IN THE LABOUR COURT OF LESOTHO

LC/01/06

HELD AT MASERU

IN THE MATTER BETWEEN

LABOUR COMMISSIONER **APPLICANT**

AND

MATHABO McCLOY & ASSOCIATES (PTY) LTD **RESPONDENT**

JUDGMENT

Dates of hearing: 06/04/06, 05/07/06, 13/09/06, 27/09/06, 28/09/06.

Jurisdiction – continuance – if ground upon which jurisdiction was established at time of trial ceases to exist the jurisdiction will continue to exist as long as it existed at the commencement of the trial.

Resignation – Notice to be communicated directly to employer or employee or their authorized agents – Notice tendered by complainants ineffective. Leave – employees tendering leave days as notice – Onus not discharged how many leave days were due – Leave – Sec. 120(1) of the Code – Leave can only be taken with agreement between employer and employee- Unilateral tender of leave to serve as notice inappropriate – claims for leave and severance pay dismissed.

Deduction from wages – sec. Deduction from wages – Employer acting arbitrarily without investigating how much each employee owed. Sec. 85(3) – employer may not taken more than one third of employee's monthly wages without approval of Labour Commissioner – Money allegedly repaid by complainants to employer to be returned to them

1. INTRODUCTION

1.1 In this matter the Labour Commissioner is suing in terms of section 16(b) of the Labour Code Order 1992 (the Code) which provides that:

> *"For the purpose 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."*

These proceedings have been filed on behalf of three former employees of the respondent who are seeking payment of certain benefits following their resignation from the employ of the respondent.

1.2 The Labour commissioner filed this application with this court pursuant to a certificate issued by Arbitrator Rantsane on the 22nd November 2005 referring the dispute for adjudication by this court as some of the claims fell under the exclusive jurisdiction of this court viz severance pay. I do not wish to belabour the question whether the referral of the dispute to this court was properly conceived. Suffice it to say that both parties accepted the referral and proceeded to file pleadings in terms of the rules of this court.

1.3 It is common cause that the dispute was filed on 8th February 2006. Thereafter the trial was set down and was duly conducted on a number of days with evidence led on

both sides. The trial ended on the 28th September 2006, when counsel for both parties presented their closing arguments.

1.4 Unbeknown to both counsels, Parliament had since passed a new Labour Code (Amendment) Act No.5 of 2006, which makes all claims for non-payment of any monies due under the provisions of the Code as amendment subject to determination by arbitration. In essence therefore on the last day of the conducting of this trial this court no longer had the jurisdiction to determine the claims which it is being called upon to decide in this matter.

1.5 In his book Pollack on jurisdiction; Juta & Co. 2nd Ed. David Pistorius relying on old writers like Voet; advances the principle of "Continuance" which advocates that jurisdiction must exist at the time of the commencement of the action. The learned author goes further to submit that;

"jurisdiction having once been established at that time, it continues to exist to the end of the action or proceedings even though the ground upon which the jurisdiction was established ceases to exit." (emphasis added).

1.6 This principle is in clear contrast to the principle propounded by the case of Curtis .v. Johannesburg Municipality 1906 TS 308 where Innes CJ as he then was stated that:

"Every law regulating procedure must, in the absence of express provisions to the contrary, necessarily govern, so far as is applicable the procedure in every suit which comes to trial after its promulgation." (emphasis added).

This decision was cited with approval in the case of Attorney General and 2 others .v. S.J. Kao C. of A (CIV) No. 26 of 2002 (unreported).

1.7 The emphasized phrases in the quote from Pollack on jurisdiction and the quote from the decision of Innes C.J. provide a clear demarcation line. On the basis of the principle

of continuance, this court continues to be properly seized with the jurisdiction to hear the claims despite the change in the law. The difference would arise if the trial commenced after the adoption of the new amendment; which now places the jurisdiction to determine claims which we are dealing with now, in the DDPR. Since the change came after the trial commenced; this court is enjoined to deal with the claims to the end. As the learned author states in Pollack on jurisdiction at p.13;

"This principle of continuance has been held to follow from practical considerations because the due administration of justice would be seriously hampered if the rule were otherwise."

