LAC/CIV/R/09/03

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

PASCALIS MOLAPI APPLICANT

AND
METRO GROUP LIMITED 1ST RESPONDENT
FRASERS CASH AND CARRY 2ND RESPONDENT
THE PRESIDENT OF LABOUR COURT 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

CORAM: THE HON. MR. ACTING JUSTICE K.E. MOSITO

ASSESSORS: MR. D. Twala
Mr. L. O Matela

HEARD: 25 October 2006

DELIVERED: 2 NOVEMBER, 2006

SUMMARY

Practice - Pleadings in the Labour Court - Meaning, purpose and application of Rule 5 of the Labour Court Rules 1994 – Rule that defences which have not been pleaded cannot be argued – Review of Labour Court proceedings and decision – Labour Court having failed to hold respondent to its pleadings and having permitted the adduction of evidence which was

outside the issues delineated by the Answer – Regularity of the Labour Court's conduct of proceedings.

Motion proceedings in the Labour Appeal Court – Failure by the respondent to file opposing affidavit in review matters- the averments of fact by applicant to be assumed as correct - Consideration of meaning, purpose and application of Rule 15 of the Labour Appeal Court Rules 2002 - effect of failure to comply with the Rule.

Delays in finalising litigation in labour and employment matters – Undesirability thereof –Effect thereof.

Consideration of meaning and application of section 73 of the Labour Code Order NO. 24 of 1992 – factors informing the exercise of a discretion whether to award reinstatement or not under the section.

Contract of Employment.- Identification of employer –Employer taking over a number of companies with their employees and promoting and dismissing employee – Labour Court holding that it is unable to make any order as it is not clear against whom the order will be made – Labour Appeal Court identifying employer and holding him liable.

JUDGMENT

1. This is an application for review of the decision of the Labour Court. The present application is one for an order in the following terms:-

    (a) Proceedings in LC6/94 and LC12/96 should be reviewed and set aside.

    (b) An order reinstate in the Applicant as employee of first and/or second respondent.

    (c) An order directing the first and/or second respondent to pay applicant all his emoluments from date of purported dismissal to date.

    (d) Costs of suit.

    (e) Further and/or alternative relief.

2. This application was brought in terms of Rule 15 of the Rules of this Court. Neither of the respondents filed an intention to oppose nor an answering affidavit. More about this later. It suffices to mention at this stage that, the facts of this application are therefore not in dispute.

3. A conspectus of the facts herein reveals that, the Applicant was first employed by the 2nd respondent in October 1968. His employment continued until November 1990 when the Applicant was dismissed by a company called Metcash.

4. It is worth mentioning that according to the Applicant in 1988 Metro Cash and Carry took over Frasers (sic). While Applicant was still employed by Frasers, Metro merged with Frasers, and the "company" resulting from such merger was called Metcash. The record of proceedings from the Labour reveals that one Mr. Stephanus Theunis Bekker the then General Manager and Director of Frasers Cash and Carry in Lesotho testified on behalf of first respondent in the Labour Court to the effect that, Frasers Cash and Carry, Frasers Lesotho, Frasers Ltd and Holad Wholesalers became subsidiaries of Metro, with Metcash becoming the holding company of these subsidiaries. However all those companies remained as individual entities, each with its own Managing Director. He also confirmed that the Applicant had been employed by Frasers Cash and Carry. It is also common cause that, when Metro took over these companies, the contracts of employment of their respective employees were not affected. They were also taken over by Metro as well.

5. It is also common cause that, on the 2nd day of April 1990 the Applicant was offered "the position in Metro Group Ltd" subject to the terms and conditions outlined in a letter of appointment annexed as "PM5" to the proceedings. The appointment was that of a Manager in Maputsoe branch, reporting to the Regional and Operations Managers. His salary had to remain unchanged. This new position entitled Applicant to bonus, leave, provident fund, medical aid as well as funeral assistance scheme. The letter was signed by Mr Bekker for Metro Group Ltd.

