

LAC/CIV/APN/4/09

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:-

TUMO LEHLOENYA	1ST APPLICANT
TSILONYANE MAHASE	2ND APPLICANT
PHILLIP LETLATS	3RD APPLICANT
MOLIBETSANE LETLAKA	4TH APPLICANT
KHOPISO SHEA	5TH APPLICANT
JOSEPH QABA	6TH APPLICANT
SEBAKI MAKHUTLA	7TH APPLICANT
KHAUTA MARIE	8TH APPLICANT
BROWN RAJOELE	9TH APPLICANT
SECHOCHA SENYANE	10TH APPLICANT
MOITHERI MOHAPI	11TH APPLICANT
PEISO MATHAFENG	12TH APPLICANT
MOTLATSI MAPOOANE	13TH APPLICANT
MOFEREFERE MOSHEOA	14TH APPLICANT
MOTLATSI PHAROE	15TH APPLICANT
LEFA MAFATA	16TH APPLICANT
THETSANE MOROMELLA	17TH APPLICANT
LEMOHANG FANANA	18TH APPLICANT
ROSA KHOETE	19TH APPLICANT
SENATLA MAKAE	20TH APPLICANT
TEBOHO TSOENE	21ST APPLICANT
LIKOTSI QOBOSHEANE	22ND APPLICANT
RETSELISITSOE LITLALI	23RD APPLICANT
THATO TSALONG	24TH APPLICANT
KHETHANG MOLOISANE	25TH APPLICANT
SELLO KHIBA	26TH APPLICANT
RAMATABOE RAMATABOE	27TH APPLICANT
MALEFETSANE KHEO	28TH APPLICANT
ALBERT LESAOANA	29TH APPLICANT
MATLALA KAEANE	30TH APPLICANT
LENYAKHA MABEA	31ST APPLICANT

LETHUSANG PHEKO	32 ND APPLICANT
MOTLATSI MPEETE	33 RD APPLICANT
MAKHOASE PALI	34 TH APPLICANT
TANKISO LEFULEBE	35 TH APPLICANT
KOSE POTSANE	36 TH APPLICANT
LEBABO M. LEKHOAA	37 TH APPLICANT
THABANG MPO	38 TH APPLICANT
ADRIES HANI	39 TH APPLICANT
DANIEL HOOHLO	40 TH APPLICANT
PHOLO MOSEBO	41 ST APPLICANT
LEQALA LESEO	42 ND APPLICANT
LEKHANYA MAPESELA	43 RD APPLICANT
ISAAC BELEME	44 TH APPLICANT
DANIEL SESING	45 TH APPLICANT
THABANG NTSANE	46 TH APPLICANT
PETLANE SEETANE	47 TH APPLICANT
MAPHELETSO MOSENENE	48 TH APPLICANT
TELEKOA LEBUSA	49 TH APPLICANT
SEABATA MOLEPA	50 TH APPLICANT
TUMELE MOTHOKO	51 ST APPLICANT
TSOKA THOKO	52 ND APPLICANT
MAOELA MAOELA (EN 350)	53 RD APPLICANT
KHOBATHA MOLAPO	54 TH APPLICANT
SONKI E. THOKOANE	55 TH APPLICANT
GLADYS SEBATANE	56 TH APPLICANT
MOTLATSI MOTSOANE	57 TH APPLICANT
MPOBOLE RAMPOBOLE	58 TH APPLICANT
THABO SEKONYELA	59 TH APPLICANT
MAPANYA MAPANYA	60 TH APPLICANT
JOHN BERENG	61 ST APPLICANT
KHASIPE KHASIPE	62 ND APPLICANT

And

LESOTHO TELECOMMUNICATIONS CORPORATION (LTC)
(now TELECOM LESOTHO) **RESPONDENT**

JUDGMENT

(on Recusal Application)

CORAM : HON MR JUSTICE S.N. PEETE

PANELLIST : 1. Mr. Mothepu
2. Mr. Mofelehetsi

DATE : 24TH FEBRUARY, 2011

Peete J.:

Background

[1] This labour matter involves about 62 former employers of the erstwhile Lesotho Telecommunications Corporation which saw its last days sometime in 1999, after a New Zealand Consultant – **John Crook Consulting** – recommended a turn-around in 1998 which included a major retrenchment. The 62 applicants were subsequently retrenched on the 26th July 1999. This was common cause. In law, the time limit must be determined from that date.

