THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **L. A. C. (CIV) NO.3 OF 2002**

In the matter between:-

NTJOLO LEUTA 1ST APPELLANT
NAPHTALI MAKOKO 2ND APPELLANT

AND

LESOTHO BREWING COMPANY (PTY) LTD 1ST RESPONDENT
PRESIDENT OF THE LABOUR COURT 2ND RESPONDENT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

ASSESSORS: MR MOTHEPU
MS MOSEHLE

DATE : 6TH NOVEMBER, 2003

Headnote

Labour Law – Unfair Dismissal – Constructive dismissal under Section 68 (c) of the Labour Code Order No.24 of 1992. A claim presented to Labour Court after the repeal of Section 70 of the Order. Labour Court lacking jurisdiction to hear such a claim despite Section 18 of the Interpretation Act No.19 of 1977.

Section 18 only preserves the pre-existing rights, privileges, obligations.

Where the appellants purported to resign their managerial positions from respondent alleging constructive (unfair) dismissal, they ought to present their respective claims before the Labour Court before the expiry of six months after their resignations, after which period they ought to seek condonation for late presentation.

Where for other reasons, the appellants fail to file their claims timeously in terms of Sections 70 and do so only after twelve months and the repeal of section 70 repeals their access to the Labour Court, their rights to claims are not prescribed but can be presented before the Directorate of Dispute Prevention and Resolution before which they can apply for condonation for late presentation of their claim.

It was not correct for the Labour Court to dismiss the application upon the ground that it was time barred and because there was no proper process for the application for condonation. Issue of condonation can only be considered where the court enjoys primary jurisdiction to adjudicate in the matter.

This is an appeal against the decision of the President of the Labour Court handed down on the 2nd March 2001 dismissing the application filed by the appellants on the 30th June 2000 for unfair dismissal on the grounds that "*the application was time barred in terms of the repealed section 70 of the Labour Code Order 1992 and that the Labour Court hence had no jurisdiction to hear it.*" It was common cause that section 70 had been effectively repealed by the Labour Code (Amendment) Act No.3 of 2000.

Background

The appellants, the erstwhile employees of the 1st Respondent, had resigned their managerial positions – the first appellant on the 3rd June 1999 and the

second appellant on 8th July 1999 – each listing certain grievances against the then Managing Director of the 1st respondent. The appellants purported to resign their positions invoking section 68 (c) of the Labour Code Order 1992 which reads-

> *"For the purposes of section 66 "dismissal" shall include*
>
> *(a) termination of employment on the initiative of the employer*
>
> *(b) ……..*
>
> ***(c) resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice by reason of the employer's breach of the term of contract."*** (My emphasis)

Originating Application was filed on 30th June 2000 i.e. two months after the repeal of Section 70. In their joint application, the appellants had prayed that the Labour Court declare "their resignation in terms of Section 68 (c) of the Labour Code Order 1992 to have amounted to "*constructive dismissal*" and that the said dismissal was wrongful, unlawful and unfair."

It is not in dispute that the Originating Application was filed in the Registry of the Labour Court (LC81/2000) on the 30th June 2000. It is therefore common cause that – almost 12 months after their resignations or unfair dismissal - the six months time limit under section 70 had expired for both appellants assuming that the constructive and unfair dismissal occurred when each appellant signed letters of resignation on the 3rd June and 8th July 1999 respectively.

It is also quite clear that when the originating application (a claim for unfair dismissal) was made on the 30th June 2000, section 70 had already been repealed by section 19 of the Labour Code Order (Amendment) Act. When it existed, section 70 read-

> "***70. Time Limit***
>
> *(1) A claim for unfair dismissal must be presented to the Labour Court within six months of the termination of the contract of 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."*

To practicalise it, Rule 30 of the *Labour Court Rules* reads-

"Unfair Dismissal: Application for condonation under 70 (2)

> *30. (1) an applicant seeking condonation of the late filing of an originating application claiming unfair dismissal shall present, or deliver by registered post, such application to the Registrar and the respondent named therein and also a written application for such condonation, in or substantially in accordance with Form LC 4 contained in Part A of the Schedule, giving not less than fourteen days' notice thereof to the said respondent, or as the Court or President may direct.*
>
> *(2) The respondent may enter appearance pursuant to rule 29(2).*

> *(3) Notwithstanding rule 25 (3) (a), such application for condonation shall be heard by the Court as constituted under section 23 (5) of the Code."*

In view of the straight forward provisions of Rule 30, we are not convinced by **Mr. Mosito**'s argument that without being formally moved, the Labour Court *suo motu* could consider whether to condone the late filing of the claim under section 70 (2). Anyway it is not important to come to a definite decision on this point in the light of the ultimate determination reached by this court in this matter.

