CIV/T/163/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

RETŠELISITSOE MOLEKO **Plaintiff**

and

'MANTŠASE HIGH SCHOOL **Defendant**

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 3rd day of September 2001

The matter came before me on application for default judgment. The Defendant had been served with summons on the 8th May 2001. There had since been no response to the summons whatsoever. The matter was accordingly set down for the motion Court on the 6th August 2001.

On the 6th August 2001 the Plaintiff having given evidence as PW 1 I ordered that the matter be postponed to the 20th August 2001 to enable Mr. Nteso to address me on the viability of some of the Plaintiff's claims. That he did and supported his arguments with heads of argument which went so long way to assist the Court.

The Plaintiff had claimed for the following orders:

1. M10,000.00 for unlawful suspension
2. M45,000.00 for malicious prosecution
3. M211,513.00 for loss of earnings
4. M2,000.00 for loss of capital
5. M4,000.00 for loss of furniture
6. Costs of suit
7. Further and/or alternative relief.

The Plaintiff who had been a teacher at the Defendant's school since 1996. She was suspended from teaching at that school from August 1998 to February 2000 she has in that month since returned to work. This was after a decision of the Adjudicator of the Teaching Service of the 7th December 1998.

Although the Plaintiff says under oath that no reasons were given this was contrary to the brief particulars given in her declaration. Although (brief as it was) it was not consistent with the larger story contained in the Adjudicator's decision in "the judgment of the management of Mantšase High School v Retšelisitsoe Moleko." It was clear that there were certain complaints or charges of misconduct

against the Plaintiff. It says "three counts of misconduct" I may say that there was also one witness called by the school. To sum it all the adjudicator says the management "lamentably failed" to prove its case against the defaulter. And added: "I find her not guilty and discharge her on all counts. This sounds an understatement when one looks at the criticisms levelled at every corner against every count that "were not properly drawn and which did not disclose an offence." The impression is incapable that the charges against this Plaintiff were trumped up and indeed malicious. This I would say notwithstanding what appears as a ground of appeal (the appeal which was not prosecuted) at (d) which says:

> "It is submitted that the standard of proof set out in the technical form of charge sheets or in indictment as practised in the Courts is <u>not required</u> in cases of "misconduct" or "disciplinary" whereby the standard required is merely "on the balance of probabilities" unlike beyond a "reasonable doubt" as in criminal cases. It is more probable than not that the charged teacher has committed the misconduct as charged."

This becomes what is colloquially called hot air when one has read the adjudicator's damming reasons.

Plaintiff says all the losses that she incurred resulted from the loss of her income as a result of the suspension. Meaning that she was no longer paid her emoluments until she resumed work as aforesaid. Amongst these losses was her furniture which was repossessed because she could not longer keep up with instalments.

Secondly, she had planned for a chicken raising project that did not take off or was unable to take off because of her loss of income. While these losses could possibly be attached to that loss of income I found that they were not adequately supported by evidence nor was there proof at all. For example to say that she intended to raise up a chicken project without more evidence as to what the project involved. She herself been made it is difficult to determine the actual loss or delictual losses. Mr. Nteso fairly agreed that objectively, without evidence it would have been difficult to make any award under this head.

Concerning the repossession of the furniture we were merely told that M4,000.00 had already been paid. There was nothing more than that plain statement. I thought there should have been something to show about the fact that there was the purchase actually made e.g. some agreement, some invoices or a set of receipts. All this would go towards justifying the distinction between general damages which Counsel thought the Court could award and special damages.

Furthermore that surely a default judgment cannot be a blank cheque for every claim merely by reason of the absence of opposition. I was therefore accordingly unable to make any award under this head.

The Court was told that the school has already settled arrear salary which arose only of default in paying the Plaintiff's monthly salary. Even if I would not have found it not difficult to make an award under that head (prayer 3), calculated as the total on every monthly salary by all other months in which there was no payment, I would have accordingly allow the prayer under the head. But it turned out that the money attached to the claim for loss of earnings by the Plaintiff was in reality loss of proceeds of two (2) insurance policies for which Plaintiff being put out from a certain Insurance Company. This turned out to be in the nature of maturity values and unpaid premiums. Plaintiff said there was a *causal nexus* between plaintiff's suspension and the two policies which lapsed. More about that later.

The awards under claims 1 and 2 are not quite easy to justify. They were the cause of asking Mr. Nteso to address me further on the claims even after the Plaintiff's testimony on the understanding that the suspension was a proximate cause of the damages under the heads claimed and such damages were not remote in that they were caused by the negligence of the Defendant who would have foreseen the harm of the general kind that actually occurred, would have foreseen

the general kind of causal consequences against which it could have taken certain steps to guard against and finally that Defendant failed to take those steps. See **The Law of Delict,** P O R Boberg vol.1 1st Edition page 39.

Having spoken about the Defendant's negligence Mr. Nteso submitted that in the case of **Russel NO, Loveday NO vs Collums Submarine Pipelines Africa (Pty) 1975 (1) SA 1110** the term damages was defined as:

> "The value estimated in money or something lost ..... the sum of money claimed or adjudged to be paid in compensation for loss sustained."

