

IN THE LABOUR COURT OF LESOTHO

LC/20/08

HELD AT MASERU

IN THE MATTER BETWEEN

MOHAU RASEPHALI

APPLICANT

AND

CGM (PTY) LTD

RESPONDENT

JUDGMENT

Date : 30/07/09

Contempt of court proceedings - Applicant instituted contempt proceedings in the Labour Court after failing to prove that employer is refusing to honour reinstatement order at the DDPR - Arbitrator having dismissed applicant claim for payment of wages because applicant failed to present himself to work, the employer cannot be found guilty of contempt - plea that the issue of non-compliance with DDPR award is res judicata was upheld - Delay - Applicant approaching court to enforce reinstatement order after lapse of two years - The delay is unreasonable - Application dismissed.

1. At the start of the hearing I reckoned that the respondent is represented by a legal representative while the applicant is appearing in person. I brought to the attention of Mr. Macheli for the respondent the provisions of section 28 of the Labour Code Order 1992, and the strict interpretation of that section by the Labour Appeal Court in *Lenka Mapiloko .v. President of the Labour Court & Another* LAC/REV/05/07, where the Labour Appeal Court held that it was improper to allow legal representatives to represent parties where other parties are not represented.

2. Mr. Macheli did not dispute that there is a Labour Appeal Court decision which directs this court to continue to be bound by section 28 of the Code and to disallow legal representation where one of the parties is not legally represented. He submitted that he had asked management of the respondent to be present in order to step in and prosecute the company's case if he happened to be disallowed to represent it. They were however not present for reasons they have not disclosed to him. Accordingly, the court proceeded with the case without respondent's representation, but allowed Mr. Macheli to sit through the proceedings and note the proceedings on behalf of the respondent as a friend of the court.

3. This is an application for contempt of court and for an order of committal of the respondent and payment of arrears of salary from 1st September 2006, with interest at 25% per annum. Applicant was admittedly employed by the respondent on the 2nd January 2006. Two months later he was dismissed on the 1st March 2006.

4. Applicant referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and Resolution. The referral was made on the 27th July 2006, almost five months after the dismissal. The arbitration proceeded in default of appearance by the respondent on the 14th August 2006. On the 31st August the arbitrator issued an award in which she ordered that applicant be reinstated with effect from 15th December 2006. She further ordered the respondent to pay M3,861-00 to applicant as lost wages for the 6 months that he had been out of employment.

5. Applicant avers that he went to the respondent on the 14th September 2006, to enquire whether he could start work on the 15th September. He averred further that he met with the Managing Director Mr. Adriaan Chang who told him that he should not come to work because they were considering legal steps that they could take in regard to the award.

6. On the 28th September applicant was served with a notice of application for rescission, which was scheduled for 7th November 2006. On the 6th December the arbitrator issued an award dismissing the rescission. On the 7th December 2006 applicant approached this court for enforcement of the monetary aspect of the arbitrator's award. On the 7th February 2007 the respondent paid the amount ordered by the arbitrator as lost wages. Applicant collected his pay cheque on the 12th February 2007.
7. Thereafter all went silent. On the 10th September 2008 applicant issued an originating application seeking an order of committal of the respondent as herein before mentioned. The respondent raised two points *in limine*. Firstly it said the matter is *res judicata* in as much as it was disposed of by Arbitrator Monoko in referral No. A0275 /07 where applicant was seeking unpaid salary from date he would have been reinstated. The second was that it has taken applicant an unreasonably long time to bring this matter to court.
8. The defence of *res judicata* is based on facts that are common to both sides. According to Annexure CGM1 applicant referred a dispute of unpaid salary to the DDPR. He averred in that referral that the respondent had failed to reinstate him in accordance with the DDPR award. He contended that despite the non compliance with the order to reinstate him, he was nonetheless still an employee and therefore entitled to be paid his monthly salary from the 15th September 2006. The dispute was arbitrated on the 4th May 2007.
9. Respondent's version was that after the dismissal of their rescission application, the applicant never reported to start work in terms of the reinstatement order of the DDPR. The respondent therefore refuted that it refused to reinstate the applicant and that it owed him any arrears of salary.
10. Arbitrator Monoko's award was that respondent does not owe applicant any salary. He stated in Paragraph 6 of the Award that:

“It was definitely incumbent upon the applicant to have gone to the respondent’s workplace to resume his duties immediately after the dismissal of the respondent’s application for rescission of award No. A0532/06. He ought to have done this since the decision and order that he be reinstated in his job became immediately effective when the application for rescission was dismissed. It was absolutely unnecessary for the respondent to recall the applicant to resume his duties following the dismissal of the application for rescission, as was applicant’s argument.”

