IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/A/28/2013**

In the matter between:

LIKETSO MOKUBUNG APPELLANT

AND

AON LESOTHO (PTY) LTD **1ST** RESPONDENT

DEPUTY PRESIDENT OF LABOUR COURT 2ND RESPONDENT

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

ASSESSORS : MR R. MOTHEPU

MRS M. THAKALEKOALA

Heard on : 31 JANUARY 2014

Delivered on : 05 JANUARY 2014

SUMMARY

Appeal from the Labour Court to the Labour Appeal Court – whether the rules of natural justice do not apply to labour matters – and whether it would have made any difference if the arbitrator did not disregard the evidence tendered before her.

Held that the rule of natural justice that no man should be judge in his own cause has application to labour relations and employment law. That in the particular circumstances of the present case the Managing Director's role violated the principle – that in any event it was wrong for the Labour Court to have held that although it had found that the DDPR had not considered the evidence before it and had as such misdirected itself, that would make no difference in the case. The no difference rule does not apply in cases such as this.

JUDGMENT

MOSITO AJ

1. INTRODUCTION

1.1 The present appeal comes to this court from the decision of the Labour Court. The appellant was an employee of the 1st respondent. Appellant was disciplinarily charged of three instances of misconduct. The first one was gross-insubordination by ignoring a specific instruction from a legitimate superior. The second was an act of serious omission by the appellant of not attending to specific requirements of a tender. The third was a charge of non-disclosure of material information.

1.2 A disciplinary chairman was duly appointed by the Managing Director of the respondent and he had the case against the appellant. The disciplinary chairman came to the conclusion that the relationship between appellant and her employer had deteriorated irretrievably and he also found the appellant guilty of the first and third charges. He then determined that the offences on which he had found appellant guilty were dismissible and recommended her dismissal, he however recommended that given that there is a lot of poor performance involved in the matter, the dismissal should be one of termination of the contract with benefits recommending that the parties should negotiate the allowable terminal benefits.

1.3 The recommendation was made to the Managing Director of the 1st respondent. The Managing Director wrote a letter to the appellant informing her of her dismissal from the 1st respondent. The appellant was not satisfied with her dismissal and she took the case to the Directorate of

Dispute Prevention and Resolution (DDPR). The DDPR did hear evidence and at the end of the day dismissed the appellant's claim. The appellant still not satisfied filed an application for review in the Labour Court for an order in the following terms:

> "(a) That award No. A0356/10 be reviewed, corrected and set aside.
> (b) That the 2nd respondent be ordered to submit the record of proceedings to the Registrar of Labour Court within fourteen days of receipt hereof.
> (c) That the applicant be granted further and/or alternative relief.
> (d) That the 1st respondent be ordered to pay costs hereof."

2. PROCEEDINGS BEFORE THE LABOUR COURT

2.1 Before the Labour Court, the appellant complained that the learned arbitrated had erred in finding that no procedural irregularity was committed by 1st respondent in dismissing the appellant. The crux of the matter on this attack seems to be that the complainant was one Mrs Mohapeloa. The said Mrs Mohapeloa was also the Managing Director of the 1st respondent company. The same Mrs Mohapeloa had appointed the chairman of the disciplinary hearing to preside over the case. The same Mrs Mohapeloa was also a witness in the proceedings that led to the dismissal of the appellant. The same Mrs Mohapeloa was the one to whom the recommendation for the dismissal of the appellant was made. The same Mrs Mohapeloa wrote a letter in which she informed the appellant that she and others had confirmed the recommendation for her dismissal.

