

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/74/2013

IN THE MATTER BETWEEN

BOITHATELO RATSOANE

APPLICANT

AND

PACT LESOTHO

RESPONDENT

JUDGMENT

Claim for unfair dismissal for operational reasons. Applicant claiming that the correct procedure was not followed in terminating her. Applicant claiming that if procedure had been observed, she would not have been terminated. Applicant claiming payment of the remainder of her contract at the time of termination as compensation. Court finding in her favour and awarding compensation as claimed. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal, allegedly on the grounds of operation requirements of the employer. Applicant was an employee of Respondent on a fixed term contract from 29th September 2010 to 30th September 2014. She was terminated on the 31st July 2013. Unhappy with the termination she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The claim was duly conciliated upon but without success. A report of non-resolution was issued, referring the matter before this Court for adjudication. It is on the basis of this background that the matter was heard. Having heard parties, Our judgment follows.
2. It however, important to mention that in opening, Applicant stated that she challenged the termination of her employment as being procedurally unfair. She stated that the Respondent failed to follow the due processes in dismissing her. Further that if the due processes towards her retrenchment had been followed, she would not have been dismissed. She claimed payment of the remainder of her contract with all benefits that she would have accrued but for the termination. We also wish to add that whereas parties had promised to file their heads of argument, that did not happen. We were therefore compelled to make this judgment without them.

FACTS AND EVIDENCE

3. Respondent led the evidence of only one witness by the name of Kholotsa Meyane, the Country Director, while applicant also testified alone in support of her case. The evidence of these witnesses is summarised hereunder.

Respondent's case

witness : Kholotsa Moejane

4. Witness testified that at the time of the incidents in issue, he was country director at Respondent. He stated that Respondent survives on grants from the United States government. Further that sometime in January of 2013, Respondent was informed in a meeting with agents of its funder, that there would be no funding in certain programmes that Respondent ran. It was said that the funder had changed the programme direction.

5. On or around the 18th March 2013, Respondent management had a staff meeting where staff was informed about the decision of the funder and its implications on them. Staff was informed that there was a possibility that there may be retrenchments, as a result. In that meeting, employees were also informed that management would be reducing the number of departments, and merge some of the positions.

6. After the meeting, certain positions were merged and Applicant's position was affected by the merger. The new position that was created by the merger was advertised and applied for, but Applicant was however unsuccessful. She

was then retrenched along with five others, at the end of July 2013.

7. During cross-examination, witness testified that the decision to change the structure of Respondent, was made by management to the exclusion of staff, among whom is Applicant. Further that employees comments were only invited after the decision to change the structure had been made by the management of Respondent, contrary to his earlier version that consultation started earlier.

Applicant's case

Applicant: Boithatelo Ratšoane

8. Applicant testified that at the time of her termination, she held the position of Operations Officer in the department of Finance and Operations. She stated that sometime, mid-March 2013, Respondent called a staff meeting. In that meeting, all employees were informed that there would be no funding beyond October 2013.
9. Also in that meeting, all employees were invited to come up with ideas on how to save Respondent. They were then divided into groups and allocated specific areas of focus. On the reporting day suggestions were made to the country Director who promised to revert to staff with the attitude of the full management team.
10. Applicant testified further in that to her dismay, the Country Director never brought feedback as promised, but

rather came back to them with a new structure of Respondent. In terms of the new structure, certain positions had been merged, some changed except that of the Accountant and the Country Director.

11. Applicant was thereafter called to country director's office, where she was told that her position had been merged with two others and that she would have to apply. She applied and was unsuccessful after having been promised that the requirement for her to apply, was just a formality. She was then terminated on 31st July 2013. Her salary was M12,607 at the time of termination and she asked for payment of salaries and benefits up to the end of her contract, which was 30th September 2014.

12. Cross examination revealed that Applicant currently works at EGPAF, where she earns M11,000-00 per month, since June 2014. It further revealed that she was only out of employment from July 2013 to June 2014.

