues surrounding his anticipated retrenchment

18. He further testified that after that failed meeting, no other meetings were held until he was called to Van Wyk's office and given his letter of termination, annexure BM4. He added that he used to visit Mr. Van Wyk (2nd witness) at his

Bloemfontein office and that the visits were purely social, as they never discussed anything relate to the retrenchment. He stated that whereas the letter suggests that he engaged in consultations with Respondent management, he disputed that. He added that he was surprised that his termination was for a change in structure when he had initially been informed that it was based on his unsatisfactory performance in the polygraph test, as annexure BM2 had suggested.

19. Applicant also testified that the termination of his contract, on account of change in structure by Letšeng diamonds, was contrary to clause 4.2 of the contract between Letšeng Diamonds and Respondent. He stated that in terms of the contract Letšeng Diamonds had no right to change the structure of Respondent. Annexure BM6, a copy of the contract between Letšeng Diamonds and Respondent, was tendered. Applicant testified that he had access to a copy of the contract by virtue of being a manager within Respondent ranks.

20. Applicant prayed for compensation of an amount equivalent to his 36 months' salary. He stated that since his retrenchment, he applied for several jobs and even joined several existing companies which failed and were shut down. He stated that with his terminal benefits from Respondent, he has built rented apartments which give him a return of M900.00 per month. He stated that this has been the

position since January 2014. He handed in BM5 as proof that he applied for jobs.

SUBMISSIONS

Applicant

21. It was submitted that in the case of *BMD Knitting Mills (Pty) Ltd v SACTWU (2001) 22 ILJ 2264 (LAC)*, the Court of Appeal stated that a court determining the fairness of a dismissal for operational reasons, must examine if both the reasons for dismissal, which accounts for the substantive aspect, and the manner in which the dismissal is effected, which accounts for the procedural aspect, are reasonable. It was submitted that this Court is no exception to the principle.

22. Regarding the substantive aspect, Applicant submitted that in the case of *Maphoto Machelo v Lesotho Bakery (Blue Ribbon) LAC/A/04/2004*, the Labour Appeal Court stated that a substantively fair retrenchment is one that is based on both a *bona fide* reason, and is also operationally justifiable. It was argued that *in casu*, there is no justifiable and *bona fide* reason. It was submitted that the argument is based on the fact that the basis of the retrenchment is contrary to the contract between Letšeng Diamonds and respondent, in particular clause 4.2 thereof.

23. Regarding the procedural aspect, it was submitted that the dismissal of Applicant is unfair. It was sated that in the case of *Phetang Mpota v Standard Lesotho Bank*

LAC/CIV/A/10/2008, the Labour Appeal Court, at paragraph 39 of the judgment, stated that in a possible retrenchment situation, parties must meet and discuss the three following,

- 1) how to avoid retrenchment,
- 2) if retrenchment is unavoidable, selection criteria of retrenchment, and
- 3) ways of alleviating hardships of retrenchment such on reasonable severance pay, etc.

24. It was argued that *in casu*, this guideline was not followed as the Respondent simply unilaterally decided to retrench Applicant. It was argued that this approach of Respondent was shunned in the case of *Lesotho Highlands Development Authority v Motumi Ralejoe LAC/CIV/A/03/2006* & in *Makhobotlela Nkuebe v Metropolitan Lesotho LC/79/2006*.

25. It was also submitted that Applicant has complied with the provisions of section 73 (2) of the *Labour Code Order 24 of 1992*, in that he has mitigated his loss as evidence has shown. It further submitted that in addition to mitigation of loss, Applicant has also been able to show a breach on the part of the Respondent which is his legally unjustifiable retrenchment. It was submitted that compensation in terms of section 73(2) of the *Labour Code Order (supra)*, is thus due to Applicant. It was specifically prayed that the Court find an award of 36 months' salary equivalent a fair and equitable award, particularly considering factors such as future likely loss to be suffered by Applicant, age of Applicant, prospects

of Applicant finding a job, and the circumstances of his dismissal.

Respondent

26. Respondent submitted that evidence has shown that Applicant was dismissed because Letšeng Diamonds had changed the structure, and that this decision affected Applicant's position with Respondent. It was submitted that in the security industry, it is client that determines the structure and that what happened was not uncommon. It was added that Applicant did not challenge this claim.

27. Regarding the procedure, it was submitted that evidence has been led to show that Applicant was consulted on a number of occasions. It was said that consultations were both face to face and telephonically. It was argued that reflective of this is annexure BM4. It was added that there is thus no dispute that consultations took place as Applicant did not challenge BM4 on that issue. It was argued that in law where a fact is not disputed, then judgment must be made in favour of the Respondent on the basis of that fact. The Court was referred to the cases of *Plascon - Evans Paints (Pty) Ltd v van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*; and *Lesotho National Olympic Committee v Morolong LAC (2000 - 2004) 49*, in support of the argument.

28. It was further argued that evidence has been led to show that the contract that Applicant seeks to rely on to claim that

Page **12** of **19**

there was no valid reason for his dismissal, was illegally obtained. Reference was made to annexure BM6, which is the contract of service between Letšeng Diamonds and Respondent. It was thus prayed that the said contract be excluded and that it be found that the reason for dismissal was valid.

ANALYSIS

29. We wish to comment that We accept the authorities cited by Applicant and confirm the principles contained therein. Applicant's first argument relates to a contract between Letšeng Diamonds and Respondent. The admissibility of this contract has been challenged by Respondent, and he primarily challenges how it was obtained and the reliability of its content. It has been suggested that not only had the contract expired but also that Applicant did not have authorised and legitimate access to it.

