IN THE LABOUR COURT OF LESOTHO LC/REV/45/08

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO ELECTRICITY CORPORATION APPLICANT

AND

DDPR 1ST RESPONDENT
MPAIPHELE DYSON MAQUTU 2ND RESPONDENT

JUDGMENT

Date : 07/07/09
Review – Arbitrator's mistake of law which materially affects the decision constitute a reviewable irregularity – Where parties agree on an issue for the arbitrator to determine, it is a reviewable irregularity if the award of the arbitrator goes beyond the scope of that issue – the portion of the award that exceeded agreed issues is reviewed, corrected and set aside.

1. The 2nd respondent is the Head of the Legal Section of the applicant company and it's Corporate Secretary. He was employed as such on the 15th September 2005. Apart from his monthly salary, the 2nd respondent is paid sitting allowance for attendance at company's Board meetings and sub-committee meetings. These allowances are also paid to other Board and sub-committee members including the Managing Director (Chief Executive).

2. On the 8th February 2008, the Auditor General Mrs. Lucy Liphafa wrote a letter to the Honourable Minister of Natural Resources Mr. Monyane Moleleki, with which she submitted the

company's Audited Financial Statements for the year ended 2007. Whilst expressing "unqualified opinion on the financial statements…as a result marked improvement in the overall system and accountability of funds;" the Auditor General went on to observe that:

> *"During the year under review, the Director's statutory records reflect that the Chief Executive and the company's Secretary were paid allowances while attending board meeting(s). They both attend meetings by virtue of their positions, this implies that their role in this capacity shall be part of their normal day to day activities. They are full time employees of the company as such do not attract any sitting allowance as other Non-Executive Directors."*

3. It is common cause between the parties that despite the Auditor General's letter of February 2008, the issue of payment of allowances for the Chief Executive and the Corporate Secretary had been before the Board for as far back as 2004. (see p.p. 26-27 of the record). The Board was already grappling with how to terminate the allowances for the two Senior Executives. The 2nd respondent testified that he had advised that the allowances be phased out rather than being stopped abruptly.

4. It is not clear from the record what the Board's reaction was to that advise. However, payment of sitting allowance for the Chief Executive was terminated with the termination of the contract of the then Chief Executive. When the present incumbent was employed in October 2007, his position no longer attracted sitting allowance for attendance at board meetings and sub-committee meetings. In effect therefore, the letter of the Auditor General directly pertained to the Corporate Secretary as he was the only one now still getting sitting allowance.

5. It is common cause that at its meeting of 28th February 2008, the Board resolved to stop payment of sitting allowances for the 2nd respondent in accordance with the advise of the Auditor General. Sometime in March on a date that is not clear from the extract of the Referral form annexed to the record; the 2nd respondent made a referral to the 1st respondent in which he claimed "breach of contract of employment (non payment of sitting allowance)." The dispute was conciliated on the 2nd April 2008 and was postponed for further conciliation and to allow parties time to explore settlement.

6. On the 8th April 2008, the conciliation process reconvened. It was at that meeting that representatives of both sides reported that there was no possibility of a settlement and requested that parties proceed to arbitration. At the start of the arbitration, the arbitrator invited the representatives of the parties to circumscribe the issues for determination. At page 8 of the record the representative of the applicant herein is recorded as having said in part, "our dispute relates to consultations as a fact and as a point of law." The arbitrator asked the representative of the 2nd respondent;

Arbitrator: "Mr. Ntaote, is it going to be limited to that?

Mr. Ntaote: "We will agree to that so that we may move on to the issue of consultations. Indeed if the respondent (applicant herein) agrees in a clear manner, the applicant received these sitting allowances were part and parcel of his terms and conditions of employment, it must be clear like that, then we can go into the issues of consultations."

7. At page 9 of the paginated record, counsel for the 2nd respondent again put the issue in dispute as being:

> *"….in relation to consultations, whether he (counsel for applicants herein) is saying that the applicant (2nd respondent) was consulted before the sitting allowance was taken away…. because that is what we are disputing…."*

Mr. Makeka for the applicants insisted that there were consultations in the circumstances of this case and invited 2nd respondent to take the witness stand so that he could put questions to him that relate to the very consultations he is challenging. After a lengthy exchange on the issue for determination, the arbitrator was asked by Mr. Makeka for the applicant to "outline in general what our case is all about." The arbitrator made a summary that "I think the case is just around the issue of consultation." (see p.10 of the record). Both sides agree with the arbitrator's summary of the issue in dispute.

