LAC/CIV/A/12/2004
LC/15/2003

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

TSOTANG NTJEBE	1st APPELLANT
TEKO MOLOTSI	2ND APPELLANT
LEABA MAPHALLA	3RD APPELLANT
LIKHANG LINKUNG	4TH APPELLANT
LELOKO MATSOSO	5TH APPELLANT
TUMISANG RANTHAMANE	6TH APPELLANT
SETLOBOKO MOJAKI	7TH APPELLANT
SELLO SHODU	8TH APPELLANT
'MOLAOA KOPO	9TH APPELLANT
MPELI TLHOELI	10TH APPELLANT
LEBOHANG CHECHE	11TH APPELLANT
LEPATOA LEPATOA	12TH APPELLANT
MOTLALEPULA MOTLALEPULA	13TH APPELLANT
LEHLOHONOLO MAFATLE	14TH APPELLANT
MOEKI BULARA	15TH APPELLANT
NGAKA MALIKATSE	16TH APPELLANT
HLEMPHE MOLISE	17TH APPELLANT
SEABATA TLHOELI	18TH APPELLANT
TALIME MOTHOBI	19TH APPELLANT
LEBOHANG KOPO	20TH APPELLANT
ESAIAH MASHININI	21ST APPELLANT
MOKHESENG NTSANE	22ND APPELLANT
TEBOHO MATLAMELA	23RD APPELLANT
TANKI MARUMO	24TH APPELLANT
MPESI MAKETA	25TH APPELLANT
LEBOHANG RAMAQHOBELA	26TH APPELLANT
MOKHESENG FALENG	27TH APPELLANT
THABO KAKASA	28TH APPELLANT
BOTEANE SHODU	29TH APPELLANT
THAPELO MOROANA	30TH APPELLANT
METHE KOTELO	31ST APPELLANT

AND

LESOTHO HIGHLANDS AUTHORITY RESPONDENT

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU LC/23/2003
LAC/CIV/A/12/2004

In the matter between:

TELANG LEEMISA & OTHERS APPELLANTS

AND

LESOTHO HIGHLANDS AUTHORITY RESPONDENT

JUDGMENT

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

ASSESSORS: MRS. M MOSEHLE

MRS. M. THAKALEKOALA

HEARD ON: 27TH JANUARY 2009

DELIVERED ON: 6TH FEBRUARY 2009

SUMMARY

Appeal from Labour Court – overtime pay – security guards – Meaning of supervisor. Unfair dismissal – No notice given after the previous notice withdrawn – Effect thereof. Remittal of matter for further evidence on the quantification of overtime pay and compensation.

Practice -Amendments of pleadings on appeal

Result _ appeal upheld with costs in respect of overtime pay and compensation.

JUDGEMENT

MOSITO AJ.

INTRODUCTION

1. The appellants before this court were apparently represented by different lawyers in the Labour Court. Telang Leemisa was represented by his present counsel, while the 1st to the 31st appellants whose names appear in the heading of this judgment were also represented by their present counsel.
2. Leemisa's application before the Labour Court was for an order in the following terms:

(a) That the purported retrenchment of the applicant should be declared unfair and invalid on account of procedural unfairness in that there was no adequate notice given to the applicants and there were no consultations conducted in accordance with respondent's own rules, policies and the law.

(b) That the purported retrenchment of applicants should be declared unfair and invalid on account of substantive unfairness in that the respondent employed other employees during the so-called retrenchment process thereby demonstrating that the so-called operational requirements were not in existence, alternatively, that it was unfair and discriminatory for lack of selection criteria for retrenchment.

(c) That respondent be ordered accordingly to reinstate all the applicants herein or alternatively:-

(d) That the respondent should be ordered to pay applicant's salary as compensation for the unfair dismissals, from date of judgement hereof and for a further period of six months to enable applicants to look for alternative employment.

(e) Further, that the termination of applicants' employment during the process of preparation for consultation and before any consultations should be declared unfair and invalid.

(f) That respondent be ordered to pay the applicant all their outstanding overtime payments of 24hours day worked per 15 days of every month from the date of employment to date of termination hereof.

(g) That respondent is ordered to calculate any pay all the applicants' terminal benefits in terms of the total cost to company (ctc) as opposed to basic salary.

(h) That it should be declared that Clause 15 of the respondent's Staff Separation Policy is illegal, unfair and invalid by reason of it being discriminatory and in-conflict with the Labour Code (Codes of Good Practice) and I.L.O. Conventions 1982.

