IN THE LABOUR COURT OF LESOTHO **LC/95/06**

HELD AT MASERU

IN THE MATTER BETWEEN

RETSELISITSOE LECHESA **APPLICANT**

AND

LESOTHO NATIONAL DEVELOPMENT CORPORATION **RESPONDENT**

JUDGMENT

Date of hearing : 11/04/07.
Severance pay – Before the enactment of Act No.5 of 2006, severance pay fell under Labour Court jurisdiction in terms of sec. 226(1)(a) – The amendment has rendered claims failure to pay any monies including severance pay a subject of determination by arbitration under sec. 226(2) of the act – Labour Court not having jurisdiction any more to hear claims of severance pay.

1. The applicant herein was first employed by the respondent corporation (the Corporation) on the 7th April 1977. On the 31st March 1996 he was seconded to the Government of Lesotho, an arrangement which meant that, whilst working for the Government his contract with the Corporation still subsisted.

2. On the 31st March 2000, the applicant tendered his resignation from the Corporation. His resignation was accepted. The Corporation duly paid him his terminal benefits but failed to

pay him severance pay. Applicant avers in paragraph 5 of his Originating Application that "despite demand the respondent (the Corporation) refuses, neglects and/or fails to pay the severance payment."

3. On the 6th October 2006, the applicant caused the Originating Application to issue out of the Registry of this court, claiming severance pay from the Corporation in the amount of M75,285-31 plus interest thereon amounting to M63,616-00, calculated at 13% of the principal amount.

4. As it can readily be seen the application was filed some six years and 6 months after applicant's cause of action arose. This led the respondent to raise two points in limine as follows:

   (a) That the matter is prescribed pursuant to section 227(1)(b) of the Labour Code (Amendment) Act 2000 (the Act).
   (b) That the Honourable Court lacks jurisdiction to deal with this matter in the light of the provisions of section 4 of the Labour Code (Amendment) Act No.5 of 2006 (Act No.5 of 2006).

5. The matter was enrolled for hearing on the 11th April 2007. At the start of the hearing the Court directed that Counsel for the parties should limit their submissions to the preliminary issue of jurisdiction. The court went on to say that all other issues would only be entered into in the event of the jurisdictional issue being resolved in favour of the matter proceeding before the Labour Court.

6. The directive was informed by the fact that if the Labour Court were to be found to lack jurisdiction to deal with this matter, it would equally not have jurisdiction to decide whether the claim has been filed within or outside the prescribed time limit. (See Ntjolo Leuta and Another .v. Lesotho Brewing Co. (Pty) Ltd & Another, LAC (CIV) No.3 of 2002 (unreported) at p.7 of the typed judgment).

7. Counsel for the applicant relied on section 226(1)(a) of the Act which provides that:

> *"(1) The Labour Court has the exclusive jurisdiction to resolve the following disputes:*
> *"(a) subject to subsection (2), the application or interpretation of any provision of the Labour Code or any other labour law;"*

Counsel referred to the case of Moeketsi Mokhoabane .v. Standard Bank Lesotho (Pty) Ltd; LC/07/05 (unreported) where this court per Khabo DP decided that severance pay, being an issue provided under the Code (viz sec. 79) falls to be determined by this court under section 226 (1)(a), because severance pay was then not covered under section 226(2) which lists disputes that must be determined by arbitration.

8. The learned counsel submitted then that the applicant's claim for severance pay falls to be decided by this court in accordance with the *dicta* in Mokhoabane case *supra*. It is common cause and counsel for the respondent submitted as much that subsequent to the decision of this court in Mokhoabane case *supra* the tripartite alliance were concerned that strict interpretation of the judgment would result in a situation where the DDPR would be rendered redundant. This situation was likely to result because it was then going to be possible for every issue that was expressly provided for under the Code to be directly taken up before the Labour Court under the guise that it was a matter of law and therefore required to be applied and interpreted by the Labour Court in terms of the provisions of section 226 (1) of the Act.

9. This concern led to the promulgation of Act No.5 of 2006, section 4 of which directly amends section 226(2)(c) so that it now reads as follows:

> *"(2) The following disputes of right shall be resolved by arbitration:-*
> *"(a)*

"(b)

"(c) A dispute concerning the underpayment or <u>non-payment</u> of any monies due under the provisions of this Act."

10. The underlined words have been introduced by the amendment. Accordingly unlike in the past when paragraph (c) of subsection (2) only applied to claims of underpayments of wages, due under the Act, the amendment has enabled workers to also claim for payment of any monies to which they are entitled to lay claim in terms of the Code/Act in terms of section 226(2)(c) as amended. This entails that claims for failure to pay any monies due under the Act must if agreement is not reached at conciliation be resolved by arbitration.

