IN THE LABOUR COURT OF LESOTHO

CASE NO LC 20/00

HELD AT MASERU

IN THE MATTER OF:

TUMO LEHLOENYA	**1ST APPLICANT**
TSILONYAN MAHASE	**2ND APPLICANT**
PHILLIP LETLATSA	**3rd APPLICANT**
MOLIBETSANE LETLAKA	**4th APPLICANT**
KHOPISO SHEA	**5th APPLICANT**
JOSEPH QABA	**6th APPLICANT**
SEBAKI MAKHUTLA	**7th APPLICANT**
KHAUTA MARIE	**8th APPLICANT**
BROWN RAJOELE	**9th APPLICANT**
SECHOCHA SENYANE	**10th APPLICANT**
MOITHERI MOHAPI	**11th APPLICANT**
PEISO MATHAFENG	**12th APPLICANT**
MOTLATSI MAPOOANE	**13th APPLICANT**
MOFEREFERE MOSHEOA	**14th APPLICANT**
MOTLATSI PHAROE	**15th APPLICANT**
LEFA MAFATA	**16th APPLICANT**
THETSANE MOROMELLA	**17TH APPLICANT**
LEMOHANG FANANA	**18th APPLICANT**
ROSA KHOETE	**19th APPLICANT**
SENATLA MAKAE	**20TH APPLICANT**
TEBOHO TSOENE	**21st APPLICANT**
LIKOTSI QOBOSHEANE	**22nd APPLICANT**
RETSELISITSOE LITLALI	**23rd APPLICANT**
THATO TSALONG	**24th APPLICANT**
KHETHANG MOLOISANE	**25th APPLICANT**
SELLO KHIBA	**26th APPLICANT**
RAMATABOE RAMATABOE	**27th APPLICANT**
MALEFETSANE KHEO	**28th APPLICANT**

ALBERT LESAOANA	**29th APPLICANT**
MATLALA KAEANE	**30th APPLICANT**
LENYAKHA MABEA	**31st APPLICANT**
LETHUSANG PHEKO	**32nd APPLICANT**
MOTLATSI MPEETE	**33rd APPLICANT**
MAKHOASE PALI	**34th APPLICANT**
TANKISO LEFULEBE	**35th APPLICANT**
KOSE POTSANE	**36th APPLICANT**
LEBABO M. LEKHOOA	**37th APPLICANT**
THABANG MPO	**39th APPLICANT**
ADRIES HANI	**40th APPLICANT**
DANIEL HOOHLO	**41st APPLICANT**
PHOLO MOSEBO	**42nd APPLICANT**
LEQALA LESEO	**43rd APPLICANT**
ISAAC BELEME	**44th APPLICANT**
DANIEL SESING	**45th APPLICANT**
THABANG NTSANE	**46th APPLICANT**
PETLANE SEETANE	**47th APPLICANT**
MAPHELETSO MOSENENE	**48th APPLICANT**
TELEKOA LEBUSA	**49th APPLICANT**
SEABATA MOLEPA	**50th APPLICANT**
TUMELO MOTHOKO	**51st APPLICANT**
TSOKA THOKO	**52nd APPLICANT**
MAOELA MAOELA (EN 350)	**53rd APPLICANT**
KHOBATHA MOLAPO	**54th APPLICANT**
SONKI E THOKOANE	**55th APPLICANT**
GLADYS SEBATANE	**56TH APPLICANT**
MOTLATSI MOTSOANE	**57th APPLICANT**
MPOBOLE RAMPOBOLE	**58th APPLICANT**
THABO SEKONYELA	**59th APPLICANT**
MAPANYA MAPANYA	**60th APPLICANT**
JOHN BERENG	**61st APPLICANT**
KHASIPE KHASIPE	**62ND APPLICANT**

AND

LESOTHO TELECOMMUNICATIONS CORPORATION
RESPONDENT

JUDGMENT

This is an application in which the sixty-two applicants are challenging their retrenchment by the respondent corporation. The case was set down for the 5th and 6th December 2000. On the 6th December the court dismissed the application but reserved the reasons. What now follows are the reasons for the judgment.

The sixty-two applicants are part of a total of four hundred and two people who were retrenched by the respondent on the 9th July 1999. For purposes of salary they were told they would be paid up to 9th August 1999. In short they were terminated on the 9th July with one month's notice. The applicants filed the present application on the 15th February 2000. Respondents duly answered and the pleadings were closed. In their Answer the respondents' raised a pint in limine that the applicants' claims have not been presented to the court within six months of the termination of the contracts as required by section 70(1) of the Labour code Order 1992 (the code) and that there has not been application for condonation of the late filing of the Originating Application in terms of rule 30(1) of the Labour Court Rules 1994 (the rules).

On the first of the two days allocated for the hearing of this matter i.e. 5th December Mr. Roberts and Advocate Woker represented the respondents. Mr. Panyane of KEM Chambers appeared on behalf of the applicants requesting a postponement to 6th December 2000. His reason was that the matter was being handled by Mr. Mosito who was unaware that the matter had been set down for two days. He stated that Mr. Mosito was only aware of the 6th December as the date of hearing of the matter as a result he had gone to Roma and would not be able to proceed on the 5th.