The Labour Code (Amendment) Act No.3 of 2000 was a legislative milestone in the labour relations in Lesotho; the Act sought to define in clear terms the exclusive jurisdiction of the Labour Court in labour matters in that it also established a new legal *fora* or infrastracture – the **Directorate for Dispute Prevention and Resolution** for the resolution of labour disputes through conciliation and arbitration.

Section 226 defines the exclusive jurisdiction of the Labour Court in the following "disputes of right"-

> *"226 **Dispute of right***
>
> *(1) The Labour Court has exclusive jurisdiction to resolve the following disputes:*
>
> *(a) Subject to subsection (2), the application or interpretation of any provision of the Labour Code or any other labour law;*
>
> *(b) An unfair labour practice;*

(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 the operational requirements of the employer."

It goes further to provide that the "dispute of right" involving unfair dismissal for any reason other than dispute concerning underpayment of any monies due under the provisions of the Act "shall be resolved by arbitration"- Section 226 (2) (d).

It has not been contended that the claim as and when it stood and was presented on the 30th June 2000 fell under the exclusive jurisdiction of the Labour Court. In our view this claim fell under the residual jurisdiction of the DDPR. We are not convinced that the Labour Court could assume, even with the agreement of the parties, jurisdiction which it did not primarily possess under the new law.

It is important throughout to bear in mind that when the claim was presented "*before the Labour Court*" on 30th June 2000

(a) six months had long expired since the purported termination of contracts;

(b) Section 70 of the Labour Code Order had since been repealed; it was therefore unnecessary even to think of condonation under its subsection (2);

(c) The appellants had however lodged a counter-claim some time in August 1999 in the High Court CIV/APN/337/99 raising the issue unfair dismissal.

Upon proper interpretation of section 70, it seems to us that the section, when it existed, was a procedural provision and not a substantive one because it dealt with jurisdiction of the Labour Court to deal with cases of unfair dismissal and time-limits and condonation for late presentation of such claims. It seems therefore that the case of **Attorney General v Kao** – *C of A (CIV) No.26 of 2002* is apposite. It was there held by my Brother **Ramodibedi J.A. (**considering section 25 of the Labour Code – another procedural provision) that:

*"[28] I conclude from the aforegoing consideration therefore that Section 25 (1) of the Labour Code (Amendment) Act 2000 is undoubtedly a procedural provision. Once that is so, I conclude further that this section must necessarily govern, so far as it is applicable, the procedure in every case that comes to trial after the date of its promulgation even though the cause of action arose before the date of promulgation and even though the case may have been pending at the date of such promulgation (**Curtis v Johannesburg Municipality** – 1996 (3) SA 745 (AD).*

See also ***Minister of Public Works v Haffejee NO*** where ***Marais J.A.*** had this to say:

> "*... it does not follow that once an amending statute is characterised as regulating procedure, it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.* ***Aliter,*** *if they are not."*

In casu, the repeal of section 70 of the Labour Code did nothing to impair the substantive rights enjoyed by appellants but to created new *fora* and methods of redress. (**Bezuidenhout v AA Mutual Insurance Association**, 1978 (1) SA 703, where **Kotze JA** held at 711 BC that –

> ***"****Questions relating to what courts and within what time, proceedings are to be instituted are questions of procedural law" –* ***Salmond*** on ***Jurisprudence*** – 11th Ed page 504".

It is **Mr Mosito's** submission therefore that the Labour Court was wrong to dismiss the application on the ground that it has no jurisdiction in terms of the (repealed) section 70 of the Labour Code Order; and in also coming to such conclusion upon reliance on section 18 of the **Interpretation Act No.19 of 1977** section 18 which reads in part-

"*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 investigations, 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 proceeding 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 important to note that this section 18 has the effect of preserving the *status quo* (so to speak) of rights, obligations, liability and remedies acquired by litigants before the repeal of section 70 came into effect.

