

**IN THE LABOUR APPEAL COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter between:**

**INDEPENDENT CASH & CARRY GROUP**

**t/a FAHIDA CASH & CARRY (PTY) LTD**

**APPLICANT**

**AND**

**MPHO LESALE & 30 OTHERS**

**1<sup>ST</sup> RESPONDENT**

**LABOUR COURT**

**2<sup>ND</sup> RESPONDENT**

**CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.**

**ASSESSORS: Mrs. M.E. Thakalekoala**

**Mr. M. Makhetha**

**Heard on: 10<sup>th</sup> AUGUST, 2009**

**Delivered on: 17<sup>th</sup> AUGUST, 2009**

## SUMMARY

*Application for review of the Labour Court judgment- matter still pending before the Labour Court- propriety of bringing review while the matter so still pending – Labour Court having determined that the dismissal was both procedurally and substantively unfair.*

*Compensation – parties agreeing as to amount of compensation – court ordering compensation as agreed.*

*Costs – application dismissed with costs.*

## JUDGEMENT

### MOSITO AJ

1. This is an application for an order in the following terms:

“1

- (a) Calling upon the 1<sup>st</sup> respondent to show cause (if any) why the Judgment in LC98/05 should not be reviewed, corrected and/or set aside.*
- (b) Directing the 2<sup>nd</sup> respondent to dispatch the record of the proceedings in LC98/05 within fourteen (14) days of the service of this Notice.*
- (c) Granting Condonation for late filing of this Application.*

2

- (a) Granting the stay of execution of Judgment in LC/98/05 pending the finalization of this matter.*
- (b) Granting applicant costs in the event of opposition of this application.*

*(c) Granting applicant such further and/or alternative relief”.*

2. The facts that culminated in the institution of the present application are that, the 1<sup>st</sup> respondents had been employees of the applicant. They instituted an application in the Labour Court in LC/98/05 challenging their dismissal by the applicant herein. The respondents were dismissed by the applicant for allegedly participating in an illegal strike on the 19<sup>th</sup> day of September 2005. The applicants were at all stages of proceedings herein, and which commenced in the Labour Court assisted and represented by the Labour Commissioner in terms of section 16 (b) of the Labour Code Order 1992 which empowers the Labour Commissioner to institute and carry on civil proceedings on behalf of any employee, or employee’s family or representative, against any person and arising in connection with the employment of such employee or the termination of such employment.
3. The applicant is a wholesale grocer. Sometime during the week of the 14<sup>th</sup> day of September 2005 one Mr. Mahone who was responsible for internal security and internal investigations discovered empty tins which showed that tin-stuffs had been eaten out of the said tins. The empty tins had been stuffed into the pillars supporting the roofing in such a way that they could not be easily seen. Mr. Mahone took the empty tins, most of which had contained beef, to management. Management instructed Mr. Mahone and the Human Resource Manager, Mr. Mothepu to carry out the investigations.
4. From the Record of proceedings before the Labour Court, it seems that Mr. Mahone could only remember interviewing one Victor Pillay who denied any knowledge of the consumption of the tinned stuff. He had forgotten the

others that he had allegedly interviewed. Mr. Mothepu could only recall three persons, this were Victor Pillay, Moeketsi Mapota and one Mabetha. The trio had also denied any knowledge of the consumption of the said tinned stuff.

5. On Saturday the 17<sup>th</sup> day of September 2005 at 14:00hours, the employees were to be paid their weekly wages as they were weekly-paid. Mr. Mothepu was instructed by the Managing Director of the applicant that he must divide the cost of the waste cost by the consumed food-stuffs amongst all the floor staff. The cost of the food-stuff was found to be thirty four thousand Maloti (M34, 000.00). The floor staffs were 35 workers who were affected by the decision. The divided cost rendered each of the 35 workers liable to pay to the employer the sum of nine hundred and ninety Maloti and fifteen Lisente (M990.15) which was to be paid in twenty weeks with fifty Maloti deducted from the wages of each of the said workers each week. When the workers were paid on the 17<sup>th</sup> day of September 2005, they were each made to sign an acknowledgement of debt letter in which they accepted responsibility for the said loss and they allegedly authorized the employer to deduct M50.00 from their wages for the next twenty weeks. The employees were unhappy with the decision but the Human Resource Manager told them to go home with a promise that their grievances they had regarding the deductions would be discussed on Monday the 19<sup>th</sup> day of September 2005. On that Monday the workers reported at work. However when the doors opened for the workers to start their days' shift, the floor staff remained outside. According to their evidence they were waiting for the Human Resource Manager to grant them a meeting to discuss their wage deductions as promised on the previous Saturday.

