IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/REV/01/13**

In the matter between:

PITSO MAHLAPHA APPLICANT

AND

NEO LEPAMO & ASSOCIATES (PTY) LTD RESPONDENT

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

ASSESSORS: MRS L. RAMASHAMOLE

MRS S. KAO

Heard on: 24th June, 2013

Delivered on: 28th June, 2013

SUMMARY

Application for review of the judgement of the Labour Court – Applicant having filed founding papers and respondent having failed to respond to the factual issues raised therein – the correctness of the version of the applicant assumed.

Judgment of the Labour Court reviewed and set aside on the basis that there were irregularities as to representation before the DDPR on the basis of which the judgment of the Labour Court ought to have found for the applicant.

Representation – employees entitled to representation by a trade union official before the DDPR – Court having erred in excluding union official but allowing a legal practitioner representing the employer to proceed. – Such an irregularity.

Costs – the applicant awarded costs of the application before the Labour Appeal Court and those before the Labour Court.

JUDGMENT

MOSITO AJ

INTRODUCTION

1. This is an application for review brought by Applicant against the judgment of the Labour Court (Ramoseme ADP) handed down on the 23rd day of November 2012. The present application is one for an order int he following terms:

> "1. That the decision of the Acting Deputy President of the Labour Court under case No. LC/REV/92/10 be reviewed, corrected and set aside.
> 2. That the Acting Deputy President be ordered to dispatch the record of proceedings in Case No.: LC/REV/92/10 before the above Honourable Court within fourteen (14) days of receipt hereof;
> 3. That the Respondent be ordered to pay an amount equivalent to M98.00 to the applicant as underpayment of salaries;
> 4. That the Respondent be ordered to pay costs only in the event of opposing this matter.
> 5. Granting the applicant further and/or alternative relief as the Court may deem just and equitable in the circumstances."

2. The decision of the learned Acting President to be reviewed and corrected in this application results from LC/REV/92/10. That was an application for review of an arbitration award of the DDPR. The Applicant sought to have

the arbitration award handed down on the 30th day of September 2010, reviewed, corrected and set aside. The facts leading to that application were that on 22 October 2009, Applicant referred a dispute to the DDPR in terms of which he claimed an award for unfair dismissal and underpayment of salaries. Both claims were dismissed and Applicant lodged review proceedings in the Labour Court. The application was opposed but 1st respondent failed to make appearance on the date of hearing. As a result the matter proceeded on the basis of the presentation by applicant only. It is against this background that the application was determined.

PROCEEDINGS IN THE LABOUR COURT

3. In the Labour Court, several grounds of review were raised by the applicant in his notice of motion and founding affidavit. However, in his submissions, he indicated that he only had four grounds against which his review application was premised. These grounds were namely that learned arbitrator failed to apply her mind to the facts as there was no valid reason for the dismissal of applicant; that the learned Arbitrator failed to understand that there was no hearing prior to the dismissal of applicant; that the learned arbitrator failed to appreciate that applicant only came to know about his dismissal upon receipt of the letter of dismissal; and that the learned Arbitrator demanded irrelevant and immaterial issues not relevant to the matter, hence committing an irregularity.

4. It appears from the judgment of the Labour Court that, in amplification of the first ground, applicant submitted that in the proceedings before the

DDPR, no evidence was led on the charges that led to the dismissal of applicant. Rather, the evidence that was led related to shortage of an amount in the tune of M40.00. Consequently, applicant argued that clearly, there was no valid reason for dismissal as the evidence adduced related to something different from what applicant was charged and dismissed for. The Labour Court however, held that, this evidence was not only led but considered by the learned Arbitrator.

5. On the second ground, it was submitted in the Labour Court that, on the day in issue applicant was called for a meeting in which workplace issues involving him were going to be discussed. Reference was made to exhibit "PM1" which was the letter inviting applicant to the said meeting. Applicant argued that the learned arbitrator miscarried [sic] the whole issue in holding that a hearing was held for applicant on the date reflected in "PM1" when none of the procedural aspects for a fair dismissal were followed.

6. Upon consideration of both "PM1" and the applicant's argument, the Labour Court formed an opinion that applicant was dissatisfied with the conclusion that the learned Arbitrator made, in relation to the status of the meeting that was organised for applicant prior to his dismissal, and that, it is clear from the construction of this ground that it is not an issue of an irregularity on the part of the learned Arbitrator but her interpretation of the "PM1" to be an invitation to a disciplinary hearing. The Court then held that, clearly applicant was challenging that decision of the learned arbitrator and not the procedure or processes following in reaching her decision.

