

IN THE LABOUR COURT OF LESOTHO

LC/31/05

HELD AT MASERU

IN THE MATTER BETWEEN

**LABOUR COMMISSIONER (OBO
DECEASED MOTLALEPULA
CHARLES RAKHOBAS FAMILY)**

APPLICANT

AND

LETA SECURITY SERVICES (PTY) LTD

RESPONDENT

JUDGMENT

Date : 26/07/06

Workmen's Compensation Act 1977 – Workman fatally shot by robbers – Late filing of claim for compensation – condonation – sec. 13(b) – Applicant to prove delay was caused by mistake or other reasonable cause – Reasons not showing that delay was caused by mistake or other reasonable cause – Delay of three years inordinate – Ex facie pleadings, claim not having prospects of success – Deceased did not die on duty – section 14(3)(a) and sec. 11(1) and (3) – Labour Commissioner made no determination if there are dependants left by deceased – In absence of dependants no compensation is payable – Application for condonation dismissed – claim prescribed.

The applicant is the Labour Commissioner suing on behalf of the family of a deceased workman Mr. Motlalepula Charles Rakhoba pursuant to section 16(b) of the Labour Code Order 1992. The said section provides that a Labour Officer may:-

“(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 respondent is a registered security company which employed the deceased at the time of his untimely death.

The deceased was employed by the respondent as a security guard. He was assigned to guard a supermarket at Motimposo in Maseru. On the 29th March 2002 at around 1900 hours, he was fatally shot through the head by suspected robbers. Agreed facts are that at the time of the incident the deceased was not at the supermarket that he was employed to guard. He was some one kilometer away escorting the Chinese owner of the supermarket who was apparently going home after closing the shop. He had handed over the guard duty to another security guard at 18.00 hours.

It is further an agreed fact that contrary to section 14(1) of the Workmen’s Compensation Act 1977 (the Act), which requires an employer to report an accident that results in the death or absence of a workman from work for three days or more, to the Labour Commissioner within three days of the accident, the respondent herein reported the deceased’s death after two months and two weeks of the occurrence of the accident. In his report the employer specifically recorded that the deceased was not on duty at the time of accident. The report is dated 12th June 2002.

Following the report of the employer the Labour Commissioner assessed the compensation payable at M25,440.00. The assessment was done on the 16th October 2002. It is not clear when the assessment was communicated to the employer. However, on the 24/03/03 which is just five days short of a full year from the date of the accident, a reminder was sent to the respondent to pay compensation in respect of the death of the deceased. They (respondent) were given fourteen (14) days within which to act. On the 23rd April 2003 the section dealing with Workmen’s Compensation transferred the claim to the Legal Section of the Department. They specifically informed the Legal Section that their “...office (had) made several attempts to recover the compensation payable to the workman including written and telephonic reminders which were fruitless.”

We mention these dates to underscore the dilatory conduct of the applicants herein. It was only on the 24th March 2005 that the Legal Section filed a claim for compensation in this court. This was five days short of three years since the workman died. Section 13 of the Workmen's Compensation Act 1977 (the Act) provides in part that:

“13 Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given either orally or in writing to the employer or to any foreman or other official under whose supervision the workman is employed, by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury or in the case of death, within six months from the time of death:

Provided that :

“(a) ...

“(b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake or other reasonable cause,

“but no proceedings for the recovery of compensation shall be maintainable unless the claim is made within a period of three years from the date of the accident.”

Quite clearly the applicants filed the claim after the lapse of six months but before the expiry of three years. It follows that the applicants' default falls within a condonable delay provided that the applicant proves that their delay was occasioned by mistake or other reasonable cause. As it would be expected the applicants made an application for condonation, in which they proffered the reasons that have caused the delay.

Applicants' first reason is that the respondent delayed to report the accident, and that delay had an adverse effect on the timeous filing of the claim. As mentioned above, the respondent admitted that they made the report on the 12th June 2002, which was two months and two weeks after the deceased's death. Obviously the applicant had two months and two weeks to compute

the claim and file it in court. We say they should have filed it in court within the time available because in their report the respondent had already made it clear that as far as they were concerned the deceased's death had neither arisen out of, nor in the course of employment. Accordingly, all that the applicant had to do was to assess the compensation payable, communicate it to the employer and initiate legal proceedings for the recovery of that compensation because the respondent's attitude was already known. Two and a half months was sufficient for the applicant to have fulfilled the above functions and they would have remained within the prescribed time frame.

