IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 58/2015
CIV/A/21/2015

In the matter between

LESOTHO FLOUR MILLS **APPELLANT**

And

MOCHELA MATSEPE **RESPONDENT**

CORAM: FARLAM AP
MOKGORO AJA
CLEAVER AJA

HEARD: 14 APRIL, 2016
DELIVERED: 29 APRIL, 2016

SUMMARY

Successful appeal against dismissal from employment – reinstatement as remedy ordered without consideration and application of section 73 of Labour Code Order, 1992 – requiring Court to determine whether reinstatement is compliant with section 73 – Primary duty is of the Court to raise question of the application of section 73 – Determination involving questions of fact as evidence – matter remitted to Directorate of Disputes Prevention and Resolution as appropriate forum to make a determination in terms of section 73.

JUDGMENT

MOKGORO AJA:

[1] Although this matter comes to this Court as an appeal against the decision of the Labour Appeal Court, delivered on 1 July, 2014 it is common cause between the parties that the only question before this Court is to respond to the question whether, after respondent had succeeded in his prayer for a finding that his dismissal was unfair, the parties were entitled to the application of section 73 in the matter and if so, which court should have done so.

[2] The Appellant is Lesotho Flour Mills, a commercial flour milling company, registered in Lesotho. The Respondent had

been employed by Applicant as a mill operative in and around 1989 and was promoted to miller in 2006.

[3] On 15 September, 2008, he was dismissed from his employment. He had been charged with misconduct, found guilty. He unsuccessfully appealed the finding through an internal disciplinary process.

[4] Respondent then filed a referral before the Directorate of Dispute Prevention and Resolution (DDPR), who dismissed the referral. Taking that dismissal up for review in the Labour Court, the review application was similarly dismissed.

[5] Respondent proceeded to appeal the review dismissal before the Labour Appeal Court. There, the appeal succeeded. The order of the Court, after an application for its correction, read as follows:

"*(a) The appeal succeeds with costs,*

(b) The judgment of the Labour Court is set aside and replaced with one that the application is [granted] with costs."

[6] The effect of that order was that the Respondent was to be reinstated with full benefits. Anxious about the implications of that order in the workplace, almost eight years after the

dismissal, the Appellant, was of the view that the Labour Appeal Court had failed to apply its mind to the need to apply provisions of section 73 of the Labour Code Order, 1992. In particular, section 73 requires a determination whether or not reinstatement as remedy was sought in the first place and if so, whether or not it was practicable, taking account of the circumstances of the matter. If impracticable, the next question would be what compensation if any, would be just and equitable. As it turned out, at no stage in the entire litigation it seemed, had the question of the need for the section 73 inquiry been raised?

[7] It is in that context that the Labour Appeal Court, when it had to identify the question of law as ground for granting the certificate for leave to appeal in terms of Section 38 AA (2) of the Labour Code (Amendment) 2010, stated as follows:

"When ordering Mr Matsepe's reinstatement, [the LAC] failed to apply and / give effect to section 73 of the Code by not either itself applying section 73, alternatively not referring the matter back to the DDPR for section 73 to be complied with."

[8] There is no dispute as between the parties that the singular issue to be determined in this Court is the question of law identified by the Labour Appeal Court as ground for granting leave, namely, whether, when the Respondent's appeal before the Labour Appeal Court succeeded and his reinstatement was ordered, the parties were in law entitled to have the

provisions of section 73 of the Code given effect to and if so, which forum should have done so.

[9] It is apposite at this point, to highlight the provisions of section 73 of the Code, so as to determine, in the context of the interpretation of the section, which Court or forum should have given effect to its provisions

[10] According to Section 73 (1), where the Court or arbitrator has decided that an employee had been unfairly dismissed, it *shall*, if the employee so wishes, order reinstatement. The reinstatement must be without loss of remuneration, seniority or other entitlements or benefits he or she would have been entitled to, had there been no dismissal. However the Court or arbitrator shall not make that order, if it considers reinstatement, in light of the circumstances of the case, to be impracticable, the onus being on the employer to show impracticability. The impracticability would then be determined by the Court or the arbitrator as a question of fact, in the circumstances of the case.

[11] If in accordance with section 73 (2) it is decided that reinstatement is impracticable in the circumstances of the case at hand, or the employee does not wish for reinstatement, an amount of compensation shall be fixed by the Court or arbitrator in lieu of reinstatement. That amount

shall be just and equitable. Similarly, the determination of impracticability and the amount of compensation are also questions based in the surrounding context of the case.

[12] Further, section 73 (2) provides that in the assessment of the compensation amount, it shall be taken into account whether there has been any breach of the employment contract by either of the parties. Furthermore, it shall be considered whether the employee has taken any steps, as may be reasonable to mitigate his or her losses. Again, these are questions of fact to be determined by evidence.

[13] Defining reinstatement as a primary remedy following a finding of unfair dismissal, Nkabinde J, in the case of Equity Aviation Services (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others. 2009 (1) SA 390 (CC) at 404 D-F (para [36], held the ordinary meaning of reinstatement to be,

"… to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions … It is aimed at placing the employee in the condition he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are

reinstated, they resume employment on the same terms and conditions that prevailed at the time of their dismissal....”

