IN THE LABOUR COURT OF LESOTHO

CASE NO LC 42/00

HELD AT MASERU

IN THE MATTER OF:

MOEKETSI MOLOINYANE APPLICANT

AND

MANAGING DIRECTOR, GATTI ICE CREAM RESPONDENT

JUDGMENT

This matter was first heard on the 28th August 2000. At that hearing the applicant gave his evidence in Chief and was conclusively cross-examined by Mr. Shale who was then representing the respondent. It was again set down for 31st January 2001. However, even without approaching court to apply for postponement of the matter, B. Sooknanan & Associates on behalf of the respondent wrote a letter to Mr. Mofoka of the Legal Aid who is representing the applicant as follows:

> ***"24th January 2001***
> ***Att. Mr. Mofoka***
> ***Legal Aid***
> ***Maseru***
>
> ***Sir/Madam***
>
> ***Re: LC42/00 Moeketsi Moloinyane vs. The MD Gatti Ice Cream***
>
> ***We have been made aware that the above matter is set down for hearing on the 31st January 2001.***
>
> ***We wish to put on record that Mr. Shale is not representing Gatti anymore and that we are.***

We accordingly request that we approach the Registrar to allocate suitable dates for all parties.

Yours faithfully,

B. Sooknanan & Associates

c.c. Mrs. M. Khabo
Registrar of Labour Court
Maseru.

The matter was accordingly rescheduled for 12th September 2001. On the date of hearing a clerk from Messrs Sooknanan and Associates came to the court to report that the case has been allocated to Mr. Molapo who had gone to Leribe and Mr. Sooknanan himself had gone to Thaba-Tseka. The court made it very clear to the clerk that she must contact any of the two lawyers and inform them that the matter was going to proceed. If they were unable to attend they must tell the respondent to obtain alternative legal representation. Incidentally the respondent himself was not in court. The court gave them forty five (45) minutes to be present or to make alternative arrangements.

After approximately an hour the court reconvened. There was neither any of the two lawyers nor the respondent. Only Mr. Mofoka was in attendance. As a mark of its displeasure at the clear disregard of the rules of this court and the rules of practice the court decided it was not going to countenance the respondents behaviour by allowing them the postponement they had not even sought; for the second time for that matter. The case had long been set down and only on the day of the scheduled hearing lawyers say they are unable to proceed. To make matters worse, even before knowing the attitude of the court the respondent and his attorneys absent themselves as though they are entitled to a postponement as of right. A postponement is an indulgence and it is granted at the discretion of the court after careful consideration of the reasons for the postponement. We accordingly ordered that the case proceeds in default of appearance of the respondents who ought to have been in court anyway even if his legal representative had a problem.

The thrust of applicant's case is that he wants the court to order the respondent to pay him his arrears of salary from September 1997 to the date of judgment. His evidence is that he was employed by the respondent as a heavy duty driver. In July 1997 his truck overturned at Clocolan in the RSA. He sustained injuries as a result of which he was hospitalised at Pelonomi hospital in Bloemfontein for forty two days. He was released in September 1997 and upon arrival at home he reported directly at his work. The employer told him to go to the Labour Department and find out what should happen about a person who is injured like him.

The applicant testified that at the Labour Department they gave him accident report forms which had to be filled by the employer, the hospital and the Clocolan Police. Afterwards, the forms were sent to the respondent and the Labour Department. It was then that the respondent said he should wait for the Doctor's report on whether he was fit to resume work. During this time the applicant says he was not being paid. The report dated 10/06/98 was duly made by the Medical Board which cautioned that the applicant no longer hears well and cannot carry heavy objects with his right hand. Applicant testified that after the respondent received the report it promised to write to him stating his position. He says that he waited for the letter till this day.

It is the applicant's contention that by not taking him back after his release from hospital the respondent had suspended him. He contended that he still considers himself suspended even today because his position with the respondent was never determined. When he was cross-examined by Mr. Shale on this aspect of the evidence he conceded without any difficulty that he was never at any stage suspended, but that this is the conclusion he made when he was kept out of work. We are not persuaded that the applicant was suspended as he claims. What is clear however, is that he was not allowed to resume work without being formally terminated. Infact the respondent promised to tell him what his status with the company was, but it never did so.

In cross-examination Mr. Shale sought to show that applicant was infact dismissed. The applicant vehemently denied that he was dismissed. Mr. Shale read applicant a letter dated 28/10/99, addressed to the respondent by the Labour Department in which the latter was saying the applicant had been unfairly dismissed by the respondent. Again the applicant denied that he was dismissed and said that was infact the defence of the respondent to the complaint he had laid with the Labour Department. The respondent's defence was that the applicant had been dismissed. We have no reason to disbelief the applicant on this point. Indeed the respondent, while claiming that the applicant was dismissed could not produce prove of that dismissal. The letter of the Labour Department of 28/10/99 is not and cannot be proof that the applicant was dismissed as the respondent would want us to believe.

Mr. Shale further asked the applicant why he waited for two years before approaching the court for relief. He said he was reporting at the firm all the time. This is highly improbable. Infact when the question was asked again he said he was reporting at the Labour Department, but later he said Labour Department started to help him in 1998. Whilst we are satisfied that the respondent kept the applicant in the dark about his employment status, we are not convinced as to the reason why the applicant only approached the court in April 2000. Indeed the medical report which he was supposed to await was issued in June 1998. It must have been clear to him after that time when the respondent did not fulfill its promise to write to him

that the respondent was playing games with him. He should then have taken steps to seek redress in the appropriate institutions.

Furthermore, it turned out under cross-examination that the applicant received compensation for the injuries he sustained. Applicant never handed in the accident report form w/c9, which would show the period of temporary incapacity he was allowed by the Doctor, during which he is according to the workmen's compensation Act 1977 entitled to 75% of his earnings. The applicant ought not to have included that period in his claim for payment of arrears of salary, because that is the period for which he is officially temporarily incapacitated to perform his duties. His claim therefore, can only run from the end of that period, but also up to the point that this court in exercise of its equity jurisdiction thinks he ought to have taken steps to prosecute his claim.

The report of the Medical Board which according to the law is final, was made in June 1998. It is this same report which the respondent had said the applicant must wait for. In our view the second half of 1998 was too long a time for applicant to have allowed to pass without seeking to know what his status with the respondent was. In his own evidence he says after the release of the report the Labour Department told him that they had sent the report to his employer and according to the report the employer was to decide what to do with him (the applicant). This is where he was told he would be written a letter clarifying his position. Leaning head over heals we think the applicant must not have allowed December 1998 to pass without following upon the letter he was promised in June or July of that year.

In the premises we find it just, fair and equitable to order that the respondent pays the applicant his arrears of salary from the end of the period which the Doctor had awarded as the period of temporary in capacity up to the 31st December 1998. As duly prayed by Mr. Mofoka in his closing arguments the applicant's contract of employment is herewith revoked and/or rescinded effective the 31st December 1998, in terms of section 24(1)(J) of the Code. Costs are awarded to the applicant.

THUS DONE AT MASERU THIS 14TH DAY OF SEPTEMBER, 2001.

L.A LETHOBANE
PRESIDENT

M. MAKHETHA
MEMBER **I AGREE**

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

FOR APPLICANT : **MR MOFOKA**
FOR RESPONDENT: **NO APPEARANCE**