CONSULTATION PRIOR TO RETRENCHMENT

IN THE LABOUR COURT OF LESOTHO **CASE NO LC 29/97**

HEARING BEFORE RETRENCHMENT

HELD AT MASERU

IN THE MATTER OF:

SERAME KHAMPEPE **APPLICANT**

AND

MUELA HYDROPOWER PROJECT CONTRACTORS & 4 OTHERS **RESPONDENTS**

JUDGMENT

The applicant herein seeks a declaration that;

(a) his retrenchment is null and void and consequently that he be reinstated;
(b) costs of suit;
(c) further or alternative relief.

The applicant was an employee of the first respondent. He was retrenched on the 1st November 1996. The applicant contends that his retrenchment was unfair because he was not given a hearing and further that, he was a carpenter, but after his said retrenchment the respondent continued to absorb carpenters.

In their Answer the respondents deny that applicant was a carpenter. They aver that he was a shutterhand and they have annexed documentation proving this. Mr. Maieane for the applicant sought to persuade the Court to allow viva voce evidence on the question of the occupation of the applicant. The Court overruled this request on the ground that the real issue for determination is one of law namely, whether the applicant was entitled to a hearing before retrenchment. The factual dispute of what the applicant was employed as can easily be decided on the papers filed of record.

The respondents annexed applicant's pay slips for the months of July, August, September and November 1996. All these show applicant's occupation as shutterhand. There is no evidence showing that at any stage of his employment applicant ever queried this classification, except when he attempted without success to do so in testimony before Court. This was clearly going to be a waste of valuable

time to allow applicant to come and deny such indisputable records which he has lived with and accepted as correct throughout his employment with the respondents.

It is not necessary for this court to decide whether the respondent continued to absorb carpenters after applicant's retrenchment. That may well have been the case, but such recruitment had nothing to do with the applicant because his occupation, was as we have found, shutterhand not a carpenter. Even the question of his possible transfer to that occupation does not arise because has not pleaded any knowledge of that job. Accordingly applicant's attempt to challenge the fairness of his retrenchment on this ground is without merit.

In terms of Section 66 (4) of the Labour Code Order 1992 (the Code) an employee whose services are terminated under Section 66(1)(a) or (b) of the Code is entitled to have an opportunity at the time of dismissal to defend himself against the allegations made. Sub-section (1)(a) and (b) deal with the termination of the services of an employee for reasons connected with; the capacity of the employee to do the work the employee is employed to do and the conduct of the employee at the workplace respectively. Sub-section (1)(c), which is consciously left out in Section 66 sub-section (4) deals with the termination of the services of the employee based on the operational requirements of the undertaking, which is the case in hoc casu.

What is clear is that the hearing as it is envisaged in Section 66(4) of the Code, is not a pre-dismissal requirement where the dismissal is as a result of operational requirements. This Court has however, basing itself on the International Labour Organisation Instruments and decisions of neighbouring countries especially South Africa, evolved a precedent in terms of which an employee earmarked for retrenchment must be notified in good time of the intended action and consulted on alternatives. (See Article 13(1)(a) of ILO Convention No.158 of 1982 concerning Termination of Employment). The established principle however, is that where employees are members of a trade union or some other collective body through which they communicate with the employer on matters of common interest, it is sufficient for the employer to consult with such a union and/or collective body. (See Luthuli & Others .v. Flortime (Pty) Ltd & Another (1988) 9 ILJ 287 at 291 and Mbobo .v. Randfontein Estates Gold Mining Co. (1992) 13 ILJ 1485.).

In hoc casu, the respondents averred in paragraph 2 of the Answer "Ad sub-paragraph (b) thereof" that the "respondent dealt with the retrenchment issue collectively with applicant's own Workers Representative Committee." The Court was referred to annexure "DPA3" to the Answer which is a memorandum addressed to all employees by the first respondent's Project Director notifying all employees of the "Employee Reduction Programme." The reduction was said to be necessitated by the "completion of work in a number of areas. In addition while there is still much work and many milestones ahead before the completion of the various contracts, the general situation demands a reduction."

