

IN THE LABOUR COURT OF LESOTHO

LC/15/03

LC/23/03

HELD AT MASERU

IN THE MATTER BETWEEN

TSOTANG NTJEBE & 30 OTHERS  
TELANG LEEMISA

APPLICANTS  
APPLICANT

AND

LESOTHO HIGHLANDS  
DEVELOPMENT AUTHORITY

RESPONDENT

## Judgment

*Dates : 07/10/09, 08/10/09*

*Matter remitted to the Labour Court by Labour Appeal Court for computation of overtime and quantification of compensation - Section 227(1)(b) of Act No.3 of 2000 read with section 5(c)(d) of Prescription Act 1861 require claim of overtime to be made within 3 years when the cause of action accrued - Compensation - Applicants failed to take reasonable steps to mitigate their losses - The compensation due lowered by 3 months with exception of those who have died and 3 who were proved to be working - The 3 who are working are to submit their earnings for set-off as mitigation - Applicants to get six months salary as compensation.*

1. These two applications have a very long history. All the applicants were employed by the respondent as security guards. They were retrenched on the 31<sup>st</sup> March 2003. The 31 applicants filed an Originating Application claiming overtime as

- well as unfair retrenchment on the 13<sup>th</sup> May 2003. The applicant in LC23/03 filed his Originating Application on the 17<sup>th</sup> June 2003. He was claiming substantially the same relief as his colleagues who filed their claim before him.
2. The two applications were for convenience heard together. On the 15<sup>th</sup> October 2004, this court handed down a judgment dismissing the applicants claim. They appealed against that decision. On the 6<sup>th</sup> February 2009, the Labour Appeal Court handed down a judgment upholding applicants appeal in respect of claim of overtime and compensation for procedurally unfair retrenchment; due to inadequate notice.
  3. The Labour Appeal Court remitted the issue of computation of the amount of overtime due to each applicant as well as the quantification of the compensation payable to each applicant to this court. Parties filed affidavits as directed by the Labour Appeal Court and the applications were set down for hearing on the 7<sup>th</sup> and 8<sup>th</sup> October 2009.
  4. At the start of the hearing certain facts were accepted as common cause. This was that two of the applicants in LC15/03 have since passed on. These are: 5<sup>th</sup> applicant, Leloko Matsoso and 23<sup>rd</sup> applicant Teboho Matlamela. It was agreed that whatever is due to them in terms of this judgment, be dealt with terms of section 78 of the Code which provides:
 

*“After the death of an employee, the employer shall, as soon as practicable, pay or deliver to the Labour Commissioner, for distribution in accordance with law all wages and other remuneration due to and all property belonging to the deceased employee which is in the employer’s possession.”*
  5. Affidavits were duly filed as directed by the Labour Appeal Court. Applicants detailed computation for overtime, from their respective dates of engagement to the date of their termination i.e. 31<sup>st</sup> March 2003. The overtime was calculated on the basis that the applicants worked a fourty day week divided into eight days a week.

7. Counsel for the respondent raised a point in limine that in terms of section 227 of the Labour Code (Amendment) Act 2000 (the Act) applicants can only claim up to 3 years of overtime and that anything beyond 3 years is capable of being claimed if it is accompanied by a condonation application. The representative of the applicants argued on the other hand that the 3 year limit only applies to claims that are filed with the DDPR. They argued that this court is not bound by the 3 year limit prescribed by section 227(1)(b).
8. A ruling was made that even assuming that section 227(1)(b) is meant to apply only to claims that are presented to the DDPR, it is a trite principle of law that a litigant must present his claim to court within a reasonable time (see *Mohlomi Seutloali .v. DPP C. of A (CR1) 14/06*). Any claim presented to court after a lapse of three years is certainly inordinately delayed and it requires to be accompanied by a condonation application.
9. We are fortified in this view by section 5(c) and (d) of the Prescription Act No.6 of 1861 which provides that no suit or action for the salary or wages of any merchant's clerk or servant shall be capable of being brought at any time after the expiration of three years from the time when the cause of action in any such case first accrued. The Prescription Act is still law in this Kingdom as it has never been repealed. It is binding on this court. Section 227(1)(b) of the Act must be read together with the Prescription Act and it will be found that its provisions apply to this court as well. Accordingly, the point in limine was upheld and it was found that applicants' claim for overtime is limited to three years from April 2000 to 31<sup>st</sup> March 2003.
10. In paragraph 4.16 of his supporting affidavit, the Finance Manager of the respondent Mr. Marthinus Christoffel Botha has deposed that *"four applicants, to wit, Tumisang, Ranthamane, Tso tang Ntjebe, Leaba Maphalla and Teko Molotsi were supervisors who did not work shifts like the security guards. They did not work overtime and are not entitled to overtime payments."* This deposition relates to a factual matter which should have been dealt with on appeal. It is not a point of law

like the issue of prescription, which may be raised at any stage of the proceedings. In terms of the judgment of the Labour Appeal Court all the applicants' appeal on overtime was upheld. This court cannot therefore interfere and seek to substitute its judgment that certain of the applicants do not qualify to be paid overtime.

