**LAC/CIV/APN/02/2010**

**IN THE LABOUR APPEAL COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter between:**

**PHETHANG MPOTA** APPLICANT

**AND**

**STANDARD LESOTHO BANK** RESPONDENT

CORAM: THE HONOURABLE DR K.E. MOSITO AJ.

ASSESSORS: Mr. L. Mofelehetsi

Mrs. M. Mosehle

Heard on: 18th JANUARY 2010

Delivered on: 22nd JANUARY 2010

**SUMMARY**

*Application for reinstatement of the appeal; for condonation and amendment of prayers on appeal – Matter referred to Labour Court for re-hearing on the amended papers.*

*Court marking its displeasure by denying the successful applicant costs of the application.*

**JUDGEMENT**

**MOSITO AJ**

**INTRODUCTION**

**1.** This is an application for an order in the following terms:

(a) Reinstating the Appellant's appeal in this case on the roll.

(b) Amending the Appellant's originating application to include a prayer (a) that the retrenchment or dismissal of the Appellant should be declared procedurally unfair.

(c) Declaring the dismissal or retrenchment of the Appellant to be unfair and unlawful

(d) Condoning the late filing of this application and this appeal.

2. This application follows the dismissal of a condonation application by this Court, which dismissal resulted in the striking off of the appeal which is now sought to be reinstated in the present proceedings. The appeal struck off was an appeal against the judgment of the Labour Court handed down by the deputy President of that court on the 18th day of May 2007. That was a judgment consequent upon an application by the present Applicant in which the present applicant had claimed relief in the following terms:

(i) Payment of salary for twelve (12) months as damages.
(ii) Costs of suit.
(iii) Further and/or alternative relief.

3. The facts that led to the institution of the application before the Labour Court were that the parties had entered into a contract of employment on 5th August 1999. The applicant rose through the echelons of the respondent until he became a branch manager. He was subsequently promoted to a position of Area Service Centre Manager (ASCM) on February 2004. In December 2005, the Applicant and some employees of the respondent were informed that there would be some staff retrenchment due to operational requirements of the respondent's bank. However, no further steps were taken by the respondent until the 22nd February 2006 when Applicant was

informed that he was going to be retrenched. Applicant was informed that *negotiations* for retrenchment would commence on the 1st day of March 2006. The purpose of the said negotiations was to reach "a mutual agreement on exit benefits".

4. It was in consequence of the said negotiations that Applicant was dismissed purportedly in terms of section 66(1) © of the **Labour Code Order 1992**. The Applicant complained thereafter that the retrenchment process undertaken in consequence of the rationalization process undertaken by the respondent was procedurally flawed. He appealed to this Court, but his appeal was struck off the roll when his condonation application could not succeed. He then returned to this Court for the relief outlined above.

## 2. CONDONATION AND REINSTATEMENT OF THE APPEAL

2.1 Regard being had to the facts of the present case, the issue of reinstatement of the appeal should be considered together with the application for condonation. It is well-established that where the prospects of success in the appeal will have to be considered, the application for condonation and reinstatement should be brought at the hearing of the appeal (See ***Meyer v Dowson & Dobson Ltd*** **1967 (4) SA 628 (T)** at 628F-G; ***De Sousa v Cappy's Stall*** **1975 (4) SA 959 (T)** at 960G-961F; ***Lipshitz NO v Saambou-Nasionale Bouvereniging*** **1979 (1) SA 527 (T)** at 529C-E). The Applicant's appeal was previously struck off on account of lack of prospects of success. The latter stemmed largely from the deficient condonation

application. The main deficiency of the prospects of success was the lack of a prayer for a declaration of the dismissal as unfair. In paragraph 3 of his affidavit filed in support of his application for condonation and reinstatement, Applicant places the blame for failure to include the prayer at the door of his attorneys. In ***S v McNab*** **1986 (2) ZLR 280** (S) Dumbutshena CJ held that in cases similar to the applicant's case a party should be punished for the negligence of his legal practitioner. He said at p 284A-E:

"In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in ***Saloojee & Anor NNO v Minister of Community Development supra*** **at 141 C-E** when he said:

'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court … The attorney, after all, is the representative whom the litigant has chosen himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be dissolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are'."

