

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

QUEEN KOMANE

1ST APPELLANT

ELIZABETH MANAKO

2ND APPELLANT

AND

CITY EXPRESS STORES (PTY) LTD

RESPONDENT

CORAM: HONOURABLE MR JUSTICE K.E.MOSITO AJ.

ASSESSORS: Mr M. Makhetha

Mr L. Matela

DATE: Heard on 7th August, 2009

Delivered on 14th August, 2009

SUMMARY

Appeal from the Labour Court – Appellants complaining that the Labour Court did not consider their entitlements to leave pay and severance pay – Affidavits reflecting such averments.

Condonation application made – no averments in the Founding Affidavits – Court dismissing application for want of the requirements for condonation.

Application dismissed with costs for want of the requirements – appeal struck off the roll with costs.

JUDGEMENT

Mosito AJ

1. This is an appeal against the decision of the Labour Court handed down on the 31st day of August 2007. That judgment was a sequel to a judgment of this Court handed down on the 2nd day of November, 2006. In the 2006 judgment, this Court handed down its decision consequent upon an appeal from a judgment of the Labour Court in which the Applicants (Appellants in the present matter) had approached the Labour Court for an order in the following terms:
 - (a) That the “hearings” conducted on the 26th September, 2000 was procedurally unfair and the decision reached therein be declared null and void as it was conducted outside Lesotho.
 - (b) That the act of taking the workers outside Lesotho is contrary to the provisions of the Lesotho Laws especially Labour Code.
 - (c) Payment of salary up to date of judgment.
 - (d) Further and/or alternative relief.

2. The Labour Court had dismissed the said application with costs on the 28th day of March 2002. The present Appellants were not satisfied with the said judgment of the Labour Court. They appealed that decision to this Court. After considering the issues in their entirety, this Court came to the conclusion that the appeal had to succeed on the grounds as detailed out in the judgment handed down on the 2nd day of November, 2006. In handing

down the judgment this Court gave out a rather detailed order. For the sake of convenience, I reproduce that order which was in the following terms:

33. The issue of the *quantum* of emoluments is one that should be enquired into by the Court *a quo* either on affidavits suitably augmented if there is no dispute of fact or, if necessary, by viva voce evidence of the parties.
34. In all the foregoing circumstances, the appeal must be upheld.
The following order is consequently made:
 - (a) The appeal is upheld with costs
 - (b) The order of the Labour Court is set aside and replaced with the following order:
 - (i) Prayers (a) and (b) of the originating application are granted.
 - © (i) The Respondent is ordered to pay Appellants salary from the purported date of dismissal to date,
 - (ii) In order to ascertain what *quantum* of such salary is payable to the Appellants the matter is sent back to the Court *a quo* for the furnishing of evidence thereon.
 - (iii) The Court *a quo* should be furnished with affidavits from both parties regarding emoluments (if any), which have been earned by the Appellants in the period since their dismissal.
 - (iv) If there is a dispute of fact which cannot be decided on affidavits, then the Court *a quo* will order that viva voce evidence be given by the parties and will in due course make such order regarding the quantum of emoluments, if any, to which the Appellants are in the opinion of the Court, entitled.
 - (d) The order outlined in paragraph © above must be compiled with by the parties within 30 days of this judgment in that:
 - (i) The Appellants must file their affidavits within 15 days of this order.

- (ii) The respondent must file its affidavits (if any) within 15 days of the date on which Appellants have filed their affidavits.
- (iii) The Registrar of the Labour Court is directed to place the matter on the quantification of emoluments before the Labour Court for determination within 30 days of the filing of the Respondent's affidavit.
- (iv) The costs of this application must be borne by the first respondent.

3. In compliance with the above order, the Appellants duly filed their affidavits as to quantification. The main affidavit was filed by the 1st Appellant. It related to the loss of wages; annual increase in respect of the particular years in respect of which Appellants complained that they were entitled to be compensated, leave pay and severance pay. I should perhaps quote paragraphs 7 and 8 of the Affidavit of the 1st Respondent from where the following appears:

7.

On Annexure NURAW is also attached a document reflecting my leave entitlement. I was entitled to eighteen (18) days leave per year from 2000 to 2006. I did not take even a single day of the said leave.

8.

The said Annexure NURAW 1 also has an attachment dealing with severance pay I states working for Respondent on the 1st August, 1993 until the 2nd November, 2006 when which is thirteen (13) years.

