IN THE LABOUR COURT OF LESOTHO

LAC/REV/38/04
LC/REV/88/06

HELD AT MASERU

IN THE MATTER BETWEEN

CGM GARMENTS **APPLICANT**

AND

DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION **1ST RESPONDENT**

GIBBS MATSOKO **2ND RESPONDENT**

JUDGMENT

Date:15/05/07
Review – Sec. 228E(3) of Act No.3 of 2000 – should failure of arbitrator to comply with 30 days time limit render his decision ultra vires – In the light of the purpose of the section 3.which is expediency the appropriate remedy is mandamus – Practice – representatives of parties testified without being sworn and arbitrator relying on their evidence – The arbitration process irregular – Severance Pay – A claimant basing his claim on a mutual agreement between the parties – DDPR empowered to adjudicate disputes under the Code only – Agreement between parties extra judicial compromise on which DDPR lacks jurisdiction – Parties to seek enforcement of agreement in the ordinary courts – Review application upheld

1. This is an application for the review of the award of Directorate of Dispute Prevention and Resolution (DDPR) dated 6th June 2003. In that award Arbitrator Thamae had ordered the applicant to pay the 2nd respondent, its former employee severance pay amounting to M5,538-38.

2. The brief facts in so far as they are relevant to this judgment are the following; that the 1st respondent was employed by the applicant on the 15th October 1989. He (2nd respondent) was part of 1,500 employees of the applicant company who were dismissed on the 13th February 1998, for having taken part in an illegal strike starting 12th February 1998.

3. On the 14th May 1998, the Union (Lesotho Clothing and Allied Workers Union – LECAWU) to which the dismissed employees belonged launched an application on notice of motion to the High Court on behalf of the "dismissed" workers. We have put the word "dismissed" in invertered commas because in the High Court application the number of dismissed workers on behalf of whom the union filed the application shot up to 2,480. The company was insistent that it only employed 1,500. However no ruling was made on the veracity of either version.

4. In the notice of motion the union sought an order of the court in the following terms:

    1. Declaring the purported dismissal of applicants to have been unfair, unlawful and null and void and of no force and effect.
    2. Directing the respondent to (i) reinstate the applicants or alternatively (ii) to pay applicants damages in the form of monthly salary from purported date of dismissal to date of reinstatement or payment.
    3. In the event that this Honourable Court does not order reinstatement, respondent be directed to pay applicants their notice money.

4. Further and/or alternative relief.
5. Costs of suit.

5. The court per Maqutu J. did find the dismissals of the applicants to be unlawful. The court went further to order the company to pay the workers their notice money and to regularize their termination of employment.

6. The applicant herein noted an appeal against the orders of Maqutu J. to the Court of Appeal of Lesotho, inter alia on the ground that the matter was one that fell within the exclusive jurisdiction of the Labour Court and that the court a quo had no jurisdiction to make the orders which it did. The Appeal Court upheld the appeal and went on to "…. emphasize that in the matters provided for under the Code, the High Court has no jurisdiction and that only the Labour Court has jurisdiction." (p.9 of the typed judgment).

7. In short the union and the employees lost the matter which they had won in the court a quo. The court of Appeal judgment was delivered on the 15th October 1999. It is not clear what the union and the "dismissed" employees did thereafter to institute the matter before the Labour Court as the appropriate forum at the time in cases of unfair dismissal.

8. According to statements (not sworn evidence) before the DDPR, it turned out that on the 26th July 2001 the union and the company (the applicant) reached a mutual agreement in terms of which the dismissed employees were going to be reemployed and they were going to be paid severance pay which would include the service prior to February 1998.

9. I must mention that the alleged agreement was not availed to us. We cannot therefore vouch for its contents. The statement before the DDPR avers further that the 2nd respondent was a beneficiary of this scheme and was duly reemployed on the 5th October 2001. He however was not paid any severance pay.