Paragraph 2 of the memo alerted the employees to the fact that the respondent is working hand in hand with the Workers Representative Committee in the process. The applicant contended however, that at the time of the consultations he was on suspension with full pay. The disciplinary case arising out of the suspension was finalised on 15th August when the applicant was acquitted of the charges. It is common cause that annexure "DPA3" was dated 8th August 1996. It is significant that in his originating application the applicant has not stated when his suspension started. He only mentions the 15th August when he was acquitted. This Court has no factual basis on which to conclude that on the 8th August the applicant was already on suspension. He may therefore still have been at work when "DPA3" was written.

Again the applicant has not stated what the terms of his acquittal were. He has made vague generalities that on the 11th November he was still awaiting to be called to work when he received the letter of his retrenchment. What is clear from the annexures, however, is that applicant personally signed for his pay for the months of July and August, which are the pertinent months in relation to the consultations about the reduction programme. The applicant is the author of this situation of insufficient information. It is therefore fair to the other side that we make an adverse inference against him (the applicant) as we hereby do, that he infact knew about the process of the consultations.

Mr. Maieane submitted that the applicant denies being a member of any trade union or being part of the so-called Workers' Representative Committee. Firstly, this was not pleaded by the applicant. It was clearly evidence from the bar which is not acceptable. However, Mr. Moiloa sought Mr. Maieane's consent that he refers to the record in another matter which is pending before this Court namely LC27/97. After consultation Mr. Maieane gave his consent. The documentation annexed to the founding papers in that matter shows that the applicant was, or still is the trustee of the Workers' Representative body which later transformed itself into the Lesotho Workers Trade Union. Be that as it may, the issue to determine is whether the employer was obliged to consult with the applicant individually despite consulting and reaching agreement with the Workers Representative Committee.

In Mbobo's case supra some employees of the respondent had challenged their retrenchment on grounds, inter alia, that the respondent had neither notified them in good time nor consulted them prior to the retrenchment. They lodged this complaint notwitbstanding that the respondent had reached a comprehensive agreement covering all aspects of the retrenchment exercise with the National Union of Mineworkers and other unions representing employees in the bargaining unit and with non-union members on an organised basis. The court had to decide whether it should entertain the individual applicant's claim in the light of the said agreement. In approaching the issue Schoeman AM stated on p.1494 of the judgment:

"I feel that the issue under consideration should be resolved against the background of collective bargaining, the history of collective bargaining, the rationale thereof and trends to promote the process of collective bargaining."

And at p.1496 of the judgment the learned additional member stated:

"It would at first blush appear that one can hardly expect from (sic) employers to negotiate or consult with each employee concerning matters affecting all employees in the particular bargaining union or certain groups of employees in that bargaining unit on matters like annual salary increases or pending retrenchments. Preferential treatment should be avoided. The minority would be expected to abide by the decision of the majority. Employers can hardly agree on more favourable conditions for non-union members or for members operating separately from the union on an individual basis than those conditions agreed upon with the bargaining agent. (See National Union of Mineworkers .v. Henry Gould (Pty) Ltd & Another (1988) 9 ILJ 1149 and National Union of Mineworkers .v. East Rand Gold & Uranium Co. Ltd (1991) 12 ILJ 1221 (A).) The practice to negotiate with individuals concerning general issues is unknown and impractical."

The learned member was however, quick to show that bargaining with non-organised groups is not unknown. In conclusion it was observed that it would infact not be fair to the employer to permit individual employees to opportunistically renege from collective agreements with a view to clinch a better deal for themselves. That would certainly also not be in the interest of collective bargaining. It is the duty of this Court to uphold the principles of collective bargaining and to protect collective bargaining agents or their members from visiting unfair practices on one another.

In the circumstances this application ought not to succeed. It is therefore dismissed. Were it not for Mr. Moiloa's compassion, this was a case fit for the loosing party to be mulcted with costs. Given the circumstances surrounding this case especially the deliberate withholding of appropriate information by the applicant it is apparent that this was

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