LAC/CIV/APN/04/2009
LC/14/2008

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between

TUMO LEHLOENYA AND OTHERS **APPLICANTS**

And

LESOTHO TELECOMMUNICATIONS CORPORATION (LATER TELECOM LESOTHO (PTY) LIMITED COMPANY, AND NOW ECONET TELECOM LESOTHO (PTY) LTD) **RESPONDENT**

EX TEMPORE JUDGMENT

CORAM: The Hon. Acting Justice Keketso Moahloli

Assessors: Mr. R. Mothepu
Mrs. M. Thakalekoala

Heard: 23 February 2016
Delivered: 4 March 2016

Appearances:

Adv. N. Pheko for Applicants
Adv. HHT Woker for Respondent

Moahloli AJ (the Assessors concurring)

[1] These applications for condonation and substitution are before us following a direction by my brother Peete, in terms of section 38A (3) of the Labour Code Order 1992, that the matter before the Labour Court [LC/14/2008] be heard by the Labour Appeal Court sitting as a court of first instance.

Background

[2] Applicants were dismissed because of operational requirements by Lesotho Telecommunications Corporation (LTC) in July 1999. They instituted a case for unfair dismissal at the Labour Court on 15 February 2000, some five weeks outside the statutory time limit prescribed by section 70 of the Labour Code, which states:-

> "70. **Time-limit**
>
> (1) A claim for unfair dismissal must be presented to the 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 subsection (1) above if satisfied that the interests of justice so demand."

[3] The President of the court heard the matter December 2000 and handed down a judgment in which he ruled that as the Applicants had not applied for condonation of the late filing of their originating Application, he had

no basis upon which to exercise the discretion vested in him by section 70 (2) of the Code to allow presentation of Applicants' claim outside the period or time-limit prescribed by section 70 (1). And that accordingly the court clearly had no jurisdiction to entertain the matter.

[4] Surprisingly, the President then went on to dismiss Applicants' claims on the basis, *inter alia*, that they had no prospects of successfully challenging the procedural fairness of their retrenchment, and had failed to disclose a cause of action.

[5] On appeal, my learned brother Judge Peete (in LAC/CIV/A/4/2003) decided that the court *a quo* did not have jurisdiction to hear the merits of the case, as it had not first condoned the filing of the Applicants' claim outside the prescribed time-limit. He therefore overturned the judgment of the court *a quo,* and allowed Applicants to apply for condonation within 30 days if they wished to pursue the matter further.

[6] Applicants did not take advantage of this opportunity to rectify their application by applying for condonation. They instead chose to reschedule their case before the court *a quo* for a consideration of the merits. Their arguments for deciding to proceed this way are, *inter alia,* that:

(a) at the time their case was first heard in December 2000, section 70 of the Code, which set the 6-month time limit for lodging claims and required condonation of late claims, had already been repealed by the Labour Code Amendment Act of 2000 with effect from April 2000.

(b) Judge Peete's order of November 2003 gave them the impression that they had an option to either apply for condonation or not.

[7] The Deputy President of the court *a quo*, in her judgment delivered in May 2004, rightly in our view, rejected both arguments. The first, because this court had already decided that section 70 was still in force when proceedings were instituted in February 2000 and Applicants deliberately chose to ignore this finding. And the second, because Judge Peete had made it crystal clear in his judgment that he was over-turning the Labour Court President's judgment precisely for determining the merits without having condoned the late filing of the claim. So how could condonation be optional? She therefore dismissed the case.

[8] Undeterred, Applicants again appealed to this court. Judge Peete, in his judgment delivered on 18 April 2008, upheld the decision of the Deputy President. Curiously however, the learned Judge once more gave Applicants the opportunity to "reopen the matter before the Labour Court as previously directed".

[9] Applicants finally applied for condonation at the Labour Court on 30 May 2008. Respondent filed an Opposing Affidavit on 24 June 2008, and Applicants replied on 8 July 2008. Applicants subsequently applied for the matter to be heard by this court as a court of first instance, which application was granted on 30 September 2010.

