LAC/CIV/A/02/07

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:-

MATS'ELISO MATSEMELA — APPLICANT

AND

NALIDI HOLDINGS (PTY)LTD
t/a NALIDI SERVICE STATION — RESPONDENT

CORAM: HONOURABLE ACTING JUSTICE K.E. MOSITO
ASSESSORS:MR. J.TAU
MRS. M. MMOSEHLE

HEARD: 30 OCTOBER 2007
DELIVERED: 31 OCTOBER 2007

SUMMARY

Appeal from decision of Labour Court – Consideration of section 73(2) of the Labour Code Order No.24 of 1992 – When reviewing an award from the DPPR, Labour Court should also correct it in line with the terms of section 73(2) of the Labour Code Order No.24 of 1992
Costs – Appellant punished with costs of appeal by being ordered to forfeit half of the costs of appeal. – Respondent to pay half of costs of Appeal.

JUDGMENT

MOSITO AJ:

instead of reviewing it, thereby constituting itself a court of appeal. Secondly, complained that the Labour Court had failed to determine the specific ground of review brought before it. Thirdly, she complained that the Labour Court had erred in finding that the Appellant had sought five months salary, when the correct position is that she had sought compensation for unfair dismissal not specifying the number of months. It was further complained that the Labour Court had erred in disregarding the mandatory provisions of the section 73(2) of the **Labour Code Order No.24 of 1992**.

4. The only issue argued before us, was whether the Labour Court was correct in granting the review application, disregarding the mandatory provisions of the section 73(2) of the **Labour Code Order No.24 of 1992**, by not *correcting* the award as to the correct factors that ought to have been taken into account by the DDPR. Mr Tlapana for the Appellant contended in effect that, the Labour Court ought to have fixed an amount of compensation to be awarded to the employee in lieu of reinstatement in an effort to correct the award within the meaning of that section. He submitted that it was not enough for the Labour Court to have undone the award of the DDPR without substituting the correct *quantum* since it was common cause that there was unfair dismissal in this case. He contended that this was mandatory regard being had to the mandatory provisions of the section 73(2) of the **Labour Code Order No.24 of 1992**. He further contednded that the Labour Court ought to have considered an amount that would be just and equitable in all circumstances of the case.

1. This is an appeal against the decision of the Labour Court sitting as a Court of review over an award of the DDPR. The facts leading to the award in the DDPR were briefly that, the Appellant had been employed by the respondent on the 7th day of July 1998 and was dismissed on the 1st day of October 2005. The Appellant was dismissed for letting customers fill in petrol for themselves. She therefore sought a declarator that the dismissal was unfair. She successfully challenged her dismissal in the DDPR, and was awarded compensation purportedly in terms of section 73(2) of the **Labour Code Order No.24 of 1992** in the sum of ten months salary. This was awarded notwithstanding the fact that the Appellant had, in her evidence, informed the Arbitrator that she was claiming compensation in the sum of five months salary. The learned Arbitrator awarded the said amount bearing in mind the factors that Appellant had not been given severance pay, and that she had been dismissed without a valid reason for dismissal. The learned Arbitrator further considered that the Appellant was still employable.
2. The respondent brought an application for review in the Labour Court complaining that the Arbitrator had taken irrelevant factors into consideration when deciding on the *quantum* of the compensation. The application for review was granted on the ground that the Arbitrator awarded a higher compensation amount than was sought in evidence. The Labour Court further held that the Arbitrator considered irrelevant factors in arriving at her decision. The Labour Court did not, however determine the correct *quantum*.
3. The Appellant then brought the present appeal on four grounds. Firstly, she complained that the Labour Court has retried the case

further to itself, determine the correct *quantum*, as it was common cause that the dismissal was unfair. He however argued that in the circumstances of the present case, there were no facts upon which the Labour Court could have undertaken the exercise. He pointed out that there was no evidence that Appellant had even mitigated her loss as required by section 73(2) of the **Labour Code Order No.24 of 1992**.He contended that in the absence of such facts, the position of the Labour Court was an unenviable one. He contended that a way could and ought to have been found to correct the issue of *quantum*.