8. Evidence was adduced on both sides. At the conclusion of the arbitration an award given was that the applicant company "had unilaterally varied the terms and conditions of employment of the applicant (2nd respondent) thus constituting a breach of contract." (p.18 of the award paragraph 32). The arbitrator proceeded to make orders in part as follows:

    (i) 2nd respondent be paid unpaid allowances that were stopped on the 6th march 2008.
    (ii) The applicant herein reinstates and continues the payment of the sitting allowances…. as per the terms of the contract of employment up until the contract of employment lawfully terminates.

There are two other orders which are not of immediate relevance for the purpose of this review.

9. On the 28th May 2008 the applicant filed an application for the review of the award of the arbitrator. There is essentially one ground of review even though it is divided into two paragraphs. Under paragraph 6 of his Founding Affidavit the Chief Executive stated the ground of review in these terms:

> *"6.1. There is nothing one can do with the finding as regards the existence or non-existence of consultation, procedures and processes and the conclusion at Award A0229/08. There is a serious problem of a point of law at award (b) particularly*

the phrase "up until the contract of employment lawfully terminates."

"6.2 This phrase is both wrong in law and is in excess of the powers of the arbitrator…"

10. In his submission before court Mr. Makeka for the applicant argued that, the applicant is not challenging the first part of the arbitrator's award and that it has in any event been complied with by the applicant. He contended that they have difficulty with only the 2nd part of the 2nd order that says payment of the allowance be continued until the contract lawfully terminates. He pointed out that in making that statement which they are challenging, the arbitrator exceeded his powers in as much as he went beyond the issues that were presented before him in terms of the Referral form.

11. 2nd respondent in his argument relied on the Labour Appeal Court decision in Lesotho Highlands Development Authority .v. Motumi Ralejoe LAC/CIV/A/03/06 in which it was held that:

> *"In employment law, an employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible."* (p.20 para 24 of the typed judgment).

The court brought to 2nd respondent's attention that indeed the arbitrator's award which favoured him was based on the principle extracted from the Ralejoe case and that the applicants are in agreement with the principle, hence they do not challenge it.

12. 2nd respondent submitted further that the disputed portion of the award should not be construed as an absolute bar to the employer's amendment or variation of the existing contract. He referred to the case of WL Ochse Webb & Pretorius (Pty) Ltd .v. Vermeulen (1997) 2 BLLR 124 (LAC) where it was observed that:

> *"….it has been held that an employer is entitled to alter an employee's remuneration package if it has a commercial rationale for doing so and if the final decision to do so was arrived after proper consultation with the employee."*

13. The remarks of the learned Judge in the Webb and Pretorius case are without doubt the correct statement of the law. The disputed portion of the award of the learned arbitrator is infact a complete bar to the employer to vary the terms and conditions of the 2nd respondent, where there is a commercial rationale and the employer has followed proper consultation procedures. That disputed portion of the award therefore, constitute a reviewable irregularity in terms of section 228F(3) which empowers this court to "set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision." The disputed part of the award of the arbitrator constitute a serious mistake of law and it is therefore reviewable.

14. There is a further ground which as correctly stated by Mr. Makeka makes the disputed portion of the award of the learned arbitrator reviewable. This is that the learned arbitrator went beyond the issues he was called upon to decide. In Albert Makhutla .v. Lesotho Agricultural Development Bank 1995 – 1996 LLR-LB 191 at p.195; Browde JA upheld the argument of counsel for the respondent bank that the appellants had approached the High Court with an appeal disguised as a review. The learned judge of appeal however went further to state:

> *"there seems to me to be substance in that submission. What is not characteristic of an appeal however, is the allegation in the appellant's founding affidavit that the judgment of the Labour Court went beyond the scope of the issues which by agreement, it was called upon to decide…"*

15. From the record it is abundantly clear that the dispute referred to the 1st respondent was breach of contract of the 2nd respondent by the former unilaterally imposing variation of the terms without consulting the latter. A considerable amount of

time was spent by the parties under the guidance of the arbitrator to frame and circumscribe the issue for determination by the arbitrator. In the end an agreement was reached and was aptly summarized by the arbitrator at p.8 of the record that the issue was whether applicant consulted the 2nd respondent before introducing variation of the terms of his contract.

