IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **L. A. C. (CIV) NO. 4 OF 2003**

In the matter between:-

TUMO LEHLOENYA	1ST APPELLANT
TSILONYANE MAHASE	2ND APPELLANT
PHILLIP LETLATSA	3RD APPELLANT
MOLIBETSANE LETLAKA	4TH APPELLANT
KHOPISO SHEA	5TH APPELLANT
JOSEPH QABA	6TH APPELLANT
SEBAKI MAKHUTLA	7TH APPELLANT
KHAUTA MARIE	8TH APPELLANT
BROWN RAJOELE	9TH APPELLANT
SECHOCHA SENYANE	10TH APPELLANT
MOITHERI MOHAPI	11TH APPELLANT
PEISO MATHAFENG	12TH APPELLANT
MOTLATSI MAPOOANE	13TH APPELLANT
MOFEREFERE MOSHEOA	14TH APPELLANT
MOTLATSI PHAROE	15TH APPELLANT
LEFA MAFATA	16TH APPELLANT
THETSANE MOROMELLA	17TH APPELLANT
LEMOHANG FANANA	18TH APPELLANT
ROSA KHOETE	19TH APPELLANT
SENATLA MAKAE	20TH APPELLANT
TEBOHO TSOENE	21ST APPELLANT
LIKOTSI QOBOSHEANE	22ND APPELLANT
RETSELISITSOE LITLALI	23RD APPELLANT
THATO TSALONG	24TH APPELLANT
KHETHANG MOLOISANE	25TH APPELLANT
SELLO KHIBA	26TH APPELLANT

RAMATABOE RAMATOBOE	27TH APPELLANT
MALEFETSANE KHEO	28TH APPELLANT
ALBERT LESAOANA	29TH APPELLANT
MATLALA KAEANE	30TH APPELLANT
LENYAKHA MABEA	31ST APPELLANT
LETHUSANG PHEKO	32ND APPELLANT
MOTLATSI MPEETE	33RD APPELLANT
MAKHOASE PALI	34TH APPELLANT
TANKISO LEFULEBE	35TH APPELLANT
KOSE POTSANE	36TH APPELLANT
LEBABO M. LEKHOOA	37TH APPELLANT
THABANG MPO	38TH APPELLANT
ADRIES HANI	39TH APPELLANT
DANIEL HOOHLO	40TH APPELLANT
PHOLO MOSEBO	41ST APPELLANT
LEQALA LESEO	42ND APPELLANT
LEKHANYA MAPESELA	43RD APPELLANT
ISAAC BELEME	44TH APPELLANT
DANIEL SESING	45TH APPELLANT
THABANG NTSANE	46TH APPELLANT
PETLANE SEETANE	47TH APPELLANT
MAPHELETSO MOSENENE	48TH APPELLANT
TELEKOA LEBUSA	49TH APPELLANT
SEABATA MOLEPA	50TH APPELLANT
TUMELE MOTHOKO	51ST APPELLANT
TSOKA THOKO	52ND APPELLANT
MAOELA MAOELA (EN 350)	53RD APPELLANT
KHOBATHA MOLAPO	54TH APPELLANT
SONKI E. THOKOANE	55TH APPELLANT
GLADYS SEBATANE	56TH APPELLANT
MOTLATSI MOTSOANE	57TH APPELLANT
MPOBOLE RAMPOBOLE	58TH APPELLANT
THABO SEKONYELA	59TH APPELLANT
MAPANYA MAPANYA	60TH APPELLANT
JOHN BERENG	61ST APPELLANT
KHASIPE KHASIPE	62ND APPELLANT

AND

LESOTHO TELECOMMUNICATIONS CORPORATION
(Now TELKOM LESOTHO) RESPONDENT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

ASSESSOR 1 : MR POOPA
ASSESSOR 2 : MR TWALA

DATE : 6TH NOVEMBER, 2003

Historically this is the first case to be heard and disposed of by the newly created **Labour Appeal Court of Lesotho** which came into existence on the 25th April 2000 under Act No.3 Labour Code Order (Amendment) 2000. Section 38 thereof reads:-

> "*38* ***Establishment and composition of the Labour Appeal Court***
>
> *(1) There shall be a Labour Appeal Court.*
>
> *(2) The Labour Apeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court.*
>
> *(3) The Labour Appeal Court consists of-*
>
> *(a) a judge of the High Court who shall be nominated by the Chief Justice acting in consultation with the Industrial Relations Council; and*
>
> *(b) two assessors chosen by that judge –*

(i) one from a panel of employer association nominated by the employer members of the Industrial Relations Council; and

(ii) one from a panel of employee members on the Industrial Relations Council."