6. Mr. Tlapana urged upon us that the fact that the Appellant had shown that she had been unfairly dismissed in itself amounted to mitigation of her loss. We are unable to agree with Mr Tlapana on this point. In terms of section 73(2) of the **Labour Code Order No.24 of 1992**, in assessing the amount of compensation to be paid, account must be taken of whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses. .
7. This rule as to mitigation of damages is often described as casting a duty to mitigate on the injured party, but the truer formulation probably is quite simply that a person cannot recover damages for which he himself is responsible, in the sense that but for his negligence in administering his affairs he would not have suffered the damage.(See **Jayber (Pty) Ltd v Miller and Others 1980 (4) SA 280 (W) p283**). The duty to mitigate entails that the party who has suffered damages as a consequence of a breach of contract is under duty to take reasonable steps to ensure that his original loss is contained.(**MACS Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd 1995 (3) SA 377 (D) p381**). In Joubert, **The**

Law of South Africa vol 7 para 35 at 20, in the chapter dealing with "Damages" (written by H J Erasmus and J J Gauntlett), it is pointed out that, in the case of mitigation of loss, the court is concerned with the standard of conduct required of the plaintiff: has he acted reasonably in all the circumstances? Where the loss is exacerbated by a failure on the part of a claimant to act reasonably, his claim will be proportionately reduced.(Compare **Da Silva and Another v Coutinho 1971 (3) SA 123 (A) at 145C-E).** Being a question of mitigation, the *onus* of establishing that there were other less costly remedies which Appellant ought to have adopted in this case rested upon the respondent. (**See Holmdene Brickworks (Pty) Ltd v Roberts Construction CO Ltd 1977 (3) SA 670 (A) p. 689**).

8. But, does the mere fact that, there was no mitigation of the loss entitle the Labour Court not to have sought to find a solution to the quantum of the compensation? In our view, the Labour Court ought to have gone further itself, to determine the correct *quantum*, as it was common cause that the dismissal was unfair. As was once pointed out in the Scottish Law Commission report entitled **'Report on Remedies for Breach of Contract' (1999)** which, in part 4 thereof, deals with this very issue. In para 4.10 it is stated:

> 'On principle it would seem to be desirable to take into account the conduct of the aggrieved party in contributing to the loss or harm. This is just an extension of the policy underlying the well-established rules on mitigation of loss. In cases where loss of damage is sustained as a result of breach of contract it will often be the case that the aggrieved party is partly to blame for the loss or harm. To force courts into an all or nothing choice is likely to produce unreasonable results.'

9. In Lesotho **Bank v Mahlomola Khabo 1999-2000 LLR-LB 328**, the Court of Appeal of Lesotho approved the principle enunciated in **Arendse v Maher 1936 TPD 162** at 165 that:

> "It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer."

10. In **Hersman v Shapiro & Co 1926 TPD 367** at 379 Stratford J is reported as stating:

> "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it."

11. In the present case, Appellant ought to have adduced evidence of mitigation. She did not do so. However section 73(2) of the **Labour Code Order No.24 of 1992** provides that:

> (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.

12. The above-quoted section enjoins the Labour Court in assessing the amount of compensation to be paid, to take account 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. In our view, there was a breach of contract by terminating the contract other than as required by law. In line with the case of Lesotho **Bank v Mahlomola Khabo** (*supra*), the Appellant is entitled to damages (compensation) in relation to the loss of her salary (net of deductions and tax) for some period as her contract was one without limit of time for a period of five months, less the net total of her income derived from employment for her failure to mitigate her loss through other employment when it was reasonably possible for her to do so. However, there are no figures available to us to establish a reasonable estimate. Such evidence is essential. The justice of this case should be met by remitting this case to the Labour Court to hear evidence on the quantum of compensation.

13. The dismissal of the Appellant having been found to be unfair, Appellant is clearly entitled to severance pay in terms of section 79 of the **Labour Code Order No.24 of 1992.**

14. In our view, the following order would meet the justice of this case:

    a. The Labour Court should hear evidence on quantification of the compensation.

    b. Appellant is entitled to severance pay, and respondent is directed to pay the same to Appellant.

    c. Appellant having substantially succeeded on appeal, but having contributed to the delay in finalisation of this matter by failing to provide material facts for quantification of the compensation

as required by the statute, must be punished with costs, in that Respondent is to pay half of Appellants cost on appeal.

15.My Assessors agree.

K.E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT OF LESOTHO

For Appellant: Mr. M.P.Tlapana

For 1st Respondent: Mr. M.P. Mokoko