

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/30/2013**

**IN THE MATTER BETWEEN**

**KENEUOE MOLAPO  
LIKOPO LEPHOTO  
MPHAPHATHI QHOBELA  
SOPHIE GOOLAM  
NTSOAKI TLALI  
'MALESEKELE MAKHA  
MPOLOKENG MATANYANE  
'MAMOROBHI MOTHOBHI  
NTHABELENG RAMPHALILE  
NTEBALENG NQOSA  
SECHABA LETEBELE**

**1<sup>st</sup> APPLICANT  
2<sup>nd</sup> APPLICANT  
3<sup>rd</sup> APPLICANT  
4<sup>th</sup> APPLICANT  
5<sup>th</sup> APPLICANT  
6<sup>th</sup> APPLICANT  
7<sup>th</sup> APPLICANT  
8<sup>th</sup> APPLICANT  
9<sup>th</sup> APPLICANT  
10<sup>th</sup> APPLICANT  
11<sup>th</sup> APPLICANT**

**AND**

**WATER AND SEWERAGE  
COMPANY (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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*Application for a declaratory order. Respondent raising two points of law. First that Applicant's claims have prescribed and that Applicants have not established a cause of action. Court only finding merit in the second point of law and dismissing the Applicant's claims for want of jurisdiction. No order as to costs being made.*

**BACKGROUND OF THE DISPUTE**

1. This is a claim for a declaratory order in the following terms:
  - “(a) Declaration that the unequal treatment of the applicants in this matter is unfair and unlawful.*
  - “(b) Directing the respondent in this matter to pay the applicants at D upper in accordance with the policy and practice with*

*effect from September 2009 being the time when the applicants sought to rectify disparities.*

*(c) Directing respondents to pay costs of this application.*

*(d) Further and alternative relief.”*

2. The brief background of the matter is that Applicants are employees of Respondent, at least as at the time of the referral of this matter. During their employ, Respondent drew a policy in terms of which all employee-diploma holders were to be paid at Grade D upper. That notwithstanding, Applicants were not paid at Grade D upper, while other diploma holders were paid at that grade.
3. As a result, Applicants referred a claim for discrimination with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly conciliated upon but was unfortunately not resolved. The learned Arbitrator then issued a report of non-resolution and referred the matter for adjudication before this Court. Armed with the report of non-resolution, Applicants then initiated the current proceedings, wherein they no longer claimed discrimination but unequal treatment.
4. In reaction to the claims, Respondent answered by raising two points of law. Firstly, Respondent argued that the Applicants' claims had expired as they accrued in 2009, whereas the claims were only lodged on 11<sup>th</sup> October 2012. Secondly that Applicants have no cause of action as their pleadings do not make out a case for discrimination, at least as contemplated by sections 5 and 196 of the *Labour Code Order 24 of 1992*. Both parties made representations and having heard them, Our judgment therefore follows.

### **SUBMISSIONS AND ANALYSIS**

5. Respondent argued that the cause of action arose in August 2009 and that by the time that the referral was lodged the three years' time limit prescribed, under section 227 of the *Labour Code Amendment Act 3 of 2000*, had lapsed. It was argued that as a result the claim had prescribed and that without an application for condonation, this Court has no jurisdiction over Applicants claims. It was prayed that they be dismissed.