11. In apparent reply to the foregoing remarks of arbitrator Monoko, applicant averred in paragraph 5.7 of his supporting affidavit in this court that *“on the 7th day of December 2006, I went to respondent’s premises whereby I met the Personnel Manager by the name of Kolobe and urged him to implement the order of award No. A0532/06 but he refused on the basis that they still intent to apply for review.”* Applicant’s averrements is in direct conflict with what he said before arbitrator Monoko that he expected the respondent to call him to work. Before this court he changes and says he reported but was refused to resume work. This cannot be accepted. Applicant cannot tell this court a different story from that he told the DDPR on the same facts. He is certainly not being truthful.
12. In response to the respondent’s argument that the matter is *res judicata*, applicant averred that the DDPR had no jurisdiction to enforce its awards and that it was not the dispute before it that the respondent refused to abide with the order in A0532/06. The dispute before the DDPR was clearly that the employer has failed to comply with the order to reinstate applicant and in the meantime applicant was asking that the employer be ordered to comply with its obligation to pay him his wages.
13. Whichever way it is looked at applicant’s dispute at the DDPR was clearly that the respondent has failed to abide by the award. Applicant himself brought the issue of non-compliance under the jurisdiction of the DDPR by claiming an order for payment of wages due, as a result of the reinstatement order

- which he alleged respondent was not honouring. The arbitrator found in clear and unambiguous terms that he was not entitled to any wages because he failed present himself for work when he was supposed to do so. The arbitrator's ruling clearly absolves the respondent of any wrong doing in regard to the implementation of the reinstatement order. Instead the arbitrator puts blame at the door step of the applicant himself.
14. The arbitrator cannot be faulted for deciding as he did because he had heard an uncontroverted evidence of Maaoa Pupese that after the dismissal of the rescission application on the 6th December 2006, the applicant failed to present himself for the purpose of resuming work. In a veiled attempt to plug that hole applicant avers for the first time before this court that he sought to present himself on the 7th December 2006. This is clear fabrication which is however, unhelpful to the applicant because this court cannot find respondent guilty of contempt when another court has already pronounced, albeit in a different context that the respondent is not responsible for non-compliance with the reinstatement order. It follows that respondent's contention that the issue of non-compliance with the reinstatement order is *res judicata* must succeed and it is accordingly upheld.
 15. The above finding is enough to dispose of this matter. However, the respondent raised yet another important point of undue delay by the applicant to bring this action to court. The order to reinstate the applicant was made on the 31st August 2006. Applicant only sought to enforce that order through the present proceedings on the 10th September 2008. This was some two years after the order was given.
 16. Even assuming the rescission application contributed to this delay, but the time lapse from 6th December 2006, when the rescission was refused, to the 10th September 2008, is equally unreasonably long. As the Court of Appeal held in *Lesotho Bank .v. Maitse Moloi C. of A. (CIV) 31/95* (unreported) a party to an employment relationship whose contract has been unlawfully repudiated must decide within a reasonable time how

he intends to react. The court went on to state per Kotze J.A that:

“what he cannot do, is do nothing for an unreasonable time and then sue for specific performance in a matter of this kind.”

17. Having approached the DDPR timeously and ordered to be reinstated, applicant was obliged to pursue and obtain his reinstatement within a reasonable time. He cannot sit idle and after two years approach court seeking payment of salary for the services he never tendered. This is a case in which the principle of *vigilantibus non dormientibus iura subveniunt* ought to apply. In terms of this principle a litigant is obliged to pursue his claim within a reasonable time. (see *Marumo & Others .v. Dorbyl Ltd & Others* (2005) 26 ILJ 498 at 500 and *Benedict Rangoanana .v. Standard Bank Lesotho Ltd* LC/41/05).
18. Accordingly, we agree with respondent’s counsel that the delay in enforcing the reinstatement order is unreasonable. What makes matters worse is that applicant has not even sought to explain his inordinate delay. For this reason again, this contempt application cannot succeed. The application is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 27th DAY OF AUGUST 2009

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

IN PERSON

**No appearance. Mr. Macheli sat to note
on behalf of respondent as friend of the
Court.**