

IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

LAC/CIV/A/07/2010

In matter between:

LESOTHO NATIONAL FEDERATION
OF ORGANISATION OF THE
DISABLED

APPELLANT

And

MOJA LEFA LOBHIN MABULA

1st RESPONDENT

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

2nd RESPONDENT

JUDGMENT BY: C.J. MUSI, AJ

DELIVERED ON:

Summary

Labour law – jurisdiction – DDPR – the DDPR does not have jurisdiction to make a settlement agreement reached at conciliation an arbitration award.

[1] The crisp issue that falls to be decided in this matter is whether an arbitrator conducting proceedings under the auspices of the Directorate of Dispute Prevention and

Resolution (DDPR) may on application, make a settlement agreement an arbitral award.

- [2] The first respondent, who was an employee of the appellant, referred an unfair dismissal dispute to the DDPR. On 1 June 2009 the parties entered into an agreement, during conciliation. The terms of the agreement are as follows:

“The parties agree that the respondents pay the applicant an amount of M33, 670.00 being compensation;

The amount is to be paid at the offices of the DDPR, Maseru not later than 1 July 2009;

The parties further agree that this agreement is in full and final settlement of the agreed issues without further recourse if the parties agree with all the terms thereof;

The parties furthermore agree that no variation of this agreement will be legally binding unless reduced to writing and signed by both parties;

The parties agree that in the event of any dispute arising in the application of this agreement the aggrieved party may make an application to the Director, in accordance with Regulation 26 of the Labour Code (DDPR) Regulations 2001 to turn the above settlement agreement into an arbitration award, which shall be subject to enforcement by the Labour Court.”

- [3] The appellant did not honour the agreement. According to it, subsequent to entering into the agreement it was advised not to perform in accordance with the agreement. The first respondent applied to the DDPR to make the agreement an arbitration award.
- [4] During the hearing of the application to make the agreement an arbitration award the appellant sought leave to file a notice of intention to oppose an opposing affidavit. The application was unsuccessful because the appellant sought to file those papers out of time, seemingly without an application for condonation. The second respondent ordered that the agreement be made an arbitration award.
- [5] The appellant launched a review application against the second respondents' order. The court *a quo* dismissed the application. The court *a quo* distinguished the facts of this case from that of **CGM Garments v DDPR and Gibbs Matsoko** LC/REV/88/06 on the basis that in this matter that the agreement in this case provided that *“this agreement is in full and final settlement of the agreed issues without further recourse if the parties agree with all the terms thereof.”* The

court *a quo* was further of the view that parties should not be allowed to enter into agreement and renege on them when it suits them.

- [6] The DDPR was created by section 46B of the Labour Code (Amendment) Act 2000. The functions of the DDPR are *inter alia* (a) to attempt to prevent and resolve trade disputes through conciliation;
- (b) To resolve trade disputes through arbitration;
- [7] The unfair dismissal dispute in *casu* was resolved during conciliation when the parties entered into the agreement. The agreement is a full and final settlement of all the issues relating to the unfair dismissal.
- [8] The parties in essence, agreed that the first respondent will be paid M37.670. 00 and that the appellant shall be entitled to terminate his employment. The agreement settled the dispute between the parties, relating to the employer – employee relationship. There was thereafter no dispute to arbitrate.

[9] Arbitration can only take place when there is a dispute to resolve. In the context of an arbitration under the auspice of the DDPR the dispute must be a trade dispute. In **Parekh v Shah Jehan Cinemas (Pty) Ltd and Others** 1980 (1) SA 301 (D) at 304 E-F Didcott J said the following:

“Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default.

All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise.”

See also **Telecall (Pty) Ltd v Logan** 2000 (2) SA 782 (SCA) at paragraph 12.

[10] The dispute in *casu* is not a trade or employment dispute. It is a dispute that flows from a trade dispute which was settled in full. The only issue was the enforcement of the agreement.

[11] In **Food Workers Council of SA & Other v Sabatino's Italian Restaurant** (1996) 17 ILJ 197 (IC) at paragraph 202 the following was said with regard to a settlement agreement emanating from an employment dispute:

“It is therefore clear that the dispute concerns the settlement agreement and actions subsequent to the conclusion of the agreement. The dispute does not concern the original employer-employee relationship. I agree with the view held in *Van Staden v Busby Sawmills (Pty) Ltd* at 1102 A-B that a settlement agreement of this nature constitutes a compromise. This compromise has the effect of *res judicata* and is an absolute defence to an action on the original cause of action, viz the applicant's employment or the termination thereof. The applicant is accordingly confined to her remedies on the settlement agreement. These remedies have to be sought in the ordinary courts as the Industrial Court does not have jurisdiction over disputes not arising from an employer-employee relationship, but from a contract of a different nature.”

See also **Van Stander v Busby Sawmill (Pty) Ltd** (1994) 15 ILJ 1094 (IC) **Nouwens Carpets (Pty) Ltd v National Union of Textile Workers** 1989 (2) SA 363 (N) at paragraph 367 and **CGM Garments v DDPR & Gibbs Matsoko** *supra* at paragraph 33 to 36.

