LAC/CIV/APN/03/2009
LAC/CIV/A/5/2002

IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

In the matter between

QUEEN KOMANE 1st APPELLANT
ELIZABERTH MANAKO 2ND APPELLANT

AND

CITY EXPRESS STORES (PTY) LTD RESPONDENT

CORAM: HONOURABLE MR JUSTICE K.E.MOSITO AJ.
ASSESSORS: Mr Twala
Mr Matela

SUMMARY

Appeal from the judgment of the Labour Court - applicants/appellants complaining that the Labour Court did not quantify their emoluments regarding severance pay and leave pay - The appellants also complaining that the Labour Court denied them 1/3 of their total compensation without justification. - Labour Appeal Court finding that severance pay had been quantified and granting the same. - Labour Appeal Court also finding that no justifiable basis existed for denying appellants/applicants 1/3 of the total compensation - court granting such 1/3. - Labour Appeal Courting finding that leave pay had not been quantified on the record - leave pay refused Practice - costs on attorney and client scale de bonis propriis granted against respondents' attorneys and counsel.

JUDGEMENT

MOSITO AJ

1. The present application is a sequel to an appeal that was decided by this Court some years ago. That appeal was first filed in this Court on the 5th day of July 2002. It heard on 23 October 2006 and disposed of on 2nd November 2006 under LAC/CIV/A/5/2002.

2. That appeal arose out of an application launched by the Appellants in the Labour Court for an order in the following terms:
(a) That the "hearings" conducted on the 26 September 2000 was procedurally unfair and the decision reached therein be declared null and void as it was conducted out outside Lesotho.
(b) That the act of taking the workers outside Lesotho is contrary to the provisions of the Lesotho Laws especially Labour Code.
(c) Payment of salary up to date of judgment.
(d) Further and/or alternative relief.

3. The respondent in the Labour Court had not filed an answer but an authority to represent as contemplated by the Rules of the Labour Court. The Labour Court had allowed the respondent to be represented by an attorney and to argue the matter. The Labour Court had consequently dismissed the application with costs on the 28th day of March 2002. The present Applicants then noted an appeal complaining about the decision of the Labour Court, both on the merits and

procedure. The appeal was consequently upheld with costs. This Court set aside the Labour Court and made the following order:
(a) The order of the Labour Court is set aside and replaced with the following order:
(i)Prayers (a) and (b) of the originating application are granted.
(c) (i) The Respondent is ordered to pay Appellants salary from the purported date of dismissal to date.
(ii)In order to ascertain what *quantum* of such salary is payable to the Appellants the matter is sent back to the Court *a quo* for the furnishing of evidence thereon.
(iii) The Court *a quo* should be furnished with affidavits from both parties regarding emoluments (if any), which have been earned by the Appellants in the period since their dismissals, (iv) 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 Appellants are 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 Appellants must file their affidavits within 15 days of this order;
(ii) The respondent must file its affidavits (if any) within 15 days of the date on which Appellants have filed their 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 respondent's affidavits.
(iv) The costs of this application must be borne by the first
respondent.

4. The Labour Court duly proceeded in terms of the above order, but did not quantify severance pay and leave pay. It was in respect of those two that the appellant/applicants returned to this Court on appeal. They were however late and had to file an application for condonation for the late noting of the appeal. The application was dismissed for lack of some essentials of condonation. The appeal was consequently struck off and they in due course returned to this Court with an application for condonation and reinstatement of the appeal.