2.2 The argument before the Labour Court was that Mrs Mohapeloa was clearly a judge in her own cause and that this conduct constituted a clear breach of the principles of the natural justice, in particular the rule that *nemo judex in propria causa.* The Labour Court held that the appellant had imported the general application of the rules of natural justice "from the ordinary civil matter into the labour sphere. As rightly pointed out by respondent, the key actors in labour matters are the employer and the employee. This essentially means that all the disciplinary processes centre around them. Therefore, the mere fact that Mrs Mohapeloa was both the complainant and the one who made the decision to dismiss the applicant, cannot sustain as a ground of bias, given the peculiar context within which labour matter operate." The Labour Court went on to hold that :

> "The role that that was placed by Mrs Mohapeloa in the entire disciplinary process, was well sanctioned by the applicable law in workplace discipline (see sections 10 and 11 of the Codes of Good Practice (Supra). This essentially highlights the difference in the application of the rules of natural justice in labour matters. It therefore means that biasness cannot be pleaded merely from the fact that Mrs Mohapeloa was the complainant and the person who made the decision to dismiss applicant. There has to be more than just that in order for the procedure adopted to sustain as sufficient to render the decision to dismissal unfair."

2.3 The Labour Court consequently found that while it had found that there had been an irregularity in the arbitration hearing, such would not have altered the decision of the learned arbitrator even if she had considered

the evidence in issue. It held that the arbitrator would have been bound by the principles enunciated in some authorities to which it had referred to find that there was no irregularity in Mrs Mohapeloa being the complainant, the witness and the decision maker to dismiss the appellant. It therefore decided that it would not interfere with the decision of the arbitrator.

2.4 There was a second ground of appeal that the arbitrator had ignored uncontroverted evidence of the appellant in making her decision. The argument was that the appellant had not committed the offence with which she was charged and dismissed for. The appellant's contention had been that her evidence and that of Tebello as to the non-disclosure had been ignored. The Labour Court held that appellant had failed to prove that she led evidence to the effect that she disclosed the said information to Mrs Mohapeloa. It also found that the arbitrator had actually dealt with the evidence.

2.5 In the result the Labour Court refused the application for review and ordered that the arbitral award should remain in force. It further went on to order that that award should be complied with within thirty (30) days of its judgment and it went on to order that there would be no order as to costs.

3. PROCEEDINGS BEFORE THE LABOUR APPEAL COURT

3.1 The appellant came before this court on the basis of five grounds of appeal. In essence, the first ground of appeal was that "the Court a quo erred in law by holding that there is a distinction between application rules of natural justice depending on whether the case is before the Labour Court or an ordinarily known civil court." The second ground was in effect one that the Managing Director was a judge in her own cause. In

our view regard being had to the decision to which we have come in respect of the first and second *in solidum* as well as the 5th grounds, there is no need to consider the remainder of the grounds of appeal. It is vitally important to underscore the fact that the rules of natural justice sit at the heart of our labour jurisprudence in this country. The arguments advanced on both sides, certain observations in the judgment of the court *a quo,* make it necessary to restate the principles relevant to that primary issue. As Donaldson LJ put it in ***Cheall v Association of Professional. Executive. Clerical and Computer Staff [1983] QB 126***, "natural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'". The Court of Appeal has remarked extensively on this subject in **Matebesi v The Director of Immigration and Others LAC (195 -1999) 616 at**

> The right to be heard (henceforth "the *audi* principle') is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions {see generally De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th ed 1995) 378 - 379; Schwarze European Administrative Law (1992) 1358-1370; Joseph Constitutional and Administrative Law in New Zealand (1993) 717 et seq; Hotop Principles of Australian Administrative Law (6th ed 1985) 168 et seq). The *audi* principle has ancient origins, moreover, traced back to Seneca, Hammurabi and even what have been described as the events in the Garden of Eden (see further Rakhoboso v Rakhoboso unrep. C of A (CIV.) 37/96, 19 June 1997). It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "stereotyped expression which is used to describe [the] fundamental principles of fairness (see Minister of Interior v Bechler: Beier v Minister of the Interior 1948 (3) SA 409

> (A) at 451). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in Ridge v Baldwin [1964] AC 40, particularly in Administrator. Transvaal v Traub 1989 (4) SA 731 (A) and more recently, Du Preez v Truth and Reconciliation Commission supra and Doody v Secretary of State for the Home Department [1993] 3 All ER 92

3.2 It is clear from the above quotation that the rules of natural justice apply in labour relations in Lesotho. This is because these rules sit at the heart of our jurisprudence including our labour law. The argument therefore that the rules of natural justice do not apply in labour matters cannot be supported and is clearly incorrect. In particular, and for our present purposes the *nemo judex* principle applied and ought to be applied by the Labour Court and the DDPR. Failure to apply this principle constituted a fundamental flaw in the proceedings. The Labour Court and the DDPR erred in this regard in this principle.

