IN THE LABOUR APPEAL COURT
HELD AT MASERU

In the matter between:

THABO TEBA	1st APPELLANT
MOEKETSI SENAETERE	2nd APPELLANT
MAKHETHA MAKHETHA	3rd APPELLANT
OROSANG LEPOTA	4th APPELLANT
LEKHOOA HLABANA	5th APPELLANT
TSEKO POULO	6th APPELLANT
JOBERE LETLELA	7th APPELLANT
KHOALE KHURUMALA	8th APPELLANT
NKOPANE MOKOLOKO	9th APPELLANT
WHITE KHOARAL	10th APPELLANT
MOHLOMI NTSANE	11TH APPELLANT
KHOTSO LENGENE	12th APPELLANT
MOLATO MOTHOLO	13th APPELLANT
PEETE LEPHOI	14th APPELLANT
MONYOOE SEMANO	15th APPELLANT
MPHO **LEKHOOA**	16th APPELLANT
MAFUPARA MATELA	17th APPELLANT
TIEHO NTEREKE	18th APPELLANT
MAMOOKHO SEQHOBO PHATLA	19th APPELLANT
'MAITHABELENG RAMANGANA MOSANTELI	20th APPELLANT
MABERENG LELIMO KOTELO	21ST APPELLANT
KATLEHO MOSEBETSI KHOANA	22nd APPELLANT
MAPONTS'O KHAUTA MOHLAKALA	23rd APPELLANT
MATSEBISO TSOKOLO LIKOTSI	24th APPELLANT
MANTOA MOLATO MOLELEKI	25th APPELLANT
MAPALI TLOUNG PALI	26th APPELLANT
TSITSO MOEPO MATLOSA	27th APPELLANT
MAQEKISI SESHOPHE MPHUTHING	28th APPELLANT
NTEBOHELENG LEKHOTSO BORINATA	29th APPELLANT
MACHAKA TS'OOANA PUTSOANE	30th APPELLANT
MAMOLIBELI KHOTSO NTSANE	31ST APPELLANT

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY RESPONDENT

JUDGMENT

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

ASSESSORS: MR L. MATELA
MR R. MOTHEPU

HEARD ON: 28th January 2010
DELIVERED ON: 3rd February 2010

SUMMARY

Appeal from the Labour Court—Appellants/applicants having been retrenched -Appellants/applicants having made application for joinder in the Labour Court -joinder applications having been dismissed. - Whether competent for the Labour Appeal Court to join applicants/appellants to a case which the Labour Appeal Court has already resolved.

Practice — Labour Appeal Court having no jurisdiction to join applicants to a case in respect of which the Labour Appeal Court is functus officio. - Labour Appeal Court having no such powers — condonation - condonation principles discussed and applied - application dismissed with costs and appeal struck off the roll with costs.

JUDGMENT

MOSITO AJ.

1. Introduction

1.1 The present case involved two separate cases which were heard together by the Labour Court due to the fact that the termination of the contracts of the applicants arose under the same circumstances. It appears that an attempt was made in the Labour Court to have the two cases consolidated into one case but all in vain. The Labour Court decided to hear the two cases together but as separate cases. Judgment was handed down in respect of the said two cases which were LC 15/03 and LC23/03.

1.2 These case is indeed an epitome of a comedy of errors. In respect of LC15/03, the applicants had filed their originating application on the 15th day of May 2003 following their retrenchment on the 31st March 2003. Their claim was that their retrenchment was both procedurally and substantively unfair. They also claimed that they worked fifteen straight days in a month without rest for twenty four hours as a result of which they have worked 105 hours of overtime every month which was never paid. In this regard, they claimed payment of each applicant's difference in salary from date of employment to the date of dismissal.

1.3 I should mention while at this juncture that when the proceedings for the hearing of the cases commenced before the Labour Court, Mrs Kotelo who appeared for some of the applicants before court, made an application under LC15/03 that one Methe Kotelo be joined as the 31st applicant and there was no opposition to that application. The court granted the said application and Methe was joined as the 31st applicant. It is not clear from the reading of the Record however as to on what date the joinder of Kotelo was granted.

1.4 I must pause to point out that this was clearly the fault of the Registrar of the Labour Court who allocated applicants the same case number as the case in respect of which they desired to be joined. This has far-reaching consequences as will appear herein-below. The proper thing to be done is that, when a party makes an interlocutory application, it is appropriate to allocate such a party a number with a distinguishing application, it is appropriate to allocate such a party a number with a distinguishing feature (such as LC23B/03) so that the case can be distinguished from the main one for procedural purposes. If this is not done, a party who would otherwise have a further recourse against a ruling or order of the Labour Court would have his or her hands tied until the main application would have been finalized. This might be quite prejudicial to a litigant as will appear herein-below. Returning to the history of this case, their joinder application was refused by the Labour Court on the basis that Rule 8 of the **Labour** Court **Rules 1994** did not permit joinder of applicants as parties to an ongoing litigation. However, it appears that on or about 2004 the present applicants lodged an application under LC23/03 and LC15/03

respectively that they be joined as co-applicants. The reason for this was that, the issues for the determination of their claim were the same as those in LC/15/03 and 23/03. Their application was filed on the 9th day of August 2004. The Labour Court this time took a turn and refused to entertain the application on the basis that in terms of Rule 8 of the Labour Court Rules 1994, it had no jurisdiction to order the joinder of an application. Unfortunately this ruling was not part of the judgment of the Labour Court. When later an appeal was taken to this Court by those of the applicants who were proper parties to LC15/03 and LC23/03 before the Labour Court, the issue of the non-joinder of the present applicants was omitted.

