LAC/REV/121/05

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LESOTHO ELECTRICITY CORPORATION	APPLICANT
AND	
LITEBOHO SAMUEL RAMOQOPO	1ST RESPONDENT
THE DIRECTORATE FOR DISPUTE PREVENTION AND RESOLUTION	2ND RESPONDENT

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

ASSESSORS: MR.
MR.

HEARD: 23 August 2006

DELIVERED: 5 SEPTEMBER, 2006

SUMMARY

Review of Arbitral proceedings – Distinction 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 - Arbitrator conducting proceedings such that Respondent starts first followed by Applicant and then Respondent – Need to prove prejudice – Failure to prove such prejudice - effect thereof.

Court having not been addressed on costs – Application dismissed – no order as to costs.

JUDGEMENT

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1. The present application came as a result of an arbitral award issued by the 2nd Respondent's arbitrator on 30 June 2005, which came out in favour of the present 1st Respondent. Dissatisfied with the said award, the present Applicant, on 16 August 2005, approached this Court for an order in the following terms:

(a) That the Respondents show cause (if any) why the decision in referral No. A0461/05 shall not be reviewed, corrected and set aside;

(b) That the Applicant's late filing of the application be condoned;

(c) That the Second Respondent delivers to the Registrar of the above Honourable Court and within fourteen (14) days of the service of the notice of motion:-

   (i) the record of proceedings in referral no. A0461/05

   (ii) Reasons (if any) that the Second Respondent may wish to give in relation to his award in referral no A0461/05.

(d) That the Respondents be directed to pay costs hereof in the event of their opposing this application.

(e)Granting Applicant further and/or alternative relief.

2. The facts giving rise to the present litigation between the parties are not seriously in dispute, and have been aptly summarised by the Applicant's Counsel, Advocate S. Shale in his written heads of arguments, and for which the Court is deeply indeed to him. The Court will therefore make useful profit out of that summary. The summary runs as follows: It is common cause that the First Respondent herein was an employee of the Applicant since May 1993 until he was dismissed on the 30 March 2005. Prior to this dismissal First Respondent was disciplinarily charged by the Applicant herein for gross negligence and misconduct.

3 At the material time the First Respondent was holding the position of Manager-Central Districts. In the disciplinary hearing, the First Respondent was found guilty and dismissed from his employment. It is this dismissal that led to the institution of the proceedings before the Second Respondent with the 1st Respondent referring a dispute of unfair dismissal to the Directorate of Dispute 3.Prevention and Resolution (hereinafter referred to as the DDPR or 2nd Respondent), on 19 May 2005. The matter was heard and finalized on 16 June 2005. In the proceedings before the Second Respondent, it was not common cause between the parties that the First Respondent had indeed contravened the Applicant's procedures in relation to engagement of a Contractor where the job involved money in the sum of Twenty Thousand Maloti (M20,000,00); and which was classified as a major work and which would fall in the scope of the Planning Department.

4 The First Respondent, however, contended that he did not survey to determine the cost of the job because it was a project which merely needed completion. The First Respondent's attitude was that he had made a recommendation to the appropriate repository of power that effected the appointment of the Contractor. The Second Respondent then found for the First Respondent.

5 In ***JD Trading (PTY) LTD t/a Supreme Furnishers v M.Monoko and two Others LAC/REV/39/04,*** (delivered on the same date as the present judgement), this Court considered the sources and the extent of its power of review. It pointed out

inter alia that, 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. It went on to considered a number of authorities such as, ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)*** at 152A-E , and held in line therewith that, broadly, in order to establish review grounds it may have to be shown that the tribunal failed to apply its 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)***.

6 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 tribunal 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.This Court also stated that, 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.
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> (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.

6. The ***Hera's*** decision was also followed in many other decisions such as ***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.)*** It pointed out that, Smallberger ADP held 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]).

7. 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.***

8. This Court held that the phrase, “any grounds permissible in law “ as contained in section 228F the Act, should be so interpreted as to include the various grounds of review mentioned above in respect of matters falling within its jurisdiction.

9 Now, turning to the merits of the present case, the Applicant’s first complaint is that, the Second Respondent’s award calls for review in as much as it is totally unsupported by evidence. It is wholly against the weight of the evidence given before the Second Respondent. Furthermore, Second Respondent has totally misconstrued the law on the subject matter before him. Second Respondent has also acted irregularly in directing that

First Respondent be placed on written warning. The second challenge by Applicant is that, the Second Respondent's judgement is marred with irregularities and contradictory findings both as to fact and law. He cites as an example that, Second Respondent has elected to term and classify as negligence what is otherwise outright gross misconduct coupled with dereliction of duty and cross insubordination by the First Respondent.

10 At the hearing before this Court, Counsel for Applicant Advocate S. Shale, submitted both in his heads of argument and very able oral submissions that, the award of the DDPR should be reviewed on ground of procedural impropriety. He contended that before the DDPR, the order of presentation of the cases of the parties was changed in that, the Respondent (present Applicant) before the DDPR was called upon to present its case first, followed by the Applicant (present 1st Respondent), and then respondent (present Applicant) again. He submitted that this was irregular in as much as, the Respondent (present Applicant) was in effect, called upon to answer a case before it was placed by applicant (present 1st Respondent) before the DDPR. He However conceded (and correctly so in our view) that, there was no prejudice to which he could point that his client (present Applicant) suffered as a result of this switching of positions, in as much as he was allowed to contradict the case of present 1st Respondent. He said it was just that, it was undesirable that the DDPR adopted

that route. In all fairness to Applicant's Counsel, he was unable to pinpoint a provision in either the Act or any Rules of procedure that could be said to have been violated by this procedure.

