IN THE LABOUR COURT OF LESOTHO **LC/REV/28/12**

HELD AT MASERU

In the matter between:

STANDARD LESOTHO BANK LTD **APPLICANT**

and

`MASECHABA ANNA NTS`IHLELE **1ST RESPONDENT**

DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

DATE: 24/09/10

Review of an arbitral award - Quantum - Applicant averring that the amount of compensation awarded by the Arbitrator has no basis (irrational) - That the Arbitrator failed to consider factors that ought to have informed the exercise of her discretion in terms of Section 73 (2) of the Labour Code (as amended) - 1st respondent's Counsel contending that the matter is not reviewable - Principles regulating review revisited - Court found matter reviewable - Having identified some irregularities in the DDPR award it was accordingly corrected and set aside.

BACKGROUND TO THE DISPUTE

1. This matter has a rather protracted history. The dispute arose from the dismissal of the 1st respondent from applicant's employ on 10th December, 2004 following a disciplinary hearing. The applicant subsequently referred a dispute challenging the fairness of this dismissal before the (Directorate of Dispute Prevention and Resolution) DDPR on 20th January, 2005. In its award dated 21st March, 2005, the DDPR dismissed her claim. Dissatisfied with this award, she instituted review proceedings before the Labour Appeal Court (then the appropriate forum to review

DDPR awards in terms of ***Section 228F of the Labour Code (Amendment) Act, 2000)*** on 1st June, 2006). These powers of review were removed from the Labour Appeal Court and entrusted with the Labour Court by an amendment to this Section in terms of the ***Labour Code (Amendment) Act, 2006***. Following this amendment, this Court inherited this matter and had it registered as LC/REV/516/06.

2. The review application was heard by this Court and it held that the learned Arbitrator's finding that the dismissal was fair was unreasonable as it was not supported by the evidence tendered. The Court found that 1st respondent's dismissal had been substantively unfair. It therefore reviewed and set aside the DDPR award of 21st March, 2005. It however, remitted the matter to the DDPR for an assessment of compensation in terms of ***Section 73(2) of the Labour Code Order, 1992*** (as amended) by the ***Labour Code (Amendment) Act, 2000*** (hereinafter referred to as the Code).

3. The DDPR duly made an assessment of compensation per an award handed down on 17th March, 2012 in A 0088/05 and put it at ***Two Million, Six Hundred and Seventy - Four Thousand, Seven Hundred and Sixty - One Maloti, Seventeen Cents (M2 674 761.17)***. This is the award that is at the heart of this dispute. The applicant is before this Court to have it reviewed, corrected and set aside.

GROUNDS OF REVIEW

4. The applicant seeks to have the DDPR award in A0088/05 reviewed, corrected and set aside on the basis that the learned Arbitrator erred and misdirected herself in arriving at the decision in the following respects:-

(i) That the 1st respondent is entitled to leave pay when she was not in employment at the material time;

(ii) By holding that the 1st respondent was entitled to a 13th cheque when it is a performance based bonus;

(iii) That the applicant had served the 1st respondent for a period of eighteen (18) years when she had averred in the papers that she had only worked from 1st September,1999;

(iv) That the 1st respondent was likely to remain in employment until her retirement;

(v) That she failed to consider that the 1st respondent had failed to mitigate her loss;

(vi) She failed to consider the practicality, affordability and long term viability of the applicant in the award of compensation amounting to ***Two Million, Six Thousand and Seventy - Four, Seven Hundred and Sixty - One Maloti and Seventeen Cents***.

5. 1st Respondent's Counsel's reaction to the objections raised by applicant's Counsel was that the grounds raised impinged on an appeal over which this Court has no jurisdiction. He further argued that issues raised by applicant's Counsel around ***Section 73(2) of the Code*** ought to have been raised by the applicant at the DDPR and not for the learned Arbitrator to take them up ***mero motu***.

THE COURT'S EVALUATION

6. Applicant's case is generally that the learned Arbitrator failed to exercise her discretion judicially, acted arbitrarily in arriving at her award and thereby committed a gross irregularity. The issues will be dealt with ***seriatim*** as raised by the applicant:-

LEAVE PAY

7. This issue pertains to annual leave. It is applicant's case that: leave is earned. Applicant's Counsel contended that it was irregular for the learned Arbitrator to have ordered that the applicant be paid for leave during the period when she was already out of employment.

