IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 7/2012

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **APPELLANT**

and

TSOTANG NTJEBE & OTHERS **RESPONDENTS**

And in the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **APPELLANT**

and

TELANG LEEMISA **RESPONDENT**

CORAM: SMALBERGER JA
MELUNSKY JA
HOWIE JA

HEARD: 8 OCTOBER 2012
DELIVERED: 19 OCTOBER 2012

SUMMARY

Appeal by the appellant against a decision of the Labour Court, with leave, on three points of law – appeal unsuccessful – declarator issued – costs to be paid by the appellant.

JUDGMENT

SMALBERGER JA:

[1] This appeal raises three points of law. Two of them arise from a certificate for leave to appeal granted by the Labour Appeal Court (Mosito AJ) (the LAC) in terms of section 38 AA(2) of the Labour Code (Amendment) Act 3 of 2000 (the Act). In respect of the third point, on which the LAC declined to certify, the required leave was granted by this Court on application to it. (See **Lesotho Highlands Development Authority v Tsotang Ntjebe and Others; Lesotho Highlands Development Authority v Telang Leemisa** C of A (CIV) 7/2012 (unreported) judgment delivered on 3 September 2012.) Leave on all three points was sought by the appellant (the LHDA).

[2] Before the appeal hearing commenced there was an application by Mr. Sekonyela for the substitution of Mokhethi Matsoso and Mantai Falleng (the applicants) as respondents in the place of their late husbands, the erstwhile 5th and 27th respondents respectively. The papers before us confirm the deaths of the 5th and 27th respondents, and that the applicants were lawfully married to them. None of the other parties to the appeal opposed the application. In the circumstances the application is granted in terms of prayers (a) and (b) of the Notice of Motion dated 1 October 2012. The right of anyone not a party to the present proceedings to challenge the applicants' entitlement to the proceeds of any payments made to them as a consequence of the appeal, is reserved.

[3] There were protracted proceedings in the courts below, the Labour Court and the LAC respectively, commencing as

far back as 2003. It is necessary, for a proper understanding of the issues involved in the appeal, to briefly set out the factual background to those proceedings, and the course they took. In doing so I shall borrow liberally from the judgment of this Court referred to above.

[4] Following upon their retrenchment in March 2003, the respondents sought relief in the Labour Court in two separate applications which were heard together and have since travelled the same paths. Their claims, for compensation and unpaid overtime, were dismissed by the Labour Court on 15 October 2004. This rendered it unnecessary for the Labour Court to pronounce on the quantum of their claims. On appeal, in a judgment handed down on 6 February 2009, the LAC set aside the decision of the Labour Court and held that the respondents were entitled to both compensation and overtime. But because

"*the requisites for the purpose of computation of how much the [respondents] would be entitled to were not placed before the Labour Court*" the LAC remitted the matter to that court for the parties to provide this information.

[5] The respondents in due course deposed to affidavits in support of their claims for compensation and overtime. Many of the latter claims extended back well in excess of three years. The LHDA filed an answering affidavit in which for the first time there was an oblique reference to prescription. Whether prescription was pertinently or effectively raised as a defence is a matter to which I shall return.

[6] When the matter came before the Labour Court for the second time counsel for the LHDA argued that by reason of the provisions of section 227 (1) of the Act the respondents'

claims for overtime were limited to overtime worked in the three-year period immediately preceding the commencement of proceedings. No argument founded on the Prescription Act 1861 was apparently advanced.

[7] In its judgment delivered on 16 November 2009 the Labour Court held that section 227 (1) (b) of the Act read with section 5 (d) of the Prescription Act required claims for overtime to be made within three years of the cause of action accruing and that overtime worked more than three years prior to the commencement of proceedings had prescribed. The court accordingly limited its awards in respect of overtime to time worked in the three year period. It also held that for the purpose of determining overtime the respondents' hours of work were regulated by Legal Notice No. 108 of 1995 and the Personnel Regulations 1999, not their letters of appointment. The court went on

to determine the amount of compensation payable to each of the respondents.

