IN THE LABOUR COURT OF LESOTHO

CASE NO LC 9/99

HELD AT MASERU

IN THE MATTER OF:

CLAUDIA PHOLOSA APPLICANT

AND

BERGERS STORES RESPONDENT

JUDGMENT

This is an application for condonation of the late filing of a claim for unfair dismissal. The application was heard on the 25th October 2000 and the ruling thereon pronounced at the conclusion of the hearing and the reasons were reserved. What now follows are the reasons for the ruling.

The applicant who was an employee of the respondent store was dismissed on the 19th November 1997 following a disciplinary hearing which found her guilty of gross negligence. The charge arose as a result of applicant's alleged failure to bank moneys and the disappearance of some four laybyes in the storeroom. The applicant appealed the decision and the appeal was heard on the 23rd March 1998. According to the respondent's Answer the applicant and her union representative were advised of the outcome of the appeal on the 23rd March and the 1st April 1998 respectively. The present application was filed on the 26th April 1999, some one year and three weeks after the date of termination of applicant's contract of employment.

Section 70(1) of the Labour Code Order 1992 (the Code) which is proposed to be replaced by section 227 of the Labour Code (Amendment) Act 2000 when it comes into operation, provides that a claim for unfair dismissal must be presented to the Labour Court or the Directorate, in the case of the Amendment, within six months of the termination of the contract of employment of the employee. Section 70(2) empowers the court in its discretion to "...allow presentation of a claim outside the

period prescribed in subsection (1) ....if satisfied that the interests of justice so demand."

In the case of Khotso Sonopo .v. Lesotho Telecommunications Corporation LC67/95 (unreported), this court had occasion to deal with the issue of condonation of late filing. In deciding that case the court referred to the passage in the leading case of Melane .v. Santam Insurance Co. Ltd 1962(A) SA531 (A) where Holmes JA as he then was said, that the court may condone failure to comply with statutory time limits upon the defaulting party showing sufficient cause why there was a delay. Holmes JA went on to state;

> ***"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon 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 for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."***

This court held in the Sonopo case that the Melane case lays relevant principles in as much as this court is enjoined to exercise its discretion to condone non-compliance with the statutory time limit after it satisfied itself that the interests of justice so demand. Accordingly, for the court to properly exercise its discretion and to correctly inform itself as to the demands of justice in each case the defaulting party must show good cause or in the language of Holmes JA sufficient cause. We will now proceed to consider each of the relevant facts with their overall impact being the determining factor whether to grant or not to grant the condonation application.

<u>The degree of lateness</u>
The applicant has filed this application after the expiration of twelve months and some three weeks, thus being out of time by six months and three weeks. This is double the maximum time allowed as such the delay is inordinate. It therefore requires satisfactory and convincing explanation to qualify for condonation.

<u>Explanation for the delay</u>
Applicant did not testify under oath and declined the invitation to do so when a suggestion was made to her lawyer during submission by a member of the court that it may be necessary to lead evidence to substantiate her reasons. Her lawyer only sought to apply for permission to lead evidence when he rose to reply to respondent's counsels' submissions and this request was then refused for two reasons namely; that it would not be a fair or just procedure because the respondent's counsel had at that stage closed his address. Secondly, the evidence was going to introduce new material which had not been pleaded in the Originating application. The court was therefore, left with the allegations in the Originating

Application which in themselves do not constitute evidence in as much as they are not deposed to on oath. We will therefore, consider them for what they are worth to the extent that they are not contradicted by the respondent's answer.

In her Originating Application the applicant has advanced three reasons for her delay. Firstly, she claimed that the chairman of the appeal hearing never communicated the outcome of the appeal to her. However, this allegation was denied by the respondents in their answer who said the outcome of the appeal was communicated to the applicant herself on the 23rd April 1998 and to Mr. Nkosivombu her trade union representative at the appeal hearing on the 1st April 1998. They contended that this was per applicant's own instruction. They attached annexures "R3", "R4" and "R5" as evidence of their communication with Mr. Nkosivonbu about applicant's appeal. They also attached annexures "R1" and "R2" being facsimile transmission report showing that on the 23rd March and 1st April 1998, certain information was sent by fax from respondent Johannesburg office to a receiving fax number 8349376.

Mr. Teele sought to discredit the transmission reports by arguing that the report does not say where the fax was sent. This much is true, because we do not know whose number is 8349376. However, in their answer the respondents said it was applicant's own instruction that the communication regarding the appeal be so relayed. Accordingly the problem of contradiction here could only be solved by sworn evidence or affidavit not merely discrediting the report.

Secondly, she says she was ignorant of the provisions of the Code which lay down the six months time limit. This argument is advanced notwithstanding the well-known principle that ignorance of the law is no excuse. Applicant has not pleaded her level of education to enable us to know if it is reasonably possible that she would not know the law governing her as an employee. That being the case we are enjoined to assume that she ought to have known the law as Section 6 of the Interpretation Act provides that "every Act shall be a public Act and shall be judicially noticed as such." Furthermore, we are in agreement with the respondents averrement in their answer that the applicant's claim of ignorance cannot possible be true because she was represented by a trade union official who by virtue of his position is supposed to have good knowledge of labour legislation and its provisions.

