

IN THE LABOUR COURT OF LESOTHO

LC/REV/32/09

HELD AT MASERU

In the matter between:

SEOTLONG FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

‘MAKHOMARI MOROKOLE

1st RESPONDENT

**ARBITRATOR - DIRECTORATE
OF DISPUTE PREVENTION AND
RESOLUTION**

2nd RESPONDENT

JUDGMENT

Date: 19/04/11

Application for review of an arbitral award - On grounds that it was inappropriate for the Arbitrator to have ordered reinstatement where the dismissal had only been found unfair solely for want of compliance with a proper procedure but otherwise substantively fair - Court finds reinstatement to have been an inappropriate relief - Considering that even if procedural impropriety was found, it ought to have been weighed against factors such as the reason for dismissal, whether the employment relationship was still harmonious and not impaired in anyway.

1. The applicant is a Financial Services provider, and the 1st respondent is its former employee. The 1st respondent had been in the employ of the applicant from 1st July, 2008 to 21st November, 2008 when she was summarily dismissed for absenteeism. Subsequent thereto, she challenged the fairness of this dismissal on both substantive and procedural grounds before the Directorate of Dispute Prevention and Resolution (DDPR). The Arbitrator found that the dismissal was substantively fair but procedurally unfair in that the applicant had failed to afford

the 1st respondent a hearing prior to the dismissal as required by law. He ordered reinstatement on that basis. The applicant is before this Court to seek the review and setting aside of this reinstatement order contending that it was an inappropriate remedy where the only reason the dismissal was found unfair was that the employer did not follow a fair procedure prior to dismissal. Applicant's Managing Director, Mrs Makamane (hereinafter referred to as the MD) further contended that she had indicated before the DDPR that the position which the 1st respondent occupied is now filled, and also that her attitude left much to be desired and in the circumstances reinstatement was impractical.

2. It is common cause that the 1st respondent had been engaged to assist in the auditing of applicant's books as well as the updating of accounts and financial statements. The applicant's MD testified before the DDPR that they were in a crisis as the books were behind and needed updating. She alleged that the 1st respondent was not helpful as she absented herself from work on numerous occasions without valid reasons. She indicated that several meetings were held to reprimand her but they bore not fruits. She pointed out that they ultimately had to engage somebody else to ameliorate the situation of their books.

3. Applicant's Counsel, Mr. Khumalo, submitted that it was irregular for the learned Arbitrator to have ordered reinstatement where the dismissal was found to have been substantively fair on grounds of the 1st respondent having failed to perform her duties for which she had been specifically employed. He contended that absenteeism is a gross misconduct which warranted summary dismissal. He conceded that they were in the wrong as no formal hearing had been held prior to 1st respondent's dismissal, but felt the learned Arbitrator misdirected himself in finding for the 1st respondent. He appreciated that in ordering reinstatement, the learned Arbitrator exercised a discretion. However, as far as he was concerned, it was improper to order reinstatement in a situation where the position was no longer available as the Company had had to engage somebody else to update its books due to the 1st respondent's continued absence. Again, he maintained, relations between applicant's MD and the 1st respondent had irretrievably broken down. According to him, the learned Arbitrator ought to have at least awarded three months' compensation for the procedural impropriety and not reinstatement.

4. In reaction, Mr. Teele for the 1st respondent, started off by raising an objection to the nature of the application that is before Court on the basis that this Court is being asked to entertain an appeal when it has no jurisdiction over appeals. He argued that the complaint is factual and affects the learned Arbitrator's discretion and is therefore not reviewable. He pointed out that it was not sufficient for the

applicant to say it had engaged somebody else, and that she had a bad attitude. He insisted that the applicant cannot be heard to claim that reinstatement is impractical when it took the risk on its own accord to hire 1st respondent's replacement. As far as he was concerned, applicant's MD appeared to have been shrouded by some sense of insecurity. He referred here particularly to the allegation that the 1st respondent was communicating directly with applicant's Chairman of the Board and bypassing her MD. He agreed with the learned Arbitrator's finding that relations between the parties had not irretrievably broken down, and submitted that the application for review is misconceived and should therefore be dismissed. The Court is therefore called upon to determine whether it was appropriate for the learned Arbitrator to have ordered reinstatement in the circumstances of this case.

5. However, before going into this issue, we wish to delve into the issue raised by 1st respondent Counsel that the applicant has brought an appeal under the guise of a review. We wish to commence by indicating what a review entails. Section 228F (3) of the Labour Code (Amendment) Act, 2000 as amended by the Labour Code (Amendment) Act, 2006 sets out grounds for review and reads;

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

The Section refers to “***any grounds permissible in law***”. This envisages the normal common law grounds for judicial review. Generally, judicial review is concerned, not with the decision, but with the decision-making process. Procedural irregularities cover issues such as bias/likelihood thereof, irrationality/unreasonableness, illegality, arbitrariness or capriciousness. Having analysed the grounds of review *in casu*, we come to the conclusion that they impinge on the reasonableness/rationality of the learned Arbitrator's decision, that is, whether it was reasonable in the circumstances of this case for the arbitrator to have ordered reinstatement.

