IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

CASE NO. LAC/CIV/A/07/12

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **APELLANT**

and

THABO MOHLOBO & 19 OTHERS **RESPONDENTS**

Coram : C J Musi AJA, Mr Mofelehetsi et Mrs Mosehle

Heard on: 24 October 2013

Judgment by : C J Musi AJA

Summary-*Review by Labour Court- Review tests. There are two review tests- correctness and reasonableness. Elements of both tests set out.*

[1] This is an appeal against the judgment of the Labour Court wherein it dismissed the appellant's review application with no order as to costs. The respondents lodged a cross appeal against the costs order.

[2] The respondents referred a dispute relating to the non-payment of a mountain and deprivation allowance to the Directorate for Dispute Prevention and Resolution (DDPR). The arbitrator ruled in their favour.

[3] The appellant was dissatisfied with the award and launched a review application in the court *a quo*, primarily on the ground that the arbitrator misdirected herself with regard to the factual findings that she made. The

appellant contended in the court *a quo* that the findings of the arbitrator are findings that no reasonable court could have arrived at.

[4] The Labour Court was of the view that the review application was nothing else but an appeal disguised as a review and consequently dismissed the application. The Labour Court's judgment did not meet with the appellant's approval, hence this appeal.

[5] The appellant awarded a contract to implement the Mohale Water and Sanitation Project to a contractor during October 2000. Due to poor performance, the contract was terminated during August 2004. The appellant decided to complete the project and to that end if engaged some of the artisans that were in the contractor's employ. The aforementioned artisans are some of the respondents to this matter. They were engaged on 5 August 2004 until 28 November 2005 when the project was completed. They were all paid their termination benefits upon completion of the Mohale project.

[6] After the completion of the Mohale project the respondents were engaged at the KLM-WATSAN project during November 2005 to 30 April 2008. The KLM-WATSAN project was to provide water and sanitation for communities in the Katse catchment area.

[7] The appellant was the implementing agent on behalf of the Lesotho Government (the government) in respect of the KLM-WATSAN project. It is disputed, albeit not seriously, whether the KLM-WATSAN project was a continuation of the Mohale project. According to the appellant it was not whereas the respondents contended that it was.

[8] The respondents were employed in terms of oral contracts of employment. Due to some challenges that the respondents encountered their contracts were reduced to writing. In terms of the written contracts of employment they were each paid a salary of R3000,00 per month or a wage of R15-00 per hour and a mountain allowance of R300-00.

[9] The maintain allowance was only applicable to those employees who were not from the Katse catchment area. The contract further provided that they will be subject to the Rules, Regulations and Procedures of KLM-WATSAN.

[10] It was common cause that LHDA employees, who qualified therefor, received a higher maintain allowance of M1800-00 per month. There is a dispute as to whether this amount was increased to M 1907-00. Nothing much

turns on this increase for present purposes because it will only be relevant when the compensation payable, if any, is computed. It is also not disputed that LHDA employees were governed by its human resources management manual (the manual) which stated that "regulations, policies and procedures contained in this manual shall apply to all employees of LHDA excluding persons who are not citizens of Lesotho and are remunerated under Individual service contract in line with international rates of pay." See clause 2.4.1 of the manual. The appellant contended at the DDPR that the respondents were not its employees and secondly that the manual did not apply to them. The respondents contended that they were LHDA employees and therefore subject to the manual and consequently entitled to the M1800.00 per month mountain allowance.

[11] The arbitrator, as stated above, found in the respondents favour. She found that the respondents were LHDA employees and that the manual was applicable to them. Once those rights were given, so reasoned the arbitrator, they cannot be taken away without the employees' consent. She found that the manual intended the respondents to be paid a "mountain allowance of the same value like all other employees as envisaged under clause 20.3.4 termed deprivation allowance especially where it is not disputed that they were deployed outside the greater Maseru area." The arbitrator further found that the increase from M1800-00 to M1907-00 was not approved.

[12] The Labour Court analysed section 228 F (3) of the Labour Code Order 24 of 1992 as amended (the Labour Code) which states that the Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects it. The Labour Court concluded that any ground permissible in law "must relate to the process or procedure adopted by the decision-maker in arriving at the conclusions that form the subject of challenges". It went further to say that "this therefore means that even the argument that the Court arrived at a conclusion that no reasonable court could have arrived at, must relate to the processes and procedures of arriving at the conclusion in issue". The Labour Court was of the view that the appellant made no reference to any process or procedural irregularity on the part of the learned arbitrator. The Labour Court then concluded that the grounds of review are actually appeal grounds and dismissed the application.

[13] The appellant contended, before us that the Labour Court misconstrued its task and it misunderstood the LHDA's grounds of review. The respondents contended that the court *a quo* was correct.

