IN THE LABOUR COURT OF LESOTHO LC/REV/49/08

HELD AT MASERU

IN THE MATTER BETWEEN

TSEPANG MANYELI 1ST APPLICANT
PIUS TANGA 2ND APPLICANT

AND

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION 1ST RESPONDENT
M. KETA (ARBITRATOR) 2ND RESPONDENT
NATIONAL UNIVERSITY OF LESOTHO 3RD RESPONDENT

JUDGMENT

Date: 04/08/09
Review and appeal distinguished – Respondent's point in limine that the applicant's application for review is infact an appeal upheld as the grounds for review were concerned with the correctness of the decision of the arbitrator on the merits – Bias applicants alleged arbitrator sided with 3rd respondent without specifying in what manner arbitrator defended their opponent – Court deprecated attacks on integrity of presiding officer without substantiation – Application dismissed.

1. This is an application for the review of the award of the 2nd respondent in which he dismissed the applicants' claim for payment of salary for sixteen months they spent working on a non-profit making project implemented by the 3rd respondent.

2. The facts are largely common cause. The two applicants are employed by the 3rd respondent as lecturers in social work. On the 7th April 2006, the NUL entered into a grant agreement with

Pact (a non profit making organization), *"to implement a USAID funded orphans and Vulnerable Children (OVC) program."* The agreement and the program were for the Roma Valley orphaned and vulnerable children. The NUL would implement the project through its consultancy unit usually referred to as NUL Consuls.

3. In terms of the agreement, the NUL was to appoint two project Managers for the project. The two applicants were designated as Project Managers. They however, remained full time lecturers and only spent three days in a week working on the project. They also continued to earn their full salaries as lecturers.

4. In terms of the agreement Pact would *"reimburse NUL for the actual time that project staff spend on (the) project."* The NUL was going to base the charge on current staff salaries. It had been specifically agreed that the charging of *"consultancy fee in excess of the normal staff salary paid by the University would be construed as profit under the grant which is not allowable."*

5. Based on prevailing staff rates at the time, the budget for the project showed that the NUL would claim M80.37 and M83.60 per hour for Programme Managers 1 and II respectively. According to evidence of the first applicant these rates translated into M64,135.26 and M66,712.80 per annum for each applicant. Evidence of the first applicant was further that at the end of each month each Programme Manager submitted a claim form accompanied by a time sheet which indicated the number of hours and days a manager had spent on the project.

6. The claim form would be endorsed by the Director of the Consultancy Unit and then forwarded to the Bursar who would then use them to transfer the claimed funds from the Programme Vote to the NUL Account. The witness testified that the Project ran for 16 months and in that period they had submitted claims totaling M85,513.67 for Programme Manager 1 and M88,915.40 for Programme Manager II.

7. There was a misunderstanding between the applicants and the NUL concerning the payment of these claims. The applicants understood that the claims ought to be paid to them as reimbursement for the time they spent on the Project. The NUL on the other hand understood that the reimbursement was to be made to it for the time that its employees spend on the Project, whilst it paid them their full salaries. This misunderstanding was even communicated to the representative of Pact, who expressed dismay why staff were not being remunerated for time spent on the Project when *"Pact had reimbursed NUL for salary costs incurred."*

8. Ultimately the two applicants referred a dispute to the DDPR claiming payment from the NUL of the claims they had made during the 16 months they spent on the Project. The applicants were claiming M85,513.67 and M88,915.40 for Programme Manager I and II respectively. The evidence tendered on behalf of the 3rd respondent was simply that the two applicants are employees of the 3rd respondent and that they had always been paid their full salary as lecturers including the time that they spent working for the Project. This evidence was not denied.

9. In his award the learned Arbitrator Keta found that the two applicants are not entitled to be paid Programme Managers salaries as they claimed. He found that according to the agreement it was the 3rd respondent that had to be reimbursed for paying applicants their full salaries as lecturers despite the time they spent working on the Project. He went on to state that *"the applicants were using University time on the Project and they received their full salary and Pact reimbursed the University for paying the applicants while they were (working on) the Project."* He concluded that applicants' claim amounts to asking for a top up over and above their usual salary as lecturers. He thus dismissed the referral.

