IN THE LABOUR COURT OF LESOTHO

CASE NO LC 28/95

HELD AT MASERU

IN THE MATTER OF:

JOSEPH NKABANE APPLICANT

AND

LESOTHO HOTELS INTERNATIONAL RESPONDENT

JUDGMENT

The originating application was first issued out of this Court in February, 1995. In their answer the respondent raised a preliminary point that they lacked locus standi either to sue or to be sued as they had been placed under judicial management since 1989. On the 23rd November, 1995 counsels for the parties appeared before the President in Chambers, and by agreement the applicant was granted leave to seek leave of the High Court to sue the respondent. On the 26th February, 1996 the High Court duly granted applicant leave to sue the respondent in this Court.

This matter was heard on the 9th June, 1997. The applicant's case is that he was an employee of the respondent since August, 1982 until October, 1994, when he resigned. In his oral evidence, however, applicant said he resigned in October, 1993. This was clearly a slip of the tongue because in his originating application he has stated that he resigned on the 13th October, 1994 and the respondent has admitted same in its answer. The applicant was employed in a position of a Manager which is normally referred to as Duty Manager in hotel and catering linqua franca.

Applicant's claim is for:

(a) Payment of public holidays worked for the period 1st August, 1982 to October, 1994.

(b) Payment of leave earned but not taken for the years 1987 to 1991, at the rate of 30 days per year;

(c) Payment for weekly rest days on which applicant allegedly worked for the period 1989 to 1993;

(d) Payment of severance pay for 11 years;

(e)` Payment of overtime worked from 21st to 23rd of January, 1994 and 26th May to 13th August, 1994.

At the close of his address Mr Mosito conceded that the applicant was infact not entitled to claim payment of overtime in terms of the law, as he was in a management position. As for the other claims he reiterated that the respondent should be ordered to pay them.

The applicant adduced two brief evidences of himself and one Peter Mokuku who was the respondent's Personnel Manager from November, 1991 until February, 1996. Applicant's evidence was essentially to substantiate the claims contained in his originating application. Mr Mokuku is the one who had deposed to the respondent's answering affidavit. At the time that he deposed to the affidavit he was still the Personnel Manager of the respondent.

In the affidavit which he had sworn on oath, Mr Mokuku had issuably answered to the applicant's originating application, specifically stating that the facts deposed therein either fell within his personal knowledge, or had been ascertained by him from the respondent's records to which he had full access. At the time that he testified on behalf of the applicant he had since left the employ of the respondent. In his oral evidence he contradicted his affidavit by testifying that certain of the things that he had alleged to have extracted from the records were infact what he had been told. For instance, he particularly denied personal knowledge, or knowledge derived from the records of the contents of paragraphs 4(a) and 4 (g) of his answering affidavit. Faced with these contradictions this Court is left with no alternative but to throw out the whole of Mokuku's evidence as unhelpful. Indeed the contradictions could well have been influenced by the fact that he had since left the employ of the respondent.

It is common cause that Mr Mosito based all his arguments in support of applicant's claim on the provisions of the Labour Code Order, 1992 (the Code). However, from information easily descernable from the record, only one and a half years of applicant's employment with the respondent is governed by the Code i.e 1st April, 1993, when the Code came into operation to 13th October, 1994, when applicant resigned. The entire pre-April, 1993 employment is governed by laws that operated then, because the Code does not have retrospective application.

When Mr Mosito conceded that he could not claim payment of overtime because applicant held a management position, he should have similarly conceded the claims for payment of rest days and public holidays. The employment law applicable before the advent of the Code was the Employment Act No.22 of 1967. Sections 55 and 56 of that Act governed entitlement to weekly rest days and payment of overtime respectively. Section 57 (1) (ii) provided that;

> **"57 (1)** ***The provisions of Section 55 and 56 shall not apply to the following;***
> ***(i)*** ***.....***
> ***(ii)*** ***Persons holding positions of management or employed in a confidential capacity".***

Accordingly, therefore, the applicant was exempt from claiming payment for either having worked overtime, or on his rest days. Assuming that some of the rest days fell into the period of his employment which is governed by the Code; Section 119 (1) (b) of the Code, still exempts persons holding positions of management or employed in a confidential capacity from either claiming payment of overtime or payment for working on a rest day.

Under the 1967 Act public holidays were not paid. A special dispensation was made in 1978 for certain specified public holidays to be paid holidays to persons who were earning M240.00 per month or less. This arrangement was gazetted as Orders in Legal Notice No. 5 of 1978 which was called Wages and Conditions of Employment Order, 1978. Under cross-examination the applicant was asked how much he earned when he started to work for the respondent in 1982 and he said he earned M500.00. Clearly, therefore, he was outside the scope of Legal notice No.5 of 1978 and as such he cannot seek its protection or base his claim on its provisions.

Public holidays first became payable generally in April 1993, when the Code came into operation (see Section 117 (2) of the Code). However, again Section 119(1)(b) exempts persons holding positions of management, or employed in a confidential capacity from the protections enshrined in Section 117 and Section 118 of the Code. In the circumstances the applicant's claim for payment of worked public holidays cannot succeed as he falls within excluded catagories.