16. The learned arbitrator found that the 2nd respondent was not consulted. This meant that the unilateral variation of the terms of his contract constituted a breach of his contract. The learned arbitrator correctly ordered that the breach be purged and the payment of allowances be reinstated. The mandate of the learned arbitrator ended there. He was not at any point called upon to make a determination in regard to the future contractual relationship of the parties. Clearly, therefore, the phrase "up until the contract of employment lawfully terminates," goes beyond the scope of the issues agreed by the parties and is not justified by the evidence presented before the arbitrator. The phrase is therefore reviewable. In Tao Ying Metal Industry (Pty) Ltd .v. Pooe & Others (2007) BLLR 583 (SCA) Nugent JA aptly stated the principle governing the tieing of authority of the arbitrator to properly circumscribed issues in these words:

> *"The task of an arbitrator is a demanding one. It is made even more demanding by the absence of formality that characterizes the resolution of labour disputes. It is important that an arbitrator, notwithstanding the absence of formality, ensures at the outset that the ambit of the dispute has been properly circumscribed, even if the dispute has many facets, for that defines the authority that the arbitrator has to make an award. The authority of the arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid."* P.587 H – I.

(see Shoprite Checkers (Pty) Ltd .v. CCMA & Others (1998) 19 ILJ 892 and Standard Bank of South Africa .v. CCMA & Others (1998) 19 ILJ 903 at 912 – 913 A – C.)

17. The court referred Mr. Maqutu to p.21 of the record where he was specifically asked what remedy he was seeking? His response was:

> *"The remedy that I am seeking is for the sitting allowances that I was paid to be reinstated going forward or alternatively…if the Auditor General is uncomfortable in the manner is which it is done, this can be effected in my remuneration package and not be paid as a sitting allowance."*

The 2nd respondent's answer is clearly made in two parts. The first part is the one that the arbitrator adopted namely reinstatement of the allowances.

18. I am however unable to read the words "going forward" as meaning until the contract lawfully terminates. From the award it does not look as if the arbitrator understood them to support his order that the allowance be paid until the contract terminates. Mr. Maqutu himself would want the court to construe the words as meaning until the contract lawfully terminates.

19. As we said the arbitrator did not construe them as carrying that meaning, for if he did he would have said so in his award. Mr. Maqutu is a qualified lawyer who knows exactly what words he would employ to achieve the result that he now wants this court to read in the words "going forward." This in our view is a clear sign that it was never Mr. Maqutu's desire to have the award framed in the words that the arbitrator used which are a subject matter of this review. It makes it clear therefore, that the phrase "up until the contract lawfully terminates is not justifiable in the light of the evidence tendered and is therefore reviewable.

20. Even assuming however, that the phrase "going forward" could be interpreted to mean "up until the contract lawfully terminates," it would mean that the evidence went beyond the issues as circumscribed by the parties and duly summarised by the arbitrator. The issue as previously indicated, did not anticipate that the arbitrator makes determination on the future

contractual relationship of the parties. For these reasons the review application ought to succeed and the phrase "up until the contract lawfully terminates" in award A0229/08 is reviewed corrected and set aside. The order in paragraph (b) of the Award should thus read; "the respondent is further ordered to reinstate and continue payment of the sitting allowances to the applicant as per the terms of the contract of employment." Neither party asked for costs, there is therefore no order as to costs.

THUS DONE AT MASERU THIS 22ND DAY OF JULY 2009

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI — I agree
MEMBER

M. MOSEHLE (MRS) — I agree
MEMBER

FOR APPLICANT: — ADVOCATE MAKEKA KC
FOR 2ND RESPONDENT: — IN PERSON