FACTS/BACKGROUND

The sixty-two (62) appellants are the erstwhile employees of the now defunct Lesotho Telecommunications Corporation (LTC) which has been replaced by a newly privatized corporation named Telecom Lesotho.

Experiencing huge financial problems and sailing in dire straits the defunct LTC had its fate or demise finally sealed by the decision of its Board of Directors and by the Lesotho Government. An Australian firm of consultants "**John Crook Consulting**" decided and recommended that in privatizing LTC, the permanent staff component of the ailing LTC be reduced from 785 to 491 by the end of March 1999. Appendix 5 captioned "*Right Sizing Process Management*" is attached because of its critical importance. It is dated 6/11/98.

As can be gleaned from para 3 thereof, the right-sizing process – colloquially termed "*retrenchment*" - was to be managed through a consultative communication process between management and the affected staff i.e. "*simultaneous meetings will be held of all staff at which their General Manager will inform them of the proposed changes and the steps which will be taken to implement them. General Managers will be briefed*

before the meetings to ensure that a consistent message is given to all LTC staff."

This accorded with the modern labour practice of "*consultation prior to retrenchment of employees*." It is not necessary in this appeal to expatiate upon the *rationale* behind this labour practice save to say it is part of sound labour relations and fair employment practices in our democratic world today. See section 31 of the Constitution of Lesotho (1993). It reads:-

> *"31. Lesotho shall take appropriate steps in order to encourage the formation of independent trade unions to protect workers' rights and interests and to promote sound labour relations and fair employment practices."*

This consultative process is an integral part of a duty "*to bargain in good faith*". In the modern commercial world, the employer has freedom to determine the destiny of his commercial enterprise and this includes enlargement or reduction of its scope and operations. The affected workers must however be informed timeously of the intended changes so that they can decide upon their own fate, future and opportunity in time having been briefed fully by their employer about proposed changes in the enterprise.

Ex "B" is the first letter from the Acting Managing Director Mr. T.C.F.D. Rasekila which was addressed to all LTC staff in Lesotho informing them of the proposal for the "*right sizing*" or *"turn-around*" of LTC and their involvement in the retrenchment process and consultation that went along with it, Sequel to this letter, a national meeting of all LTC employees was convened for the 14th May 1999 and this resulted in a document titled "**Staff**

Input on Proposed Right sizing". These were followed by many letters and correspondence from May 1999 onwards – some mild, some quite acrimonious – if not provocative; for example, the one dated 23rd July 1999 even threatened court litigation. It is should be made quite clear from the onset that the applicants, now appellants, were not co-owners of LTC nor did they hold any shares to speak about but were employees of the LTC which was then a parastatal entity.

Also attached to the record is "A" which is the "**LTC RIGHT SIZING PACKAGE – JULY 1999**" which lists the employees due to be retrenched, period engaged, salaries, tax deductions, net severance and deserved retrenchment packages. It is not in dispute that the appellants ultimately received and accepted their respective packages. It is also not in dispute that the then acting Managing Director held meetings with the all LTC employees likely to be affected by the "*right-sizing process*". The employees duly submitted their "*Staff Imput*" dated the 19th May 1999.

Somehow the hitherto pleasant communications took a sour turn when some misunderstandings over proposals surfaced amongst the employees themselves about the "*way forward*" and with the LTC management. Indeed, matters heated up when per letter dated 4th May 1999 "K" the managing Director informed the 1st Appellant that "*if the proposed reorganization goes ahead as suggested your present position would become redundant*" and was also advised of possible options. It seems some employees felt victimized into retrenchment for various ulterior reasons or motives. Some employees were requesting certain guarantees like tax relief, possibility of acquisition by them of shares in the new Telecom, and for some, early retirement in

accordance with Lesotho National Insurance Group Rule and preference of retrenched staff in the outsourcing procedures. It is the applicants' case that the so-called negotiations were merely "*cosmetic*" to cover a malicious pruning plot and discriminating maneuvers for certain employees. To quote their letter dated 22nd July 1999.