6. The Human Resource Manager failed to come and address them until they decided to call him. After about five minutes he came and instructed them to resume work. This created further dissatisfaction among the workers. They made a lot of noise demanding to know why he was not addressing their grievances. The Human Resource Manager told them that he was not going to do it; the workers then proceeded to the office of the District Labour Office to report.
7. I may mention that the above recounting of the evidence pertains to the story as told by the workers. Mr. Mothepu's explanation was different in some respects. His version was that he was never called by the workers to come and talk to them. His version was that after twenty minutes had passed of the workers standing outside and refusing to come in and start work, he wrote an ultimatum with which he went to the workers. He explained it in Sesotho and gave the workers ten minutes to start working or risk being dismissed. He also told them to nominate two people to go and discuss with him their grievance. He says that the workers instead decided to walk away. However, the workers deny any knowledge of the ultimatum or the request to nominate the representative.
8. Mr. Mothepu wrote a letter to the Labour Commissioner and the Directorate of Dispute, Prevention and Resolution (DDPR), explaining that they, as management, considered the workers to have dismissed themselves as they had engaged in an illegal strike. He went to the DDPR and the Labour Office to deliver the letters, and he found the workers at the District Labour Office. A few hours after he had returned to his office, he received a letter from the District Labour Office Mr 'Mako who was instructing him to reinstate the workers and to stop deducting their wages. This letter it is

common cause, was brought by the workers to Mr. Mothepu. However the workers were not allowed entry into the premises of the applicant. A security officer took the letter to Mr. Mothepu and came back to tell them that Mr. Mothepu had said he would only talk to them at Labour (by which we understood Labour Department at the District Labour Office). However Mr. Mothepu denies the latter statement attributed to him by the security officer. The workers then returned to the Labour Office to report what had transpired.

9. It was against the foregoing factual background that the workers brought an application challenging both the procedural and substantive fairness of their dismissal. From a procedural perspective, their contention was that they were dismissed without being afforded a hearing. From a substantive point of view, their contention was that they refused to work because their wages were being illegally deducted and they wanted that issue clarified by the employer. The application was opposed by the present applicant.
  
10. The Labour Court heard the matter and held that the dismissals were both substantively and procedurally unfair. In terms of section 73 of the Labour Code Order 1992, the Labour Court had to go ahead and determine a consequential relief either in terms of reinstatement or compensation. However, the following order appears in paragraph 33 of the Labour Court Judgment:

*“33. The applicant had sought the reinstatement of all the dismissed employees or twelve months compensation and other terminal benefits. The court was however not addressed on these aspects. For this reason,*

*we defer the question whether to reinstate the complainants or order payment of compensation to a date after Counsels would have addressed the court on the issue. The legal representatives shall therefore approach the Registrar for allocation of a date when they can address us on the suitable relief in this matter. There is no order as to costs.”*

11. The present applicant then decided not to comply with the above order but to snatch the matter from the hands of the Labour Court and brought it into this court. It sought an order as outlined in paragraph 1 above.
12. When the matter was first called before us on the 21<sup>st</sup> day of July 2009 the Learned Counsel for the applicant, Mr. N. Hlalele informed the court that the Managing Director of the applicant was out of the country and that he would be back on or about the 2<sup>nd</sup> day of August 2009, he further informed the court that there were attempts to have the matter resolved by settlement out of court. He then requested the court to enable the parties to settle the matter. He further requested the court to have the matter postponed to the following week so that on or about the 7<sup>th</sup> day of August 2009 the parties will have had the matter settled or at least reached finality as to whether or not there was agreement. He pointed out that a report would be laid on this court as to the progress on the 7<sup>th</sup> day of August 2009.
13. The learned advocates who appeared for the Labour Commissioner as representing the respondents, advocates Lerotholi and Khalane agreed with the suggestion by Mr. Hlalele. The matter was accordingly postponed to that date.

