IN THE LABOUR COURT OF LESOTHO

CASE NO LC 81/00

HELD AT MASERU

IN THE MATTER OF:

NTJOLO LEUTA 1ST APPLICANT
NEPHTALI MAKOKO 2nd APPLICANT

AND

LESOTHO BREWING COMPANY (PTY) LTD RESPONDENT

JUDGMENT

The applicants herein launched the present proceedings against the respondent herein seeking relief in the following terms:

(b) Declaring the resignation of the applicants in terms of section 68(c) of the Labour Code Order to have amounted to constructive dismissal of the applicants by respondent.
(c) Declaring the said dismissal to have been wrongful, unlawful and unfair.
(d) (i) Directing the respondent to pay applicants their full entitlements and benefits arising out of their contracts of employment with respondent of their remaining period of service before their retirement.
Alternatively:
(ii) Directing the respondent to pay applicants their monthly salary at the current rate as compensation from purported date of dismissal to the date of due retirement.
(e) Directing that salary and benefits be set off against any loan proved to be outstanding in favour of respondent.
(f) Directing the respondent to pay costs of this application.
(g) Granting applicants such further and/or alternative relief.

The two applicants jointly filed the present application on the 30th June 2000 claiming as stated that they had been constructively dismissed by the respondent company. Reading from their Originating Application, save for their common

concern that they felt constructively dismissed by the respondent, there is nothing common in their respective cases as to have led them to have filed a joint application. The Originating Application was therefore, objectionable. However, it appears that the respondent did not object thereto ostensibly because they were going to raise a point in limine which applied to both applicants.

It is common cause that the first and second applicants resigned from the respondent company on the 3rd June 1999 and 8th July 1999 respectively. They filed the present proceedings on the 30th June 2000 which was approximately one year and one month in the case of the first applicant, and nearly one year in the case of the second applicant; after the respective termination of their contracts of employment. At the hearing hereof Mr. Woker for the respondent raised a point in limine that this court lacks jurisdiction to entertain this matter as the applicants have failed to comply with section 70(1) of the Labour Code Order 1992 (the Code) which provides as follows:

> ***"(1) A claim for unfair dismissal must be presented to the Labour Court within six months of the termination of the contract of employment of the employee concerned."***

He referred to the judgment of Ramodibedi J in Lesotho Brewing Co. t/a Maluti Mountain Brewery .v. Labour Court President CIV/APN/435/95 at p.22 where the learned judge stated that:

> ***"...I am of the firm view that 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."***

Mr. Woker contended further that this is not a proper case where the court can be "...satisfied that the interests of justice demand" that the presentation of the claim outside the six months limit be allowed, because the applicants had effectively terminated their contracts of employment on their respective dates of resignation and should have approached the courts before the expiry of the prescribed time limit.

Mr. Mosito for his part conceded that an unfair dismissal claim has indeed lapsed in terms of section 70 of the Code. He contended that the application of section 70 would, however, only affect prayer 8(b) of his Originating Application, as that is the only sub-paragraph that seeks to have the dismissal declared unfair. He contended that section 70 has no application to the rest of the prayers as they do not have anything to do with unfair dismissal. His clients' case is one of constructive dismissal he argued.

Looking at paragraph 8 of the Originating Application one is left with no doubt that the principal relief claimed by the applicants is that contained in sub-paragraph 8(a) namely; to declare the applicants resignations "...to have amounted to constructive dismissal..." All other prayers are, to use Mr. Woker's argument flowing from it. They are all based on a favourable finding in prayer 8(a). Conversely if prayer 8(a) fails they all fall away.

It was Mr. Mosito's argument that applicants' case is one of constructive dismissal not unfair dismissal as such it should not be found to have been affected by section 70(1) of the Code. Mr. Woker in response referred to section 68(c) of the Code which defines dismissal as including;

> ***"c. resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract."***

Incidentally this is a clause that the applicants based their resignations on. Clearly therefore, they were saying that the respondent has dismissed them through its unreasonable conduct. Now for any remedy to flow to an employee who is challenging his or her dismissal the dismissal must be ruled by this court to be unfair. It follows that for constructive dismissal to be actionable, it must amount to an unfair dismissal.

Indeed in subparagraph 8(b) which Mr. Mosito unconditionally conceded it should fall away, he had averred correctly as follows: "declaring the <u>said dismissal</u> to have been wrongful, unlawful and unfair." (emphasis added). The said dismissal, which we have emphasized, refers to the dismissal spoken about in sub-paragraph 8(a) namely, constructive dismissal in terms of section 68(c). He is therefore, aware that resignation of an employee under section 68(c) amounts to dismissal. Clearly therefore, dismissal arising out of an employee's resignation under that section amounts to an unfair dismissal which ought to be brought to court in compliance with section 70(1) of the Code. The concession made in relation to sub-paragraph 8(b) should have been made on sub-paragraph 8(a) as well, and indeed all other prayers because as we stated earlier the rest of the prayers all flow from prayer (a). Their validity depends upon the court making a favourable finding in prayer 8(a).

It came out during arguments that this matter had first been filed in the High Court. However, this was never pleaded by the applicants in any manner whatsoever. It only emerged in respondent's answer. It does not therefore form part of the applicants' case before this court. Accordingly nothing useful will flow from its consideration. It was also argued that section 70 of the Code no longer has application as it has been repealed by section 19 of the Labour Code (Amendment) Act 2000. There was initially a hot debate on whether the Amendment has commenced operation. It has become clear that since the amendment does not

specify its date of commencement it has come into operation in terms of section 16(b) of the Interpretation Act 1977 which provides in part that; "every Act shall come into operation on the expiration of the day next preceding the day of its publication" unless it is provided in the Act that such Act shall come into operation on some other day.

In response to the argument about the repeal of section 70 of the Code Mr. Woker referred us to section 18 of the Interpretation Act which provides in part as follows:

> ***"18. Where an Act repeals in whole or in part another Act, the repeal shall not***
> ***(a).....***
> ***(b) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed;***
> ***(c) affect any right, privilege, obligation or liability acquired;***
> ***(d) .....***
> ***(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability....referred to in paragraph (c) and (d); and any such legal proceedings or remedy may be instituted, continued and enforced....as if the repealing Act had not been passed."***

It is common cause that the causes of action herein arose on the 30th June 1999 and 8th July respectively. In terms of section 16(b) of the Interpretation Act the Labour Code (Amendment) Act came into operation on the 24th April 2000 as this was the day next preceding the day of its publication in the Gazette. In terms of section 18(e) read with section 18(c) the present proceedings can be proceeded with as they relate to things done or suffered under the repealed section 70 of the Code. Indeed there is a well-known presumption of law against retrospective application of statutes unless such is the express intention of the legislature.

The conclusion to which we arrive is that this court lacks jurisdiction to entertain these proceedings in the absence of express condonation of the applicants' late filing of the Originating Application. The claims were clearly inordinately out of time and warranted to have been accompanied by a condonation application. Accordingly applicants' application is dismissed on account of being time barred and consequently the court does not have jurisdiction to hear it. This being a claim for unfair dismissal there is no order as to costs.

THUS DONE AT MASERU THIS 2ND DAY OF MARCH, 2001.

L.A LETHOBANE
PRESIDENT

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

S.M. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MR WOKER AND MR. ROBERTS**