LAC/REV/03/09

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOHAU RASEPHALI APPLICANT

AND

CGM (PTY) LTD 1ST RESPONDENT

LABOUR COURT 2ND RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: Mr R. Mothepu

Mr M. MPHATS'OE

Heard on: 16TH JANUARY 2012

Delivered on: 30TH JANUARY 2012

SUMMARY

Application for review of the decision of the Labour Court- applicant's complaints based on no grounds of review but grounds which if properly formulated might qualify as grounds of appeal – no merit in the application – application dismissed with costs.

JUDGEMENT

MOSITO AJ

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

1. That the Rule of this Honourable Court concerning record of hearing be dispensed with because the grounds for institution of this action are solely that of lawfulness of decision making process which merely involves or/and pertain in both the law and the Annexured documents from which 2nd respondent inferred or directed itself during the process of decision making.
2. That the Rule Nisi to be issued returnable on the date and time to be determine by this Honourable Court.
3. Calling upon the above mentioned respondent to, within 14 days of receipts of this application, show the cause why (if any);

(a) The decision of 2nd respondent in LC/20/08 cannot be reviewed and corrected in line with the reliefs sought by the above mention applicant before 2nd respondent.

(b) The above order number 2 cannot be made absolute.

(c) 1st respondent cannot be ordered to pay costs of the suit, for both in LC/20/08 held at Labour Court and this above matter, with tripled total amount in the event of opposition herein.

4. That prayers 1 and 2 do operate with immediate effect as interim Court order.
5. Further and alternative relief.

2. The present application is a sequel to an application that was brought before the Labour Court by the applicant. That application was for contempt of court and for an order of committal of the 1st respondent herein and payment of arrears of salary from 1st September 2006 with interest at 25% per annum. It was common cause that the applicant had been employed by the 1st respondent since 2nd January 2006. Two months later, he was dismissed on the 1st March 2006. He referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and

Resolution (DDPR) on the 27th July 2006. The arbitration proceeded in default of appearance by the respondent on the 14th August 2006. On the 31st August 2006 the arbitrator issued an award in which she ordered that the applicant be reinstated with effect from 15th December 2006. It is significant to point out that it is not clear why the date of the 15th December 2006 was decided upon by the arbitrator regard being had to the terms of section 73(1) of the Labour Code Order 1992. That notwithstanding, this is not an issue before us and we make no determination on it.

3. The learned arbitrator further ordered the respondent to pay M3,861.00 to applicant as lost wages for the six months that he had been out of employment.

4. For his part the applicant avers that he went to the respondent's work place on the 14th September 2006 to enquire whether he could start work on the 15th September 2006. He avers that he met the Managing Director of the 1st respondent Mr Adriaan Chang who told him that he should not come to work because the respondent was considering legal steps regarding the award.

5. On the 28th September 2006 applicant avers that he was served with a notice of application for rescission which was scheduled for hearing on the 7th November 2006. On the said date the case duly proceeded and on the 6th December 2006, the arbitrator issued an award dismissing the rescission application. It is worth mentioning that the case was proceeded with on 7November 2006 in default of the respondent again. On the 7th December 2006 applicant approached the Labour Court for enforcement of the monitory aspect of the arbitrator's award. On the 7th February 2007 the respondent paid the amount ordered by the arbitrator

in respect of which the Labour Court had been approached to have the matter settled. The applicant collected his pay cheque on the 12th February 2007. After that all went silent.

6. On the 10th September 2008 applicant issued an originating application seeking an order of committal of the respondent as mentioned above, the respondent raised two points in limine: that the matter was *res judicata* in asmuchas it was disposed of by the arbitrator Monoko in referral No. AO275/07 in which referral it appears that applicant had gone back to the DDPR to seek unpaid salary from the date he would have been reinstated. The second was that it had taken applicant an reasonably long time to bring the matter to court.

