IN THE LABOUR COURT OF LESOTHO

CASE NO LC 165/99

HELD AT MASERU

IN THE MATTER OF:

LABOUR COMMISSIONER **APPLICANT**

AND

M & C CONSTRUCTION INTERNATIONAL (PTY) LTD
1ST RESPONDENT
EDDIE SYKES **2ND RESPONDENT**

JUDGMENT

The applicant is the Labour Commissioner suing terms of Section 16(b) of the Labour Code Order 1992 (the Code), on behalf of some twenty seven (27) former employees of the first respondent. The second respondent is cited in these proceedings in his capacity as the managing Director of the first respondent.

This application is based on Section 79(1) and Section 79(4) of the code, which provide respectively as follows:

> ***"(1) An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his or her services, a severance payment equivalent to two weeks wages for each completed year of continuous service with the same employer."***
> ***"(2) ……***
> ***"(3) ……***

> ***"(4) For the purposes of subsection (1) the two weeks' wages referred to shall be wages at the rate payable at the time the services are terminated."***

It is not disputed that the twenty-seven former employees had all completed more than one year of continuous service. Complainants 1-23 were each remunerated at the rate of M2.44 per hour. Complainants no.s 24 and 27 earned M2575 per month and M2625 per month respectively. Complainants nos. 25 and 26 earned M5.50 per hour and M5.40 per hour respectively. It is common cause that the hourly rates of complainants nos. 25 and 26 pitched them above M1000-00 per month.

The first respondent obtained a contract on the Highlands Water Project. Consequently complainants Nos. 1-23 and complainant no. 25 were transferred to the Mohale dam project area. Upon their transfer, complainants nos. 1-23's hourly rate was increased to M4.52. complainant no. 25's rate remained unchanged. According to second respondent's letter dated 15th October 1999, which is attached to the Originating Application the change in the wage rates was the result of the employees' employment in the Highlands Water project Area "… where the minimum wage rate was higher than the Lesotho minimum wage rate."

Upon completion of the contract at the Highlands Water Project all the employees were redeployed, according to second respondent, "….to other projects, where Lesotho minimum wage rates were applicable." This resulted in the twenty-three complainants' wage rates being revised downwards to their pre-highlands water project employment rates. As for complainants nos. 24-27 their remuneration remained the same. All the twenty-seven employees were subsequently retrenched after being given due notices.

Complainants nos. 1-23 were all paid their severance pay calculated at the reduced rate of M2.44. Their last monthly earnings were also calculated at the same rate. Complainants nos. 24-27 were not paid any severance pay. The complainants filed a complaint with the Labour Commissioner who instructed that the twenty-three complainants' severance payment be calculated at the rate of the Highlands Water Project earnings and their monthly wages be also paid at that rate. The Labour commissioner further directed that complainants nos. 24-27 be paid their severance payments. When no settlement was reached the Labour Commissioner decided to bring this dispute to Court.

<u>The Case of Complainants Nos. 1-23</u>

Counsels for both sides agreed that they were not going to lead any oral evidence and that they would only make arguments on the legal points arising. Ms Kotela who appeared for the applicant contended that the severance payment of the twenty-three complainants must be calculated at the hourly rate they were paid whilst they were working in the highlands water area. She contended that this was the rate at which they were being remunerated at the time of their retrenchment.

She contended further that even the monthly wages should be paid at the rate at which they were paid while they were employed at the Highland Water Project Area.

According to Section 79(4) of the code, severance payment should be calculated "… at the rate payable at the time the services are terminated." It was not in dispute that at the time that they were retrenched, the twenty-three complainants were being paid at the rate of M2.44. Whether rightly or wrongly that is the rate at which they were remunerated and that is the rate that should govern the calculation of their severance pay.

As regards their monthly wages, it is common cause that the complainants' wages reverted to what they were before they were deployed at the Highlands Water Project. However, neither the Labour Commissioner nor the complainants themselves ever challenged this as an issue either during mediation/conciliation stage, as evidenced by correspondence between the parties, annexed to papers filed of record. Thus Ms Kotela's attempt to bring this issue up from the bar could not be allowed without causing immense prejudice to the respondents. In the premises we find that the complainants severance payments were properly calculated in terms of what they were earning at the time of termination of service. If there was a dispute regarding the appropriate rate that should have come up as an issue on its own and the determination thereof would automatically determine the correct rate for purposes of calculation of severance payment. But as we stated this was never done.

