LAC/CIV/A/20/13

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MISSION AVIATION FELLOWSHIP **APPELLANT**

AND

LINEO HLALELE **1ST RESPONDENT**

ARBITRATOR KALAKE **2ND RESPONDENT**

DEPUTY PRESIDENT OF THE LABOUR COURT **3RD RESPONDENT**

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

ASSESSORS: MRS P. E. LEBITSA

MRS L. RAMASHAMOLE

Heard on: 14TH OCTOBER 2013

Delivered on: 7TH NOVEMBER 2013

SUMMARY

Appeal against the judgment of the Labour Court – appellant complaining that the court erred in declining jurisdiction to reverse a ruling and not an award of the arbitrator mid-stream – the problem is that the appellant pleaded one thing and sought the court to decide another. The court a quo had to decide the issue of the paper before it which was one as to

review. Viewed in that way the Labour Court was correct in declining jurisdiction to decide an issue which was not before it.

Whether an arbitrator has the discretion to make a ruling without giving reasons during the proceedings promising the reasons to follow later – the arbitrator has the discretion to run the proceedings and was entitled to make such a ruling without reasons promising that reasons would follow later.

Whether the case before the court a quo was a review application – the answer is that it was a review application. Whether appellant would suffer prejudice where a ruling is given with a promise of reasons to follow later within the final award – no prejudice established in this matter.

Consequently appeal dismissed with costs.

JUDGEMENT

MOSITO AJ

1. INTRODUCTION

1.1 The facts in this appeal are generally not in dispute. They are that the first respondent filed a referral before the DDPR where she complained among other things, that she was unfairly dismissed. The appellant raised what it termed a point of law to the effect that because appellant had accepted certain monies upon the purported termination of her employment contract with the appellant, acceptance of money denoted that the respondent waived her right to pursue a claim for unfair dismissal.

1.2 The point raised by the appellant was dismissed and it was ordered that the matter should proceed in to its merits and, that the reasons for the ruling would be included the final award when the matter is finally decided on its merits. The appellant being dissatisfied with the decision to defer the reasons until the final award, applied for review of the ruling on the preliminary point before the Labour Court. The Labour Court dismissed the appellant's application hence the present appeal.

2. THE APPEAL BEFORE THE LABOUR APPEAL COURT

2.1 It is necessary to detail out the facts that gave rise to this application in brief. The appellant being dissatisfied with the judgement of the Labour Court as detailed out above, approached this court by way of appeal.

2.2 In the Notice of Appeal, the appellant records that it appeals against the decision of the Labour Court in case NO. LC/60/13 on the grounds set out in the Annexure hereto for an order that:

1. The decision of the Deputy President of the Labour Court in the application in LC/60/2013 lodged on the basis of section 228 of the Labour Code Amendment Act 2000 as well as section 22(1) of the Labour Court Rules 1994 be set aside.
2. This Honourable Court to make a decision on the application filed in the Labour Court in LC/60/2013 which is hereunto annexed.
3. That 1st respondent pays costs of suit in the event of opposition of this matter.
4. Further and or alternative relief as the court deems fit.

2.3 In the grounds of appeal, the appellant detailed its ground of appeal as follows:

1. The Honourable Court a quo erred and misdirected itself in finding that it does not have the jurisdiction to intervene in matters pending at the DDPR where there is a ruling and not an award.
2. The Honourable Court a quo erred and misdirected itself in finding that appellant's application is couched in the form of a Review Application and thus it is governed by section 228E of the Labour Code Amendment Act of 2000 and refusing to grant the relief sought on that basis.
3. The Honourable Court a quo erred and misdirected itself in finding that appellant herein will suffer no prejudice if the case proceeds into the merits at the DDPR as the application is just a pre-emption of the arbitrator's decision."

2.4 I must say that as can be seen from the content of the Notice of Appeal and the grounds of appeal, in the Notice of Appeal appellant details out different grounds which it calls an order that it seeks. This is never done. A specimen of a Notice of Appeal is contained in Civil Form LAC 1 as set out in Schedule Two. It is clear from that Form that no form of order or relief is required to be contained in the Notice of Appeal as the appellant has done in this case. In our view therefore, we are not required to consider the form of order that the appellant has contained in its Notice of Appeal.

2.5 In all fairness to Advocate Mokebisa for the appellant, she did not require us, let alone seek to rely on the form of relief or order contained in the Notice of Appeal. She however relied on the Notice of Appeal and the Grounds as detailed out in the preceding paragraph above. It is on the basis of the Grounds of Appeal as detailed out in paragraph 2.3 above that this appeal falls to be determined.

2.6 In order to determine the Grounds of Appeal relied upon by the appellant, it is apposite at this stage to reproduce the form of relief that the present appellant sought from the Labour Court wherein the appellant was an applicant. In paragraph 12 of the Originating Application, the appellant as applicant sought an order from the Labour Court in the following terms:

> 1(a) calling upon the 1st respondent to show cause (if any) why the award in AO239/07 should not be reviewed corrected and or set aside.
>
> (b) Directing the 2nd respondent to dispatch the record of the proceedings in A1069/13 within 14 (fourteen) days of the service of this notice.

(c) That the matter A1069/13 be heard de novo before a different Arbitrator.
(d) That the proceedings in the matter A1069/13 be stayed pending finalization of this application.
(e) Costs of suit in the event of opposition.
(f) Further and or alternative relief

2.That prayer 1(d) operate as an interim order."

