IN THE LABOUR COURT OF LESOTHO

LC/REV/562/06

HELD AT MASERU

IN THE MATTER BETWEEN

NALEDI HOLDINGS (PTY) LTD T/A NALEDI SERVICE STATION **APPLICANT**

AND

MATSELISO MATSEMELA **1ST RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date of hearing : 14/03/02

Review – Sec.228F(3) – The Court may review DDPR award on any ground permissible in law and any mistake of law that materially affects the decision.
Arbitrator disregarding evidence led – Award of compensation – Arbitrator awarding higher compensation than sought in evidence.
Arbitrator taking irrelevant factors into account and disregarding relevant factors – award reviewed and set aside.

1. This review application arises out of an award of the Directorate of Disputes Prevention and Resolution (DDPR) in favour of the 1st respondent. Since it is a relatively short matter, it was argued in chambers yesterday, Wednesday 14th March 2007. The 1st

respondent was admittedly employed by the applicant on the 7th July 1998 as a petrol attendant.

2. Sometime in 1999 she was promoted to the position of a cashier. Sometime in 2002 she was demoted back to the position of petrol attendant. This followed a robbery at the service station in which an amount of M175,000-00 was stolen. 1st respondent was suspected of colluding in the robbery, because she had met and talked to the robbers and failed a polygraph test.

3. In January 2004, 1st respondent had a shortage of M1,075-00. The Managing Director was not particularly happy with the explanation she gave for the shortage. She had several warnings for suspicion of involvement in the acts of dishonesty. At one time the management had a recommendation to dismiss her, but they could not do so because of lack of solid evidence linking her to those acts.

4. At another time the 1st respondent was found to have handed in M1,000-00 made up of M100-00 notes. One of the notes had been torn into two halves and hidden among the complete M100-00 notes. The other half of the note was missing. The management concluded that there was no way the incomplete note could be part of the pack without applicant being aware of it. She was made to pay for the money, but she never bothered to explain the circumstances that led to the inclusion of the half note and what had happened to the other half.

5. The last straw that broke the camel's back was when she was discovered by the Managing Director to have opened the petrol machine for a customer and allowed the customer to fill petrol for himself. The incident was observed twice, the previous evening and following morning.

6. This time round, 1st respondent was charged in the presence of the Deputy Manager Mr. Leponesa Maoeng who testified to the events at the DDPR. According to Maoeng, the 1st respondent offered no satisfactory explanation save to say that the queue was long and she did not look outside, ostensibly to see who was filling petrol.

7. It was emphasized at the hearing before the DDPR that "a person should always look outside to see who they open a machine for, because customers have a tendency of filling petrol and leave. It is even in terms of the company's rules to do that." (See p.16 of the record).

8. It is common cause that following the said confrontation 1st respondent was dismissed. She approached the DDPR which found that the employer had "…failed to discharge his duty of proving the reasonable ground for the applicant's dismissal." The DDPR then ordered that the applicant be compensated in the sum equivalent to 10 months wages.

9. The applicant approached this court seeking review and setting aside of the award of the DDPR. The grounds upon which review is sought are contained in paragraph 9 of the Managing Director's founding affidavit and they are couched as follows:

> "9.1 The 2nd respondent misdirected itself in awarding 1st respondent ten (10) months' salary, whereas the 1st respondent was seeking a relief of compensation equivalent to five (5) months salary.
>
> "9.2 The 2nd respondent therefore misdirected itself in awarding the 1st respondent the relief she was not seeking. This is an irregularity which warrants setting aside the said award.
>
> "9.3 The 2nd respondent misdirected itself in failing to furnish reasons why the 1st respondent was awarded ten (10) months' salary…..as opposed to the relief that the 1st respondent sought."

10. In her response the 1st respondent relied on section 73 of the Labour Code Order 1992 (the Code) as amended which provides:

> "(1) If the Labour Court (arbitrator) 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 (arbitrator) shall not make such an order if it considers reinstatement of the employee to be impracticable in the light of the circumstances.

"(2) If the court (or arbitrator) 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 (or arbitrator) 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 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 loss."

11. Mr. Tlapana for the 1st respondent sought to show that the 2nd respondent had a discretion to fix the amount of compensation payable where the employee does not desire reinstatement. Whilst there is no direct evidence that the 1st respondent did not desire reinstatement, it can readily be discerned from the record. For this you can see p.2 of the typed record where the 1st respondent says:

"I attended a hearing on the 26th and on the 1st I received a dismissal letter. After my dismissal I came here seeking compensation and my severance pay because it was not given to me."

