IN THE COURT OF APPEAL OF LESOTHO

JUDGMENT

C OF A (CIV) 1/2015

LAC/CIV/APN/26/14

In the Matter Between:

MOLAHLI EDWIN MOLAHLI **APPELLANT**

And

MORIJA PRESS BOARD **RESPONDENT**

Neutral citation:

Coram: Majara CJ, Musonda AJA, Mahase JA

Heard: 20 October 2015

Delivered: 6 November 2015

Summary

Appeal against the judgment of the Labour Appeals Court confirming the decision of the Labour Court – Appellant having been dismissed by the respondent pursuant to disciplinary proceedings against him – Whether charge sheet disclosed an offence – Whether the court a quo erred and misdirected itself in dismissing the appeal – Whether arbitration proceedings should follow legalistic and formal procedures - Arbitration inquisitorial in nature and should be conducted quickly and informally, but with circumspection to avoid arbitrariness – Appeal dismissed.

ORDER

On appeal from: Labour Appeals Court per Mosito AJ

The appeal is dismissed. There is no order as to costs.

JUDGMENT

Majara CJ (Musonda AJA and Mahase JA concurring)

[1] This is an appeal against the judgment of the Labour Court handed down on the 7th July 2014. The matter originated in the Directorate of Dispute Prevention and Resolution in which the present appellant had referred a claim for unfair dismissal which he challenged on substantive and procedural grounds.

[2] The matter was dismissed and the appellant instituted review proceedings in the Labour Court to have the Arbitrator's award reviewed, corrected and set aside. The application was initially unopposed, but at the time of hearing the respondent's representative moved an application for condonation to be allowed to file an answering affidavit out of time. The application was dismissed by the Labour Court. The Court however did not find in favour of the appellant hence his appeal to the Labour Appeal Court.

[3] The first ground of his appeal in the court a quo was that the Labour Court erred in denying the respondent the opportunity to file its answering papers on the basis that it lacked prospects of success only for it to enter judgment in favour of the respondent without giving an explanation where the prospects of success came from. The court a quo dismissed this ground on the basis that the prospects of success referred to were in relation to the condonation for failure to file the answering affidavit, not on the merits.

[4] The second ground was that the court a quo erred in not finding that the appellant's job description was not refuted. This ground was also dismissed on the reason that the dismissal was based on the charge that the appellant had sold the respondent's property for personal gain which was breach of discipline and nothing else.

[5] The next ground was similarly dismissed for the reason that it was basically the same as the second one, but for the fact that it was put in different terms.

[6] The last ground, namely that the Labour Court erred in refusing to enter default judgment against the respondent yet it had failed to make an appearance was also dismissed by the court a quo on the reason that the Labour Court is not a rubber stamp that is bound to simply enter judgment once a matter is not opposed and that the appellant seems not to appreciate the import of Rule 14 of the Labour Court Rules.

[7] The appellant then filed this present appeal on grounds that I will deal with seriatim. The first ground is that the judge a quo failed to appreciate that in principle the employer has to prove fairness of the dismissal on both substantive and procedural grounds and the that the indictment in this case did not disclose any offence or breached work rule.

[8] I have already shown that in its judgment, the court a quo stated at paragraph 2.4 that the appellant was not charged with the offence that he alleges establishes what his duties are, but with selling the respondent's CDs for personal gain which constituted misconduct. I can find no fault with the reasoning of the court as indeed evidence adduced that was in this connection was accepted as true by the Court. This ground accordingly fails.

[9] The second ground was that the court a quo erred in confirming the award of the Labour Court which in turn confirmed that of the DDPR, which was wrong in as much as it demanded the reverse onus or proof of innocence on the part of the appellant. To this end, the court a quo had found that the appellant's attack on the absence of authority for the General Manager to oppose the proceedings was a bare denial of same.

[10] In other words the issue of a bare denial was raised not on the merits but on whether or not the General Manager had indeed been authorised to represent the respondent in the proceedings in the Labour Court. The court a quo then upheld the ruling of the Labour Court on the basis of decided cases that have laid down the rule that authority is not necessarily to be proved by production of resolution in circumstances where the person alleging authority has established same on basis such as his position with the company he alleges he has authority to represent. To this end the learned Judge a quo quoted the remarks of this Court in the case of **Lesotho Revenue Authority and Others v Olympic Off-sales**[1] wherein it made the following instructive remarks:-