[14] Mr Woker, on behalf of the appellant, argued that the review standard to be applied is whether the finding of the arbitrator is one that no reasonable court would have arrived at. See **Mantsoe v R** LAC (1990-1994) 193 at 195. In the South African context this review standard is couched somewhat differently but it is also a result based standard. In **Sidumo and Another v Rustenburg Platinum Mines LTD and Others** 2008 (2) SA 24 (CC) at para 110 the standard is set as follows: "is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[15] The reasonableness standard demands that the review court must respect the decisions of the arbitrator as long as such decisions are within the band of reasonableness. If the decision is one that a reasonable decision-maker could not reach then the award falls to be set aside. The review court must therefore show deference to the decision of the arbitrator. The deference shown is only limited to factual decisions and some points of law that are inextricably linked to the facts.

[16] The reasonableness standard cannot apply to jurisdictional issues or points of law. Points of law and jurisdictional questions are either wrong or right. The arbitrator may not give himself/herself vires where he/she has none. Likewise a statute cannot be interpreted reasonably. It is either interpreted correctly in accordance with the known canons of construction or it is interpreted incorrectly. Therefore when the question is one of jurisdiction or pure law then the the correctness standard should be applied. **See SARPA v SA Rugby (PTY) LTD 4 others; SA Rugby (PTY) LTD v SARPU** (2008)9 BLLR 845 (LAC) at para 40 and 41. When applying the correctness standard no deference is shown to the decision of the arbitrator.

[17] The issues in this matter are whether the respondents were employees of the appellant and if so, whether they were entitled to the M 1800-00 mountain allowance in terms of the manual. Both these issues should be decided by using the correctness standard. This is so because if they were not employees of the appellant then the wrong respondent was before the DDPR. It cannot be said that deference must be shown to the arbitrator's decision when such decision burdens the wrong party with responsibilities.

[18] The determination of whether they were employees of the appellant must be decided with reference to and by interpreting section 3 of the Labour Code. The second question must be determined by interpreting the manual and the contracts of employment of the respondents.

[19] It is therefore clear that the Labour Court and Mr Woker were not alive to the fact that we have a bifurcated review standard. The Labour Court used the reasonableness review standard in circumstances where the correctness standard should have been applied. It followed an erroneous approach to the matter.

[20] According to Mrs Mkofo, the Project manager: Special Projects of the appellant, the appellant implemented the KLM-WATSAN project on behalf of the government. They received funding from the government. Mr Kule's - one of the respondents - evidence that they had no dealings with government went unchallenged. Likewise his evidence that the appellant paid their salaries and terminated their employment is beyond cavil. According to Mr Botha, the Chief Finance Manager of the appellant, the payroll for KLM-WATSAN was administered by the appellant. He also confirmed that the appellant issued certificates of service for the respondents.

[21] Mr Woker argued that the arbitrator could not, on the evidence, find that the respondents were employees of the appellant.

[22] Section 3 of the Labour Code defines employee follows:

"employee means any person who works in any capacity under a contract with an employer in either an urban or a rural setting, and includes any person working under or on behalf of a government department or other public authority;"

Employer is defined thus:

"employer means any person or undertaking, corporation, company, public authority or body of persons who or which employs any person to work under a contract and includes:

a) Any agent, representative, foreman or manager of such person, undertaking, corporation, company, public authority or body of persons who is placed in authority over the employee..."

The definition of employer is very wide. On the appellant's own evidence it acted as the implementing agent of the government. That alone makes it the

employer of the respondents. The other evidence, as the arbitrator correctly pointed out, also points to the appellant being the employer of the respondents. The respondent represented, on its purchase requisitions, that KLM-WATSAN was a division of the appellant. The respondents were not told that they were employed by the government or any other person. They were correctly under the impression that they worked for the appellant. The appellant did nothing to disabuse them of this reasonable impression. They were paid by the appellant. The appellant issued their certificates of service after termination. I find no force in the argument that the arbitrator was wrong in concluding that the respondents were employed by the appellant.

[23] The arbitrator found that the respondents were entitled to the M1800-00 allowance because the manual applies to all the appellant's employees. Clause 2.4.1 and 2.4.2 which govern the "scope of application" of the manual reads as follows: "

2.4.1 The regulations, policies and procedures contained in this manual shall apply to all employees of the LHDA, excluding persons who are not citizens of Lesotho.

2.4.2 Where these policies and procedures are in conflict with the terms and conditions of contracts for employees, the contracts shall prevail, unless agreed otherwise between such employee and the LHDA."

[24] The arbitrator found that the respondents, being employees of the appellant, were covered and governed by the manual. The arbitrator did consider the implications of the clause 2.4.2 and found that once the respondents were given a right under clause 2.4.1 of the manual such right could not be taken away without consulting the respondents.