8. Leave is indeed earned, and is based on the number of days an employee has spent at work. It is regulated by statute, but parties may agree through a collective bargaining agreement or a contract of employment on leave terms which have to be compliant with the statute or offer more favourable terms. On termination of

employment, an employee is entitled to be paid for any leave due but not taken. Leave is for expended days and serves to afford employees a rest. It is more of a welfare issue. It was therefore irregular that the learned Arbitrator ordered that the 1st respondent be paid leave for a period when she was already dismissed.

13th CHEQUE

9. The applicant argued that the 1st respondent was not entitled to the award of a 13th cheque for the period when she was out of work because it was not automatic but was performance based. It was contended on its behalf that the applicant only grants performance bonuses to employees who had reached their set targets. According to the applicant, the bonus was not even part of 1st respondent's employment contract. We agree with the applicant that the 13th cheque is a bonus that is tied to performance. Hence, the 1st respondent could not claim it when she had not rendered any service. The learned Arbitrator misdirected herself by awarding the 1st respondent this benefit, and thereby committed an irregularity in law.

TENURE OF OFFICE

10. The applicant objected to the learned Arbitrator's ruling that the 1st respondent worked for eighteen (18) years on the basis that she had averred in her referral form that she started working for the 1st respondent on 1st September, 1999. This issue was not pursued during proceedings, and therefore fell off. Counsel actually agreed that since the period of service had not been challenged before the DDPR, it should be allowed to stand. The next grounds bring in a closer perspective of ***Section 73 of the Code***.

COMPENSATION

11. Applicant's grounds for review in this respect are that the learned Arbitrator failed to comply with the statutory directives set out in ***Section 73 (2) of the Code***. Generally, remedies available in an unfair dismissal claim are reinstatement, re - employment and compensation. The paramount relief is reinstatement as it guarantees job security by allowing an employee to take up his or her job again, and also offers him or her the possibility of retaining the rights he or she has acquired. However, circumstances surrounding each case will dictate the nature of the relief to be granted.

12. As it is, the 1st respondent had not claimed compensation but had sought thirty-six (36) months' compensation at the initial hearing before the DDPR together with the release of her terminal benefits plus interest. So the question of which relief was more appropriate in the circumstances did not arise. Following the determination by the Labour Court, the issue became: how much compensation. This Court as well as the DDPR is empowered to order compensation in terms of ***Section 73 (2) of the Code***. The Section reads as follows:

> ***If the Court*** (or arbitrator) ***decides that it is impracticable in light of 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*** (or arbitrator) ***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 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.***(underlining mine)

13. The Section sets out factors to be taken into consideration in the award of compensation for unfair dismissal. The factors are not only relevant as to whether compensation should be awarded in the first place but also on the ***quantum*** thereof. In Lesotho, unlike in other jurisdictions such as South Africa ***(Section 194 (1), (2) and (3) of the Labour Relations Act 66 of 1995)*** there is neither prescribed a ceiling nor a minimum amount of compensation to be awarded. With this lack of direction the amount to be granted generally becomes discretionary. According to the learned Mosito AJ., in ***Pascalis Molapi v Metro Group Ltd and Others LAC/CIV/R/09/03*** at paragraph 26, the conferment of this discretion upon Courts and the DDPR is contained in the expression ***"in light of the circumstances."*** The discretion must of course be exercised judiciously, and not arbitrarily.

14. It is also applicant's case that the learned arbitrator failed to comply with the statutory directives set out in ***Section 73(2) of the Code*** by failing to take into account factors prescribed in the Section in arriving at the ***quantum***. In determining the quantum of compensation for unfair dismissal, the basic principles

of quantification should apply, and these principles are contained in ***Section 73(2) of the Code***. In awarding compensation the Court or the DDPR, as the case may be, is enjoined to award such amount at it considers just and equitable in all the circumstances of the case. As to what constitutes a "***just and equitable"*** compensation, the following factors have to be taken into account:-

(i) ***whether there has been any breach of contract by either party***; and
(ii) ***whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses***.

15. The Section goes further to accommodate other factors besides these ones specifically mentioned. This is reflected in the use of the word **"*also*"** in the Section. This word means ***"in addition," "as well," "furthermore," "besides," "moreover," or "plus"- Thesaurus***. According to an ILO (International Labour Organisation) publication on ***Protection Against Unjustified Dismissal***, ILO (International Labour Office), Geneva, 1995 at paragraph 229 these may include one or several factors such as the nature of the employment, length of service, age, acquired rights or the circumstances of the particular case, for instance, the reason for the termination of employment, the possibility of finding a job, career prospects, or the personal circumstances of an employee, such as his or her family status, or of the employer, such as the size or nature of the undertaking .