7. On the facts the 1st respondent argued before the Labour Court that after the dismissal of their rescission application, the applicant never reported to start work in terms of the reinstatement order of the DDPR. The respondent therefore disputed that it refused to reinstate the applicant and that it owed him any arrears of salary. Arbitrator Monoko's award was that respondent did not owe applicant any salary because it was incumbent upon the applicant to have gone to the work place to resume his duties immediately after the dismissal of the respondent's application for rescission of award NO. A0532/06. The arbitrator went on to point out that the applicant ought to have done this since the decision and order that he be reinstated became immediately effective when the application for decision was dismissed. I may pause to point out and *en passent* that this may give a wrong impression that once an application for rescission is launched with the DDPR, the obligation to reinstate is suspended. This is clearly not correct. The effectiveness of the award remains extant until either the award is rescinded by way of review or

rescission order and not otherwise. In any event this is not an issue for determination before us. Arbitrator Monoko also pointed out that it was absolutely unnecessary for the respondent to recall the applicant to resume his duties following the dismissal of the application for rescission as that was the applicant's argument. I express no opinion on the correctness of this last contention by the arbitrator. Sufficeth to say that it was on that basis that arbitrator Monoko held applicant not entitled to payment occasioned by the applicant's non-tendering of his services as an employee of the 1st respondent.

8. When he filed his application before the Labour Court, the applicant pointed out in paragraph 5.7 of his affidavit that on 7th December 2006, he went to respondent's premises whereat he met the Personnel Manager by the name of Kolobe and urged him to implement the order contained in the award NO. A0532/06 but the said Kolobe refused on the basis that the respondent still intended to apply for review. As the Labour Court correctly found out, the applicant's averments in this regard were indirect conflict with what he had said before arbitrator Monoko that he had stayed at home waiting for the said 1st respondent to call him to work. When he realized that the arbitrator did not buy his story in his award he changed his horse to ride on one that conveyed the message that he had reported to work but reinstatement refused. The Labour Court quite correctly in our view disallowed the applicant changing horses' midstream.

9. Having considered the contentions presented before it, the Labour Court found that the applicant was guilty of unreasonable delay in enforcing his reinstatement order and that the contempt application before it could

not succeed. It accordingly dismissed the application with no order as to costs.

10. The application having been dismissed as aforesaid the applicant then filed the present application for review in the terms outlined in paragraph 1 above. In paragraphs 6 - 7 of his application before this Court, the applicant presents his complaint in detail. I intend to reproduce his complaints which he contents serve as grounds for review before this court:

> "6.1 I am dissatisfied with the way in which 2nd respondent arrived at its decisions.
> 6.2 In arriving at its decision 2nd respondent willfully misdirected itself and wrongfully considered that it had itself jurisdiction to-
>
> (a) judicially use or input from dead points (or papers) for which there was no prosecution or/and invites canvassed as it does
>
> (i) if 2nd respondent as that lawful authorization to, on its own accord, prosecute/canvas the merits of the absent party in proceedings without its permission, it deems it frivolous to appear before the Court of Law and canvass the merits as it does.
>
> (b) judicially deprive itself of its statutory power to enforce the DDPR order(s), because of decision made by the Court inferior to it and without lawfully authorization as it does.
>
> (i) It is not the principle, policy or and concept of both the doctrine of Presidency and the law established 2nd respondent that superior court(s) be bound by decision of inferior court, namely DDPR that had no jurisdiction for a matter being judicially considered before the 2nd respondent (LC20/2008).

(c) Judicially without hearing evidence exercise unexercised disciplinary jurisdiction of employer(s) on its managerial responsibility at it does.

(i) the employment law enjoined not 2nd respondent but 1st respondent with power to declare, through its disciplinary outcome, that an employee has committed and offence or otherwise infringed any such its instructions.

(d) Refuse to consider and decide the case (LC/20/08) for which it has jurisdiction on its merits as it does.

(i) It is the principle of fairness that every matter brought before the court of law for its decision be considered or decided on its merits.

(e) Judicially deprive me of my statutory right(s) and duty which are merely results of conclusion of continuing contract of employment as it does.

(i) In the circumstances that either party in contract of employment is otherwise do no longer interested to its continuity or existence, the act concerned provided that the concerned party undo the agreement (terminate employment contract) but not avoiding to do a duty (evade)

(ii) 2nd respondent do not know or never heard the evidence why does 1st respondent chose not to exercise its disciplinary discretion as the law confer such profuse discretion to 1st respondent.

7.1 It is my submission that 2nd respondent misdirected itself with intention to cause me distress, frustration, anxiety, displeasure, vexation, tension and aggravation for which I can't be compensated and it succeeded.

7.2 Irrespective of negativeness of 2nd respondent decision in effect, it is my submission that 1st ought to be liable for the cost of these acts in a three total amount for that it will lead to dependence of respondent for making wrong decisions in exchange of anonymous incentive.