10. In an unsworn statement the representative of the 2nd respondent stated that on the 20th July 2002, the company released the 2nd respondent, from work and asked him to be outside work while a suitable place was being looked for him. He was however never taken back. On the 8th October 2002 he (2nd respondent) filed a referral with the DDPR claiming his severance pay for the period October 1989 to February 1998.

11. I have quoted these statements because that is the "evidence" that the Arbitrator relied upon in his award. However, in his sworn evidence the 2nd respondent said that he never accepted the work he was assigned because he realized that it was going to be strenuous for him. He was offered a different job involving working with machines. He told the management that even that job he did not know it. He asked to be given the job that he would know. In particular he wanted to go back to the work he did before he was dismissed. He was told that there was no work in that department and that there was no other work that is available to him. He categorically stated that these things happened on the same date of his reinstatement i.e. 5th October 2001. (see pp 31-32 of the record).

12. The 2nd respondent says from there he went back to his union which sought to meet with personnel, who he says promised to look for an alternative job for him. He averred that from the 5th October when he had disagreement with management about the work he had been allocated, he has been waiting for personnel to find him another job, which was never found as he was never recalled.

13. As stated in paragraph 10 above, on the 10th October 2002, the 2nd respondent referred a dispute of unpaid severance pay to the DDPR. This was some three years and eight months since the cause of action arose. Section 227(1)(b) of Act No.3 of 2000 requires that all disputes of right, except those concerning unfair dismissal, must be presented to the DDPR within 3 years of the dispute arising.

14. No application for condonation of the late referral was made before the arbitrator. It must be recorded that the representative for the 2nd respondent did not base his claim on section 79 of the Code. He based it on the agreement reached between the company and the union on the 26th July 2001. Whilst the arbitrator accepted that in terms of the agreement the applicants were obliged to pay severance pay to the 2nd respondent, he however proclaimed that the award was being made in terms of section 79(1) of the Code. The applicant was found liable to pay 2nd respondent severance pay in the amount of M5,538-48.

15. Applicants sought the review of that award on two grounds namely;
    (a) The arbitrator was seized of the dispute in excess of 30 days contrary to section 228E(3).
    (b) The arbitrator acted on a dispute which he had no jurisdiction on in as much as the claim had prescribed.

    On the 15th May 2007 applicants filed an application for Amendment which was moved and granted without objection from respondents on the same day. The first two amendments were a repeat of the above two grounds of review. The two new grounds were that:

    (i) Representatives of the parties were allowed to give evidence without being sworn.
    (ii) The onus of proof was placed on the employer although this was not an unfair dismissal case.

16. It is common cause that the arbitration of this matter was heard on the 28th November 2002. It is also common cause that the award was only handed down on the 6th June 2003. Section 228E(3)(a) provides that;

> **"(3) within 30 days of the conclusion of the arbitration proceedings:**
>
> **"(a) The arbitrator shall issue an award with brief reasons signed by the arbitrator."**

17. Ms Sephomolo for the applicant contended that the award should be reviewable on this ground because, by the time that the arbitrator made the award he could no longer apply his mind to what was presented to him. The court asked Ms. Sephomolo if she could furnish evidence of what she was saying, she could not.

18. In our view the enquiry must be directed to what was the purpose of enacting a provision such as section 228(E)(3)(a). In our view the rationale for this section is expediency. That is what we consider to be the purpose behind the section. The effect which it was sought to achieve was to minimize if not altogether to eliminate delays in the adjudication of labour disputes (see the words of Lord Denning in the The Disciple of Law quoted in the book by G. E. Devinish, Interpretation of Statutes 1992 Ed. Juta & Co. p.36).

19. Now that the 1st respondent did not comply with this mandatory provision of the statute, the question that arises is what the appropriate remedy should be? Is it correct to set aside the decision of the arbitrator on the ground that the arbitrator failed to issue an award within a statutorily stipulated time? As Baxter in his book Administrative Law, Juta & Co. 1984 puts it at page 677 distinction has to be drawn between two separate functions that a court is expected to perform. Those are:

> *"…reviewing the legality of the action in question and granting an appropriate order, if it finds the action to be unlawful. In all examples just cited the legality of the action is placed under review, but in each the remedy might be different, depending upon what is appropriate."*

20. At page 679 of the book, Baxter avers that, *ultra vires*, as a remedy "…is only useful if setting the decision aside would provide suitable relief or if the court considers itself able to correct the offending action." The learned author concludes by saying that for these reasons "an application for setting the decision of a public authority aside is often accompanied by an application for consequential relief."