11. Both counsels are in agreement with the rule as espoused in the case of Curtis .v. Johannesburg Municipality 1906TS 303, which was echoed by the Lesotho Court of Appeal in Attorney General & 2 Others .v. S. Kao C of A (CIV) No.26 of 2002 (unreported). The rule is aptly captured in the following often quoted passage from the Curtis case *supra*:

> *"Every law regulating legal procedure must in the absence of express provisions to the contrary, necessarily govern, so far as is applicable, the procedure in every suit which goes to trial after its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate such procedure even though the cause of action arose before the date of the promulgation and even though the suit may have been then pending."*

12. In the Kao case *supra* Ramodibedi J. as he then was concluded that a provision of a statute that determines the forum for determination of a dispute is a procedural provision. (See also Ntjolo Leuta & Another .v. Lesotho Brewing Co. *supra* at p.7 of the typed judgment). I will go a step further and say that even a provision that provides for the method of determination of a dispute, like is a case in *casu* is a procedural provision.

13. It follows from these conclusions that the dispute before us, ought to be decided in terms of the procedure that is now applicable to such disputes namely; arbitration. However, Mr. Letsika for the applicant sought to distinguish the case of the applicant from the *dicta* in Curtis and Kao's cases.

14. He contended, rightly so, that the legislature is presumed to legislate for prospective matters unless retrospectivity can be expressly or impliedly provided for in the enabling statute. As shown before, in procedural provisions retrospectivity is as a matter of statutory interpretation intended to apply in as much as to be fully applicable the new procedure must apply to every suit going to trial after its promulgation.

15. Mr. Letsika went further to refer to the case of Minister of Public Works .v. Haffejee No. 1996 (3) SA 745 (A) at pp 752-753 where the learned Marais J. ruled that a realization has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation. The learned judge of appeal went further to explain himself as follows:

> *"In other words, it does not follow that once an amending statute is characterized as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not."*

16. Mr. Letsika went further to submit that the court should interpret section 4 of Act No.5 of 2006 as a substantive provision. His reason was that the applicant's right to claim his severance pay before the DDPR might be met with a plea of prescription and that infact as far as the DDPR is

concerned this might well be the case whereas it is not the case with this court.

17. This contention implies that the provisions of section 4 of Act No.5 of 2006 impairs the applicant's right to severance pay in as much as the claim might be adjudged prescribed by the DDPR. Quite clearly section 4 does not in any way impair existing rights such as those of the applicant herein. It merely prescribes the new procedure in terms of which those rights must be prosecuted.

18. What Mr. Letsika is expressing is infact no more than a fear that because he will be presenting a claim outside the prescribed period of three years he will be barred. (See section 227(1)(b) of the Act). As the learned Peete J. stated in Ntjolo Leuta's case *supra* at p.14 of the typed judgment it is not right to use the word "prescribe" when we interpret provisions such as those of section 227(1)(b) because the legislature has not used it in the section in question.

19. The learned judge goes further to state that:

> *"prescription" is a legal word with grave legal consequences in that it is of "extinctive" type, it effectively extinguishes a right which can henceforth no longer be enforced or resuscitated in court. Section 70 (in casu section 227(1)(b)) did not have the effect of extinguishing the right to claim for unfair dismissal because even after expiry of six months the right could still be enforced if the court condoned the delay."*

20. The same applies in *hoc casu*. Section 227(2) provides that "notwithstanding sub-section(1), the Director may, on application condone a late referral on good cause shown." Clearly therefore all the applicant need do is apply to the Director of the DDPR for condonation of his late referral of his claim. The claim has not been extinguished. It may be late but its not prescribed: it is capable of resuscitation before the DDPR upon application, showing of good cause

and a discretion to condone the late referral being exercised in their favour.

21. The conclusion to which we come is that applicant is pre-existing right to claim his severance pay has not been impaired by either section 227(1)(b) of the Act or section 4 of Act No.5 of 2006. The retrospective application of the provisions of section 4 must not therefore be interfered with. In other words the applicant must prosecute his claim for severance pay in terms of the new procedure namely that the claim must be taken for arbitration before the DDPR. There is no order as to costs.

THUS DONE AT MASERU THIS 4TH DAY OF MAY 2007.

L. A. LETHOBANE
PRESIDENT

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

D. TWALA **I CONCUR**
MEMBER

FOR APPLICANT: **ADVOCATE LETSIKA**
FOR RESPONDENT: **ADVOCATE MOFOKA**