7. It is consequently held that applicant had not challenged the processes of procedures adopted by the learned Arbitrator in concluding that a hearing

was held. The argument was simply that she miscarried or wrongly interpreted the evidence, in particular "PM1", to mean that a hearing was held. Consequently this point failed.

8. In relation to the third ground of dismissal, it was submitted before the Labour Court that applicant only came to know about his dismissal upon receipt of his letter of termination of employment and that in that letter no reason for the dismissal was stated. It was argued that this is contrary to the established principles of procedure in disciplinary matters. As a result, applicant maintained that the learned Arbitrator committed an irregularity by failing to take the fact that there was no reason for the termination of applicant. Reference was made to the letter of termination marked "PM2".

9. The fact that no reason for the termination of his employment was given is an afterthought as it was not among them. It is being raised for the first time at the review stage. It was never part of the issues that applicant complained of in the DDPR proceedings and as such there was no way that the learned Arbitrator could have considered it. Applicant cannot at this stage be heard to allege an irregularity on the part of the learned Arbitrator over this issue. The Labour Court held however that, the fact that no reason for the termination of his employment was given was an afterthought as it was not among them. This was being raised for the first time at the review stage. It was never part of the issues that applicant complained of in the DDPR proceedings and as such there was no way that the learned Arbitrator could have considered it. Applicant cannot at this stage be heard to allege an irregularity on the part of the learned Arbitrator over this issue.

10. Lastly, it was argued before the Labour Court that the learned Arbitrator committed an irregularity in that on the date of hearing, whereas applicant had attended the proceedings alone, the learned Arbitrator did not proceed with the matter by way of default but caused it to be postponed. The reason for postponement was that the learned Arbitrator questioned the right of appearance of the union representative and demanded a copy of the constitution of applicant representative's union. According to applicant, in doing so she demanded irrelevant and immaterial issues to the matter at hand and thus committed an irregularity. It was argued that the learned Arbitrator's conduct was also contrary to the established rules of procedure that where one of the parties is not in attendance, as it was the case, the matter ought to have proceeded by way of default. Reference was made to section 227 (8) of the **Labour Code Amendment Act 3 of 2000** in support of this argument.
11. The Labour Court held however, that, there is nothing that bound the learned Arbitrator to proceed by way of default in the absence of the other party, as suggested by applicant. In referral AO768/2009, the learned Arbitrator had a choice of two options to either postpone or proceed by way of default. The Labour Court, she exercised her discretion and made a choice to postpone the matter to allow for the presentation of the union constitution.
12. In the result, the Labour Court made the following order:

    1. That the review application is dismissed;
    2. That the award in referral AO768/2009 remain in force;
    3. The said award be complied with within 30 days of receipt of this judgment; and
    4. That there is no order as to costs.

13. The applicant was not satisfied with the judgment of the Labour Court and the order given as reflected above. He therefore approached this Court for an order as outlined in paragraph 1 above.

PROCEEDINGS IN THE LABOUR APPEAL COURT

14. The applicant filed an application supported by an affidavit before this Court. The Respondent, quite strangely, contended itself with filing an affidavit raising a point of law that this Court has no jurisdiction to entertain reviews from the Labour Court. Its contention was that this Court lacks the power to review the judgment of the Labour Court inasmuch as this Court is a "Superior Appellate Court" with jurisdiction to determine appeals from the Labour Court and, in the light of the fact that it is not being prayed to review an administrative action or decision of the Labour Court, it had no jurisdiction to entertain the matter.
15. The problem presented by the Respondent's pleadings or affidavit in this Court is that it did not dispute the factual averments made by the applicant. Its only point was that this Court has no jurisdiction. As would be expected, if this point failed, then the Respondent would be faced with a problem that it would have not opposed the averments of fact deposed to by the applicant. It if succeed, then that would be the end of the case of the applicant and this Court will just have to deal with the case of the applicant on the basis that his averments of fact are correct.
16. The question that now arises is whether the Respondent was correct that this Court has no jurisdiction. It is convenient therefore to start with this point before examining the case of the applicant.
17. Section 38A of the **Labour Code (Amendment) Act 2000** provides as follows:

> "1. The Labour Appeal Court has Exclusive jurisdiction
> (a) To hear and determine all appeals Against the final judgment and the Final orders of the Labour Court.
> (b) To hear and determine all reviews
> (i) From the judgments of the Labour Court;
> (ii) From arbitration awards issued in Terms of this Act and
> (iii) Of any administrative action taken In the performance of any function In terms of this Act or other Labour Law".

