

HELD AT MASERU

In the matter between:

PASCALIS MOLAPI

APPLICANT

And

METRO CASH AND CARRY (PTY) LTD

RESPONDENTS

JUDGMENT

Date: 13th September 2012

Application for review of arbitration award. Applicant having filed an unfair dismissal claim. Applicant being granted an award for reinstatement status quo ante dismissal. Applicant later retiring and subsequent thereto claiming provident fund and unpaid leave before the DDPR. Arbitrator dismissing claim as being res Judicata. Applicant seeking the review of DDPR award, deeming it irregular on the ground that the matter is not res Judicata. Court finding the award irregular and setting it aside and ordering a hearing of the Applicant's claims for provident fund and unpaid leave, before the DDPR.

BACKGROUND OF THE ISSUE

1. This an application for the review of an arbitration award of the DDPR. It was heard on the 13th September 2011 and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 18th September 2009, reviewed and set aside. The review application was unopposed and as such it proceeded solely on the basis of the averments of Applicant.

2. Facts surrounding this application are basically that Applicant had initially referred a claim for unfair dismissal sometime in the early 1990's. His claim was dismissed by the Labour Court. He then lodged an application for review with the Labour Appeal Court. The Labour Appeal Court then ordered Applicant's

reinstatement without loss of remuneration, seniority or other entitlements or benefits which Applicant would have received but for the dismissal. The Court further directed that the Labour Court determine the emoluments and quantum thereof, due to Applicant. This matter was dealt with by this Court in line with the order of the Labour Appeal Court.

3. Pursuant to both the orders of the Labour Appeal Court and this Court, Applicant commenced his duties in November 2009 until his retirement from employment in March 2009. He then lodged a claim for provident fund and leave earned but not taken with the DDPR. His claim was dismissed through an arbitration award handed down on the 18th September 2009, on the ground that it was *res Judicata*. It is in the light of this background that he lodged this review application.

SUBMISSIONS

4. Applicant submitted that the learned arbitrator erred in law in holding that his claim was *res Judicata*, when it only accrued after his reinstatement, pursuant to an order of the Labour Appeal Court. The dismissed claims, namely that of provident fund and leave earned but not taken, arose upon his retirement and became payable then. As a result, they could not have been claimed prior to the time of his retirement.

5. It was further argued that the learned Arbitrator further erred in law by premising Her decision on that of Her colleague, in the case of *Queen Komane and Another vs. City Express Stores*. It was argued that the DDPR does not hold precedent in its own decisions and for the learned Arbitrator to have done that, it constitutes a gross irregularity. It was thus prayed that the award in C058/2009 be reviewed, corrected and set aside.

ANALYSIS

6. A review is primarily concerned with manner in which one making a decision has come to their conclusion. It seeks to determine if the decision that has been made is rationally justifiable or not. This principle has been echoed in the case of *County Fair Foods (Pty) Ltd vs. Commissioner for Conciliation and Others (1999) 20 ILJ 1701* and cited with approval in a number of judgments of this court (see *Global Garments vs. Mosemoli Morojele LC/REV/354/2006*). As a result, in an application of this nature, the Court is not concerned with the correctness of the award but rather the reasoning behind it.

7. I have considered both the award of the learned Arbitrator, the record of proceedings as well as the submissions of Applicant. It is evident from them that there was a claim for unfair dismissal after which Applicant was reinstated without loss of remuneration, seniority or other entitlements or benefits which Applicant would have received but for the dismissal. It has also been alleged that Applicant was indeed reinstated until he resigned in March of 2009. Thereafter, he referred a claim for provident fund and leave earned but not taken, which has led to the lodging of the present application.

8. It is my opinion that the above evidence was key to the final determination as to whether the matter was *res Judicata* or not. The premise of my argument is that for a claim of *res Judicata* to succeed, there are a number of requirements that must be met. Reference was made to these requirements in the case of ***Lethoko Sechele and Lehlohonolo Sechele C of A (CIV) No. 6 of 1988*** at page 5, as thus,

“... for a defence of res Judicata to succeed the judgement in the prior suit had to be:

- (a) With respect to the same subject matter;*
- (b) based on the ground;*
- (c) between the same parties.”*

9. In the circumstances of the matter at hand, a claim was initially referred which related to the fairness or otherwise of the dismissal of Applicant. The subsequent claims of provident fund and unpaid leave were not part of the referral. Although the parties and the basis of the claims may have been similar but the subject matter was different.

10. It is thus my strong view that, had the learned Arbitrator taken the above referred evidence into consideration, she would have come to a different determination that the claims referred therein were not *res Judicata*. Consequently, I find that the decision of the learned Arbitrator is not rationally justifiable as she has failed to apply her mind judiciously to the facts before her, which were relevant towards her determination of the matter. On this ground alone, the decision of the learned arbitrator deserves to be reviewed, corrected and set aside. However, as Applicant has raised two grounds for review, I shall now proceed to deal with the second one.

11. It has also been argued that the learned Arbitrator erred in law by basing her decision on that of her colleague, in an allegedly similar case as the DDPR does not hold precedent in its own decisions. I am in agreement with Applicant for the reason that the principle of judicial precedent provides that inferior courts are bound to apply the legal principles set by superior courts in cases that came prior to their case where the facts are sufficiently similar. In the present case, the learned Arbitrator relied on the decision of Her colleague to justify the decision that she made. This does not in any way fit within the dictates of the principle of judicial precedence. Consequently, I find that it was irregular for the learned arbitrator to have acted in this fashion.

AWARD

Having heard the submissions of Applicant, I hereby make an order in the following terms:

- 1) That the application for review succeeds and the award in C058/2009 is reviewed, corrected and set aside;
- 2) That the DDPR must hear Applicant’s claims for provident fund and leave earned but not taken; and
- 3) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 8th DAY OF OCTOBER 2012,

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**T. C. RAMOSEME
DEPUTY PRESIDENT OF THE LABOUR COURT OF LESOTHO (AI)**

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**Mr. M. MPHATŠOE
MEMBER**

I CONCUR

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**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**FOR APPLICANT: ADV. SELLO
FOR RESPONDENT: ADV. MABULA**