IN THE LABOUR COURT OF LESOTHO

LC/41/05
LC/33/97
LC/18/98

HELD AT MASERU

IN THE MATTER BETWEEN

BENEDICT TSELISO RANGOANANA **APPLICANT**

AND

STANDARD BANK LESOTHO LTD **RESPONDENT**

JUDGMENT

Date of hearing : 18/04/06

Motion proceedings – Dispute of fact on affidavits – Court to adopt respondent's version – Set-off Applicant bringing claims piece-meal.

Set-off – Applicant challenging it after seven years – ***Vigilantibus non dormientibus jura subveniunt -*** *a litigant has a duty to make his claim within a reasonable time- Interest claimed after five years – late referral undermines good administration of justice.*

Interest – general rule is to claim interest a ***tempore mora*** *– Any further interest may be claimed in terms of agreement to that effect*

between parties – Lesotho has no statute regulating interest on judgment debts – Application dismissed with costs.

INTRODUCTION

The applicant filed this application out of the Registry of this Court on the 1st July 2005. The relief sought was couched in the following terms;
That the Honourable Court make an order in the following terms:

(a) That the respondent be ordered to comply fully with the judgment of this Honourable Court in LC33/97;
(b) To declare the deduction made by the respondent as set-off as unlawful and contrary to the judgment in LC33/97;
(c) That the respondent be ordered to pay the applicant an amount of one hundred and thirty three thousand maluti (M133,000.00) being unlawful deduction made contrary to the judgment in LC33/97.
At the hearing this amount was revised down to M68,888.08 after realizing that an amount of M60,810.00 paid to applicant's then attorneys of record in December 2000 constituted part settlement of the amount claimed under this paragraph.
(d) That the respondent be ordered to pay compound interest on M133,000.00 (now M68,888.08) at the rate of 27% from the date of judgment in LC33/97 to date of payment.
(e) That the respondent be ordered to pay compound interest at the rate of 27% p.a. on the amount of M60,810.00 being applicant's arrear salary, from the date of judgment in LC33/97 to 3rd February 2001.
(f) Costs of suit.
(g) Further and/or alternative relief.

HISTORICAL BACKGROUND

The History of this dispute dates back to 1982, when the then bank employees union, Lesotho Union of Bank Employees (LUBE) called out its members on a strike in support of wage demands. LUBE organized and had

substantial membership in the two international banks operating in Lesotho at the time. Those were Barclays Bank PLC and Standard Chartered Bank. The applicant was employed by the former as an Accountant.

The strike resulted in the dismissal of two prominent members of LUBE; one from each of the two banks. Bahlakoana Moliko was dismissed from the Standard Chartered Bank, while the applicant was dismissed from the Barclays Bank PLC on the 10th August 1982. The union referred the matter to the then Unfair Labour Practices Tribunal under the then Trade Unions and Trade Disputes Law No.11 of 1964. The Tribunal found in favour of the union and the two complainants and ordered their reinstatement and compensation for lost wages from 01/09/82 to 14/04/83. The two banks appealed to the High Court which set aside the finding and order of the Tribunal. The Union took the matter on further appeal to the Court of Appeal, which set aside the High Court judgment and reinstated the finding of the Tribunal. However, the Court of Appeal ordered the Tribunal to re-evaluate the propriety of the order of reinstatement it had given, in the light of the fact that three years had lapsed since applicant's dismissal. The Court of Appeal judgment is reported in the 1985-1990 volume of the Lesotho Law Reports at p.435.

The matter only came before the Tribunal in 1986. It was finalized in June 1987. The Tribunal concluded that it was no longer practicable to order applicant's reinstatement in the light of the time lapse since his dismissal. The tribunal "awarded damages comprising his monthly salary from the 7th July 1982 to the 1st June 1987…" (See p.1 of typed judgment in LC33/97). By this time the respondent had undergone numerous changes of names having assumed the name of Barclays Bank International Ltd. A year earlier it had been known as Barclays Bank Limited. It is common cause that the present respondent has been substituted for the previous entities which employed the applicant.

The award of the Tribunal ordered that the income that the applicant earned from self-employment during the ensuing period be deducted from the amount due in terms of the Tribunal's award. It is common cause that that amount i.e. the mitigated amount was not easily ascertainable as it had been raised through informal trading as among others, fruits hawker. The Court accordingly ordered the two parties to sit down and seek to reach agreement on the amount to be deducted. The award had a rider that if the parties failed to agree the issue be referred back to it (the Tribunal) for final

determination. It appears that even the salary that had to form the basis of the award became a big dividing issue as the parties could not agree on it.

