CIV/APN/89/2000

IN THE HIGH COURT OF LESOTHO

In the Application of:

THE EMPLOYMENT OF AFRICA LTD Applicant

VS

L.A. LETHOBANE AND 3 OTHERS Respondent

JUDGMENT

Delivered by the Honourable Mrs Justice K.J. Guni
on the 5th day of June 2001

In this application, the court is being asked to review and set aside, in terms of Rule 50 (1) (b) HIGH COURT RULES, Legal Notice N0.9 of 1980, the judgment and an award of LABOUR COURT. That judgment and an award were made by THE LABOUR COURT on the 16th SEPTEMBER 1999 and 26th DECEMBER 1999, respectively. The Labour Court consisted of The PRESIDENT and two members [i.e. 1st respondent, 2nd respondent and 3rd respondent in this application. The judgment and an award which this court is asked to review and set aside, were

made by the said court in favour of the 4th respondent. The 4th respondent was at all material time an employee of this applicant.

The applicant is The EMPLOYMENT BUREAU OF AFRICA LTD. It is a South African Company, duly incorporated in terms of the company law of The republic of South Africa. This company conducts its business of employment agency all over Southern Africa. Here in LESOTHO, the principal office of business of the applicant company is situated in the Industrial Area of the city of MASERU.

The brief history of this case, as put together from the facts gleaned from the papers filed of record, is as follows:- On the morning of Friday 29th August 1997, there was a noisy disturbance at this applicant's offices. Apart from the officials or workers of this applicant company, there were, in that office about three hundred or so mineworkers who were being served or processed at the time of that noisy disturbance. Apparently, the noise was being made by only three of those mineworkers who were seeking services in that office at that time. Appeals were made to the noisy mineworkers to calm down and behave orderly while waiting their turn to be served. These appeals were ignored. The noisy disturbance continued unabated. The three mineworkers who were responsible for the fracas were also drunk. The 4th respondent herein advised the drunken and disorderly

individuals to behave orderly. Nevertheless they persisted uncontrollably with their bad behaviour. The 4th respondent appealed directly to one of those three disorderly mineworkers, to calm down and behave in an orderly fashion. This particular individual took exception to the 4th respondent's appeal. His reaction was to directly insult the 4th respondent. Provoked by the insult, the 4th respondent attempted to push that individual out of the office. Having failed to evict him, the 4th respondent then told him that he was not going to serve him unless and until he behaved in an orderly fashion whereupon that mineworker then and there left that office on his own accord.

The occurrence of the said fracas came to the knowledge of the applicant later. There were two other employees besides the 4th respondent in the office where the noisy disturbance occurred. Those were Mr Ntlhakana and Mrs Masithela. Their written reports were made on 29th August 1997 and 30th August 1997. [KH2, KH3. Page 87,88 of the record]. The 4th respondent submitted his written report on 1st September 1997.

As a result of the incident of the 29th August 1997, the 4th respondent was charged with a number of offences in terms of the applicant's disciplinary code thus:- [KH4, Page 91 of the record]

1. a charge of assault alternatively disorderly conduct
2. a charge of threatening violence alternatively intimidation
3. a charge of abuse of privileged position and
4. a charge of breach of domestic rules.

He was found guilty of misconduct as charged and summarily dismissed. He availed himself with all the internal appeal procedures provided for in the applicant's code of conduct without success.

On the 1st January 1998, the 4th respondent instituted proceedings in THE LABOUR COURT challenging his dismissal by the applicant. He sought the following relief:-

1. that the purported dismissal by the applicant herein be set aside.
2. that he be reinstated with payment of all his emoluments and benefit.
3. costs of suit

Alternatively

4. that the applicant be ordered to pay such damages and terminal benefits as THE LABOUR COURT might deem fit.
5. costs of suit.

The 4th respondent had raised two points of law as regards the propriety of the disciplinary hearing by and at the applicant company which was concluded with his summary dismissal at this applicant company. The first legal point raise on behalf of the 4th respondent was that the Disciplinary proceedings conducted at the applicant company against the 4th respondent, had in terms of the company code of conduct established by the applicant company, prescribed. In its rules of conduct the applicants company has specified the period within which the charges preferred against any employee must be proceeded with. The second point of law raised was that the presiding officer at the Disciplinary hearing had been "*a judge in his own cause*".

