IN THE LABOUR COURT OF LESOTHO

LC/29/03

HELD AT MASERU

IN THE MATTER BETWEEN

LABOUR COMMISSIONER (O.B.O. MATSEPO SEMOLI) **APPLICANT**

AND

FRASERS LESOTHO (PTY) LTD **RESPONDENT**

JUDGMENT

Date : 10/05/05

Disclosure – Applicant failing to disclose material facts – Court taking judicial notice and accepting facts as rebuttable presumption.

Delay – common law and rules of international labour law. Claim To be presented within a reasonable time from date of termination.

Application dismissed.

This case was brought by the Labour Commissioner acting in terms of section 16(b) of the Labour Code Order 1992 (the Code) which provides:

> *"16 Power of Labour Officer in relation to court proceedings.*
> *"For purposes of enforcing or administering the provisions of the Code a labour officer may:*
> *"(a) ……..*
> *"(b) institute and carry on civil proceedings on behalf of any employee, or the employee's family or representative, against any employer in respect of any matter or thing or cause of action arising*

in connection with the employment of such employee or the termination of such employment."

The Labour Commissioner filed the present proceedings on behalf of Matsepo Semoli a former employee of the respondent company (the company)whose employment was admittedly terminated on the 31st May 2002.

It would appear that this matter has a rather peculiar and perhaps unfortunate history, which the applicants have decided to keep away from the court. As it would be expected that history came out in court at the behest of the respondent. It came out in court that the complainant herein has had more than one case filed either with this court or the Directorate of Disputes Prevention and Resolution (DDPR) or both. On the 16th October 2002 she filed referral number 1418/02 with the DDPR, which is apparently still pending before that body. On the 31st October she filed referral No. 1421/02 which the DDPR declined jurisdiction on, on the 12/12/02. That referral gave rise to the present proceedings. On the 30/04/03 the complainant filed yet another referral no. A0656/03, which she withdrew on her own accord on the 3rd June 2003. On the 28th July 2003 she filed the present proceedings following the DDPR's declination of jurisdiction on the 12th December 2002.

Mr. Mochochoko for the applicants did not even attempt to deny that the history of this matter is as enunciated by Mr. Makeka. He merely said he was being taken by surprise. It is trite chat a litigant who approaches court for relief must place all the facts that ought to be known by the court before it. The applicant chose to hide these facts and the company for its part decided to make them known. The company cannot be faulted. Infact Mr. Makeka did not just make wild allegations but he made allegations, which he supported with authoritative referral numbers which are established procedure for filing referrals with DDPR. This in our view suffice to give rise to a rebuttable presumption of the existence of the facts as he alleges them which "will stand unless it is destroyed by countervailing evidence." (See Schwikkard et al Principles of Evidence Juta & Co. p.345 paragraph 28 3 2). Furthermore, the alleged historical facts ought to be taken judicial notice of by the court as "facts which are not generally known but which are readily and easily ascertainable …." (Ibid p.332 paragraph 27 4 3). As we said the citing of DDPR referral numbers and the dates of referral make these facts readily and easily ascertainable. A mere denial by applicant of

these facts would have sufficed to place them in issue, but they chose not to. There was no basis for not believing them, accordingly the court accepted them.

On the 6th August 2003, the company filed its Notice of Intention to Oppose, Authority to Represent and Request for further particulars. On the 15th December 2003, the applicants filed what they styled an Amendment to the Originating Application, even though it does seem clear that what they intended to do was to comply with the request for further particulars.

On the 23rd January 2004 the company's lawyers wrote to applicant's lawyers to bring this anomaly to their attention. They responded by filing a proper process providing further particulars in identical terms to what was contained in the so called "Amendment to the Originating Application." No apology or anything followed this, accordingly the company's lawyers remain convinced that applicants' counsel did mean to amend their Originating application when they filed the process of the 15th December 2003. This understanding became apparent during Mr. Makeka's submissions on the 10th May 2005. They cannot be faulted for that understanding.

On the 19th August 2004 the company's lawyers wrote a letter to applicants' lawyers requesting to be given more time to file their Answer as the company had encountered many problems which necessitated restructuring which had led to some top and middle managers being retrenched. They requested to be given time to locate the relevant management that handled the complainant's case. On the 15th February 2005, the company duly filed its Answer which was accompanied by application for condonation of late filing. The matter was duly set down for hearing on the 10th May when only the preliminary points were argued.

Mr. Makeka for the company argued that they delayed to file an Answer because it took them a long time to trace the whereabouts of the relevant management who dealt with complainant's termination, as they have also since been retrenched. He argued further that they, with the counsel for applicants engaged in protracted negotiations in the hope of striking an out of court settlement. When the negotiations failed they then decided to defend the proceedings. He submitted that the court has a discretion to be exercised judicially whether to condone the late filing of the Answer.

On the question of prospects he contended that *ex facie* the papers the company has the prospects as it contended that it never entered into a contract with the complainant that she would retire at the age of 63. He contended that the Labour Commissioner has not even attached a copy of such a contract if it exists to establish a prima facie case. Furthermore, he contended that the case is based in the alternative on the proper construction of the letter of termination whether the words "….as previously discussed" constitute consultation or not. Mr. Makeka argued further that not only do they have prospects, their condonation application is not opposed by the applicants.

Mr. Mochochoko for the applicants did not dispute the reasons advanced by the company for being late in filing its Answer. He also did not dispute their contention that they have prospects of success. He however, sought to show that they had filed a notice to oppose the condonation application. There was no record of such a process having been filed even though Mr. Makeka conceded having a copy although he said it bore no court stamp. Despite Mr. Makeka bringing it to their attention that even though he has unauthenticated copy in his records, he has checked and established that none existed in the court file, no steps were taken by applicants' counsel to redress the situation. Accordingly, there is no way the court can take into consideration processes it does not have before it. We therefore, find that applicants have not opposed respondent's request for condonation. It is accordingly granted as prayed.