5. When the matter was heard before us during this session, it emerged that this Court had dismissed the condonation application on the basis of the papers. For some mysterious reason, one of the two bundles had disappeared from the assessors' and the judges files when the condonation application was to be determined. The application had to be determined purely on the remaining bundle, which resulted in the dismissal of the application. This was unfortunate. After reading the judgement appellants retuned to this Court with an application for condonation and reinstatement of the appeal and had to multiply the copies which had been mysteriously removed. The Court then proceeded with the an application for condonation and reinstatement of the appeal as filed. 6. When the matter was heard, the parties agreed and the court ordered that the application for condonation and reinstatement of the appeal be heard together with the appeal. When that was to happen, it became clear that the respondents counsel, Advocate Rafoneke was ill-prepared for the hearing. He started by raising some flimsy so-called point *in limine.* He sought to argue that the appeal should not be heard because the Appellants had not paid the costs of the dismissed condonation application. He was raising this notwithstanding that there was neither a bill of costs prepared and filed nor an order making the payment of such costs a precondition for the hearing of the application for condonation and reinstatement of the appeal together with the appeal. What is more, no substantive application for this kind of relief before this Court. When it failed, he then asked for postponement. This was refused as well, but the matter was stood down for one hour to enable him to re-organise. This gave him an opportunity to come back with so semblance of heads of argument. The matter took off and the

Applicants/appellants counsel addressed to a finish. The matter had to be postponed to Monday the 1st of February at 2:30pm for hearing. Every body arrived on time on that day except Advocate Rafoneke who never appeared at all! The Registrar was sent to locate him all in vain. His client was given an opportunity to go to Advocate Rafoneke's office but the client returned saying the office reported that that afternoon, Mr Rafoneke arrived at the office took the files and indicated that he was coming to court. That was the last thing that was heard of him on that day. The Court then ordered that the matter should proceed, and the client had to argue the matter herself. I may say that she was completely at sea as to the proceedings. 7. The Court could not understand why it had to be treated in this rather cavalier manner. As a result, the Court issued a directive that the parties should file written submissions on why the respondents attorneys should not be ordered to pay costs on attorney and client scale and *de bonis propriis* for this rather un acceptable conduct. The heads were duly filed, but no affidavit by Advocate Rafoneke's office explaining his absence. Instead, he annexed a document which appeared to be certificate of incapacity addressed to his employer and purporting to give him sick leave from the 1st to the 5th days of February 2010. The problem with this document is that, it did mot take cognizance of the fact that Mr Rafoneke was at work on the 1st and the 5th days of February 2010 when he prepared the rather voluminous heads to which it was annexed. Why then should we believe in the veracity of the content of this document?! It also emerged from, the record of the proceedings in the Labour Court that this hide-and-seek game was being played by respondents lawyers. At times they abandoned at shore and decided to go to Bloemfontein when the case was to proceed. They did not even file quantification documents as directed. The respondent however still decided to remain with this team of lawyers as lawyers of its choice to date. We will revert to this issue.

8. In our view, there was no reason why the labour Court did not respondents to pay severance pay because it had been proved on the papers. There is of course an arithmetic error for severance pay as spelt out in our judgement of the 14th August 2009. The correct figure should be M20, 818.44 for each of the appellants not M243,322.10. We are not convinced that the leave pay had been proved as there is no NURAW document attached. The Labour Court was probably not favoured with this document as well. The leave pay claim cannot succeed. The Appellants' further complaint was that, the Labour Court erred in denying them of one-third of their total compensation. They contended that this Court should interfere with that exercise of discretion. Whether or not this Court is entitled to interfere in the Labour Court's decision to award the Applicants/Appellants compensation in that manner, should depend on whether the Labour Court was exercising a discretion in so doing. In addition it would depend upon whether or not the Labour Court's decision to award compensation in that amount, was the result of the exercise of a true discretion. If it was. then this Court would only be entitled to interfere with the exercise of such discretion on very limited grounds. If it was not, then this Court would be at large to decide the issue according to its own judgement. A true discretion is also referred to as a narrow discretion, (see **EM Grosskopf JA in MWASA v Press Corporation of SA Ltd 1992(4)SA 791 (A)** at 800 D-E. In the MWASA case the Appellate Division of the Supreme Court of South Africa referred to a quotation from an article by Henning: **"Diskresie uitoefening** " in 1968 THRHR 155 at 158 where the author said:

"A truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power (Rubinstein Jurisdiction and Illegality (1956) at 16)".