Despite these disagreements neither party approached the Tribunal for final determination. It is common cause that in April 1993, all hitherto existing Labour Legislation was repealed and replaced by the Labour Code Order 1992. It follows that even the then Unfair Labour Practices Tribunal became defunct. Functions that it performed devolved in the Labour Court. The Labour Court commenced operations in October 1994. It was only in 1997, ten years after the award, that the applicant approached the Labour Court in LC33/97 for final determination of the outstanding issues namely salary; to be used in formulating the compensatory award and the set off. It emerged in this action that the respondent also sought to set off a mortgage loan it made to the applicant which the applicant opposed.

It turned out at the hearing that the parties had previously been involved in intense negotiations in an attempt to agree on what should have been applicant's salary between July 1982 and June 1987, should he have continued in respondent's employment. These negotiations yielded an agreement which was communicated to applicant's then counsel by respondent's counsel on 14/12/95. The letter was attached to the papers in LC33/97 as annexure "STB7" and the agreement itself was "STB10". The court determined the matter in LC33/97 by endorsing that agreement as constituting the salary applicant would have earned for the period plus the thirteenth cheque for each year end. As for the set off the court decided the issue by endorsing applicant's own suggestion that "… respondent's entitlements be pursued separately…". The court accordingly decided that the set-off sought by the respondent be ventilated in another forum to avoid any further delay in deciding the salient issue of the amount to which applicant is entitled in terms of the Tribunal's award.

In July 1998, the respondent made a unilateral payment in the amount of M118,987.32 to applicant's then attorneys of record. This amount was made up of salary for the period July 1982 to may 1987 totalling M158,937.70, less guestimate for mitigation of damages rounded off to M65,000.00. The balance of M93,937.70 was multiplied by two to cater for interest within the context of the *in duplum* rule. The amount arrived at was reduced by M34,444.04 again multiplied by two representing the balance of the mortgage bond with interest again based on the *in duplum* rule. That left the

balance of M118,987.32 which was paid by cheque to applicant's attorneys, without prejudice.

THE PRESENT CASE

It would appear that just before the unilateral payment of the amount aforesaid, the applicant filed fresh proceedings on the 14th March 1998 under case LC18/98 in which he sought order of the court compelling respondent to pay him the judgment sum as computed by himself unilaterally. The application was heard and two judgment thereon delivered on the 25th August 1998 and the 1st August 2000. In the preamble paragraph of the judgment of the 25th August, the learned Mapetla Ad hoc President as he then was made a pertinent remark that:

> *"this matter has an unfortunate history of being a subject of recurring dispute because the parties involved do not seem to agree on anything with respect to the issues which this court reserved for their mutual agreement and compromise. In particular, it is common cause that a meeting which this court ordered to determine the amount of unpaid salary due to the applicant never materialized. On the contrary each party made its own computations and calculations which are the world apart."*

The learned Ad hoc President however, repeated his earlier finding endorsing the computation reflected in annexure "STB10" and that the applicant is entitled to the thirteenth cheque and interest at the rate of 27%. The court further ruled after considering a host of authorities on the subject that the *in duplum* rule should be invoked essentially because each party carried a share of the blame for the delay in effecting payment as ordered initially by the Tribunal and later by the court. The court ordered that the issue of mitigation of damages be dealt with at the resumed hearing due to be held on the 2nd November 1998.

At the resumed hearing; judgment for which was delivered on the 1st August 2000, the Ad hoc President ruled that the applicant was bound to mitigate his damages. From applicant's own computation of what he earned outside respondent's employment it was held that his award be reduced by M4,190.00. The court refused to endorse the questimate amount of M65,000.00 and ruled instead that:

> *"In the result we come to the conclusion that the respondent is entitled to deduct the amount of M4,190.00 only from what is due to*

> *the applicant as damages.* ***We are aware that the respondent has already made an advance payment of about M118,000.00 to the applicant without prejudice*** *and we consider this to be a reasonable effort towards a settlement."* (emphasis added).

We have emphasized the above phrase for the reasons that will be clear hereunder.

Following this judgment the respondent reinstated payment of M65,000.00 which it had unilaterally deducted as questestimate for mitigation of damages. The amount was paid less the M4,190.00 allowed by the court as mitigation of damages. The net amount of M60,810.00 was duly paid to applicant's then attorneys of record on the 14th December 2000, even though the applicant himself says his attorney only transmitted payment of that money to him in February 2001. It is trite that in motion proceedings if the two versions of the applicant and the respondent conflict the court will take the version of the respondent. (See Molapo Qhobela & Another v.v. BCP & Another (1999-2000) LLR – LB 235 at p.253, Bernard Moselane & Ors .v. Manager Bonhomme High School & Others (1991-1992) LLR – LB 132 at page 135.) Indeed the applicant has not contradicted the respondent's averrement regarding the date of payment in his reply to respondent's Answering Affidavit. In the circumstances the court is entitled to assume the correctness of averrements which are admitted or are not challenged. (see Plascon-Evans Paints Ltd .v. Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A)). That payment, would seem, ***ex facie*** the papers before us, to have closed the dispute between the parties.

