IN THE INDUSTRIAL COURT OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE

CASE NO. IC 822/09

IN THE DISPUTE BETWEEN:

TERENCE T. SHOWA & 16 OTHERS **APPLICANTS**

AND

PATHFINDER ENTERPRISES T/A NIIT **RESPONDENT**

CONSTITUTION OF COURT

H. RUHUKYA **INDUSTRIAL COURT JUDGE**

B. N. KHUMO **NOMINATED MEMBER (UNION)**

B. S. TSAYANG **NOMINATED MEMBER (BOCCIM)**

FOR APPLICANT

SHOWA T. **REPRESENTATIVE**

FOR RESPONDENT

MASWABI M. M. **(PUPIL ATTORNEY)**

PLACE AND DATE

GABORONE **17 OCTOBER 2011**

Retrenchment – whether Applicants consulted prior to being dismissed – value of consultation discussed.

JUDGMENT

[1] When the Applicants instituted proceedings against the Respondent in terms of their Statement of Case, they totaled 17. At the commencement of the trial the Court was informed that nine of the 17 had been re-employed and were no longer therefore, pursuing the matter.

[2] The Court was also informed that the Applicants had all agreed that Terence T. Showa would testify on their behalf.

[3] The Applicants were dismissed on 31st May 2009 by reason of redundancy.

[4] According to Ravi Srinivasan, who testified on behalf of the Respondents, the intention to terminate the Applicants' contracts of employment was formed in early March 2009.

The employees likely to be affected by the intended retrenchment were notified on or about 15th March 2009. The Commissioner of Labour was only notified on 30th March 2009. After letters were written Mr. Srinivasan told the Court that staff was called to a staff meeting to discuss retrenchment procedure. The staff meetings were called and held on 2nd & 3rd April 2009. The Respondent tendered the purported minutes of the said meetings. To the Courts; surprise the purported minutes were, with the exception of one paragraph, exactly the same. No explanation was given for this except to say that there were two groups that attended the meetings. The Court was therefore unconvinced that the purported meetings (as submitted by Mr Maswabi for the Respondent) were consultation meetings pursuant to the intended retrenchment.

[5] In the case of **Machaira vs. Paledi Morrison Partnership 2006 (1) BLR 669** @ **674 E** the late De Villiers J said,

> ***"By using the word "shall" in the said section 25(2), the legislature intended these provisions to be mandatory. The giving of written notice forthwith of intention to retrench to all employees likely to be affected is therefore mandatory……..."***

[6] I am of the view therefore that section 25(2) of the Employment Act CAP 47:01 (which provides the processes that must take place in redundancy exercises) requires not substantial but full compliance. Anything less than full compliance will just not do.

[7] Article 14(1) of the Termination of Employment Convention 1982 (No. 158), whose provisions this Court has the power to apply because of its equitable jurisdiction, provides,

> ***"When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible ……the reasons of the termination ……" (underlining is only my emphasis).***

[8] Mr Maswabi, in arguing his case, submitted that even though the letters to the Applicants came 15 days after the intention to retrench was formed and the Commissioner of Labour informed 30 days after the said intention was formed that the Respondent must be formed to have been substantively correct. As was stated by De Villiers J,

> ***"…… substantial compliance of the said provision…….. does not enter the equation when making a finding on whether the retrenchment was lawful of not …… "***

[9] Was there consultation *in casu*? I have already found that they alleged staff meetings could not and do no pass the test to qualify as consultative meetings. This finding is premised on both domestic case law as well as Convention 158 of 1982.

[10] It is the duty of an employer, after having duly notified the employees likely to be affected by the retrenchment, to create a meaningful forum to allow those employees adequate consultation. Consultation is an extension of the *audi alteram*

partem rule. The employer must allow the employees to make suggestions on how the retrenchment can be avoided. Most employers then stop there. But what good does it serve if a suggestion is made and no feedback is given by the person to whom the suggestion was made? In this regard therefore the employer has a further duty to adequately communicate to the employees its basis for not accepting the suggestions of the employees.

[11] In the present case no evidence was led to show that meaningful consultation took place. Nothing was presented during argument to show how the Respondent dealt with any suggestions the Applicants made to avoid retrenchment. The Respondent also fails to show what steps, if any, it took to avoid retrenching the Applicants. This would have been material when viewed against the Applicants' evidence that they were skilled in the disciplines and could have been redeployed to teach other classes.

[12] Article 13(1)(b) of the Termination of Employment convention, supra, provides that,

> ***"(1) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:***
>
> ***a) ……***
>
> ***b) give…….the workers representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any termination……" (underlining is my emphasis).***

[13] The Court therefore finds that the Applicants were not consulted within the meaning of the term prior to their termination by reason of redundancy. The Court therefore finds that their dismissals were substantively fair but procedurally unfair.

[14] Having found the dismissals procedurally unfair the Applicants are entitled to some *quantum* of compensation**.** They asked the Court to award each of them six months salary.

[15] In determining the *quantum* of compensation the Court is guided by section 24(4) of the Trade Disputes Act No. 15 of 2004. The Court also takes judicial note of the words of De Villiers J in the Machaira case, supra, where he said,

> ***"The Court therefore finds that substantial compliance of the said provision…… does not enter the equation when making a finding on whether the retrenchment was lawful or not. Substantial compliance can however enter the equation when dealing with compensation."***

[16] Having considered that the basis for retrenchment is not in dispute, the Respondent's substantially complied with the provisions of section 25(2) of the Employment Act I find that the Applicants cannot succeed on their claim for six months compensation. The Applicants will however be awarded compensation as determined hereunder.

DETERMINATION

1. The dismissal of the Applicants was substantively fair but procedurally unfair.

2. The Applicants are awarded compensation as follows:

2.1	Terence Showa	-	P16 400.00 representing two months salary.
2.2	Fradreck Gomo	-	P9 000.00 representing one month salary.
2.3	Boatametse Mongati	-	P6 500 representing one month salary.
2.4	Richard Masinri	-	P9 000 representing one month salary.
2.5	Gilbert Malale	-	P27 500 representing two months salary.

2.6 Simbarashe Chirimubwe - P20 000 presenting two months salary.

2.7 Goabaone Kgosisejo - P13 000 representing two months salary.

2.8 Edison Mutema - P20 000 presenting two months salary.

3. All the above sums of money are compensation in nature and the full sums without any deductions whatsoever, including but not limited to, income tax are payable to the listed Applicants.

4. The total sum of P121 400 is payable on or before 16th December 2011 through the office of the Registrar.

5. No order is made as to costs.

DATED AT GABORONE THIS ……. DAY OF …… 2011.

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H. RUHUKYA
JUDGE

We agree on the facts.

……
B. N. KHUMO
NOMINATED MEMBER (UNION)

……
B. S. TSAYANG
NOMINATED MEMBER (BOCCIM)