IN THE LABOUR COURT OF LESOTHO LC/146/2000

HELD AT MASERU

IN THE MATTER BETWEEN:

KHOAI MATETE APPLICANT

AND

INSTITUTE OF DEVELOPMENT MANAGEMENT RESPONDENT

JUDGMENT

Dates: 21/04/08, 15/10/08
Unfair dismissal – Compensation – Section 73(2) gives the Labour Court the discretion to award just and equitable compensation – Allowances and benefits capable of being expressed in terms of money ought to be included as part of an employee's wages/salary in the assessment of compensation – The measure of damages to be awarded in the case of breach of a contract without reference to limit of time is the sum the dismissed employee would have received from date of dismissal to the earliest date on the facts found by the court the employment would terminate less what he has earned following his dismissal.

BACKGROUND

1. This case has a sad history of not coming to an end. However the blame cannot be placed entirely at the door of either party. Each time it dragged it was not because either side was sitting back and doing nothing to see it finalized. It was either because parties were locked in settlement negotiations which fell through, or the case was pending in one or the other of the three courts it has been through.

2. The applicant was employed as the Country Director for the respondent on the 1st April 1993. He was admitted to permanent and pensionable establishment on the 20th April 1994. On the 15th September 1995 he was appointed on secondment to the Regional Office based in Botswana. He was seconded to become Regional Director of the respondent for a fixed term period of three years.

3. Misunderstanding pertaining to suspected misappropriation of funds arose between the applicant and the Regional Office. Applicant was charged of fraud but was soon acquitted by the Magistrate Court in Botswana. Following the criminal charges saga, applicant tendered his resignation in terms of the contract of secondment on the 16th July 1997. The resignation was duly accepted.

4. Applicant sought to return to his substantive post of Country Director – Lesotho. His effort was resisted by the respondent since the office was then being occupied by an incumbent who had been appointed on contract for the duration of applicant's secondment. Applicant challenged respondent's refusal to allow him to resume his duties as Country Director in the High Court of Lesotho. The application was unsuccessful and the High Court held that he could only legally claim resumption of his duties with effect from the official end of is secondment to the Regional Office, which was going to be on the 30th September 1998.

5. Applicant waited for the official end of the secondment. On the 1st of October 1998, he sought to resume his duties as the secondment had now ended officially. The respondent did not allow him to do so. Parties entered into settlement negotiations which failed. On the 13th November 2000 applicant successfully moved this court for an order directing that he be reinstated in his position as Country Director. The Judgment of this Court was handed down on the 9th August 2002.

6. The judgment of this Court was taken on appeal by the respondent. It is not clear on what date the appeal was noted but it was in 2002. On the 25th February 2005, the Labour

Appeal Court per Peete J. delivered a judgment in which it held, inter alia, as follows:

(a) The refusal to accept the respondent (applicant herein) back as Country Director even after his acquittal in Botswana was in the circumstances unreasonable and not justified in that save for the Botswana problem or saga there was no good reason why he was not taken back.
(b) In the circumstances it is fair to conclude upon the facts that in refusing the respondent resumption of his duties this amounted to a termination of employment in terms of section 68 of the Labour Code Order 1992.
(c) Since the appellant has not established facts that justified this de facto dismissal, it follows that the dismissal is unfair.
(d) Since the 1st October 1998 some six or seven years have passed. By all means reinstatement of the respondent cannot be practicable in the circumstances and the Labour Court ought not to have ordered reinstatement but fixed an amount of compensation in lieu of reinstatement.
(e) The case is remitted to the Labour Court for it to fix compensation. This case is back before this court pursuant to the foregoing findings and order of the Labour Appeal Court.

CLAIM FOR COMPENSATION

7. The applicant has filed a notice of amendment of his Originating Application in which he included the prayer that respondent be directed to pay him compensation in lieu of reinstatement in the amounts specified in Annexure "KM1". The respondent filed an Answer in which it did not oppose the application for amendment. They rather went straight ahead to deal with applicant's claims. Accordingly, the amendment passed unopposed.

8. Applicant's claim is divided into three parts. The first part of "KM1" is a claim for prorated gratuity due and payable to the

applicant upon his resignation as Regional Director on the 16th July 1997. Applicant testified that the gratuity was payable in terms of his secondment contract. He claims P46,000-00 which converts to M61,180-00. This part of the claim is not disputed by the respondent.