The applicant also claimed payment of his annual leave for the years 1987-1991 at the rate of 30 days per year. Applicant was asked by Mr Ndlovu under cross-examination if he entered into a written contract with the respondent, he agreed. However, he could not submit such contract as evidence, for instance, of his annual leave entitlement. We are therefore, in the dark as to what the basis of applicant's claim for 30 days annual leave entitlement is, in the absence of evidence to support it.

The respondent has annexed annexure "PM1" to its answer which is a "leave request form" which applicant filled when he proceeded on a three months' leave in June, 1994. This form shows applicant's leave entitlement as 18 days. Applicant did not contradict this in his evidence, thus leaving the Court with no option, but to accept it as his leave entitlement.

According to the same form, applicant took leave for three months with effect from 13/06/1994 to 27/09/1994 - which gave him a total of 90 days absence. It is recorded in this form that the leave is for the years 1987 to 1994, less the leave for the years 1989/90 to 1990/91, this being the period when applicant was allegedly not in the respondent's employment. It is further recorded that the balance of applicant's leave after the 90 days leave would be nil.

Again the applicant has not in his evidence contradicted this evidence. Instead he confirmed during re-examination that he was given three weeks leave in 1986 and three months leave in 1994. How he claims payment for leave in respect of the same period, which the evidence before court suggests he requested and was granted leave, is far from clear. Applicant's claim for payment of leave in respect of those years which the respondent says he was granted his leave should be dismissed, because he also confirms taking the leave.

As for the years 1989 to 1991, these are the years during which the respondent, in Mokuku's answering affidavit alleges that the applicant was employed by a group called Bruce, Creyton and Bothma. This is one of the pieces of his sworn evidence which he (Mokuku) contradicted during his oral evidence by saying that what he said was what he was told. We have already said that to the extend that Mokuku's evidence contradicts evidence in his sworn affidavit, the whole evidence is treated as not being of any help to the Court.

What is clear from the records however, is that in the 90 days leave which applicant took, was included also leave for the whole 1994 and yet applicant resigned in October, 1994. In paragraph 3 (c) of his originating application applicant avers that when he resigned he *".....gave respondent money in respect of leave days for the year."* This averrement is admitted by the respondent. No explanation was tendered as to what leave this was that applicant paid for. Presumably therefore, it was reimbursement for the 1994 days which applicant had already taken before earning them.

There is no evidence that upon tendering his resignation applicant ever indicated to the respondent that he still had a querry in respect of his outstanding annual leave. This coupled with the fact that the applicant was infact the one who tendered payment for leave for the year, which he had taken before being legally entitled to same. On top of all these, applicant was aware that as far as the respondent was concerned there were no leave days to his credit as this had clearly been recorded in

annexure "PM1". The totality of this circumstantial evidence leads us to the inference that applicant's claim for leave is a fabricated after thought.

Finally, we come now to applicant's claim for payment of eleven years' severance pay. We have already stated earlier that the Code has no retrospective application. In terms of Section 79 (6);

> ***"The right to severance pay in accordance with this section shall apply as from the date of entry into force of this part of the Code. Rights to severance pay accrued under the Wages and Conditions of Employment Order 1978 shall be enforceable under the terms of that Order, notwithstanding its repeal".***

It is common cause that the Code came into operation on the 1st April, 1993. Whatever claim applicant wants to make under the Code for severance pay shall be as of that date. Claim for payment for a period prior to then shall be governed by the 1978 Order which was the legislation governing severance pay at the time.

As at March 1993, the 1978 Order had since been amended per Legal Notice No 72 of 1991, to raise the cover to employees whose monthly wage did not exceed M1000.00 per month. Accordingly therefore, only employees falling within that wage bracket could legally lay claim to payment of severance pay prior to April, 1993. According to paragraph 3 (b) of his originating application, applicant's salary at the time of his resignation was M1, 171. 25. But this was in October, 1994. No evidence was adduced by the applicant to show what his salary was in March 1993. In the premises the Court is not able to determine whether applicant had accrued any right to claim severance under the 1978 Order or not.

With effect from the 1st April, 1993 any employee who has completed one year of continuous service became eligible for severance pay. However, such severance pay was to be claimable with effect from the 1st April, 1993. When applicant resigned in October, 1994, he had completed one and half years of continuous employment with the respondent. Since severance pay is paid for a completed year of service, applicant's entitlement is, therefore, for one year severance pay. The respondent is accordingly ordered to pay applicant one year severance pay calculated at the rate of applicant's remuneration at the time that he resigned.

This is not a case of unfair dismissal, therefore the limitations placed on the Court by Section 74 (2) of the Code in connection with the award of costs has no application. Both parties asked for award of costs in their favour. Given the respondent's success in this case as compared to the bit on which applicant was successful it is only fair that the costs be shared proportionally. In the premises the applicant is ordered to pay two thirds (2/3) of the respondent's costs.

THUS DONE AT MASERU THIS 6TH DAY OF JUNE, 1997.

L.A LETHOBANE
PRESIDENT

P.K LEROTHOLI
MEMBER **I AGREE**

A.T KOLOBE
MEMBER **I AGREE**

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MS NDLOVU**