16. The Labour Appeal Court cited some of these factors as relevant in the determination of ***quantum*** in the judgment of ***Standard Lesotho Bank v `Nena and Another LAC/CIV/A/06/08 at paragraph 15 (LESLII)***.They included:-

(i) the actual and future loss likely to be suffered by the employee as a result of the unfair dismissal;
(ii) the age of the employee;
(iii) the prospects of the employee finding other employment;
(iv) the circumstances of the dismissal..***et cetera***

17. However, each and every case will be judged on its own merits. It is impossible to make an exhaustive catalogue. The use of the word ***"shall"*** in the Section makes it mandatory or peremptory that one or some of these factors are considered. The applicant contended that the learned Arbitrator has failed to take into account

anyone of these factors nor to indicate the factors she considered in her award, thereby rendering her award reviewable.

18. There has to be a basis upon which the Court or an Arbitrator can be able to assess the loss suffered by an employee because of the unfair termination of his or her services. This can be gleaned from the facts laid down in papers filed of record and on the evidence tendered - See paragraph 26 of ***Pascalis Molapi (supra).***

COMPENSATION FOR A PERIOD UP TO RETIREMENT

19. It is easier to compute compensation in the case of the unlawful termination of a fixed term contract because payment will be for the remainder of the contract period. However, in 1st respondent's case which is a contract without reference to limit of time, the Court or the DDPR has to use its discretion to award a just and equitable compensation regard being had to the circumstances surrounding the case. In ***casu***, the learned Arbitrator awarded the 1st respondent compensation up to the age of retirement as claimed.

20. This approach is rather problematic. It carries a connotation that an employee is guaranteed employment up to the age of retirement. This is not necessarily the case. An employee could decide on his or her own accord to change jobs; he or she could be affected by retrenchment or some other form of restructuring process; and he or she could get a job after dismissal or get into some form of business. These are realities of life. If an employee is paid up to retirement, it is like his or her life wholly depended on the particular job. Mindful of this, the Court held in ***Khoai Matete v The Institute of Development Management LC/146/00 at paragraph 20 (SAFLII)*** citing with approval the case of ***Jones v KPMG Aitken and Peat Management Services (Pty) Ltd (1996) 17 ILJ 693 at p. 697*** that ordering compensation up to the age of retirement simply loses sight of the fact that employment may be terminated before the due date of retirement for a number of reasons. It was pointed out in the latter case that:

> [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.***

21. The Court concluded in the case that an employee's compensation under the relevant South African legislation was not for the loss of income from the date of retrenchment until the date of retirement. The learned Arbitrator had concluded that ***"though there is no job for life, in applicant's case it is highly likely that she would have remained in the employ of the respondent till retirement age."*** The learned Arbitrator rightly observed that there is no job for life but then turns around to say that the 1st respondent herein was likely to remain in applicant's employ till retirement, making this conclusion without any aorta of evidence in support thereof.

22. Relying on the judgments of the Labour Appeal Court in ***Pascalis Molapi (supra)*** followed by the Labour Court in ***Khoai Matete (supra)***, applicant's Counsel contended that the correct approach to have been adopted by the DDPR in awarding compensation ought to have been what the employee should have earned from the date of dismissal up to the final date of judgment plus any fair and equitable compensation in lieu of reinstatement. We are persuaded to adopt this approach following these precedents.

MITIGATION OF LOSS

23. In assessing the amount of compensation due to an employee the Court is enjoined, ***inter alia***, to take into consideration any reasonable steps an employee may have taken to mitigate his or her losses - ***Section 73(2) of the Code*** above. This statutory provision echoes the general common law principle on mitigation. The duty to mitigate entails that a party who has suffered damages as a consequence of a breach of contract is under a duty to take reasonable steps to ensure that his original loss is contained. Echoing this principle, the Court held in ***Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC) at p.981*** that there is a duty on the part of the employee seeking compensation to mitigate his or her loss by taking all reasonable steps to acquire alternative employment.