14. On the 10<sup>th</sup> day of August 2009, the parties appeared before us and informed us that they had failed to reach agreement. The learned counsel advocate Hlalele for the applicant informed this court that his client was not challenging the decision of the Labour Court on the procedural and substantive dismissals of the workers. This means that it became common cause that the workers had been unfairly dismissed. He further informed the court that it was common cause that the workers were being owed M405,000.00 by the applicant. He pointed out that the issue of the quantum was now common cause. The learned advocates for the workers advocates Lerotholi and Khalane agreed with the issues pointed out as common cause by advocate Hlalele.

15. Mr. Hlalele told the court that his client was willing to have the matter settled. He further informed the court that his client had closed down and that it would be unwise to proceed to make a final decision on the case before the parties because the workers would not be able to get anything out of the judgment of this court. He went further to point out that his client wished to pay M500.00 to each one of the workers until the entire amount owing to them would have been cleared off.

16. The court then asked Mr. Hlalele who had given him instructions to come and pursue the present application if indeed his client had closed down. The court also asked him whether if his client had closed down it would be possible for the alleged settlement to be reached with a client who had closed down and how that will be gone about.



17. Mr. Hlalele informed the court that his client had not gone insolvent. It had not been liquidated. It is not a company in liquidation. It has only ceased to operate because of some logistical problems relating to the client's property at the industrial area which had been sold to a company called MKM Burial Society (Pty) Ltd. He pointed out that there were problems surrounding the MKM Burial Society (Pty) Ltd which have made it difficult, if not impossible, for the MKM to pay a bond over the building. He further informed the court that the managing director of the applicant, one Unice Cassim Abdullah would like to undertake to pay these workers each M500.00 per month for twelve months until the whole amount would have been cleared which is owing to the workers. He further told the court that Mr. Abdullah would like to pay the workers because he does not want the applicant to have a bad name when it opens. He further told the court that Mr. Abdullah has no money but he would pay the M500.00 to the workers as pointed out above from his salary which he earns from another business which is in the sum of M10, 000.00 per month. Mr. Hlalele further explained that half a loaf is better than no bread and that the court should consider making an order that would be in line with this offer so as to ensure that the workers get something each month whether they are working or not.

18. The court then enquired from Mr. Hlalele whether it had jurisdiction to order a Managing Director such as Mr Abdullah to make payments out of his salary to the workers on behalf of the applicant company, more so when Mr Abdullah is not even a party to the present proceedings. The court further indicated that it would be a different story if Mr. Abdullah would file an application for intervention in these proceedings or before the 17<sup>th</sup> day of August 2009 in which he makes this undertaking that Mr. Hlalele is making

from the bar. Mr. Hlalele said that there would be no problem because Mr. Abdullah could do that before that date. He further pointed out that it would be in the best interest of the parties that this kind of arrangement be reached.

19. The learned counsel for the workers contended that they do not accept this offer because it is for the first time that Mr. Hlalele is coming up with the issue that the applicant has closed down. They pointed out that when they were discussing the settlement the previous week, this issue was never raised. In particular Mr. Lerotholi contended that the applicant is trying to play a hide and seek game with the court and that it should not be allowed to do that. He also attacked the attitude of Mr. Abdullah of trying to give a wrong impression that he could be a Good Samaritan by undertaking to pay the workers out of his own pocket when he is not even a party to these proceedings. He contended that now that the issue of quantum is no longer in dispute, the court may as well go ahead and determine that aspect in the present case so that the workers will see how to retrieve their entitlement.

20. In all fairness to Mr. Hlalele we did not believe that this court has jurisdiction to order a non-party to this proceedings to act as a Good Samaritan to pay on behalf of the applicant monies which are admittedly owed by the applicant which the parties agree is the amount of compensation due to the parties. In our view it was even unwise for the applicant to have brought the present application while the issue of reinstatement or compensation had not yet been determined by the Labour Court. It seems to us that this case had been in the courts ever since 2005 and was heard according to the judgment of the Labour Court, on the 8<sup>th</sup> day of June 2006, 27<sup>th</sup> day of July 2006, 27<sup>th</sup> day of September 2006 and 7<sup>th</sup> day of November

2006. Judgment was handed down on the 28<sup>th</sup> day of November 2006 by the Labour Court. On the 7<sup>th</sup> day of March 2007, the present applicant brought the present application. On the 12<sup>th</sup> day of March 2007 my brother Peete J granted prayers 1 (b) and 2(a) of the Notice of Motion which had the effect of staying finalization of the proceedings before the Labour Court.