21. In casu the counsel for the applicant sought the action of the arbitrator to be set aside. The question that comes to mind is what useful purpose will be achieved by that relief, in the light of what we stated to be the purpose of the section namely to secure expediency. Quite clearly that will be defeating the very purpose of the section. In our view the appropriate way of achieving what the section seeks to achieve in the circumstances would be by seeking a remedy of mandamus, requiring the 1st respondent to rectify the position.

22. Mandamus would be suitable if the illegality was ongoing. It is common cause however that the illegal action has since been rectified in that an award was issue albeit six months later. It also emerged during the hearing that the arbitrator applied to the Director for an extension of time beyond the 30 days. The Director, acting pursuant to section 228E(4) did grant that extension thereby purging the illegality complained of.

23. Ms. Sephomolo for the applicant sought to argue that they as interested parties were not informed of the intended application by the arbitrator for extension. Nothing turns on this argument because the Act does not sanction that they be informed. In any event if they had taken the right action at the right time namely, a mandamus application they would have known that an extension had been sought and granted in as much as such an extension would be a legitimate defence to the application for mandamus.

24. The other ground of review was concerned about the manner the arbitration was conducted in as much as it was contended that the representatives of the parties were allowed to testify without being sworn. The record very much confirms this. Mr. Sam Mokhele made a lengthy statement which went beyond an opening statement. He clearly usurped the witness stand and unfortunately the arbitrator allowed him and yet he had not been sworn.

25. When Mr. Mokhele had finished Mr. Kolobe for the company started testifying also without being sworn. He was grilled at length with cross-examination by Mr. Mokhele for the 2nd respondent despite his evidence not being on oath. The only person whose evidence was taken on oath was the complainant Mr. Gibbs. He however decided not to testify on the material aspects of his case as he stated at p.29 of the record; "I said that the statements that have been made by my representative, I accept them and I do not want to add anything or remove anything from what he said."

26. This left the arbitrator with only the unsworn statements of the representatives of the parties. Indeed even the entire award was based on those statements. This was clearly irregular and unlawful as it violated section 26(8) of the Labour Code (Conciliation and Arbitration Guidelines) Notice of 2004 which provides that; "The arbitrator must first swear or affirm the witness and advise the witness of the process of questioning." See also Vodacom Lesotho (Pty) Ltd .v. DDPR & 3 Others LAC/REV.47/05 at p10 paragraph 19 of the typed judgment where it was held that the fact that both parties had led evidence without an oath was "….gross irregularity which justifies interference with the award."

27. The next ground of review was that the applicant shouldered the burden of proof despite this not being an unfair dismissal case. This contention does not find support anywhere in the record. It is therefore bound to fall away. The final ground on which the review of the award was sought was that the arbitrator dealt with a claim of severance pay in respect of a period which had prescribed and that no condonation had been sought in the circumstances.

28. As stated in paragraphs 13 and 14 of this judgment, the claim was presented to the 1st respondent after the lapse of three years and indeed no condonation application was made for the late referral which was irregular. Our understanding is however that no condonation application was made because the referral was not made pursuant to section 79 of the Code but rather in terms of the July 2001

so-called out of court agreement (see pp2 and 3 of the record of the proceedings.).

29. The DDPR is established by section 46B of the Act. Subsection (5) thereof outlines the functions of the DDPR as follows:

"(5) The functions of the Directorate shall be:

(a) to attempt to prevent and resolve trade disputes through conciliation;
(b) to advise employers, employers' organisations, employees and trade unions on the prevention and resolution of trade disputes."

Nowhere in this section is the DDPR empowered to arbitrate over private agreements such as that entered into between the applicant herein and LECAWU.

