IN THE LABOUR COURT OF LESOTHO

CASE NO LC 44/99

HELD AT MASERU

IN THE MATTER OF:

LESOTHO WHOLESALERS & CATERING WORKERS UNION & 33 OTHERS APPLICANT

AND

METCASH LESOTHO LIMITED 1ST RESPONDENT
METCASH TRADING LIMITED 2ND RESPONDENT

JUDGMENT

This is an application in which the applicants challenge the retrenchment of the 2nd to 33rd applicant on the ground that the "...retrenchment violated the recognition agreement in that it was carried out without following the in-built procedure therefor." Accordingly the applicants claimed reinstatement, alternatively compensation and payment of arrears of salary.

It is common cause between the parties that the individual applicants were retrenched on the 30th November 1998. It is further common cause that the present proceedings were filed on the 8th October 1999, some eleven months after the termination of the 2nd to the 33rd applicant. According to Section 70(1) of the Labour code Order 1992 (the Code),

> ***"(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."***

In their answer which was filed on the 23rd November 1999, the respondents raised a special plea in bar that the claim is prescribed in terms of Section 70(1) of the Code. They acknowledged that in terms of Section 70(2) the Court may allow presentation

of a claim outside the six months time limit "... if satisfied that the interests of justice so demand." They however, contended that subsection (2) must not be invoked because "no basis has been set out in the Originating Application to indicate that it would be in the interests of justice for the above Honourable Court to allow presentation of such a claim in accordance with Section 70(2) of the Labour Code Order ...."

The special plea was argued on the 8th September 2000. It became apparent during arguments and it was regarded as common cause by counsel for both sides that this matter was first lodged in the High Court where it was dismissed on the 29th June 1999 on account of lack of jurisdiction. Accordingly, Mr. Mosito did not apply for condonation of the late filing of the Originating Application as he was of the view that it had been brought timeously before the High Court. When he noticed that the respondents were objecting to the Originating Application by way of a special plea, he sought to rectify the error by filing an application for condonation on the 5th May 2000.

It became apparent during Mr. Kennedy's arguments that the respondent had not been served with the application for condonation. This became apparent when Mr. Kennedy observed that despite being aware of the special plea the applicants had still not applied for condonation. Indeed there is no signature on the original document to evidence that it was served on and received by the respondents.
In terms of rule 30(1) of the Labour Court Rules 1994 (The Rules) "an applicant seeking condonation of the late filing of an Originating Application claiming unfair dismissal shall present, or deliver by registered post such application to the Registrar and the respondent therein..." The service of the application for condonation on the respondent was therefore the sole responsibility of the applicant. This much was conceded by Mr. Mosito.

Section 70(1) which prescribes the time limit for presenting a claim for unfair dismissal is couched in peremptory terms as the word "must" is used. It has been held that in a case which is filed after the lapse of the statutory time limit, the Court is divested of jurisdiction to hear the matter unless the late filing is condoned by the Court. (see Hlongwane & Others .v. Nu-World Industries (Pty) Ltd(1994) 15 ILJ 183 at 194G, & Lesotho Brewing Co./ta Maluti Mountain Brewery .v. Lesotho Labour Court President & Another CIV/APN/435/95 at p.22 of the typed judgment (unreported). Mr. Kennedy's argument was that the applicant ought to have applied for condonation as the prescribed period had lapsed and further that the High Court application did not disrupt prescription.

Section 70(1) of the Code provides that "a claim for unfair dismissal must be presented to the <u>Labour Court</u> within six months of the termination of the contract." (emphasis added). We have emphasized the words "Labour Court" in order to underscore a point that no other court is implied in the section. If any other court such as the High Court was intended, that would be clear *ex facie* the

Statute. That being the case we are not persuaded that the filing of the application in the High Court interrupted prescription. That does not mean, however, that such a step would not be a factor to be taken into account in considering an application for the condonation. It would be a very important factor to consider.

Mr. Mosito wanted to suggest albeit, indirectly that the prescription ought to be counted from the 29th June 1999 when the High Court delivered its judgment. In that way the application would be found to have been filed three months and some days from the date when the cause of action arose. When he was asked by the Court to advance an authority for this proposition he said no authority existed but common sense and equity dictated that this be done.

Common sense does not mean that one should create his own rules based on his common sense. Prescription has the rules that govern it both under the common law and under statute law. We cannot, without sound reason depart from those rules simply because out of sheer gut feeling we want to change them to suit the situation at hand. In this regard the quotation extracted by Justice Maqutu in the High Court judgment in this same matter from Kurt .v. Transvaalsche Bank 1907 TS765 at p.774 is relevant:

> ***"using equity in its broad sense, we are always desirous to administer equity, but we can only do so in accordance with the principles of the Roman Dutch Law. If we cannot do so in accordance with those principles, we cannot do so at all."*** **(Per Innes C J).**

Furthermore the statute which govern us i.e. the Code, clearly state that the period of six months is counted from the date "...of the termination of the contract." The view that we hold is therefore, that the present matter was clearly presented outside the time limit prescribed by the statute. It therefore, had to have been accompanied by a condonation application.