1.8 The learned author states further down the middle of the same page that "it would be impossible to administer justice were this not so."

2. APPLICANTS' CASE

2.1 It is common cause that the three complainants resigned from the employ of the respondent on the 5 August 2005. According to PW1 'Matsoanelo Thene, she was employed as an Administrator. In that position she was responsible for staff matters and answerable to the Managing Director Mrs. Mathabo McCloy about those matters.

2.2 She averred that she never took leave. Since she could in terms of section 25(2) of the Code only claim up to three years backwards, she concluded that she had thirty-six accrued annual leave days. She then decided to tender some of those annual leave days as notice.

2.3 On the 5th August 2005 she wrote a letter of resignation tendering thirty of her perceived thirty-six accrued leave days as notice. The notice was to run up to the 4th September 2005. She averred that this meant that she was left with a balance of six leave days.

2.4 PW1 testified further that at the end of July 2005 the respondent made a deduction of M1000-00 from her salary which she claims was unlawful. She averred that the deduction was said to be for the misuse of office telephone between 2003 and July 2005.

2.5 The witness claimed payment of six outstanding leave days; refund of the M1000-00 which she says was an arbitrary deduction in as much as the calls that she allegedly made were not identified. Finally the witness claimed payment of severance pay for the period that she had worked with the respondent.

2.6 PW2 was Malerato Nyakane, who did front desk work and finances. She had also resigned on the 5th July 2005 tendering thirty of what she considered to be her thirty six accrued leave as notice. That meant that she also remained with six days standing to her credit, which she claimed.

2.7 She also claimed severance pay and M1500-00 which she avers was unlawfully deducted from her July salary as repayment for alleged misuse of the office telephone between 2003 and July 2005.

2.8 PW3 was Mr. Molibetsane Nyakane. He had also tendered thirty of what he considered his thirty six accrued leave days as notice and remained with six days which he is claiming in these proceedings. He also claimed severance pay and M660-00 which he said was deducted from his July salary in circumstances similar to those of PW1 and PW2.

3. RESPONDENTS' CASE

3.1 The respondent denies that the complainants are entitled to any of the claims they are making. DW1 Mrs. Mathabo McCloy testified that, the three complainants are not entitled to severance pay because of the manner that they left employment.

3.2 She averred that she had come to work at around 10.00 am on Monday 8th July 2005, only to find the offices of the three complainants empty. She even had to ask the staff members who were there if it was already lunch.

3.3 It was then that she was told that a letter had been given to the office driver the previous Friday to give to her. Upon enquiry from the driver, the latter confirmed that he had taken a letter to her house which he had handed to the maid. Coincidentally the maid had taken a weekend off and was only going to return that Monday.

3.4 The driver was sent back to the house to look where the maid would possibly have put the letter. He came with the envelope which contained three letters from the three complainants tendering resignation in identical terms. She averred that she was surprised because she had been talking to PW3 up to abut 4.00 pm the previous Friday and he had not hinted his intention to resign. She averred that the manner of the three complainants' departure had caused her company great loss.

3.5 With regard to leave DW1 said as a small office they had found it convenient to close during the Christmas/new year festive season so that all staff could proceed on leave at the same time. In this regard she was gainsaid by DW2 Itumeleng Nkhelooane and PW3, who both agreed that the office used to close around the 20th of December and reopened during the second week of January the following year.

3.6 DW1 averred further that even during the year people who needed leave could ask for days off. She stated that PW1 was one to whom requests for leave would be communicated and she was not aware of any person who was refused leave. She was again supported by DW2 who said they were a very small office and she would have known if anyone in the office had been refused leave. She averred that to her knowledge no one was ever refused leave.

3.7 Indeed even none of the three complainants testified about any one of them being refused to go on leave. PW1 said leave was once refused to Itumeleng and PW3 some three years prior to their resignation. But none of those two could confirm that they were ever denied to go on leave. It was put to PW2 that PW1 never singled her out as having been refused leave at anytime. Asked what her comment would be, she said she had nothing to say.

