LAC/CIV/A/17/2009
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 JUSTICE K.E. MOSITO AJ

ASSESSORS: MR. R. MOTHEPU

MR. O. L. MATELA

HEARD ON: 21ST AND 22ND JUNE 2011

DELIVERED ON: 4TH JULY 2011

SUMMARY

Appeal from Labour Court – overtime pay – security guards –time limits in terms of section 227 of Labour Code (Amendment) Act 2000 not applicable-appellants entitled to payments of overtime pay from their respective dates of employment to date of dismissal.

Compensation-no basis found for interfering with Labour Court's exercise of discretion as to compensation-Labour Court's discretion on compensation left undisturbed

Costs-No order as to costs.

JUDGEMENT

MOSITO AJ.

INTRODUCTION

1. This is an appeal from the judgment of the Labour Court handed down on the 16th of November 2009. The relief originally sought by the Appellants related to compensation and overtime in the terms as outlined in detail in the judgment of this Court delivered on the 6th day of February 2009 between the parties. After considering the evidence and pleadings before it in the original matter, the Labour Court handed down judgment on the 15th day of October 2004 in respect of both LC15/2003 and LC23/2003. The Labour Court dismissed the appellants' claims with costs.

2. The Appellants then appealed to this Court and, their appeal was heard on the 27th January 2009 and judgment delivered on the 6TH February 2009. This Court then ordered in part that:

> 8. 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 purposes 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.
>
> 9. 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.
> 10. In the result their appeal on both overtime and entitlement compensation is upheld with costs.

3. The parties complied with the above directives and they filed affidavits and computations as directed. The respondent filed its answering affidavits and raised what it called a point *in limine.* It averred *inter alia* that, since this was a legal point, the Court should hear this point *in limine* and make a ruling thereon without going into the merits of applicants' claims.

4. The point that was raised was that, in so far as applicants claim the difference in salary from the date of their respective appointments to date of dismissal, which in each and every case was 31 March 2003, and in so far as respondent had always disputed their entitlement to such payment, the dispute is one concerning the underpayment of

monies due to them in accordance with the Labour Code and therefore a dispute of right in accordance with section 226(2) (c) of the **Labour Code Amendment Act of 2000**. The aforesaid subsection provides that such a dispute can only be resolved by way of arbitration. The respondent further averred that, the procedure to be followed is set out in section 227 of the Act. Section 227 provides that all disputes of right must be referred to the Directorate of Dispute Prevention and Resolution (DDPR) within three years of the disputes arising (save in the case of unfair dismissals). The section provides for late referral to be condoned on good cause shown. The respondent further averred that. once condonation is granted in the event of a late referral, the director of the DDPR shall appoint an arbitrator who shall attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.

5. The appellants objected to the raising of this defence along the terms that: the Respondent never raised the points in October 2004, five years ago when the matter was argued in the Labour Court and neither did Respondent file a cross-appeal against the said judgement of the Labour Court. The Labour Court subsequently heard argument on this and other issues and handed down its judgment on the 16th of November 2009. It is against the said judgment that this appeal is now brought.

6. The appellants appealed to this court on the following grounds:

"1. By re-trying issues that were already dealt with by both the Labour Court and the Labour Appeal Court.

2. By holding as follows:

2.1 that the appellants/applicants can only claim overtime up to 3 years and thereby upholding the respondent's point *in limine* and holding further that section 227(1) (b) of Act No. 3 of 2000 and the Prescription Act 1871 are applicable in this case.

2.2 that the appellants needed to annex their individual contracts of employment to substantiate that they were supposed to work from 8hours to 13:00hrs and 14:00hrs to (45hrs per week), when the issue had already been determined by the Labour Appeal Court.

2.3 that the appellants' hours of work were regulated by Legal Notice No. 108 of 1995 and the Personnel Regulation 1999 not their letters of employment.

That the appellants with the exception of 2nd,3rd,5th,6th and 23rd Applicants had failed to take reasonable steps to mitigate their Losses and thereby awarding them only 9 months compensation yet the respondent had not discharged the onus of proving that they failed to mitigate their own losses.

2.4 that the compensation of the appellants with the exception of 2nd,3rd, 5th,6th and 23rd appellants was to be reduced by 3 months.

2.5 that compensation payment for the 2nd,3rd and 6th applicants was to be suspended until they have disclosed their respective earnings.

2.6 by flagrantly disregarding the order of the Superior Court to the effect compensation should be paid from the date of dismissal to the date of judgment.

2.7 by condoning and giving effect to a novel practice whereby having failed to raise issues at the pleading stage the respondent raised points in *limine* after the case was concluded.

