

HELD AT MASERU

In the matter between:

‘MANTSANE RANTEKOA

APPLICANT

and

NEDBANK (LESOTHO) LTD
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

Date: 25/10/10

Application for review of arbitration proceedings-In reaction 1st respondent raising a point in limine to the effect that the application is an appeal brought in the guise of a review - Court has no power to entertain appeals - Principles distinguishing reviews from appeals revisited - Applicant mainly pleading a mistake of law by the Arbitrator Court finds allegation of mistake of law unsubstantiated - Application dismissed.

1. The applicant is a former employee of Nedbank (Lesotho) Ltd, 1st respondent herein. At the time of her dismissal she held the position of Head of Sales, a managerial position. She challenged the said dismissal before the Directorate of Dispute Prevention and Resolution (DDPR) and was unsuccessful. Dissatisfied with the DDPR award, she approached the Labour Court to have the award reviewed, corrected and set aside.

2. It was common cause that applicant's dismissal arose from her membership of a grocery club whose objective had been to buy grocery at the end of the year. Prior to her dismissal, she had been charged with being a member of a grocery club in breach of a prohibition of such clubs by the bank; Secondly, engaging in activities

that were in conflict with the activities of the bank and lastly, failing to disclose her membership of the club to the bank.

3. In reply to the application for review, 1st respondent's Counsel, advocate Sephomolo, raised a point *in limine* to the effect that the said application is in fact an appeal cloaked as a review. She submitted that the applicant is challenging the correctness of the decision of the Arbitrator and not necessarily the decision making process. She contended that the review application as set out reflects grounds for appeal as opposed to grounds for review, and warned that this Court has no power to entertain appeals under the Labour Code. She cited some cases in support of her submission in which the Court drew a distinction between a review and an appeal.

4. These included the case of *Tieho Potlaki v Lesotho Electricity Corporation LC/REV/396/06* www.saflii.org per Lethobane P., in which the Court drew a distinction between reviews and appeals and restated a number of cases including *Johannesburg Consolidated Investment Co., v Johannesburg Town Council 1903 TS 111* in which the Court held that;

“the term judicial review denotes the process by which apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before this court in respect of gross irregularities occurring during the course of such proceedings.”

She further cited the case of *‘Mamatalase Lieta & 23 Ors v Lesotho Electricity Corporation* (then) *LC/REV/119/06* (unreported) per Khabo DP., in which it was pointed out that on review it is not the Arbitrator's decision that is challenged but the manner in which it was arrived at. Advocate Sephomolo observed that the applicant has alleged in her papers that none of her submissions were dealt with, but a look at the award reveals that the learned Arbitrator considered all her evidence and therefore any intervention by the Labour Court would be tantamount to interference with a discretion lawfully exercised.

5. Advocate Teele for the applicant, vehemently opposed the point *in limine* and implored this Court to tread carefully in its determination of the reviewability of this matter because as he has observed Section 228 F of the Labour Code (Amendment) Act, 2000 tends to bring a lot of confusion. He pointed out that this Court tends to overlook the wide powers conferred upon it under the said Section. He started off by addressing the question of review in great detail, and submitted that the first thing to look at in determining whether a matter is reviewable is to

consider the character of the body whose decision is subject to review. He contended that more often than not, there is a tendency to fail to make a distinction between review of courts of law and public bodies. He stated that it is critical to consider the nature of the body to be reviewed. Such bodies, he maintained, may be categorised into three. The first category being Courts of law, both civil and criminal, the second, public bodies which have powers to exercise administrative or quasi-judicial functions and lastly, bodies over whom review powers are conferred by statute. He warned that powers of review over this last category are wider than review in the ordinary sense as they incorporate appeals.

6. He submitted that Section 228 F (3) of the Labour Code (Amendment) Act, 2000 (as amended) which provides that;

The Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision

clearly encompasses appeal powers. By being entitled to review any mistake of law that materially affects a decision, appeal is contemplated. Substantiating this point, he indicated that this means that where the law has not been properly applied or an irrelevant consideration has been made, the decision is reviewable. The Court further has to determine whether such mistake of law materially affects the decision. According to him this means that the Arbitrator is not entitled to make a wrong decision in law. He argued that even if it appears that the Arbitrator applied his mind to the issues at hand, but if he comes to a wrong legal conclusion, the decision becomes reviewable. In this sense review is synonymous with appeal and cited in support of his argument the case of ***Receiver of Revenue v Sadeen 1912 AD 339 at 342***. All in all, applicant's Counsel's argument is that the powers of review imposed on this Court are so wide as to include appeal powers. In essence he agrees with 1st respondent's Counsel that the grounds for review that he has raised could be grounds for appeal, but this Court has power to determine them by virtue of the wide powers contemplated under Section 228 F. He therefore prayed that the point in *limine* be dismissed.