2.2 Indeed Steyn CJ pointed out in ***Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141C*** *that:–*

'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. The attorney, after all, is the representative whom the litigant has chosen for himself'

2.3 However the same judgment states clearly that it has never been held that condonation will be withheld simply because of an attorney's negligence (141B-C) and that even where there is a high degree of negligence on the part of the attorney (as there clearly was in the present case) condonation may still be granted if there are strong prospects of success (141H). In our view therefore, we would not deny applicant reinstatement and possibly condonation on this ground alone. This Court has dealt with cases arising out of the identical circumstances as the present. In our judgment, all those cases were decided in favour of applicants where the prayer for a declaration of unfairness of the dismissal had been included. The Labour Court had had the opportunity to consider the merits of those cases. Some of them came to this Court on appeal. These are similar cases. Justice demands that similar cases be treated alike. It is highly probable that if the amendment sought is granted, the trial court may very well find that there are prospects of success. We are therefore prepared to grant the application for reinstatement of the appeal.

## 3. AMENDMENT OF PLEADINGS ON APPEAL,

**3.1** As shown in paragraph 2 above, applicant's prayers did not include a prayer for a declaration that the dismissal was unfair. This triggered the observations of this Court in LAC/CIV/06 that:

> The question however that has to be determined is whether there had been inadequate notice in the present case that would warrant the granting of the consequential reliefs contemplated by section 73 of the **Labour Code Order 1992.** Section 73 (1) of the **Labour Code Order** prescribes that reinstatement is the preferred remedy in cases of unfair dismissals where the employee desires it. If the employee does not desire reinstatement or reinstatement is

> not practicable in all the circumstances of the case, then the next available remedy in terms of section 73 (2) of the Code is that of compensation. It is common cause that the Applicant did not ask or did not desire reinstatement before the Labour Court. He only desired "damages" as appears in the prayers reflected in paragraph 1 above.
> It is important to mention that as clearly appears in paragraph 1 above, there was no prayer for the Labour Court to find that the dismissal of the Applicant was unfair.

3.2 After referring to section 73 of the Labour Code Order 1992 this Court proceeded to hold that, it is clear from the above section that relief in terms of section 73 (2) is only available where the court has found a dismissal to be unfair. In the present case, there was no prayer for the Labour Court to find the dismissal unfair. Although the Labour Court may have been urged to find the dismissal unfair, it is clear that there was no way in which it could have granted such an order where such order was not asked for. We proceeded to hold that, the Court of Appeal and this court have on several occasions deprecated the practice in terms of which the courts grant orders that nobody has asked for. For this approach, we relied on the following decisions of the Court of Appeal of Lesotho wherein the Court deprecated the practice of granting orders which are not sought for by the litigants and relying on issues not raised. *(See **Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354; Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd LAC (1995 – 1999) 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd LAC (2000-2004) 197; Theko and Others v Morojele and Others LAC( 2000-2004) 302; Attorney-General and Others v Tekateka and Others LAC (2000 – 2004) 367 at 373; Mota v Motokoa***

***(2000 – 2004) 418 at 424. National Olympic Committee and Others vs Morolong LAC (2000 – 2004)449.***

3.3 We were of course, not oblivious of the fact that the issues relating to the fairness or otherwise of the dismissal had been canvassed. The problem was that nobody had applied for an order to that effect. Indeed, the issues relating to the fairness or otherwise of the dismissal were canvassed both in the pleadings and in the evidence. Once there was no such prayer, the Labour Court could not make a declaration of the fairness or otherwise of the dismissal. Once no such declaration of the fairness or otherwise of the dismissal had been found, the Labour Court would have no jurisdiction to consider the consequential reliefs contemplated by section 73 of the **Labour Code Order 1992**. No prospects of success could be found to exist therefore, hence the failure of the condonation application and the subsequent striking off of the appeal.