6. The facts also reveal that on the 25th day of October, 1990, the Regional Manager, Mr. Lambrechts, together with the Applicant, conducted a hearing against one of the cashiers in connection with a "Refer to Drawer" cheque; which was improperly banked in order to balance the day's takings, which had been short, because one of the purchasers had not had enough cash to pay for the goods he had purchased. In the cause of answering the questions relating to the incident the cashier implicated the Applicant by saying that it was the Applicant who instructed her to bank the cheque. This resulted in Applicant being called to appear before a disciplinary enquiry conducted by the General Manager, Mr. Bekker on the 30th day of October 1990. The inquiry concerned the alleged unauthorized credit which Applicant gave to customers. Applicant conceded some of them. Two other employees testified against Applicant that he had authorized other credits as well in favour of some other customers. It was common cause that this was contrary to some regulations of the company. As a result, Applicant was dismissed.

7. It is common cause that Applicant was not given a prior notice that this inquiry was going to be held against him. He was also not given a chance to cross-examine the witnesses who implicated him. The Labour Court, that notwithstanding, held that applicant had known some five days prior to this inquiry against him that he had been implicated by one of the cashiers in the controversy involving unauthorised credits. This was a reference to the knowledge he acquired by reason of his having been present in the cashier's inquiry on the 25th day of October 1990. It was thus, the Labour Court's view that, when Mr. Bekker called Applicant to an inquiry on the 30th day of October 1990; he was not being confronted with new allegations that were unknown to him as he had heard them being uttered in his presence on the 25th day of October 1990. Thus, the Court held that the Applicant did not therefore suffer any prejudice as a result of the failure to give him prior notice of the hearing.

8. We are unable to agree with the above view. Indeed as the Court of Appeal of Lesotho said in **Makara v OK Bazaars (Pty) Ltd LAC (1990-1994) 517** at

522 in line with **Heatherdale farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T)** at **486**, the person concerned must be given a reasonable time in which to assemble the relevant information and prepare and put forward his representations. He must be put in possession of such information as will render his right to make representations a real, and not an illusory one. In our view, it is to render an employee's right an illusory one if their court would accept that, when an employee happens upon some allegations in a situation other than one in which he is himself disciplinarily charged, then he must be taken to have had notice within the foregoing formulation. As Mohamed P said in **Makara's** case *(supra)*:

> *fundamental to the proper application of the audi rule are two requirements: Firstly, notice of the intended action to the party affected; and secondly, a proper opportunity for him to present his case.*

9. It is therefore inadequate to say that, since Applicant heard some employees making allegations implicating him in an inquiry other than one in which he was charged, then he must be taken to have been *given notice of the intended action against him*. In such circumstances he would have no legal obligation to prepare a defence in anticipation of a non-existing intended action against him.

10. The importance of the *audi* rule in our employment law is one that cannot be overemphasized. The principles have been summarized by Gauntlett JA in the Court of Appeal of Lesotho's decision in **Matebesi v Director of Immigration and Others LAC (1995-1999) 616** at pp **621I- 626,** with which exposition of principles we are in respectful agreement. Needless to say, all courts of law in this country, including the Directorate of Dispute Prevention and Resolution as well as similar tribunals have to observe these principles. Failure to observe these principles will certainly result in the superior courts in this country interfering in the decisions of the inferior courts and tribunals. The *audi* principle sits at the heart of the employment relationship in our law.

11. The Labour Court proceeded to state that, it appears Applicant

was not afforded the opportunity to cross-examine the witnesses who implicated him in a material way. In particular the witnesses did not only stop at confirming the irregularity with regard to unauthorized credit. They went further to make allegations that on two occasions the applicant appropriated company funds for private use. This information was clearly prejudicial to the applicant and he should have had the opportunity to rebut it either by cross-examining the witnesses or by calling his own witnesses.

Counsel for the respondents sought to explain this anomaly by saying that the funds that applicant allegedly appropriated for private use are not the basis for applicant's dismissal and therefore not the reason for this proceedings. This explanation is not supported by respondent's conduct of these proceedings. For instance, in the bundle of documents which were handed in court by the respondents in support of the decision to dismiss applicant, they have also attached the statements in which the allegations of misappropriation were made by the witnesses. They have also attached notice reports to Senior Management about the misappropriated funds. (pp. 17-19 of the bundle refer). At the bottom of the "Notifiable Incident Report" at p.19, the reporting officer has ticked the action taken against the culprit as "dismissal". In our view therefore, the statements were attached to this bundle of documents which was supporting applicant's dismissal because the allegations contained therein were relevant to applicant's dismissal. The report to the head office also showed that the culprit had been dismissed. We are therefore convinced that the hearing was flawed and therefore the dismissal based thereon was unfair.