9. Under part 2 of "KM1" the applicant claims payment of salary plus benefits accruing to the Country Director from 1st October 1998 to September 2008. The claim is based on the salary of M9050-00 paid to the Country Director as of October 1998. Applicant avers that he has no knowledge of annual increases that were made but invited the court to use its discretion. It was however subsequently submitted by Mr. Phafane for the applicant that they have agreed with counsel for the respondent that 18.5% interest be applied to amounts due to both parties. Applicant's claim under this part before applying the agreed rate of interest is M1,726,609-29.

10. Part 3 to Annexure "KM1" is a claim of salary at the rate of M9,050-00 plus benefits from October 2008 to the date that applicant would retire at the age of 65 years. This period represents 10 years and three months. The total amount claimed under this part is M1,769,774-43. The total claim extracted from the three parts of the Annexure adds up to M3,958,227-15 after the 18.5% agreed rate of interest is applied.

THE LAW

11. The Labour Court is empowered to order compensation by section 73(2) of the Labour Code Order 1992 (the Code) which provides:

> *"(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 be taken of whether there has been 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."*

Quite clearly the Court is given a discretion to award "…such amount as the court considers just and equitable in all circumstances of the case."

12. Mr. Phafane for the applicant contended that this case is different in that the Court has no discretion to exercise in the light of the words of the learned judge of the Labour Appeal Court that this Court should fix an amount of compensation "in lieu of reinstatement." Relying on the Oxford Concise Dictionary meaning of the words "in lieu" he contended that, this is not a case where the Court will "fix what it considers to be a fair compensation, it has to be a compensation in lieu of reinstatement." He contended further that such compensation must "take the place of reinstatement." (See paragraphs 2.2 and 2.3 of applicant's heads).

13. The words "in lieu of reinstatement," are not the novelty of Peete J. He actually borrowed them from section 73(2) of the Code. To prove this, even as he used them in the judgment, he did not forget to put "section 73(2)" in brackets right in from of them. (See paragraph 33 of the LAC judgment). It follows therefore, that the words are not used in the judgment in a context that was meant to derogate from the general import of section 73(2), which essentially leaves the issue of just and equitable compensation in lieu of reinstatement to the discretion of the court. (See Standard Lesotho Bank .v. Lijane Morahanye and President of Labour Court LAC/CIV/A/06/08 at p.12 para 15 of the typed judgment.)

14. In exercising its discretion the court is enjoined to consider whether there has been breach of contract by either party and whether the employee has failed to take reasonable steps to mitigate his or her loss. (See sec.73(2) of the Code and Matseliso Matsemela .v. Naledi Holdings t/a Naledi Service Station LAC/CIV/A/02/07 (unreported) at p.7 of the typed

judgment). That the respondent is in breach of the contract between it and the applicant begs no question. This is a case of plain unfair dismissal both procedurally and substantively. The learned Peete J has said as much in his judgment. The applicant has been dismissed for no known wrong on his part. He was just denied resumption of duty without any reason being given. This was the reason why this court believed reinstatement was a suitable remedy as indeed the applicant desired it. (See sec. 73(1) of the Code).

15. The desire of the applicant to be reinstated is further proof that he was not so much for self enrichment. However, the Labour Appeal Court said we must fix compensation in place of reinstatement. Counsel for the applicant referred us to the case of CEPPWAWU and Another .v. Glass Aluminium CC (2002) 5 BLLR 399 where the Labour Appeal Court dealt with compensation in a case of an automatically unfair dismissal – a case on all fours with the present matter. Two excerpts are worth quoting from that judgment:

> *"In considering whether or not to award compensation in a case where the dismissal is automatically unfair, the Labour Court must give due weight to the reason for the dismissal"* p.409A

Further down the same page the learned Judge of appeal states:

> *"….such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected. In considering whether or not to award compensation in such a case the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly there must be a punitive element in the consideration of compensation."* p.409 G-H.

16. The Court has to show that the type of termination to which applicant has been subjected is not condoned. However, the Court still has to weigh that attitude with the reality that where the court has taken the position not to order specific performance like is the case in casu, "the innocent party will have to prove his damages which may be far less burdensome on the debtor." Furthermore, the applicant is bound to prove his damages because the court has "no jurisdiction to make a punitive award as an inducement to perform." (See RH Christie The Law of Contract in South Africa 4th ED. Lexis Nexis Butterworth pp611 and 616).