The legal points had to be dealt with first, before going into merits of the case. The Counsel for both parties agreed that those points raised *in limine* go to the heart of the matter and that the determination of those points put an end to the matter. The LABOUR COURT found that the legal points were properly raised and must succeed. The court's finding on these points is not challenged. Mr K.S. TIP SC Counsel for the applicant has conceded and in my view properly so that there were procedural shortcomings in the disciplinary process as conducted at the applicant company against the 4th respondent. There was no evidence to support the alleged charges against the 4th respondent. The reports submitted by those

members of staff of the applicant company, who were present in the office at the time the noisy disturbance took place, contained exculpatory evidence. Technological advancement in communication, such as E-mail, fax and telephone, should have assisted the search for the complainant in the mines of South Africa. The delay, was therefore unwarranted. The applicant was obliged in terms of the provisions in its code of conduct to merely inform the 4th respondent that the investigations are still continuing and as a result there will be a delay in the proceedings against him. That was not done. There was no explanation, why the 4th respondent was not advised that there was going to be a delay. The proceedings of the disciplinary hearing were in terms of the applicant company code to be conducted within a specified period. That the presiding officer in the Disciplinary hearing was the investigator of the case against the 4th respondent and the person who preferred the alleged charges against him, was one of the grounds on which the LABOUR COURT found that he had been "*a Judge in his own cause*". In its judgment THE LABOUR COURT found the dismissal of the 4th respondent in those circumstances procedurally and substantively unfair.

THE LABOUR COURT is a creature of statute. Its powers and directives are found within the relevant statutes. The Decisions of THE LABOUR COURT are final [section 38 LABOUR CODE 1992]. This court can only interfere with the

Decisions of THE LABOUR COURT by way of review. The review of the proceedings of THE LABOUR COURT, must also be brought upon competent grounds. Such grounds are listed at page 326, Paragraph 176 BECK'S Theory and Principles of pleading in Civil Actions. They are:-

(1) "Incompetency of the court in respect of the cause of action such as absence of jurisdiction.

(2) Incompetency of the court in respect of the judicial officer such as that he or a near relative had an interest in the cause

(3) Malice or corruption on the part of the Judicial Officer.

(4) gross irregularity in the proceedings

(5) The admission of evidence which should not have been admitted or rejection of evidence which should have been admitted"

The present application for review of THE LABOUR COURT JUDGMENT and AWARD contains none of the above mentioned grounds upon which inferior court's proceedings may be subjected to a review. It is contended that THE LABOUR COURT failed to apply itself in the required manner to the question of the appropriate relief. [my underlining] In other words, the judgment is accepted and there is no complaint of any impropriety as regards the procedure adopted leading up to that judgment. What the applicant does not like is the award.

The remedies, in matters of this nature, are provided for by section 73 LABOUR CODE ORDER, 1992.

"Remedies

(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.

(2) If the Court decides that it is impracticable in light of the circumstances of the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded by the **Labour Court** shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses."

THE LABOUR COURT, being a creature of statute, regarded itself as being bound by the provisions of the section cited above. The Labour Court had found that it was in the common cause that the dismissal of the 4th respondent was both procedurally and substantively unfair. This must be so because there was no evidence to support the charges against the 4th respondent. It is argued on behalf of this applicant, that THE LABOUR COURT and this court should note the very grave nature of those charges. The nature of the unsupported charges is irrelevant. The court *a cquo* made an award in accordance with the dictates of the law as annunciated in the statute and the cases cited in the reasons for the said award.

[Section 73 Labour Code Order 1992 and East Rand Proprietary Mines LTD V United people's Union of SA (1996) 17 ILJ 1135]. Justice and fairness demanded by the law in order to redress an employee who has been unfair dismissed, is nothing short of full restoration of the position the employee enjoyed before dismissal.

There is no impropriety that can be levelled against the procedure adopted by The labour Court and leading up to the judgment and the consequential award complained of. There are therefore no grounds for review of this award. In this circumstances this application must fail.

