

**IN THE LABOUR APPEAL COURT OF LESOTHO****LAC/A/18/10****HELD IN MASERU****In the matter between:****‘MASEMPE MAIME****APPLICANT****AND****HAREENG HIGH SCHOOL BOARD****1<sup>ST</sup> RESPONDENT****HAREENG HIGH SCHOOL****2<sup>ND</sup> RESPONDENT****LESOTHO EVANGELICAL CHURCH****3<sup>RD</sup> RESPONDENT****PRESIDENT OF THE LABOUR COURT (NO)****4<sup>TH</sup> RESPONDENT****ARBITRATOR M. MASHEANE****5<sup>TH</sup> RESPONDENT****CORAM: HONOURABLE K.E. MOSITO AJ****ASSESSORS: MRS. M THAKELEKOALA****MR. M. MAKHETHA****HEARD ON: 30<sup>TH</sup> JUNE 2011****DELIVERED ON: 30<sup>TH</sup> JUNE 2011**

## SUMMARY

*Appeal from Labour Court – Whether Labour Court erred in not reviewing and setting aside the award of the Arbitrator in not reviewing the arbitral award– Remittal of the case to DDPR to consider and grant the relief in terms of section 73 of the Act - No order as to costs.*

## JUDGEMENT

MOSITO AJ.

1. On the 30<sup>th</sup> day of June 2011, this Court granted an order that by agreement, this case be remitted to the DDPR (the relevant Arbitrator) to determine and pronounce herself on the choice of the relief granted under section 73 of the Labour Code Act 1992 and to go ahead and order such relief. We promised to file reasons latter as the pronouncement was made in Court. The following are the reasons for our aforesaid directive.
2. The complainant had been employed by the 2<sup>nd</sup> respondent on a one year fixed term period. She was employed as a matron. In September 2005, the complainant was sent on leave as a result of misunderstandings arising out of her work. It must be recorded that by this time complainant was left with just three months prior to the expiry of her one year contract.
3. According to evidence, the complainant misused food meant for the children. She fed the children later than stipulated times and allegedly she spread negative rumours about the principal to the effect that the principal misuses school funds and that he is a paedophile. She was accused generally of being disrespectful towards the principal and not obeying his

(principal) instructions. A member of the Board Mr. Matsabisa Motsapi testified that they had at least four Board meetings where they summoned the complainant in an effort to help her to resolve the problems pertaining to her work and her relations with the principal. On the 29<sup>th</sup> October 2005, the Board wrote applicant a letter extending her leave and inviting her to show cause why she should not be dismissed for the infractions already referred to. She was given until the 19<sup>th</sup> November 2005 to respond. Complainant duly responded and on the 19<sup>th</sup> November 2005 she was served with a letter of dismissal and paid three months salary in lieu of notice.

4. Complainant referred a dispute of unfair dismissal to the DDPR which found that her dismissal was unfair in that she was not given a hearing. This finding was made by the arbitrator despite evidence of the principal that the complainant was given a chance to respond to the charges in writing which she admittedly did. The principal's evidence was not refuted by the complainant and it was confirmed by the member of the Board Mr. Motsapi.
5. Despite finding that the dismissal was unfair the learned arbitrator decided not to award reinstatement or compensation. Her reasons for so deciding were firstly that *"the applicant was left with one month before the lapse of her employment contract. On the basis of this I cannot award reinstatement*

*because her contract was on the verge of completion.*” The second reason was that:

*“on the matter of compensation, it would only be fair to award compensation... for the remaining period of employment contract, but in this case it has been indicated that the applicant had already been paid her wages for the remaining month of December 2005 and this matter has not been disputed by applicant.”*

6. The Applicant approached the Labour Court for review. The grounds on which the review is sought are contained in paragraphs 6.3 – 6.5. They are that:

*“(i) The arbitrator erred in concluding that she could not award reinstatement or compensation.*

*(ii) The arbitrator misdirected herself in concluding that because I was paid wages for the month of December 2005 compensation could not be awarded.*

*(iii) The arbitrator intentionally disregarded section 73(1) and (2) of the Labour Code Order No.24 of 1992.*

7. The respondents neither filed the notice of intention to oppose nor any opposing papers. Even though they desired a review of the DDPR proceedings, what they sought in papers before the Labour Court they were challenging the arbitrator’s exercise of the discretion vested in her by section 73 not to either reinstate the complainant or order that she be compensated.