WAS REINSTATEMENT AN APPROPRIATE RELIEF IN THE CIRCUMSTANCES OF THIS CASE?

6. 1st respondent's immediate dismissal arose from her absence from work on 21st November, 2008. She testified before the DDPR that she had gone to a funeral parlour for sending off rites of someone who had departed. Applicant's evidence is that when she left, the MD was not in, so she had informed her colleagues that she was leaving. Upon her return, she was served with a letter of dismissal with immediate effect. Section 66 (4) of the Labour Code Order, 1992 prescribes that an

employee be given an opportunity to defend himself/herself against allegations leveled against him/her prior to a dismissal. The DDPR therefore rightly found the dismissal to have violated labour laws on procedural grounds. Applicant's Counsel acknowledged this flaw, but had a problem with an order of reinstatement where the employer had been found to have had a valid reason to dismiss on account of an employee's conduct. In this case, there was overwhelming evidence before the DDPR that the 1st respondent had absented herself from work on several occasions during the tenure of her employment.

7. In his analysis, the learned Arbitrator found the 1st respondent to have failed to draw a line between her role as one of the Directors of the Company and as an employee. It emerged from the DDPR proceedings that both the 1st respondent and applicant's MD were Directors of the Company (the applicant herein). They also owned a catering company registered as Gremomak and run by the 1st respondent, hence one of the complaints levelled against her by the MD was that she did her catering jobs during working hours. All in all, the learned Arbitrator found the applicant to have had a valid reason to dismiss the 1st respondent due to her incessant absenteeism. He concluded that there was sufficient evidence to prove that the 1st respondent was frequently absent from work and applicant's financial statements continued to be behind leading the latter to engage temporary help to fill the void (paragraph 15 of the award). Applicant's MD's evidence regarding 1st respondent's absenteeism, was corroborated by two witnesses, one Moipone Mosebo and Thato Leuta. The learned Arbitrator ordered reinstatement which culminated in this application for review.

8. Section 73 (1) of the Labour Code Order, 1992 (as amended) by the Labour Code (amendment) Act, 2000 provides remedies for the unfair dismissal of an employee. It provides that:

If the Labour Court or arbitrator holds the dismissal to be unfair, it shall (emphasis mine), if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal.

Undoubtedly, the Legislature intended reinstatement to be the primary remedy if a dismissal has been found to be unfair. The Legislature was however prudent enough to acknowledge that there are situations where reinstatement may not be possible or fair. To this end, Section 73 (1) of the Labour Code Order, 1992 (as amended) further provides in part that the Court shall not order reinstatement -

If it considers reinstatement of the employee to be impracticable in the light of the circumstances.

Subsection (2) thereof provides that:

If the Court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court or arbitrator shall be such amount as the Court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses.

9. The Labour Court and the DDPR therefore have two options of reliefs open to them in an unfair dismissal case *viz.*, reinstatement or compensation or both. The decision to either order reinstatement or compensation in the particular circumstances of a case is discretionary. The discretion must, of course, be exercised judicially. The relevant considerations in the exercise of this discretion will vary according to whether the dismissal is substantively or procedurally unfair or both. In exercising this discretion, the Court will be required to embark upon a ***“traditional assessment of facts that are relevant and have been properly tendered in evidence, and in so doing rely on considerations of common sense and justice”*** – see Brassey: Employment and Labour Law Vol 3 A8:73. The overriding consideration must be one of fairness to both the employer and the employee. The ultimate test being whether in all the circumstances of the case it is just and equitable either to grant or refuse compensation. One is enjoined to carefully weigh up a constellation of factors not least of which is the prejudice to both parties.

10. It is significant to note that applicant’s MD was opposed to the granting of reinstatement to the 1st respondent before the DDPR bent on the assertion that 1st respondent’s position had been filled and that with applicant’s attitude it would be difficult to reinstate her to her former job. Applicant’s Counsel insisted that in the circumstances, the DDPR ought to have ordered compensation. Hence, he prayed that the Court order at least three months’ compensation for the procedural

impropriety. We are inclined to agree with him on the aspect of compensation being a more appropriate relief in the circumstances of this case. The relations between applicant's MD and the 1st respondent were obviously strained. There are several pointers to this effect;

- (i) the allegation, which was not disputed, that communication between applicant's MD and the 1st respondent had broken down to the extent that the latter was bypassing her and communicating directly with the Chairman of the Board;
- (ii) the scuffle over office space with the 1st respondent wanting to occupy the MD's office when it had been clearly explained to her that she should not occupy it;
- (iii) the evidence that at some stage the 1st respondent sent a Short Message System (SMS) to inform her MD that she would be absent from work to attend a choral music competition outside the country, instead of telling her in a formal manner; and
- (iv) the fact that the 1st respondent herself testified before the DDPR that they were having problems because the MD did not approve of her efforts aimed at improving the company.

Clearly, there was a breakdown of relations here. There was also broken trust between the two parties.