(i) That this Honourable Court shall grant further and/or alternative relief deemed fit in accordance with the dictates of the ends of justice.

3. The 1st to the 31st appellants asked the court for an order in the following terms:

(a) Payment of each applicant's difference in salary from the date of employment to the date of dismissal.
(b) Re-instatement of the applicants, Alternatively the granting (sic) the contract of security services to applicants' Company, namely Survival Development Services (PTY) LTD (sic).
(c) Payment of applicants' salary (in compliance with the Labour Code) with effect from the date of dismissal to the date of judgement.

4. After considering the evidence and pleadings before it, the Labour Court handed down judgment on the 15th day of October 2004.

5. In respect of both LC15/2003 and LC23/2003, the Labour Court dismissed the appellants' claims with costs.

6. Dissatisfied with the judgment of the Labour Court, the appellants then appealed to this court on very prolix grounds of appeal. The matter was heard before us and counsel addressed us at length for two days.

APPLICATION FOR AMENDMENT OF PLEADINGS ON APPEAL

7. I must begin by pointing out that when the matter was first called, this court asked the counsel for both sides as to whether LC15/2003 and LC23/2003 had been consolidated in the Labour Court. The counsel replied that they had not been consolidated, but had been heard together. In all fairness to the counsel for both parties, it appeared at first instance that in principle, they had no problem with consolidation of the two cases. However, the issue that arose related to whether the claims could be consolidated when the prayers were different. This is what created a great deal of some discomfort before this court and the issue as to whether it was permissible for the Labour Appeal Court to consolidate the claims on appeal arose. This issue arose because it appeared that Mr. Sekonyela wished to abandon prayers (a), (b), (c) of his originating application and the appeal relating thereto.

8. Mrs. Kotelo initially wished to abandon prayer 10(a) and (b) of her originating application as well as appeals relating thereto. The difficulty that arose however related to whether she had prayed for

compensation in terms of Section 73 of the Labour Code Order 1992. This is because prayer (b) of her originating application, inelegant as it appears, prayed for re-instatement. The alternative to that prayer embodied in the same prayer is absolutely unintelligible as it clearly appears above. It meant that if Mrs. Kotelo was abandoning a claim for re-instatement, she would then have to ask for compensation or this court would be enjoined to grant compensation where a party no longer insisted on re-instatement. Mrs. Kotelo appeared to be at sea as to what should happen if she abandoned reinstatement. She then applied for amendment of the prayers that appellants' 1 to 31 be paid compensation in case this court finds that their retrenchment was unfair. She made this application from the bar. She contended that the application for amendment should be upheld because all issues relevant to the determination of whether or not to order compensation had been canvassed before the Labour Court. For this proposition she relied on the case of ***United Building Society and Another v Lennon, Ltd., 1934 AD 149***. She also relied on Herbstein and van Winsen, ***Civil Practice of the Superior Courts in South Africa*** 3rd Ed at p. **737.**

9. Mr. Daffue for the respondent opposed the application and argued that the cases relied upon by Mrs. Kotelo was based on the South African statues which did not apply in the present case. He contended that neither Rule 19(1) nor (2) of the Rules of the Labour Appeal Court deal with a situation in terms of which this court can grant an amendment on appeal. He argued that an amendment must be brought expeditiously and that in the present case the amendment was not so brought. He further argued that there was no evidence before court to

justify the amendment at this stage. He argued that there was no evidence that would point to the fact that his client would not suffer prejudice if the amendment were to be granted at this stage. He further argued that we are dealing here with a monetary claim and that appellants cannot at this stage change their pleadings when they did not do so before the Labour Court. He contended that if this court were to grant the amendment that will cause further uncertainty. He further submitted that if the Legislature wanted an amendment to be permissible at this stage, it would have said so in so many words.

10. In reply Mrs. Kotelo referred this court to the Court of Appeal Judgment in ***National University of Lesotho and Another v Motlatsi Thabane C of A (CIV) NO.3 of 2008 at pg 5.*** This court ruled in favour of allowing the amendment and promised to furnish reasons therefor in the main judgment. I therefore proceed to provide such reasons below.