In our view the enquiry should be: In repealing section 70, did the 2000 Amendment Act impair these substantive pre-existing rights of the appellants to enforce their claims? In other words, after April 2000, did the appellants continue have any substantive rights to claim for unfair dismissal? Or had their rights to present these claims been prescribed after six months of their resignation in June/July 1999? – Could they still seek condonation in

a proper forum, for example before the Director of DDPR under section 227 (2)?

In our view, the rights of the appellants had not prescribed (or been extinguished) but these rights were still enforceable upon application for condonation before the proper forum and that is the DDPR. Under the new section 227 of the amended Labour Code, the Director "*may, on application condone a late referral on good cause shown*."

As already pointed out, the time limit for the first appellant expired on **3rd December 1999** and for the second appellant expired on **8th January 2000**. After these dates but before 25th April 2000, they could still under enforce their respective claims before the Labour Court upon application for condonation for the late presentation. They failed to do so.

After the 25th April 2000, their claims were no longer justiciable before the Labour Court but before the Directorate of Dispute Prevention and Resolution (DDPR) established under section 46B of the Labour Code (Amendment) Act No.3 of 2000- See Section 226 (2) (c).

The appellants – for reasons best known to them and their lawyer– went to "*knock at the wrong door*" and presented their claim before the Labour Court on 30 June 2001– which, in our view, as at June 2000, had absolutely no jurisdiction to hear the matter and we dare say the Labour Court had no power even to grant condonation because the whole section 70 had been repealed on the 25th April 2000.

The learned President of the Labour Court then held that

> *"... in terms of section 18 (e) read with section 18 (c) the present proceedings can be proceeded with as they related to things done or suffered or suffered under the repealed section 70 of the Code. Accordingly the applicants' application is dismissed on account of being time barred and consequently the court does not have jurisdiction to hear it."*(My underline)

In effect, the learned President was relying on the repealed section 70 of the Labour Code to found and assume jurisdiction, hence his decision that since no application for condonation had been made, the court lacked jurisdiction. He says –

> *"The conclusion to which we arrive is that this court lacks jurisdiction to entertain these proceedings in the absence of express condonation of the applicant's late filing of the originating application."*

In our view however, after the 25th April 2000 which is a cut-off date even if the applicants had made an application for condonation on the 30th June 2000, the Labour Court at the point in time simply lacked jurisdiction even to condone that late presentation of the claim – the proper *forum* being the DDPR. (SEE: Section 227 (2) of the Act).

It was not proper or necessary to effectively decline jurisdiction relying on a repealed section and stating "… *The claims were clearly inordinately out of time and warranted to have been accompanied by a condonation application*". The pertinent question is: "*Could such application for*

condonation been validly made before the Labour Court?" How could the Labour Court in June 2000 validly assume jurisdiction after the repeal of section 70 in a case of unfair dismissal as claimed by the then applicants? In our view, in June 2000, the Labour Court had no primary jurisdiction to hear a matter of unfair dismissal such as claimed.

All that the Labour Court should have done is to dismiss the application on the ground that it lacked jurisdiction to hear the merits of the application itself and even for condonation As at June 2000, the Registrar of the Labour Court should not have placed the matter on the roll but should have referred the applicants to DDPR.

It is quite clear that the purport of section 19 of the Labour Code (Amendment) Act was to revise the general jurisdiction of the Labour Court to hear all claims for unfair dismissal and to limit it to cases of unfair dismissal as those contemplated under the new Section 226 (1) (c) (iii). The effect of section 18 of the *Interpretation Act* is not to confer jurisdiction where jurisdiction has been removed by law. Take, for example, a case where a repealing or amending law states that all rape cases should henceforth be tried before the High Court. A Subordinate Court cannot claim jurisdiction upon the ground that commission of rape occurred before the promulgation of that law.