1.5 The appeal by the applicants who were proper parties before the Labour Court in LC15/03 and LC23/03 was heard by this court under LAC/CIV/A/12/04. It was finalized in February 2009 when this court decided in favour of the appellants in that appeal.

1.6 Apparently after the judgment had been handed down, those applicants whose joinder applications has been dismissed by the Labour Court hoped that Christmas would come their way and they sought to benefit under that judgment. They entered into discussions with the respondent and also submitted their claims to no avail. On 22nd July 2009, the respondent refused to honour their claims. The reason for these was that their joinder applications have been dismissed as detailed out above.

1.7 The present applicants then approached this court for condonation of late filing of the appeal regarding the joinder applications which had been dismissed by the Labour Court and also lodged their appeals before this Court. They pleaded that they were not in willful default of compliance with the Rules of these Court as they were struggling for a long time to raise money for their counsel and that they had very heavy "costs" in which they were involved. They also contended that they were also busy negotiating with the respondent. They further informed this court that due to the time it took them to finalise their claims and the difficult conditions under which they worked in very remote areas of the country, some of their co-applicants had even passed away and their heirs and estates had thus authorized their counsel to prosecute the appeal.

1.8 I may mention as early as now that, those applicants who did not feature at all in any of the joinder applications referred to above before the Labour Court do not have any right of appeal and their application for condonation and appeal should therefore be dismissed with costs further ado. Notwithstanding the filling of opposing papers on behalf of respondent on 15 December 2009, the applicants failed to reply thereto.

1.9 The above application was vigorously opposed by the respondent before this court. The main reason for such opposition was that the application was **so** hopelessly out of time, and that there were no adequate reasons for condonation. The learned Counsel advocate **J.P.** Daffue SC contended quite strenuously that even if there were strong reasons or prospects of success, the delaying in bring the present application for condonation was crossly inordinate. He contended that the requirements for condonation had not been satisfied.

2. Condonation application

2.1 The principles applicable in an application for condonation for breach of the Rules Court are now well-established in this jurisdiction. The Court of Appeal of Botswana aptly summarized these principles in ***Attorney-General* v *Manica Freight Services (Botswana) (Pty) Ltd [2005] 1 BLR 35 (C.A.)) at 42D-43B*** as follows:

Condonation of a breach of the rules of court is granted not as of right but as an indulgence. It is accordingly necessary for an applicant for such condonation to show not merely that he has

strong prospects of success on appeal but to give good reasons why he should receive such indulgence, that is, that he acted expeditiously when he discovered his delay and advance an acceptable explanation for the delay (see State v Elias Moagi 1974(1) BLR 37, CA at p 39; Solomon v Attorney-

General (supra) at p 666D). There are, however, other factors which the court, in considering such an application, is also obliged to take into account. These are conveniently referred to and collected in Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th ed p 897-8. While applying to applications in South Africa, they are the same principles which are applicable in our law (see CF Industries (Pty) Ltd v The Attorney-General and Another [19971 BLR 657, CA).

Those factors include not only the degree of non-compliance, the explanation for it. the prospects of success and the importance of the case but also the respondent's interest in the finality of his judgment, the question of prejudice to him, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

In Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at p 532(C-D, Holmes JA said the following:

'Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are not prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

It is essentially a matter of fairness to both sides. (See Melane's case, (supra))."

2.2 Condonation is not to be had merely for the asking. The appellant has brought a substantive application to this Court seeking condonation for his failure to comply with a number of rules of this Court. The application is opposed by the respondent. The principles governing condonation applications and the factors which weigh with this Court are well-known and have been often restated. The main principles are succinctly formulated in ***Federated Employers Fire & General Insurance Co Ltd and Another*** **v** ***McKenzie*** **1969 (3)** SA **360** (A) **at 362 F-H.** In that case Holmes JA said:

'In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of noncompliance, the explanation therefore, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'

The material facts relating to the condonation application are the following:

3. Non-compliance

3.1 In the present case, the degree of non-compliance is clearly serious and the explanation or excuse not particularly compelling. It is apparent from the aforegoing history of the case that there were a number of instances where the rules of court were not complied with. Furthermore, inadequate and indeed, in some cases, no explanation is given for such non -compliance. As

Zulman JA pointed out in para 4 in ***Byron* v *Duke Incorporated [2002] 3 All SA 235 (A),*** I also **do** not believe, however, that the non-compliances in question were so flagrant and gross that merely because of them the application for condonation should be dismissed without considering the appellant's prospects of success on appeal (cf, for example, ***Ferreira v Ntshingila*** 1990 (4) SA 271 (A) 281J - 282A and ***Barries v Sheriff, Magistrate's Court Wynberg, and Another*** 1998 (3) SA 34 (SCA) at 44H-J).