3.3 The bias rule demands that the decision maker should be disinterested and/or unbiased in the matter to be decided. Justice should not only be done but be seen to be done. If fair-minded people would reasonably apprehend/suspect the decision-maker has prejudged the matter, the rule is breached (often referred to as 'a reasonable apprehension of bias'). The application of the bias rule is most easily established when the person who is in the position of complainant also is the decision-maker or participates in the investigation/decision or gives advice throughout the course of the matter. This is not a hard and fast rule and will depend to a large extent on the circumstances of a matter.

3.4 The test for reasonable apprehension of bias is that set out by de Grandpré J. in ***Committee for Justice and Liberty v. National Energy***

***Board*, [1978] 1 S.C.R. 369** where de Grandpré J. (writing for the minority, though his views were subsequently adopted by the Supreme Court of Canada in other cases) stated that:. . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

3.5 The decision of this court is that there was a clear likelihood of bias in the case in which Mrs Mohapeloa was a complainant, a witness and a decision-maker in respect of confirmation of dismissal of the appellant. She was clearly a judge in her own cause. Mr Mabula for the respondent argued that there was no other authority to whom the recommendation could be made. He argued that it makes sense in labour relations and employment law for the Managing Director to have played all those roles indicated above. He argues that there is nothing in labour law to prohibit such role playing by the Managing Director.

3.6 In the present case there was no evidence as to whether there was no other person to whom the recommendation could be made. Mr Mabula's submission is therefore not based on facts but speculation. In fact, the facts would indicate otherwise because on page 304 of the Record, Advocate Makeka KC as a witness before the arbitrator testified that the other person who could make the decision is the Board of AON. This he said under re-examination. It is therefore factually incorrect in the present case to argue that there was no other person to whom the

recommendation could be made when Mr Makeka himself and who was the witness for the 1st respondent says there was.

3.7 The last ground of appeal to which we turn to is ground 5 to the extent that it is argued that the court a quo erred in rejecting the arguments advanced on behalf of the appellant regarding whether or not the arbitrator had ignored the evidence tendered before it, the Labour Court held in paragraph 11 that it is inclined to find in favour of applicant that indeed the arbitrator had ignored the evidence that was complained about. In paragraph 18 of its judgment the court held that it had found that there has been an irregularity in the arbitration hearing. It then went on to say that such would not have altered the decision of the arbitrator even if she had considered the evidence in issue. This approach by the Labour Court is what is usually referred to as the "no difference rule".

3.8 In **Matebesi's case** (*supra*) the Court of Appeal went on to state that, the "no difference" argument has also been rejected in ***Friedland and Others v The Master and Others 1992 (2) SA 370 (W) at 378A-C; Muller and Others v Chairman. Ministers' Council. House of Representatives, and Others 1992 (2) SA 508 (C) at 514F-G; Yates v University of Bophutatswana and Others 1994 (3) SA 815 (BG) at 838A-E; Fraser v Children's Court. Pretoria North and Others 1997 (2) SA 218 (T) at 231H-233B; Yuen v Minister of Home Affairs and Another 1998 (1) SA 958 (C) at 969J-970G).*** The court also rejected the no difference argument. Indeed in the present case, the no difference argument should be rejected as well.

4. CONCLUSION

4.1 In conclusion it is clear that this appeal is bound to succeed on the basis principally that, the Managing Director played roles that rendered her

make her a judge in her own cause. In the result, the appeal succeeds with costs.

4.2 This is an unanimous decision of the court.

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DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Appellant : Advocate L.A.Molati

For the 1st Respondent : Advocate M. Mabula