[8] The respondents again appealed. The LAC in its judgment dated 4 July 2011 rejected the argument on what may be referred to as "*the section 227 point*" and held further that the Labour Court had not been entitled to rely on the Prescription Act because it had not been pleaded. The court also expressed doubt as to whether the Prescription Act had application to proceedings in the Labour Court. In the result, the LAC substituted an award for overtime which in some instances went back for more than 12 years. However, it failed to make any finding on the application of Legal Notice No. 108 of 1995 and the Personnel Regulations 1999 to the computation of overtime. The award of compensation given by the Labour Court to each respondent was left undisturbed.

[9] The certificate issued by the LAC granted the LHDA leave to appeal on the following grounds:

> *"(1) In determining the amounts the individual respondents herein are entitled to as unpaid overtime, is the calculation to be performed on the basis that section 118 of the Labour Code Order 1992 applies, that is, on the basis of a nine hour working day alternatively an eight hour working day as provided for in the respondents' contracts or has the application of section 118 and the [respondents'] contracts been rendered nugatory by Legal Notice 108 of 1995 so that, pursuant to this Legal Notice, the calculation is to be performed on the basis of a twelve hour working day; and*
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> *(2) In determining the amounts the individual respondents are entitled to as unpaid overtime, is the calculation to be performed on the basis that the calculation is impacted by the provisions in section 227 of the Labour*

> *Code (Amendment) Act 2000, such that the calculation is limited to three years calculated backwards from the date the claim was instituted in the Labour Court, viz. 31/5/2003. Or is the calculation to be performed on the basis that the period of computation is date of engagement to date of dismissal?"*

[10] This Court granted the LHDA leave to appeal on a further point, namely; *"whether the Prescription Act 6 of 1861 is applicable to proceedings in the Labour Court and, if so, whether in the circumstances of the present case the [LHDA] is entitled to rely on its provisions in respect of the respondents' claims for overtime payments"*. I shall deal with each of these questions in turn starting with that relating to prescription.

[11] Recent decisions of this Court have confirmed that the Prescription Act is part of the law of Lesotho. (See **Mohau**

Makamane v Minister of Communications Science and Technology and Others, C of A (CIV) No. 27/2011, delivered on 21 October 2011 (unreported); **Bokang Lelimo v Teaching Service Department and Others**, C of A (CIV) No. 01/2012, delivered on 27 April 2012 (unreported).) *Prima facie* there is nothing in the Labour Code Order, 1992 (the Code), or any subsequent amendment thereof, which expressly or by necessary implication excludes the operation of the Prescription Act in proceedings in the Labour Court. For present purposes I shall assume, without deciding, its applicability in such matters.

[12] In their originating application dated 10 May 2003 the respondents, in addition to compensation, unequivocally claimed unpaid overtime from the time of their respective engagements. The individual dates of engagement were not stated in the founding papers. They must, however, have

been known to the LHDA from the records under its control. It should therefore have been apparent to the LHDA and its advisers that the overtime claims of the respondents (most if not all of them) extended beyond the prescriptive period of three years provided for in the Prescription Act.

[13] When the matter came before the Labour Court the primary issue was that of the LHDA's liability for overtime. In appropriate cases prescription may extinguish liability, or curtail the extent of liability which may be found to exist. It would therefore have been expected of the LHDA, if so minded, at the initial stage when liability was in issue, to have raised prescription as a defence. This it failed to do, either then, or at any later stage. The Prescription Act makes no provision with regard to when prescription should be raised. The common law would therefore apply;

and the common law generally requires that this should be done promptly (**Cassim v Kadir** 1962 (2) SA 473 (N) at 476H-477A). Had prescription been pertinently raised by the LHDA, either then, or later, it would have afforded the respondents an opportunity to raise possible defences to the plea of prescription. They were denied such opportunity. Therein lies potential prejudice.

[14] As mentioned earlier, the Labour Court held that the respondents were not entitled to either compensation or overtime. The appeal to the LAC that followed again raised the issue of the LHDA's liability for overtime. It is common cause that in the proceedings before the LAC no reference was made to prescription. The LAC confirmed the respondents' entitlement to compensation and overtime and referred the matter back to the Labour Court for

quantification. By then nearly six years had elapsed since the institution of proceedings.