During argument Mr. Mosito conceded that the condonation application which he made belatedly was not served on the respondents. We are therefore, in full agreement with Mr. Kennedy's submission that even if we may have wished to consider it, we are barred from doing so in as much as the respondent has not been served with it and as such it is not properly before the Court. A further attempt was made by Mr. Mosito to move an application from the bar. Such an application was not in compliance with rule 30 of the rules which prescribes how an application for condonation should be done. It was therefore an improper application. That does not mean however that the Court cannot on its own motion in exercise of its equity jurisdiction consider whether to condone the late filing. Indeed Rule 7 (2) of the Rules provides that;

> **"*Notwithstanding anything contained in these rules the Court may in its discretion in the interest of justice upon written application, or oral application***

> ***at any hearing, or of its own motion, condone any failure to observe the provision of these rules."***

In terms of Section 70(2) of the Code the Court is empowered to condone late filing of an Originating Application if it is satisfied that the interest of justice so demand. In Khotso Sonopo .v. LTC LC67/95 (unreported) this Court held that it can only be in a position to satisfy itself if the interests of justice demand that late filing be condoned upon good cause shown. In essence the Court is vested with a discretion, which it must exercise judicially. In Melane .v. Santam Insurance co. Ltd 1962(4) SA531(A) the following was said:

> ***"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive."***

In Paper Printing Wood & Allied Workers Union and Others .v. Kaycraft (Pty) Ltd & Another (1989) 10 ILJ 272 at 276E Ehlers P and Basson AM added a fifth factor to be taken into account namely; prejudice caused to the other party. We propose to examine the relevant facts under the five headings.

<u>Degree Of Lateness</u>

As already indicated the application was late by some four months and eight days. In Paper Printing Wood and Allied Workers Union case supra, the Court relying on Metal & Allied Workers Union .v. Filpro(Pty) Ltd (1984) 15 ILJ 171 held at p176 of the judgment that "in applications for a status quo order in terms of Section 43 (of the South African Statute) it should be noted that time is of the essence and the degree of urgency is imported into the procedures." It is common cause that in casu the applicants seek reinstatement which is a status quo relief. Accordingly time is of the essence. The lapse of four months is certainly a long delay as this was almost double the stipulated time limit. The long delay is aggravated by the nature of the relief sought which is reinstatement and payment of arrears of salary.

<u>Explanation for the delay</u>

Apart from what came out as common cause between the parties namely that the case was first taken to the High Court, no other explanation was proffered as indeed no formal application for condonation had been made. Mr. Mosito argued that since after the 15th October 1999 when the Court of Appeal handed down its judgment in CGM(Pty) Ltd .v. Lesotho Clothing and Allied Workers Union & Others C. of A. (CIV) No.10 of 1999 in which it was held at p.9 that "...in matters provided for under the code, the High Court has no jurisdiction and that only the Labour Court has jurisdiction," all labour cases are being referred back to the Labour Court. He contended that to refuse condonation in this matter would

prejudice all those cases which are bound to come before this Court from the High Court.

The Court brought it to Mr. Mosito's attention; and he conceded, that this is not a case of referral of a case by the High Court to the right forum, in which case this Court would be seized with the matter. This is a case which has run its course in a wrongly chosen court and was dismissed by that court, only to be resurrected before this court. This necessitated that a formal application for condonation be made accompanied by satisfactory explanation why the statutory time limit was not complied with. The fact alone that a case was first taken to the High Court in the process of which the prescribed time limit lapsed does not automatically exclude the need to make a formal condonation application. Accordingly, it is not correct to say the outcome of this case will prejudice all other cases which are to be brought to this court in future from the High Court as each case will be considered on its merits, namely, why it has been filed late. However, this Court does take into account the fact that this case was first filed in the High Court, a factor which has contributed to the delay.

It is however, important to note as well that it was applicants' own wrong choice of forum which has resulted in the present state of affairs. As much as little blame may be put on the applicants themselves, they were however, acting through a firm of attorneys which ought to have advised them at every stage of the proceedings. In his valuable work, Beck's Theory and Principles of Pleadings In Civil Actions, Butterworths, 5th edition, Isaacs, relying on the 1966 Transvaal division case, submits at p.63 that "*a person is not entitled to rely upon his own default to interrupt prescription running against him.*" In Hlongwane's case supra Jacobs AM, dealing with a similar case of non-compliance with time-limit set by the rules stated at p.194D-E that "*Applicants using the machinery of the Act must be taken to know the provisions of the Act and the rules.*" The learned member goes on to quote from the Labour Appeal Court decision in NUMSA and Another .v. Rotor Electrical CC (1993) 14 ILJ 1042 where at 1044J of the judgment the learned De Klerk J also quotes the Appellate division case of S V DeBloom 1977(3) SA513(A) where it was pointed out *that "...one is supposed to acquaint oneself of the rules, regulations and laws concerning the scene onto which one ventures. A litigant cannot, without some explanation, plead ignorance of the consequences of his conduct and expect that he will thereby automatically escape those consequences."* In the circumstances the explanation though plausible, is not on its own sufficiently satisfactory, as the applicants have not explained why they took the matter to the High Court and not the right court, despite the Court of Appeal having long established in Attorney General .V. L T T U & Others C. of A. (CIV) No 29 of 1995 at P.22 & P.25 that matters provided for under the Code fall within the perview of the exclusive jurisdiction of the Labour Court. The CGM case also referred to the L T T U case with approval.