12. We agree with the above observations and findings of the Labour Court.

13. As it had to, there came a stage whereat the Labour Court had to make an order. The Labour Court however, reached the conclusion that, "[i]n the circumstances, the court are unable to make any order as it is not clear against whom the order will be made". This conclusion resulted from an unfortunate feature of the present case in which the parties were not held to their pleadings, and evidence was permitted to be adduced beyond the issues delineated on the pleadings. This ought not to have been done. (See Frasers **Lesotho Ltd v Hata-Butle (Pty) Ltd LAC (1995-1999)698 of 702).**

14. Rule 5 of the Labour Court's Rules 1994 provides that:

> *A respondent may within fourteen days of receipt by him of a copy of the originating application, enter an appearance to the proceedings by means of presenting, or delivering by registered post, to the Registrar and to the applicant an answer to the originating application which shall be in writing in or substantially in accordance with Form L C2 contained in Part A of the Schedule and which* ***shall set out the grounds on which the respondent intends to oppose the application...***

15. The purpose of this Rule is the same as that served by a plea in the High Court or Subordinate Court. This purpose was aptly summarized as follows in **Frasers Lesotho Ltd v Hata Butle (Pty) Ltd** (supra), at **702 A-D:**

> *It has been stated often enough that the requirement of a rule in terms such as these is to enable each side to come to trial prepared to meet the case of the other (see Benson and Simpson v Robinson 1917 WLD 126), and to enable the court to isolate the issue it is to adjudicate upon (Robinson v Randfontein Estates Gold Mining Co. Ltd 1925 AD 173 at 198). The cause of action or defence must appear clearly from the factual allegations made (Dun and Bradstreet (Pty) Ltd v South African Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 224). It is wrong to direct the attention of the other party to one issue and then attempt to canvass another (Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107-108). This*

respondent was permitted to do, and at great length, in the Court below".

16. The present case is a classical example of what the above quotation proscribes. In the Labour Court Mr. Mar'e for the respondent was permitted to raise the issue that in the High Court case in which the Applicant had first instituted his action for unfair dismissal, he had cited Fraser's Cash and Carry, and yet in the matter before the Labour Court, he had sued Metcash Pty Ltd. This issue he was permitted to raise in cross-examination of the Applicant. This route of cross-examination was clearly intended to establish that the respondent was not liable to the Applicant as alleged, but which was never pleaded in the Answer filed in court. It is true that a cross-examiner has wide latitude to cross-examine a witness, but such latitude itself is always confined by the fact that cross-examination must be directed either to facts relevant to the issue, or facts relevant to the witness's credibility. (See Tapper, (7th **Cross on Evidence ed 1990) 303** and Hoffmann and Zeffert, **the South African Law of Evidence (4th ed. 1988) 458)**. A generalised fishing expedition, or trial by ambush, does not meet either requirement. (See **Frasers Lesotho Ltd v Hata Butla (Pty) Ltd (supra).**

17. It was clearly irregular for the Labour Court to have permitted counsel for the respondent to have canvassed the issue of a wrong party having been sued when the pleadings themselves did not cover the issue. All this regrettably, resulted in the Labour Court holding that, in the circumstances; the court is unable to make any order as it is not clear against whom the order will be made.

18. There is another reason on the facts why the aforementioned Labour Court's conclusion was wrong. Section 3 of the Labour Code Order 1992, provides that:

> *"employer" means any person or undertaking, corporation, company, public authority or body of persons who or which employs any person to work under a contract and ncludes:*
>
> *(a) any agent, representative, foreman or manager of such person, undertaking, corporation, company, public*

> *authority or body of persons who is placed in authority over the employee; and*
> *(b) in the case of:*
> > *(i) a person who has died, his or her executor;*
> > *(ii) a person who has become of unsound mind, his or her Curator Bonis;*
> > *(iii) a person who has become insolvent, the trustee of his or her insolvent estate;*
> > *(iv) a company in liquidation, the liquidator of the company*;

19. Bearing in mind the principles mentioned in the South African Labour Appeal Court case of **Board of Executors Ltd v McCafferty (1997) 18 ILJ 949 (LAC)** from 954A-956C for determining who an employer is, we are satisfied that the first respondent ought to have definitively identified as the employer herein. Firstly, in his evidence, Mr. Bekker, witness for respondent before the Labour Court, clearly says he was the General Manager of Frasers, which had been taken over by Metro. In the letter dismissing Applicant, it is expressly indicated that he dismissed Applicant on behalf of Metro Group or Metcash (a distinction without a difference). What more was then required to be able to identify the employer?! It is clear from the factors outlined in paragraph 20 below that the employer was the respondent before the Labour Court, which is the first respondent herein.

