LAC/REV/39/04

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between

JD TRADING (PTY) LTD t/a SUPREME FURNISHERS	APPLICANT
AND	
M.MONOKO (cited in his capacity as Commissioner for the Directorate of Dispute Prevention and Resolution)	1st RESPONDENT
THE DIRECTORATE FOR DISPUTE PREVENTION AND RESOLUTION	2ND RESPONDENT
'MANTHETHA MAFETHE	3RD RESPONDENT

CORAM: THE HON. MR. ACTING JUSTICE K.E. MOSITO

ASSESSORS: MR .Tau
Mr. L. O Matela

HEARD: 23 August 2006

DELIVERED: 5 SEPTEMBER, 2006

SUMMARY

Review of Arbitral proceedings – Distinction between review and appeal – Delays in finalizing litigation in labour and employment matters – Undesirability thereof –Effect thereof.

Consideration of meaning of sections 38, 38A and 228F of Labour Code (Amendment Act) NO.3 of 2000 Court having not been addressed on costs – Application dismissed – no order as to costs.

JUDGEMENT

---

1. This is an application for an order in the following terms:

(a) That the 1st Respondent be ordered to transmit the record of proceedings in Referral No. F031/03 to the above Honourable Court within 14 days.

(b) That the above Honourable Court grand condonation for the late filing of this Application.

(c) That the Arbitration Award made by the Directorate of Dispute Prevention and Resolution in favour of Third Respondent be reviewed varied and/or set aside.

(d) That the execution of the Award should be stayed spending the final determination of the matter.

(e) That the Respondents be ordered to pay Applicant's legal costs in the event of opposition.

2. The facts that gave rise to the proceedings before the Directorate of Dispute Prevention and Resolution (hereinafter variously called the DDPR or the 2nd Respondent) are not in dispute. They are that the 3rd Respondent was employed by the Applicant for a number of years going back to the 1st November 1996 as a cashier. The applicant dismissed her consequent upon a disciplinary enquiry held against her in which she was charged for misconduct. It was alleged that she was responsible for stock loss. The said disciplinary enquiry was held on the 17th day of January 2003. As a result of the said enquiry, the 3rd Respondent was dismissed purportedly in terms of section 66 (1) of the Labour Code Order No. 24 of 1992. The relevant Section reads as follows:

> "An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is –
>
> (a) ……
>
> (b) connected with the conduct of the employee at the workplace; or
>
> (c) ……

3. The 3rd Respondent was consequently dismissed from the employ of the Applicant. She then brought her complained before the 2nd Respondent. Her complained was arbitrated by 1st Respondent. On 29th September 2003, the 1st Respondent handed down his award in the following terms:

> (a)The respondent is accordingly ordered to reinstate the applicant on the 7th/October/2003.

(b)The applicant is also ordered to report for duty on the above-mentioned date of the 7th/October/2003.

4. It is against this award that the present applicant brought this application to this Court. The Applicant complained appears on page 2 of its Founding Affidavit as follows:

> "6. It was not the intention of the Applicant not to attend the Arbitration, as this would not be in the interest of the Applicant.
>
> 7. The analysis of the evidence and submissions contained in the award are not a true reflection of the facts of the matter.
>
> 8. The First Respondent thought that it would have been wiser and reasonable for the Applicant to have given the Arbitration priority over the matter of its administration lest it be deemed to have acted in a contemptuous manner. The fact of the matter is that the J D Group acquired the loss making business of Profurn, and had to restructure the Profurn Group in order to minimize job losses. In the process the position of the Residing Regional Director became affected. The Applicant does not deny that the Regional Director did not get the set down for the arbitration. Due to his involvement in the restructure, and his own position being affected, it is understandable that a reasonable man could have unintentionally omitted to inform the new Employer, the J D Group.
>
> 9. Generally the award is not justifiable, given the reasons."

5. The 3rd Respondent raised what she called a point *in limine*. She contended in essence that:

> "The Applicant can only approach the court on review not on Appeal. The so called ground of review is definitely a ground of Appeal as it actually deals with the merits of the award. Argument will be advanced at the hearing."

6. We understand the above point raised by 3rd Respondent as a challenge directed at whether there is a review properly conceived, or an appeal in disguise. In advance of examining the merits of the above point, it is important to examine the law relating to reviews and appeals with which this court has been empowered to deal. We now tend to consider the law in this regard.