<u>The Case of Complainants 24-27</u>

It is common cause that complainants nos. 24-27 were never paid any severance pay upon their retrenchment. The reason for this is because the respondents are of the strong view that, the four complainants do not qualify for severance pay in terms of the Wages and Conditions of Employment Order 1978 as amended (L.N. No.5 of 1978). Section 2(1) of that Order provided that;

> ***"2(1) This Order shall apply to all persons employed in any commercial or industrial undertaking whose minimum rate of remuneration excluding any allowances, bonus, overtime payment or other additional benefit, does not exceed:***
>
> ***"(a) where wages are calculated by the hour R1.20 per hour***
> ***"(b) where wages are calculated by the day R10.00 per day***
> ***"(c) where wages are calculated by the week M60.00 per week***
> ***"(d) where wages are calculated by the month R240.00 per month"***

In 1991, the 1978 Order was amended by the Wages and conditions of Employment (Amendment) Order 1991 (LN No.72 of 1991). Section 2(1 was repealed and replaced by the newly revised limits. The Order was to apply to persons whose minimum rates of remuneration did not exceed the following limits:

(a) Where wages are calculated by the hour M5.13 per hour.

(b) Where wages are calculated by the day M52.63 per day.

(c) Where wages are calculated by the week M250-00 per week.

(d) Where wages are calculated by the month M1000.00 per month.

It is the respondents contention that the four complainants' rates of remuneration place them above the aforesaid limits as such they do not qualify for severance pay.

The respondents submitted that they are live to the provisions of Section 241(1) of the Code which repeals inter alia, Legal Notice No. 5 of 1978. Mr. Malebanye for the respondent contended that sub-section (2) of Section 241 make provision for the survival of certain Orders not specified in sub-section (1) until they are revoked, replaced, cancelled or they have expired. He argued that this is the situation with Legal Notice No.72 of 1991 which he correctly stated is not one of those listed under sub-section (1).

He averred that he is fortified in his argument by Section 79(3) of the Code and the case of Clement Sebaka .v. Lesotho Milling Co. (Pty) Ltd CIV/APN/175/98. Section 79(3) provides that "in no case, regardless of an employee's length of service may the amount of severance pay payable to an employee exceed a sum which may be prescribed by the Minister from time to time after consultation with the Wages Advisory Board." It is common cause that the Minister has not yet exercised his powers in terms of this sub-section. It was Mr. Malebanye's contention therefore that until such time as the Minister shall have prescribed the limit of severance pay payable the limits prescribed by Legal Notice No.72 of 1991 shall continue to apply. With regard to the Sebaka case supra, he relied on it as a living example of the continued survival of Legal Notice No.72 of 1991 as it was applied and relied upon by the Honourable Mr. Justice Ramodibedi in that case.

Ms Kotela who appeared for the applicants made a strong argument that the Order relied upon is repealed by Section 241(1) of the Code. She contended that in terms of Section 241(1) read with Section 79(6) of the code it is only the rights to severance pay accrued under Legal Notice No.5 of 1978 that survive as for the rest of the

Order together with the amendments thereto they have been repealed. To support her argument she referred us to Section 21 of the Interpretation Act 1977.

In our opinion the case of Sebaka supra is clearly distinguishable from the present case. In hoc casu the Court in faced with the issue whether Legal notice No.72 of 1991 survived the repeals prescribed in Section 241(1) of the code. In the Sebaka case the Honourable Judge was never faced with such an issue. His was to apply the law with the presumption that there has not been any repeal or attempted repeal of the law he was applying. Accordingly, in our view the Sebaka case is not relevant.

During argument the Court had occasion to ask Mr. Malebanye where he can show the connection between Section 79(3) of the Code and Legal Notice No.72 of 1991, which leads to the conclusion that, if the Minister has not prescribed the limit in terms of Section 79(3) then the limits prescribed by Legal Notice No.72 of 1991 are still applicable. As would have been expected no such nexus was established. In our view, this question is pertinent because there is nothing express or implied in Section 79(3) that links it to Legal Notice No.72 of 1991. In the same vain no rule of interpretation would permit such an extrenous construction as to lead to the distortion of the intention of the Legislature. We find ourselves in the good company in this regard of P. St. J. Langan: Maxwell on the The Interpretation of Statutes 12th Ed. At p.1 where the learned Barrister/Author quotes Lord Greene M.R. in Re A Debtor 1948 2 ALL E.R 533 at p.536 where the Lord Justice enunciated the following principle: "if there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used."

