IN THE LABOUR COURT OF LESOTHO **LC/REV/10/10**

HELD AT MASERU

In the matter between:

ECONET-TELECOM LESOTHO (PTY) LTD **APPLICANT**

and

SEQAO PHENYA **1st RESPONDENT**
ARBITRATOR - DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

Date: 15/12/10

Practice and procedure - 1st Respondent raising three points in limine viz., (i) absence of Company resolution authorising the Chief Human Resource Officer to make an affidavit on behalf of the applicant; (ii) that it was irregular for the applicant to file its papers through a notice of motion as opposed to an originating application prescribed by the Labour Court Rules; lastly (iii) that the matter is not reviewable - All the points in limine dismissed.

1. This review application arises from an award of the Directorate of Dispute Prevention and Resolution (DDPR) in A 0166/09 in which 1st respondent's dismissal had been declared unfair and reinstatement ordered.

2. The 1st respondent is a former employee of the applicant and had been engaged as a Technician in the Operations and Maintenance Division. It is common cause that the 1st respondent had installed a telephone in a place other than the one that

appeared on the work order, but had failed to record the transfer. The telephone was supposed to have been installed at Motimposo but was found by the applicant to have been installed at Ha Ts'osane. He was consequently charged with dishonesty and found guilty as charged. His defence had been that he had failed to record the change because the computer had crashed. His services had been terminated following the disciplinary hearing. Dissatisfied with the verdict, he lodged an internal appeal which was unsuccessful. He subsequently instituted an unfair dismissal claim with the DDPR which turned out in his favour. The award ordered that he be reinstated to his former position from 8th March, 2010, without loss of earnings and any other benefits/entitlements he would have been entitled to had it not been of the dismissal.

3. The 1st respondent reported for duty on 8th March, 2010 as ordered by the DDPR, but the applicant refused to accept him on the basis that the Company was never served with the award and only came to know of its existence when 1st respondent reported for duty. Applicant's representatives alleged that following 1st respondent's report for duty, they made several attempts to get hold of the award, but to no avail. They indicated that they were only able to lay their hands on it on 10th March, 2010. The award had been handed down on 23rd February, 2010. In the award, the learned Arbitrator had found in favour of the 1st respondent on the basis that the applicant ought to have found him guilty of negligence and not dishonesty. The applicant was not happy with this award, and lodged the present application for review.

4***. GROUNDS FOR REVIEW***

The following were the grounds for review; that the

a) Second respondent failed to apply his mind to the fact that the employer is only required to prove a fair and valid reason for the dismissal of the employee. Second respondent accordingly failed to apply his mind to the fact that such a fair and valid reason had been proved;

b) Second respondent acted irregularly in considering the proved reason of dismissal as tantamount to negligence as opposed to dishonesty as viewed by the employer and as defined in the employer's code. By so doing second respondent defined for the employer what negligence is and what is dishonesty at applicant's workplace. This he could not do as that is the

employer's domain to decide what constitutes negligence and what constitutes dishonesty in his workplace. In the circumstances therefore second respondent acted grossly irregularly;

c) ***Second respondent acted irregularly by failing to take cognizance of first respondent's conduct as dishonest conduct. Second respondent particularly misdirected himself and acted irregularly by not considering applicant's evidence in its totality but considering only the issue of first respondent's failure to record changes in the work order, whereas the evidence in its totality revealed dishonest and deceitful conduct on the part of first respondent;***

d) ***Second respondent grossly misdirected himself by failing to take cognizance of the fact that in view of the nature of applicant's operations, first respondent's conduct amounted to the kind of dishonesty that results in the total breakdown of the trust required to sustain employment relations justifying dismissal;***

e) ***Assuming without conceding that the dismissal was unfair second respondent improperly exercised his discretion by ordering reinstatement when the evidence clearly revealed that applicant no longer trusted first respondent and that any continued employment would be intolerable, unbearable and/or not in the best interests of the parties;***

f) ***Second respondent's award is grossly irregular as it contains orders not sought or applied for;***

g) ***Second respondent acted irregularly by misconceiving the evidence adduced before him. This is evidenced by his finding that a technician is authorized to install a phone at a different location than one applied for provided that he makes necessary changes in the work order. Second respondent further misconceived the evidence and/or did not apply his mind to the evidence by finding that first respondent had said he had recorded the changes in a scrap of paper whereas it was applicant's case that if first respondent was acting honestly he would have recorded the changes in a separate piece of paper if***

there was no sufficient space in the work order.

In reaction to the review application, 1st respondent raised three points ***in limine*** upon which he prayed that the application be dismissed with costs.

5. ***POINTS IN LIMINE***

The first point was that the deponent to applicant's founding affidavit, Mr. Mathaba, the Chief Human Resource Officer had not filed a formal resolution authorising him to depose to the said affidavit. The second point related to the fact that the applicant had lodged his application through a notice of motion as opposed to an originating application. The last point was that the issues raised by the applicant were not reviewable. These points ***in limine*** will be dealt with ***seriatim*** as they appear in 1st respondent's opposing affidavit.