The Law

7. Section 38 of the Labour Code (Amendment) Act No.3 of 2000 (the Act), establishes the Labour Appeal Court. The Court is the final court of appeal in respect of all judgments and orders made by the Labour Court and the Directorate of Dispute Prevention and Resolution (DDPR). The Labour Appeal Court consists of a judge of the High Court who is nominated by the Chief Justice acting in consultation with the Industrial Relations Council; and two assessors chosen by that judge –one from a panel of employer assessors nominated by the employer members of the Industrial Relations Council; and one from a panel of employee assessors nominated by the employee members on the Industrial Relations Council.

8. The Minister is enjoined to appoint, in a full-time capacity, one of the assessors from each of the panels referred to above. The judge of the Labour Appeal Court may appoint any suitable person as an assessor in any particular case if there are no nominated assessors able to sit. The assessors must be persons having experience or knowledge of labour relations. The full time assessors must be appointed for a period of five years on such terms and conditions as may be determined by the Minister – (i) in consultation with the Minister of Finance; (ii), after consultation with the Judicial Service Commission; and after consultation with Industrial Relations Council. The decision of the Labour Appeal Court must be – (a), on matters of fact, the majority of the court; and (b) the judge, on matters of law.

9. Subsection (9) of the Act provides that, no proceedings in the Labour Appeal Court are invalid because – (a), the appointment of an assessor was defective; or (b), after the commencement of proceedings, the Court proceeds without an assessor because – (i), the assessor is unable to continue to sit as an assessor in the case; or (ii), the judge removes the assessor from the proceedings for good cause. Also, the Registrar of the Labour Court is the Registrar of the Labour Appeal Court.

10. Section 38A(1) of the Act provides that, the Labour Appeal Court has exclusive jurisdiction – (a), to hear and determine all appeals against the final judgments and the final orders of the Labour Court; (b) to hear and determine all reviews – (i), from judgments of the Labour Court; (ii), from arbitration awards issued in terms of the

Act; and of any administrative action taken in the performance of any function in terms of this Act or any other labour law. Subsection (2) the Act provides that, notwithstanding the provisions of any other law, the Labour Appeal Court may hear any appeal or review from a decision of any Subordinate Court concerning an offence under this Code and any other labour law. Subsection (3) the Act provides that, notwithstanding the provisions of subsection (1), the judge of the Labour Appeal Court may direct that any matter before the Labour Court or a matter referred to the Directorate for arbitration in terms of section 227 be heard by the Labour Appeal Court sitting as a court of first instance. Subsection (4) provides that, Subject to the Constitution of |Lesotho no appeal lies against any decision, judgment or order given by the Labour Appeal Court.

11. Section 228F (1) of the Act provides that, any party to a dispute who seeks to review any arbitration award issued under this Part (a reference to Division C), shall apply to the Labour Appeal Court for an order setting aside the award: – (a) within 30 days of the date the award was served on the applicant, unless the alleged defect involves corruption; or (b), if the alleged defect involves corruption, within 30 days of the date that the applicant discovers the corruption. Subsection (2) provides that, on good cause shown, this Court may condone the late filing of an application to review an arbitration award.

12. The Legislature has thus, created a special judicial forum in which persons aggrieved by decisions of the Labour Court and the DDPR can seek redress. The Labour Appeal Court, when exercising the power of review conferred upon it by section 38, 38A and section 228F, functions as a court of law. Moreover, it functions as such on

the same level in the hierarchy of Courts as does the High Court, only in respect of labour matters in respect of which it has jurisdiction. It hears appeals and reviews; it is presided over by a Judge; and no appeals lie against its decisions.

13. The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgment already given. Where the reason for wanting to have the judgment set aside is that the Court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where, on the other hand, the real grievance is against the method of the trial it is proper to bring the case on review. An appeal is thus in reality a re-evaluation of the record of proceedings in the Court *a quo*. It is generally a matter of argument on the record alone, whereas in a review the irregularity generally does not appear on the record.

14. In an appeal parties are bound by the record, whereas in a review the parties are not, and may bring evidence to prove the irregularity or illegality. A party appealing cannot use his statement of the grounds of appeal to supplement the evidence by suggesting facts as to which the record is silent. The aforementioned difference between appeals and reviews also give rise to a corresponding difference in procedure. Different time limits may also apply to the noting of appeals and reviews. Unless a statute or Rule of Court provides otherwise (as is the case with Rule 6 of the Lesotho Court of Appeal Rules 1980), the noting of an appeal at common law, has the effect of staying execution of the judgement or decision appealed

against. In the case of a review however, unless there is an order of court, or statute or Rule of Court to the contrary, the filing of a review application *per se*, does not have the effect of staying execution of the decision sought to be reviewed. In the absence for such order therefore, the awards of the DDPR must be enforced.