[2] Having instructed *KEM Chambers*, the applicants only launched their application questioning the lawfulness of their retrenchment on the 15th February 2000¹ – some twenty (20) days after the expiration of the six months period as stipulated by the now repealed *section 70* of

¹ LC 20/2000.

the **Labour Code Order No. of 1992**. Their claim was certainly out of time by those 20 days and condonation had to be sought under *section 70 (2)* of the Order. This repealed section read in full:-

“70. Time limit

- (1) *A claim unfair dismissal must be presented to he Labour Court within six months of the termination of the contract of employment of the employee concerned.*
- (2) *The Labour Court may allow presentation of a claim outside the period prescribed in sub-section (1) above if satisfied that the interest of justice so demand. (My **underline**)*

- [3] As I ruled in my judgment dismissing the applicants’ appeal from the Labour Court on the matter of condonation, the respondent “*had a right not to be sued*” unless condonation had been granted on (LTC) application. In their wisdom, the applicants’ attorneys held different view – arguing that since *section 70* was repealed by the **Labour Code Amendment** in April 2000, application was not necessary. They were wrong – as my judgment indicated. I ordered that the applicants return to the Labour Court and – “*if they still wished to pursue their claim*” – to make an application for condonation. This was again misinterpreted by counsel for applicants that I was giving them an option whether or not to apply for condonation. They elected still not to apply.
- [4] Instead of making an application for condonation, the applicants then later applied that the matter be heard by the Labour Appeal Court

sitting as a court of first instance in terms of *section 38A* of the 2000 Labour Amendment. It reads:

“38A. (3) notwithstanding the provisions of section (1) the Judge of the Labour Appeal Court may direct that any matter before the Labour Court or a matter referred to the Directorate for arbitration in terms of section 227 be heard by the Labour Appeal Court sitting as a court of first instance.”

[5] *Rule 14 (4)* of the **Labour Appeal Court Rules (Legal Notice 158 of 2002)** provides that good cause must be shown to the Judge of the Labour Appeal Court why the direction should be given under section 38A.

[6] For reasons given in my judgment I granted their application under *section 38A* and directed that this applicants’ case be heard by the Labour Appeal Court sitting as a court of first instance. This decision has not been appealed against by the respondent.²

[7] In that judgment an *obiter dictum* statement was made by me to the effect that in view of the fact that the applicants’ case on retrenchment had taken up to a decade since 2000 without finality, it was indeed in the interests of justice to all concerned that the issue of condonation be foregone and merits of retrenchment be traversed once and for all before the Labour Appeal Court.

² Rule 14 (2) of the Labour Appeal Court.

[8] This *bona fide* view was directly put to counsel of both sides in chambers and – I should say – in greatest confidence. I regret to say that what I said about condonation was taken up by counsel for LTC and is the present ground for my recusal.

[9] Having heard counsel on both sides about a reasonable perception that as regard condonation, I would not be impartial and having considered the trite principles that should guide a judge whose recusal is being sought, I made an *ex tempore* decision that it was only very proper that I recuse myself from the preliminary application for condonation. The following are my reasons:

[10] *Section 12 (8) of the Constitution of Lesotho* reads:-

“12 (8). Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time.” (my underline)

[11] Every judge has taken a solemn oath to administer justice according to the Constitution and to the law and to discharge this fairly, without fear or prejudice; in other words to be impartial. The guiding principles are not cast in stone and the particular circumstances and facts of each case are always important in guiding the judge whether

he or she ought to recuse. Recusal is not to be readily made. There exists a trite *presumption of judicial impartiality* and there should be shown cogent facts upon which recusal is being sought.

[12] The fact that in my judgment and later in chambers, I gave a *bona fide* a genuine advice to counsel for respondent to forgo the condonation application can create a perception in a reasonable person that perhaps I would grant the condonation. It was a genuine advise seriously considered without prejudice to either side – but a perception can easily be created.

[13] Whereas the special circumstances of this case cry for finality condonation is a double – edged relief in that it can extinguish the right of the respondent not to be sued unless the court grants condonation and it, also can resuscitate a right hitherto unenforceable! Good and convincing reasons have to be shown why the claim was not made within the period stipulated under law; such may be ignorance of the relevant statutory provisions; indigency; professional negligence or intransigence or recalcitrance; or any other *bona fide* ground. There are old sayings in law that: “...*ignorance of the law is no excuse...*”, or that “...*the law does not come to the aid of the slumbering...*”!

[14] All things considered, I however hold that the submissions presented by the respondents' counsel **Mr Woker** are not unreasonable and I have decided to recuse myself from hearing the condonation application.

[15] It is for the Honourable Chief Justice to make an appointment of a Judge of Appeal to hear the condonation application and, I hope, to hear the rest of the main application made by respondents in February 2000 – some eleven years ago.

[15] For these reasons, I recuse myself.

JUSTICE S.N. PEETE
JUDGE OF THE LABOUR APPEAL COURT

For Applicants : **Mr Rafoneke (KEM Chambers)**

For Respondent : **Mr Woker (Webber Newdigate)**