9. After this quotation in the MWASA case EM Grosskopf JA said at 800 E-F :-
"The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

10.The Appellate Division then referred, with approval, to ***Salmond on Jurisprudence*** 12th ed at 70 - 1 where different categories of matters that come before courts are discussed. In the latter book, the following appears:

"Matters and questions which come before a court of justice, therefore, are of three classes:
(1) Matters and questions of law - that is to say, all that are determined by authoritative legal principles;
(2) Matters and questions of judicial direction - that is to say, all matters and questions as to what is right, just equitable, or reasonable, except so far as determined by law;
(3) Matters and questions of fact - that is to say, all other matters and questions whatever.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment, in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth."

11 .In the next paragraph in MWASA's case at 796 H - I EM Grosskopf JA pointed out that in the above passage the word "discretion" was used "in a wide sense to convey 'the action of discerning or judging; judgment; discrimination **(The Shorter Oxford Dictionary SV discretion)."** In ***Ex Parte Neethling and others 1951(4) SA 331 (A)*** at p.334 H-335A, Greenberg JA pointed out that:

"I think, therefore, that, if an appeal lies, this Court would be entitled to interfere, not on the ground that in its opinion the contract was not in the interest of the minors, because if it did so it would be substituting its discretion for that of the upper guardian but only if it came to the conclusion that the Court a quo had not exercised a judicial discretion. Rex v Zackey, 1945 AD 505, dealt with the question of an appeal court's power to overrule a lower court's decision where the decision had been on a matter within the discretion of such lower court and three classes of such cases were referred to, viz decision on the question of costs, on a postponement and on an amendment of pleadings in the lower court. To these might be added the question of an alteration of sentence on appeal (see Rex v Ramanka 1949 (1) SA 417). I see no distinction in principle between these and the present case. At p. 513 of the report in Rex v Zackey, supra, instances were given to show what is meant by 'judicial discretion' and these instances are apposite here (see also Merber v Merber, 1948(1) SA 446, and Levin v Felt and Tweeds Ltd, 1951(2) SA 401 at p.416). Can it be said in the present case that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons? I can see no ground for answering this question in the affirmative."

12.In **Knox D' Arcy Ltd and others v Jameson and others 1996 (4)** SA **348** (A) **at 362 D-E** EM Grosskopf JA pointed out that, if a court had "a truly discretionary power in an application for an interim interdict, it would mean that in principle on identical facts it could choose whether to grant or refuse an interdict and a Court of Appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (Perskor case at 800 D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it." Thereafter, EM Groskopf JA said that the statement that "a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision." In ***Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)*** at p.781 I-J, the Appellate Division stated that "(i)t is an equally well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed." The Labour Court awarded the

Applicants/Appellants compensation as aforesaid purportedly exercising its its discretion on the basis of section 73 of the **Labour Code Order 1992:** That section provides in part as follows:

13.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.

14.In ***Shepstone & Wylie & others*** v ***Geyser*** *N.O.* ***1998(3) SA 1036(SCA)*** the Supreme Court of Appeal of South Africa dealt at 1044J - 1045E with the issue of interference by a Court of appeal with the exercise of a discretion by a lower Court or a Court of first instance such as our Labour Court *in casu.* Hefer JA, writing for a unanimous Court, pointed out ***Shepstone & Wylie & others v Geyser*** *N.O. (supra)* at 1044 J - 1045A that, there were numerous judgments of the Supreme Court of Appeal which were to the effect that the power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the lower Court or Court of first instance had exercised its discretion capriciously or upon a wrong principle, or had not brought its unbiased judgment to bear on the question, or had not acted for substantial reasons. In ***National Coalition for Gay and Lesbian Equality v Minster of Home Affairs 2000 (2) SA 1 (CC),*** the South African the Constitutional Court pointed out that:

"[11] A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles....."

