L. A. C. (CIV) NO.8 OF 2003

IN THE LABOUR APPEAL COURT OF LESOTHO

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

CORAM : HON. MR JUSTICE S.N. PEETE

DATE : 18TH APRIL, 2008.

PEETE, J.:

Introduction

[1] This labour appeal is a sequel of a long standing saga between some 62 erstwhile employers of the now defunct Lesotho Telecommunications (LTC) Corporation over their entrenchment which effectively terminated their employment on the 9th July 1999. It is common cause that their claim was presented on the 15th February 2000, thirty six days after the lapse of six months period after their dismissal.

[2] Fundamental to this labour dispute in *casu* was the issue raised by respondent (LTC) that in terms of the then section 70 (1)[1] of the **Labour Code Order 1992,** the Labour Court had no jurisdiction to hear the matter unless condonation is made *mero motu,* by the court or upon application. Section 70 of the Order read:-

> *"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.*

[1] Now repealed by section 19 of the Labour Code (Amendment) Act No.3 of 2000.

(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."

[3] The issue of prescription was dealt fully by this Court in its judgment delivered on the 6th November 2003[2] where it was found that when the original application was filed on the 15 February 2000, the six months period had elapsed, and since no application for condonation had been moved and granted, the Labour Court had no jurisdiction in the matter.[3]

[4] Condonation not having been granted in the Court *a quo* this court held then that the Labour Court *"did not have jurisdiction to go into the main application at all."*

[5] The judgment of this Court directed that

"- The order of the President of the 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 – if they so wish – a formal application for condonation, the same to be heard within 30 days of its filing."*

[2] LAC (CIV) No.4 of 2003.
[3] **Lesotho Brewing Co. v Labour Court President** CIV/APN/435/95 per **Ramodibeli J.** as he then was)

[6] It was indeed clearly up to the applicants to have timeously taken advantage of this benevolence, as they could not validly contend that their claim was filed within six months. In fact, some 36 days had gone by.

[7] In passing it should be noted that it has been common cause throughout that the substantive issue in this matter is one of *dismissal related to operational requirements of the employer*[4] and the Labour Court had jurisdiction to adjudicate over the matter if it had been timeously presented.

[8] It seems that when the matter again was re-heard by the Labour Court in 2004 the applicants took a firm position that despite the order/directive made by this Court – it was not necessary to make an application for condonation and that it was in any case optional because the Order used the phrase "*if they so wish*" and further that since the section 70 had been repealed, there was no need to apply for condonation.

[9] If **Mr Mosito** – then counsel for the applicants – certainly seems to have encountered some interpretational problems with the Order made by this Court, he had to comply with the Order because he had no right to appeal against it.[5]

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[4] Section 226 (1) (c) of the Labour Code Order 1992
[5] Section 38 A (4) of the Labour Code (Amendment) Act No.3 of 2000

[10] In our view, the Order/directive made by this Court in its judgment of 6th November 2003 was misinterpreted by the applicant's counsel in importing optionality into its compliance and furthermore to criticize its wisdom before the Labour Court.

[11] The Labour Court President (**Mrs Khabo**) then held as follows:-

> *"By having not placed before this Court a condonation application as ordered by the Labour Appeal Court, this Court's efforts in complying with the order as instructed have been frustrated by the applicants. Assuming for a moment that such an application had been presented, the Court would still be faced with the problem that the application would have been filed out of time.*
>
> *The cumulative effect of these considerations leaves this Court with no alternative, but to dismiss the present application. It is accordingly dismissed with costs."*

[12] The appellants grounds of appeal are the following:-

> *"-1-*
>
> *The Learned Deputy President erred and/or misdirected herself in holding as she did that condonation was required for the Labour Court to hear and determine the matter before it.*
>
> *The learned Deputy President ought to have hold that since the matter came to trial after the repeal of the Procedural Section (section 70) of the Labour Code Order No.24 of 1992, there was no longer need to apply for condonation in respect of dismissals based on operational requirements so long as such application was brought to the Labour Court before the expiration of the 3 year period contemplated by the law.*

-2-

The learned Deputy President erred and/or misdirected herself in holding as she did that the proper interpretation of the judgment of the Labour Appeal Court on p.15 of the judgment in LAC/REV/No.4/2003, was to render application for condonation mandatory.

The learned Deputy President ought to have hold that it was discretionary on the applicants to institute condonation application pursuant to the fact that section 70 of the Labour Code Order No.24 of 1992 had been repealed.

-3-

The learned Deputy President erred and/or misdirected herself in holding as she did and deciding without inviting the parties to address her on the issue that, even if the application for condonation had been made or presented, the court would still be faced with the problem that the application would have been filed out of time.

The learned Deputy President ought to have invited the parties to address her on the propriety of even filing such an application regard being had to so time limits allowed to in her judgment."

[13] The purport of the grounds of appeal is indeed to ask this Court to revisit and review its own Order of 6th November 2003 and to hold that since section 70 of the Code had been repealed, there was no need "*to apply for condonation*".

[14] On this appeal – whether its order of the 6th November 2003 was right or wrong – this Court should not sit on review over its own judgment or order – but should limit consideration to whether the judgment of the Labour Court was correctly or wrongly decided.

[15] In its judgment of the 31st May 2004, the Labour Court was unpersuaded to proceed to hear the application without condonation having first been granted. It declined "*to question the wisdom of the judgment of a court superior to it.*"

[16] Whilst the interpretation given by the Labour Court on the second leg of the order directing that "*if they so wish*" the appellant could file an application for condonation, cannot be faulted, we hold that it is a misconception on the part of **Mr Thoahlane** to argue that the Labour Appeal Court went beyond what had been asked for.