17. Accordingly in exercising its discretion the court still has to be guided by what is proven or failing prove "do its best with the facts which are available." (See Lesotho Bank .v. Mahlomola Khabo 1999 – 2000 LLR-LB 328 at 337 and Matseliso Matsemela .v. Naledi Holdings t/a Naledi Service Station LAC/CIV/A/02/07 at p.5 paras 7-8 of the typed judgment.). In his testimony applicant testified that he has no knowledge of the increases that were made to the salary of Country Director since his departure. He invited the court to use its discretion and determine what increases he should get.

18. That would be a dangerous terrain to venture into. The court is not in possession of the necessary facts to exercise such a discretion. However, since there is no dispute that applicant's dismissal is unfair and that he is entitled to a measure of damages for some period yet to be determined, the court will in line with the precedent in the Lesotho Bank case supra do the best with the information at its disposal. We find support in the remarks quoted with approval in the Lesotho Bank case supra from a judgment in the old case of Stolte .v. Tietze 1928 SWA51 at 52 where it was stated:

> *"if there is evidence that some damages have been sustained, but it is difficult or almost impossible to arrive at an exact estimate thereof, the court must endeavour with such material as is available, to arrive at some amount which in the opinion of the court will meet the justice of the case."*

19. Despite the fact that applicant made it plainly clear that he has had no information on the annual increases if there were any, the respondent in whose peculiar knowledge such information would be; made no effort to avail it. In the face of this dearth of information on the increases, counsel for the applicant suggested with the concurrence of counsel for the respondent that the court should apply 18.5% interest on all amounts found due whether to the applicant or to the respondent. This was very much a guess figure, but the court will adopt it since it constitutes the best available information to work on.

ASSESSMENT OF COMPENSATION

20. It is common cause that the applicant's claim for compensation is that he must be paid his monthly salary and benefits from 1st October 1998 to the date of his retirement at age 65. The claim until the age of retirement has in it an element of taking away the court's discretion to determine what is just, fair and equitable measure of damages in the circumstances of the case. (see CEPPWAWU case supra p.409-410 para 50(b)A). Furthermore, it carries a connotation that one is guaranteed employment until retirement. It looses sight of the fact that the employment, may be terminated before due date of retirement for a number of reasons. In Jones .v. KPMG Aitken & Peat Management Services (Pty) Ltd (1996) 17 ILJ 693 at 697 Myburgh J had this to say:

> *"By contrast, in a contract of employment the employer is entitled to terminate the employment relationship for a valid reason having followed fair procedure; there is no job for life. One of the valid reasons for terminating the employment relationship is a bona fide reduction in workforce. An employee's claim for compensation under section 46(9) is not, therefore, for the loss of income from the date of retrenchment until the date of retirement."*

21. In his argument Mr. Phafane referred us to the case of Billy Lesedi Masetlha .v. The President of the Republic of South Africa CCT01/07 in which the Constitutional Court awarded the applicant full salary and benefits from date of dismissal to the date that his fixed term contract would have expired. This case

is distinguishable from the present case precisely because the instant matter does not involve a fixed term contract. It is rather an indefinite contract, referred to in the Code as "a contract without reference to limit of time." (See sec.62 of the Code).

22. The correct approach in such contracts is to be found in among others the case of Jones supra where the following was said:

> *"The Industrial Court should interpret the concept of compensation in a case such as this one as similar to one for general damages: it is not one which is capable of precise mathematical calculation. An appropriate measure of compensation may often be the earnings of the retrenched employee at the time of retrenchment multiplied by the number of months which the court finds reasonable in the circumstances."*

In Parry .v. Astrol Operations Ltd (2005) 26 ILJ 1479 at 1500 it was held that:

> *"The common law entitlement of an employee for contractual damages for breach of an indefinite contract is what he would have earned from date of dismissal to the earliest date after which the employment could lawfully have been terminated. Effectively this is the notice period. Loss of such benefits such as pension rights and other benefits payable during the notice period must be included in the claim."*

In the Lesotho Bank case supra the court held :

> *"It seems to me that the correct approach applying the usual measure for damages ex contractu, is that the claimant is in principle 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. It is then a matter of enquiry as to how long on the facts of each case the contract is likely to have endured. In the case of a fixed term contract, it is to the end of the contractual period. In a case such as the present it is until the date which on the fact found by the court the contract is likely to have terminated."* (at p336).