[15] The respondents duly filed affidavits in support of their claims. In his answering affidavit Mr. Phakoe, the acting Chief Executive of the LHDA, stated, *inter alia*, the following:

> *"3.3 Section 227 [of the Act] makes it clear that all disputes of right must be referred to the DDPR within three years of the disputes arising (save in the case of unfair dismissals). The section provides for late referrals to be condoned on good cause shown. Once condonation is granted in the event of a late referral, the director of the DDPR shall appoint an arbitrator who shall attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.*

3.4 I have been advised that in so far as this is a legal point, the Honourable Court should hear this point in limine and make a ruling thereon without going into the merits of applicants' claims.

3.5 Even if it is found that applicants could have approached the Court directly, which is not conceded, there is no application for condonation for the late filing of the originating application which was filed on 13 May 2003.

3.6 The applicants claim the difference in salary from the date of their respective appointments that goes back as long as 1991 and thus 12 years prior to the filing of the originating application.

3.7 At the best for applicants and on the basis that the Honourable Court rules that it could have been approached directly, all claims in respect of difference in salary prior to May

2000 should be dismissed as these claims have become prescribed."

[16] This was the first time (now more than 6 years since the institution of proceedings) that any reference was made to prescription. Significantly, no mention was made of the Prescription Act or any of its applicable provisions, as might have been expected if the LHDA was intent on relying upon it. In the context of the passage quoted above the most reasonable inference to be drawn is that the word *"prescribed"* was used in relation to the section 227 point. It did not seek to raise the provisions of the Prescription Act as a defence to the respondents' claims. This conclusion is borne out by subsequent events.

[17] It is common cause that at the further Labour Court hearing prescription (as opposed to the section 227 point) was not raised or argued by counsel appearing for the

LHDA. To the extent that the Labour Court relied upon it, it did so *mero motu* without it being a justiciable issue before it. Nor was it pursued during the second LAC appeal. As recorded by the LAC in its judgment: *"The learned counsel for the [LHDA] Adv Daffue S.C. informed the court that his case had not been based on the Prescription Act 1861 but on section 227 (1) of the Labour Code (Amendment) Act of 2000"*. This in effect amounted to a disavowal of any reliance upon the Prescription Act.

[18] It is trite law that prescription has to be specifically pleaded, and that a party cannot generally rely upon a defence that has not been pleaded. At no stage up to the present has the LHDA sought to amend its papers by invoking, in clear and unequivocal terms, a defence of prescription based on the provisions of the Prescription Act. It probably went beyond the stage of being able to do

so because its earlier conduct, properly assessed, constituted a waiver of its right to rely on prescription. Whether the matter is approached on the basis of the LHDA simply never having pleaded prescription, or on the basis of its having waived its right to plead prescription, the result is the same. Either way it is precluded from raising prescription in the present appeal. The answer to the third question posed for our consideration in this appeal is accordingly that the LHDA is not entitled to rely upon the provisions of the Prescription Act in respect of the respondents' claims for overtime payments.

[19] The respondents' counsel raised the question in argument before us whether the Prescription Act was in any event applicable in the present matter as, so it was contended, the respondents, as watchmen, did not fall within the extended definition of *"servant"* in terms of

section 5 (d) of the Prescription Act. As a matter of interpretation there may be substance in their argument, although it is not necessary for us to decide the point. What it does bring to the fore again, however, is the inadequacy of the Prescription Act and the need for reconsideration of its wording and provisions to bring it in line with the legal requirements of a modern, progressive society.

[20] More than eight years ago Melunsky JA in the matter of **Lesotho National General Insurance Co. Ltd v Nkuebe** LAC (2000-2004) 877 (a decision of a Full Bench of this Court) said the following (at p.894):

> *"[33] As indicated, the existing Prescription Act 6 of 1861 has a limited range. Its application is restricted to contractual rights of action and no provision is made for delictual claims. Moreover it lacks adequate provisions for the interruption and*

suspension of the running of prescription. These are necessary to ensure that prescription achieves its purpose in a fair and reasonable manner. It is so that, unless expressly or impliedly excluded, the common law of prescription applies and augments provisions dealing with prescription. But the common law is not explicit in this regard and is not known or accessible to litigants in this Kingdom. Moreover, it may not be sufficiently adequate to ensure fairness in respect of all time-barring provisions. It is consequently in the interests of all concerned that a new Prescription Act be drafted. In doing so, provisions in other jurisdictions, for instance the English Limitation Act 1980 and the South African Prescription Act may be of assistance."