2.8 by failing to take proper notice of the fact that in terms of section 73 (2) breach of contract and failure to take reasonable steps to mitigate loss are of equal application.

2.9 by reducing compensation by one third of the total which reduction is excessive, unjust and inequitable.

2.10 by making the following findings that:

* applicants have further claimed payment of leave and payment for rest days.
* certain days have been subsumed under the hours of overtime.
* applicants did not ask for access to their records from respondent."

7. It is convenient at this stage to record that at the commencement of this appeal the parties informed the court that they had agreed firs that the methodology of principles of computation of overtime is not in dispute between the parties even though there were slight and few arithmetic errors. Secondly, that it had been agreed that the computations should be in accordance with Cost To Company (CTC) by which is meant that the basics salaries plus allowances (as opposed to basic salary only) should be used in the computation of the overtime payments.
8. The real issues in dispute we whether the point taken by the respondent at the trial had been correctly taken at that stage and whether or not the point was bad in law. The point to which reference was being made relates to the issue whether the calculations of the appellants' overtime pay should be limited by the Prescription Act of 1861 and/or section 227(1) of the Labour Code(Amendment)Act 2000, both of which limit the computation up to three years from the date of claim. Secondly in dispute was the issue whether the computations of overtime entitlements were governed by the contracts of employment of the appellants as embodied in the respondent's Personnel Regulations pertaining to the hours of work for watchmen; or legal Notice 108 of 1995 which

exempts watchmen from the provisions of section 118 (1) of the Labour Code Order 1992 which limit the number of hours that a watchmen has to work for. Thirdly, the appellants also appealed against the quantum of compensation awarded to them by the Labour Court.

9. It is worth noting that at the commencement of this appeal, and having read through the pleadings and the Record, the court asked the counsel involved whether the issue of the application or applicability of the Prescription Act of 1861 had been pleaded by the parties and/or whether the Labour Court had been addressed on that aspect when the matter was presented before it. The counsel on both sides informed the court that this issue had neither been raised nor addressed by the parties before the Labour Court. They saw it for the first time in the judgment. I must indicate that this court and the Court of Appeal had on several occasions deprecated the practice of deciding issues that have not been pleaded in the papers. The Labour Court therefore ought not to have included the issue of prescription under the Prescription Act which has not been pleaded by the parties. I can only point out at this stage that I am even in doubt as to whether the Prescription Act of 1861 had application to these proceedings or to the claim presented before the Labour Court by the parties. We fortunately have not been called upon to determine this question and we can safely keep our doubts to ourselves.

10. The learned counsel for the respondent Adv. Daffue S.C informed the court that his case had not been based on the Prescription Act 1861 but on the section 227(1) of the Labour Code (Amendment) Act of 2000. Indeed we are of the view that the learned counsel was correct in this statement because there was no reference of mention of the Prescription Act or any of its provisions in the Answering affidavit filed on behalf of the respondent. We safely therefore express no further opinion on the applicability of the Prescription Act to these proceedings. Other than just to mention that the Labour Court ought not to have determined the issues on the basis of the law which was not in issue between the parties. We note however that when the matter was first heard before the Labour Court the counsel that represented the respondent advocate Matshikiza was allowed to argue from the bar the issue of prescription of the claim notwithstanding that it had neither been raised nor pleaded in the papers. This was of course wrong and the Labour Court ought not to have permitted counsel to argue the issue which had not been pleaded moreso an issue of the nature of prescription which must specifically be pleaded before it can be relied on. No ruling was made by the Labour Court on that point at that stage hence the issue was not part of the judgment and was not consequently relied on, on appeal in the matter that came before us in the previous appeal.

11. We now set out to consider the grounds of appeal as quoted above *seria tim.* The first ground is that the Labour Court erred in re-trying the issues that had already been tried by this court.

12. Mrs Kotelo submitted on behalf of the respondents that the Labour Court misdirected itself by failing to follow and abide by the directives of this court. She submitted that the court had earlier ruled in favour of the appellants when the matter was remitted to the Labour Court only for purposes of quantification. She argued that the Labour Court re-tried and accepted some new points in *limine* at this late stage of the case regardless of the fact that this court had disposed off the matters notwithstanding the issue of prescription.

13. Advocate Daffue attacked the first ground of appeal on the basis that it is so vague it can never be accepted as a proper ground of appeal and should therefore be disregarded. For this proposition the learned counsel relied on the case of SCOTT-KING (PTY) LTD V COHEN, 1999 (1) SA 806 (W) at 810E-F. The learned counsel further submitted that this ground is also bad in law as it is widely expressed that it leaves the reader in doubt as to what exactly is going to be raised (see: VAN DER WALT V ABREL, 1999 (4) SA 85 (W) at 103B-J). We agree with advocate Daffue in this regard and hold that the first ground of appeal is too broad and it is not clear which issues were said to have been retried which had already been determined by this court.