Applicants' second reason is that they are a busy office as such they were only able to compute the compensation due on the 23rd October 2002. This was some three weeks after the lapse of six months. We have already shown that applicants ought to have been able to process the assessment of compensation and filed same in court within the time available from the 12th June 2002 when they received the report. Their failure to do so could only be attributable to applicants' generally lax and dilatory conduct. It is significant to note that the applicants are the office entrusted with the administration of the act under discussion. They are therefore the people best placed to know that the act has time frames that have to be complied with. The lame excuse that they are a busy office, is a clear case of a litigant who manufactures his inconvenience and later plead it in court. The court will not countenance such conduct.

Applicants' third reason for the delay is that since the time stipulated by the Act had already lapsed when the computation was completed on the 23/10/02, they decided to seek an amicable settlement of the dispute. Obviously in applicant's own words, the delay was worsened by their free choice not to approach the court for relief, but to repeat the efforts of the workmen's compensation section of seeking an amicable settlement which had already failed. If applicants had lodged the claim on the 23rd October when the assessment was completed, or soon thereafter, the delay would at that time have been reasonable. There is no doubt that the delay being sought to be condoned is an ordinate one. Furthermore, as Mr. Teele for the respondent submitted, applicant's explanation shows that the delay was willful. If they could not seek the court's indulgence only three weeks after the lapse of the statutory time frame, because they felt at that time that they were out of time; they should be even more reluctant to approach the court almost three years late. The view that we hold is that the delay is not only

inordinate, even the cause therefor is neither occasioned by mistake nor other reasonable cause.

PROSPECTS OF SUCCESS

Mr. Moshoshoe for the applicants argued that the applicants had good prospects of success on the merits. He argued that there is evidence that the injury causing the deceased's death arose out of and in the course of employment. He referred us to section 5(1)(b) which provides that:

“(b) if it is proved that the injury to a workman is attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed: Provided that where the injury results in death or serious and permanent incapacity, the court, on consideration of all the circumstances may award the compensation provided by this Act or such part thereof as it shall think fit.” (emphasis added).

The highlighted phrase refers to a workman who sustains injury in the course of employment whilst such accident is not necessarily arising out of employment or vice-versa. In terms of the act, compensation is payable if the accident arises out of and in the course of employment. Both facts must exist contemporaneously.

If one of the two facts is missing compensation is not payable. However, if the accident results in death or serious permanent incapacity, the court may in its discretion upon consideration of the relevant facts award full compensation in terms of the Act or part thereof. The admitted facts of this case do not fit into the above scenario. The respondents' contention is that both qualifying facts do not exist. In other words the accident neither arose out of, nor in the course of the deceased's employment.

In the accident report form the employer furnished the following as the description of the accident:

“The deceased was not on duty at the time of accident. His duty was at Great Sentuary Supermarket. He is alleged to be killed at about 1 km away from his duty place After he had knocked off from duty,

he took another duty beside the one on contract (of escorting) the Chinese.....”

This report is clear regarding the circumstances in which the deceased died. In terms of section 14 (1) of the Act an accident which results in death of a workman must be reported to the Labour Commissioner. Section 14(3) provides that:

“(3) on the receipt of a notice under subsection (1) or (2) the Labour Commissioner may make such investigations as he may think fit and if it appears to him that a claim for compensation may lie under this Act in respect of the death of the workman he shall take steps;

- (a) to ascertain whether there are any dependants of the deceased workman and if so the degree of their dependency; and*
- (b) to inform such dependants if any of the reported cause and circumstances of the death of the workmen and to ascertain whether such dependants intend to make a claim for compensation or wish a claim to be made on their behalf.”*

In the light of the report of the employer that the deceased did not die on duty, one would have expected the Labour commissioner to have invoked section 14(3) to enable the department to make an informed decision whether a claim for compensation could lie under the act. No investigation was made, as a result, *ex facie* the papers there is nothing to support counsel’s *ipse dixit* that the applicant has a good case on the merits. The only facts we have are the undenied report of the employer that the deceased did not die on duty. We cannot in the circumstances share counsels’ submission that the applicants have good prospects of success.