3.4 The applicant then returned to this Court and filed an application for amendment of the pleadings to include a prayer for a declaration of the dismissal as unfair. It is trite that a party can apply for an amendment of his or her pleadings, even at the late stage when the matter is on appeal. In *de **Villiers v de Villiers,*** **1947 (1) SA 264 (CPD)**, Ogilvie Thompson, AJ, (as he then was) stated the rule as follows on p 264-265:

> "Although somewhat unusual, amendments of pleadings can certainly be made on appeal, and there is a good deal of authority to support such amendments; but the Court will only grant an amendment on appeal if it be satisfied that the amendment will not occasion prejudice to the other side; and in the ordinary course such prejudice will obtain if the subject-matter now sought to be

> introduced by the amendment was not canvassed in the court below."

3.5 The amendment sought in the above case concerned an alternative cause of action to be introduced by the appellant. The Court refused the application and, referring to the intended amendment, stated that it would involve further investigation of a number of matters. (See further **British Diesel Ltd v Jeram & Son, 1958 (3) SA 605 (N) and Desai v NBS Bank Ltd, 1998 (3) SA 245 (N)).** (See also **Channel Life Namibia (Pty) Ltd v Otto 2008 (2) NR 432 (SC)**). Although this court is in principle empowered – as part of its wide powers in terms of Rule 19 of the Labour Appeal Court Rules 2002 – to grant an amendment of the pleadings, this power should be sparingly exercised and an amendment should only be allowed in cases where the court is satisfied that the other side will not be prejudiced thereby. In order to satisfy this test, the party seeking an amendment on appeal must ordinarily satisfy the court that the issues sought to be raised have been thoroughly canvassed in the court below. (See Erasmus ***Superior Court Practice*** **(1994 with loose-leaf updates, Service 26) at A1-59; Herbstein & Van Winsen** ***The Civil Practice of the Supreme Court of South Africa*** **(4ed, 1997) 914–5**). I must pause here to observe that, applications for amendments on appeal would not be granted as a matter of course and should not be allowed to become a substitute and belated remedy for legal practitioners who performed their duties negligently and/or without the necessary diligence and expertise. (See **Government of the Republic of Namibia v Wamuwi NO [2003] NASC 11**).

3.6 In the present case Advocate. Sekonyela submitted that the issue of the fairness or otherwise of the dismissal between the parties at the trial was fully canvassed. He submitted that in the circumstances the amendment could not cause the respondent any prejudice. Advocate Macheli for the respondents could not deny that these issues had been fully canvassed in the Labour Court. Indeed this fact is born by the record and the judgment of the Labour Court. In our view, it would be difficult if not impossible to see what real prejudice respondent would suffer in the circumstances of this case if this formal amendment were to be granted. The amendment is consequently granted.

**4. REFFERAL OF THE CASE**

The Labour Court did not consider whether or not to grant the prayer on the fairness or otherwise of the dismissal as the prayer did not exist in the papers before it. The primary repository of the discretion on whether or not to grant that prayer is the Labour Court. We are therefore inclined to accede to the argument by Advocate Macheli that should we grant the reinstatement and amendment, we should refer the case to the Labour Court to consider the issue of the fairness or otherwise of the dismissal. The case is accordingly referred to the Labour Court for rehearing on the papers as amended.

5. **COSTS OF SUIT**

The degree of inadvertence reflected in the drafting of the Applicant's papers leaves much to be desired. Had there been no negligence of omission of the prayer

for the declaration of fairness or otherwise of the dismissal, this case would have long been finalized. This Court is not pleased with this laxity. There must be finality to litigation. Thus, we have to signify our displeasure at this conduct by denying applicant costs of this application.

My assessors agree.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Applicant Advocate B. Sekonyela

For the Respondent Advocate T.D.Macheli