> *"Finally we are bringing to your attention that the much-hyped staff participation in your current "down sizing right – sizing, turn-around, redundant, exercise" has proved to be more of a witch hunt than motivated by genuine operational requirements.*
>
> *...It is now clear that the so called consultations were just a smokescreen to solicit manipulatively the conspiracy of staff to violate both national and international laws governing labour relations."*

It is for these reasons that before the Labour Court, the applicants claimed an award couched thus:

> *"(a) Declaring that the dismissal is null and void as being unfair and unlawful.*
>
> *(b) (i) Directing the Respondent to reinstate Applicants into their employment.*
>
> ***ALTERNTIVELY***
>
> *(ii) Directing the Respondent to compensate Applicants in the sum equivalent to their respective monthly salary calculated from the date of purported termination of contract to the expected date of retirement in terms of the regulations of the Respondent which is sixty (60) years.*

In the event of Respondent not reinstating Applicants, directing the Respondent to provide the Entrepreneurship Training Programme to Applicants as contemplated in Annexure "B" and "E".

(c) Directing the Respondent to return to First Applicant (TUMO LEHLOENYA) the sum of Twelve Thousand Five Hundred and Seventy Three Maloti Thirty Six Lisente (M12,573.36) being monies wrongfully and unlawfully deducted from Applicant's dues, in the event this Honourable Court holds that reinstatement is not granted.

(d) Granting Applicants such further and/or alternative relief as the Honourable Court may deem meet."

It is common cause that the purported unfair dismissal occurred on the 9th **July 1999** and that the originating Application was filed in the Registry of the Labour Court on the **15th February 2000**. It was therefore common cause that the 9th July 1999 was the critical date of purported dismissal.

Section 70 of the Labour Code Order 1992 reads thus:-

"*70.* ***Time Limit***

*(1) A claim for unfair dismissal must be presented to the Labour Court "**within six months**" of the termination of the employment of the employee concerned.*

(2) The Labour Court may allow presentation of a claim outside the period prescribed in subsection (1) above if satisfied that the interests of justice so demand." (My emphasis)

It is not in dispute that when the application was lodged in February 2000, Section 70 of the Labour Code Order was still extant and was only repealed by Section 19 of the Labour Code Amendment Act No.3 of 2000 which came into operation on the 25th April 2000.

If it was still operative, three issues arise.

(a) When the claim was lodged on the 15th February 2000 had six months – period under section 70 expired?

(b) If the answer is in the affirmative, did the applicant apply for condonation; if not

(c) Has their claim prescribed? Or has the Labour Court the right upon application being made, to grant applicant right to claim after expiry of six months?

It should be noted that section 70 of the Labour Code Order is drafted differently from, say, a prescription clause like section 10 of the *Lesotho Motor Insurance Order No. 26 of 1989.* Which reads:-

> *"10. (1) The right to claim compensation under this Order from the insurer shall become prescribed upon the expiry of a period of two years from the date upon which the claim arose.*

> *Provided that prescription shall be suspended during the period of sixty days referred to in section 12 hereof (my emphasis) as quoted in* ***Letsie v Commercial Union*** *– 1991-96 LLR* (Vol. 1) page 378.*"*

In my view, it is not proper to impute "*prescription*" into a statutory clause unless such is clearly the intention of the legislature. Under our law prescription is extinctive if it limits an action i.e. an action is not enforceable on the ground that the time fixed by the law as that within which it should have been enforced has expired. – **Rogers v Erasmus** – 1975 (2) SA 59 (T). The effect of "*extinctive prescription*" – under which prescription section 10 of the Motor Vehicle Insurance Act falls, is to effectively extinguish the right of action. Once the period of prescription has expired without the right being enforced, the court has no power to resuscitate such right unless the statute particularly empowers the court to do so.

It is our considered view that section 70 of the Labour Code Order is not however an extinctive prescription clause by stretch of any imagination, because the expiry of six months (after the date of cause of action) *per se* does not extinguish the right to claim but merely states that the right shall not be enforced unless the court is satisfied that interests of justice justify condonation.