THE APPLICANT'S CLAIM

In a surprise turn of events, approximately five years down the line, the applicant approached this court seeking full compliance with the judgment in LC33/97. His contention is that the respondent wrongly deducted the money in respect of the mortgage bond because the deduction was not authorized by the judgment. He also seeks interest at 27% per annum for the alleged late payment of M60,810.00 and the amount of the mortgage bond from date of judgment to the date of payment.

CONCLUSIONS

Three things need to be said about this claim. First the applicant was aware as of August 1998 when he received payment of M118,987.32 that among the deductions made was one that related to the mortgage bond. He approached the court in LC18/98 and one of the main issues canvassed in

that case was deductions. Whilst he attacked the deduction of the questimate amount of M65,000.00 he said nothing about the deduction of the mortgage bond. Even the court in the judgment of August 1998 referred to the amount respondent paid without prejudice which was less the mortgage bond deduction. No justifiable reason is advanced why the issue was not raised in that case because the applicant and the court were already aware of the deduction. *Prima facie* this is a typical case of a piece-meal approach which courts simply do not countenance. (See Moeketsi Moru .v. The Attorney General & Another C. of A (CIV) No.12 of 2001 (unreported).)

The second issue relates to the length of time that is has taken the applicant to approach the court to challenge the said deduction. The set-off is being challenged seven years after it occurred. Public policy dictates that there should be finality to litigation. Thus if a party takes an unreasonably long time to seek a relief to which he is entitled he is assumed to have waived his right to claim. In Marumo & Ors .v. Dorby (& Ors (2005) ILJ 498 at p.500 A-B the principle that a litigant is obliged to pursue his claim within a reasonable period was described as ***vigilantibus non dormientibus jura subveniunt***. See also National Union of Metalworkers of SA & Others .v. AS Transmissions &Steering (Pty) Ltd (2000) 21 ILJ 327. The same principle was invoked in the case of Cape Town Municipality .v. Abdulla 1974 (4) SA 428 at p.348 where the following was said:

> *"A man whose allegedly legal interests are threatened should be vigilant in protecting them. He is not entitled to expect others particularly not the party threatening the disputed interest to protect him.* ***Vigilantibus non dormientibus jura subveniunt*** *may not be a rule of law, but it seems to be a maxim having some application in this instance."*

See also Mbetshu .v. SA Broadcasting Corporation & Others (2005) 26 ILJ 1598 at pp.1603-1604 F-J and A-E.

The third and final issue to consider is that the respondent's defence is that it effected a set-off after an agreement was reached between itself and the applicant at a meeting held pursuant to the order of the court that the issue be ventilated in another forum. (See paragraphs 7 and 8 of the Answering Affidavit). As would be expected the applicant denies that the set-off of the mortgage bond was done pursuant to any agreement between him and the respondents. The circumstances of this case however, militate against his

version. If indeed no agreement was reached to effect the set-off of the mortgage bond, the applicant would have acted swiftly to challenge it. But the applicant has been quite about the set-off since 1998 when it was allegedly unilaterally effected until 2005 which is approximately seven years. We are inclined to accept the respondent's version as the more probable version in the circumstances. In addition the rule enunciated in Qhobela Molapo's case *supra* where dispute of fact arises in affidavits still applies in this instance. Accordingly this claim falls to be dismissed.

The issue that remains is that of interest on the alleged late payment of the M60,810.00. It is common cause that the payment of that amount was done pursuant to the judgment of this court in LC18/98. If any interest was due on that amount it ought to have been claimed in that proceeding. It appears however that the applicant claims payment of interest from 1st August 2000 to 14th December 2000 when payment was made. The position is that once again the applicant has furnished no reason why he is only approaching court after five years to claim what he alleges belong to him. It is apposite to repeat what was said by Jones J in Mbetshu's case *supra* at p.1604 E. The learned judge who was dealing with a case of late review application stated that "the good administration of justice requires certainty and finality in the judicial process, which is undermined if matters are brought on review after so many years." We have no hesitation in finding that the same principle should apply in the instant matter.

Furthermore, in the normal course of things, as a rule interest may only be claimed ***a tempore mora***. Any further interest may not be claimed otherwise than in terms of an agreement which must be specifically alleged. (See Beck's Theory & Principles of Pleading in Civil Actions; 6th Edition, Butterworths at p.331.) In the case of South Africa interest may be claimed on a judgment debt in terms of prescribed Rate of Interest Act No.55 of 1975. It has not been suggested to us that Lesotho has an equivalent statute and we are not aware of its existence. Accordingly, there is no basis in the law for the applicant to claim interest on a judgment debt as he is seeking to do. In the circumstances this application cannot succeed, it is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 1ST DAY OF JUNE 2006

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **MEMBER**	**I CONCUR**
R. MOTHEPU **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MR. KHAUOE**
FOR RESPONDENT:	**MR. MALEBANYE**