Thirdly, the applicant said that she delayed because she lacked financial means to seek legal representation. It is worth mentioning that the Labour Court is a court of equity which functions without formalities that would normally be a deterrant to a litigant to bring his or her claim to court unassisted by a lawyer. Applicant had the option to bring the case in person, or to approach any labour office anywhere in the districts for assistance, or to have sought the assistance of her own trade union. The Legal Aid Department is also there to help the indigent but there is no evidence that any of the above approaches was tried and it failed. Finally we tend to agree with Mr. Mpobole's submission that the applicant is on a fishing expedition for

explanation of her delay. If ignorance was the reason it should stand as such and there is no reason for indigence to feature. If indigence is the reason then ignorance does not come into play. Only one, not both, can constitute a valid explanation for the delay in the circumstances. Accordingly this court is not convinced by applicant's explanation of her delay.

<u>Prospects of success</u>
As no evidence was led to establish the prospects, we are of the view that the applicant's prospects must be apparent ex facie the papers before the court. In her Originating Application, applicant averred that she has prospects of success because:

(a) The charges of negligence were not proven.
(b) Respondent failed to provide record of hearings.
(c) Alternative employment was not considered regard being had to her length of service.

According to respondents' answer the applicant admitted being grossly negligent in not exercising proper control in the safe keeping of the laybyes. This the applicant has not denied. One does not comprehend how in an employment situation failure to furnish record of proceedings can constitute prospect of success, in the absence of a specific rule that prescribes that such record be kept. Section 66(4) of the Code which entitles an employee to a hearing before dismissal does not prescribe that records be kept. Such a detail could be provided for in the employer's disciplinary code or in the collective bargaining agreement between employees and the employer. No evidence of a code or an agreement which provides for such a procedure was adduced. In their answer respondents admit that no formal minutes were kept. In the absence of any law, rule or agreement that obliges them to keep such a record they cannot be faulted for not having kept it. Accordingly they could not furnish what they did not have.

On the issue of alternative employment there is nothing in law or practice which obliges an employer to provide alternative employment to long serving employees who misconduct themselves in the manner applicant did. An employer is however obliged to consider mitigating factors and an employee's personal circumstances where they are relevant before imposing the ultimate penalty. These must however be pleaded by the accused employee. There is no evidence that the applicant pleaded in mitigation. Be that as it may, the respondents for their part have said that they did consider the mitigating circumstances and came to the conclusion that "...the charges were serious and the breach of the trust relationship was a factor which out-weighed the mitigating circumstances." That the applicant's misconduct amounted to the breakdown of the trust relationship was made very clear in the "Notification of disciplinary Enquiry" form which notified the applicant of the disciplinary hearing.

It follows that it (breach of trust relationship) formed part of the charges which the applicant was invited to defend herself against. According to the respondent's answer the applicant was afforded the opportunity to cross-examine witnesses and she was entitled to call her own witnesses. She was therefore, afforded the chance to rebut the accusations that she had breached the trust relationship. Once the relationship of trust is broken between the employer and the employee, and there is no doubt that the charges that applicant faced, once proved, amounted to that breach; then the question of lesser penalty short of dismissal does not arise. The conclusion to which we arrive is therefore, that the applicant has failed to show that she has prospects of success.

<u>Importance of this case</u>
The case is certainly important in as much as the applicant wants to get his relief and the respondent is desirous to see this litigation come to finality in terms of the law. It is the question of fairness to both sides. If the applicant has shown sufficient cause to enable the court to conclude that in the interests of justice his delay should be condoned then he should get his relief. Similarly if he has not shown such good cause the respondent is entitled to protection of the law against claims that are lodged outside the stipulated time limit.

<u>Conclusion</u>
The conclusion to which we arrive is that the applicant has failed to show that it will be in the interests of justice to condone this late filing in as much as his delay is inordinate, his explanation is unsatisfactory and ex facie the papers before the court he does not have prospects of success. It was for these reasons that the application for the condonation of late filing of claim for unfair dismissal was dismissed with costs.

However, in paragraph 7 of her Originating Application, the applicant has alleged that the respondent has failed to pay her severance pay, contribution to the pension fund and accumulated leave. Counsel can approach the Registrar for allocation of a date when applicant's case in respect of these claims can be heard as they are not affected by the six months time limit.

THUS DONE AT MASERU THIS 9TH DAY OF NOVEMBER, 2000.

L.A LETHOBANE
PRESIDENT

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

M. MAKHETHA
MEMBER **I AGREE**

FOR APPLICANT : **MR TEELE**
FOR RESPONDENT: **MR MPOBOLE**