15.Against what has been said above, the question arises whether in deciding whether the power given by section 73(2) of the Labour Code Order 1992 to the Labour Court or an arbitrator to award or not to award compensation in a case where it has found the dismissal of an employee unfair involves the exercise of a true discretion (i.e the narrow discretion). There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. Firstly, the amount of compensation awarded by the Labour Court must be such amount as the court considers just and equitable in all circumstances of the case. The "just and equitable" provision confers very wide discretionary powers on the court. The words 'just and equitable' are words of the widest significance and do not limit the jurisdiction of the court to any particular situation. They relate to a question of fact and each case must depend on its own circumstances. No general classification can be made to show under what circumstances the court can invoke the 'just and equitable' provision. However, the assistance of this provision has to be taken into account whenever the court is of the opinion that considerations of justice and fairness require that a particular method of quantification based on the facts of the case before court, and not otherwise, be carried out. Secondly, in assessing the amount of compensation to be paid, account must also be taken of whether there has been any breach of contract by either party. Lastly, the Court must also consider whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses. There is nothing in section 73 of the ***Labour Code Order 1992*** to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is

just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of the employer or employee could constitute a relevant circumstance under the section. What is just and equitable could be affected by the reasonableness of efforts made in connection with suitable alternative resolution of a dispute, the time scales proposed relative to the degree of disruption involved, and the willingness of the parties to respond to reasonable alternatives put before them. 16.In the case before us, there is no indication that the amount of compensation awarded by the Labour Court was such amount as the court considered just and equitable in all circumstances of the case. We say this because there is nothing in the judgment of the Labour Court indicating that, in assessing the amount of compensation to be paid, account was also taken of whether there had been any breach of contract by either party and whether the employees had failed to take such steps as may be reasonable to mitigate their losses. In our view, this exercise of discretion was capricious and arbitrary. This is more so because there was neither any opposition to the evidence adduced, nor the allegations of fact that Appellants had indeed taken steps to mitigate their losses. We are therefore entitled to interfere in this decision. In the result, since there was no reason to reduce the *quantum* of compensation by one third, and there was no evidence that the Appellants did not mitigate their losses, were would order that the full compensation be paid. The respondent must thus, pay the one third of the total compensation which the Labour Court unjustifiably caused to be deducted.

17.Coming to the issue of costs, I have already indicated that the parties were given notice of our intended action in relation to costs. The same basic principles discussed in Part I above, apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct [this list is not exhaustive] on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs.(See ***Nel* v *Waterberg Landbouers Ko-peratiewe Vereeniging, 1946 AD 597*** at p 610 second paragraph). The Courts have dealt in a number of cases with the question of attorney and client costs. For example, the Courts awarded attorney and client costs. It has also been held that the attorney and client costs should be ordered "where the other side is put to unnecessary trouble and expense which the other side ought not to bear. This occurs where the actions are unreasonable and reprehensible. Examples cited include where scandalous allegations were made or where mala fides was alleged without proper foundation."(***Engineering Manufacturing Services* v *South Cape Corp* 1979(3) SA at 1344 - 5 (WLD).** Again, "[w]here … the Court finds that an attempt is made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case."(De Villiers JA's dictum in ***Hudson v Hudson and Another* 1927 AD 259 at 268).** Moreover in such cases the Court's hand is not shortened in the visitation of its displeasure.(see **Jewish Colonial Trust ltd v Estate Nalham 1940 AD 163 at 184, lines 1 - 3).** It is also good law that it is unusual to make such an order in a matrimonial suit. (See Van Winsen. **The Civil Practice of the Supreme Court on South Africa** 4th Ed at page 721). The direction that the costs should be paid *de bonis propriis* in the case of an attorney is only to be made in a limited set of circumstance i.e. "serious cases such as cases of dishonesty, wilfulness or negligence in a serious degree". (Cilliers on ***Costs 2nd Ed.*** para 10.25).

18.In this case, it is clear that respondent's attorney fits squarely within the above principles. This Court is enjoined to make its displeasure at the way in which respondent's attorney handle this case and treated this court.

19. It is accordingly ordered that costs of this appeal are to be paid on attorney and client scale de *bonis propriis* by the respondent's attorney and counsel.

20. This is a unanimous decision of the Court,

K.E.Mosito
Judge of the Labour Appeal Court

For Appellants Advocate. B Sekonyela

For Respondent Advocate M. Kotelo