LAC/CIV/A/06/08

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

In the matter between

STANDARD LESOTHO BANK	APPELLANT
AND	
MOLEFI 'NENA	1ST RESPONDENT
THE PRESIDENT OF LABOUR COURT	2ND RESPONDENT

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

ASSESSORS: MR. R. MOTHEPU

MR. J.TAU

HEARD: 19 January 2009

DELIVERED: 26 January 2009

SUMMARY

Appeal from judgement of the Labour Court – Dismissal procedurally unfair for failure to observe Recognition Agreement considered. Severance package having been agreed to by employer payable –.Compensation under section 73 of the Labour Code 1992 – How assessed – factors to be considered - Appeal dismissed – Cross-appeal partly successful. Appellant to pay costs of Appeal

JUDGEMENT

MOSITO AJ:

1. This is an appeal from the judgment of the Labour Court (per Lethobane P) handed down on the 10th day of June 2008.
2. The facts of this case are similar to those in ***Standard Lesotho Bank v Lijane Morahanye and Another LAC/CIV/A/06/08*** (a matter in which this

Court handed down judgement on the 10th day of November 2008). The facts were that the Respondent was retrenched on the 10th day of March 2006. The basis of the Respondent's complaint in the Court *a-quo* was that his retrenchment was substantively and procedurally unfair. He further claimed payment of M81, 534.00 as the balance due on the severance package paid out to him which he alleges was based on 14 years service instead of 34 years that he had served at the bank at the time that he was retrenched. His service had thus been short-calculated by 20 years. The Labour Court heard the matter and handed down judgment on the date aforementioned. It ordered the Appellant to pay the Respondent the amount of M81, 534.00 by which his severance package had been short-calculated. The Labour Court further held that there was proper consultation and therefore, no compensatory award was due to Respondent on grounds of procedural unfairness of the dismissal.

3. Dissatisfied with the decision ordering of the Labour Court that Appellant should pay the Respondent the amount of M81, 534.00 by which his severance package had been short-calculated, the Appellant on appeal. The essence of its rather prolix grounds of appeal was that, while it was common cause that Respondent had joined Appellant's employ in 1972, regard being had to the evidence before it, the Labour Court ought to have held that Respondent's severance package had not been short-calculated in as much as, Respondent was not *reinstated*, but *re-employed* (together with others, including Morahanye) in 1992.
4. The Respondent cross-appealed on a total of fifteen grounds of appeal, the majority of which were in fact complaints against the reasoning as opposed to the decision of the Labour Court. However, in the light of the agreement as to which issues should be decided, there is no need to detail these out

herein. When the matter was called before us this Court drew Counsel's attention to the decision in **Standard Lesotho Bank v Morahanye** (supra), and asked both Counsel whether this case was not on all fours with the aforementioned case. Both counsel immediately conceded, and properly so in our view, and requested a brief adjournment to consult each other and their respective clients as to how the present case could best pursued. When the Court resumed, the learned Counsel informed the Court that, regard being had to the decision in **Morahanye**'s case, the parties had agreed that the Labour Court had correctly found that Respondent's severance package had been short-calculated in the amount of M81,534.00 and that, that point was no longer available for challenge before this Court. As the days follow the nights, it then followed that this was the end of the Appellant's appeal. The Counsel further reported that they had agreed that, the only issue that they had to argue was one about the quantum of compensation in as much as this Court had already held in para 9 in **Morahanye**'s case that:

> Where there is a Recognition Agreement between the parties, the agreement must be given effect to without fail. Failure to do so will affect the retrenchment process on the basis of procedural impropriety. Once the Court has found that the procedure as detailed out in the Recognition Agreement was not followed, that has the effect of nullifying the process.

5. As was the case in **Morahanye**'s case, the parties accepted as common case that there had been failure by Appellant to follow the provisions of the Recognition Agreement between the parties. Mr. Ntaote argued that although there had been failure by Appellant to follow the provisions of the Recognition Agreement, which phenomenon led to the procedural unfairness

of the dismissal, Respondent is nevertheless not entitled to compensation at all as this would disregard the fact that he was voluntarily given a separation package by Appellant. He argued, apparently on legal policy lines that awarding compensation in this regard would be inappropriate. Mr Sekonyela for Respondent countered by saying that, this is a question of legal prescription as appears in section 73 of the ***Labour Code Order 1992***.