CONDONATION OF NON- COMPLIANCE

[10] In the present case what calls for some acceptable explanation is not only the delay in instituting the unfair dismissal case at the Labour Court, but also the delay in seeking condonation thereof.

[11] It is trite that the factors to be considered in a condonation application include:-

(a) The degree of lateness.

(b) The sufficiency and acceptability of the reasons/explanation for the lateness (or other non-compliance or default. It is vital that "a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility". The explanation must also be reasonable.

(c) The applicant's prospects success (i.e. the strength of the applicant's case on the merits).

(d) The importance of the cause.

(e) The prejudice likely to be suffered by all the parties

e.g. "to prevent an injustice being done, owing to the delay".

e.g. to avoid prejudice to the other party in the conduct of his case.

(f) the avoidance of unnecessary delay in the administration of justice

Delay presenting case to Labour Court

[12] It must be noted at the outset that what is in issue here is not mere compliance with the rules of court, but a breach of a statutory time-limit in the principal Act itself, which goes to the Labour Court's jurisdiction. Because of late presentation of the case to the court, without any condonation, the court lacked jurisdiction to entertain the matter *ab initio* from February 2000. Respondent brought this to the notice of Applicant's as early as 24 March 2000 when it filed its Answer. This was well before the repeal of section 70 of the Code on 25 April 2000. Applicants took no heed of Respondent's advice.

Degree of lateness

[13] It is common cause that Applicants' case was lodged some thirty-six (36) days after the statutory time-limit expired. Applicants contend that the length of its delay was neither unreasonable nor excessive. We do not agree.

Explanation for the delay

[14] Appellants have not provided any explanation whatsoever why they failed to lodge their case within six months of their dismissal as required by section 70 (1). Both their Founding and Replying Affidavits to their condonation application are silent on this matter. The only explanation they repeatedly harp upon is why they failed to apply for condonation. Our law is very clear that an applicant cannot claim the court's indulgence without giving an explanation for his default. The explanation must

be reasonable and acceptable in the sense that it must show that his default was not wilful nor due to gross negligence on his part.

Prospects of success

[15] Applicants referred me to their Originating Application for their prospects of success. In essence they allege that their retrenchment exhibited numerous features of procedural unfairness (for example, there was no proper consultation; there was no clear selection criterion; there were no appraisal procedures). They also allege that they were not given the retrenchment packages they were entitled to. In its Answer Respondent refutes the claims and argues that the retrenchments were procedurally and substantively good in law.

Failure to apply for condonation

[16] It is trite law that a party who is in default must apply for condonation as soon as it becomes aware of its non-compliance. As I have already stated above Respondents made Appellants aware that they had not applied for condonation when it filed its Answer to the Originating Application on 24 March 2000. However Applicants failed to apply as soon as they become aware of their non-compliance. They had absolutely no excuse for not applying because at this time section 70 was still in place. It was only repealed by Supplement No.1 to Gazette No.30 of 25th April 2000. At this stage Applicants could not have portended that section 70 was going to be repealed a moth later.

Prejudice to the parties

[17] I fully agree with Respondent's contention that hearing the merits of this matter some 16 years after the retrenchments would prejudice Respondent in the conduct of its case and result in an injustice being done. I take judicial notice of the fact that this long delay has affected the witnesses' accuracy of recollection of the events and that it might be difficult to obtain the evidence of particularly the overseas witnesses.

Conclusion

[18] This court has given Appellants ample opportunity to rectify their mistakes and properly present their case to the Labour Court. They have failed to take full advantage of this. On a full conspectus of all the issues discussed above we are left with no option but to order that:

1. The condonation is refused.
2. There is, in the circumstances, no need to consider the application for substitution.
3. No costs order is made.

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KEKETSO MOAHLOLI
ACTING JUDGE OF THE LABOUR APPEAL COURT