11. Was it competent for this Court to allow an amendment on appeal? Rule 19(2) of the Labour Appeal Court Rules 2002 provides that "the Judge may give any directions that are considered just and expedient in matter of practice and procedure." In my view this Rule confers a discretion and indulgence upon the judge to give any directions that are considered just and expedient in matter of practice and procedure, which includes the power to permit amendments even at this stage of appeal. As indicated above, the learned Counsel argued that an amendment must be brought expeditiously and that in the present case the amendment was not so brought. I agree with this submission subject to the ridar that, in the absence of prejudice to the opponent, leave to amend may be granted, despite such delay, at any stage,

however careless the mistake or omission may have been and however late the application for amendment. (See ***the Krogman case at 193, as also Mabaso and Others v Minister of Police and Another 1980 (4) SA 319 (W) at 323D***). In the latter case Goldstone AJ said that 'even in a gross case' the Court should grant an amendment unless there is a likelihood of prejudice to the other side which cannot be cured by a suitable order for costs. In the present case, there was no prejudice to the respondent because section 73(2) of the ***Labour Code Order 1992*** would have still required that where a party no longer requires reinstatement as *in casu*, we would still be obliged to order compensation, whether there was such a prayer or not.

12. In my view, the basic consideration in deciding whether this course of permitting amendments on appeal may properly be adopted is whether the issue sought to be covered by the proposed amendment had been so exhaustively canvassed in the evidence led at the trial as to result in no possibility of prejudice to the other side. (See ***Van Ryn Wine and Spirit Co v Chandos Bar, 1928 T.P.D. 417 at p. 421***, per Greenberg, J.; ***United Building Society and Another v Lennon, Ltd., 1934 AD 149 at pp. 162 - 3***, per Stratford, D A.C.J., and ***Union Government v Hawkins, 1944 AD 556***, per Centlivres, J.A). Of course as correctly stated by LEWIS, A.J.A. in ***Sager Motors (PTY) LTD v Patel 1968 (4) SA 98 (RA) at 104***, it is not open to an appellant, in the absence of an amendment to his application, to claim on appeal something which he did not claim in the Court *a quo*, and where an amendment would radically alter the nature of the issue and require further evidence for its determination. Such an application for amendment will not be allowed on appeal. (See ***United Building Society and Another v***

Lennon Ltd 1934 AD 149 at 163; Union Government v Hawkins 1944 AD 556 at 560). It was on account of the aforegoing reasons that we granted the amendment.

13. After the issue of amendment had been disposed of, the Court sought the reaction of the parties as to consolidation of the two cases. Mrs. Kotelo was not in favour of consolidation. It was then agreed that the anomalous procedure of hearing the cases together as opposed to consolidating them should be carried on with. The cases then proceeded unconsolidated. We therefore proceed to determine the merits of the appeal.

OVERTIME

14. In their originating applications, appellants complained that they worked overtime. On their version, they worked for a straight shift of 24 hours for 15 days. They therefore claimed their differences in salary. The respondent disputes this by saying that there were beds and shelter provided for appellants at their work stations and they could sleep and rest when tired. It was impossible for the appellants to work for a straight shift of 24 hours for 15 days. On the face of it, there appears to be much logic in this argument. However, on mature reflection on the facts, it will be realised that respondent does not dispute that the appellants would be at the work station for a straight shift of 24 hours for 15 days. The question is whether being at the duty station at the work station for a straight shift of 24 hours for 15 days; such employee should be regarded no longer as being at work because they can sleep when tired. In our view, such employee would

still be at work because, should any thing go wrong with his work, he must account. It is understandable that when tired they can sleep, but that does not mean that they are no longer on duty during that time.

15. Mr. Daffue argued before us that the appellants acquiesced in this because they continued to work like this for years without protesting. The labour Court held that appellants were stopped from claiming overtime because they did not do any thing for a long time with this practice despite the fact that it had been going on for so long. In their appeal, appellants complained that, in its judgement, the Labour Court raised the issue of estoppel for the first time against the appellants without it being pleaded by the respondent, let alone addressed by the parties before Court. As a general rule an estoppel must be alleged and proved by the party who relies upon it as a defence.(See ***Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 (1) SA 394 (A)***). Estoppel is a defence which must be raised by the party wishing to rely upon it. (See, ***Ras v Liquor Licensing Board, Area NO 11, Kimberley 1966 (2) SA 232 (C) p 238***). To prove an estoppel it is not enough merely to show that there has been a representation on the part of the representor. It must also be shown that the representee relied upon it and that such reliance caused him to alter his position to his detriment (see ***Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd 1976 (1) SA 441 (A)***). It was clearly wrong for the Labour Court to have raised the issue of estoppel in the manner it did.