[17] After the 9th January 2000, the respondent LTC in law acquired a vested right consisting of an immunity from suit in respect of the appellants' cause of action. In **Minister of Safety and Security v Molutsi** – 1996 (4) SA 72 AD per **Marais JA.** at p.90 F-H had this to say:-

> *"Lest it be thought that it has been overlooked, something must be said about the distinction which is often when interpreting statutes between those which are classified as '**procedural**' and those which are not. The former are regarded prima facie as being applicable even to situations which arose before their enactment whereas the latter are not so regarded prima facie. The imprecision of the dichotomy and the sometimes elusive nature of the distinction has been frequently remarked upon. I do not find it necessary to review the debate. It is sufficient to say that while there can be no vested right in purely procedural provisions, it is now well recognized that even although a statute may have procedural dimensions, if it adversely affects vested rights which are not purely procedural, it will be construed as **pro tanto** prospective."*

In our view this right could not be stripped away by section 19 of Labour Code (Amendment) Act on 25th April 2000.

[18] After 9th January, 2000 the fact remained that LTC was vested with a substantive and absolute defence to the appellant's claim – namely prescription, and therefore section 19 should not be construed as having been intended to divest such vested right; in other words section 19 is to be construed as being prospective.[6] This legal position was guaranteed by section 18 of the Interpretation Act of 1977.

[19] *Section 18* of the **Interpretation Act 1977** reinforces the protection of vested right by providing that the repeal of a procedural provision *"shall not affect any right, privilege obligation or liability acquired or incurred under the Act or provision so repealed."*

[20] Immunity from suit acquired by respondent was a substantive right that then vested in it or it could be used as a defence if the appellants sought to resuscitate their claim after the 9th January 2000. Therefore when the application was lodged by the appellants on the 15th February 2000 respondent had been enjoying the right (immunity of suit) and a right or defence they could have raised or pleaded if the appellants, without having been granted condonation, presented their claim for unfair dismissal.

[6] See **Transnet v Ngcezula** – 1995 (3) SA 539 – presumption against retrospectivity.

[21] With complete disregard of section 70, the appellant's counsel was not also present in court when his application was dismissed by the Labour Court in November 2000. He cannot fall back on the fortuitous amendment of the Labour Code on the 25th April 2000.

[22] **The Curtis rule**

The old case of **Curtis v Johannesburg Municipality** *1906 TS 308* laid down that:-

> *"...the presumption that the Legislature intended its legislation to affect only future matters does not apply where the legislature in question deals with procedural matters including the case where an enactment providing for a specified procedure is simply repealed and not replaced y any other procedural provision ..."*[7]

[23] Section 70 of the Labour Code Order was clearly a provision dealing with a purely procedural matter – presentation of a claim after a cause of action arose; its repeal was therefore a procedural change which affected all causes of action whether they arose prior to the appeal or thereafter.[8]

[24] The **Curtis** rule has been qualified in recent times.[9] Section 70 of the Labour Code Order 1992 governed the procedural enforceability of a

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[7] Code 1.14.7, *Maxwell an Interpretation of Statutes* 12 Ed at 215.
[8] **Ngcezula** – p.545 E-F
[9] **Protea International (Pty) Ltd v Peat Marwick Mitchell** – 1990 (2) SA 566 at 573 A-B per **Joubert JA**

claim based on unfair dismissal. Generally interpreted, section 70 provided that such claims could be enforceable within six months of their occurrence; after the expiration of six months, the employer could not be sued by the dismissed employee unless condonation had been granted by the court. Once the six months period expired, right of immunity of suit accrued to the employer to raise a defence of prescription if sued after the expiration. This right was by no means affected or abrogated by section 19 of the Labour Code Amendment Act No.3 of 2000 in April 2000. That right remain extant and in tact.[10]

[25] In the English case of **Yew Bon Tew vs Kenderaan Bas Mara** [1982] 3 All ER 833 PC **Lord Brightman** noted that expressions "*retrospective*" and "*procedural*" can sometimes misleading and may lead one astray – with one interpretation seeking to regulate the course of the proceedings and with another interpretation reviving or destroying the cause of action itself.[11]

[26] Section 70 of the Labour Code Order ca be interpreted in three parts: (i) the claimant must lodge the claim for unfair dismissal within six months; (ii) the sanction for non-compliance with (i) is that the employer shall not be liable; (iii) the sanction will be lifted if the claimant applies for and obtains special leave to lodge the claim out of time. Part (i) is purely procedural; Part (ii) is prescriptive and a right accrues to the employer if claim is presented after the lapse of six months – and this is a matter of substantive and not procedural law.

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[10] Section 18 of the *Interpretation Act 1977*
[11] **Ngcezula** (*supra*) page 549 (G-I)

Granting of condonation under part (iii) has consequences:- if condonation is refused, the employer's claim is extinguished and if granted, the merits of the claim are justiciable.

[27] Under our law, the protection of accrued rights has finally been guaranteed under section 18 of the Interpretation Act.

[28] In these circumstances, we hold that the appeal has no merit and is therefore dismissed with costs.

[29] The appellants have the right to appeal[12] to the Court of Appeal within six weeks or to again reopen the matter before the Labour Court as previously directed.

S.N. PEETE

JUDGE OF LABOUR APPEAL COURT

I agree:

PANELLIST

I agree:

PANELLIST

For Appellants : **Mr Thoahlane**

For Respondent : **Mr Woker**

[12] **Muso vs Minister of Labour and Employment & Others** – Constitutional case No.4 of 2005.