3.8 As regards the alleged unlawful deduction, DW1 said she was infact paid back by the staff for having misused the office telephone. She averred that she had enquired from PW1 and PW2 who were responsible for controlling the use of telephone in the office. The control measure was that a telephone call had to be requested from PW1 who would authorize it upon verifying that it was an official call by seeing the file in respect of which the call was going to be made. PW2 would then release the telephone to the staff member in question. She (PW2) had a notebook in which she would record if the call was private or official.

3.9 When DW1 enquired why the bill for the telephone was rising, she then learned that the control measure as herein outline was overridden since 2003. Staff were making calls without going through PW1 and PW2 was no longer recording the calls. She was however, informed that staff were making official as well as private calls freely without using the controls that were put in place. She then instructed that staff divide the cumulative bills from 2003 to June 2005 equally among themselves and the office as an additional member; and each must pay back to her their share of the distribution. She averred that the staff had met on their own and agreed on what they would each pay back for the misused telephone.

4. CONCLUSION

4.1 NOTICES OF RESIGNATIONS & SEVERANCE PAY

4.2 The success of the claims for severance pay depend largely on whether the resignations of the complainants were lawful. All the complainants conceded under cross-examination that they were advised by the office of the applicant to resign as they did and claim the benefits that they are claiming. Naturally therefore, the applicant's contention is that the resignations were lawful.

4.3 Each of the three complainants give a different reason why they resigned. What is clear from the issues raised under cross-examination is that, all the three complainants resigned in consequence of an advise they got from the office of the applicant where they had gone to report their dissatisfaction about the money the Managing Director had directed that they each pay back to the company.

4.4 In terms of section 63 of the Code "either party may terminate the contract (without reference to limit of time) upon giving one month's notice (if the employee had been continuously employed for one year or more.)" There is no dispute that the three complainants had been continuously employed for more than one year.

4.5 In the case of Transport & Allied Workers Union and Others .v. Natal Cooperative Tiber Ltd (1992) 13 ILJ 1154 at 1160, the court restated the principle of effective and lawful notice thus:

"….notice of termination of a contract of employment, in order to be effective, must be communicated to the employee, and must be given to the employee personally unless he has appointed an agent with authority to receive such notice on his behalf."

This rule was reiterated in Honono .v. Williwvale Bantu School Board & Another (1961)(4) SA 408 at 414 H.

4.6 The same principle should apply where the employee terminate their employment. Invariably however, employers do have authorised agents to whom the notice of termination

would be communicated. In hoc casu PW1 was one such person. It follows therefore, that PW2 and PW3 had correctly communicated their resignation to PW1 for onward transmission to DW1. On the other hand PW1 could only communicate her resignation including that of PW2 and PW3 to DW1 to whom she was responsible for staff matters.

4.7 In our view therefore, it was not proper for PW1 to have communicated her resignation to the office driver who has not been shown in evidence to be the agent of the employer in respect of such matters. PW1's notice of resignation was therefore faulty in this regard

5. LEAVE

5.1 Evidence has shown that the office of the respondent used to close in December for employers to take their leave during the festive season. Ms. Ntene for the applicant, sought to argue that the leave was not official leave because no forms were filled to authenticate it as such. Now that is elevating form over substance.

5.2 Whilst, the employer may be taken to task under other parts of the Code for failing to keep proper records, the undenied fact that the employees used to take days off during the festive season cannot be glossed over. Indeed PW3 did concede that their leave was utilized during the festive season. At the sametime PW1 who was responsible for administering staff leave could not even say that any one of them was refused leave in the preceding three years, which would justify the leave allegedly owed to them.

5.3 It goes without saying therefore, that it was wrong for the three complainants to have concluded that in the three years preceding their resignation they had accumulated 36 days leave. The conclusion was factually wrong because they admittedly took days off during the end of each of those years and only came back to work in the second week of the following year.

5.4 The onus was on the complainants to show how many days they took and how many days remained. The complainants contended themselves with a speculation that they each had thirty six days, which as we have shown cannot possibly be correct. Since the onus was not discharged this court is in the dark as to the number of leave days that each of the three complainants had.

5.5 It follows therefore that even if PW2 and PW3 may have correctly submitted their resignation to PW1, it cannot be said that they gave adequate one month's notice which by law they were obliged to give. The facts before us simply do not support such a conclusion because we do not know how many leave days they had to their credit which they could tender as notice.