10. The applicants have applied for the review and setting aside of the learned Arbitrator's award. In advance of considering what applicants say are their grounds of review, it is apposite to state once more that a review is not a method used to attack the

merits of the decision of a decision maker. A review properly speaking is:

> *"the process by which the proceedings of inferior courts of justice both civil and criminal are brought before the court (i.e. the reviewing superior court) in respect of grave irregularities or illegalities occurring during the course of such proceedings."* per Innes C.J. in Johannesburg Consolidated Investment Co. .v. Johannesburg Town Council 1909 TS 111 at 114.

11. In the case of JDG Trading (Pty) Ltd t/a Supreme Furnitures .v. M. Monoko & 2 Others LAC/REV/39/04 (unreported) Mosito AJ stated the difference between an appeal and review thus:

> *"where the reason for wanting to have the Judgment set aside is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where on the other hand, the real grievance is against the method of trial it is proper to bring the case on review."* (at p.8 of the typed judgment).

In the case of Teaching Service Commission & 3 Others .v. the Learned Judge of Labour Appeal Court & 4 Others C. of A. (CIV) No. 21 of 2007, the Court of Appeal restated the distinction and pointed out that review *"is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality being a means by which those in authority may be compelled to behave lawfully"* – (see p.5 of the typed judgment). This court associated itself with the decisions in the foregoing cases in the case of Tieho Potlaki .v. Lesotho Electricity Corporation & Another LC/REV/396/2006 and held at p.7 of its judgment that *"the review procedure is appropriate where the complaint is against the method of trial."* (see also LEC .v. Liteboho Ramoqopo & Another LAC/REV/121/05 (unreported).

12. In their application for review applicants allege falsely that they worked under the Project for sixteen months without being paid their monthly salary. This averrement flies in the face of 1st applicant's testimony at page 11 of the record of the arbitration proceedings where she was asked under cross examination:

Q. *"During the time that you were employed as Project Manager what happened to your salary as full time lecturer?*
A *I was getting paid."*

13. Applicants grounds of review appear under paragraph 6 of 1st applicant's founding affidavit. She avers that the 2nd respondent erred and misdirected himself in:

(i) holding that no evidence was tendered which give us the right to our claims, since we had adduced evidence that the basis of our claim was that we had worked for the respondent for sixteen months,

(ii) finding that we could not claim payment of our salaries under the project as this would top up our salaries as lecturers, yet our function as managers under the project had nothing to do with our lectureship,

(iii) raising the issues that were not raised on behalf of the 3rd respondent at the hearing in defence to our claims.

14. Counsel for the 3rd respondent raised a point in limine that applicant's so-called review is in fact an appeal. He contended that the founding affidavit does not contain even a single one of the well known grounds of review as outlined in Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, Juta & Co. 1997 p.929.

15. There is no doubt that the first two grounds of review do not attack the method of trial as ought to be the case in review proceedings. Both those grounds are concerned with the merits of the finding of the learned Arbitrator. The applicants are concerned that the finding of the learned Arbitrator is not justified by the evidence they tendered. While this may or may

not be so, the principle is that, *"the giving of a judgment not justified by the evidence would be a matter of appeal and not of review,"* upon the now well established distinction between an appeal and review. (see Herbstein and Van Winsen supra p.932). In the premises we agree with Mr. Koto for the 3rd respondent that the first two grounds do not constitute ground of review.

16. The last point namely; that the arbitrator raised issues that were not raised on behalf of the 3rd respondent could constitute a reviewable ground. However, Mr. Koto for the 3rd respondent successfully shot down this ground as well by pointing out that the applicants have failed to show what those issues that the arbitrator raised on behalf of 3rd respondent were. Applicants merely alleged that the arbitrator played a defensive role on behalf of the 3rd respondent, without specifying in what manner he defended the 3rd respondent.

17. The court will not take remarks that paint a negative picture of a presiding officer lightly. Where such remarks are made they must be justifiable and not just be thrown recklessly without due regard to the integrity of the presiding officer concerned. It is a disturbing phenomenon that applicants have attacked the arbitrator as having sided with their opponents without substantiating in what manner he took sides. Such conduct will in future attract punitive measurer of costs. Accordingly, the review application is dismissed and there is no order as to costs.

THUS DONE AT MASERU THIS 4th DAY OF SEPTEMBER, 2009.

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI MEMBER	I CONCUR
M. MAKHETHA MEMBER	I CONCUR
FOR APPLICANTS:	ADV. NTAOTE
FOR RESPONDENT:	ADV. KOTO