IN THE LABOUR COURT OF LESOTHO

CASE NO LC 111/00
LC112/00
LC125/00
LC140/00
LC141/00

HELD AT MASERU

IN THE MATTER OF:

J. KNESL	APPLICANT
J.J. NORTJE	APPLICANT
JOHAN NIEMAN	APPLICANT
ANTHONIE DE WIT	APPLICANT
G.G. GEORGIOU	APPLICANT

AND

MOHALE MATSOKU CONTRACTORS RESPONDENT

JUDGMENT

The five applicants filed separate applications in which they sued the respondent Joint Venture for an alleged unfair retrenchment. The applicants are all male South Africans who were employed to work in the Lesotho Highlands Water Project under the respondent Joint Venture. They were employed in senior and/or specialist positions. All the five Originating Applications were presented to the Court outside the six months time limit prescribed by section 70(1) of the Labour Code Order 1992 (The Code). They were thus each accompanied by a condonation application in terms of rule 30 of the Labour Court Rules 1994 (the rules).

It is trite law that in terms of section 70(2) of the Code, this Court may allow presentation of a case outside the six months period prescribed in sub-section(1) if it is satisfied that the interests of justice so demand. In applying this section to the facts, this Court has held that in order for it to satisfy itself as to the demands of justice in each case, there must be good cause shown by the defaulting party. (see Khotso Sonopo .v. Lesotho Telecommunications Corporation LC67/95 (unreported).

The Court has further adopted the principle that in showing good cause, the defaulting party must explain his delay, show the prospects of success as well as that the delay is not inordinate (see Melane .v. Santam Insurance Ltd 1962(4) SA 530). We will consider the applications case by case.

J. Knesl LC111/00

This applicant was retrenched on the 22nd March 1999. He filed his Originating Application with the Registry of this Court on the 11 September 2000, some one and a half years after his termination. This represents a delay of one year. There is no doubt in our minds that it is an inordinate delay. All five applicants give the same explanation for their delay. It will therefore be convenient to deal with that reason all at once.

On the prospects, the applicant avers that he was retrenched without consultation. He avers further that the respondent took no steps to avoid retrenching him and that the reason that the project is finished is a disguise because he was replaced. In short the applicant contends that the respondent has not followed the retrenchment guidelines. It may be true that the retrenchment guidelines were not followed as alleged, but that in itself would not entitle the applicant to the relief sought namely, reinstatement.

In his article Retrenchment: The New Guidelines (1985) 6 ILJ 127 Professor Cheadle aptly states:

> ***"these guidelines are not absolute rules of law – they are no more than canons of good industrial relations practice which change with circumstances.....should an employer deviate from the principles laid down, it will not mean that the employer necessarily acted unreasonably."***

In the letter of termination the employer put it to the applicant herein that "all employees are certainly aware that the initial phase of mobilization of the three projects is about to be completed. As a result of operational requirements it has therefore become necessary for management to review its employee complement in view of its adaptation to the new situation." In the letter that applicant wrote to the respondent as well as in his founding papers he has not denied this averrement, but he claims that he was not consulted. That does not make sense.

Applicant's claim that he was immediately replaced by a Mr. Janson cannot advance his contention that he was unfairly retrenched any further. His departure for operational reasons clearly did not mean immediate closure of the project. Depending on the criteria used to retrench there would be some persons left who would continue with what may be termed mopping up operations. With regard to alternatives to retrenchment, the project applicant was working for was contracted to perform a specific work. In terms of section 62(4) of the Code "a contract to perform some specific work....shall terminate upon the completion of the work..."

In our view there can be no talk of alternatives to retrenchment in such a situation. As to when the particular phases of the work end thereby necessitating the periodic scaling down of particular sections of the work force as was apparently the case in casu, is within the peculiar knowledge of the management concerned. We therefore, find that this applicant has no prospects of success on the merits.

J. J. Nortje LC112/00

This applicant was employed as the Workshop Foreman. He was retrenched on the 8th March 1999. He launched these proceedings on the 11th September 2000, which was one and a half years after the termination of his contract of employment. This again in an inordinate delay.

On the prospects, the applicant says he has prospects because respondent misrepresented facts to him. Looking at the proposed originating application it is apparent that applicant's grounds for relief are similar to those of Mr. Knesl. This applicant says he was not consulted; secondly he says he was not furnished with the reasons for termination. Lastly he says he had a legitimate expectation to work for a longer period and this expectation was arbitrarily ended.

Individually the employees may not have been consulted, but overall it seems the respondent's attitude is that the employees knew that certain phases of the project were being completed as a result of which workforce reductions would have to be done. As indicated these applicants were employed in reasonably senior positions where they would in the normal course of things get to know the progress of the project and its timing. We are not therefore, persuaded that the retrenchment took the applicant by surprise. The letter of termination is curt. It merely states "*please note that your services with MMC are no longer required with effect from 9th March, 1999".* No reason(s) are given.

However in their answer the respondents say the reason was redundancy. This reason, cannot ex facie the papers be disputed. In any event in terms of the Code failure to give reasons for termination does not nullify the termination. It is an offence punishable by imposition of a fine. It does not affect the fairness or otherwise of the dismissal. (See Section 69 (4) of the Code). Regarding the expectation to work for a longer period the applicant does not show the basis on which he bases this expectation to work for the period required by the project. The preamble to his letter of appointment clearly states that the duration of his appointment will be as per the Joint Venture's requirements. Furthermore, clause 12.2.1 provides that either party may terminate the contract upon giving thirty days notice. The view that we hold is that there cannot be talk of legitimate expectation to work for the life of the project in the face of such clear clauses which show that the contract may be terminated prior to the end of the project. Accordingly, we are not satisfied that even this applicant has prospects of success.