30. It is common cause that at the arbitration Mr. Kolobe for the applicant disputed the enforceability of that agreement. At page 5 of the record he is recorded as repeatedly saying that the document being relied upon is not a "court document." At pp11-12 of the record an exchange between him and the arbitrator clearly shows that the applicants were not willing to be bound by that part of the agreement which the 2nd respondent and his union were relying upon. This is what transpired:

Arbitrator: Ntate I am not quite sure as to whether this agreement, that is you are disregarding this agreement?

Response: Yes Ntate. We are not saying….because many of the points, I believe 95% of its contents has been carried out.

Arbitrator: You do not agree with that Clause 2?

Response: Except that clause 2 Ntate.

Arbitrator: You disagree with clause 2, even though you have signed it?

Response: Yes Ntate.

31. Despite this exchange in his award, the arbitrator found for the 2nd respondent on the basis of the agreement. At p.3, of the award last paragraph the arbitrator states, "in his concluding arguments Mr. Mokhele stated that the basis of their claim is clause 2 of the settlement." At page 4-5 he wrote further:

> *"The expectation is that the parties should fulfil their obligations arising out of an agreement freely entered into without any coercion.*
> *In view of the failure of the respondents to clearly illustrate that denial of severance pay to the applicant is based on the fact that the provision of section79(1)(2) of the Labour Code were not met, and on the basis of Out of Court settlement signed between the union and the company on 26th July 2001, my finding is that the applicant is entitled to severance pay."*

32. Surely section 79(1)(2) had not been met by the 2nd respondent in as much he had been fairly dismissed for misconduct. Their short lived victory at the High Court was soon overturned by the Court of Appeal which found that the High Court had adjudicated a dispute on which it lacked jurisdiction.

33. The out of court settlement itself fell outside the jurisdiction of the DDPR to arbitrate. In Food Workers' Council of SA & Others .v. Sabatino Italian Restaurant 1996 (17) ILJ 197, the court held that a settlement agreement is a compromise which had "….the effect of *res judicata* and is an absolute defence to an action on the original cause of action viz. the 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."

34. In the same case reference was made to two other decisions. Firstly, it was Ford .v. Austen Safe Co. (Pty) Ltd (1993) 14 ILJ 751 where the court held:

> *"The effect of a repudiation (breach) of the settlement agreement is not, as applicant submitted, that the employer/employee relationship which existed before the settlement agreement was concluded revived.*
> *The settlement agreement constitutes an extra-judicial compromise of the respective claims of the parties…. Such a compromise has the effect of res judicata and is an absolute defence to an action on the original contract or cause of action except where the settlement expressly or by clear implication provides that, on non-compliance thereof, a party can fall back upon his original right of action."*

35. Secondly it was Nouwens Carpets (Pty) Ltd .v. NUJW (1989) 10 ILJ 44 (also 1989 (2) SA 363 (N)) in which the court held that a settlement agreement had the effect of a contract and was not a piece of subordinate domestic legislation. The court held further that "breach of the agreement order for specific performance thereof was a matter arising from the contract and not from the application of the provisions of the Labour Relations Act." The court concluded that the Industrial Court did not have jurisdiction to entertain matters arising from such a settlement agreement.

36. It is clear that apart from the finding we made at paragraph 29 that the Arbitrator acted beyond the powers vested in him by the enabling statute, it is settled law that in the ordinary cause of things settlements agreements constitutes extra-judicial compromise, which a statutory body such as the DDPR with a specific mandate will lack the jurisdiction to entertain. This is not to suggest that parties are left without remedy because there are ordinary courts of the land with wider mandate which can be approached for assistance. With these reasons we find that the arbitrator committed

gross irregularities on a number of fronts which call for interference with his award. Accordingly, the award in referral No. A1387/02 is reviewed, corrected and it is set aside.

There is no order as to costs.

THUS DONE AT MASERU THIS TH DAY OF MAY 2007

L. A. LETHOBANE
PRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MS. SEPHOMOLO**
FOR RESPONDENT: **MR. MOLATI**