PRINCIPLES DISTINGUISHING APPEALS FROM REVIEWS REVISITED

7. The distinction between appeals and reviews has been raised in a plethora of authorities, but it continues to be a sticking point. Perhaps to heed applicant's Counsel's advice we should first establish the nature of the entity that determined the decision that is now a subject of the present review application. That entity is the DDPR, a body established by statute, the Labour Code (Amendment) Act, 2000

and deriving its powers there from. It is a public body and has been established under Section 46B of the said legislation as a juristic person, and its functions include the resolution of trade disputes through arbitration. It is not a court of law - see *Attorney General v Lesotho Teachers Trade Union & Others 1995 - 1999 LAC 119*. Much as the DDPR is not a court of law, it exercises judicial functions through arbitration. It is trite that decisions made in the exercise of judicial functions do not amount to administrative action - see *Nel v Le Roux NO & Others (1996) SA 562 (CC) at p. 576 C para. 24*. It therefore follows that review of DDPR awards is not review of an administrative action.

8. No appeals lie against the decisions of the DDPR. Generally, where the reason to have a judgment set aside on the grounds that the Court came to a wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where on the other hand, the grievance is against the method of the trial, it is appropriate to bring the case on review - See *Herbstein & Van Winsen in The Civil Practice of the Supreme Court of South Africa* 4th ed., 1997 at p. 932. According the learned author Baxter in *Administrative Law* 3rd ed, 1996 review is concerned with the legality of the decision and not its merits. The exposition of the learned authors Herbstein & Van Winsen (*supra*) on the distinction between the two remedies of appeal and review is very illuminating. They stated at p. 929 that;

Judicial review is in essence concerned, not with the decision, but with the decision-making process. Upon review the court is in general terms concerned with the legality of the decision, not with its merits.

Furthermore at p.933 they pointed out that;

The essential question in review proceedings is not the correctness of the decision under review but its validity.

Validity here refers to the reasoning behind the decision or the process. It follows in our situation therefore that it is not the Arbitrator's decision that is under review but the reasoning behind it or the process followed in reaching it.

9. The meaning of the word “review” as espoused in *Johannesburg Consolidated Investment Co v Johannesburg Town Council (supra)* by Innes CJ., at p. 114-16 is authoritative and has been over the years. If one may recapitulate on its meaning in the said judgment and to which applicant's Counsel is agreeable;

It denotes the process by which, apart from appeal, the proceedings

of inferior courts of justice, both Civil and Criminal are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings ...

This may be summarised as review of proceedings of inferior Courts;

secondly,

Whenever a public body has a duty imposed upon it by statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them ...

This refers to review of proceedings of administrative or quasi - judicial bodies, and is ordinarily referred to as review under the common law;

and thirdly, where

The Legislature has conferred upon a Court a power of review ... meant to be far wider than the powers it possesses under either of the review procedures.

Review powers under this species of reviews is wider than the ones in the above two categories. It pertains to review of proceedings of certain statutory bodies or review in its widest sense.

10. Awards of the DDPR are subject to review by the Labour Court per Section 228 F of the Labour Code (Amendment) Act, 2000 as amended in 2006. As aforesaid, grounds upon which a review may lie are in terms of Subsection (3);

any grounds permissible in law and any mistake of law that materially affects the decision.

The DDPR not being a court of law but exercising judicial functions, could be categorised as a quasi - judicial body, subject to reviews under the second species of reviews according to the classification in ***Johannesburg Consolidated Investment Co., (supra)*** that is, reviews under the common law of decisions of a body or tribunal vested with specific statutory powers. “[A]ny ***permissible grounds permissible in law***” should be interpreted to include the various grounds of review under the common law.

11. The common law powers of review were restated in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another, 1988 (3) SA 132 (A) at 152 A-E* as follows (with reference to a decision of the president of the Johannesburg Stock Exchange) that;

Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. Such failure may be shown by proof, inter alia that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the manner aforestated”.

12. Over and above this common law powers, decisions of the DDPR are subject to review for **“any mistake of law that materially affects [its] decision.”** The Legislature saw it fit to add **“mistake of law”** as a further ground for review. This is a wider power than the common law powers of review. Generally, a mistake of law is an appealable ground, but to the extent that it forms a ground of review under the Labour Code, the Legislature has conferred upon the Labour Court a power of review far wider than the powers it possesses under the common law (the **“permissible grounds for review”**). This review powers would fall under the second category of the definition of review in the *Johannesburg Consolidated Investment Co., (supra)*. One must however hasten to warn that this wider power of review does incorporate appeals but is only limited to a **“mistake of law that materially affects the (DDPR) decision”** and not any other ground.

13. On the above analysis, the test as to whether or not the matter before us is reviewable becomes whether the learned Arbitrator failed to apply his mind to the relevant issues by either arriving at the decision arbitrarily, capriciously, ignoring relevant considerations or reaching a grossly unreasonable decision, the test in *Johannesburg Stock Exchange and Another (supra)*, or whether he has committed a mistake of law that has materially affected his decision.