Adj. Please be clear. Why are you here? What is your claim?
App. My claim is about compensation.
Adj. What for?
App. Unfair dismissal."

> That the learned arbitrator had discretion to award compensation begs no question. It is however trite that a discretion must be exercised judicially. This entails hearing evidence on which a presiding officer will be able to base their decision.

12. Mr. Tlapana sought to argue further that the learned arbitrator assessed the level of compensation basing herself on the fact that the dismissal had been found to be substantively unfair, and that the applicant had a long service for which she had not been paid severance pay.

13. Whether the dismissal of the 1st respondent can be said to be substantively unfair, regard being had to the cumulative effect of the misconducts with which she was accused; and indeed the one which finally led to her dismissal, leaves a lot of room for doubt.

14. Quite clearly, the learned arbitrator attributed every scant weight to the undisputed evidence of Maoeng that the 1st respondent offered unsatisfactory explanation when she was confronted with the accusation that she had allowed customers to fill up petrol for themselves. All that she did was a bare denial that she allowed customers to serve themselves. Significantly the Managing Director had sought the presence of Maoeng when she confronted the 1st respondent and Maoeng was thus testifying to events personally known to him.

15. It is common cause that in terms of section 228F(3) as amended this court "…may set aside an award (of the DDPR) on any ground permissible in law and any mistake of law that materially affects the decision." (See also Lesotho Highlands Development Authority .v. The Directorate of Disputes Prevention and Resolution and Another LAC/REV/74/05 p.8 of typed judgment (unreported). Accordingly, the DDPR award is assailable on this ground to the extend that it made an award totally at variance with the evidence adduced.

16. Counsel for the applicant also referred us to page 4 of the typed record where the 1st respondent clearly stated that she would want to be compensated by payment of five months salary for the unfair

dismissal. Despite that evidence the learned arbitrator awarded compensation of ten months salary because she took into account that the 1st respondent had not been awarded severance pay.

17. Since the learned arbitrator had found that the dismissal of the 1st respondent was substantively unfair, albeit wrongly so, she was entitled to award compensation. However that did not entitle her to be arbitrary. Even though the 1st respondent said she was seeking payment of severance pay, the DDPR heard no evidence as to that entitlement.

18. This court was correctly referred to the Court of Appeal decision in Mathabo Mbangamthi .v. Puleng Sesing-Mbangamthi C. of A (CIV) No.6 of 2005 when the following was said:

> *"the third aspect for concern is the fact that the learned judge took it upon himself to make an order which was not sought in the notice of motion or covered by the evidence, or so we were informed canvassed in argument at the hearing."* (Page 8 paragraph 9 of typed judgment).

Severance pay is governed by section 79 of the Labour Code Order 1992. Nowhere in the record has the 1st respondent made necessary averments with a view to proving her entitlement to severance pay under that section.

19. On more than one occasion (pages 4 and 21 of the typed record), the 1st respondent averred that the relief she sought was five months compensation. Despite that the arbitrator awarded 10 months because she considered that severance pay had not been paid to 1st respondent. This was clearly an irrelevant consideration which is not envisaged by section 73(2) of the Code.

20. True enough 2nd respondent considered that she found the dismissal to be unfair. She however did not complete her assignment under that section which was to consider whether the 1st respondent had taken such steps as are reasonable to mitigate her losses. Instead she misdirected herself and considered that the 1st respondent was employable.

21. In Lesotho Brewing Company t/a Maluti Mountain Brewery .v. Lesotho Labour Court President and Another CIV/APN/435/05 (unreported) p.16 of typed judgment, Ramodibedi J. as he then was addressed the question arising under section 73 as follows:

> *"in the same breath I find that by being silent on the question whether the 2nd respondent failed to take such steps as may be reasonable to mitigate his losses the Labour Court wrongfully disregard the express provisions of section 73(2) of the Labour Code 1992 and thus committed gross irregularity."* (Emphasis added).

22. There is no doubt that this is what happened in casu and that therefore the learned arbitrator committed a gross irregularity which calls for the review, correction and setting aside of the award on this ground as well. Accordingly, the review application must succeed. There is no order as to costs.

THUS DONE AT MASERU THIS 15TH DAY OF MARCH 2007

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **I CONCUR**
MEMBER

M. MAKHETHA
MEMBER

I CONCUR

FOR APPLICANT: **MR. MOKOKO**
FOR RESPONDENT: **MR. TLAPANA**