Reinstatement therefore restores the status quo ante, i.e as if the employee had not been dismissed. That explains the purpose of Section 73 as a whole, in particular, the importance of determining the practicability of reinstatement, including its implications for the workplace dynamics.

[14] That reinstatement is the primary remedy for unfair dismissal, is trite. Section 73 itself requires it once it is established that the employee so wishes. The question however, is upon whom it was incumbent to raise and apply Section 73 in this matter.

[15] It was the submission of the Appellant that the Labour Appeal Court itself should have raised the Section 73 question. The fact that the parties did not do so, it was contended by the Appellant, is not sufficient reason for section 73 not to have been considered and applied by the Court.

[16] Section 73 (1) makes the remedy of reinstatement mandatory upon a finding of unfair dismissal. (See Matseliso Matsemela v Naledi Holdings (Pty) Ltd, LAC/CIV/A/2/07 a judgment of the Labour Appeal Court, which can be accessed on the website of the Lesotho Legal Information Institute for the

mandatory nature of section 73). If the employee so wishes, it *must* be considered in terms of Section 73.

[17] It follows that when neither of the parties have raised the question in their written and or oral submissions in anticipation of the Court's findings, the Court *must* raise the issue *mero motu* during the proceedings, if not already done in the Court's directions if any, prior to the hearing of the matter.

[18] Generally, it is primarily the duty of the Court to obtain submissions from the parties ensuring that the provisions of Section 73 are complied with. However, although parties make submissions mainly to state their cases and to bolster their arguments, they also owe a duty to the Court to do so competently in order to assist it in arriving at a just, equitable and practicable order. (See in Standard Lesotho Bank v Molefi 'Nena and Another, LAC/CIV/A/06/08 p9/17 a judgment of the Labour Appeal Court, which can be accessed on the Lesotho Legal Information Institute).

[19] Relevant to the application of section 73 therefore, is that if litigants themselves do not raise the issue and make submissions at the earliest opportunity, they do a disservice to themselves. Litigation is costly. To have to return to the Court at a later stage only to pursue the one issue of the

determination of the appropriate remedy which could have been raised and finalised much earlier in the main matter, is hardly a mere procedural inconvenience. It is an oversight which has the potential of placing the administration of justice at risk.

[20] Equally mandatory are the provisions of section 73 (2) of the Code, which kick in when, following a finding that reinstatement is not practicable, and as an alternative to a remedy of reinstatement, an amount of compensation *must* be considered and determined. The determination which must be made, is that of fact, taking into account the surrounding circumstances. Important to consider in determining the amount of compensation is whether either of the parties had been in breach and as already indicated, above, in para [12], whether the employee has taken it upon herself or himself in the meantime, to mitigate her or his losses, so far as it was reasonable. Here too, the determination is made in the context of the factual matrix of the case.

[21] Due to the mandatory requirements of Section 73, the parties were indeed entitled to the application of Section 73, and the Labour Appeal Court was obliged to raise and apply it, following its finding of unfair dismissal. It was in the Labour Appeal Court that the unfair dismissal finding was first made.

It is therefore in that Court that the duty arose to apply Section 73.

[22] The application of the provisions of Section 73 raise questions of fact which might require evidence to be placed on record before the Court. Due to the fact that reinstatement as a remedy requires that the employee's wish must be canvassed, its terms and conditions, its practicability, compensation as an alternative remedy, including issues of mitigation of losses to be argued, based on factual submissions, because none of that has been addressed and articulated in any of the fora in the process of this litigation, there is no evidence on record for this Court to embark on the determination of an appropriate remedy. That evidence might still be required. This Court cannot be turned into a Court of first and last instance, canvassing new evidence before it, without any opportunity for an appeal. This Court is therefore in no position to make a determination based on section 73 of the code. (See Bruce and Another v Fleecytex, Johannesburg CC & Others 1998 (2) SA 113 (CC) at para.8).

[23] Neither should the Labour Court of Appeal be placed in a position to do so, even though it was there that the need to apply Section 73 first arose. Based on the principle in Bruce v Fleecytex, it is important in matters of this nature, not to

deprive litigants who might be aggrieved, ample opportunity to appeal the decision of a Court.

[24] For the reasons stated above, this matter must therefore be remitted back to the DDPR, where the main case was initiated. That forum is in the best position to canvass all the necessary evidence that might be required and make a fully informed determination. (See Minister of Defence & Others v Dunn 2007 (6) SA 52 (SCA) at 64 D-E (para [39]). See also Gauteng Gambling Board v Silverton Development) Ltd 2005 (4) SA, 67 at 74E.) There will thus be ample opportunity for aggrieved parties to escalate the matter on appeal, if necessary.

[25] Concerning costs, the question of appropriate remedy was critical to settle for both parties. It was thus common cause that they had to come to this Court, following the Labour Court of Appeal referral. It would thus be just and equitable not to make a cost order in this matter.

1. The matter is remitted to the Directorate of Dispute Prevention and Resolution to apply the provisions of section 73.

2. There is no order as to costs.

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J.Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

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I.G. FARLAM
ACTING PRESIDENT

I agree:

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R. B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellant: Mr H.H.T Woker

For the Respondent: Mr L.A. Molati