> *"I am nonetheless of the view that the applicant's point in limine in the Court a quo was without substance and that the Court a quo clearly erred in upholding this technical objection. The second respondent is not only the Commissioner General of the first respondent in terms of section 17 (1) of the Lesotho Revenue Act, 14 of 2001 ("the Act"), he is also the chief executive of the first respondent (section 17 (1 of the Act) and the secretary of the board of first respondent for keeping minutes of board meetings (section 10 (7) of the Act). The second respondent is therefore pre-eminently the official who would have known at first hand of the first respondent's resolution to oppose this application. It is in any event inconceivable, in the light of the history of this matter, that the first respondent would not have opposed the application."*

[11] It is on the basis of this position that the Judge a quo upheld the finding of the Labour Court that the appellant's attack of the General Manager's authority to represent the respondent was a

[1] LAC (2005 – 2006) p 535

bare denial of that authority. The court a quo further found that the appellant merely brought the issue up but never took it any further. I therefore find that the Judge a quo was correct in reaching his finding. Thus the appellant's ground in this connection was misconceived and stands to be dismissed.

[12] I now turn to deal with the other ground of appeal, namely that the learned judge erred in principle in his interpretation of prospects of success. This ground is premised on the finding of the court a quo that the issue of prospects of success was in relation to the application for condonation for failure to file an answering affidavit.

[13] I was initially following and going along with this submission as I was of the view that it could not be reasonable for a court to find that a party has no prospects of success only to rule against the other party. However, upon closer scrutiny of the submission, the judgment and the record of proceedings, I found that the court a quo's finding was not on the merits of the case, but on the application for condonation itself. In other words, the Labour Court found that the respondent had no prospects of success to persuade it that it could establish sufficient cause for its delay to take action.

[14] The confusion that this caused on the part of the appellant is understandable. However, as I stated, at that stage, the Court was only restricting its finding on the interlocutory application for condonation of the respondent's failure to file its answering papers, nothing more. This simply means the respondent was barred from opposing the proceedings which the appellant had

instituted but was yet to support with facts and evidence before the Labour Court. On the basis of the foregoing reasons, it is my finding that the court a quo's decision in this regard cannot be faulted as it is borne out by the contents of the record. Thus, it also falls away.

[15] The next ground that was raised for this Court's consideration was that the learned Judge a quo failed to comprehend that Rule 14 of the 1994 Rules is only applicable to the procedure with regard to originating applications and not review applications. To this end, the court a quo found that proceedings in the Labour Court are initiated by way of originating application and the respondent is required to file an answer. Failure on the part of the respondent then brings into operation the provisions of Rule 14. It reads as follows:-

> *"Judgment by default*
>
> *Whenever a Respondent fails to file an answer to an originating application, the Court* ***may, upon application in writing by the Appellant****, being satisfied as to receipt of the originating application by the respondent,* ***enter judgment for the Appellant, or make such other order or determination as considers just****." Emphasis added*

[15] In this connection, the court a quo ruled that the rule is two-fold. Firstly, before the court can enter judgment by default, an application for same has to be made in writing and that the present appellant had failed to fulfil this requirement as he made the application from the bar.

[16] Secondly, the Judge a quo found that where the court is satisfied that a written application has been duly made, it can

either enter such judgment or make such other order or determination as it considers just. It added that the Labour Court is not bound to enter default judgment without anything more even where the respondent has not opposed the application.

[17] To this end he added as follows in relevant parts of paragraph 2.10 of his judgment:-

> *"This means that the Court has to consider the evidence before it in order to determine what kind of order or determination it has to make. If no evidence is available, it is difficult to imagine how the Court can decide what kind of order or determination it should give to meet the justice of the case. It follows therefore that the contention by Mr Mosuoe that the Labour Court should just acted* (sic) *as a rubberstamp upon the claim of the Appellant is insupportable in the light of the foregoing reasons. This argument cannot find support in the law as it stands."*

[18] In my view, this is a proper interpretation of the section for indeed one of the cornerstones of justice and fairness is that he who alleges must prove. This does not mean that failure by the other person to oppose is per se guarantee that a claimant will be granted the relief it claims in the absence of any support of such a claim.

[19] This Court had occasion to consider a similar issue in the recent judgment of **Mak'humalo Evelyn Hlekwayo v Mountain Star**[2] in which incidentally, Counsel for the present appellant represented the appellant therein**. Mr. Mosuoe** had raised a similar issue although it was in terms of different statutory provision.[3]

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[2] C of A (CIV) No. 49/14

[3] Section227 (8) of the Labour Code (Amendment) Act No.3 f 2000

[20] Having discussed the import of the relevant provisions, the Court per the judgment of Musonda AJA (Majara CJ and Peete JA concurring) stated what the correct interpretation of the provision is at paragraph 6.3 thereof in the following terms:-