Mr. Makeka further raised a point in limine regarding jurisdiction on the grounds of prescription. He referred to the numerous referrals the complainant made at the DDPR and said they only go to show that complainant is only seeking a chance. He submitted further that there is no explanation where the complainant was between 12th December 2002 when the DDPR declined jurisdiction and the 28th July 2003 when she filed the present proceedings. He conceded that Section 227(1) of the Code as amended prescribes time frames for filing of claims with the DDPR, but referred to the decisions of this court in Mohau Takana .v. Lesotho Bank LC165/95, (unreported) Mahao & Others .v. Hotel Mafeteng LC39/01 (unreported) where this court held that even if there is no statutorily prescribed time within which to file a case; a claim must in terms of the common law be filed within a reasonable period from the time that the cause of action arose.

As this court held in Mahao & Others .v. Hotel Mafeteng supra "there is (presently) no statutory time frame for the referral of disputes to this court." (P. 3 of the typed judgment). However, the court is still enjoined to consider whether a claim has been filed within a reasonable time from the time a cause of action arose. Indeed even the International Labour Organisation (ILO) Convention No. 158 concerning Termination of Employment of 1982 does provide in Article 8(3) that;

> *"A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination."*

This article is clearly in tandem with the common law and I find no reason why this court should not follow it.

It may just be mentioned at this point that Mr. Mochochoko for the applicants denied himself the chance to rebut the arguments of Mr. Makeka by adopting the position that he was being taken by surprise and therefore he does not need to respond and that the court should ignore Mr. Makeka's submissions. It is trite that a point of law can be raised at any stage in the proceedings and even from the bar. This was brought to Mr. Mochochoko's attention, but his attitude was that he did not consider Mr. Makeka's point as a point of law. As just shown, this is a point of law capable of being raised at any stage of the proceedings, especially when it relates to jurisdiction. In the case of Maluti Mountain Brewery .v. Lesotho Labour Court President and Another CIV/APN/435/95 (unreported) Ramodibedi J as he than was held at p.22 of the typed judgment:

> *"As I read section 70(2) of the Labour Code Order 1992, I am of the firm view that the jurisdiction of the Labour Court in a case where a claim for unfair dismissal has prescribed <u>only</u> 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."*

The approach of Mr. Makeka was to argue that the applicant has delayed to present the claim as such, unless condonation of the late filing is sought this court has no jurisdiction to hear the matter. As Herbstein and Van Winsen, The Civil Practice of the Superior Court of South Africa 4th Ed. Juta & Co. puts it at p.479 "the usual method of raising a defence of absence of

jurisdiction is by way of a special plea because the lack of jurisdiction is often not apparent from the allegations contained in the pleadings objected to….". What this means is that it "…can be raised at any stage in the proceedings and need not necessarily be taken before *litis contestatio*." (Ibid page 477).

It is common cause that the applicant was dismissed on the 31st May 2002. The referral which later became a subject of these proceedings was made at the DDPR on the 31st October 2002. On the 12th December 2002, the DDPR declined jurisdiction and issued a certificate of referral of the dispute to this court. That was clearly a very prompt determination by the DDPR. The complainant on the other hand was dilatory in dealing with this matter, because she did not take steps to file this case with this court until the 28th July 2003, which was seven months since DDPR referred the dispute to this court and one year and two months since the cause of action arose. Undoubtedly this delay is unreasonable.

In the mean time the complainant had the time to file other claims with the DDPR such as a referral No. 0656/03 which was filed at DDPR on the 30th April 2003. Clearly the applicant was not eager to pursue the present case because by that time i.e. 30/04/03 she was already supposed to have filed this case with this court. Applicants do not deny that the complainant withdrew that referral of her own free will on the 3rd June 2003. On the 28th July, she got the Labour Commissioner to file the present case on her behalf. Clearly the filing of this case was a belated afterthought which was considered only when every other relief complainant had sought to seek had failed. In the meantime she was keeping the respondent suspended. In Mike Nkuatsana .v. Maluti Mountain Brewery 1997-1998 LLR – LB 420(CA) at p.422 Van Den Heever J.A. observed that:

> *"It is clear from the chronology outlined in the first paragraph of this judgment that the appellant had been extremely leisurely in his attempts to obtain redress from what he purports to have regarded as an unfair dismissal on a charge of dishonest conduct to which he had pleaded guilty. The adage that "justice delayed is justice denied" cuts two ways: a respondent compelled into court by a lackadaisical claimant suffers the injustice occasioned by the uncertainly as to whether the sword over his head will descend and how sharp it will prove to be."*

The foregoing remarks by Van Den Heever J.A. apply with equal force to the present case. Surely the complainant owed this court an explanation, why she should not be deemed to have waived her right to challenge her dismissal in accordance with the rules of international labour law and why her delay in presenting this claim to court should not be found to be unreasonable in accordance with the rules of the common law. Such an explanation could only be furnished in an application for condonation which the complainant ought to have made. Having failed to present such an application with the Originating Application the complainant together with her representatives still had the option to seek leave of the court to make such an application. The applicant's representative however, chose not to exercise that option. In the circumstances we hold that indeed the application is unreasonably late. It is accordingly dismissed on that ground. There is no order as to costs.

THUS DONE AT MASERU THIS 13TH DAY OF MAY 2005

L. A. LETHOBANE
PRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANTS: **MR. MOCHOHOKO**
FOR RESPONDENT: **MR. MAKEKA**