23. Following on the foregoing stare decisis, the applicant was carried through a careful history of his employment during cross-examination. In Answer to the questions under cross-examination he stated that he holds two degrees of BSC and MSC Education. He stated that he started to work in 1978 as Registrar of the then National Teacher Training College (NTTC). In less than a year he had been transferred to teach Maths under the Faculty of Science at the National University of Lesotho (NUL). After approximately seven years at NUL, he was seconded to head NTTC as its Director from 1987 to 1991. At the end of his second term as Director of NTTC he was appointed Principal Secretary in the Ministry of Education. He served only one two year term which ended in early 1993. On the 1st April 1993 he was appointed IDM Country Director in Lesotho. In September 1995 he was seconded to become Regional Director.

24. This evidence shows clearly that applicant was and probably would have remained a highly marketable person within government and its parastatal bodies. This goes to show that it cannot be correct that he would have remained with respondent until age 65. He was a highly mobile individual. This is a factor to be taken into account in assessing the earliest date his employment with the respondent would possibly terminate.

25. When it comes to the benefits, the applicant has claimed every benefit to which he was entitled in terms of his contract. These are accumulated leave, at the rate of 2.5 days per month; housing allowance at the rate of M2000-00 per month; telephone allowance at the rate of M500-00 per month; transport allowance at 15% of monthly salary and 5% employer's pension fund contribution.

26. We are in no doubt that the applicant has rightly included these benefits as an integral part of his remuneration package. The Labour Code Order 1992 (the Code) defines pay interchangeably with wages as:

> *"remuneration or earnings however designated or calculated, capable of being expressed in terms of money fixed by law or by mutual agreement made in accordance*

with the Code, and payable by virtue of a written or unwritten contract of employment to an employed person for work done or to be done or for services rendered or to be rendered." (emphasis added).

Just like our law does, the Malawi's Supreme Court of Appeal faced with interpretation of the terms pay and wages, held that "the terms wages, salary, pay and remuneration are normally used interchangeably." To that end it went further to hold that salary in the context of the Employment Act is made up of basic salary and all allowances and benefits payable to the employee. (See STANBIC BANK LTD .V. RICHARD MTUKULA M.S.C.A CIV/A/NO.34 of 2006, see also the Parry case supra).

27. Quite clearly all the allowances are capable of being expressed in money. They are therefore claimable. There is however, contradiction in the evidence of the applicant in respect of telephone allowance. The Applicant has testified twice before this court. First during the main trial; the finding of which went on appeal and in the present where he is claiming compensation. During the trial applicant testified that, "telephone allowance was not fixed. It was upon production of bills from the telephone company and the employer would pay." In evidence during the proceedings in the present matter he has conjured a figure of M500-00 per month as telephone allowance. This contradiction has not been explained. At best we would have expected to see telephone bill records that evidence the amount claimed. It follows that the claim for telephone allowance is not proved to the satisfaction of the court.

28. The court agrees with the approach of the applicant that he must first be awarded what he should have been earning up to the date of the final judgment and thereafter determine a fair and equitable compensation in lieu of reinstatement after the judgment. In this approach we find ourselves in the good company of our Labour Appeal Court in the judgment of Pascalis Molapi .v. Metro Group Ltd & 3 Ors LAC/CIV/R/09/03; where the appellant was awarded compensation in the form of lost wages from date of purported dismissal to date of judgment and was thereafter reinstated. What remains to be determined

is which is to be adopted as the correct date of judgment? The date of judgment of the Labour Appeal Court or the date of judgment of this court?

29. In the Molapi case supra the emoluments ordered were up to the date of judgment of the Labour Appeal Court. In this way the possible escalation of the damages due to possible delays in finalizing the exercise of quantification which this court had been ordered to do, was contained. In casu, in his wisdom the learned Peete J had ordered that this court should be approached to fix compensation and of course finalize this matter within 30 days from date of his judgment.

30. It is common cause that this matter was first scheduled to be heard on the 13th October 2005, approximately eight months after the judgment of the Labour Appeal Court. It did not proceed. Thereafter it was postponed six times on the 16/11/06, 02/10/07, 22/10/07, 12/02/08, 13/02/08 and 06/03/08. The matter was finally able to proceed on the 21/04/08. It was finalized on the 15/10/08. I have detailed these delays precisely to show that it is now well in excess of three years since the judgment of the Labour Appeal Court was delivered. Who should bear the cost of the damages that have immensely increased in the time between the final judgment of the Labour Appeal Court and the finalization of the case by this court? There is no straight easy answer.