11. One of the primary duties of an employee is the duty to serve. The duty imposes on the employee a positive duty to provide his/her services in the manner, to the standard, and the time agreed upon between him/her and the employer. The employee must also comply with the duty/obligation to respect which entails submission to the employer's authority. Again, if an employee undertakes to perform a particular task, he/she must perform it with the degree of diligence – that is, care, skill and commitment agreed to by the parties. The employee must also do nothing to impair the employer's confidence in him/her - Generally on duties/obligations and rights of employers and employees see Brassey: Employment and Labour Law Vol. 1, Juta, 2000.

12. The nature of applicant's establishment is also significant in ascertaining whether to order reinstatement or award compensation. This Court decided in *Sekhonyana Seemahale v Superknitting (Pty) Ltd LC 21/10* (reported in

www.saflii.org/ls) per my brother, Lethobane P., that in ordering reinstatement the learned Arbitrator “*lost sight of the fact that the organization she was dealing with is not a public entity but a private one and personal feelings go a long way to determine whether an employment relationship between the parties is still viable.*” Applicant *in casu* is a private entity, and surely as pointed out by my brother Lethobane P., interpersonal relationships are crucial. Moreover, the respondent’s MD had indicated at the DDPR that he no longer liked to work with the applicant but reinstatement was nevertheless ordered.

13. The reason for dismissal is also critical for a determination of which relief is viable. 1st respondent’s dismissal, as aforementioned, was actuated by absenteeism. Surely, this is a misconduct, as rightly pointed out by applicant’s Counsel. The learned Arbitrator found the reason for dismissal to have been a valid one, that is, one that is sufficient to warrant a dismissal. Weighing the reason for dismissal against an order of reinstatement in this case, we conclude that reinstatement was not a proper relief in the circumstances. In reaching this decision, the Court also took into consideration the fact that 1st respondent violated some of the implied terms of an employment contract as shown in paragraph 10 above, that is, the duty of obedience, respect and co-operation.

14. If the dismissal is found to be substantively fair, that is, for a valid reason, but procedurally wrong it is a case in which an employee does not deserve to continue in the employ of the employer in any event because there was a fair reason to dismiss such an employee and the employer only got the procedure wrong. However, where the dismissal is found to be unfair on substantive grounds, it is a case of an employee who should not have been dismissed in the first place. The case before us fits into the first scenario. The danger of ordering reinstatement where there is a valid reason to dismiss and the defect is only of a procedural nature, is that a procedural defect can always be cured or remedied. Such that the employer may reinstate the employee only to immediately put in motion a proper process leading to a dismissal.

15. Reinstatement is rather problematic where the dismissal was unfair only because the employer did not follow a fair procedure. This Court in ***Central Bank of Lesotho v DDPR, Arbitrator Shale and Mpho Ivonne Mofokeng LC/REV/216/06*** (unreported) reviewed and set aside a case in which the learned Arbitrator had ordered reinstatement in a case in which an employee had been charged with the irregular disbursement of money. The employee, 3rd respondent, had been found guilty as charged on the basis of her own admission of guilt. She did not challenge the evidence tendered, and witnesses on behalf of the employer

had given chilling details of how she had breached established procedure, an act which put the reputation of the bank on the line. The employer was taken to have had a valid reason to dismiss.

16. The learned Arbitrator however found the employee's dismissal to have been procedurally flawed in that the bank's disciplinary committee had been improperly constituted, and thereby ordered the reinstatement of the 3rd respondent to her position as a banking officer. The bank approached this Court to have the arbitrator's decision reviewed and set aside. The Court found that it was not suitable for the learned Arbitrator to have ordered reinstatement considering (i) 3rd respondent's guilty plea; (ii) the fact that she had not challenged the applicant's chilling account of her total disregard of important procedure of checks to prevent fraud; and lastly, (iii) the question of the trust relationship in a banking sector. The Court consequently reviewed and set aside the award.

17. It also struck this Court that the 1st respondent had only been in applicant's employ for about three and half months, but the relationship was so tumultuous. Reinstatement in our opinion would not be suitable in the circumstances.

18. The Court having taken the following factors into consideration;

- (i) That there was too much friction between applicant's MD and the 1st respondent which could disturb the operations of the applicant;
- (ii) That a continued employment relationship between the parties would be intolerable;
- (iii) That employers have to be sensitised to comply with fair procedures before effecting dismissals. Besides it being a question of fairness, if all employers could comply with fair procedures before they could dismiss employees, work related disputes would be significantly reduced and there would be industrial peace.

Makes the following determination;

- (i) That reinstatement is not an appropriate relief in the circumstances of this case and that an award of compensation is more appropriate;

- (ii) The order of the DDPR in A0081/09 in respect of reinstatement is therefore reviewed and set aside;
- (iii) The Court substitutes the said order with an order that the applicant pay the 1st respondent an amount equivalent to four months' wages as compensation for the procedural impropriety. This amount must be paid to the 1st respondent within thirty (30) days from the handing down of this judgment.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 19TH DAY OF APRIL, 2011.

F.M. KHABO
DEPUTY PRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR THE APPLICANT:

**MR. KHUMALO ASSISTED BY
MS. M. CHOBOKOANE**

FOR THE 1ST RESPONDENT:

MR. TEELE KC