3.2 A party seeking condonation cannot rely solely on prospects of success to entitle it to be excused for not complying with the rules. (See P ***E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd*** **1980 (4) SA 794 (AD); Commissioner for South African Revenue Services Gauteng West v Levue Investments (Pty) Ltd [2007] 3 All SA 109 (SCA) and *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) at 281D-282A.** Muller JA in ***P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd*** 1980 (4) **SA** 794 **(AD)** said the following (at 799 D-E):

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.'

3.3 In **Van Wyk v Unitas Hospital and Another** 2008 (4) **BCLR** 442 **(CC),** the South African Constitutional Court commented as follows on the question of the explanation for delay:

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirement

[24]...The inordinate delay in appealing against the decision ...is, in our view, inexplicable except on the basis that the applicant had no intention to pursue this matter. This explains the attitude of the applicant in not proceeding with the matter until she was confronted with a threat of execution to recover taxed costs.

3.4 The Court further noted that:

[31]There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable.... A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.

4. Inordinate delay

4.1 It is common cause that there was an inordinate delay in the bringing of this intended appeal for which this condonation has been brought. In ***Van Wyk v Unitas Hospital) (OPEN Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)*** at 479H - 480A, it was held that an inordinate delay induces a reasonable belief that the order had become unassailable and after such a delay a litigant is entitled to assume that the losing party has accepted the finality of the Order and does not intend to pursue the matter further. We agree with this view. In fact, as Advocate Daffue SC correctly submitted on behalf of the Respondent, to grant condonation after an inordinate delay and in the absence of a reasonable explanation, would

undermine the principle of finality in litigation and cannot be in the interest of justice. We also agree that, an even stricter approach applies to labour matters. The reason for this is that, the achievement of expeditious dispute resolution is a commitment of labour legislation. Disputes between employers and employees should be finalized as soon as possible to be in the interest of justice. (See the judgment of Conrandie, AJA in ***Queenstown Fuel Distributors CC v Labuschagne NO, (2000) 21 ILJ 166 (LAC)).***

5. Prospects of Success

5.1 The applicants have submitted that their application for condonation bears prospects of success. It is worth mentioning however that, even if the prospects **of** success were held to be strong, this fact is not of itself sufficient cause to grant condonation. *(See* ***Molapo Mothunts'ane & Others V Kopano Selomo & Another, C OF A (CIV) 16/1992 at p. 7 ; Lesotho Wholesalers & Catering Workers Union & 33 Others V Metcash Lesotho Ltd & Another LC/44/1999; Paper Printing Wood & Allied Workers V Keycraft (1989), 10 ILJ 272 at 276E.*** *See also* ***Torwood Properties (PTY) Ltd V SA Reserve Bank, 1996 (1) SA 215W at 230H; Chemical Energy Paper Printing Wood & Allied Workers Union v Metro Box t/a M.B. GLASS, [2005] 26 ILJ 92 (LC) at 94-96****.). The* various factors for condonation must be put on a scale and weighed against one another.

5.2 In fact, prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay. Secondly, applicants seek to appeal against the Labour Court's refusal of their joinder application, which case has already been finalised on appeal. Section 38(2) of the ***Labour Code (Amendment) Act 2000*** provides that, the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court. As to whether or not the use of the term "all" includes interlocutory orders is doubtful. We however express no definite opinion on this point as we have not been addressed thereon. Sufficeth to say that, a joinder application is by nature, an interlocutory application. An interlocutory order is normally not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" (see ***Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (I) 839 (A) at 870.*** (And see further ***African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A) at 48 E - G; Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532 J - 533 A; Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd 1996 (3) SA 686 (A) at 690 D -G).***

5.3 Furthermore, the present Applicants have brought a very strange application before us. They want this Court to join them to an appeal which has long been disposed of by this Court. What does this mean in practical terms? Of course the applicants' co-employees were eventually successful in this Court in that case to which the present applicants would like to be joined. This Court is *functus officio* in respect of that case. How can a court join parties to a case in respect of which it is *functus officio?!* In our view, this Court has no jurisdiction to do that. On this ground alone, it does not appear that there are any prospects of success in this appeal. The condonation application must therefore fail. It is accordingly dismissed with costs. The appeal is struck off the roll with costs.

5.4 This is a unanimous decision of this Court.

K.E. MOSITO AJ
Judge of the Labour Appeal Court

For Appellants: Advocate B. Sekonyela

For respondent: Advocate J.P. Daffue SC