11. Counsel's attention was drawn to the decision of this Court in ***Vodacom Lesotho (PTY) LTD v The Directorate of Dispute Prevention and Resolution and 2 Others LAC/REV/47/2005*** at para 15 at which this Court said:

> In advance of determining whether such an irregularity as is complained of in paragraph 3 above did actually occur, it is at this stage appropriate to examine the law relating to the said subject. Section 26 (8) and (9) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004 provides as follows:
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> "(8) The arbitrator must first swear or affirm the witness in and advise the witness of the process of questioning.
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> (9) The process of questioning should be as follows:
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> (a) The arbitrator or (representative of any party to the dispute) should lead the witness. At this stage, the arbitrator must avoid cross-examining the witness. The object of the questioning is to elicit the evidence of the version in support of which the witness is giving evidence.
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> (b) The arbitrator should then permit the other party/representative to cross - examine the witness.
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> (c) The arbitrator should then permit the party who called the witness to ask any additional questions in order to clarify questions asked in cross-examination.
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> (d) If necessary, the arbitrator should ask questions in order to ascertain the truth of the witness' testimony. Those questions may be in the form of cross-examination.
>
> (e) The arbitrator then permits the other party to the dispute to call his/her witness and to lead evidence.

The arbitrator may also ask questions merely to elicit the evidence of the version in support of which the witness is giving evidence.

(f) The arbitrator then permits the other party/representative to cross-examine the witness.
(g) The arbitrator then permits the party/representative of the party who called the witness to ask questions in order to clarify questions asked in cross-examination.

(h) The testimony given by witnesses must be recorded by hand or tape or both."

12 The Learned Counsel for the Applicant immediately, and in an impressive manner, sought to avail himself of the above statement of the law, and while courteously expressing his indebtedness to the Court for bringing the case and the Guidelines to his attention, he submitted that the case goes to support his contention that the DDPR had irregularly proceeded *in casu,* and its decision has to be reviewed for failure *inter alia,* to comply with the above statement of the law.

13 In answer thereto, Mr. T Matooane for 1st Respondent, submitted that, Applicant's Counsel no longer had a room for manoeuvre in as much as, he had conceded that, no prejudice to the Applicant had been established. We agree with Respondent's Counsel on this point. We further observe that this point of procedural impropriety had not been raised in the founding affidavit of the Applicant, and was taken from the bar and in the heads of argument, which aspect distinguishes this case from the ***Lesotho Vodacom's*** case *supra*.

14 The learned Counsel also conceded that while there was a procedural irregularity, it was not a gross. He contended further

that for the irregularity to stand for review, it does not have gross. We disagree with this contention. As already stated above, for the irregularity to stand as a ground of review, As was said in ***Johannesburg Consolidated Investment Co. v. Johannesburg Town Council 1903 TS 111,*** in its first and most usual signification, the term judicial review denotes the process by which apart from appeal, the proceedings of inferior courts of justice in respect of *gross irregularities* occurring during the cause of such proceedings. See also ***Vodacom Lesotho (PTY) LTD v The Directorate of Dispute Prevention and Resolution and 2 Others LAC/REV/47/2005*** at para 11.

15. The Learned Counsel further argued that, the decision of the 2nd Respondent, was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter regard being had to the fact that, no tribunal properly directed would have come to the kind of decision to which 2nd Respondent came to on the evidence before him. He contended that the decision was so unreasonable as to warrant the inference that he had failed to apply his mind to the matter regard being had to the contents of paragraph 8 of the founding affidavit. He argued that there was simply no evidence upon which a tribunal properly directed would have come to the kind of decision to which 2nd Respondent did come. As already mentioned above, this attack is based on grounds embodied in the phrase “any grounds permissible in law “as contained in section 228F of the Act.

16. It is significant that the Learned Counsel conceded that there was no ***gross*** unreasonableness involved in the present matter. In the absence of unreasonableness of such a ***gross*** nature as to justify the interference by this Court, the question arises whether this Court can interfere with the decision of the DDPR. In our view it is not enough that the decision is unreasonable. A party challenging the reasonableness or otherwise of the DDPR, must show that the decision is ***grossly*** unreasonable. We do not agree with the Learned Counsel for applicant that there is no need to determine whether the decision was grossly unreasonable.

17 another attack by the Counsel was that the decision was against the weight of evidence. He contented that the decision was not supported by evidence at all. We are unable to agree with this argument. In fact on page 12 of the record, the DDPR points out in its awards that "in his response, applicant argued that he did not appoint the contractor on his own, but he advised the DMD-Engineering that Hanslet was the one who could do the job. He stated that the DMD-Engineering approved that Hanslet should be engaged. This statement was not rebutted by respondent such that it could be believed that the DMD-Engineering indeed, agreed with applicant's recommendation that Hanslet should be appointed". The 1st Respondent herein opposed the application.

18 The crux of the said Respodent's opposition is that, there was no irregularity at all in the proceedings before the Second Respondent. He also contents that the1st Respondent has not

even disclosed the alleged irregularities complained about. It is with the above contentions that this Court has to grapple with. In our view, there is no enough reason to disturb the award of the arbitrator in the particular circumstances of the present case.

19 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.

DATED AT MASERU THIS 5TH DAY OF SEPTEMBER, 2006

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K.E. MOSITO
JUDGE OF THE LABOUR APPEAL COURT OF LESOTHO

ASSESSORS:

Mr. R. L Mothepu — _______________ I agree

Mr. L.O. Matela — _______________ I agree

For the applicant: Advocate S. Shale
For the first and second respondents: Mr. T.Matooane