

HELD AT MASERU

In the matter between:

**LIBE MOTHOLO
THABO NKUTU
RAMPAI RAMMULANE
MASHOAI LABANE**

**1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT**

And

**THETSANE HARDWARE BUILDING
MATERIAL (PTY) LTD**

RESPONDENT

JUDGMENT

Date: 29th October 2013

Claims for unfair dismissal for operational reasons. Parties agreeing on payment of compensation in full and final settlement of the matter – parties disagreeing on how the compensation amount is to be paid. Parties requesting the Court to determine how payment is to be made. Parties holding a pre-hearing conference and highlighting common cause issues and issues for determination. Court directing Respondent to make payments in 6 instalments equal to the last salaries of Applicants until whole amounts are fully paid out. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This dispute involves claims for unfair dismissal on the ground of operational reasons of the employer. It was heard on this day and judgement was reserved for a later date. Applicant was represented by Mrs. Leche-Lechesa from TSAWU, while Respondent was represented by Adv. Monesa. The brief background of the matter is that, Applicants referred claims for unfair dismissal for operational reasons with the DDPR, in terms of section 227 of the *Labour Code Order 24 of 1992*, as amended. The matter was duly conciliated upon and conciliation having failed, it was referred to this Court.

2. At the commencement of the proceedings, parties informed the Court that they had reached settlement of the matter in the following,
 - a) That Thabo Nkutu be paid M14,046.15;
 - b) That Libe Moholo be paid M9,011.38;
 - c) That Rampai Rammulane be paid M9,476.72;
 - d) That Mashoai Labane be paid M9,626.92; and
 - e) That all these amounts are in full and final settlement of the matter.

3. However, parties could not agree on how the said amounts were to be paid. Applicants claimed payment of the amounts in three instalments. According to Applicants, Respondent was expected to pay M5,000.00 on the 1st of November in respect of 1st, 3rd and 4th Applicants, and the balance in two equal instalments, on or before the end of every month, commencing November 2013 to December 2013. In respect of the 2nd Applicant, Respondent was expected to pay M9,000.00 on the 1st November 2013, and the balance in two equal instalments, as is the case with the other Applicants. Respondent's counter argument was that it could only be able to pay the amounts in six equal instalments commencing end of November 2013, due its financial situation.

4. In view of this above, parties then requested the Court to make a determination on this issue. The following issues were identified as common cause,
 - a) That the salaries of 1st to 4th Applicants were M1,650.00; M2,500.00; M1,600.00; and M1,750.00, respectively;
 - b) That all Applicants remained unemployed since their termination in February 2013;
 - c) A copy of annual financial statement of Respondent for the year ended 31st March 2013, be admitted as representing the financial position of Respondent as at that time; and
 - d) That parties do not need to adduce any further evidence, safe to rely on the issues agreed upon for their submissions.In the light of this above, We now proceed with Our judgment.

SUBMISSIONS AND ANALYSIS

5. It was briefly submitted on behalf of Applicant that the financial report shows that Applicant can be able to pay the amounts agreed upon from their profits. It was added that any

other mode of payment, other than that claimed by Applicants, will greatly prejudice them considering that they have been without employment for the past 9 months. The Court was then requested to consider the entire financial report in making its conclusion.

6. In reply, it was submitted on behalf of Respondent that, in terms of the financial report of Respondent, it only made a profit of, plus/minus, M61,000.00, in the financial year ending 31st March 2013. It was argued that this clearly showed that the Respondent company was not doing very well in business. It was argued that in the light of this, it would be impossible for it to pay the amounts as claimed by Applicant.
7. It was highlighted the required upfront instalments claimed by the 1st November 2013, were to the tune of M24,000.00. Respondent submitted that this amount is a huge portion of the profits made by Respondent. It was further submitted that if an order is made, as claimed by Applicants, it would negatively affect the well being of the current employees of Respondent as it might have to shut down. It was added that the Court does not only have the responsibility to ensure the well being of the Applicants, but also that of the current employees of the Respondent.
8. In making its decision, this Court is vested a discretion, which must be exercised judiciously. The exercise of judicial discretion was unpacked by the learned Mosito AJ, in *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v LHDA LAC/CIV/17/2009*, as follows,
“The sphere of judicial discretion includes all questions as to what is right, just, equitable, or reasonable - so far as not predetermined by authoritative rules of law but committed to the liberum arbitrium of the Courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the Court.”

In the light of this authority, We shall now proceed to address the merits of the matter.

9. We have perused the financial report of Respondent and confirm that a figure of M61,039.00, but same is reflected as a loss for the financial year ended 31st March 2013. We have also noted that in the past year, the total profits were M91,117.00. This being the case, it is without doubt that financial position of Respondent reflects a loss, in terms of profits, in the year ended 31st March 2013. In view of this said, it would only be unfair to expect Respondent to meet the demands of Applicants under its current financial position. We are of the view that to do so, would negatively affect Respondent's ability to operate and consequentially affect the interests of the current employees of Respondent. As Respondent has correctly pointed out, the responsibility of this Court is not only limited to the Applicants, but also to the Respondent as well as its current employees.
10. Respondent has indicated that it will only be able to pay the settlement amounts in six equal instalments. In view of the financial position of Respondent, We find that payment in six instalments would be appropriate. We have determined the six equal instalments proposed by Respondent, are short of a very small margin to the monthly salaries of Applicants, which is no more than M200.00 in each case. Having considered all relevant facts before Us, and the circumstances surrounding the matter, We find that it would be *right, just, equitable and reasonable* that the instalment amounts be equal to the salaries of Applicants, as at the time of their termination. It is Our view that Respondent will be able to surmount to the impact of this increase, given the margin involved.
11. No order as to costs has been sought by parties and neither have We found any circumstances that warrant any. It is a trite principle of law that parties can and must only be given the relief that they seek (see *Phetang Mpota v Standard Bank LAC/CIV/A/06/2008*). As a result any act contrary to this trite principle would amount to an irregularity reviewable before a higher Court. We therefore do not make any order as to costs.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

- a) That the Respondent pay the settlement amounts in instalments equal to Applicant's monthly salaries, at the time of the termination of their employment;
- b) That all instalments be paid on or before the last day of every month commencing November 2013, to on or before the last day of April 2014;
- c) That Respondent must inform Applicants when the payments are ready for collection, either on or before the date of payment; and
- d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF NOVEMBER 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO**

**Mr. S. KAO
MEMBER**

I CONCUR

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**MRS. LECHE-LECHESA
ADV. MONESA**