To date nothing has been done to revise or redraft the Prescription Act. The matter is in need of urgent attention.

[21] The second question of law on which leave to appeal was granted by the LAC is whether section 227 of the Act

limits the calculation of the respondents' claims for overtime to three years prior to the institution of proceedings in the Labour Court.

[22] Section 227 (1) provides:

> *"(1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate –*
>
> *(a) if the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal;*
>
> *(b) in respect of all other disputes, within 3 years of the dispute arising."*

[23] The question posed must be answered on the basis that the parties accepted that the respondents' disputed claims for compensation and unpaid overtime constituted disputes of right cognizable by the Labour Court in terms of section 226 (1) of the Act, and that the respondents were free to institute proceedings directly in that court without

the need for prior arbitration or conciliation through the medium of the Directorate. The Labour Court's jurisdiction to hear the matter was not initially disputed by the LHDA, nor was it ever called into question by either the Labour Court or the LAC despite those courts having each been twice involved with the matter. Nor does any issue relating to the Labour Court's jurisdiction feature in the questions of law submitted to us.

[24] Section 227 (1) applies when a dispute of right is referred to the Directorate. Where the dispute is one that falls to be resolved under section 226 (1), as must be taken to have been the case in the present matter, there is no obligation on any of the parties involved to refer that dispute to the Directorate. Where section 226 (1) applies the right to do so is permissive (the word *"may"* is used) not peremptory. In the present instance none of the parties

invoked the provisions of section 227 (1) by seeking a referral of their dispute to the Directorate.

[25] On a proper interpretation of section 227 (1) (a) and (b) it is clear that its limiting provisions are confined to instances where there has been a referral of a dispute of right to the Directorate. There is no similar provision which governs matters that fall to be instituted and dealt with directly under section 226 (1). Nor can it be said that the provisions of section 227 (1) (a) and (b) should be extended by necessary implication to apply to matters falling under section 226 (1). If the Legislature had intended a similar limitation to apply to proceedings under section 226 (1) it would presumably have said so in clear terms. In any event they are pre-conditions for the institution of proceedings and not, as such, true prescriptive provisions.

[26] In my view the provisions of section 227 (1) (a) and (b) have no application to the respondents' claims under section 226 (1), or the computation of such claims, where, as here, there has been no referral under section 227 (1). It is accordingly not necessary to consider what effect non-compliance with such provisions, if they were applicable, might have had on the respondents' claims. It follows that the respondents' claims for unpaid overtime are to be computed from the date of their respective engagements to the date of their dismissal.

[27] This brings me to the remaining question of law in respect of which the LAC granted a certificate, namely, whether the respondents' unpaid overtime should be calculated on the basis of a twelve hour working day, or some lesser period.

[28] Section 118 of the Code provides:

"(1) Except as otherwise provided in the Code, the normal hours of work for any employee shall be not more than 45 hours per week, calculated as follows:

(a) for an employee who ordinarily works a five-day week, nine hours of work on any day;

(b) for an employee who ordinarily works a six-day week, eight hours of work on five days and five hours of work on one day."