31. However the court should strife to do fairness to both sides. In doing so, I believe both sides should share the blame for the delay. Accordingly, this part of the claim will be accepted only up to half the period of three years and eight months by which this case has delayed finalization after the judgment of the Labour Appeal Court. This makes the claim under Part 2 of "KM1" admissible up to one year and ten months after 25th February 2005. In the premises judgment under this part will be entered for the applicant as claimed from 01/10/98 up to December 2006, excluding the claim for telephone allowance. This is the time within which applicant's claim for compensation would be expected to be finalized had things been done appropriately. Admittedly, this is very much an estimate.

However, we find ourselves in the good company of the authority in Hersmann .v. Shapiro & Co. 1926 TPD 367 at 379 which was quoted with approval by the Court of Appeal in Mahlomola Khabo case supra. There the learned Stratford J is quoted as saying:

> *"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 on it."*

32. The applicant also asked that he be paid salary and benefits up to the age of retirement. We have already shown that the correct approach in cases such as this one is not to award salary up to the projected date of retirement. The court should instead seek to compensate the innocent party by awarding him such sum as would represent the length of time that on the facts established by the court he would have remained in employment.

33. The facts of this case have established that applicant is well educated and his marketability in employment has been very high. In just two years as Country Director he had already been seconded to the senior office of Regional Director. After he left NUL in 1987 he has been moving from one senior position to another. The longest he spent in one post was the two terms he served as Director of NTTC, which was about four years. Given the pattern of his movement from one post to another in a relatively short time, it seems to us that applicant would not have lasted at the respondent longer than four years. In the

premises we are of the view that payment of salary and benefits excluding telephone for four years after 2006 represent just and equitable compensation to the applicant. In short applicant is awarded compensation for the unfair dismissal in the form of payment of salary and benefits excluding telephone allowance for the period 01/10/98-2010. That represents 12 years and three months.

MITIGATION

34. The applicant testified that he had been able to mitigate his damages in the amount of M227,815-00 that he has earned through consultancies. Mr. Moiloa for the respondent argued that the court should substantially reduce the amount of compensation payable to applicant because applicant failed to obtain alternative employment to further mitigate his damages.

35. Section 73(2) of the Code requires an employee to take reasonable steps to mitigate his losses. It does not go so far as to enumerate the steps that the employee must take. The fact is that the applicant has taken steps to mitigate. It is not for this court to say that he must have also found alternative employment; which is only one of the ways he can mitigate his losses. He cannot be faulted for choosing to mitigate through consultancies as opposed to formal employment. In the circumstances the court is satisfied with the measures taken by the applicant to mitigate his losses.

36. It has throughout been stated that applicant is indebted to the respondent in the amount of M75,000-00 which the respondent would like to have set off. Applicant has conceded this indebtness and has no objection to it being set off.

AWARD

37. In the circumstances applicant is awarded to be compensated as follows:

(i)	GRATUITY PLUS 18.5% INTEREST : 61180X0.185X9 @	M113,183-00
(ii)	SALARY & BENEFITS PLUS INTEREST 01/10/98-31/12/06 : 13888-41X99X0.185X8 @	M2,034,929-83

((iii) SALARY & BENEFITS PLUS INTEREST FOR 4 YRS

13888-41X48X0.185X8 @	M986,632-65
GRANT TOTAL OF (i), (ii) & (iii)	**M3,134,745-48**
LESS MITIGATED AMOUNT	M227,815-00
LESS LOAN PLUS INTEREST M75,000-00X0.185X8+75,000	M186,000-00
NET AMOUNT	**M2,720,930-48**

COSTS

38. Counsel for the applicant asked to be awarded costs. Section 74 of the Code prevents award of costs in proceedings for unfair dismissal "unless the court decides that the party against whom it awards costs has behaved in a wholly unreasonable manner." There is nothing to make us conclude that the respondent has acted unreasonably. All the respondent has done is exercise its legal right to prosecute and defend its interest. There is no unreasonableness in that. In the circumstances we have come to the conclusion that there be no costs awarded. It is so ordered.

THUS DONE AT MASERU THIS 24TH DAY OF NOVEMBER 2008

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI — **I CONCUR**
MEMBER

R. MOTHEPU — **I CONCUR**
MEMBER

FOR APPLICANT: — **MR. PHAFANE KC**
FOR RESPONDENT: — **MR. MOILOA**