Mr. Woker expressed his strong dissatisfaction with the requested postponement, arguing that the delay in prosecuting this case will have negative impact on the privatisation programme which the respondent company is going through. He was particularly unhappy with the explanation advanced for Mr. Mosito's non-attendance. He accordingly urged the court to require Mr. Mosito to explain his failure to attend court as expected and to impose an appropriate order of costs.

This court noted that KEM Chambers together with Webber Newdigate & Co. were the ones who agreed on the dates which were subsequently confirmed by the Registrar. Thereafter the Registrar caused three different notices to be issued to both counsels each confirming the 5th and 6th December as the dates allocated for the hearing of this matter. The first was dated 17th November 2000, the second 20th November 2000 and the third is the usual monthly roll which is normally sent by the Registrar to all practitioners. Mr. Panyane could not explain how Mr. Mosito could claim ignorance of the date in the light of so many notices which have been

addressed to his office and that of the respondent's legal representatives. It was in the light of the lack of satisfactory explanation that the court agreed to postpone the matter to 6th December but issued an instruction that Mr. Mosito be told that before proceeding with the merits of the case on the 6th he would have to explain his failure to be in attendance on the 5th and to show why he should not be punished with an appropriate order of costs.

On the 6th a memorial service for a late legal practitioner delayed the start of the proceedings. When the court convened at around 11.30am there was no sign of Mr. Mosito. Advocate Woker explained to the court that Mr. Mosito was present for about 15 minutes between 11.00am and 11.15am and that he told him that he was having a criminal trial which he was attending at the High Court. The Registrar also confirmed that Mr. Mosito reported that he was attending a criminal trial at the High Court. As it can be seen this latest excuse flies in the face of an order of this court the previous day that not only is Mr. Mosito expected to be at court but also he must be prepared to explain his failure to attend on the 5th to the satisfaction of the court or be mulcted with costs.

Mr. Woker submitted that his instructions are that he should proceed with the matter. He referred to rule 16 of the rules which provides as follows:

> ***"16. If a party shall fail to appear and to be represented at the time and place fixed for the hearing of an Originating Application or appeal or application, the court may, if that party is an applicant or appellant, dismiss the Originating application, appeal or application, or in any case, proceed to hear and dispose of the mater in the absence of that party or may adjourn the hearing to a later date."***

He urged the court to exercise its discretion in favour of proceeding. He contended that Mr. Mosito's new reason for not being present was contradictory with the reason advanced the previous day; namely that he was only aware of the 6th of December as the date when this matter would proceed. There is truth in this argument because Mr. Mosito would have known already on the 5th that he was going to be in he High Court for the criminal trial. The inference we draw is that the court was not told the truth as to why Mr. Mosito did not attend the court hearing on the 5th. The court was again told an untruth that on the 6th he would be present when he was already scheduled to appear in the High Court. Surely the court must sound its greatest displeasure at this kind of behaviour. For this reason alone it must show its displeasure by proceeding with the case in the absence of Mr. Mosito.

Mr. Woker further contended that the matter is of particular importance to the respondents and this country as such it must be disposed of as expeditiously as possible so that the respondent which is due to hand over to a new company, hands over with this litigation over. Furthermore he contended that this court has no

jurisdiction over this matter as it has been filed outside the six months time limit prescribed by section 70 of the Code. Finally he contended that the application is entirely without merit and that it discloses no cause of action.

It is common cause that some if not all of the individual applicants were present in court. The court invited them if they could, to show cause why Mr. Woker's application that the court exercise its discretion in favour of proceeding with the matter should not be granted. Mr. Thabo Sekonyela rose and pleaded on behalf of the group that the court should grant them an indulgence to consult with their lawyer. Asked if they did not meet with Mr. Mosito when he was at court that morning he said they met with him but they needed another time to consult with him.

Expedition in proceedings before the Labour Court is a key objective in the establishment of this court. (See section 27(3) of the Code). The respondent party in these proceedings is entitled to know its fate within a reasonable time especially because, the respondent, we are informed is undergoing privatization. Infact, it was suggested that a new company by the name of Telecom Lesotho has already been formed and is in the process of taking over the present respondent. Accordingly this is a factor which weighs heavily against the exercise of the discretion to postpone this matter because were a postponement to be granted this case will not be able to find a date earlier than October 2001 as the court roll is already full up to then.

In considering whether to postpone the case, the court noted that the applicants wanted to consult with the same lawyer who had decided not to proceed with their case in favour of proceeding in the High Court. It was the lawyers' fault that there was double booking for appearance in the High Court and before this court. As it was held in Saloojee & Another .v. Minister of Community development 1965(2) SA 135(AD) at 141;

> ***"The Attorney...is the representative whom the litigant has chosen for himself, and there is little reason why in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."***

The respondents had no reason whatsoever to be made to suffer because of the ineptitude of the applicants' attorney. Furthermore it would be futile and inconsiderate to the respondents to postpone the case to allow applicants to consult with Counsel who has already made a decision to abandon them and attend the High Court matter.