30. We wish to note that this Court is concerned with the dispensation of substantial justice. In order to effectively do so, this Court must admit all materials presented before it, in the form of evidence. However, such materials are relevant to the issue for determination. In essence, in this Court, the admissibility and/or inadmissibility of evidence turns more on relevance than on how the evidence was obtained (see *Goosen v Caroline Frozen Yoghurt Parlor (Pty) Ltd & another (1995) 16 ILJ 396 (IC)*). Therefore, its evidence is relevant for

purposes of dispensing substantial justice, then it is admissible.

31. Applicant claims that when the decision to retrench him was taken, the contract between Letšeng Diamonds and Respondent, prohibited Respondent from altering the structure of dismissing the employees of Respondent. For this he relies on annexure BM4, which as we have said is the contract of employment between Respondent and Letšeng Diamonds. We have perused the contract and have noted that in terms of clause 2.2 therefore, it ran from the 1st August 2008 to 31st July 2011. The Clause is recorded as follows,

“The Contractor’s appointment hereunder shall be in terms of clause 14 of the Mining Agreement and shall endure for an initial period of 36 (thirty six) months from 1 August 2008 to 31 July 2011.”

32. Clearly during the period in issue, this contract had long lapsed and was no longer applicable to parties. This was suggested to Applicant by Respondent and he failed to address it. In law what has not been challenged or addressed is taken to have been admitted. (see *Theko v Commissioner of Police & another 1991 - 1992 LLR-LB 239 at 242*). As a result, Applicant cannot rely on the contract in support of his claim for the substantive unfairness of his dismissal. The contract is plainly immaterial to the issues to the dispute between the parties.

33. However, evidence was led by the witnesses of Respondent, during their cross examination, that Letšeng Diamonds had no right to change the Respondent structure, at least in terms of the current contract. This evidence corroborated the evidence of Applicant to this extent. That being the case, there is no legal justification for the change in structure within Respondent at the instance of Letšeng Diamonds. The termination by retrenchment was therefore substantively unfair.

34. We are fortified in Our decision by the fact at different stages towards the retrenchment of Applicant, several distinct reasons were advanced by Respondent as the basis for the retrenchment. At one point, according to 1st witness of Respondent, the reason was lack of funds to pay the Applicant's position. Later on, he stated that it was because Applicant had failed the polygraph/integrity test and until it was eventually stated to be a change in structure at the instance of the client, Letšeng Diamonds.

35. Clearly there is inconsistency in the evidence of the witnesses of the Respondent in relation to the reasons for the dismissal of Applicant. This inconsistency in reasons given, suggests a fabrication of facts on the part of the Respondent. It is trite law that inconsistencies in evidence are an epitome of a fabrication of facts. Such facts are in law unreliable and cannot be used as a basis of any legal decision (see *Factory* Page **15** of **19**)

Workers Union v Ever Unison Garments (Pty) Ltd LC/07/2004). On this premise, We find that there was no *bona fide* reason for the dismissal of Applicant.

36. On the aspect of procedure towards the termination of Applicant, We wish to again comment that they acknowledge and accept the principle in the Labour Appeal Court authority of *Phetang Mpota v Standard Lesotho Bank (supra)*, as put by Applicant. We are of the attitude that Applicant was not consulted prior to his dismissal, at least in the manner anticipated in the above authority. Evidence presented has been able to show that Respondent only considered the alternatives short of dismissal and no more. As a result, the procedural requirements in a dismissal for operational reasons in the case of Applicant was flawed, and thus unfair.

37. Regarding the relief sought, We are convinced that Applicant has met the requirements for an award of compensation in terms of section 73(2) of the *Labour Code Order (supra)*. Applicant has shown the several attempts that he has made to mitigate his loss, as shown on annexure BM5. He has also satisfied Us that the Respondent unfairly breached his contract of employment by dismissing him without a valid reason and in the procedurally correct manner. We therefore proceed to formulate his compensatory award.

FORMULATION OF THE AWARD

38. Applicant had asked for 36 months salary equivalent as compensation for both the procedural and substantive unfairness of his dismissal. The claimed award was not challenged by Respondent. We therefore see no reason to deviate from the Applicants claim, particularly because We hold the view that the circumstances of his dismissal warrant more than what he has claimed.

39. We say this because, Applicant's actual loss is almost 36 months already, without considering his future loss, as well his prospects of finding a job. Evidence has shown that the prospects are quite bad because he remained either unemployed or employed but without income, at least to the end of this matter.

40. For two reasons, We will compute Our award over the claimed period of 36 months. The first reason is that the law requires that a party be awarded no more than what it has asked for (*see Phetang Mpotla v Standard Lesotho Bank (supra)*). Secondly, a compensatory award is not meant to unfairly enrich a wronged party, but to compensate in a just and equitable manner. On account of the second reason, We will consider the income earned from January 2014 to date, in Our award.

41. Our computation is therefore as follows,

From January 2014 to June 2015, there are 17 months. At the income rate of M900.00 per month, in the 17 months,

Applicant has been to earn M15,300.00 (M900 x 17). His 36 months salaries equal to M957,600.00 (M26,600.00 x 36).

42. The just and equitable compensatory award is therefore
 $M957,600.00 - M15,300.00 = \mathbf{M942,300.00}$.

AWARD

We therefore make an award as follows,

- 1) That the Applicant's dismissal is both substantively and procedurally unfair.

- 2) Respondent is order to pay Applicant compensation in the amount of **M942, 300.00**.
- 3) The order is to be complied with 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. THAKALEKOALA

I CONCUR

MRS. RAMASHAMOLE

I CONCUR

FOR APPLICANT:

ADV. SEPIRITI

FOR RESPONDENT:

ADV. KOTO