IN THE LABOUR COURT OF LESOTHO

CASE NO LC 25/96

HELD AT MASERU

IN THE MATTER OF:

MAKELELLO XABA	APPLICANT
AND	
LESOTHO WORKCAMPS ASSOCIATION	1ST RESPONDENT
FOOD SECURITY ASSISTANCE PROJECT	2ND RESPONDENT
RURAL SELF-HELP DEVELOPMENT ASSOCIATION	3RD RESPONDENT

JUDGMENT

Applicant herein was employed by the 1st respondent on the 5th May 1987, but worked for the 2nd respondent, which was a Project falling under the Lesotho Workcamps Association. It is not clear from the originating application what the relevance of citing the 3rd respondent in this proceedings is, but in her evidence in chief the applicant stated that the 2nd respondent is also third respondent, which could suggest that 2nd respondent is also sometimes referred to as Rural Self-Help Development Association. It appears from annexure "EM2" to the originating application that applicant was working as a copy typist. Annexure "EM1" which is her letter of appointment does not state the position to which she was being appointed.

On or around 28th January 1993, the Managing Director of the third respondent wrote annexure "EM2" to the applicant in which she informed her that her " ..... *post as a Copy Typist will be terminated with effect from January 29th 1993."* The applicant was paid one month's salary in lieu of notice and informed that the

benefits of the Metropolitan Pension Fund scheme will be forwarded to her as soon as same is ready.

On the 14th February 1996, the applicant lodged the present application challenging the fairness of her dismissal, on the grounds that she was not afforded a hearing and that her dismissal was in contravention of clause 16 of her contract of employment. She prayed for condonation of her late filing of the present application stating that she "*.... only learned fairly recently (in September 1995) about the existence of this Court.*"

In her oral evidence the applicant explained her delay as having been occasioned by the fact that, when she approached her attorneys of record in July 1993, she was informed that the High Court was full of Labour cases which were not proceeding. When she reported again in January 1994, she was told by her lawyers that the High Court was no longer hearing labour cases and that plans for the establishment of the Labour Court were underway. She stated further that after a long wait she was informed that the Labour Court was now operational, whereupon she instructed her attorneys to proceed with the case.

Mr. Mosito for the applicant contended that the applicant's late filing should be condoned because she has prospects of success. He submitted that applicant was dismissed without a hearing and that her dismissal by the Managing Director of the third respondent contravened clause 16 of her contract of employment which stated that she would be responsible "*..... to both LWA Director and Principal Food Security Assistance Project Officer.*" He argued that applicant's dismissal could only be valid if sanctioned by both these officers to whom applicant was answerable.

He contended further that even though applicant's delay is inordinate, the test is whether the respondent will suffer any prejudice if the delay is condoned. He submitted that there is no evidence to suggest that the respondent will be prejudiced. He went further to argue that other factors which led to the delay can be attributed to the negligence of applicant's attorneys and as such she should not be punished for her attorneys' negligence. Finally Mr. Mosito submitted that since December 1993, the High Court had decided in the case of Potlako Makoa V. LHPC CIV/APN/400/93 that employment cases should no longer be taken to the High Court.

In response, Mr. Mphalane for the respondents contended that since this is the case of unfair dismissal the prescriptive clause of the Code applies to it. He contended that the delay of the applicant is so inordinate that even the Prescription Act of 1861, which prescribes a three year time limit has been contravened. It must be mentioned however, that the three years prescription period provided by the prescription Act does not relate to the presentation of cases of unfair dismissal. He submitted that in determining whether to condone the late application the court should be guided by the good cause shown by the applicant.

Mr. Mphalane argued that the good cause has to be contained in the papers and that applicant's reason in her papers is that she only learned in September 1995 about the establishment of this Court. He averred that the applicant ought to stand and fall by her papers, consequently the court should find that whatever applicant said in the witness box which is not contained in her papers is an afterthought.

We are in full agreement with Mr. Mphalane's submissions, that the applicant must stand and fall by her papers. In any event her allegation that she was told that the High Court is full is not only improbable, it is also uncorroborated. This Court takes applicant's explanation as being that she only knew in September 1995, about the establishment of this court. However, this court has ruled in several other cases in the past that its non-existence cannot be a justifiable reason for delays in instituting prodeedings because there were courts to which labour disputes could be referred for determination at that time notably; the Subordinates Courts and the High Court.