Johan Nieman LC 125/00

This applicant was employed as a Senior Surveyor. He was terminated on the 16th July 1999. He launched his originating application on the 11th October, 2000, some one year and three months after his dismissal. Once again this is an unreasonable delay, given that according to the code the case must have been presented to court within six months of the dismissal. This applicant's reasons for challenging his termination are the same as those of the previous two applicants. Accordingly the reasons for not finding any prospects of success in respect of those two apply with equal force to the present applicant.

Anthonie De Wit LC140/00

This applicant was retrenched on the 11th August 1999. He launched his application on the 2nd November 2000. This was one year and five months after the termination, a delay of eleven months. This was clearly an unreasonably long delay. The reason advanced for challenging the retrenchment is that the applicant was replaced by some two persons and that he had a legitimate expectation that his contract would last until August 2002. Furthermore, no steps were taken to avoid retrenchment.

Quite clearly the circumstances in which applicants were employed were not such as would allow the application of the retrenchment guidelines without a variation. Applicant's letter of termination clearly says the respondent is undergoing reorganisation and this does not mean total phasing out of operations. Some persons may be retained as respondent says, with lower qualifications to finish off the job. Therefore, the fact that some persons continued to do the job applicant was doing does not necessarily mean that his retrenchment was unfair. With regard to legitimate expectation there is nothing in the contract of employment that can give rise to the expectation that applicant's contract would last until August, 2002.

G.G. Georgiou LC 141/00

This applicant was employed as a Quantity Assurance Manager. He says he was employed in Sandton South Africa on the 18th March 1998. He was allegedly told that his contract would be for fifty-two months. In April, 1998 he was transferred to Lesotho. He was issued with a letter of appointment for his Lesotho assignment. On the 2nd July he was presented with a letter of retrenchment. The applicant avers that as the Quantity Assurance Manager he expected to be the last to leave site and that he expected to be given a hearing before his expectation to work for the remainder of the period he did not serve was taken away.

This application was launched on the 2nd November 2000. Like all the others this application was hopelessly out of time as it was filed one year and four months after the termination. With regard to prospects, other than his ipse dexit , there is nothing in his contract of employment to support applicant's averrement that he was told that his contract of employment would be for forty-two months. We have already observed that when a company winds down it does not mean that operations come to an abrupt halt. Accordingly the claim that a Mr. Begg and Mr. Dixen continued to do applicant's work cannot be conclusive proof that there was no need to retrench. Similarly, as to who would be the last to leave site, is not capable of being determined by anybody else, least of all this court, other than the respondent through their lawful representatives. Accordingly this applicant too has no prospects of success.

Explanations for the Delay

All five applicants have furnished the same reason as being the cause of their delay. That is that they relocated to their country, the Republic of South Africa; where after obtaining legal advise they took their cases to the South African Commission for Conciliation, Mediation and Arbitration (CCMA). The Commission dismissed their claim on the ground that it had no jurisdiction to hear the matters as they originate in Lesotho. They aver further that their RSA Attorney briefed their present attorneys of record, but during the exchange of instructions the firm of T. Makeka & Associates approached their RSA attorney saying that they represented the respondents. Messrs T. Makeka then allegedly asked that all those former employees' claims be compiled and sent to him so that both parties could consider settlement. They state further that their RSA attorney duly compiled the claims and sent same to Messrs Makeka's office on the 5th June 2000. Despite repeated reminders nothing was heard from Mr. Makeka until this day. Applicants submit that it is for these reasons plus the fact that they are hindered by distance to consult and instruct counsel effectively that they have delayed to launch these proceedings.

A satisfactory explanation leaves no questions lingering in the mind of the person to whom it is furnished. Furthermore, where reliance is made on a person as a cause of the delay like in casu, evidence must be availed to support the allegations. The contracts of all the five applicants clearly point out that they were employed to work for the Joint Venture in Lesotho. There is no explanation why they decided to take their cases to the South African courts. We do not know if it was a result of ignorance, misunderstanding or anything. Secondly, the applicants are not specific when they took their cases to the CCMA. This is important because they may have approached even the CCMA after the six months had already lapsed.

It is significant that the respondents deny ever briefing Messrs T. Makeka to represent them in this matter. Despite this denial the applicants place heavy reliance on the fact that they lodged their claims with Messrs T. Makeka who has

allegedly never responded until today. No affidavit was obtained from Mr. Makeka by the applicants to confirm their averrements in this regard. Accordingly, their claim that their cases delayed due to false promises by Messrs Makeka & Associates is not sustainable. As regards distance we are in full agreement with respondents' counsel that the applicants cannot be heard to blame distance in this modern systems of communication. In any event the applicants were themselves to blame because they failed to brief counsel while still in Lesotho. For these reasons we are not satisfied with the explanations given. Accordingly the condonation applications are refused with costs.

THUS DONE AT MASERU THIS 5TH DAY OF DECEMBER, 2001.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER **I AGREE**

S. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANTS: **MS MAHASE**
FOR RESPONDENT: **MR LOUBSER**