5.1 AUTHORITY TO DEPOSE TO AN AFFIDAVIT

5.1.1 In his first point ***in limine*** the 1st respondent challenged Mr. Mathaba's authority to depose to the founding affidavit on behalf of the applicant. He contended that Mr Mathaba had no authority to depose to the affidavit without attaching the resolution of the Company to the effect that he had been so authorised. It indeed emerged that no such authority had been attached. The issue then becomes whether the 1st respondent is relating a proper legal stance. This is indeed a trite legal position as laid down in ***Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA (C) at 315 E - G***. The Court held therein that the cardinal principle regarding representation of artificial persons is that;

> ***an artificial person unlike an individual, can function only through its agents, and can take decisions only by passing resolutions in the manner prescribed by its constitution … The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the Company annexing a copy of the resolution.***

This was confirmed in ***Pretoria City Council v Meerlust Investments (Pty) Ltd 1962 (1) SA 321 (AD)*** in which ***Ogilvie Thompson, JA.,*** pointed out that;

> ***The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorized by the Council; that it is the Council which***

is prosecuting the appeal, and not some unauthorized person on its behalf… Since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorized by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before this Court an appropriate worded resolution of the Council.

5.1.2 Applicant's Counsel relying on the Labour Appeal case of ***Lenka Mapiloko v President of the Labour Court & Ano., LAC/REV/05/07*** (unreported) submitted that the onus lies on the 1st respondent who is challenging the said authority to prove that the deponent had no such authority. He contended that the 1st respondent has failed to place before this Court contradictory evidence that no such authority exists.

5.1.3 The principle laid down in ***Mall (supra)*** and ***Pretoria City Council (supra)*** that a party representing a legal persona must always produce a resolution to prove that he or she has been duly authorized to represent such an entity is qualified. It was pointed out in ***Mall*** at p. 352 A that each case must be considered on its merits and the Court must decide whether enough has been placed before it to warrant the conclusion that some unauthorized person is litigating on behalf of the applicant. Where there is no substantiated averment that the applicant is not properly before Court, the Court will not uphold the objection regarding authority. The Court indicated that a minimum of evidence will suffice. According to ***Parsons v Barkly East Municipality 1952 (3) SA 595 (E)*** in order to succeed on the point that there is no authority, the person who challenges the existence of authority must place some ***"contradictory evidence"*** to combat the existence of such authority. The Court also confirmed that a minimum of evidence will suffice.

5.1.4 There is a plethora of authorities on the issue. In ***Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd 1973 (4) SA 136*** the Court concluded that in proceedings by artificial persons, although prudent to attach the resolution authorizing the institution of proceedings, it was not always necessary to attach it. A challenge to an authority must be substantiated by evidence.

5.1.5 In ***Central Bank of Lesotho v Phoofolo LAC (1985 - 1985) 235 at pp. 258-259 Mahomed JA*** sitting in the Court of Appeal of Lesotho held that;

The first technical ground was that no resolution evidencing the authority of the Governor to depose to an affidavit on behalf of the appellant in the proceedings, was filed. This objection was without substance, and was correctly dismissed by Molai J. There is not an invariable rule which requires a juristic person to file a formal resolution manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts. In the present case the authority of the Governor to represent the appellant in the proceedings in the Court a quo appears amply from the circumstances of the case, including the filing of the notice of opposition to the application.

5.1.6 In ***Tattersal & Another v Nedcor Bank Ltd 1995 (3) SA 222 (A),*** the Court held at p. 228 G - H that a copy of the resolution of a company authorising the bringing of an application need not always be annexed. This is particularly so where there is sufficient evidence of authority and where the denial of authority is a bare one as in the present case. The deponent to applicant's affidavit, Mr Mathaba expressly deposed in his founding affidavit at paragraph 1 that he had ***"been duly authorised to depose to this affidavit on behalf of the applicant"***. As it is, there is no substantiated averment that he was not duly authorised. It follows therefore that 1st respondent's denial that Mr Mathaba was not duly authorised to depose to an affidavit on behalf of the applicant was a bare one. On this premise the Court dismisses this point.

5.2 ***NOTICE OF MOTION CONSTITUTING AN IRREGULAR PROCESS***

5.2.1 The second objection raised by 1st respondent's Counsel was that the notice of motion is an irregular process before the Labour Court as it flouted Labour Court Rules. He submitted that Labour Court proceedings are instituted through an originating application as prescribed by Labour Court Rules and not through a notice of motion as the applicants have done. He pointed out that the notice of motion is a procedure that is applicable to the High Court. He further objected to the fact that despite asking for a rule in the notice of motion, the President of the Court failed to issue it but ordered stay of execution of the award. In response applicant's Counsel noted that indeed Labour Court proceedings are lodged through an originating application, but pointed out that the 1st respondent had not suffered any prejudice or shown to have suffered any by virtue of the case having been filed through a notice of motion. On the issue of the ***rule nisi***, applicant's Counsel submitted that they had duly sought it, but were advised by the President

of this Court that it was not necessary. He averred that the President had pointed out this was meant to avoid matters frequently coming to Court, and that if the application was not prosecuted it would be dismissed for non-prosecution.