15. We mention the latter point because, it has come to the attention of this Court that, most of the cases comprising the current backlog of cases in this Court, are frivolous applications for review, filed with the main purpose of frustrating the execution of decisions of the DDPR. Apparently, the current practice is that, once a litigant files an application for review of the DDPR's decision, those charged with the task of enforcing the relevant DDPR's award seem to believe that, the award cannot be enforced for that reason. The result is either that, the cases so filed are not pursued, or languish in the registry for years. This practice is wrong, and must come to an end. It is not only lacking in legal foundation, but it is *a fortiori,* a recipe for injustice, which has the effect of bringing the administration of justice into disrepute.

16. Section 228F (3) provides that, the Labour Appeal Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision. The phrase, "any grounds permissible in law " is not defined in the Act. Against this background it is necessary to consider what this phrase entails for purposes of this Court, thereby determining the grounds upon which the Labour Appeal Court

is empowered to review the proceedings of the DDPR (and also those of the Labour Court). This can best be achieved by comparing the Labour Appeal Court's grounds, with the grounds upon which the High Court could exercise its common-law power of review. The grounds upon which the High Court exercises its common law power of review as a superior court, were formulated in the context of the Supreme Court of South Africa in ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)*** at 152A-E as follows (with reference to a decision of the president of the Johannesburg Stock Exchange):

> 'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice" (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F-G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1972 (3) SA 726 (A) at 895B-C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1972 (3) SA 726 (A) at 14F-G). Such failure may be shown by 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 president 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 president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and Northwest Townships (Pty) Ltd v The Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8D-G; Goldberg and Others v Minister of Prisons and Others (supra at 48D-H); Suliman and Others v Minister of

Community Development 1981 (1) SA 1108 (A) at 1123A.) Some of these grounds tend to overlap.

17. The ambit of review for error of law was considered by Corbett CJ in ***Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at*** 93A-94A, where the Learned Judge pointed out that, to sum up, the present-day position in our law in regard to common-law review is, in my view, as follows:

(1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review.

(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited.

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review.

(6) In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express a decisive view.

18 Thus in Johannesburg ***Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)*** at 152A-E, CORBETT JA outlined the grounds informing the position outlined in 2 in Hira's case above, as follows:

> Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F - G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1972 (3) SA 726 (A) at 895B - C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1972 (3) SA 726 (A) at 14F - G). Such failure may be shown by 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 president 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 president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8D - G; Goldberg and Others v Minister of Prisons and Others (supra at 48D - H); Suliman and Others v Minister of Community Development 1972 (3) SA 726 (A) at 1123A.) Some of these grounds tend to overlap.

19. the above decision was also followed in ***During NO v Boesak and Another 1988 (3) SA 132 (A) at 671I-672D; Jacobs en 'n Ander v Waks en Andere 1988 (3) SA 132 (A) at 550H-551C.)***

20. Smalberger ADP pointed out in T***otal Support Management (PTY) LTD and Another v Diversified Health Systems (SA) (PTY) LTD and Another 2002 (4) SA 661 (SCA)*** at page 673, in the context of a private arbitration that, arbitration is a form of private adjudication. Therefore, the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in ***Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) at 1082G***. Thus, decisions made in the exercise of judicial functions do not amount to administrative action (***cf Nel v Le Roux NO and Others 1996 (3) SA 562 (CC)*** at 576C (para [24]). The principles of judicial review invoked in cases of judicial review of administrative action will therefore find no application in cases of review of arbitration awards and proceedings. Thus, in ordinary circumstances, where an arbitrator has given fair consideration

to the matter which has been submitted to him for decision, it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact. See for example, ***DICKENSON & BROWN v FISHER'S EXECUTORS 1915 AD 166 at 176.***

21. This Court is of the view that the phrase, “any grounds permissible in law “ as contained in section 228F of the Act, is broad enough to include the aforementioned review principles, and are applicable to matters falling within the jurisdiction of this Court.