14. In order to answer this question, one would have to consider applicant's grounds for review. The Court will attempt to summarise the grounds as they have been presented in a rather lengthy manner. The applicant alleged that she had been subjected to an oppressive cross-examination; that the learned arbitrator ignored certain evidence; that the learned Arbitrator failed to appreciate that grocery clubs were a common phenomenon among Basotho women and impinged on family responsibility; that there was no conflict of interest between banking and grocery clubs. In his submissions applicant's Counsel emphasised that the Arbitrator has a duty to arbitrate over trade disputes in terms of labour laws of this country. He argued that this matter is reviewable because if labour laws of this country provide that it is automatically unfair for a person to be dismissed on account of family responsibility and the learned Arbitrator finds differently he would be disregarding his duty imposed by law.

15. A number of review grounds had been raised in the pleadings but Counsel concentrated on the ground that he said impinged on family responsibility. He submitted that the learned Arbitrator's decision shouldn't be allowed to stand as its importation discriminates against women. He submitted that by dismissing applicant's claim before the DDPR he committed a mistake of law which materially affected his decision rendering it reviewable under Section 228 F (3) of the Labour Code (Amendment) Act, 2000. He submitted that the learned Arbitrator may have applied his mind to the claim but reached a wrong decision in law in that he misconceived the law relating to family responsibility, thereby committing a mistake of law. He defined "*mistake of law*" as a situation where the law has not been improperly applied or irrelevant considerations have been made. He emphasised that the Arbitrator is not entitled to make a wrong decision as he is bound by law. According to him, a mistake of law that materially affects the Arbitrator's decision is not confined to considerations of procedural impropriety but to the conclusion itself, that is whether it complies with the law.

16. Applicant's Counsel was at pains to advance this point as he felt Section 228 F (3) is generally interpreted very narrowly. There was no allegation that the Arbitrator did not apply his mind to applicant's claim. Looking at the record of proceedings and the reasoning in the award, the learned Arbitrator seem to have addressed all the issues that were presented to him, and in a very clear and organised manner. We feel he has applied his mind to them. We appreciate that the Section contemplates review in a wider sense, but I have a serious problem with the argument even where the Arbitrator applied his/her mind to an issue if an aggrieved party feels he has reached a wrong legal conclusion the matter is reviewable. This begs the question, what is a wrong legal decision? It is too broad,

and it will lead to a situation where every case in which the decision depends upon a legal determination will qualify for a review thereby blurring the distinction between reviews and appeals. Surely, there's a reason the Legislature decides on either a procedure by appeal or a procedure by review for claims, and it just has to be observed. For instance,

the purpose of review is to ensure that certain fundamental values are upheld, that 'due process' is followed.

See ***Solomon v Commission for Conciliation, Mediation & Arbitration & Others (1999) 20 ILJ, 2960 at p. 2967.***

Applicant's Counsel wants this Court to indirectly challenge the outcome as opposed to the process.

17. Applicant's Counsel tried to fit his claim into a ***"mistake of law"*** that materially affected the DDPR decision as envisaged by Section 228 F (3) of the Labour Code (Amendment) Act, 2000 (as amended) but failed to convince the Court that it was. All in all, applicant's Counsel alleged that the learned Arbitrator committed a mistake of law that materially affected his decision but failed to clearly demonstrate to the Court what mistake of law had been. We could not agree with his conceptualisation of a ***"mistake of law that materially affects an Arbitrator's decision"***. In our view, mistake of law relates to the application of a wrong law, a wrong interpretation or construction of a law by the decision - maker. The issue then becomes which law this is, is it the common law or a statutory provision? Applicant's Counsel's papers and submissions could not point to a law that the Arbitrator had misconstrued.

18. Applicant's Counsel also raised another issue basing himself on ***Selitse and Another v Lewis Stores (Pty) Ltd LAC /A/07/07*** which concluded that where the decision of the DDPR cannot be supported by evidence there is a legitimate ground for review and in doing so the Labour Court has to look at the evidence and re-evaluate it, but in his submissions he did not really delve into it. He just discussed it as a principle but did not relate it to his review application by way of ascertaining how the DDPR award was not supported by evidence. The issue was therefore not before us for determination.

19. Having heard both Counsel's submissions, and considered the principles governing reviews as opposed to appeals, we come to the conclusion that the applicant has not been able to convince the Court that her grounds of review fall

within the ambit of Section 228 F of the Labour Code (Amendment) Act, 2000 (as amended) and are reviewable. The application for review is therefore dismissed.

The Court has found no compelling reasons to mulct the applicant with costs as prayed for by the 1st respondent. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 25th DAY OF OCTOBER, 2010.

F.M. KHABO
DEPUTY PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR THE APPLICANT:
FOR THE 1st RESPONDENT:

ADV., M. E. TEELE KC
ADV., L. SEPHOMOLO