24. Applicant's Counsel submitted that the 1st respondent had not taken sufficient steps to mitigate her loss and therefore failed to meet the requirements of ***Section 73(2) of the Code***. The 1st respondent had testified that he had made a lot of applications and it took her from 2005 to 2007 to start a small business at a coffee shop. She further indicated that employers did not trust her due to the nature of the allegations that were leveled against her. The 1st respondent made vague statements

in respect of employment opportunities. She failed to identify the employers she had approached for employment and the positions she had applied for. She also failed to give any evidence on the employment opportunities she pursued subsequent to July, 2007. She also testified that ***"employers want young blood nowadays."*** She made these bare statements without even attesting to her age.

25. The 1st respondent holds a Diploma in Secretarial Studies. With this diploma she has prospects in the job market. She just indicated that ***"…it would be difficult to get another job in the sector despite being absolved from the offence."*** She however, did not point out the efforts she made to secure employment but just talked in broad terms. The learned Arbitrator accepted these general and vague statements. In light of the unsatisfactory nature of her evidence, the Court feels the 1st respondent failed to mitigate her loss as required by ***Section 73(2) of the Code***.

PRACTICALITY/AFFORDABILITY OF THE QUANTUM OFFERED TO THE 1ST RESPONDENT

26. The applicant averred that the learned Arbitrator had awarded an unreasonably high compensation which threatened its sustenance/existence. It was submitted that the applicant employed a total staff complement of eight hundred (800) employees spread throughout the ten districts of Lesotho. The applicant considered the amount punitive and therefore prayed that it be reviewed and set aside as irrational and impractical. It was maintained that the applicant could not be made to pay for all the period that the 1st respondent was not pursuing the matter.

27. Applicant's Counsel submitted that the 1st respondent herself caused the delay by not bringing the action on time and not being vigilant enough. It was maintained that she had to bear the brunt for the delay, and not for the applicant to be punished therefore. The applicant averred that the 1st respondent waited two years before she could file review proceedings. Applicant's Counsel pointed out that there are about sixty- four (64) months that cannot be blamed on the applicant. The applicant felt that by failing to act within a reasonable time the 1st respondent herself exacerbated her loss and should therefore have her claim proportionately reduced.

WHETHER MATTER REVIEWABLE

28. It has repeatedly been pointed out that a review does not re - open the merits of the decision of the trier of facts, but only deals with the regularity of the

proceedings and the legality of the process. In ***Mohlobo and Others v Lesotho Highlands Development Authority LAC/CIV/A/2/2010*** the Labour Appeal Court quoting from the judgment of ***Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA)*** remarked that in review proceedings:

> … ***two separate questions arise. The first is whether the award was made in accordance with law. The focus in that enquiry is not whether the decision of the arbitrator is right or wrong but rather on the process and the way in which the decision- maker came to the challenged conclusion.***

29. It is indeed not a question of whether one agrees with the decision or not. In ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2450 (CC)*** the Court held that the test is whether a reasonable decision-maker could reach the decision that the Arbitrator had arrived at not whether the Court agrees with such a decision. When exercising review functions the Court is concerned with the legality of the decision, not its merits - See ***Judicial Service Commission and Others v Chobokoane LAC (2000-2004) 859 at 864 A-B***. ***Section 228 F of the Labour Code (Amendment) Act, 2000*** empowers the Court to set aside an award on any grounds permissible in law (including common law grounds) and on any mistake of law that materially affects the decision.

30. In ***Carephone (Pty) Ltd v Marcus NO and Others (1998) 19 ILJ, 1425*** at ***1426*** at paragraph 9, the Court pointed out that:-

> ***In determining whether an administrative action is justifiable in terms of the reasons given for it, almost inevitably, involves the consideration of the 'merits' in some way or another. As long as the judge in determining*** [the] ***issue is aware that he or she enters into the merits not in order to substitute its opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order*** (underlining mine.

The Court was here alluding to administrative decisions, but the test is just as relevant to courts of law.

31. In ***Johannesburg Stock Exchange v Witwatersrand Nigel 1988 (3) SA 132(AD)*** at 152 C-D the Court held that a matter becomes reviewable if there is:-

> ***Proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the*** [presiding officer] ***misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the*** [presiding officer] ***was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter aforestated.***

32. The gist of this application is that the DDPR award is unreasonable and irrational and also that the learned Arbitrator failed to consider factors that she ought to have considered in terms of ***Section 73(2) of the Code*** before arriving at her decision thereby committing a reviewable irregularity. The court identified a number of legal errors reflected in the body of the judgment that render the DDPR award in A 0088/05 reviewable.