18. The above section was amended by section 3 of the Labour Code (Amendment) Act, 2006. Section 3 of the latter Act provides that "the principal law is amended in section 38A (b) by deleting subparagraph (ii)". It is clear therefore that the 2006 Act does not take away the powers of this Court to review all judgments of the Labour Court. The Respondent's contention therefore that the Labour Appeal Court has no jurisdiction to review judgments of the Labour Court is without substance. It must accordingly fail. Where does this leave the case of the Respondent? That should be the end of the defence of the Respondent. Advocate Ntaote who appeared for the respondent conceded as such.

19. It is now therefore clear that this case will be determined on the basis of the correctness version of the applicant. The first complained by the applicant is that in this Court, that the Labour Court failed to take into account that he was represented by the Trade Union official from FAWU whom the arbitrator had expelled from the proceedings demanding him to produce the constitution of the Union. The Applicant submitted that

this was tantamount to expelling the representative from the proceedings. He contends that when this happened, only his representative and applicant were present before the arbitrator and the Respondent was not in attendance. In terms of section 27 of the Labour Code (Directorate of Dispute Prevention and Resolution) Regulations 2001 provides as follows:

> **Representation**
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> 27. (1) Only persons contemplated by section 228A of the Code may represent a party to dispute.
>
> (2) An arbitrator may, on application or on the arbitrator's own accord, refuse to permit any person to represent a party to a dispute.
>
> (3) The arbitrator shall give the person referred to in sub-regulation (2) an opportunity to state why he is to be admitted as a representative including the opportunity to lead evidence".

20. Division C of the Labour Code (Amendment) Act 2000 provides for general provisions concerning conciliation and arbitration. Section 228A is entitled "representation in proceedings'. Subsection 1 of that provision provides that:

> "(1) In any proceedings under this Part, a party to the dispute may appear in person or be represented only by –
>
> (a) A co-employee
> (b) A labour officer, in the circumstances contemplated in section 16 (b);
> (c) A member, an officer of a registered trade union or employers' organisation; or

(d) If the party to the dispute is a juristic person, by a director, officer of employee".

20. It follows therefore that a member, an officer of a registered Trade Union is entitled to represent a member of that union in terms of section 228A of the Code. Such representation is allowed in arbitration proceedings. A constitution of a trade union does not prove that a particular member is a member of a trade union. A worker's representative cannot therefore be excluded from proceedings where he represents a member purely on the basis that a constitution was not available or present. We agree with Mr Mosuoe for the applicant that the learned arbitrator erred in doing what she did. The exclusion of the trade union official from the proceedings on the basis that there was no constitution of the union was clearly wrong and procedurally flawed.

21. The applicant informs the Court that he instructed his attorney to address this issue in the Labour Court that there was no agreement between the parties that the other party be represented by a legal practitioner. This he says because according to his affidavit Advocate Macheli appeared representing the Respondent at a later occasion, but he was allowed on the basis that he is represented an employers' association and was as such its official or officer. However, this excuse was with respect wrong. Advocate Macheli is a legal practitioner. In the absence of an agreement between the parties that he should be represent the Respondent, it was procedurally inappropriate for the arbitrator to have allowed him to represent the respondent. The Labour Court ought to have found that this was a procedural irregularity.

22. The above procedural irregularities were in our view sufficient, in the light of the mandatory provisions of the relevant legislation to warrant interference with the award of the DDPR. The last complained of the applicant worth mentioning at this stage, is that the Labour Court failed to take into account the fact that the applicant had not been charged before the disciplinary panel with the missing M40.00 and yet he was later on convicted of it. This conviction appeared for the first time at the DDPR. It was on this basis that the arbitrator apparently based her finding that the dismissal of the applicant was substantively fair. This was wrong. The applicant ought to have been given an opportunity at the disciplinary hearing to answer the charge of the missing M40.00 and not to meet it for the first time at the DDPR and for the DDPR to hold that his dismissal was substantively fair. This was wrong and the Labour Court ought to have intervened on review even on this ground alone.

CONCLUSION

23. In all the circumstances of this case, we come to the conclusion that the applicant's application must succeed. In the result the following order is made:

    1. The decision of the Acting Deputy President of the Labour Court under case No. LC/REV/92/2010 is hereby reviewed, corrected and set aside.
    2. The respondent is ordered to pay an amount equivalent to M98.00 to the respondent as underpayment of salaries;
    3. The respondent is ordered to pay costs of this application.
    4. The order of the court a quo is changed to read that "the application succeeds with costs."

24. This is a unanimous decision of the Court.

K.E. MOSITO AJ

Judge of the Labour Appeal Court

For the Applicant Mr P.M. Mosuoe

For the respondent Adv. N.T. Ntaote