ANALYSIS

13. In law there are three recognised reasons for termination of the contract of an employee. These reasons are spelled out under section 66(1) of the *Labour Code Order 24 of 1992*, as follows:

"An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is -

- a) *Connected with the capacity of the employee ...*
- b) *Connected with the conduct of the employee ...*
- c) *Based on the operational requirements of the undertaking, establishment or service."*

14. *In casu*, Applicant has been dismissed or terminated under section 66(1)(a) of the *Labour Code Order (supra)*, and the basis of her termination is the operational requirements of the employer. However, for termination under any of the three recognised grounds to be fair, it must comply with both the substantive and the procedural requirements for a fair termination. Those requirements are laid out in the *Labour Code (Codes of Good Practice) Notice of 2003*.

15. In terms of section 7(1) of the *Codes of Good Practice (supra)*,

"(1) An employer may dismiss an employee if the employer -

(a)...

(b)...

(c) follows a fair procedure; and

(d) has a fair reason for the dismissal."

In casu, Applicant is only concerned with the procedure of her dismissal.

16. The procedure for termination of an employee for operation reasons, has been laid out under section 19 of the *Codes of Good Practice (supra)*. In terms of that section,
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there has to be a joint problem solving exercise between an employer and an employee, with the purpose to reach an agreement on the following,

- “(a) alternatives to dismissals ...*
- (b) criteria for selecting the employees for dismissal ...*
- (c) steps to minimise dismissals ...*
- (d) conditions on which dismissals take place ...*
- (e) steps to avoid the adverse effects of the dismissals
....”*

17. Evidence has shown that the employees of Respondent were divided into groups to find ways of avoiding retrenchments. These views were not considered as Respondent management neither discussed with its employees nor implemented them. Rather what it did, was to come up with a structure that was unilaterally determined, which it imposed upon the employees. Clearly the procedural steps outlined under Section 19(4) of the *Codes of Good Practice (supra)*, were not complied with.

18. We are therefore of the view that Respondent has failed to show that it followed a fair procedure in terminating or dismissing Applicant. We agree with Applicants that if considered, their inputs as employees of Respondent, which were premised on cutting costs to Respondent, could have assisted towards avoiding retrenchments. We are strongly inclined to this view by the fact that the alleged reason for

retrenchments was economic, as there was an allegation of lack of funds to run the programmes of Respondent.

19. Applicant prayed that should the Court find in her favour, that she be awarded the remainder of her contract together with the benefits that she could have accrued but for termination, at least in terms of the prayers as contained in her originating application. However, no evidence has been led to establish these benefits and We cannot therefore award same. Consequently, We will only award what has been established before Us, namely the amount due to her.

FORMULATION OF THE AWARD

20. Applicant earned a salary of M12,607-00 at the time of her termination. Her contract was from 29th September 2010 to 30th September 2014. She was dismissed on 31st July 2013. By a simple arithmetic calculation, at the time of her dismissal she had one year and two months to the end of her contract. She thus has the remaining period of 14 months.

21. She however stated during cross examination that, she was only out of employment from July 2013 to June 2014. Therefore for the 11 months in this period, she was without employment. She is thus entitled to her full salary only for the 11 months. The computation is as follows:

$$M12,607-00 \times 11 = M138,677-00.$$

22. In the period from June 2014 and beyond, she earned a salary of M11,000-00 which is about M1,607-00 (M12,607-00 - M11,000-00) below the initial salary with respondent. In the period between June 2014 and September 2014, which is about 4 months, she earned less by M6,428-00, (which is M1,607 x 4 months). The total amount awarded to applicant is thus M138,677 + M6,428-00 = **M145,105-00**.

AWARD

We therefore make an award as follows,

- 1) The dismissal of Applicant is unfair.
- 2) Respondent is ordered to pay Applicant the compensation amount of **M145,105-00**, calculated above.
- 3) The amount is 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. TŠEUOA

I CONCUR

MR. MATELA

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

ADV. PHEKO
ADV. LOUBSER