In paragraph 5 of their Answer the respondent raised a further point that there are no prospects of success not only because the deceased did not die on duty, but there is a further factor that the “deceased had no known dependants to his employers. When deceased was buried respondent’s employees performed all the duties from cooking, assisting in the digging and collecting deceased from the mortuary.” Indeed in terms of section 14(3)(a) after receipt of the report of the death of a workman one of the functions of the office of the Labour commissioner is to ascertain whether there are any dependants of the deceased workman and if so the degree of

their dependency. This duty does not seem to have been carried because the Originating Application does not disclose any dependant(s) of the deceased on behalf of whom this action is brought. Indeed when the court enquired from Mr. Moshoeshoe who the dependant(s) of the deceased are he said they are as yet unknown and it is only after the compensation would have been paid that the Labour Commissioner would make enquiries who the beneficiaries are; and then distribute the money to them.

In terms of the Act investigations must precede the lodging of the claim. When the dependants have been found it is them who decide whether they make a claim for compensation or they would want a claim to be made on their behalf. When Mr. Moshoeshoe realized the weakness of his response to the court's question, he changed and said they are acting on behalf of an uncle of the deceased, a Mr. Rakhoba whose first name he did not even know. This was of course a fierce attempt at salvaging the situation for two reasons.

In the first place this Mr. Rakhoba is not alleged anywhere in the papers. Secondly, assuming the truthfulness of the existence of this Mr. Rakhoba, Mr. Moshoeshoe could validly, but not necessarily correctly say he is instructed by an uncle of the deceased because his Originating Application says they are acting on behalf of the family of the deceased. Whilst an uncle is a member of the family of the deceased, he is not necessarily his dependant.

In this connection we were referred to section 11(1) and (3) of the Act which provides that:

“11(1) The compensation shall be payable to or for the benefit of the workman, or where death results from the injury to or for the benefit of his dependants as provided by this Act. (emphasis added).

“(2)

“(3) Where a dependant dies before a claim in respect of death is made under this Act, or if a claim has been made, before an order for the payment of compensation has been made, the legal personal representative of the dependant shall have no right to payment of compensation and the claim for compensation shall be dealt with as if that dependant had died before the workman.”

We have emphasized the words that the compensation is payable to or for the benefit of the dependants of the deceased workman precisely to show that it is not every relative who can just claim compensation for the death of a workman. The Act defines a dependant as :

“...those members of the family of a workman....who were wholly or in part dependant upon his earnings at the time of his death, or would but for the incapacity due to the accident have been so dependant....”

It goes further to provide that a person shall not be deemed to be a partial dependant of another person unless he was dependant partially on contributions from that other person for the provision of the ordinary necessities of life.

For Mr. Rakhoba to qualify to claim or for a claim to be made on his behalf he ought to have been either wholly or partially dependant on the deceased for the provision of the basic necessities of life. That could only be determined if the office of the Labour Commissioner had invoked the powers vested in it by section 14(3)(a) of the Act i.e. if it had investigated the existence or other wise of dependants of the deceased and the extent of their dependency. In the absence of that determination section 11(3) of the Act applies and no compensation is payable to the Labour Commissioner as the legal personal representative of the dependants of the deceased.

Assuming condonation were to be granted it would be a worthless exercise as there are no prospects of success in the light of the sections of the Act referred to in the body of this judgment. It is assumed that no dependants were left by the deceased and pursuant to section 11(3) no compensation is payable in the circumstances. Accordingly there will be no point in condoning the late filing of this matter, it is therefore dismissed on account of being out of time. There is no order as to costs.

THUS DONE AT MASERU THIS 3RD DAY OF AUGUST 2006

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANTS:
FOR RESPONDENT:

MR. MOSHOESHOE
MR. TEELE