16. Mr Daffue argued that only two of the appellants testified and the court should find that no case had been made for the rest of them. In our view, there is no rule of evidence that all claimants must testify

for them to succeed in a claim. It is enough that there is evidence on the basis of which a court can decide an issue before it. It is also argued that appellants have not given their dates of employment and on which they were working overtime. This contention can be easily resolved by looking at the records of the employer. The Labour Court's decision was that the appellants were exempted from claiming that they were working overtime because of the terms of section 119(1) of the ***Labour Code Order 1992***. That section provides that:

> **"Exemptions**
>
> (1) The provisions of sections 117 and 118 shall not apply to
>
> (a) …
>
> (b) persons holding positions of management or employed in a confidential capacity.
>
> (2) The limitations on ordinary working hours and hours of overtime prescribed in section 118 shall not apply
>
> (a) when it is necessary to perform urgent work to remedy any breakdown of machinery and plant; or (b) in a case of emergency to avoid or lessen danger to life or serious damage to property; or
>
> (c) in a case of force majeure, in so far as necessary to avoid serious interference with the ordinary working of the undertaking."

17. The Labour Court held that the security guards in question fell within the aforementioned exceptions. The Labour Court further held that appellant (especially PW1 and PW2 were persons holding positions of

management or employed in a confidential capacity. It appears from the evidence that PW1 and PW2 were said to be supervisors. In the Labour Court, no evidence was placed before the Court as to whether or not according to *organogram* of the respondent supervisors are classified as part of management. The use of the term "supervisor" in itself does not necessarily place a person within the ranks of management. In fact the Personnel Regulations of the respondent define a supervisor as "Any person to whom an employee report and is accountable." It is very difficult for us to believe that an organization as huge as the respondent would have all persons to whom each employee is responsible as part of management. There is simply no basis on the facts before us for holding that PW1 and PW2 were part of management so as to place them under the exceptions mentioned above. There was simply no evidence that PW1 and PW2 were ever employed in a confidential capacity. In our view, there was no evidence before the Labour Court that it was necessary for appellants to perform urgent work *to remedy any breakdown of machinery* and *plant*. There was also no evidence that there was *any case of emergency* to avoid or lessen danger to life or serious damage to property, let alone a case of *force majeure*, necessitating avoidance of any serious interference with the ordinary working of the undertaking. It is difficult to see how these appellants came to be subsumed under the terms of this section. In a nutshell, it is very difficult to comprehend the reasoning of the Labour Court in this connection. In all fairness to Mr. Daffue, he did not seek to support the Labour Court's decision on this aspect.

RETRENCHMENT

18. This is one area in which we do not find it necessary to interfere with the correctness of the decision of the Labour Court as far as relates to the propriety of the consultation process in 2001. We agree with the Labour Court that the respondent undertook a proper consultation process. We agree with Mr. Daffue that consultation was finalised as far back as December 2001. The evidence before the Labour Court clearly proved that the meetings that followed thereafter had nothing to do with consultation. They were purely administrative meetings.

19. There is however one other problem. This related to the notice of termination. Sections 63 to 65 of the Labour Code provide for notices of termination of contract. They provide as follows:

> **63. Notice of termination**
> (1) For contracts without reference to limit of time, either party may terminate the contract upon giving the following notice:
> (a) where the employee has been continuously employed for one year or more, one month's notice;
> (b) where the employee has been continuously employed for more than six months but less than one year, a fortnight's notice.
> (c) where the employee has been continuously employed for less than six months, one week's notice.
>
> **64. Payment in lieu of notice**
> (1) Without prejudice to section 67, the employer may pay an employee in lieu of providing notice of termination under section 63.
> In such cases, the employee shall be paid a sum equal to all wages and other remuneration that

> would have been owing to the employee up to the expiration of any notice of termination which may have already been given or which might then have been given…
>
> **65. Form of notice: cancellation**
> (1).....
> (2) If upon any termination as provided under sections 63 and 64 the employer suffers the employee to remain, or the employee without the express dissent of the employer continues in employment after the day on which the contract is to terminate, such termination shall be deemed to be cancelled and the contract shall continue as if there bad been no termination, unless the employer and employee have agreed otherwise.

20. Section 4.1 of the respondent's Staff Separation Policy & Procedure provides that LHDA shall give its employees and their representatives written notice of one calendar month of its intention to organise, retrench or make redundancy any of its employees. Section 4.2 of the respondent's Staff Separation Policy & Procedure provides further that no purported termination of any employee(s) services by LHDA for reasons of retrenchment/ redundancy shall be valid unless the requisite notice has been given.