[25]In my view the arbitrator misdirected herself. The respondents were all employed in terms of a particular contractual regime. They had oral contracts and those oral contracts were reduced to writing. In terms of their contracts they were to receive M300-00 mountain allowances. The arbitrator found, without a factual basis for such funding, that the appellant unilaterally changed the respondents' terms and conditions of employment. There was no such evidence in front of her. She therefore considered material that was not before her.

[26] The respondents were a group of employees who were employed by the appellant in terms of their own policies, regulation and rules. They had their own contracts of employment which governed their salaries and allowances.

[27] The respondents contended that they were entitled to the deprivation allowance as stipulated in clause 20.3.4 of the manual. That clause reads as follows: "

> 20.3.4 Allowances Not included in CTC. Depending on the position requirements for specified positions, the following allowances are payable for qualifying employees:
> Deprivation Allowance: Employees who are permanently deployed outside of the greater Maseru area shall be entitled to a deprivation allowance of M1800-00 per month to compensate for the lack of services normally enjoyed within a metropolitan area. The allowance is subject to annual review."

[28] It is clear that the deprivation allowance is an allowance that is not included in the cost to company (CTC) salary structure of the employees. This clearly presupposes that employees on the CTC qualify for the allowance and not all employees. Secondly not all employees *ipso facto* qualify for the allowance. It is dependent on the position that the employee holds within the appellant. The arbitrator's finding that all employees of the appellant qualified for the deprivation allowance is therefore wrong. She committed a misdirection and misconstrued the clause.

[29] Back to clause 2.4.2, the contracts of the respondents do not incorporate the manual expressly or by implication into their contracts of employment. There is a clear conflict between their contracts of employment and the manual. In such a case according to clause 2.4.2 the contract of employment shall prevail. Clearly, the terms of the contract of employment must get preference over those of the manual. That being the case, the respondents were only entitled to the allowances set out in their contracts of employment. Put differently, they were only entitled to a mountain allowance of M300-00 per month. The arbitrator should therefore have dismissed the application.

COUNTER APPEAL

[30] The respondents argued that the Labour Court should have made a costs order in their favour because they were successful. Mr Sekonyela, on behalf of the respondents, argued that the Labour Court erred in finding that costs are

awarded in extreme circumstances. Mr Sekonyela contended that section 74 of the Labour Code does not refer to extreme circumstances.

[31] The Labour Court said the following:

"Respondent prayed that this review application be dismissed with costs for want of merit on attorney and client scale. Respondent (sic) opposed the application on the ground that their application has merit and that it should succeed as the learned Arbitrator clearly misdirected herself. In spite of the submission of the parties, I decline to make an award of costs. My view is based on the fact that costs are awarded in extreme circumstances. The intention behind making an award of costs is not to intimidate parties away from enforcing their rights but mainly to discourage abuse of court processes. I do not find the current circumstances to justify an award of costs, more so in the light of the fact that respondent has not given this court enough justification to awards (sic) costs in their favour."

[32] In my view Labour Court did not misdirect itself or exercised its discretion arbitrarily or upon a wrong principle. It exercised its discretion judiciously. Although the phrase 'extreme circumstances" might be raising the bar too high, costs orders in the Labour Courts are not made on the same basis as costs orders in the civil courts. Costs in the Labour Court does not necessarily follow the success. This is so because many litigants in the Labour Courts are impecunious litigants who want to enforce their rights. To mulct them in costs orders every time they lose a claim that was genuinely instituted with reasonably prospect of success would be to deter those without money from approaching the courts to enforce their rights. Although Mr Sekonyela's reliance on section 74 of the Labour Code is misplaced - because we are not dealing with an unfair dismissal dispute - that section clearly illustrates that costs orders are considered differently in courts of equity[1].

[33] The appellant was partially unsuccessful but substantially successful. I am of the view that no costs order should be made in the appeal or the cross appeal because neither equity nor the law militate in favour thereof.

[1] Section 74 of the Labour Code reads as follows:
" (1) No court charges may be imposed in proceedings for unfair dismissal.
(2) No costs shall be awarded in favour of either party in proceedings for unfair dismissal unless the Court decides that the party against whom it awards costs has behaved in a wholly unreasonable manner."

[34] I accordingly make the following order:

(a) The appeal is upheld with no order as to costs.

(b) The cross appeal is dismissed with no order as to costs.

(c) The order of the Labour Court is set aside and replaced by the following order:

(i) The arbitrator's award issued under referral number A0649/08 by Mrs Senooe on 12 April 2012 is set aside.

(ii) No order as to costs is made.

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C J Musi AJA

I concur

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Mr Mofelehetsi

I concur

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Mrs Mosehle

For appellant: Adv Woker

Instructed by: Webber Newdigate

For respondent: Adv Sekonyela

Assisted by: Adv K Diaho