6. On the second point of law, it was argued that Applicants have referred a claim for discrimination. Further that both sections 5 and 196 of the *Labour Code Order (supra)*, list grounds upon which a claim for discrimination can be based. It was submitted that section 253 specifically provides for discrimination in relation to union membership, while section 5 is broader in terms of scope. It was argued that the grounds that Applicants rely on are not the grounds listed under either section 5 or section 196 of the *Labour Code Order (supra)*. It was claimed therefore that Applicants have not made a case for discrimination and therefore have no cause of action. It was prayed that the claims be dismissed.
7. The Court was referred to the case of *Sefatsa Mokone v G45 Security Services LC/31/2012*, in support of the above arguments. It was submitted that in this case, Applicant had claimed discrimination but that his complaint was not based on the grounds listed under either section 5(1) and section 196 of the *Labour code Order (supra)*. It was added that the Court dismissed the claim as having not established the cause of action. The Court was further referred to the case of *Molaoli v Lesotho Highlands Development Authority LAC/A/06/2005*, where a similar decision was reached.
8. It was argued that on the bases of the above two authorities, the Applicants claims be dismissed with costs. In support of the claim for costs, it was argued that Applicants have caused Respondent to incur costs due to their failure to observe due diligence and even continued to fail to do so despite objections being raised against their claims.
9. In answer, Applicant submitted that the issue of condonation is irrelevant for purposes of the claim before this Court. It was argued that with the repeal of section 70 of the *Labour code Order (supra)*, there is no time limit for the referral of a claim to this Court. It was added that section 227, which Respondent seeks to rely on, does not bind this Court as it relates to claims before the DDPR, whereas the current claim is before the Labour Court.

10. It was further argued that this claim is based on section 226(1) (a) of the *Labour Code (Amendment) Act (supra)*, in that Applicants want the Court to interpret the action of Respondent as amounting to unequal treatment. It was added that whereas, the authority of *Mantsane Mohlobo & Others v Lesotho Highlands Development Authority (LAC/CIV/A/02/2010)*, directs that all matters must first be conciliated upon, the Court of Appeal in *Lesotho Highlands Development Authority v Tsotang Ntjebe & Others C of A (CIV) o7/12*, said that conciliation is not mandatory for claims under section 226(1) of the *Labour Code (Amendment) Act (supra)*.
11. It was furthermore argued that with the repeal of section 70 of the *Labour Code Order (supra)* and in the light of the authority in *Lesotho Highlands Development Authority v Tsotang Ntjebe and Others (supra)*, there is no time limit within which claims before this Court may be referred. It was concluded that by referring the matter to the DDPR, it was a matter of courtesy but that Applicants were not bound to do so.
12. On the second point of law, Applicants submitted that they are not claiming discrimination but unequal treatment. The Court was referred to paragraph 22 of the Originating application, where the following is recorded:  
“22. *Nature of relief sought under the circumstances the applicants seek relief as follows:*  
*(a) Declaration that the unequal treatment of the applicants in this matter is unfair and unlawful.*”
13. We concede that initially the position of the law was that all matters that are competent for adjudication by this Court must be conciliated by the DDPR before being adjudicated upon. However that position has since been changed by the Court of Appeal as Applicant has rightly put. This in essence means that parties are at liberty to elect to either first refer their disputes to the DDPR for conciliation, or to refer them directly to this Court for adjudication. The election notwithstanding parties are still bound by the rules of procedure applicable in whatever mode, method or election that they make.

14. *In casu*, Applicants referred the matter to the DDPR for conciliation. They were bound in law to follow the rules of procedure in initiating their claim. One such rule is to apply for condonation where a referral is made out of time. That application must be made before the forum where the initial referral is made. *In casu*, the proper forum is the DDPR. What We are essentially driving at is that it is improper for Respondent to claim lack of jurisdiction on the basis of section 227 of the *Labour Code (Amendment) Act (supra)*, at this stage. This objection should have been raised with the learned Arbitrator at the DDPR. If We are to consider Respondent's argument, it would be tantamount to Us reviewing the conduct of the learned Arbitrator through these proceedings, which would be improper.

15. We therefore agree with Respondent that section 227 of the *Labour Code (Amendment) Act (supra)*, specifically sub-section (1) thereof, does not bind this Court, at this stage of the proceedings, but the DDPR. In terms of that section,  
“(1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate –  
(a) If the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal;  
(b) In respect of all other disputes, within 3 years of the dispute arising.”

16. About there being cause of action, We agree with Respondent that Applicants have failed to establish a case for discrimination, at least in terms of section 5(1) or section 196 of the *Labour Code Order (supra)*. We say this because none of the grounds alleged fall within those listed under these said sections. In terms of section 5(1), discrimination is based on “...race, colour, sex, mental status, religion, political opinion, national extraction or social origin.....”

