IN THE LABOUR COURT OF LESOTHO

LC/REV/132/06
LAC/REV/103/05

HELD AT MASERU

IN THE MATTER BETWEEN

THAMAHANE RASEKILA **APPLICANT**

AND

TELECOM LESOTHO (PTY) LTD
DIRECTORATE OF DISPUTE **1ST RESPONDENT**
PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date of hearing : 07/02/07.
Recusal – considered and dismissed. Representation of parties before the Labour Court – The court following own previous decision and decision of court of Appeal held section 28(1)(b) to be infringing litigants' right to fair trial as enshrined in the Constitution of Lesotho.
Section 38A(B) of Labour Code (Amendment) Act 2000 – Only the Labour Appeal Court can sit as court of instance in matters referred to DDPR or at any time pending before the Labour Court.
Review – court finding no grounds to disturb award of arbitrator.
Application dismissed – no costs awarded.

1. This case has the unfortunate history of simply not coming to an end. It has been before the Directorate of Disputes Prevention and

Resolution (DDPR) twice. It went to the Labour Appeal Court which sent it back to the DDPR for consideration of applicant's condonation application by a different Arbitrator.

2. The second Arbitrator Mr. Shale dismissed the condonation application because he said the explanation advanced for the delay was not satisfactory. He ruled that he felt it unnecessary to go further and consider other factors such as prospects, importance of the case and the length of the delay, because the explanation was not convincing.

3. The applicant filed a review application to the Labour Appeal Court contending that it was irregular for the arbitrator to dismiss his application on a single factor of explanation for the delay which he (the arbitrator) said was not satisfactory. He contended that the arbitrator should have considered other factors mentioned in Melane .v. Santam Insurance Co. Ltd 1962(4) SA 531 (A) which he said might have weighed in his favour.

4. However, the review application had to be taken over by this court following the enactment of the Labour Code (Amendment) Act No.5 of 2006, which removed the power of review of awards of the DDPR from the Labour Appeal Court and placed them under the jurisdiction of the Labour Court.

5. At the start of the hearing of this matter the applicant raised several preliminary points which are worth mentioning. Firstly, applicant was concerned that this matter is coming before the president who he was of the view had previously handled it and made a ruling that referred applicant to the DDPR.

6. Whilst it is correct that the president once handled a matter involving applicant and the 1st respondent in LC93/01, it is incorrect that it was similar to the present matter. In that case the applicant challenged the fairness of his dismissal by the 1st respondent.

7. The court declined jurisdiction and the matter was started de novo before the DDPR. This is the same matter that has since been tossed between the DDPR and the Labour Appeal Court and now

this court. The issue before all these fora i.e. DDPR, Labour Appeal Court and now this court, is not the merits of his termination or the benefits he claims from the 1st respondent, but whether the DDPR erred in refusing to grant him condonation of late filing of those claims.

8. This court and the President have never previously been seized of an issue such as the one presently before it, which involved the applicant and the 1st respondent. The review matter is completely new and it also raises completely new issues for our determination. Accordingly applicant's concern was ruled to be without merit.

9. Applicant also raised the issue of equality of representation. Since he is representing himself in this application, he raised a concern that the 1st respondent was being represented by an attorney, Mr. Matooane. He relied on the decision of the Labour Appeal Court in Queen Komane and Another .v. City Express Stores (Pty) Ltd LAC/CIV/A/5/2002 (unreported).

10. Relying on section 28(1)(b) of the Labour Code Order 1992, the Labour Appeal Court held that it was procedurally irregular for the Labour Court to have allowed the respondents to be represented by counsel while the appellants were not so represented. The Labour Appeal Court went on to say that that practice amounted to violation of the said section and that the practice must come to an end.

11. It is worth noting that the decision of the Labour Appeal Court is dated 2nd November 2006. This decision fails to take into account the decision of this court in Lesotho Commercial Catering Food and Allied Workers' Union .v. MKM Burial Society and Another LC45/99 (unreported) of 4th July 2000.

12. In that case this court had occasion to consider in depth the effect of section 28(1)(b) on litigants' enjoyment of fair trial. In particular the court was not impressed by the now common abuse of the section in that employees tend to take it upon themselves to dictate when parties should be represented and when they should not. It is worth noting that in this case the applicant had all along been represented by counsel of his choice namely KEM Chambers.

13. All of a sudden, without even bothering to explain, applicant has withdrawn that legal representation and he expects the respondents to do like wise. The attitude of this court was that that is a demonstration of inequality of treatment before the law which cannot have been intended by the legislature.