Prejudice caused to the respondents

The prejudice to be suffered by the respondents, should the applicants be successful in this application is immense if considered against the background of the reliefs sought by the applicants, which is reinstatement and payment of arrears of salary. A litigant seeking these reliefs must act expeditiously to avoid the inevitable prejudice that would result if several people were to be reinstated into their jobs after the lapse of nearly one year. The six months time limit becomes particularly significant in this regard.

Furthermore, it is in the interests of justice that litigation should come to finality as expeditiously as possible. (see Hlongwane supra at 194E). It is significant that when the High Court delivered its judgment on the 29th June 1999, the six months time limit had already expired on the 31st May 1999. However, the applicants waited until the 8th October 1999, which was another three months, before instituting the proceedings afresh in this court. Not even an explanation was advanced why there was yet another three months delay before approaching the right court.

Prospects of Success

No oral evidence was led nor were any affidavits filed. As a result we can only base our assessment of the applicants' prospects on the information gleaned from the papers filed of record by the parties. Granted this information is limited but if it was the information founding the litigants' case it is fair to rely on it because it was given by the parties themselves. Ex facie the papers applicants have little or no prospects of success at all. Under paragraph 12 of the Originating application, the applicants aver that the retrenchment violated the recognition agreement. However, they have failed despite annexing that agreement as Annexure G to the originating application to refer to a clause or part of that agreement which has been violated. We have ourselves looked through the agreement and have not been able to find a part of it that regulates retrenchment, which the respondents may be found in violation of.

The applicants claim further that the re-employment by the respondents is discriminatory and selective. This claim may be a legacy of the High Court case. Before this Court, the applicants have not averred anywhere in the Originating application that there were persons who were re-employed. The claim therefore is hanging and it does not make sense. Still under paragraph 12, the applicants claim the retrenchment did not follow the LIFO principle. This allegation is in stark contrast to paragraph 3 of Annexure "D" to the Originating application, which is a letter of termination of employment of each of the retrenched workers. It reads as follows:

> ***"In identifying employees to be retrenched a number of factors have been taken into account. Subject to skills retention this selection has been based on length***

of service with employees having the shortest service being selected before those with longer service (LIFO)."

Quite clearly therefore, LIFO has been used but since it is not an absolute criteria, the respondent admitted also using other factors.

The applicants' last concern was that they were not given a hearing prior to their dismissal. But in paragraph 9 of their Originating Application the applicants aver that on the 12th and 23rd October 1998 the first respondent held inconclusive discussions with representatives of the respondents about the burnt premises and future of the workers. The respondents for their part deny that the meetings were conducted on the mentioned dates and say they occured on 23rd October and 3rd November. They further deny that the discussions were inconclusive and aver that applicants' perception that the discussions were inconclusive arose only as a result of the applicants' obstructive approach to the respondent's contentions and proposals. We have gone at length into this question of consultations to demonstrate that it is not only a contradiction on the part of the applicants to say they were not heard, it is infact by their own admissions in paragraphs 9 and 10 of their Originating Application incorrect. In retrenchment, consultation with the affected workers serves the purpose of a hearing in a disciplinary case. Accordingly the applicants were heard.

<u>The importance of the case</u>
The case is clearly important to the applicants as well as to the respondents as each side needs to know its fate.

<u>Conclusion</u>
As stated that the facts must be considered in their totality and that the bottom line is fairness to both sides, we are of the view that the overwhelming body of the factual considerations leave one in no doubt that condonation of this late filing would greatly prejudice the respondents. The common law rules of prescription disapprove a condonation, the effect of which would be to prejudice the person against whom it is granted. Even if the principle of trade offs were to be applied the applicants have not scored any points on any of the relevant facts considered which could be used to compensate where they faired most badly. It is clear in our minds that on the basis of the foregoing considerations, no court properly advised would exercise its discretion in favour of the applicants. Accordingly we hold that this matter is time barred, it must as such be allowed to rest. There is no order as to costs.

THUS DONE AT MASERU THIS 26TH DAY OF SEPTEMBER, 2000.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER **I AGREE**

P.K. LEROTHOLI
MEMBER **I AGREE**

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MR KENNEDY**