This application for review and setting aside the judgment and an award of the Labour Court is oppose by the 4th respondent. The 4th respondent has raise once again *in Limine* point, being his defence of delay and giving the following reasons:-

"A. DEFENCE OF DELAY

(i) Judgment the subject matter of this proceedings was handed down on the **21st September1999** and the award was handed down on the **26th November 1999**.

(ii) The applicant did not perform any of its obligations in terms of the judgment and award. Thus I have remained out of employment since the 1997 when I unlawfully and unfairly dismissed.

(iii) I have been without my salary which salary is a constitutional right since the said unfair dismissal.

(iv) Despite the fact that both the judgment and the award were handed down as and when they were, the applicant has sat back all along and only instituted these review proceedings on the **15th March 2000**.

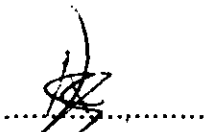
Before instituting disciplinary hearing at the applicant company, this applicant breached its own code of conduct and unreasonably delayed to proceed against the 4th respondent. Once again at this instant, the applicant has delayed to bring under review the proceedings of the Labour Court.

There is no specified time limit before whose expiration the proceedings of the inferior court, could be brought under review of the superior court. It is the court before which such review proceedings are brought that makes the decision whether or not depending on the facts of the particular case that such proceedings are brought out of time WOLGROEIERS AFSLAERS V MUNISIPALITEIT VAN KAAPSTAD 1978 (1) SA 13 at 14 E. Even where the court has found that there has been a delay in the bringing under review the proceedings of the inferior court, the superior court has a discretion to condone such a delay where the delay is not unreasonable. RADEBE V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA and OTHERS 1995 (3) sa 787.

The judgment was delivered on 21st of September 1999. An award which this applicant does not accept was made on 26th November 1999. It was only on 15th March 2000 that this application for review and setting aside the said judgment and an award, was made before this court. The letter and spirit of the Labour Code Order 1992 is that the industrial disputes must be expeditiously determined by the LABOUR COURT for the convenience of all concerned. [i.e. workers and management]. That is why the decisions and Awards of THE LABOUR COURT are final. Section 38 LABOUR CODE ORDER, 1992. The Labour Court is not bound by the rules of evidence,[express or implied] in civil or criminal proceedings, and it shall be the chief function of the court to do substantial justice between the parties before it [my underlining]. Section 27 (2) LABOUR CODE ORDER,1992. Even though the dispute between the parties in this case, was disposed of purely on the points of law without going into the merits, there was no merit in the dismissal of the 4th respondent because of lack of evidence. The applicant in this matter took well over three months to bring this award under review. This period of three months in my view constitute undue delay HEPWORTHS LTD V THORNLOE AND CLARKSON,LTD 1922 TPD. 336

The next question is whether or not the three months delay in the circumstances of this case, was unreasonable. The explanation given by the applicant in this case

for this delay, when examined in its totality, consists in the main with seeking of legal advise. For the whole period consultations were being held with various legal practitioner. The applicant is entitled to seek and obtain as much legal advice as it can afford. But it can not do so to the prejudice of the other party. For the said period of three months and more, this applicant had not complied with the judgment and the award of the LABOUR COURT. Furthermore, there has been no application for stay of the execution of the said judgment and the award. It should have been still the paramount consideration of the applicant to bring the matter to a finality without further delays. The period of more than one month was in the circumstances unreasonable delay. In *PATEL v Ismail Mia & Co 1912 TPD 650 at 652*, it was held that a delay of two months in launching a review of taxation was unreasonable, having regard to the fact that the case was a simple one. Our present case is also a simple one. It is straight forward to determine whether or not there are grounds in our case, to bring it under review. The consultations with various legal practitioners should have been done within a reasonable period of time without prejudicing the other party. HEPWORTH LTD V THORNLOE and CLARKSON LTD 1922 TPD 336. The fact that an intimation was made to the 4th respondent that the matter might be taken on review does not entitle the applicant to an unreasonable delay. For these reasons this application must fail and it is dismissed with costs.



K J GUNI
JUDGE

For Applicant : Harley & Morris
For Respondent: Mr Phafane