21. It will be realized that this matter has taken too long in our courts. It is against public policy for cases not to be finalized. The public will lose confidence in the administration of justice. More so we have pointed out in the past that Labour matters are properly classifiable as commercial matters and every effort has to be made to ensure that Labour matters are finalized with appropriate expedition and not to be allowed to languish in our courts forever. Permitting Labour matters to languish in our courts for this length of time, no doubt brings the administration of justice into disrepute. Furthermore Lesotho is one country in the world which is struggling to attract investors to come and invest into its tender economy. I do not believe that investors would have confidence in a country whose judicial system does not function properly so as to ensure that disputes between employers and employees are not resolved expeditiously. When an investor puts his money into business, he or she anticipates making profit. Cases which languish for too long in the courts of law have the effect of negatively impacting on investment. We should not allow cases to drag long in our courts to the prejudice of our country. Labour matters have to be handled with expedition. What is more even people die living behind their entitlements because of delays in the courts of law in finalizing their matters. This is totally unacceptable.

22. The above considerations impose an obligation against this court in the light of what we now know that the applicant does not dispute liability in the quantum specified. It does not deny that the workers were unfairly dismissed. It is clear that if we were to accept that the applicant had closed down, it is impracticable in terms of section 73 to order reinstatement of the workers as we understood the attitude of the lawyers, it is common cause that the applicant owes the workers M405, 000.00 collectively. There is therefore no justification as to why this court should not resolve the dispute here and now in order for this dispute to come to an end.

23. In the circumstances this court has been adequately addressed on the issues of liability and compensation. Although we were told that the applicant has closed down, we were told that the Managing Director of the applicant would like to pay the workers on behalf of the applicant. We were told that he would like to pay for a period of twelve months until he wipes off the applicant's debt. One does not need to be an expert in arithmetic to realize that a payment of M500.00 to each of the workers for a period of twelve months cannot wipe off the debt in that period. The Labour Commissioner contends that there is nothing to show that the applicant has closed down other than the mere say so of its legal representative. The Labour Commissioner insists through the learned advocates that even last week they were negotiating with applicant and there was never any mention that it has closed down. There are no papers on record to show that the applicant has closed down. We do not see how the applicant which has closed down can still be pursuing the case before us. In any event we do not understand what is meant by saying the applicant has closed down. It is not suggested that it has been liquidated or that it has gone insolvent. It is inconceivable how an

erstwhile managing director of a company can undertake to pay such company's debts out of his own pocket as Mr. Abdullah is trying to do in this case.

24. In our view there is no acceptable evidence before us that the applicant has closed down. We cannot order Mr. Abdullah who is not a party in these proceedings to pay the debts of the company to the workers. It is common cause that the employees are being owed M405,000.00 collectively which presumably can be divided amongst them properly by the Labour Commissioner.

25. In the circumstances we are of the view that this matter has to come to an end. The decision of the Labour Court to declare the dismissal of the workers unfair on both procedural and substantive grounds cannot be disturbed. The parties have already agreed to the quantum of compensation due to the workers and therefore there may be no need to send this matter back to the Labour Court with an order that the Labour Court should quantify the compensation that should be ordered. The parties are in agreement before us that there is no way in which reinstatement can be ordered. This court is therefore enjoined to order compensation in terms of section 73 (2) of the Labour Code Order 1992. The amount of compensation be ordered according to the agreement of the parties is M405, 000.00 in all which will be distributed amongst the workers.

26. In all the circumstances of this case this court makes the following order:

(a) The application is dismissed with costs.

- (b) The applicant is directed to pay the sum of M405, 000.00 to the Labour Commissioner. The Labour Commissioner is directed to divide the said payment in line with the entitlements of each of the workers herein involved, basing itself on the respective remuneration scales and severance pay entitlements of the workers.
- (c) The applicant is directed to pay the said amount of M405, 000.00 to Labour Commissioner pursuant to paragraph (b) above within thirty days of this judgment.

27. My assessors agree.

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K.E. MOSITO AJ.  
Judge of the Labour Appeal Court

For the Applicant: Advocate Hlalele

For the 1<sup>st</sup> Respondent: Advocates Lerotholi and Khalane