22. Having examined the extent of the review powers of this Court, we now turn to consider the merits of the present case. The first complaint by the Applicant is that, it was not its intention not to attend the arbitration proceedings as it would not be in its interest not to do so. Our understanding of this complaint is that, the Applicant complains that, the 1st Respondent ought to have exercised his discretion so as to allow the reopening of the arbitration proceedings. Our understanding of the law on the subject is that, the 1st respondent has discretion to exercise judiciously in deciding whether or not to grant rescission of his award.

23. In our view, the 1st Respondent correctly exercised this discretion in this regard. It was not suggested before us that the 1st Respondent exercised his discretion in such a way as to

warrant the interference with his decision. The was neither a basis for submission for irrationality, illegality, procedural impropriety nor any of the ground for review permissible in law. In our view, there is no basis to interfere with the 1st respondent's exercise of his discretion in the present case. The second complaint by the applicant is that:

24. The second contention or complained by the applicant is that, the analysis of the evidence and submissions contained in the award are not a true reflection of the facts of the matter. We may mention that the learned council for the applicant, Mr. L. Molete did not motivate the First and this Second ground in oral argument before this Court. We understand the latter ground to mean that the 1st respondent did not consider the evidence and submissions in a way that he ought to have done. Put differently, that the 1st Respondent failed to apply his mind to the facts evidence, and submissions before him. It is difficult to see which facts and/or evidence, and/or submissions the 1st Respondent can be said not to have taken into consideration in the present case. We consequently have difficulty with understanding the basis of this attack. As indicated early on, the learned Council for Applicant did not motivate the above two grounds before us, both in his oral argument and written heads of argument before us. Consequently we find that there is no basis upon which to interfere with the award of the 1st Respondent on this ground.

26. The last leg of attack by the applicant was that the First Respondent thought that it would have been wiser and reasonable for the Applicant to have given the Arbitration priority over the matter of its administration lest it be deemed to have acted in a contemptuous manner. The fact of the matter is that the J D Group acquired the loss making business of Profurn, and had to restructure the Profurn Group in order to minimize job losses. In the process the position of the Residing Regional Director became affected. The Applicant does not deny that the Regional Director did not get the set down for the arbitration. Due to his involvement in the restructure, and his own position being affected, it is understandable that a reasonable man could have unintentionally omitted to inform the new Employer, the J D Group. This was the only ground upon which the Learned Council Mr. Molete attacked the award of the 1st Respondent in his oral argument before this Court.

27 The Learned Council contended that the real ground of attack is ground 8 on page 2 of the Founding Affidavit. The Learned Council contended that the decision of the 1st Respondent was grossly unreasonable, and warranted the interference of this Court. He contended that the 1st Respondent did not consider the merits of the application for recession together with its inherent probabilities. Mr. Molete charged that the 1st Respondent ought to have examined the inherent probabilities of the Applicant's story as to why the latter did not appear at the proceedings. He consequently invited this Court to review the

award of the 1st Respondent. The Learned Council for the 3rd Respondent Mr. Matooane Contented, and correctly so in our view that in the case of **Steyn V City Council of Johannesburg 1934 WLD 143** it was stated by **Barry J. at page 146-7** that in cases where a discretion is given to a local authority the principle is well known…, that the Court will not interfere with the Council's discretion even if the Court considers that the decision arrived at by local authority is wrong or inequitable. He further contended that in the same vein then second Respondent is vested with power by the Act of Parliament to resolve this matter by arbitration and therefore the Court cannot question the merits of its decision. It can rather review its legality.

28. We respectfully agree with the forgoing submissions by the respondents Council. We consequently do not find any reason to disturb the award of 1st Respondent on the grounds and evidence presented before us.

29. The last ground contained in the Founding Affidavit of the Applicant is that generally the award is not justifiable, given the reasons. The Learned Council Mr. Molete did not address us on this ground. The thrust of his argument was on ground 8 as discussed above. In any event, ground 9 as outlined above is still intertwined with the previous grounds. It is not surprising therefore that no special argument was advanced on this

ground. We cannot therefore find this ground to be the basis for interfering with 1st Respondent's award.

30. It is obvious that the conclusion, to which we come, is that this application ought to fail. It is accordingly dismissed. We were not addressed on the aspect of costs. We therefore do not find any basis for granting costs in this matter. There will therefore be no order as to costs.

31. My assessors agree.

DATED AT MASERU THIS 5TH DAY OF SEPTEMBER, 2006

_____

K.E. MOSITO AJ

JUDGE OF THE LABOUR APPEAL COURT OF LESOTHO