20. As pointed out in paragraphs 5 and 6 above, the letter of appointment (on page 35 of the record) whereby Applicant was appointed manager emanated from the first respondent. The pay advice slip which inter alia, reflects the employee's number as 0007170; pay point 08 Maputsoe, dated 25.06.90 emanates from the present first respondent, which was the respondent before the Labour Court. The letter of termination by Mr. Bekker shows that it was made on behalf of Metro, which is still the present first respondent. The evidence in chief of Mr. Bekker, witness for the first respondent in the Labour Court reveals as follows:-

Q. Can you explain to the court the difference between companies that existed in Lesotho at the time?

A. Frasers Cash and Carry, Frasers Lesotho, Frasers ltd and Holads Wholesalers. All these companies were subsidiaries of Frasers Ltd; each company had its own Managing Director who was responsible for controlling that company. When Metro took over Frasers, Metcash became the holding company of these subsidiaries but companies still exist as individual entitles. Applicant Mr. Molapi was employed by Frasers Cash and Carry.

Q. Was he at any stage employed by Metcash?

A. Not to my knowledge.

21. It stands to reason that in the light of what has been said in paragraphs 5 and 6 above, Mr. Bekker's last answer in paragraph 16 above could not be true. It was clear that Metcash (wich Mr. De Beer for the respondents before us characterised as the "nickname" for Metro Cash and Carry) is the same thing as the first respondent before the Labour Court and this court. Consequently the Labour Court ought to have made an order against the first respondent herein.

22. It was in our view, improper for the Labour Court not to have made an order against first respondent in the circumstances of this case.

23. The question that now arises is one as to what appropriate order to make in the circumstances of this case. The Applicant's first prayer is that this court should review, correct and set aside the proceedings of the Labour Court in LC6/94 and LC 12/96. At the hearing of the present application we asked counsel for the parties whether there would be need to consider LC 12/96 along with LC6/94, as it appeared to this court that a disposal of LC6/94 will also put LC12/96 to rest. Counsel agreed that there would be no need to also deal with LC12/96 as a disposal of LC6/94 will have a determinative effect on

LC12/96. This is the approach we have adopted in this matter. This is so because LC12/96 was launched because Applicant was complaining that, although the Labour Court had found for him on the merits it nevertheless had declined to make an order as it considered that there was no person against whom such an order could be made. We have already pointed out that, the Labour Court's basing of its decision on an issue that had not been pleaded, and on which counsel for the respondent had been allowed to dwell, amounted to a gross irregularity which this courts has no hesitation in setting aside as such.

24. This matter has been going up and down in the courts of law since 1990. It must now reach finality. In deciding on the kind of order to make therefore, the starting point should no doubt be the prayers sought by the Applicant.

25. The Applicant in his originating application in the Labour Court sought reinstatement. He persisted with that relief before this court in his application for review. He did not make an alternative prayer for compensation.

26. Section 73 of the Labour Code Order No. 24 of 1992 provides that:

> *(1) If the Labour Court holds the dismissal to be unfair,* ***it shall****, if the employee* ***so wishes****, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court* ***shall*** *not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.*
> *(2) If the Court decides that it is impracticable* ***in light of the circumstances*** *for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. 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 or her losses* (Emphasis added)

We have emphasized the word ***shall*** in the section to underscore the fact that it is imperative in meaning. (See section 14 of **the Interpretation Act, 1977**). We have highlighted the words, ***in light of the circumstances***, to indicate that they confer a judicial discretion. This imposes an obligation on the Labour Court to order reinstatement where a dismissal is found to be unfair.(See the South African Labour Appeal Court case of **Mzeku & Others v Volkswagen SA (Pty) Ltd &Others [2001] 8 BLLR 857 (LAC) at 881**). In terms of this section, reinstatement is the preferred remedy by the Legislature. This approach was exemplified in the dictum of Goldstein J in **Sentraal-Wes (Koöperatief) Bpk v Food Allied Workers Union and Others (1990) 11 ILJ 977 (LAC) at 994E** where the Court said**:**