Counsel submitted further that on the other hand the definition of damages given in **Halsburg Laws of England 3rd edition volume II para 383** and the dicta to the same effect in **Found BirsharH Jab Hour v State of Israel (1954) 1 All ER 145 at 155** and **Haile Brothers SS. Co Ltd v Young 1939(1) KB 748 at page 765** was defined as:

> "damages may be defined as pecuniary compensation which the law awards to a person for the injury he has sustained by the reason of the act or default of another whether such act or default is a breach of

> contract or a touts, or put it more shortly, damages are the recompense given by the process of law to a person for wrong that another has done him."

I was mindful that in relation to that claim about lost furniture Plaintiff has submitted that the Court h ad a duty to award Plaintiff specific amount of damages. I was referred to that regard to **Farmers' Co-operative Society v Berry 1912 AD 343.** I was again referred to the dictum in **Jansen v Pienaar 1881 SC 27** where it was said:

> "The summons set out as infringement of a right and a right and allege specific damages. But the moment the Plaintiff proved a wrong - as soon as he proved the enticing away, he was entitled to some damages though he did not prove one thing of actual damages."

In this I would understand the judgment to mean a duty on the part of a Court to award normal nominal. See the distinction and the distinction of nominal damages by RG Mc Kerron in **The Law of Delict, 7th edition at page 52** and **Summer v Welding 1984(3) SA 647(A)**. In those case my suspicion is that this predicted on actual loss proved even if it is difficult to estimate the patrimonial loss or value. As I have said to question of the loss of furniture posed exceptional problems where

the actual purchase itself was not proved and such other necessary particulars were not placed before Court.

I would have had problems in tackling the problems under malicious prosecution. Authorities do make too subtle a distinction between malicious prosecution and malicious proceedings as an element of abuse of rights. **P O R** Boberg **in The Law of Delict** Vol.1 (1st Edition) says at page 209.

> "An abuse of right occurs he says when the right is *prima facie* lawful. Excessive use of a right on the other hand, occurs when a person exercises a right in the circumstances or in a manner that the law probabilities, so that its occurs is not even *prima facie* lawful. Excessive use of a right, on the other hand occurs when a person exercises a right in the circumstances or in a manner that the law prohibits, so that its exercise is not ever *prima facie* lawful. An extensive survey leads Devine to the conclusion that the doctrine of abuse of rights has its uses and that in South African law it applies in the field of nuisance (the above of proprietary rights defamation, and unjustified litigation and there is scope for its limited extension." (My emphasis)

It is said in Becks **Theory and Principles of Pleadings in Civil Actions** (3rd

Edition) became even more helpful in his analysis of malicious procedure (page 258-9) where he says at various portions of these pages:

1. The wrong malicious procedure may be inflicted on another not only by setting the criminal procedure in motion without any reasonable or probable excuse but by setting the institution of malicious and unfounded civil proceedings." (My emphasis)

And "Malicious civil procedure may be defined as an institution by the defendant maliciously and without reasonable and probable cause of civil proceedings for the redress of rights which have not existence. And in determining whether malice does or does not existed. And in determining whether malice does or does not exist the Court may consider what the acts would have in similar circumstances of discretion and prudent man."

And Finally (at page 259)

"(1) ..... If there is a total absence of reasonable and probable cause the Court may inter malice from this fact ..... but in the ordinary way the plaintiff must establish both malice and reasonable cause. ....."

Judging from the statement of the Adjudicator I would have no problem that the proceedings filed with the Adjudicator were actuated by malice. This should be an

anser to the claims (a) and (b) I found however that they were extremely inflicted.

There is no doubt that there is a direct link between the loss of premiums (failure to pay) and the malicious acts of the school. Mr. Nteso told the Court that as soon as the payments of premiums are made the policies can be re-instated. This meant that the Plaintiff could not say she was entitled to the total insured sum. I would therefore incline towards making an order that the Defendant must be sum equal to the premiums that remained unpaid during her suspension. Mr. Nteso estimated those two set of premiums (for two policies) as shown in Exhibit "A" to be about M2,442.00 and M4,200.00 on the 3rd August 2000. There should be more now. I intimated to Mr. Nteso that he could not be sure of the insurer explaining compays on attitude but he assured me that they would find it necessary and would be satisfied to receive those premiums as long as they were accurately calculated.

I found that the Respondents action was malicious and unfair harassment and demeaning of Plaintiff. I however observe that the more their claims were rather inflated

The result is that the Plaintiff's claim is allowed to the following extent:

1. M 5,000.00 for unlawful suspension.

2. M5,000.00 for unlawful malicious proceedings.

3. (a) An award of amount equal to all unpaid premiums for the first policy to date.

   (b) An award of an amount equal to all unpaid premiums for the second policy to date.

4. An amount equal to unpaid salary if same not yet paid to date.

5. Costs of suit.

T. MONAPATHI
JUDGE

3rd September 2001

For Plaintiff : Mr Nteso for Attorneys E H Phoofolo & Co.