[29] In terms of section 3 of the Code an "employee":

"means any person who works in any capacity under a contract with an employer in either an urban or a rural setting, and includes any person working under or on behalf of a government department or other public authority;"

[30] On 1 August 1995 the Labour Code (Exemption) Regulations 1995 (the Regulations) came into effect in terms of Legal Notice No. 108 of 1995. The Regulations were made pursuant to section 119 (3) of the Code and

after consultations with the employers' and employees' organizations. Regulations 2 and 3 (1) state:

> *"2. Section 118 (1) of the Labour Code Order 1992 shall not apply to a watchman.*
>
> *3. (1) The normal hours of work for a watchman shall not be more than 60 hours per week, divided into 12 hours per day for 5 days."*

[31] It is common cause that the respondents were watchmen and that the Regulations applied to them. In my view the Regulations were intended to give effect to a new regime which had been decided upon after consultation and which would supercede any existing contractual arrangements. The intention must have been that henceforth the normal working day for a watchman would be twelve hours, subject to a watchman's right to agree contractually with his employer to work for a lesser period. This is supported by the incorporation of the wording of

regulation 3 (1) into the LHDA's Personnel Regulations. It would have been incumbent upon any respondent claiming a contractual entitlement after 1 August 1995 to work less than twelve hours a day to prove such entitlement. Having regard to the appeal record no respondent succeeded in doing so.

[32] The conclusion to which I have come in regard to the third question of law is therefore as follows:

1) Unpaid overtime due to any respondent in the employ of the LHDA prior to the date on which the Regulations under Legal Notice No. 108 of 1995 came into operation (1 August 1995) must be calculated on the basis of eight working hours per day (in terms of section 118 (1) of the Code), and thereafter (i.e. from 1 August 1995) on the basis of twelve working hours per day.

2) Unpaid overtime due to any respondent who entered the employ of the LHDA after 1 August 1995 must be calculated on the basis of twelve working hours per day.

[33] In its judgment in this matter referred to in para [1] above, this Court ruled that the costs of the application by the LHDA in relation to the applicability of the Prescription Act were to stand over for determination at the appeal hearing. The LHDA has been unsuccessful on appeal in relation to that point. In the circumstances it should be ordered to pay the costs of the application.

[34] In regard to the appeal before us the LHDA was content, whatever the outcome of the appeal, that there should be no order as to the costs of the appeal. That would be in keeping with the trend followed in the Labour Court and the LAC. The respondents, on the other hand,

contended that if the points of law raised were not answered, or not substantially answered, in favour of the LHDA, they should be awarded their costs of appeal. By raising the points of law the LHDA sought to challenge the findings of the LAC. It has not been successful in that regard. In some measure the LHDA will have gained greater clarity in regard to the calculation of what is due to the respondents in respect of unpaid overtime. But that in itself would not be sufficient to justify a departure from the normal rule that costs must follow the result. The respondents are accordingly entitled to their costs of appeal.

[35] In the light of this judgment the parties should be able to reach agreement on the amounts payable to each respondent in respect of unpaid overtime. They should be granted time in which to reach such agreement. Should

they fail to do so the matter will have to be referred back to the Labour Court for the final computation of the amount of overtime due to each respondent.

[36] The following order is made:

1. In respect of the questions of law on which the appellant was granted leave to appeal to this Court it is declared that:

   (i) The appellant, in the circumstances of the present appeal, is not entitled to rely on the provisions of the Prescription Act of 1861;

   (ii) The provisions of section 227 (1) of the Labour Code (Amendment) Act 2000 are not applicable to the calculation of the unpaid overtime due to the respondents, and in the case of each respondent such overtime is to be calculated from date of engagement to date of dismissal.

   (iii) the computation of the unpaid overtime due to each respondent is to be done on the basis of an eight hour working day

up to 1 August 1995 and a twelve hour working day thereafter.

2. The appellant is to pay the costs of appeal.

3. The appellant is ordered to pay the costs of the application to this Court for leave to appeal on 16 August 2012.

4. The parties are given until 20 November 2012 to reach agreement on the amounts of unpaid overtime due to the respondents. If the parties fail to reach agreement within such period, the matter is to be remitted to the Labour Court for the computation of such amounts. In the event of referral to the Labour Court, the Labour Court is requested to give the matter priority on its roll of cases.

5. The Registrar is directed to draw the attention of the Attorney General to paragraphs 19 and 20 of this judgment.

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____

C.T. HOWIE
JUSTICE OF APPEAL

For the appellant	:	Adv H.H.T. Woker
For the respondents	:	Adv M.V. Khesuoe Adv B. Sekonyela Mrs. V.V.M. Kotelo