I am making this affidavit in support of the application for review of LC/20/08.

11. The applicant was given time to argue his aforementioned "grounds of review". We are therefore in a position to address the above complaints.

12. When addressing the first complaint, it will be realized that regarding 6.1 applicant is dissatisfied with the way the Labour Court arrived at its decision. To the unwary, this may give the impression that the applicant is complaining about the method of trial before the Labour Court. However, a closer examination of the contents of the complaints will reveal that the applicant is complaining largely about the correctness or otherwise of the decisions of the Labour Court. He is largely complaining that the Labour Court either got the law wrong or faulted on the facts. In respect of such complaints, (their merits aside) it will be clear that what the applicant ought to have done was to approach this court by way of appeal.

13. Relating to paragraph 6.2 (a)(i) realizing that it was rather difficult to understand what applicant intended by the above complaint, applicant was given amble time to address the court on what the essence of his complaint was in this regard. It emerged that what he was complaining about was that in the matter before it in which papers had been filed on behalf of the respondent, the Labour Court decided the case on the papers and after hearing applicant, it dismissed his case. The applicant's contention is therefore that the Labour Court ought not have done that because since there was nobody appearing for the respondent before the Labour Court, and nobody presented the case for the respondent,

therefore the Labour Court ought to have decided in favour of the applicant. The applicant's contention in this regard is based on his philosophical approach that if papers have been filed before court and are before court but a party does not appear on the date of hearing and speak to the said papers, the court cannot rely on those papers because according to him, those are "dead points" which require some "life to be breathed into them". This is a very strange principle which is a contribution to our jurisprudence. It has no merit and must be rejected.

14. In 6.2(b)(i) he complains that the Labour Court did not do its duty because the DDPR had already done the duty for the Labour Court. However, what the Labour Court did in our view was to confirm the decision of the DDPR regarding issue of *res judicata* whether rightly or wrongly decided. According to the Labour Court the issue of *res judicata* as allegedly found by arbitrator Monoko was correct. This is clearly not a question of the method of trial, but one as to whether the Labour Court was right in law in finding as it did. In this regard applicant ought to have appealed that decision. However, as it stands now, it is not correct that the Labour Court handed over its statutory powers to the DDPR in agreeing with the decisions of the DDPR. This complaint must therefore be rejected.

15. Regarding paragraph 6.2©(i) this was not a question of the method of trial. The complaint in that paragraph is in essence whether the Labour Court was entitled to declare that an employee has committed an offence or not. The applicant's contention before us was that the Labour Court had taken upon itself to find that the applicant had breached instructions

of the employer. We were unable to find where the Labour Court has made such a decision in its judgment. It would probably have been helpful for the applicant to have appealed the judgment of the Labour Court and not to try and bring it on review.

16. Regarding paragraph 6.2(d) the actual complaint is that the Labour Court erred in not enforcing the award of the DDPR relating to reinstatement. The difficulty here is that this is not a ground of review but one for appeal (its merit aside). As a review ground this complaint cannot succeed because what is clear is that the Labour Court considers that the applicant had been paid his entitlements and thereafter he absconded by not presenting himself to work after the dismissal of the rescission application by the DDPR. What the Labour Court actually did was to agree with the DDPR that the applicant's complaint was invalid. In my opinion if he was not satisfied with this decision the applicant ought to have appealed it.

17. Regarding paragraph 6.2(e) better formulated, the applicant is complaining of the correctness of the decision of the Labour Court of not finding in his favour in this connection, he is in essence complaining that the Labour Court ought to have held that he was entitled to be reinstated, again this is not a ground of review. It would perhaps better be classified as a ground of appeal (its merit aside). In any event there being no appeal before us against that aspect of the error in the decision of the Labour Court in coming to the conclusion it did, this complaint cannot succeed either. The same must be said of paragraph 7 of the complaints presented before us.

18. In all the circumstances it seems to us that not only did the applicant fail to approach this court on appeal as he ought to have done, but also regard being had to the manner in which his so called grounds of review were formulated which in effect disclose no grounds of review at all we are unable to find for the applicant in this application.

19. In the result, we make the following order that the application is dismissed with costs.

20. This is an unanimous decision of the court.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Applicant : In person

For the Respondent: Advocate M. Mabula