21. In the present case, the appellants were given notices of termination of their contracts for reasons of retrenchment/ redundancy on the 28 June 2002. In terms of the said letter of notice of termination, the termination of their contracts for reasons of retrenchment/ redundancy was to take effect in August 2002. On 22nd August 2002, the letter of notice of termination dated 28 June 2002 was withdrawn "until further notice." Thereafter, the Appellants were suffered to remain in

employment and continued in employment after the last day of August 2002, a month in which the contract was to terminate. The previous notices of termination having been withdrawn, such termination is in law deemed to have been cancelled and the contract continued as if there bad been no termination, unless the employer and employee had agreed otherwise.

22. There is another reason why the termination of the contracts of the employees were not lawful. On or about 14th March 2003 appellants received letter of termination of their contracts. They were informed that 31st March 2003 would be their last day of their employment. This termination was based on the consultation undertaken from December 2001. The letter received in March was itself dated 20th February 2003. In our view the letter did not give one calendar month notice as required by section 4.1 of the regulations of the respondent. It was intended to be a letter of notice of retrenchment which was not followed by any fresh consultations. In the words of Broude JA. sitting in the Court of Appeal of Lesotho in ***Khotle v Attorney General LAC (1990-1994) 502 at 504E-I:***

> "In the court a quo Molai J. found that the appellant was not given one calendar month's notice as was required by the contract of employment, a finding which, in my view, cannot be assailed. It was strenuously argued before us by Mr. Mapetla who appeared for the respondent that the defective notice given in November 1986 was put right by the letter of March 1987. The argument is, however, without substance. The March letter persists in the effective date of termination being the 1st December, 1986 and consequently the appellant was at no time given

> the notice he was entitled to in terms of paragraph (e) of the agreement. Molai J. in the court a quo, came to the conclusion that, although the termination was "wrongly effected, it was not a nullity" and that, therefore, the appellant's proper remedy was an action for damages. On that basis the learned judge dismissed the application costs. With respect, I think that that was a wrong approach. Once the notice was insufficient the purported dismissal was a nullity and, as the invalidity of the notice was insufficient the purported dismissal was a nullity of the notice was disputed, the appellant became entitled to the declaration sought in terms of prayer (a) set out above. In this regard, see Koatsa v National University of Lesotho LAC (1985-89) 335. Once there was no dismissal there is no question or reinstatement and prayer (b) was, therefore, not necessary. As far as the payment of unpaid salary is concerned I think it would be unfair to make the award sought by the appellant if, for example, he has been in other employment since the purported dismissal. This claim is properly one for damages and, as we have no information whatsoever on the subject, the issue must be decided in another forum.
>
> Consequently I would uphold the appeal with costs and substitute the order of the court a quo with the following order:
>
> The declaration sought in paragraph (a) of the notice of motion is granted with costs".

23. In our view once the notices of retrenchment dated 28th June 2002 were withdrawn, what the respondent had to do was to notify the appellants *de novo* of its new intentions to terminate their contracts on account of retrenchment in terms of regulation 4.2 mentioned above. It may be true that this may sound bizarre to some ears, but this in our

view is the effect of regulation 4.2 followed by the withdrawal of the previous letters of retrenchment. This is the respondent's own regulation and the respondent is bound by it. We therefore hold that the dismissal of the appellants on this ground was procedurally unfair.

ORDER OF COURT

24. In the result we hold that the appeals in respect of overtime and compensation must succeed. We agree with Mr. Daffue that the requisites for purpose of computation of how much appellants would be entitled to were not placed before the labour Court for purpose of good computation of the exact overtime payments due to applicants. We therefore order that this matter be remitted to the Labour Court for the parties to provide this information for purposes of computation of the appellants' entitlements in respect of the overtime period worked. Both parties must place the relevant documentation before the Labour Court to enable it to come to the correct arithmetic figures in respect of the monies due to the appellants for the overtime pay that appellants are entitled to.
25. With regard to compensation for the unfair dismissals on account of the inadequate notices of termination, we hold that the appellants are entitled to compensation in terms of section 73 of the Labour Code Order 1992. The parties are also directed to place before the Labour Court evidence by way of affidavits or *viva voce* so as to enable the Labour Court to quantify the compensation due to each of the appellants.
26. In the result their appeal on both overtime and entitlement compensation is upheld with costs.

27. This is a unanimous decision of the Court.

……..

K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Appellants: Mr. B. Sekonyela and Mrs. V. Kotelo.

For respondent: Mr. J. P. Daffue.