14. The grounds of appeal set-out in paragraphs 2.1,2.2,2.3 and 2.7 deal with the point of law successfully taken on behalf of the respondents before the Labour Court while the grounds of appeal raised in paragraphs 2.4,2.5,2.6,2.8,2.9 and 2.10 deal with compensation. We

set out therefore to deal with the first mentioned group of grounds of appeal that deal with section 227 (1) of the Labour Code (Amendment) Act.

15. It is common cause that when the matter was first presented before the Labour Court, the respondent never raised the issue of time limits contemplated by section 227(1) of the Labour Code (Amendment) Act of 2000. The argument on behalf of the respondent in this regard is that when the matter was referred back to the court *a quo* evidence was placed before that Court for the first time indicating when and over which periods the various appellants were employed by respondent and what amounts they claim in respect of which periods. Some of them had been in employ of respondent from 1991. It was submitted on behalf of the respondent that the point of law was properly and timeously taken and appellants' legal representatives were fully aware thereof long before the second hearing before the court *a quo.* The respondent's case pertaining to the point of law was fully set out in paragraph 3.2 to 3.4 of the Answering Affidavit. The appellants filed a notice objecting to a point *in limine* which notice was annexed to the respondent's Heads of Argument. Arguments were advanced before the Labour Court on the issue with the main concern being that in the absence of any application for condonation appellants were only entitled to be awarded overtime payments for the period of three years prior to the termination of their employment contracts being 31 March 2003. The respondent contended that when the former

section 70 which related to presentation of cases of unfair dismissals to the Labour Court within 6months was repealed, then the legislature introduced section 227 (2) of the Labour Code (Amendment) Act which provided for presentation of claims on disputes of right within three years before the DDPR. The learned counsel Mr Daffue submitted on behalf of the respondent that in repealing section 70 the Legislature could not have intended to do away with the prescription period completely and thereby introducing a radically and different new legal regime allowing a litigant to approach the Labour Court at any time after the dispute has arisen, even 10 years later. He argues that there is no doubt that undue delay in proceedings with a labour matter precludes a fair determination of the matter. We agree with a statement that undue delay in proceedings with a labour matter precludes a fair determination of the matter.

16. Section 227(1) stipulates that any dispute of rights may be referred to the DDPR. If it concerns an unfair dismissal it must be done within six months of the date of the dismissal and in respect of all other disputes, within three years of the dispute arising. Indeed the originating applications were filed in May 2003, i.e. within two months after appellants' services were terminated on 31 March 2003. Most of the appellants claim overtime payment for several years and in some instances for a period in excess of 12 years. They waited until after the termination of their services to claim these

monies which can be described as underpayment of money due to them, alternatively non-payment of such monies.

17. Mr Daffue submits that the time limit referred to in section 227(1)(b) should be applied in respect of the claims pertaining to the payment of overtime. The appellants are not entitled to arrear overtime payment for any period prior to 31 March 2000. The court *a quo* also relied on the trite principle of law that a litigant must present his claim within a reasonable time. The appellants' contentions were that the Prescription Act 1861 did not apply and that respondent was not entitled to raise and rely on section 227(1) at the stage when the proceedings were referred to the Labour Court for quantification purposes.

18. In our view nothing is to be made of the application or otherwise of the Prescription Act 1861 in these proceedings because, as we indicated above none of the parties had relied on this Act. The parties must be governed by their pleadings and in the absence in such pleadings, of the issue of prescription under the Prescription Act 1861, the Labour Court erred in relying on that law moreso when none of the parties had been invited to address the court on the issue.

19. As far as relates to section 227 of the Labour Code (Amendment) Act 2000, something more has to be said. Prior to August 2006 when the Labour Code (Amendment) Act 2006 was passed issues of non-payments were matters justiciable by the Labour Court. Thus non-payment of monies such as the present could not be presented

before the DDPR. The legislature introduced the DDPR's jurisdiction over the non-payments due to employees only in August 2006. In our view therefore when the legislature introduced section 227 to govern institution of proceedings or referrals to and before the DDPR. It can be safely assumed that those did not include non-payments which were only introduced in 2006. In our view therefore the terms of the Labour Code (Amendment) Act of 2006 were not retrospective. The legislature could have not contemplated that non-payments in 2000 when section 227 was introduced would be a subject of settlement by the DDPR. The DDPR was only given jurisdiction on non-payments in 2006. It follows therefore in our view that when in May 2006 the appellants filed their originating applications in the Labour Court, they would have not been bound to have launched them within three years of the causes of action arising before the Labour Court. There was nothing to prevent them to claim their non-payments in the Labour Court beyond the period of three years in as much as section 227related to cases to be presented before the DDPR.

