

IN THE LABOUR COURT

CASE NO.LC/37/95

HELD AT MASERU

IN THE MATTER OF:

MORRIS SIZWE MASHOLOGU

APPLICANT

AND

BASOTHO CANNERS (PTY) LTD

1ST RESPONDENT

LESOTHO NATIONAL DEVELOPMENT CORPORATION

2ND RESPONDENT

LESOTHO NATIONAL INSURANCE CO. (PTY) LTD

3RD RESPONDENT

JUDGMENT

Applicant was the General Manager of the 1st respondent. Second Respondent is the sole proprietor of the first respondent. The third respondent operates a pension scheme for employees of the first and second respondents. Applicant resigned his position as General Manager of first respondent on the 1st September 1994. On the 22nd September 1994, the General Manager of the second respondent accepted applicant's resignation and on the 30th September, the first respondent paid applicant a sum of M13,147-00, *"being terminal benefits due to (him)."*

On the 16th November 1994, applicant's attorney wrote to the new General Manager of the first respondent disputing the calculation of applicant's terminal benefits. In particular the applicant complained that he had been continuously employed by the respondent for ten years and yet he had been paid only one year's severance payment. The letter concluded by stating, that:

"our instructions are to demand, as we hereby do, payment of the full severance pay benefits as contemplated in the said section (i.e. Section 79(1) and (6) of the Code) within twenty-one (21) days of receipt hereof, failing which we are to approach the courts for appropriate relief."

The respondents dismissed the claim as non-sustainable and denied that they had any liability towards the applicant.

There is no evidence of any further communication between applicant and respondents. On the 15th March 1995, applicant lodged the present application seeking relief in the following terms:

- (a) Declaring his purported dismissal by the respondents null and void and of no force and effect.
- (b) Directing first and or second respondents to pay applicant's salary arrears from date of said dismissal to date of judgment.
- (c) Directing first and or second respondents to reinstate applicant forthwith with full benefits.
- (d) 18% interest thereon.
- (e) Costs.
- (f) Further and or alternative relief.

Applicant's prayers are based on the premise that his so-called resignation amounted to a dismissal in terms of Section 68(c) of the Code. The said section defines dismissal as including:-

"(c) resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract."

The alternative prayers to reinstatement were that the court should;

- (i) fix and award an amount of compensation to applicant in lieu of

reinstatement;

- (ii) direct 3rd respondent to pay to applicant his pension scheme benefits as if he has been retrenched.

It is important to note that the alternative prayers, like the main prayers flow from the main premise that the court would have first declared applicant's dismissal as unfair.

At the start of these proceedings, the court asked both counsel to address it on the issue of prescription. It is common cause that this application was lodged on the 15/03/95, exactly two weeks after the lapse of the six months time limit within which a claim for unfair dismissal must be brought to court. Mr. Matabane for the applicant submitted that in as much as the applicant had desired to resign as of 1st September 1994, his resignation was only accepted on the 22/09/94 and terminal benefits due to him were paid only on the 30th September 1994. He contended that the court should take the period of prescription to have started to run from the 30th September. Regrettably there is no authority for this proposition. What is clear is that the intention of the applicant was and has been to resign with effect from 1st September 1994. The administrative routines of accepting his resignation on 22/09/94 and effecting payment of his terminal benefits on the 30th September, did not have the effect of suspending the termination of the contract. The applicant's contract remained terminated notwithstanding non-formal acceptance by the respondents or timeous payment of his terminal benefits. The period of prescription is therefore counted from the 1st September 1994.

Mr. Matabane contended further that the applicant had all along been negotiating settlement of this matter with the respondents and that the court should reward applicant's attempts to reach an out of court settlement in this matter by showing leniency to applicant's late filing of the claim. It is true that efforts have been made, albeit unsuccessfully, to secure an out of court settlement in this matter. These efforts were however, only made after this case was lodged with the court. They do not therefore, have any bearing on the prescribed time for the lodging of this claim.

On the issue of negotiating with the respondent, there is no evidence of any kind whatsoever that such negotiations were held and that they impacted on the timeous presentation of the claim before court. The evidence that we have is of a letter of the 16th November, but this letter related to the claim of severance pay, not the alleged unfair dismissal which is the issue before the court. That letter cannot therefore help to interrupt prescription of the present claim as the two claims are completely different. A person who claims severance pay has accepted his termination, he cannot after receiving payment turn around and seek reinstatement.

Mr. Matabane's final submission was that this is an appropriate case where the demands of justice require that the late filing of the case be condoned. The facts of this case do not support this contention. Mr. Lerotholi for the respondent brought the court's attention to the fact that the applicant had himself initiated the severing of relations and as such should bear all the risks that go with that termination including the possible presentation of the claim out of time. It seems to the court that on the strength of this submission condonation of the late filing would be unfair to the respondents, because applicant was not only the author of the severing of relations but he led respondents to believe that termination of his contract was permanent and would not be challenged.

If applicant resigned because of such conduct on the part of the respondents, as would in law entitle him to resign, the applicant ought to have known that fact in time for the case to be presented timeously. However, at no stage prior to the institution of this case on the 15th March 1995, did applicant indicate to the respondents that he treated his resignation as an unfair dismissal. From the evidence before court, respondents only knew of this turnabout when they saw the originating application. What the applicant had been seeking to have rectified was the calculation of his severance pay to cover all his ten years service. All indications are that the claim of an unfair dismissal is a belated afterthought which no court, properly advised would arrive at the conclusion that the demands of justice warrant that it be condoned.

Accordingly therefore, we conclude that applicant's claim for unfair dismissal is time barred. The request for condonation of late filing is refused as there is no justifiable

excuse for the late filing. Applicant is, however, at liberty to pursue the claim of proper calculation of his terminal benefits as well as pension scheme benefits, because these claims are not time barred in terms of Section 70 of the Code.

Costs will be costs in the suit.

THUS DONE AT MASERU THIS 6TH DAY OF DECEMBER 1995.

L. A. LETHOBANE
PRESIDENT

M. KANE
MEMBER

I CONCUR

A. T. KOLOBE
MEMBER

I CONCUR