5.2.2 Institution of proceedings before the Labour Court is regulated by Rule 3 of the Labour Court Rules, 1994. It provides;

> ***Proceedings for the determination of any matter by the Court shall be instituted by any interested person or persons presenting, or delivering by registered post, to the Registrar an originating application, which shall be in writing in or substantially in accordance with Form LC 1 contained in Part A of the Schedule …***

It would therefore have been appropriate for the applicant to have filed its application for review through an originating application as prescribed by this Rule, but this on its own cannot invalid these proceedings.

5.2.3 Rule 27(1) of the said Rules provides that;

> ***Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Court otherwise directs.***

The Court is thereby given a discretion to condone failure by parties to adhere to the Rules. This does not mean that the Court will condone a flagrant disregard of its Rules, but all depends on the surrounding circumstances and whether the other party would suffer any prejudice through such condonation. Labour Courts have been established as Courts of equity and are enjoined to dwell more on substantive justice than on legal technicalities. It was held in ***Society of Bank Officials v First National Bank of Southern Africa (1996) 17 ILJ, 135 at 139*** that;

> ***Equity will be ill-served if this Court was to allow its quest for the promotion of fairness, indeed its statutory duty to advance fairness under its equitable jurisdiction to be frustrated by a narrow legalistic approach to matters before it. Only in extreme cases should the Court permit technical hurdles to block its pursuit of fairness.***

5.2.4 The Court does not find applicant's failure to file the review application through an originating application to have been so grave as to warrant the invalidation of the proceedings. Again, 1st respondent did not show what prejudice he would suffer. 1st respondent's point ***in limine*** in regard to the proceedings

having been initiated through a notice of motion as opposed to an originating application is therefore dismissed.

5.*3 MATTER NOT REVIEWABLE*

5.3.1 The third point raised by the 1st respondent's Counsel was that the grounds of review are misconceived, and the matter is in fact an appeal brought under the guise of a review in that the application concerns itself with the findings of the Arbitrator only and nowhere does it raise grounds of review. It is worth reminding ourselves at this juncture that in terms Section 228F of the Labour Code (amendment) Act, 2000, as amended, DDPR awards are only reviewable and not appealable.

5.3.2 1st respondent's Counsel contended further that the applicant's basis for the review is that the DDPR award was not supported by evidence or law, thereby questioning its finding. He submitted that the Arbitrator's award cannot be faulted as he had clearly indicated that he finds on a balance of probabilities that by installing a telephone at a location not designated in the work order and failing to record it could have been an act of negligence rather than dishonesty, and had authorities to support him. He maintained that the test for interference by way of review is that no reasonable person could have come to that conclusion, a point which the applicants did not plead. He reminded the Court that reviews concern themselves with the method of reaching the conclusion, any omission, irregularity or impropriety in the proceedings, while an appeal refers to the conclusions themselves either in fact or law.

5.3.3 In response applicant's Counsel maintained that the reviewability or otherwise of this matter cannot be addressed at the preliminary stage, but on the merits so as to consider the merits and demerits of the entire application, and prayed for the dismissal of this point as well. We disagree with applicant's Counsel in this regard. The reviewability or otherwise of a case can be raised as a preliminary point, as it can either sustain or destroy a claim.

5.3.4 On whether the review is misconceived, we revisited the grounds of review as tabulated at paragraph 4 above. On the face of it, the matter appears reviewable. In an unfair dismissal claim the duty of the Court or the Tribunal, as the case may be, is to ascertain whether the employer had a valid reason to dismiss (substantive fairness) and further whether in effecting the said dismissal a fair procedure was followed (substantive fairness). The record reflects that the 1st respondent had challenged both the substantive and the procedural fairness of his dismissal. The

issue then becomes whether the learned Arbitrator in reaching his conclusion confined himself to determining the validity and fairness of 1st respondent's dismissal or went beyond this test as alleged by the applicant by unduly getting into an area which is otherwise a managerial prerogative. This will be ascertained as aforementioned through examining whether the employer had a valid reason to dismiss and whether in effecting the said dismissal he had followed a fair procedure. Looking at the grounds for review holistically**,** the Court finds the case to be likely reviewable and orders that it be set down for hearing on the merits to enable it to assess whether the learned Arbitrator committed any irregularity which would warrant the disturbance of his award.

The Court finds no reason to mulct the 1st respondent with costs. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 15TH DAY OF DECEMBER, 2010.

F.M. KHABO
DEPUTY PRESIDENT

J.TAU **I CONCUR**
MEMBER

T.TWALA **I CONCUR**
MEMBER

FOR THE APPLICANT: ADV., S. RATAU
FOR THE 1st RESPONDENT: ADV., L.A. MOLETE