The same is thus computed as follows:

$$\frac{\text{M3468.74} \times 90 \times 13 \text{ years}}{195} = \text{M243, 322.10}$$

4. I may pause to point out that the figure of M243, 322.10 is clearly an arithmetic error. A proper computation would seem to be one for M20, 812.44 for the severance pay in question. It seems clear therefore that the former figure would properly be substituted for the latter.
5. The 2nd Appellant states that her entitlements are as reflected in a document called NURAW 2. We may mention that the Respondents did not file any opposing affidavits before the Labour Court to enable the Court to ascertain the actual position as far as they are concerned. In the circumstances we are of the view that the averments of fact made by the Appellants before the Labour Court remained unchallenged. Should need so arise, we will return to the more detailed consideration of the factual issues. For now, it suffices to say that the Appellants became dissatisfied with the judgment of the Labour Court as aforementioned.
6. On the 22nd day of April, 2008, the present Appellants noted an appeal to this Court against the judgment of the Labour Court dated 31st August, 2007. In their Grounds of Appeal the Appellants raised the following as their complaints:
 1. The reduction of the Appellants emoluments by one third by the learned President of the Labour Court for their alleged failure to mitigate their losses during the unlawful dismissal is excessive and unreasonable.
 2. The learned President of the Labour Court failed to consider different factors taken by different Appellants in mitigating their losses under circumstances.
7. The grounds were later amplified by some additional grounds. Along with the said notice of appeal, the Appellants filed a Notice of Motion, founding and Supporting Affidavit in terms of which they sought condonation for the late filing of their appeal. At the hearing of the present matter the Court

invited the Counsel to comment on whether it would not be convenient to hear the condonation application together with the appeal. The reason for this approach was that if the condonation application succeeds, then the Court will go ahead and determine the merits of the appeal. If it fails, then the Court will refuse the application for condonation and strike off the appeal from the roll. The counsel agreed and we proceeded on that basis.

8. I should mention as early as now that, not much thought seems to have gone into the drafting of this condonation application. In the first place, the application seems to have been meant for the “Labour Court” and not the “Labour Appeal Court” according to its heading and yet the Court Reference Number is that of this Court. Secondly, in her Founding Affidavit, the 1st Appellant has not made even an attempt to provide facts relating to any of the requirements for condonation application. She contented herself with the following:

CONDONATION

I wish to apply for condonation of late filling of my claim for the following reasons:

On the 2nd November, 2006, the above Honourable Court delivered a judgment directing inter alia, that the Labour Court must assess the actual emoluments due to me and the 2nd Appellant.

On or about the 31st August, 2007, the Labour Court delivered judgment which allotted our said emoluments and in his assessment. The Court President deducted one third (1/3) of the total emoluments allegedly for our failure to mitigate our losses. As appears more clearly from the judgment of the said court attached hereto and marked QK1

9. The 2nd Appellant filed a Supporting Affidavit in which she deposes that she has understood and read the Founding Affidavit of the 1st Appellant and that she wishes to fully associate herself with the contents of that affidavit. The Respondent filed an Answering Affidavit in which it took a point that

the Appellants had failed to establish the requirements for condonation in their affidavits.

10. In the recent case of **Phethang Mpota vs Standard Lesotho Bank, LAC/CIV/A/06/08**, handed down on 7 August 2009, this Court discussed in detail the various authorities on condonation at paragraphs 11 to 15. At paragraph 15, the Court *inter alia* observed as follows:

Thus, from the examination of the case law above, it can safely be said that, the factors which the Court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) *bona fide* defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. (See ***Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC)***). However, these factors are not individually decisive but are interrelated and must be weighed against each other.

11. An examination of the content of the condonation application, whose affidavit is quoted above therefore, has to be measured in the light of the above principles. In the founding affidavit as quoted above, no attempt was made to establish a single one of the requirements for condonation upon which this Court can rely upon in assessing condonation. We agree with Mrs Kotelo for the respondent that no such requirements have been established. We are therefore unable to determine facts relating to any of the condonation application's essentials in the absence of any averments in the Founding Affidavits of the Appellants for condonation relating to the above requirements. Once the Court finds that the requirements for condonation in a condonation application have not been satisfied, the

Court cannot grant such an application. Once the Court declines to grant the condonation application for the late filling of the appeal, it then follows that the appeal cannot possibly be considered. In our view the present case is one such a case.

12. The application for condonation is therefore refused and, it is accordingly dismissed with costs for want of the requirements of such an application in the Founding Affidavits. The appeal is therefore accordingly struck off the roll with costs.

13. My assessors agree.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellant: Advocate B. Sekonyela

For the Respondent: Attorney V.V.M Kotelo