In our view the main purpose or intention behind section 18 of the *Interpretation Act* is to mainly preserve the *status quo* of pre-existing rights, privileges, obligation, or liability which has accrued to a person under the Act so repealed. (**Transnet v Ngcezula -** 1995 (3) SA 538 at 552)

It seems to us that the counterclaim filed in the High Court in CIV/APN/337/99 at worst demonstrated that the applicants' attorney was negligent or remiss in not submitting a claim timeously before the DDPR after the 25th April 2000 Amendment but before the Labour Court as was the case. The appellants were indeed entitled to look to their attorney to do everything that was necessary under law to pursue their claims expeditiously and in a proper *forum*. That an unfair dismissal counterclaim was lodged in the High Court in August 1999, demonstrates the fact that the appellants had already instructed their attorneys about their claims for unfair dismissal. Indeed their claims could have been competently pursued before the Labour Court up until 25 April 2000. Anyway it is not necessary to consider whether or not the attorney was in fact negligent – All we can only say is that after the 25th April 2000, the doors of the Labour Court became shut and could not be opened even with an application for condonation; figuratively speaking, the only door to knock after 25th April 2000 was that of the DDPR. Indeed both the Labour Court and DDPR are creatures of statute with defined powers and jurisdictions, outside which they cannot function without being *ultra vires*.

In the pre-April 2000 era, expiry of six months did not extinguish the right to claim for unfair dismissal before the Labour Court; in other words the right did not prescribe because it could still be enforceable if the Labour Court then granted condonation if "*satisfied that the interests of justice so demand*." But after the 25th April 2000, a new forum was created by law to determine cases of unfair dismissal such as that of the applicants.

In our view, it is not prudent to use the word **"prescribe"** when we interpret section 70 of the Labour Code Order; moreso because the Legislature has elected not to use that word, as it did in, for example, section 10 of the **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 as 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 underline)

"*Prescription*" is a legal word with grave legal consequences in that if it is of "*extinctive*" type, it effectively extinguishes a right which can henceforth no longer be enforced or resuscitated in court. Section 70 did not have the effect of extinguishing the right to claim for unfair dismissal because even after expiry of six months the right could still be enforced if the court condoned the delay.

The Labour Court continued to have general jurisdiction in matters of unfair dismissal up until 25th April 2000 when the Amendment 2000 came into being. After that date, any claim for unfair dismissal such as one presented by the applicants, was only justiciable in the DDPR. In our view therefore when the Labour Court "purported" to hear the application filed by the appellants on 30th June 2000, it totally lacked jurisdiction in law (and not on the ground that an application for condonation had not been made) and the Labour Court could therefore not, by any means, be seized with that

application or with an antecedent application for condonation. It is, in our view, not even necessary to consider whether the filing of a counter- claim in the High Court in August 1999 constituted an interruption of the six months period. Anyway the counter-claim-as **Mr. Mosito** conceded – was dismissed in the High Court. It is not necessary to come to any definitive decision on the issue of "*interruption*" because (a) section 70 is not a "prescriptive" provision and (b) once the Labour Court lacked primary jurisdiction, it could not proceed to deal with the related issue of interruption of prescription of an unfair dismissal claim.

Coming now to the grounds of appeal, it should be noted that these grounds *seriatim* seem to assume – not correctly in our view – that the Labour Court, when it heard the application- had the necessary jurisdiction. We have already stated that in June 2000 when the appellants' claims were presented before the Labour Court they should have been filed in the DDPR and not before the Labour Court. A court of law can exercise a judicial discretion only if it enjoys the requisite primary jurisdiction to adjudicate in the matter at hand and not otherwise.

It is therefore not necessary to determine whether the Labour Court exercised its discretion judicially or wrongly. It did not have jurisdiction hence no discretion to exercise in the matter.

In our view therefore the first ground of appeal ought to fail both in the main and in the alternative. The second ground meets the same fate.

For purposes of clarity, it must be made clear that the Labour Court was correct in dismissing the application but its reasons therefor were wrong i.e. absence of a condonation application. All the Labour Court had to do was to dismiss the application upon the sole ground that it had under law no jurisdiction to hear the matter. It remains to the appellants, if they so elect, to pursue their claim before the DDPR.

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S.N. PEETE

JUDGE OF LABOUR COURT APPEAL

I agree, _____

ASSESSOR

I agree, _____

ASSESSOR

For Applicant **:** **Advocate Mosito** instructed by **Mr. Maieane**

For 1st Respondents**:** **Advocate Worker** instructed by **Mr. Roberts**