11. A further point raised by the respondent is that applicants' overtime should be worked on the basis that they worked a 12 day week and that to get their hourly rate the monthly wage should be divided by 260 hours which they worked each month. Respondent relied on Legal Notice No.108 of 1995 and its Personnel Regulations for this proposition. Legal Notice No.108 of 1995 is The Labour Code (Exemption) Regulations 1995. It provides as follows:

Exemption

*"2. Section 118(1) of the Labour Code Order 1992 shall not apply to a watchman.*

Hours of Work and Overtime

*"3. (1) The normal hours of work for a watchman shall not be more than 60 hours per week divided into 12 hours per day for 5 days."*

Clause 2.9.2 of the Personnel Regulations which came into force in February 1999 provides:

*"Normal hours of work for an employee in a position of watchman shall not be more than sixty (60) hours per week divided into twelve (12) per day for five days."*

12. Applicants' response was that their letters of employment said they would work eight hours a day. They accordingly asked the court to disregard the exemption notice as well as the personnel regulations. This court was not shown the contracts of employment of the various applicants. Neither were they annexed to their originating application. Assuming however, that they at one point were employed on an eight hour working shift that was clearly overridden by the exemption notice which categorically stated that the hours of work provided under

- section 118 of the Code shall not apply to a night watchman or a security guard as applicants were apparently called. The Personnel Regulations which form part of the terms of employment of the applicants specifically varied their terms as regards their hours of work. It follows therefore that applicants' hours of work are regulated by Legal Notice No.108 of 1995.
13. Mr. Sekonyela on behalf of the representatives of the applicants submitted that subject to the ruling of the court on the points they had raised, they had no problem with the figures of overtime as worked by Mr. Botha. He further submitted and this was confirmed by Mr. Daffue for the respondent that it was agreed that the overtime will be calculated on basic salary plus allowance, commonly referred to as CTC.
  14. Indeed Mr. Botha deposed that he had derived the information for the computation of overtime from the records of the respondent. He had attached to his supporting affidavit the pay slips of each of the applicants showing the basic pay and allowances. A list showing overtime due to each applicant based on basic salary and allowances was published in annexure MB4A at page 773(1) of the paginated record. Following the ruling on the points raised it is ordered that each of the applicants shall be paid overtime for 3 years in the amount reflected in column 2 of annexure MB4A which is annexed to this judgment.
  15. The applicants have further claimed payment of leave and payment for rest days. Leave has never formed part of applicants' claim. Even if it did, it is not one of the areas on which they were successful on appeal. Similarly, nothing was said about rest days. If anything those days have been subsumed under the hours of overtime as no specific claim was made for rest days either before this court or the Labour Appeal Court. In any event applicants' claim under this head is essentially speculative as they have not asked for access to the records to determine definitely which days would represent their days of rest. Accordingly, there is nothing to award to applicants under these heads.

16. According to the judgment of the Labour Appeal Court, applicants were unfairly retrenched in as much as the notice they were given was not one calendar month which the respondent's Staff Separation Policy entitles them to. Furthermore, the applicants had initially been notified that they would be retrenched in August 2002. That date was later cancelled and the applicants were to continue in employment until further notice. When they were notified that the retrenchment would now take place at the end of March, no fresh consultation had preceded that notification. The Labour Appeal Court found their retrenchment unfair on this score as well.
17. On the substantive side the Labour Appeal Court did not find any impropriety just as this court had found. This was to be expected because there was no dispute that the construction of the dams which had given birth to the job the applicants were employed for had come to an end. This further explains why the learned judge of appeal did not order reinstatement because there was no work to be reinstated to.
18. Despite these realities the applicants are seeking to be compensated with payment of salary from date of termination to the date of the judgment of the Labour Appeal Court with annual inflation adjustment. If this was to be so the Labour Appeal Court would have found their retrenchment both substantively and procedurally unfair. In such a situation, reinstatement is usually the appropriate remedy, unless in the circumstances of the case it is not practicable to order reinstatement. If it is impracticable to reinstate, the court would normally award substantial compensation.
19. In casu the applicants need to be compensated for the unfairness of the retrenchment as a result of failure of the respondent to follow certain procedures in effecting the retrenchment. Compensation from date of dismissal to the date of judgment cannot therefore be an appropriate remedy. In realization of this fact Mr. Sekonyela on behalf of the representatives of the applicants wisely did not pursue the line of argument raised in the affidavits any longer. He submitted