> *"Prima facie, if an unfair labour dismissal occurs the inference is that fairness demands reinstatement. And it is for the employer to raise the factors which displace such inference."*

The Court would therefore, in the first instance, be inclined to order reinstatement if firstly, the employee so desires, and/or secondly, in the absence of proof of any impracticabilities as to reinstatement. In **Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994 (2) SA 204 (A)** ("the PACT case") Goldstone JA said at 218H-J that, in a number of decisions those courts [the Industrial Court and Labour Appeal Court of South Africa], had regarded it as almost axiomatic that, in the absence of special circumstances, an unfair dismissal should have as its consequence an order for reinstatement. Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the *status quo ante*. It follows therefore that, under the Labour Code, the proper approach in cases of unfair dismissal is that, it is incumbent on the court when deciding what remedy is appropriate to consider whether in the light of all the proved circumstances there

is reason to refuse reinstatement. (See **NUMSA & others v Henred Fruehauf Trailers (Pty) Ltd [1995] 2 BLLR 1 (AD), at p**5). It is for the employer, not the employee, to raise the factors, which displace such inference. The question is whether the employer *in casu* has raised such factors so as to .displace such inference. It is to this aspect that we now turn.

27. At the hearing hereof, this court asked both counsel to address it on the issue of the practicability or otherwise of reinstatement regard being had to the lengthy period of time (about 16 years) that has passed since the purported dismissal of Applicant by the first respondent. Advocate M. Kao for the Applicant insisted that, applicant still craves and deserves reinstatement. Advocate M. De Beer, on the other hand contended that, he has heard that Frasers Cash and Carry might have since gone into liquidation, and that it may probably not be practicable for this court to order reinstatement. It is clear that Mr. De Beer's contention was advanced on the basis that Applicant had been employed by Frasers Cash and Carry and not first respondent. The court having decided that the Applicant was indeed employed and dismissed by first respondent, the force of that submission is bound to wane.

28. The Court asked Mr. De Beer for the respondents what the consequences of not filing an opposing affidavit to the present motion proceedings for review would be, moreso because the court has to look into whether, it is impracticable in light of the circumstances for the employer to reinstate the employee in employment. The learned counsel conceded that the averments of fact by the applicant should be assumed as correct for what they are worth in as much as there was no answering affidavit by respondents filed of record. He however contended that this court should exercise discretion in line with principles of equity in considering whether reinstatement is appropriate or not. In our view, such discretion has to be a judicial one. The topic of judicial discretion is discussed in an illuminating section of **Salmond on Jurisprudence 12th ed** at pp.70-1.In that section, it is stated that, matters and questions of judicial discretion are all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law.(see

also **Media Workers Association Of South Africa and Others v Press Corporation of South Africa LTD ('PERSKOR') 1992 (4) SA 791 (A)** at 796**).** It follows therefore that some factors have to exist to inform the exercise of judicial discretion. It is to these factors in this case that we now turn to.

29. It is clear from the terms of section 73 above that the Labour Court and consequently this Court, has discretion to order reinstatement. At common law, where specific performance is claimed of a contract repudiated by one of the parties to it, the court has discretion whether to order that and this applies also to a contract of employment. See **Lesotho Telecommunications Corporation v Rasekila LAC (1990-1994) 261**, see also **Lesotho Bank v Molai LAC (1995-1999) 275.**

30. It is however important to point out that the **Lesotho Bank's** case *(supra)* and Lesotho Telecommunications Corporation's case *(supra)* did not deal with section 73 of the Labour Code Order 1992. They were dealing with the common law position. The discretion that is required to be exercised in terms of section 73 (1) of the Labour Code Order 1992 has to be a judicial one taking all the facts (and not speculation) into account.