33. On a point raised by 1st respondent's Counsel whether the Court or the DDPR can on its own consider the factors enunciated in ***Section 73(2) of the Code*** without them having been raised by the parties, the Court's answer is in the affirmative. The reason being that the Section explicitly puts the onus on the Court/Arbitrator to fix such amount of compensation ***"as the Court or the Arbitrator considers just and equitable."*** Quantum has to be assessed by the Court considering facts and the evidence tendered before it and the principles laid down in the said Section.

DETERMINATION

34. Following our evaluation, the DDPR award is reviewed and set aside. It is substituted by the following order:-

- The Court wishes to adopt the principle laid down in ***Pascalis Molapi (supra)*** followed by the Labour Court in ***Khoai Matete (supra)*** as it sets precedence by which compensation is granted from the date of dismissal to

the date of judgment. However, in the circumstances of this case the matter was heard on 27th February, 2013 but judgment was only delivered on 24th September, 2013. The delay here was due to the many administrative problems that are dogging this Court ranging from a huge backlog of cases to the determination of matters that have to be disposed of on an urgent basis. The Court will therefore award compensation from the date of dismissal, 10th December, 2004 to the last day of hearing which was 27th February, 2013. We feel it will only be proper to deviate a bit from the principle because the delay in this respect could not be attributed to any of the parties but to the problems that the Court is currently confronted with. The Court deems the compensation "***just and equitable"*** in the circumstances of the case;

- This matter has been dogged by incessant delays. Applicant's Counsel insisted that there were delays that were exacerbated by the 1st respondent and the applicant should not be held liable for them. He argued that the original award of the DDPR in which the applicant lost had been issued on 21st March, 2005, but the 1st respondent only instituted review proceedings before the Labour Appeal Court on 1st June, 2006, representing a delay of about fourteen (14) months;

  He contended further that the Labour Court's judgment in LC/REV/516/06 was handed down on 25th June, 2010 but the applicant only sent her case back to the DDPR in February, 2011, about eight months down the line. He submitted, furthermore, that on or about 12th June, 2006, the applicant filed its intention to oppose the said matter, and the 1st respondent only filed a replying affidavit on 16th January, 2007. He submitted this was approximately seven months later. He also brought to the Court's attention that the 1st respondent only filed the record of DDPR proceedings on 31st October, 2008, after about nineteen months. The problem with these proposed deductions is that they were not canvassed before the DDPR. We were not able to attach any monetary value to these delays; moreover, the applicant did not provide us with any computation;

- It is common cause that at the time of her dismissal, 1st respondent's gross salary was ***Eleven Thousand, Three Hundred and Forty - Six Maloti and Ninety - Two Cents (M11, 346.92)***. Compensation is therefore computed as follows:-

Earnings from January, 2005 up to the last day of hearing 27th February, 2013

Salary at dismissal	**M11, 346.92**
Multiplied by 98 months (Jan 2005- February 2013)	**M1 111 998.16**
Plus interest @ 6.8%	**M75 615.87**
	M1 187 614.03
Less 2.5 years she said she was idle	**M340 407.60**
	M847 206.43
Less proceeds from the Coffee shop	**M165 200.00**
	M682 006.43

- The 1st respondent is also entitled to any outstanding days constituting her leave entitlement in terms of her contract of employment or any regulations in applicant's workplace subsisting during her tenure of employment. Parties are ordered to go back to check records to ascertain whether there was any accrued leave when the applicant was dismissed.

This amount is payable to the 1st respondent within thirty (30) days of the handing down of this judgment. There is no order as to costs as the Court discerns no frivolity on anyone of the parties.

THUS DONE AND DATED AT MASERU THIS 24th DAY OF SEPTEMBER, 2013

F.M. KHABO

PRESIDENT OF THE LABOUR COURT (a.i)

P. LEBITSA ***I CONCUR***

MEMBER

L. RAMASHAMOLE ***I CONCUR***

MEMBER

FOR THE APPLICANT: ***DR VAN ZYL ON BEHALF OF THE ASSOCIATION OF LESOTHO EMPLOYERS AND BUSINESS***

FOR THE 1ST RESPONDENT: ***ADV., R. SEPIRITI***