6. Section 73 of the ***Labour Code Order 1992*** reads as follows:

> **73. Remedies**
> (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.

7. It is apparent from the foregoing section that the DDPR, the Labour Court and the Labour Appeal Court are obliged to order compensation in the following circumstances:

(a) If it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or

(b) If the employee does not wish reinstatement,

8. In the light of the above, it clear that the law oblige the DDPR, the Labour Court and the Labour Appeal Court to order one of the two remedies mentioned above once a dismissal has been found to be unfair. As indicated above, the dismissal in this case was procedurally unfair. As was said in para 10 in Morahanye's case:

> It was common cause before us that there was a Recognition Agreement between the parties (the Bank and the Union of which Appellant was a member). The Agreement made provision for how consultations should be conducted). It was common cause before this Court that this Agreement was never followed. This was not the issue of the interpretation and application of the Agreement. It was the issue of compliance or otherwise with the Agreement. The non-compliance with the Agreement was, in our view, fatal to the process of consultation. There is no need to consider the other grounds once we have already answered this issue in the manner we have done.

9. The law as we see it in sec 73 of the ***Labour Code Order No. 24 of 1992*** above, workers should be reinstated and the DDPR, the Labour Court and the Labour Appeal Court should not have any discretion to deny an unfairly dismissed employee reinstatement except where the employee does not wish it, or, in the light of the circumstances, it is impracticable to reinstate such worker, in which case, compensation should be awarded.

Compensation vs. severance package

10. Mr. Ntaote contended that this Court should not award any compensation to the respondent because he has already been given severance package. Mr. Sekonyela contended on the other hand that to uphold Mr. Ntaote's argument would be illegal as section 73(2) of the Labour Code Order 1992 as quoted above, enjoins the DDPR, the Labour Court and the Labour Appeal Court to grant compensation where they find a dismissal to have been unfair. Dealing with a section of the Labour Relations Act of South Africa similar to ours, Grogan, ***Dismissal, Discrimination and Unfair Labour Practices*** **(2007) 2ed (Juta & Co Ltd, Cape Town 2007)** at 583-4 succinctly makes the point with which I agree:

> Although the employer must pay a reinstated employee a sum of money if the reinstatement order is made retrospective, that sum is not compensation as contemplated in subsection (1) (c) . . . . While 'back pay' is obviously a form of compensation for the loss of earning during the period of unemployment after the dismissal, it is generally regarded as distinct from compensation. Consistent with this view, the LRA deals with reinstatement and compensation in different sections, and suggests that reinstatement and compensation are alternative remedies. It seems clear that an employee who is awarded full retrospective reinstatement cannot be awarded compensation *in addition* to back pay. This would be inconsistent with the use of the disjunctive 'or' in section 193(1).

11. The only other question relates to the limitation on the amount of compensation that could be awarded to employees. In the light of all

the above we consider that the respondent should be granted compensation.

Assessment of compensation

12. As appears from section 73(2) of the ***Labour Code Order No. 24 of 1992***, quoted above, once a dismissal is found to be unfair, an assessment of compensation must be undertaken. The difficult question is one as to how the DDPR, the Labour Court and the Labour Appeal Court should assess such compensation?

13. In determining the quantum of compensation for unfair dismissal, the basic principles of quantification apply. The basic principle was stated as follow by Stratford J in ***Hersman v Shapiro & Co 1926 TPD 367 at 379***:

> 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.

14. In the case of ***Arendse v Maher 1936 TPD 162*** Greenberg J was faced with the problem of assessing damages claimed by a wife arising out of the death of her husband owing to the defendant's negligence. There was neither an actuarial nor other expert evidence before the Court. The learned judge stated 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."