31. In our view, the discretion that we are required to exercise should be informed by the factual circumstances and logic as may be gleaned from the record before us. It is clear from both the facts and submissions advanced on behalf of Applicant that he desires reinstatement. The respondents have not filed any apposing affidavits to show whether or not reinstatement may be impracticable in the circumstances of this. We can only assume that because the present matter has taken too long before it came to a final resolution in this court, it will probably be impracticable to order reinstatement, as probably either the first respondent has reorganized itself or has most probably filled the position that was occupied by applicant. However logical these factors may be, they are but mere speculation not supported by any factual information before us. Of course in exercising a judicial discretion, a court is free to decide which factors it should take into account. This discretion is a wide one see **James Brown and Hamer (Pty) Ltd v Simmons No 1963 (4)**

SA 656 (A) at 660 D-F. For it to be judicial, it has to have a basis on facts and logic. In our view, there is nothing factual militating against exercising our discretion in favour of ordering reinstatement in the present case. The fact that Applicant has insisted on reinstatement throughout the last moment, coupled with the fact the respondent has not filed any papers pointing to the improbability of reinstatement, are factors to be borne in mind in exercising this discretion. We should also bear in mind the mandatory provisions of section 73(1) of the Labour Code Order No. 24 of 1992 quoted above.

32. The respondents were given a proper opportunity of being heard as to the effect an order of reinstatement would have 16 years on, by being required to oppose both the proceeding in the Labour Court and this court. They have not advanced any reasons against reinstatement, either on the pleadings or in evidence. The respondents decided not to file any opposing papers to explain their position. In fact when asked to address the court on the aspect of reinstatement and failure to file the opposing affidavit, the learned counsel for respondents Mr. De Beer, argued that it was not necessary to file the affidavits in opposition to Applicant's case on review. He however pointed to the possibility or better probability that Frasers has been liquidated. However, this amounted to giving evidence from the bar; a practice not countenanced this court in motion proceedings. Against the foregoing background this Court accordingly orders in line with section 73 (1) of the Labour Code Order 1992 that first respondent reinstates Applicant subject to what is said below.

33. In Prayer (c) as reflected in paragraph 1 of this judgment, applicant asks the court to order the respondents to pay his emoluments from the purported date of dismissal to date (i.e. of judgment). There are no facts at all set out in the papers let alone in evidence, on which the *quantum* of the Applicant's loss can be assessed as salary from dismissal to date of judgment if this was the intention. See **Lesotho bank Moloi** *(supra).*

34. Whether or not a claim by an employee for his emoluments during the period from his wrongful dismissal to the date of judgment is a claim for damages or specific performance, the answer to the inquiry is the same. The employees'

earnings, if any, during that period should be taken into account since it would be inequitable for him to earn what would amount to a double salary until he is reinstated by the Court. See **Lesotho Telecommunications Corporation v Rasekila** *(supra)* at **269**. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are binding in all cases. See **National Union by Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151.**

35. Since section 73 (1) of Labour Code provides that an employee should be reinstated without any loss of seniority and benefits, the issue of the *quantum* of emoluments is one that should be enquired into by the court *a quo* either on affidavits suitably augmented if there is no dispute of fact or, if necessary, by viva voce evidence of the parties.

36. The Applicant further prays for costs of suit. The general rule is that costs follow the event and the successful party will normally be awarded his or her costs. See **Khaketla v Malahleha and Others LAC (1990- 1994) 275.**

37. In all the circumstances of this case it is just to make the following order:-

(a) The proceedings and decision of the Labour Court in LC6/94 are hereby reviewed and set aside.

(b) The first respondent herein is ordered to reinstate the Applicant in his job forthwith, without loss of remuneration, seniority or other entitlements or benefits, which he would have received, had there been no dismissal subject to paragraph (c) below.

(c) In order to ascertain what emoluments if any are payable to the Applicant for the period from the date of his dismissal to the date of this judgment, the Court *a quo* should be furnished with affidavits from both parties regarding the emoluments which have been earned by the applicant in the period since his dismissal. If there is a dispute of fact which cannot be decided on affidavits, then the court *a quo* will order that *viva voce* evidence be given by the parties and will in due course make such order regarding the *quantum* of emoluments, if any, to which the applicant is in the opinion of the court, entitled.

(d) The order outlined in paragraph (c) above must be compiled with by the parties within 30 days of this judgment in that:

(i) the Applicant must file his affidavit within 15 days of this order;

(ii) the respondent must file its affidavits (if any) within 15 days of the on which Applicant has filed his affidavits.

(iii) the Registrar of the Labour Court is directed to place the matter on the quantification of emoluments before the Labour Court for determination within 30 days of the filling of the first respondent's affidavits.

(e)The costs of this application must be borne by the first respondent.

38. My Assessors agree.

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K.E.MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For Applicant: Miss **M. KAO**

For Respondents: M**r. M. De Beer**