Assuming that the court were to lean over backwards and be inclined to accept applicants plea that the matter be postponed, it appears that the postponement would be a futile and costly exercise for the respondents because the matter has not

been filed within six months and there is no application for condonation. As it was held in Maluti Mountain Brewery .v. Lesotho Labour Court President and Another CIV/APN/435/95 (unreported);

> ***"...the jurisdiction of the Labour Court in a case where a claim for unfair dismissal has prescribed only arises from that court actually granting condonation if satisfied that the interests of justice so demand. Conversely if no condonation is granted then the Labour Court has no jurisdiction in the matter."***

In terms of Section 70(2) of the code the court is vested with discretion to condone late filing if satisfied that the interests of justice so demand. Its trite law that a court vested with a discretion must exercise that discretion judicially upon good cause shown (see Melane .v. Santam Insurance Co. Ltd 1962(4) SA 531(A) and Khotso Sonopo .v. LTC 67/95 (unreported). The applicants having not applied for condonation this court had no basis upon which to exercise the discretion vested in it by the Code. Accordingly no condonation could be granted. Accordingly, there would be no useful purpose of postponing a matter which the court clearly has no jurisdiction to entertain.

Authorities abound to show that a postponement is not a right. It is an indulgence for which a party seeking it cannot assume that it is going to be granted before a decision is made granting it or refusing it. In Real Estate Services (Pty) Ltd .v. Smith (1999) 20 ILJ 196 at 1999 Revelas J held that "in courts of law the granting of an application for postponement is an indulgence by the court exercising its judicial discretion. A reasonable explanation is usually required from the party seeking the postponement." In Gentirnco AG .v. Firestone (SA) Ltd 1969(3) SA 3118 at 320 it was held that a litigant seeking a postponement would have to show a "good and strong reason" for the grant of that relief. In Delta Motor Corporation (Pty) Ltd .v. National Automobile & Allied Workers Union (1988) 9 ILJ 743 the court refused to grant a postponement on account of the absence of counsel for the applicant. The court remarked as follows:

> ***"the starting point is that the respondent opposing the application for postponement finds itself in the superior position. It has a procedural right to have its case heard on the appointed day. That right will prevail in the absence of strong reasons for postponement."***

This court cannot say that it has strong and compelling reasons to justify postponement in the light of contradictory and ostensibly false explanations for Mr. Mosito's failure to attend court as scheduled.

It was further Mr. Woker's contention that the court must proceed to hear and dispose of the matter because the application did not disclose the cause of action. He contended that applicants' case is that there was no consultation with the

applicants, the respondent merely went through notions. He referred the court to two decisions which settled this contention by holding that consultation with employees follow management's identification of the need to retrench. In Atlantis Diesel Engines (Pty) Ltd .v. National Union of Metalworkers of SA(1994) 15 ILJ 1247(A) Smalberger JA held at 1252-

> ***"It seems to me that the duty to consult arises as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable. Consultation provides an opportunity, inter alia, to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment...and to discuss and consider alternative measures. It does not require employer to bargain with its workers or their unions with regard to retrenchment."***

The above decision of the Appellate Division has been recently quoted with approval by the South African Labour Court in the case of Fletcher .v. Elna Sewing Machine Centres (Pty) Ltd (2000) 21 ILJ 603.

In that case the applicant had contended and it was not disputed by the respondent's Chief Executive that the duty to consult was not observed in his case because at the stage of his initial discussion with Mr. Beverley, the Chief Executive "...the decision to retrench him had already been taken and was fait accompli." In rejecting the argument the learned acting judge Tommy stated;

> ***"In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and bona fide reason to reorganize, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be the legitimate purpose of consultation with employees who might thereby be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and viable basis for changing them. There is to my mind nothing unfair in that concept. In its broad context, it is a realistic and prevailing phenomenon of commercial life."***

It follows from the foregoing that to the extent that applicants' main ground of concern was that consultation was not fairly done in as much as their retrenchment was a fait accompli and that the purported consultation amounted to merely going through motions, their prospect of success in the light of the above decisions is non-

existent. Accordingly we agree with Mr. Woker that the applicants' application did not disclose the cause of action and as such no useful purpose would be served by postponing the matter to give them time to come and argue a failed cause. Such would be identical to flocking a dead horse.

It was on the basis of the foregoing considerations that the court decided to exercise its discretion in terms of rule 16 of the rules of the court in favour of proceeding with the case in the absence of Mr. Mosito. The court then proceeded to dismiss the applicants' claims for the reasons canvassed in the judgment. However, this decision does not affect the claim of the first applicant concerning the withholding of his terminal benefits to pay off his housing loan. He can persue that claim separately. There was no order as to costs.

THUS DONE AT MASERU THIS 13TH DAY OF DECEMBER, 2000.

L.A LETHOBANE
PRESIDENT

G.K. LIETA
MEMBER **I AGREE**

M. MAKHETHA
MEMBER **I AGREE**

FOR APPLICANTS :	**NO APPEARANCE**
FOR RESPONDENTS:	**MR. ROBERTS &**
ADVOCATE WOKER	