15. Although it was formulated in cases of quantification of damage in other branches of the law other than employment, our Court of Appeal extended the application of this principle to employment law in ***Khabo v Lesotho Bank LAC(2000-2004)91 at 97.*** The critical question is, how much compensation should this Court award to Respondent for his having been unfairly dismissed? This is a difficult question. Section 73(2) of the ***Labour Code Order No. 24 of 1992***, requires that we must also take account of : (a), whether there has been any breach of contract by either party and (b), whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses. The word "also" means "too", "as well", "in addition", "furthermore", "besides." It goes without saying that there may be other factors that may be taken into account in addition to those reflected in (a) and (b) above. No exhaustive catalogue of such factors may be provided herein. Each case will have to be judged on its own merits. Sufficeth to say that some of these factors that may enter into the exercise of the discretion in determining the quantum of

compensation may include, the actual and future loss likely to be suffered by the employee as a result of the unfair and wrongful dismissal, the age of the employee, the prospects of the employee in finding other equivalent employment, the circumstances of the dismissal, the acceptance or rejection by either the employer or employee of any recommendation made by the Court for the reinstatement of the employee whether or not there has been any contravention of the terms of any collective agreement or any law relating to employment by the employer or the employee, the employer's ability to pay.

16. As Gauntleett JA pointed out in ***Khabo's*** case *(supra)*, at pp 99-100, in principle, the claimant is entitled to the difference between what he has received from employment following his dismissal and the sum to which he would have been entitled had the contract been fulfilled. The above principle should serve as the basis upon which the Court should factor in the factors that we are required to consider in terms of section 73(2) of the Labour Code

17. The evidence before us does not clearly reveal the difference between what he has received from employment following his dismissal and the sum to which he would have been entitled had the contract been fulfilled. This is because no such evidence was led in *casu.* It is advisable that an applicant who claims that he or she has been unfair dismissed should also present before the forum of first instance evidence on the difference between what he/she has received from employment following his/her dismissal and the sum to which he/she would have been entitled had the contract been fulfilled so as to help the DDPR and the Courts in exercising their discretion in terms of

73(2) of the Labour Code Order 1992. Failure to do this is sure to lead to injustice as it denies the Courts adequate evidence upon which to exercise their discretion as to the quantum. This is indeed a case in which we are asked to make bricks without straw. We have no alternative by to set out to undertake this mammoth task of making 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.

18. The evidence before us reveals that, the Respondent was 57 years old when he was unfairly dismissed. He was left with about three years before reaching his contractual age of retirement. The Court finds that he is an elderly man with no prospects of employment. His working days are over. As admitted between the parties, the circumstances of the dismissal are that the Respondent's dismissal was only procedurally unfair in that the Bank failed to follow the provisions of the Recognition Agreement. The Respondent held a senior position and it has not been said that he had a tainted disciplinary record. Fortunately for the Bank, it paid him a severance package even though it was short-calculated, a factor that the Bank voluntarily accepted before us, even though Respondent had to go through the expenses of lodging and prosecuting this appeal. The Court finds that the latter attitude of the Bank, of accepting that Respondent had been wrongly underpaid should mitigate the quantum in its favour in the assessment of compensation.

19. In the Morahanye' case, the Labour Court gave him compensation for seven months. There is no reason why the same should not be extended to Respondent *in casu*. Other than his own say so, there was

nothing tangible before the Labour Court to substantiate the extent of his mitigation of his damages. As to the remaining factors, the Appellant breached the provisions of the Recognition Agreement, which goes to the issue of procedural unfairness. There was also no evidence that the Appellant was faced with the problem of inability to pay in this case. In our view, he was not even given notice of termination of his contract (if we are to accept that the contract was wrongly terminated). Taking all the foregoing factors into account, this Court therefore finds that nine months wages as compensation would be appropriate.

20. In the result, the following order is made:

a. The appeal is dismissed with costs.

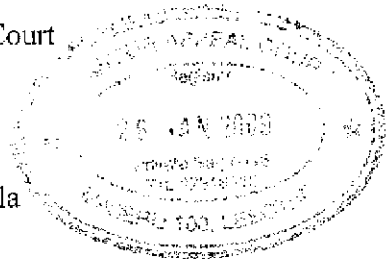
b. As this is no longer disputed, Appellant should pay the Respondent the amount of M81, 534.00 with which his severance package was short-calculated.

c. Appellant should pay the Respondent the sum equivalent to nine month salary as compensation for unfair dismissal in terms of section 73(2) of the Labour Code Order 1992.

21. My assessors agree.

K. E. MOSITO AJ.

Judge of the Labour Appeal Court



For the Appellant Bank Mr Ntaote

For the Respondent (Cross Appellant) Mr Sekonyela