14. The court went further to consider other jurisprudence on the basis of which it ruled that section 28(1)(b) unduly colours the principle of fair trial as enshrined in the constitution and other international instruments such as the International Convenant On Civil and Political Rights. It is clear to us that the Labour Appeal Court decided as it did in the Queen Komane case completely unaware of the decision referred to above as it does not even make the slightest reference to it.

15. It is common cause that in a more recent decision of April 2002, the Court of Appeal of Lesotho ruled a similar provision (section 20 of Central and Local Courts Proclamation, 62 of 1938) as;

> **"….inconsistent with section 12(8) of the constitution to the extent that it excludes an entitlement to legal representation in any civil proceedings in the central and local courts."**

(see Attorney General .v. Tebelo Mopa C. of A. (CIV) 3 of 2002.). Once again the Queen Komane decision does not seem to be aware of this decision of the Court of Appeal.

16. It is our firm view that in a situation such as the present, the decision of the Court of Appeal should take precedence. This court has for a while now not given effect to the provisions of section 28(1)(b) because of the two decisions referred to above. In the light of the Court of Appeal decision referred to herein we will continue to allow legal representation in proceedings before this court.

17. We come now to the substantive review application. The applicant issued a notice of motion seeking an order in the following terms:

(a) Calling upon the respondents to show cause on a date to be determined by this Honourable Court, why the award in Referral No. A1573 shall not be reviewed corrected and set aside.

(b) Calling upon 2nd respondent to deliver to the Registrar of this court within fourteen (14) days of service of this notice:

(i) The record of proceedings in A1573/02
(ii) Any reasons the 2nd respondent is required to give.

(c) That the above Honourable Court listen to this matter sitting as the court of 1st instance.

18. The court interrogated prayer (c) of the Notice of Motion with the applicant at length. The prayer would appear to have been based on section 38A(3) of the Labour Code (Amendment) Act No.3 of 2000, (the Act) which provides:

> **(3) Notwithstanding the provisions of sub-section (1) the judge of the Labour Appeal Court may direct that any matter before the Labour Court or a matter referred to the Directorate for arbitration in terms of section 227 be heard by the Labour Appeal Court sitting as a court of first instance."**

19. Quite clearly, prayer (c) of the Notice of Motion has no application to this court. Only the Labour Appeal Court could exercise powers of sitting as a court of first instance in respect of the issue of condonation which is the issue referred to the Directorate and currently before the Labour Court. We sought to advise the applicant to consider withdrawing the application before this court and take it to the Labour Appeal Court which could be the right forum to hear applicant's condonation application as a court of first instance. He however did not exercise that option. It follows that prayer (c) of the Notice of Motion is misplaced. It is therefore bound to fall away.

20. The only restricted issue for determination by this court is whether the 2nd respondent was wrong in ruling to dismiss applicant's condonation application on the ground alone that the explanation advanced for the delay was not satisfactory. In arriving at his decision, the learned arbitrator, correctly relied on the passage from Melane's case supra where the learned Holmes JA stated:

> **"There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, <u>the prospects of success are immaterial</u>, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused." (emphasis added).**

21. The emphasized phrase solidly supports the learned arbitrator's approach that if the explanation is not satisfactory, it is unnecessary to consider prospects. This approach was also followed by this court in the case of Posholi Mapeshoane .v. Lesotho Telecommunications Corporation LC16/96 (unreported).

22. The court relying on the case of Mphausa .v. Multi Cleaning Services 1994(10) SALLR 60 held that:

> **"A party approaching the court after the time lapse prescribed by law is obliged first and foremost to explain his delay to the satisfaction of the court. Failing the explanation the court has no jurisdiction to hear the matter. If the explanation has been given then the court may go on to consider the prospects of success because as Holmes J.A. held in the case of Melane .v. Santam Insurance Co. Ltd 1962(4) SA531 (A), notwithstanding everything else that may favour the applicant in a condonation application, there is no point of granting condonation where there are no prospects. We are in agreement with the decision in Mphausa's case that if a defaulting party has not satisfactorily explained his or her delay there is no point of considering whether he has prospects."**

23. We are of the view therefore that there is no basis for this court to disturb the finding of the DDPR. Accordingly, the review application is dismissed and we have made no order as to costs.

THUS DONE AT MASERU THIS 20TH DAY OF FEBRUARY 2007

L. A. LETHOBANE
PRESIDENT

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

M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **IN PERSON**
FOR RESPONDENT: **MR. MATOOANE**