that they now leave the question of the quantum of compensation to be paid at the discretion of the court. The parties agreed that the compensation awarded will be calculated on basic salary plus allowances.

20. The court is empowered to fix compensation where a dismissal has been found unfair and reinstatement is not desired by the employee, or if desired is impracticable, or if reinstatement is not suitable remedy in the circumstances of the case. Section 73(2) provides that:

*“... The amount of compensation awarded by the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his losses.”*

There is no doubt that the respondent has breached the contract in as much as it gave applicants a notice of less than a calendar month contrary to clause 4.1 of the Personnel Regulations.

21. As regards mitigation all the applicants said they had not been able to get employment either because they were sick or because they looked for work without success. Mr. Daffue for the respondent attacked applicants' reasons for failure to mitigate as inadequate. Not a single of those who claimed ill health as a reason submitted any form of proof of their alleged ill-health. In the same manner, none of those who said they could not find work submitted any proof of either a job application or a letter of regret. We agree that their reasons for failing to mitigate are not convincing. Accordingly, we find that the applicants with the exception of 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 23<sup>rd</sup> applicants have failed to take reasonable steps to mitigate their losses.

22. We are unable to find fault with the two deceased applicants as they are incapacitated from showing if ever they took steps to mitigate their losses due to their demise. Infact the 23<sup>rd</sup> applicant died the same year that he was retrenched. He died on 30<sup>th</sup> November 2003. We do not have exact date of the passing on of the 5<sup>th</sup> applicant.
23. As regards the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> applicants, the respondent filed affidavits to the effect that they are employed. Mr. Molotsi is said to be working at the Department of Traffic. His personal friend Mr. Albert Tsoang Makara filed a confirmation affidavit in which he averred that he has *“personal knowledge of the fact that second applicant, Tefo Molotsi is employed by the Traffic Department in the Ministry of Home Affairs.”* He stated that he is not certain when he joined the Traffic Department.
24. The Financial Director of G4 Security Mr. Louis Johannes Botha filed a confirmatory affidavit to the effect that 3<sup>rd</sup> respondent *“Leaba Maphalla was employed by (G4 Security) on 16 July 2003 and he is presently still so employed.”* The Principal Security Officer of the respondent Mr. Henry Ramaloti Fobo deposed under oath that he *“Personally watched the Lesotho Television recently and confirms that Tumisang Ranthamane the 6<sup>th</sup> applicant appeared on television as one of the Local Government Councillors for the Mohale’s Hoek District.”*
25. None of the three applicants filed affidavits denying that they are employed as alleged. It follows that they admit that they are indeed employed. The three applicants are bound to disclose the income they earned from that employment so that it can be applied towards mitigation of their losses. Payment if any will become due, will be effected once they have disclosed their earnings from their respective employment and they have been set off as mitigation of losses according to law.
26. The court has considered the compensation that should be awarded the applicants for the procedural unfairness they suffered during their retrenchment. In all the circumstances of this case, the court has found payment of nine months salary as a fair and equitable compensation to each one of the applicants.



As already said payment of the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> applicants will be suspended until they have disclosed their respective earnings to be set off from the amount payable in terms of this order. The 5<sup>th</sup> and 23<sup>rd</sup> applicants who have passed on will be paid the nine months salary without any reduction. The nine months compensation to the remainder of the applicants will be reduced by three months to cater for failure on their part to take reasonable steps to mitigate their losses in accordance with the law. They will thus each be paid six months salary as compensation.

There is no order as to costs.

THUS DONE AT MASERU THIS 16TH DAY OF NOVEMBER, 2009.

**L. A. LETHOBANE**  
**PRESIDENT**

**L. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**M. MAKHETHA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANTS:**

**MR. SEKONYELA, MR RAFONEKE,  
MS. MAHAO, MS.  
KHESUOE  
MR. DAFFUE**

**FOR RESPONDENTS:**