17. Under section 196, discrimination is based on union membership. That section is couched in the following,  
“(1) Any person who discriminates, as respects the employment or conditions of employment which he or she offers to another person, because that person is a member, officer or trustee of a trade union shall commit an unfair labour practice.

*(2) Any person who seeks, by intimidation, threats, dismissal, imposition of a penalty, giving or offering to give a wage increase, or any other means, to induce an employee to refrain from becoming or to refrain from continuing to be a member, officer or trustee of a trade union shall commit an unfair labour practice.*

*(3) Any person who communicates to another details of the names of a worker as being unsuitable for employment on grounds of the latter's trade union membership or activities shall commit an unfair labour practice.”*

18. In an effort to avert this difficulty Applicants have sought to argue that they have not referred a claim for discrimination but that of unequal treatment in terms of section 226(1) of the *Labour Code (Amendment) Act (supra)*. In terms of that section, “(1) *The Labour Court has the exclusive jurisdiction to resolve the following disputes:*

*(a) subject to subsection (2) the application or interpretation of any provisions of the Labour Code or any other law.*

Applicants argument cannot sustain and We will demonstrate how this is so.

19. Firstly, Applicants are not asking for interpretation of any provision of the Labour Code or any other law. According to them, they claim to be seeking from the Court, an interpretation that the conduct of the Respondent amounts to unequal treatment. Clearly, this is not one of the grounds in respect of which section 226(1)(a) anticipates. Secondly, at paragraph 22 of the Applicants Originating Application, they seek a declaratory order that their alleged unequal treatment be declared as unlawful and unfair. This is totally different from what Applicants are now claiming to be their relief. In fact it is not even the effect of the relief that they seek.

20. Lastly, applicants are before Us because they have been referred by the Director under section 227(5) of the *Labour Code (Amendment) Act (supra)*. This is clear from annexure KM4 to their Originating application. We have stated earlier that even though it is no longer mandatory to refer a dispute to the DDP for conciliation before adjudication, once an election

to do so is made a party is bound to follow all procedures to the letter. What are in essence saying is that Applicants having referred a claim for unfair discrimination, and having been referred to this Court for adjudication of the matter, and having initiated the current proceedings pursuant to that referral, they are bound to that claim. Any attempt to alter the claims after referral to this court pursuant to a certificate of non-resolution deprives Us of jurisdiction over such a matter.

### **COSTS**

21. Both parties have asked for costs. Respondent claims that Applicants were warned that their claims had prescribed and that they should apply for condonation. Having failed to do, We should make an award of costs against them. Clearly, Respondent's plea for costs is premised on an anticipation that its *point in limine* on the matter being out of time will sustain. Having found no merit in that point the Respondent basis for costs falls off.
22. Applicants have asked for costs on the premise that the *point in limine* that they have not established a case for discrimination is vexation, as they are not complaining about discrimination but unequal treatment. It was added that over and above that costs should follow suit particularly because this Court is not limited, *in casu* from awarding costs. It was argued that the limitation is only in relation to unfair dismissal claims.
23. In view of Our finding that Applicants have not make a case for discrimination, the first premise for an order of costs fall off. Secondly, We have stated before and continue to state that an award of cost in this Court in only made in extreme circumstances of vexations and/or frivolous conduct. This is Court of equity and fairness which is interested mainly in the dispersal of substantive justice. We do not award costs on account of failure or success in defending or prosecuting a case. The key determination are vexation and frivolous conduct. Consequently, a prayer for costs under these circumstances fails.

**AWARD**

We therefore make an award as follows:

- 1) That Applicant's claim is dismissed on account of failure to establish their case for discrimination.
- 2) No order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 11<sup>th</sup> DAY OF FEBRUARY, 2015.**

**T C RAMOSEME  
DEPUTY PRESIDENT (a.i.)  
LABOUR COURT OF LESOTHO**

**MR. MATELA**

**I CONCUR**

**MRS. RAMASHAMOLE**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENT:**

**ADV. SEKONYELA  
ADV. RAFONEKE**