

IN THE LABOUR COURT OF LESOTHO

**LC /REV/ 233/06
(LAC/REV/103/04)**

HELD AT MASERU

IN THE MATTER BETWEEN

CENTRAL BANK OF LESOTHO

APPLICANT

AND

**DIRECTORATE OF DISPUTES
PREVENTION AND RESOLUTION
C.T. THAMAE
MEREKI MONKU**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

Date of hearing: 09/11/06

Labour Court is empowered to review DDPR awards – Only material canvassed before the DDPR can be taken on review to the Labour Court. Application for review must be filed within 30 days of the receipt of the award – Procedure - To be able to succeed on the complaint that he was refused permission to see the minutes to enable him to formulate grounds of appeal a litigant must prove that he suffered prejudice- 3rd respondent had no right in terms of the staff rules and regulations to have access to the minutes – The award reviewed and set aside.

1. **The applicant has applied for the review of the decision of the Directorate of Disputes Prevention and Resolution (DDPR) in which the latter had confirmed the substantive dismissal of 3rd respondent but found his dismissal procedurally flawed. The DDPR per 2nd respondent awarded the 3rd respondent compensation of three (3) months wages in the amount of M27 727.00 for the alleged procedural impropriety. Applicant seeks the review and setting aside of the order that it pays 3rd respondent the aforesaid compensation.**
2. **A brief summary of the facts will suffice. The 3rd respondent was employed by the applicant bank on the 15th January 2001 as a banking officer. In October 2003 some M595 000.00 was disbursed irregularly and without proper authority.**
3. **The irregular disbursement was investigated and the 3rd respondent was found to have played a role. The 3rd respondent was then subjected to disciplinary proceedings in terms of the Staff Rules and Regulations of the bank.**
4. **The applicant duly appeared before a disciplinary committee which recommended after the hearing that applicant be found guilty of some of the charges and be found not guilty of some. The committee further recommended that the 3rd respondent be suspended for a period of one month without pay.**
5. **In terms of the Staff Rules and Regulations the recommendations together with the record of proceedings must be forwarded to the Director of Administration who after considering them is empowered to make a decision on what action should be taken. It is common cause that the Director of Administration decided that the applicant was guilty on all the charges and that the appropriate penalty was dismissal which he communicated to the applicant in terms of the rules on the 14th January, 2004.**
6. **The applicant lodged an appeal to the Governor of the bank. He personally appeared before the Governor to motivate his**

grounds of appeal on the 11th February 2004. On the 19th February, 2004 he was informed that his appeal had not been successful.

7. He then filed a referral for unfair dismissal with the DDPR which was heard on the 17th June 2004. Evidence was heard on both sides and on the 3rd August, 2004 the 2nd respondent issued an award in terms of paragraph 1 above.
8. The applicants have sought the review of the award of compensation on the grounds that:
 - (a). the 2nd respondent awarded compensation on the single argument that the applicant refused to make minutes of the disciplinary committee available to 3rd respondent for the purpose of his appeal to the Governor.
 - (b). 2nd respondent based his views on a misinterpretation of evidence before him in as much as the minutes of the disciplinary proceedings could not assist the 3rd respondent in his appeal. Only the written decision of the Director of Administration which he had in his possession could help him.
 - (c). The disciplinary procedure of the applicant does not mandate the availing of minutes of disciplinary proceedings to an employee.
 - (d). 3rd respondent suffered no prejudice as a result of unavailability of the minutes as annexure “D” shows that he was quite capable of formulating his grounds of appeal notwithstanding that minutes were not available.
9. The review application was issued out of the Registry of this court on the 2nd September 2004, which was well within thirty (30) days as provided by section 228 F (1) (a) of the Labour Code (Amendment) Act 2000 (the Act).