[12] The settlement agreement is an extra-judicial compromise entered into by the parties. The dispute regarding the alleged reasons for the dismissals and the appellant's right to dismiss was settled in full through the agreement.

[13] The court *a quo* distinguished this matter from the **CGM Garments v DDPR & Gibbs Matsoko** and said the following in this regard *“the settlement agreement contained a clause to the effect that the parties are legally bound by the agreement and they agree that the agreement is in full and final settlement of the agreed issue without further recourse if the parties agree with all the terms thereof. This was not the case in the CGM Garments case.”*

[14] In our view nothing turns on this clause. If anything the clause reinforces the view that all the issues relating to the employer-employee relationship were finally and fully settled. In fact the clause states in no uncertain terms that the parties will be legally bound by the agreement. There was therefore no trade dispute to arbitrate when the first respondent applied to have the agreement made an arbitration award. The cause of action was breach of contract.

[15] The matter of **Golin t/a Golin Engineering v Cloete** (1996) 17 ILJ 930 (LCN) referred to by the court *a quo* is also of no assistance to it. It is a restatement of the position that a settlement properly entered into by the parties terminates the issues on the merits.

[16] We agree fully with the appellant that the DDPR is a creature of statute and that the second respondent derives his powers solely from the Act that created the DPPR. An arbitrator at common law and in terms of the Labour Code (Amendment) Act 2000 does not have the power to make a settlement agreement entered into by the parties during conciliation an arbitration award. If, during an arbitration hearing, parties reach a settlement, such settlement may be made an arbitration award. See **Bidoli v Bidoli and Another** 2011(5) SA 247 (SCA).

[17] Lastly the parties agreed that *“in the event of any dispute arising in the application of this settlement agreement the aggrieved party may make an application to the Director, in accordance with Regulation 26 of the Labour Code (DDPR)*

Regulations 2001 to turn the above settlement agreement into an arbitration award which shall be subject to enforcement by the Labour Code.”

[18] This clause purporting to give the DDPR jurisdiction to make a settlement agreement reached during conciliation an arbitration award is null and void. An arbitrator under the auspices of the DDPR does not have inherent jurisdiction. The jurisdiction of arbitrators functioning under the auspices of the DDPR must be deduced from the empowering statutes. If the statutes do not give them the power to deal with a dispute then they may not deal with such dispute. The jurisdiction of the DDPR is limited to a particular subject matter: trade disputes. Contractual non performance outside of the employer-employee relationship is not a trade dispute. The DDPR has no jurisdiction to make a contract between parties an arbitration award.

[19] Section 228 E of the Labour Code (Amendment) Act 2000 sets out the awards that an arbitrator may make. According to Mr Maleke section 228 E (5) of the code is applicable. Section 228 E (5) reads as follows:

“An award issued by the arbitrator shall be final and binding and shall be enforceable as if it was an order of the Labour Court.”

[20] Mr Maleke’s argument is fallacious on at least two grounds. Firstly section 228 E (5) refers to an award made by an arbitrator who was called upon to arbitrate a trade dispute. Secondly it does not give the arbitrator the right to make an agreement reached at conciliation an arbitration award.

[21] Mr Maleke also sought succour from the Labour Code (Conciliation and Arbitration Guidelines Notice 2004 and pointed out that Guideline 17(6) (d) provides that:

“If the parties settle the dispute, the arbitrator must include a procedure for dealing with any disputes that may arise from the application of the agreement.”

[22] It is unfortunate that the agreement contained an incompetent procedure. Arbitrators should be careful when setting out a procedure for dealing with further disputes after a matter has been settled finally by way of compromise as in the case. Making a settlement agreement reached at conciliation an arbitration award is not a competent procedure.

[23] In South Africa the Labour Relations Act 66 of 1995 was amended by section 31 of Act 12 of 2002 in terms of which section 142 A was inserted. Section 142 A gives the Commission for Conciliation, Mediation and Arbitration (CCMA) the power to make settlement agreements arbitration awards. It reads as follows:

“(1) the commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the commission, an arbitration award.

(2) For the purpose of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court...”

[24] It is therefore competent in South Africa to make a settlement agreement an arbitration award because the enabling statute sanctions such a procedure which is not the case in Lesotho. Neither the parties by consent nor the second respondent may confer jurisdiction on the DDPR if the dispute is beyond its jurisdiction.

[25] In our judgment the DDPR does not have the power to make settlement agreements reached during conciliation arbitration

awards. The second respondent erred when it made such an award. The court *a quo* also erred in dismissing the review application.

[26] We therefore make the following order:

- 1) The appeal is upheld, with no order as to costs.
- 2) The order of the court *a quo* is set aside and replaced with the following:

The award of the DDPR under case number A003/09 is set aside

- 3) No order as to costs is made.

C. J. MUSI

I agree

Mrs P Lebitsa (Member)

I agree

Mrs Mothepu (Member)

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