8. While it is correct that judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.
9. The Labour Court considered the application and ultimately held that:

The learned arbitrator having exercised the discretion vested in her by the law, this court cannot interfere with that exercise of the discretion. This is so even if this court might have been inclined to award differently and order that the complainant be reinstated or compensated. For these reasons the application for review was dismissed and no costs order was made.
10. The appellant then appealed to this Court on the following grounds: First, that the President erred in confirming the Arbitrator's finding that she could not award reinstatement because the Appellant's contract of employment was about to lapse at the end of December, 2005 and despite correctly deciding that Appellant dismissal was unfair in that she was not afforded a disciplinary hearing prior to her dismissal. No charges relating to the alleged misconduct were communicated to her, and she was also not afforded opportunity to respond to the charges laid against her and to state her case in rebuttal of charges of infractions leveled against her by the school.

11. Second, it is complained that it is crystal clear that the fundamental rule of our law of *“audi alteram partem”* principle was not adhered to in this case. The Arbitrators contention was to the effect that she could not reinstate the Appellant to her position because her contract of employment was coming to an end, this assertion should not be allowed to stand because the Appellant had a legitimate expectation that her contract of employment would be renewed. (***Meyer Vs Iscor Pension Fund 2003 (2) SA 715 (SCA) at Para. [27], Morale And Another Vs Principal Secretary, Health And Another CIV/APN/93/95.***
12. The third complaint was that the President erred and misdirected himself in concluding that the Arbitrator was correct in not awarding compensation because the Appellant was paid her outstanding dues for the month of December, 2005 when her contract of employment was to reach expiration. The said dismissal lacked both substance and procedure to be rendered lawful and had therefore been effected on unfair grounds.
13. The fourth complaint was that, the Arbitrator failed to uphold the dictates of section 73 (1) and (2) of the Labour Code Order in that upon making a finding of unfair dismissal she exercised a refusal to make an award for compensation that is just and equitable, and surely if an award for the reinstatement of the Appellant was impracticable, an equitable award of compensation could have been made. She therefore erred in not awarding compensation or reinstatement after making a finding of unfair dismissal.

14. The fifth complaint was that the President further erred in upholding the Arbitrators decision not to award the Appellant compensation in the event of reinstatement being impracticable to fulfill in that she refused to afford the Appellant during arbitration proceedings at the DDPR in Mhales' Hoek to make representations about her contract of employment, which she had a reasonable, legitimate expectation that it would be renewed. The said contract could only not be extended if the Appellant so wishes or unilaterally and voluntarily terminated by the Appellant.
15. The last complaint was that the learned President made an error of judgment in concluding that he could not interfere with discretionary powers vested upon the Arbitrator by section 73, and yet this is the very section of the Labour Code which bestows discretionary powers upon the Arbitrator to make an award of reinstatement and/or compensation if reinstatement is impracticable under the circumstances which the Arbitrator has failed to discharge upon making a finding of unfair dismissal.
16. When argument commenced before us, this Court asked the parties whether regard being had to the terms of section 73 of the **Labour Code Act 1992**, it was competent for the Arbitrator to have made neither an order for reinstatement nor compensation. The section reads as follows:

### **73. Remedies**

(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other

entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.

(2) If the Court decides that it is impracticable in light of the 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 shall be such amount as the court 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 any 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.

17. A reference to the “Labour Court” or “Court” in the above section is now a reference to the DDPR. The parties agreed that the section is coached in mandatory terms. This had the effect of enjoining the Arbitrator to consider whether to grant reinstatement or compensation. The Arbitrator cannot just ignore this peremptory provision of the statute.
18. Thus, by agreement of the parties, it was ordered that the case be remitted to the relevant Arbitrator to determine and grant such relief in terms of section 73 of the Act as she is required to do.



19. We agree with the Labour Court that the learned arbitrator having exercised the discretion vested in her by the law, the Labour court cannot interfere with that exercise of the discretion save in circumstances not necessary for us to go into herein. This is so even if this court might have been inclined to award differently and order that the complainant be reinstated or compensated.
20. For the above reasons, we upheld the appeal and directed that the matter be remitted to the DDPR for the purpose referred to in paragraph one above.
21. This is a unanimous decision of the Court.

K.E.MOSITO AJ

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Judge of the Labour Appeal Court

For Appellants: Adv. N. Moeti

For 1<sup>st</sup> respondent: Adv. T.S.P. Ntsibolane