2.7 It was common cause at the hearing before us that in the Labour Court, the appellant did not pursue prayer 1 (a) as quoted above. What the appellant sought to do was to argue that prayer 1 (a) was not what it appears to be i.e. it was not a prayer for review of an award from the DDPR because the DDPR had not yet given an award in AO239/07. The DDPR had specifically promised that its reasons regarding the dismissal of the point *in limine* would appear in the final award that it would give in due course after having heard the case on the merits.

2.8 Advocate Mokebisa argued before us that it was wrong for the DDPR to have made a ruling while not at the same time giving reasons for the ruling to dismiss a point in *limine.* Put differently, her argument was that a court or tribunal cannot dismiss a point *in limine* without instantly giving the reasons and then promise it would give its reasons for dismissing that point at a later stage during the handing down of the final award or judgment. Her argument appears to be this that every time a court makes a ruling, it must give reasons for such a ruling. If a court gives a ruling without giving reasons, so the argument goes and, even if the court promises to give a ruling at a later stage, that is an irregularity which should justify the review of such a method of trial.

2.9 The same argument was pursued before the Labour Court and the Labour Court rejected the argument. It is the same argument that was pursued before us, to say that the Labour Court erred in not accepting the argument. However, a closer look at the first ground of appeal is not that the appellant is complaining about the reasons having not been furnished for dismissing the point in *limine*. What the appellant is complaining about in the first ground of appeal, is the finding of the Labour Court that it does not have jurisdiction to intervene in matters pending at the DDPR where there is a ruling and not an award. It follows therefore that what we have to determine in this matter in the first place is whether the Labour Court had jurisdiction to intervene in matters pending at the DDPR where there is a ruling and not an award. The second aspect of this is whether a piecemeal trial was justified in respect of a matter which is pending before the DDPR.

2.10 In her written submissions before us as well as in her oral submissions, the learned counsel for the appellant advocate Mokebisa argued that the Labour Court erred in refusing to intervene against what the DDPR had done as it was obliged to do so in terms of section 228 of the Labour Code (Amendment) Act 2000 read with Rule 24(1) of the Labour Court Rules 1994. She argued that the court ought to have considered not the prayers as couched in the papers but "the intention of the appellant which was clearly stated in court and granted the remedies it saw fit instead of dismissing the application on the basis of wording therein".

3. THE POWER OF THE COURT TO GRANT ORDERS NOT SOUGHT

3.1 The Court of Appeal and this court have on several occasions deprecated the practice in terms of which the courts grant orders that nobody has

asked for. In several of its decisions the Court of Appeal has deprecated the practice of granting orders which are not sought for by the litigants. See for example **Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354.** In the latter case the Court of Appeal of Lesotho (per Grosskopf JA) said the following at page 360:-

> "*The appellant's first ground of appeal was that the court a quo erred in making the above order when neither the appellant nor the respondent had asked for it. Counsel for the respondent, on the other hand, submitted that the court a quo was fully entitled to grant such an order since the notice of motion included a prayer for further and/or alternative relief.*
>
> *I do not agree. The relief which a court may grant a litigant in terms of such a prayer cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent."*

3.2 Similarly, the Court of Appeal and this Court have more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation. See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd LAC (1995 – 1999) 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd LAC (2000-2004) 197; Theko and Others v Morojele and Others LAC (2000-2004) 302; Attorney-General and Others v Tekateka and Others LAC (2000 – 2004) 367 at 373; Mota v Motokoa (2000 – 2004) 418 at 424. National Olympic Committee and Others vs Morolong LAC (2000 – 2004)449.**

3.3 It therefore follows that the Labour Court was obliged to only consider what had been asked for before it and not that which was not asked for. There is therefore no substance in the argument that the Labour Court ought to have considered what it was told in court as opposed to what was pleaded on the papers.

4. WAS THE APPLICATION COUCHED IN THE FORM OF A REVIEW?

In order to arrive at what was actually sought before the Labour Court, one simply has to look at paragraph 12 of the Originating Application which contains the prayers. That paragraph is quoted in full in paragraph 2.6 of this judgment. It is therefore clear that in prayer 1(a), applicant was seeking a review of an award. The other prayers that followed prayer 1(a) they simply flowed from it. It follows therefore that the answer to the question imposed should be in the affirmative. There is therefore no substance in the second ground of appeal before us.

5. WOULD THE RESPONDENT SUFFER PREJUDICE

5.1 The last ground of review by the appellant is that 'The ...Court a quo erred and misdirected itself in finding that appellant herein will suffer no prejudice if the case proceeds into the merits at the DDPR as the application is just a pre-emption of the arbitrator's decision.' In her submissions, the learned counsel contended that great prejudice was to be crossed on the appellant because the appellant was denied of the opportunity to know why the point was dismissed.

5.2 In our view this is not the correct picture of what happened in that case. What the arbitrator did was to make a preliminary ruling and to promise that reasons would follow. It is difficult to see what prejudice would result from such ruling. It is not being argued that in terms of the existing rules or regulations or provisions of the law, the arbitrator was prohibited from doing this. Courts and tribunals are clearly entitled to make procedural rulings so long as they will later furnish the reasons for such rulings. In the result there is no substance in this ground either.

6. CONCLUSION AND ORDER

6.1 It is clear in our view that there is no substance in this appeal and that it cannot succeed**.**

6.2 The following order is therefore made:

1. The appeal is dismissed with costs.

6.3 This is a unanimous decision to court.

DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the appellant : Advocate M. Mokebisa

For the Respondents : Advocate L.A. Molati