> *"In would be in our view a legal, juridical and logical fallacy, within the context of the legislation in question, to say an Arbitrator seized with power to dismiss, postpone or enter default judgment, has no inherent jurisdiction to seek clarification of the claims or call evidence to justify such claims. To put it in another way can an arbitrator remain "meek and mute" in the face of unintelligible or ambiguous claim. Can such an Arbitrator be said to be acting judiciously? We think not. Even if a respondent does not appear, it does not mean he should be penalised more than what the justice of the case demands, having regard to his/her act or omission otherwise the Arbitrator will be putting a premium on unjust enrichment by the claimant. The Legislature did not intend that the Arbitrator as a person exercising "Quasi Judicial Power" shall have his inherent power extinguished under these provisions...."*

[21] It is precisely on the basis of the same logic and reasoning that the appellant's submission which was more or less raised on similar arguments cannot be accepted. Indeed, any arbiter who exercises judicial or quasi judicial powers has to be satisfied that a claim has indeed been established ether or not it has been opposed. That is why an unopposed application can be dismissed on the basis of the applicant's papers alone. Accordingly, this ground of appeal was also not well taken and stands to be dismissed.

[22] The appellant raised a further ground that the court a quo erred in confirming the decision of the Labour Court and the DDPR for their admission of hearsay evidence contrary to the principles

of the law of evidence and adjectival law. Indeed, the general rule of evidence is that hearsay evidence is not admissible. There are however exceptional circumstances where this rule will not be strictly applied such as for instance in arbitration proceedings which as the learned Judge a quo correctly stated, are not "civil proceedings" in the strict sense of the word.

[23] The rational is quite simple and is in my view aptly encapsulated in the provisions **Labour Code (Conciliation and Arbitration Guidelines)**[4] which read as follows:-

> *25. (1) "Subject to the Regulations of the DDPR, the arbitrator may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute –*
>
> *(a) fairly and quickly; and*
> *(b) deals with the substantial merits of the dispute with the minimum of legal formalities.*
>
> *(2) ...., ..., ..., ...*
>
> *(3) Unless there are good reasons for doing otherwise, the arbitration proceedings are inquisitorial in nature...."*

[24] In its analysis of the import of this provision, the court a quo remarked and correctly so that as far as the arbitration process is concerned, the approach will be different to what obtains in courts of law in that therein, strict legal formalities should be done away with because the statutory requirement is that they should be of less legal formalism.

[25] Indeed while this provision does not do away with the exercise of on the part of the arbitrator when weighing hearsay evidence, it suffices that the arbitrator satisfied himself to the truthfulness of

[4] Section 25 (1) of the Labour Code (Conciliation and Arbitration Guidelines) L. N. 1 of 2004

the hearsay evidence given the circumstances of this case. *In casu,* the record reveals that one of the witnesses, a **Mr. Mokobori** testified to the fact that the appellant told him he was going to make a CD of the programme "*Mantsoe a Supileng*" as KEL Radio could make a lot of money from the sale thereof and that he as a matter of fact did produce same.

[26] Another witness, **Malipuo Molibeli** testified that she did buy a CD from the appellant which is the basis of the charge preferred against him in the disciplinary proceedings. Their testimonies were not rebutted. For this reason, I am of the view that the decision by the arbitrator to not call the witnesses to support the General Manager's evidence in this regard did not result in a miscarriage of justice bearing in mind the provisions of section 25 as quoted above.

[27] The other ground is more or less the same as the one above save that the appellant expounded on it with respect to the reasons that he contends both the Labour Court and the DDPR failed to address in their respective decisions. His arguments are in my opinion further proof that he was expecting the DDPR to treat this matter in a very formal and legalistic manner which would defeat the very purpose of its inquisitorial and informal nature.

[28] The last ground of this appeal is that the court a quo erred in finding in favour of the respondent yet it agreed that the alleged failure by the arbitrator to consider the relevant evidence was a reviewable ground. In this connection, the court found that the appellant bore the onus to produce the minutes which he argued would bear him out that he had been authorised to produce and

distribute the material in question. However, it found that despite this irregularity the appellant was facing charges of selling those for personal gain not merely for production thereof and that the facts had proven that he had in fact sold them for personal gain. I have already shown that perusal of the record reveals that evidence in this regard was not rebutted by the appellant so that indeed the alleged irregularity did not result in a miscarriage of justice that would justify that the decision be set aside.

[29] It is on the basis of the foregoing reasons that I accordingly find that this appeal ought to be dismissed.

[30] I therefore make the following order:-

The appeal is dismissed with costs.

N.M. MAJARA

CHIEF JUSTICE

I agree

M. MAHASE

JUSTICE OF APPEAL

I agree

DR P. MUSONDA

ACTING JUSTICE OF APPEAL

For appellant : Mr. M Mosuoe

For respondent : No appearance