10. **It was only on the 22nd June 2005 that the 3rd respondent filed opposing affidavits which were accompanied by an application for condonation of the late filing of the same. It is significant to note that Rule 16 (7) requires any person who intends to oppose an application for review to deliver his opposing affidavits within fourteen (14) days after receipt of notice either amending the applicant's ground of review or a notice that the applicant stands by its notice of motion.**
11. **It is not clear from the record if the 3rd respondent was ever served with the notice aforesaid. We cannot therefore say by how much time he was late. However, at the hearing hereof the condonation of the late filing of opposing affidavits was granted unopposed.**
12. **In his answering affidavits the 3rd respondent raised some four points in limine. These were the following:**
 - (a). **the alleged investigation report on which the Director of Administration relied when dismissing 3rd respondent is unsigned and therefore constitutes inadmissible evidence.**
 - (b). **The authors of that report were neither called to testify on it nor required to file supporting affidavits.**
 - (c). **The Director of Administration did not have power to dismiss 3rd respondent without first consulting with the Deputy Governor responsible for administration.**
 - (d). **The two representatives of the applicant before the DDPH namely Mr. Makara and Ms Guni did not have requisite authority to do so.**
13. **Except for the fourth point, all the other in limine points relate to the substantive attack on the manner the disciplinary proceedings against the applicant were conducted by the disciplinary committee. It is common cause that they were not raised at the DDPH proceedings. They arise for the first time before this court.**

14. **It is trite that in a review, the court is not confined to the record of the administrative process because the legality of the process may itself be the issue. (See Baxter, Administrative Law 1996 Juta & Co., P.307). Sometimes it may be necessary to go beyond the record to establish the illegality or irregularity complained of.**
15. **However, to constitute reviewable material, the issues ought to have been raised before the body whose decision is being sought to be reviewed. This court is empowered to review awards of the DDPR on any ground recognizable in Law. (See Section 228 F (3) of the Act as amended by Act No. 5 of 2006).**
16. **The issues being raised as points in limine, are not in our view reviewable by this court in as much as they were never considered by the DDPR whose decision this court is empowered to review and correct where necessary.**
17. **It is worth mentioning that the 3rd respondent's answering affidavit did no more than repeat the foregoing points in limine as his substantive defence to the main application. Accordingly the comments made with regard to the points raised in limine apply similarly to them.**
18. **The last point raised in limine concerned representation. Counsel for the applicants correctly pointed out that this amounts to a belated attempt at seeking a counter review of the decision of the 2nd respondent by the 3rd respondent. As earlier pointed out an application for review of the decision of the DDPR ought to be made within thirty (30) days after one receives the award. Whilst 3rd respondent applied for condonation of late filing of the answering affidavits he did not apply for condonation of late filing of the review application.**
19. **Assuming he had properly applied for such condonation applicant's point was still bound to fall away because the applicant' representation at the DDPR complied with Section 228 A of the Act which provides:**
“(1). In any proceedings under this part, a party to the dispute may appear in person or be represented only by

- (a)*
- (b)*
- (c)*
- (d). if a party to the dispute is a juristic person, by a director, officer or employee.”*

20. The two persons who represented the applicant were admittedly employees of high standing within the applicant's establishment namely; Director of Administration and the Secretary of the Board.
21. Coming now to the applicant's ground of review, we need mention that 3rd respondent's only direct response to them was that he was indeed denied access to the minutes and that the applicant conceded the same. The applicant contends that the 2nd respondent based his finding on that single argument that the applicant was denied a copy of the minutes.
22. Looking at the record it was not even the applicant's argument that he was denied the minutes of the proceedings and as such he suffered a prejudice in formulating his appeal. What is clear at page 66 of the paginated record, is that applicant informed the arbitration as part of the summary of his case that he was not allowed to have access to the minutes when he asked for them.
23. By so saying 3rd respondent was clearly not asking for any relief as a result of that denial of the minutes. It is trite that the court may not give a litigant what they have not asked for. Nowhere in that record did 3rd respondent put the issue of the minutes as a complaint for which he sought relief.
24. Assuming he had indeed sought for relief, Mr. Fischer submitted correctly that 3rd respondent would have to prove that he had suffered prejudice as a consequence of that denial. That this is the applicable principle is aptly captured by Trollop J. in *Geidel .V. Bosman No and Another 1963 (4) SA 253*.
25. At page 255 B-D of the judgment the learned Judge states:

“Section 24 (1) of the Supreme Court Act provides that the proceedings of an inferior court may be reviewable on the ground, inter alia, of a “gross irregularity” in the proceedings.” This was the same ground as was previously contained in Section 19 of the Transvaal Proclamation, 14 of 1902, now repealed. According to the decisions given under the latter and similar statutes a “gross irregularity” in civil proceedings means an irregular act or omission by the magistrate or (possibly some other officer or official of the court) in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice.”

26. Further down the same page the learned Judge state further in paragraph H;

“In regard to onus of proof in such proceedings, it is clear from the authorities that the plaintiff or applicant must first prove the existence of the irregularity and that it was so gross that it was calculated to prejudice him, and if he discharges the onus, then his adversary or opponent must satisfy the court that he in fact suffered no prejudice.”

27. No evidence of prejudice suffered by the 3rd respondent as a consequence of being denied access to the minutes was tabled before the 2nd respondent. As a result the applicant did not lead any evidence in rebuttal. But before this court, Mr. Fischer for the applicant contended that had that been necessary they would have shown that the 3rd respondent suffered no prejudice as he was able to formulate comprehensive grounds of appeal despite not being given access to the minutes. This contention was not contradicted.
28. It was contended further that the 2nd respondent misinterpreted the evidence before him in as much as the minutes sought by the 3rd respondent were superfluous because

only the reasons contained in the letter of the Director of Administration could effectively help him to formulate the grounds of appeal as he indeed was able to do. Furthermore, it was contended that the Staff Rules and Regulations of the applicant make no provision for the availing of the minutes of the disciplinary committee to the aggrieved employee.

29. **Indeed according to annexure “D”, page 55 of the paginated record, 3rd respondent was able to formulate comprehensive grounds of appeal on the basis of the dismissal letter of the Director of Administration alone. He has not suggested which other ground remain that he would have raised if the minutes were availed to him, now that he has seen both the minutes and the report of the investigation committee. This lends credibility to the contention that the minutes sought were superfluous and that their non-availability to applicant did not cause him any prejudice.**
30. **It is equally true that the Staff Rules and Regulation on which 3rd respondent places heavy reliance throughout his case, do not entitle him to the minutes of the proceedings of the disciplinary committee. Rule 12 of the Staff Rules and Regulations require the Director of Administration to communicate his decision to the affected staff member in writing. This the Director did.**
31. **If the Director had failed to communicate his decision in writing as aforesaid, 3rd respondent would have a case. Since the rules are silent on whether a staff member should be availed the copy of the minutes of the proceedings, it was irregular for the arbitrator to have made a pronouncement that it was improper for the applicant not to avail them without first pronouncing the rules and regulations themselves as unfair for not making such a provision. The act of the arbitrator in the circumstances amounted to legislating for the applicant. This is an arena into which a court must avoid to be drawn.**
32. **For these reasons we have come to the conclusion that the 2nd respondent’s decision to find that applicant committed a**

procedural irregularity and consequent awarding of three months compensation to 3rd respondent for not availing minutes of disciplinary proceedings to the 3rd respondent was irregular.

33. The award of the 2nd respondent that the 3rd respondent be paid M27 729.00 representing three months salary as compensation is accordingly reviewed , corrected and set aside. The application for review accordingly succeeds as prayed in the notice of motion. There is no order as to costs.

THUS DONE AT MASERU THIS 11TH DAY OF DECEMBER 2006.

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I AGREE

R. MOTHEPU
MEMBER

I AGREE

**FOR APPLICANT:
FOR RESPONDENT:**

**ADVOCATE FISCHER
ADVOCATE MAKKHOLELA**