5.6 Even assuming they had proved that they did have thirty six days which they could utilize to serve their notice, such an arrangement would need to be made and agreed with the employer. Section 120(1) of the Code provides that;

"An employee shall be entitled in each year to a minimum of 12 working days holiday on full pay, to be taken at such times as may be agreed between the employer and the employee. (emphasis added).

5.7 What happened in casu is a direct opposite of what the law provides. Infact it was anarchy. The complainants cannot therefore, be said to have given a proper and adequate notice in terms of the law. They are no different from deserters. In the circumstances both the claim for severance pay and leave cannot succeed. They are accordingly dismissed.

6. UNLAWFUL DEDUCTIONS

6.1 The respondent denies making any unlawful deductions from the salaries of staff in July 2005. Respondent contends that the staff voluntarily paid back to it what they had agreed to reimburse to it (the respondent) for the misuse of the office

telephone. The three complainants on the other hand argued that they did not pay the money to the respondent freely.

6.2 The amounts paid back by the employees or deducted by the employer as the case may be, are not disputed. What remains to be decided is whether the employer was justified in demanding the payment that it sought from its employees and in accepting such payments.

6.3 Section 85(3) of the Code provides in part that an "employer may take fair and reasonable deductions from the wages of an employee in respect of but not exceeding the amount of loss or damage caused by the deliberate default or gross neglect of such employee to any tools, material or other property of that employer."

6.4 All the three complainants including DW2 were unhappy that they were made to share the bill equally among themselves, the office included. They were particularly unhappy that the calls for which they were to pay back the employer were not identified. There can be no doubt that their concern is well founded. The respondent clearly acted arbitrarily in imposing the penalty universally without proper apportioning of the blame.

6.5 In her testimony the Managing Director, DW1 identified the persons in charge of the control measures as PW1 and PW2. Other than preliminary enquiries which she says she made from them about the rising bill; there is no evidence that disciplinary action was brought against them for overriding the system they were supposed to follow. Instead the blame was apportioned equally among all staff members. ***Ex facie***, this approach was unfair and smacked of capriciousness.

6.6 Even assuming she was entitled to demand repayment from the staff in the circumstances of this case, the employer infringed the letter and spirit of section 85(3) where it provides that:

"no deduction in respect of any one occurance shall, without the prior approval of the Labour commissioner, exceed an amount equal to one third of the employee's wages for a period of one month. Such amount may be deducted in installments so as to allow the employee to have sufficient means to maintain himself and his dependants."

Evidence we have heard is that the M1,500-00 that PW2 paid back to the employer represented her full salary for the month and it was nevertheless taken. In the case of PW1 the M1,000-00 she paid represented approximately 51% of her monthly pay, while PW3's deduction of M667 represented 34%. All these amounts were above the one third of salary permitted by law.

6.7 The complainants and the staff argue that an attempt should have been made to assess what the office portion of the bill should have been rather than the staff to be made to share equally with the office. I think there is sense in this concern. Clearly the matter was not investigated. The respondent instead rushed to impose universal penalty.

6.8 Finally, it was not explained to us why it took the respondent three years to realize that its control systems had been overridden. Surely that smacks of negligence. It cannot be fair to cover managerial negligence by making staff to repay faults dating so many years back with no explanation why they could not be identified timeously.

6.9 The conclusion to which we arrive is that the respondent was not justified to make the staff to repay it for the alleged misuse of the telephone without proper investigation of the blameworthiness of each of the employees. Furthermore, the acceptance of the repayments as the respondent chooses to call them contravened the provisions of section 85(3) of the Code. For these reasons the respondent is ordered to pay back to the three complainants, the respective amounts as they appear in the originating application which were improperly paid to it by the

complainants. The repayments are to be effected within thirty days from the handing down of this award.

THUS DONE AT MASERU THIS 24TH DAY OF OCTOBER 2006.

L. A. LETHOBANE
PRESIDENT OF THE LABOUR COURT

D. TWALA **MEMBER**	**I AGREE**
M. THAKALEKOALA **MEMBER**	**I AGREE**
FOR APPLICANTS	**MS NTENE & MR. MOSHOESHOE**
FOR RESPONDENTS:	**MR. MOSOTHO**