It is necessary in this regard to restate the dictum of **Ramodibedi J**. (as he then was – now Justice of Appeal) in **Lesotho Brewing Co. v Labour Court President** – CIV/APN/435/95 when he stated:-

> "*I am of the firm view that the jurisdiction of the Labour Court in a case for unfair dismissal has "prescribed" only arises from that court granting condonation if satisfied that the interests of justice so demand. Conversely, if no condonation is granted then the Labour Court has no jurisdiction in the matter*."

In our view the right to claim under section 70 does not prescribe upon expiry of six months – for if it were, no court can condone the late enforcement of a right that has prescribed and been extinguished (cf Section 10 (i) of the Motor Vehicle Insurance Order No.26 of 1989)

In this case when the originating application was filed before the Labour Court it is not in dispute that the six months period had expired and there was no application for condonation made before the Labour Court to hear the application. In our view, the Labour Court did not have jurisdiction to go into the main application at all.

Before April 2000, under the Labour Code Order No.24 of 1992, the Labour Court had jurisdiction under section 24 (1) (i)

> *"to determine whether <u>an unfair dismissal has occurred</u> and if so, to award appropriate relief."* (My underline)

Under the April 2000 Amendment, the jurisdiction of the Labour Court was drastically revised such that exclusive jurisdiction of the Labour Court in adjudicating in cases of unfair dismissal is limited to the resolution of *disputes of right* involving-

"226. (1)(c) an unfair dismissal if the reason for the dismissal is

(i) for participation in a strike;
(ii) as a consequence of a lockout; or
(iii) related to operational requirement of the employer."

The residual jurisdiction in all other cases of unfair dismissal now falls under the DDPR.

It is not in dispute that the applicants claimed before the Labour Court an award declaring that their dismissal was unfair and unlawful. If this claim does not fall under section 226 (1) (c) (i) (ii) or (iii), then it must fall under section 226 (1) (d).

Prior to April 2000, for all claims for unfair dismissal section 70 dictated that they ought to be presented before the Labour Court within six months of their occurrence – unless the Labour Court permitted presentation of such claims out of time. Logically speaking this is a matter of jurisdiction. If six months had expired, the Labour Court had first condone "*late presentation*" before it could have jurisdiction to hear the matter at all.

It is not in dispute that when the 62 applicants filed their original application on the 15th February 2000 crucial section 70 was still extant and operative.

The critical issue is the effect of section 19 of the Amendment Act which came into operation on the 24th April 2000 when this case was already pending before the Labour Court. Section 18 of the **Interpretation Act 1977** states as follows:-

> *"18. Where an Act repeals in whole or in part another Act, the repeal shall not –*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect;*
>
> *(b) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed;*
>
> *(c) affect any right, privilege obligation or liability acquired, accrued or incurred under the Act so repealed;*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the Act so repealed;*
>
> *(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment referred to in paragraphs (c) and (d); and any such investigation legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."*

It is quite clear that the fair reading of section 18 (c) and (e) of the International Act (*supra*) is to preserve or perpetuate the *status quo* of the pre-existing rights prior to the amendment. The critical date in our view is not the date hearing of the application but the date of the launching of the application that should determine the applicability of the now repealed section 70 of the Labour Code Order. To hold that the repeal of section 70 had the effect of abolishing the rights or obligations in the legal proceedings begun before the Amendment came into would be to endow the repealing amendment (section 19) with retroactive effect or consequences.

Indeed when the matter was ultimately heard on the 5th December 2000, section 70 was no longer existing having been repealed in April 2000 and **Mr. Mosito** correctly submits that the failure to comply with Section 70 i.e. to apply for condonation took place before the amendment and that effect of this failure was to effectively deprive the Labour Court jurisdiction to adjudicate in the matter of unfair dismissal unless condonation has been granted before such hearing. **Mr. Mosito** submits again rightly so that section 70 is a jurisdictional section affecting competence of the court to hear the matter subjudice.

He submits that under the new April 2000 Amendment, the Labour Court enjoyed exclusive jurisdiction under section 226 (1) (c) (iii) – the dismissal being – admittedly related to "*operational requirements of the employer*"- of the now defunct LTC.

Mr. Mosito contends that jurisdiction is a procedural matter and that procedural laws have retrospective effect notwithstanding the fact that the cause of action arose before the promulgation. **Curtis v Johannesburg Municipality** 1906 TS 308.