If any relationship exists at all between Section 79 of the Code and Legal Notice No.72 of 1991 it is that of correcting the entitlement to severance payment on the basis of salary limits. Unscrupulous employers could well exceed those limits by a few cents only to place the employee in question beyond the application of the Order. Quite clearly Section 79 of the code corrected that and instead accorded the entitlement to everyone. Section 79(3) gave the Minister the discretion to prescribe the limit of severance pay which limit will, when prescribed, apply to everybody not a particular category of employees. A further limit to entitlement to severance payment which again is, if applicable of a general nature as opposed to applying to one group of employees and not the other, is that provided for under Section 8 of the Labour code (Amendment) Act 1997. That act is however, not relevant for the purposes of this judgment.

In our view Section 79 of the Code is clearly intended to correct a mischief and that mischief is the limitations to entitlement to severance pay based on a discriminatory basis. Any construction of Section 79(3) which would permit of the continued application of Legal Notice No.72 of 1991 would in our view defeat the intention of

the legislature. Langan in his book supra at p.137 quotes an old English case where it was stated;

> ***"…the office of the judge is to make such construction as will suppress the mischief, and advance the remedy and to suppress all evasions for the continuance of the mischief." (Magdalen College Case (1616)11 Rep. 666).***

He goes on to submit on the same page that, "to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: *quando aliquid prohibetur, prohibetur et omme per quod devenitur ad illundi."* There is no doubt that by invoking Section 79(3), the respondents are seeking to avoid implementing the provisions of Section 79(1) of the Code which entitles all employees, without distinction, as was the case under the 1978 Order, to severance payment. In our view if ever Legal Notice No.72 of 1991 survived the repeal, it should establish that survival under Section 241(2) of the Code not under Section 79.

We turn now to the consideration of whether Legal Notice No.72 of 1991 survived the repeal by virtue of sub-section (2) of Section 241. That sub-section provides for the continued application of Orders, notices or other instruments made under the authority of Acts or Regulations repealed by Section 241(1), "except in so far as (they) are <u>inconsistent</u> with the code… until such time as they shall have expired or revoked, replaced or cancelled under the provisions of the Code." I have underlined the word "inconsistent" because quite clearly if Legal Notice No.72 of 1991 discriminates certain employees from being entitled to severance payment because of the rate of their remuneration, it is inconsistent with Section 79(1) of the Code which makes no distinction. Section 79(1) is couched in the singular terms as follows: "an employee who has completed more than one year of continuous service shall be entitled to receive….severance payment equivalent to two weeks wages for each completed year of continuous service with the same employer." In terms of Section 4(3) of the Interpretation Act 1977 words and expressions in the singular include the plural. We interpret plural here to mean an unqualified plural because no qualification of any kind is implied in the Section i.e. Section 79(1). On this ground alone the respondent's argument regarding the continued survival of Legal Notice No.72 of 1991 should fall away.

It is correct that Legal Notice No.72 of 1991 is not listed among the repealed laws under Section 241(1) of the Code. It is common cause however, that this Legal Notice (L.N. No.72 of 1991) is an amendment to the Wages and Conditions of Employment Order 1978 (L.N. No.5 of 1978) which is itself repealed under Section 241(1) of the Code. As we hereinbefore stated the repeal of Legal Notice No.5 of 1978 is subject to the rights to severance pay accrued thereunder. There is no saving of any other part of that Legal Notice apart from rights to severance pay.

Particularly the limitations to entitlement to severance pay contained under Section 2(1) of the Order as amended by the 1991 Order have not been saved. They must therefore fall away.

Lastly, does the fact that Legal Notice No.72 of 1991 is not listed among the repealed laws under Section 241(1) of the code advance the respondent's case any further? In our view it does not, for the simple reason that if Legal Notice No.5 of 1978 as the principal law is repealed all subsequent laws amending it are automatically repealed. We are supported in this view by Section 21 of the Interpretation Act 1977 to which we were referred by Ms Kotela on behalf of the applicant, which provides that;

> ***"21 Where an Act which has been amended by another Act is repealed, such repeal shall include the repeal of all those provisions of that Act by which the first mentioned Act was amended."***

The non-listing of that Legal Notice under Section 241(1) of the Code does not therefore, make any difference. It is repealed by virtue of the repeal of the Principal law which it amended. In the circumstances we find that there is no legal limitation to entitlement to severance payment applicable to complainants nos.24-27. They are, like all others entitled to have been paid their severance payment. Accordingly, the respondents are ordered to pay the four complainants their severance payments in the amounts that shall be worked out and agreed with the office of the Labour Commissioner. Taking into account the extent of the success and loss of each party in these proceedings, we find it only fair that each party bears its own costs and it is accordingly so ordered.

THUS DONE AT MASERU THIS 24TH DAY OF MAY, 2000.

L.A LETHOBANE

PRESIDENT

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

S. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANT : **MS KOTELA**
FOR RESPONDENT: **MR MALEBANYE**