As Mr. Mosito correctly stated in his reply, section 70(2) of the Code does not apply to this matter because the cause of action arose before the commencement of the Code. Equally, the Prescription Act 1861 which ought to apply to this matter does not prescribe the time limit for the filing of unfair dismissal claims. As it was held in the case of Moholi Chaka and Another V. Lesotho Bank LC 163/95 & LC 165/95, " *where no prescriptive period is provided, the court will be guided by the reasonableness of the time lapse."* (at P. 3)

In his submission Mr. Mosito conceded that the delay is inordinate but sought to compensate its gross length by alleging that no prejudice has been shown to be likely to result if the condonation for late filing were to be granted. However, in the case of Sylvia Ntobizonke Moholi V. Rural Self-Help Development Association LC 63/96, to which we were referred by Mr. Mphalane, this court associated itself with the ruling of the Cape Division of the Supreme Court of South Africa in Wolgroeirs Afslaers (Edms) Bpk. V. Manusipaliteit Van Kaapstaad 1978(1) SA 13. It was held in that case, that as a general rule the court's discretion to determine that proceedings should be instituted within a reasonable time, where no time limits are prescribed, is not intended to be fettered by the mere fact that ".... *it is not proved or cannot be proved that the respondent was materially prejudiced."* It was held further that it is only in exceptional cases that "..... *prejudice to the respondent and the degree thereof .... can sometimes be the decisive factor, especially in cases of comparatively trivial delay."* Clearly therefore, prejudice can only be relied upon in exceptional circumstances, especially those of trivial delays. In hoc casu both counsels have agreed that the delay is inordinate, therefore, prejudice is not a relevant factor.

Mr. Mosito argued further that the applicant has prospects of success, because she was not afforded an opportunity to defend herself and that her dismissal contravened clause 16 of her employment contract. It must not be forgotten that,

there was no statutory right to a hearing under the Employment Act 1967, as amended. The relationship between employer and employee was governed purely by the contract between the parties. As Mahomed JA stated in Koatsa Koatsa V. NUL C. of A. (CIV) No. 15 of 1986,

> **"** ***a private employer exercising a right to terminate a pure master and servant contract is not, at common law obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wishes."***

In terms of annexure "EM2" to the originating application, the applicant was paid one month's salary in lieu of notice in accordance with clause 2(c) of her contract. That compliance with the contract should have put to rest any claims of impropriety in the termination of applicant's contract.

Regarding clause 16 of her contract applicant was asked under cross-examination, who paid her salary she said it was second respondent. It is common cause that in terms of annexure "EM1" applicant was employed by 1st respondent into no specific position. However, the 2nd respondent gave her the position of Copy typist. It goes without saying that only the 2nd respondent knew whether it still required the services of the applicant in the position in which it utilized them, or not. In any event applicant herself proceeded to report her termination to the 1st respondent and the latter informed her that the third respondent was now independent. With all this evidence it cannot be said that the applicant was not terminated by a properly authorised officer. In the premises the court is not persuaded that the applicant herein has prospects of success.

Mr. Mosito's other argument that the High Court ruled in December 1993, that employment cases should no longer be taken to the High Court was in our view no less or more than clutching at the straws. Nowhere did the High Court ever make such a ruling.

In the Makoa case, the learned Maqutu J. stated after quoting the same passage that we have quoted from the decision of Mahomed J.A in Koatsa case supra that;

> ***" if allegations that in essence make this a case of unfair labour practices had not been made and respondent reply was simply that he terminated applicant's application (sic) at will after giving him the requisite notice, there would be no grounds to enquire into the matter further. The court is not ordinarily empowered to do so, but the Labour Court and tribunals of that specific type are empowered to deal with such matters.***
>
> ***This court has its traditional work. Its approach to matters of master, servant and employment generally, probably does not fit in with the times." (at P.11)***

Firstly the learned judge did not in the slightest attempt to state a general rule regarding the lodging of labour cases in the High Court . He instead specifically stated that the court is not empowered to inquire into the fairness or otherwise of dismissal, but it has traditionally dealt with cases of master and servant which were brought before it. Secondly, we have already held that given the time that the cause of action herein arose, this was not a case of unfair dismissal but one of master and servant which fitted in with those cases that the learned judge said have traditionally been the subject of determination by the High court.

This Court is satisfied, that this is not a case for which condonation can be granted. The delay is by applicants' own admission inordinate and gross. The explanation is not only unsatisfactory, but the applicant has used her opportunity to give viva voce evidence to contradict herself and present the court with uncorroborated half truths. Finally we are not satisfied that the applicant herein has prospects of success.

Mr. Mosito sought to club into this matter also claims for terminal benefits. However, the originating application is silent on what terminal benefits are being claimed. On the contrary it is evident from applicant's papers that she was paid her money in lieu of notice and her Metropolitan Pension Scheme benefits. In our view there is no case for terminal benefits on the papers before us and as such there is nothing for the respondent to answer. In the premises the entire application is dismissed as a result of applicant's unreasonable delay in bringing it to court.

THUS DONE AT MASERU THIS 2ND DAY JULY, 1997.

L.A. LETHOBANE
PRESIDENT

P.K. LEROTHOLI **I CONCUR**
MEMBER

G.K. LIETA **I CONCUR**
MEMBER

FOR APPLICANT : MR. MOSITO
FOR RESPONDENT : MR. MPHALANE