20. In our view if the legislature wished to legislate that non-payments should also be claimable within three years in the Labour Court, it would have said so in so many words. We find it difficult to see why dispute of right which were to be presented at the DDPR by virtue of the expressed provisions of section 227 should be held to have been precluded from being launched in the Labour Court beyond a period of three years. In our view to hold otherwise would be to introduce a

provision in the existing labour legislative regime which the legislature in its wisdom has decided to leave out. It follows therefore that in our view the Labour Court erred in denying the appellants their entitlements beyond three years from the date at which the claims were tried before the Labour Court. In our view the above determination renders it unnecessary for us to determine whether the respondent was entitled to raise the issue of time limits at the stage at which it raised it.

COMPENSATION

21. The next issue relates to quantification of compensation subsequent upon the unfair dismissals. The convenient starting point is section 73 of the Labour Code Order 1992. It reads as follows:

> **"73. Remedies**
>
> (1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.
>
> (2) If the Court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to

> be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses".

23. The primary issue which arises for determination in this appeal in these circumstances, is whether the court a quo was justified in adopting the approach it adopted? Put differently, was it proper for the court a quo to determine the issue on the basis of a cause of action preferred by the court and not on the basis of the cause of action as pleaded by the parties to the litigation?

24. It is no doubt convenient to start by repeating the apposite remarks which Ramodibedi JA (who is President of our Court of Appeal) had occasion to make in the Court of Appeal of Botswana in the case of ***Kaone Leoifo v Bokailwe Kgamena And Another CA 048/07,*** namely;-

> "I*t is trite that a case can only be decided by the court on the pleadings and evidence before it. It is not for the court to make out a case for the litigants. Nor can this Court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded."*

25. in the case of ***Robinson v. Randfontein Estates G.M. Co. Ltd 1924 AD 173*** at 198 Innes CJ stated the principle on pleadings in these terms:-

> "*The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."*

26. In the case of ***Durban v. Fairway Hotel Ltd 1949 (3) SA 1081 (SR)*** *at 1082* Tredgold J expressed the principle in these terms:-

> "*The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."*

27. In the present case, the 1st to 31 appellants had specifically claimed that:

> "(a) Payment of each applicant's difference in salary from the date of employment to the date of dismissal.
> (b) Reinstatement of the applicants, Alternatively, the granting (sic) the contract

of security services to applicants' Company namely Survival Development Services (Pty) Ltd (sic).

© payment of applicants' salary (in compliance with the Labour Code) with effect from the date of dismissal to the date of judgment".

28. The 1st to 31st appellants asked the court to order as quoted above. The understanding in this case is that the appellants were asking for compensation in terms of section 73 of the Labour Code Order 1992 as quoted above. It is not clear on what basis we are required to interfere with the quantification ordered by the Labour Court. In the present circumstances we have decided to leave the Labour Court's exercise of discretion in relation to compensation as it is, because there was no indication that the Labour Court had improperly exercised its discretion in this regard. The order that this court makes is that the Labour Court exercise of discretion conferred upon it by section 73 of the Act cannot be disturbed. As far as relates to Mr Leemisa, he had specifically claimed "that the respondent should be ordered to pay applicant's salary as compensation for the unfair dismissal, from date of judgment hereof and for a further period of six months to enable applicants to look for alternative employment.

29. We have already reiterated above that no court can award to a party more than he has asked for. It is clear that Mr Leemisa had asked for six months salary as compensation and he cannot on the papers now

change to claim anything that he never prayed for in the papers. It is true that the Labour Court has awarded him more than he has asked for. There was no cross-appeal in this regard by the respondent. We are therefore unable to interfere with the award given to Mr Leemisa by the Labour Court even though it is in excess of what he had claimed.

CONCLUSION

30. In conclusion the order that this court gives is that:

(a) The appeal in relation to overtime payments succeeds and it is ordered that appellants are entitled to be paid the non-payments due to them beyond the three years period earlier ordered by the Labour Court that is, from the date of their respective employments to date of dismissals.
(b) The award of compensation given by the Labour Court to each of the appellants remains undisturbed.
(c) There will be no order as to costs.

This is a unanimous decision of the Court.

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K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Appellants: Adv. B. Sekonyela, Adv. M. Khesuoe and Mrs. V. Kotelo.

For respondent: Adv. J. P. Daffue SC