- It is common cause beyond doubt that the retrenchment of the appellants was based on the operational requirements of the then ailing LTC.

- It is also clear that when the claim was presented to the Labour Court in February 2000 the six months time-limit had expired thus necessitating the need for an application for condonation before the Labour Court could have jurisdiction to hear the claim.

- When the Labour Court ultimately heard the application in December 2000, the procedural section 70 of the Labour Code Order had since been repealed on the 25th April 2000 while the case was pending before the Labour Court.

The question then is what was the effect of the repeal of section 70 in April 2000 by section 19 of the Labour Code (Amendment) Act No.3 of 2000?

Section 226 (1) (c) (iii) of the new Amendment Act vests "exclusive jurisdiction" the Labour Court over unfair dismissals related "*to the operational requirements of the employer*". It is our view that the Labour Court had jurisdiction to hear the appellants claim in December 2000 but only if an application for condonation had been made. We do not think that the right to apply for condonation was extinguished by the repealing of section 70. As was stated in **Minister of Public Works v Haffejee NO** 1996 (3) SA 745 procedural provisions should be interpreted in such a manner as not to amount to legislative interference with vested rights. In interpreting section 12 (2) (c) and (e) of the *South African Interpretation Act*, **Marais J.A.** held that-

> *"I am unable to accept that the amending Act affected any right or privilege of the respondents' within the meaning of those expressions in section 12 (2) (c)".*

We still hold that **Mr. Mosito** could have made an application for condonation when the matter was heard on 6 December 2000 despite the fact that he could be doing so under a repealed section 70. The critical time is the date of the originating application and not the hearing date. In our view, **Mr. Mosito** suffered under an honest misapprehension that when the matter was heard by the Labour Court in December 2000, he could no longer apply for condonation. The right or obligation under law to apply for condonation existed and was exercisable by the applicants before the amendment of April 2000 and this amendment did not and could not take that away. In other words to take away the right to apply for condonation would be tantamount to nullification of the appellants' claim.

The general effect of section 18 of our Interpretation Act is to preserve the *status quo* of rights in legal proceedings that proceeded the repealing of for example section 70 of the Labour Code Order in April 2000.

In our view, the Labour Court had under no jurisdiction to determine the applicant's claim unless condonation had been applied for and granted. As my Brother **Ramodibedi J (**now J.A.) stated in **Lesotho Brewing Co. T/A Maluti Mountain Brewing v Lesotho Labour Court President and Another** CIV/APN/435/95.

> *"As I read section 70 (2) of the Labour Code Order 1992, I am of the firm view that the jurisdiction of the Labour Court in a case where a claim for unfair dismissal has prescribed only arises from that court*

> *actually granting condonation if satisfied that the interests of justice so demand. Conversely if no condonation is granted the Labour Court has no jurisdiction in the matter."*
>
> *"Accordingly I consider that by failing to expressly grant condonation in the matter, the Labour Court denied itself jurisdiction and thus committed a gross irregularity by entertaining the matter in the absence of such jurisdiction."*

I should add (to these wise words) that parties cannot agree or collude to confer jurisdiction where none exists under law. In the absence of condonation properly granted, the Labour Court had no jurisdiction to consider (a) postponement of the matter or (b) its merits as disclosing no cause of action, as it purported to do so.

It was irregular therefore for the Labour Court to have proceeded to hear and dispose of the matter in the manner it did under Rule 16 of the Labour Court Rules. When the application was heard by the President of the Labour Court in December 2000, no application for condonation had, for reasons best known to them, been made by **Mr. Mosito**, the Labour Court had no jurisdiction to determine the matter and dismiss the application. The learned President should have declined to adjudicate in the matter until a formal application for condonation had been made.

We have decided to therefore to make the following order

- The order the President of Labour Court dismissing the application is hereby set aside.

- The appellants (applicants in court a quo) are given 30 days from the date of this judgment to file – if they so wish – a formal application for condonation, the same to be heard with 30 days of its filing.

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S.N. PEETE

JUDGE OF LABOUR APPEAL COURT

I agree _____

MR C.T. POOPA

ASSESSOR

I agree _____

MR TWALA

ASSESSOR