

HELD AT MASERU

In the matter between:

LEROTHOLI POLYTECHNIC
RECTOR – LEROTHOLI POLYTECHNIC

1ST APPLICANT
2ND APPLICANT

And

‘MASEBOFANE RAMAEMA
PULENG SAKOANE
DIRECTOR - DDP

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

JUDGMENT

Date: 21st November 2012

Application for review of arbitration award. Respondent raising a preliminary issue that grounds raised by Applicant are appeal disguised as review grounds. Court not finding merit in argument and dismissing preliminary point. Court not finding merit in the review grounds raised by Applicant. Review application being dismissed. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDP. It was heard on this day and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 1st October 2010, reviewed, corrected and set aside. Three grounds of review were raised in the founding documents. Respondent had also raised a preliminary issue that the grounds raised by Applicant were in fact appeal and not review grounds. Both parties made presentations in the matter and the ruling as well as reasons are in the following.

SUBMISSIONS

Preliminary issue

2. It was submitted on behalf of Respondent that the grounds raised by Applicant are in fact appeal and not review grounds. It was argued that

Applicant wanted to have the judgment set aside for the reason that the learned Arbitrator had come to the wrong conclusion. It was argued that the appropriate remedy in that case is an appeal and not a review. Reference was made to the cases of ***JD Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko and Others LAC/REV/39/04***; and ***Thabo Mohlobo and 13 others vs. Lesotho Highlands Development Authority LAC/CIV/A/2010***.

3. In response, Applicant submitted that a review is the process by which *“proceedings of inferior courts are corrected by this court “in respect of gross irregularities, on the part of the learned Arbitrator in the exercise of the powers vested in him by law, occurring during the course of such proceedings.”*

In support of the above argument, reference was made to the cases of ***Liteboho Ramoqopo and Another LAC/REV/121/2005***; ***J. D. Group (Lesotho) (Pty) Ltd t/a Price and Pride vs. Labour Commissioner o.b.o Molahli Molahli and Another LC/REV/67/2007***; ***Moleko Electrical contractors vs. Labour Commissioner obo Mokete Tsoeu and Anotehr LC/REV/20/2008***; and ***Global Garments vs. Mosemoli Morojele LC/REV/354/2006***. Applicant submitted that case at hand passes this test as the grounds raised are concerned with procedure by which the learned Arbitrator made His conclusion.

4. We are conscious of the many judgments that both parties have referred this Court to and We acknowledge that We are bound by the principles enunciated therein. We have considered the grounds of review raised by Applicant under paragraph 5 of its founding affidavit from paragraphs 5.1 to 5.3. In paragraph 5.1, Applicant challenges the fact that the learned Arbitrator found that the dismissal was unfair on a ground that was not raised or argued by Respondent. In paragraph 5.2, Applicant challenges the fact that the learned Arbitrator overlooked certain facts thus failing to take relevant considerations into account in making His decision. In paragraph 5.3, Applicant is challenging the fact that their opposition to reinstatement was overruled without any reasons being given. In our view, all these grounds relate to the process of reaching the decision and as such they *prima facie* qualify as review grounds. They are reflected under para 5 of the Applicant founding affidavit and will be analysed in the subsequent paragraphs of this judgment. Consequently this preliminary issue cannot sustain.

The merits

5. It was submitted on behalf of Applicant that the learned Arbitrator erred in law in that He found that 1st and 2nd Respondents had been unfairly dismissed due inconsistency, which ground they had not relied upon when challenging their dismissal. However, in their submissions, Applicants argued that the learned Arbitrator relied on a bare allegation of Respondents that a certain employee had committed a similar offence but was not dismissed. It was also argued that the Applicant was not aware about the conduct of that other alleged employee hence why a plea of inconsistency cannot hold. Reference was made to the case of ***Rickett & Colman SA (Pty) Ltd vs. Chemical Workers Industrial Union and Others (1991) 1 ILJ 806***. It was stated that that the Respondents had been specific that there was no reason for their dismissal and/or that the reason was invalid.
6. Respondent replied that it was denied that there was any irregularity on the part of the learned Arbitrator as one of the reasons why they challenged their dismissal was on the ground of inconsistency. It was submitted that this was part of their evidence which Applicant failed to rebut hence the finding. Reference was made to the DDPR record of proceedings.
7. The submissions of Applicant are self-defeating in that at one point it is their case that the dismissal was found to be fair on a ground that was not relied upon by the Respondents. However, they later argue that evidence was led in relation to this issue save that in their opinion such evidence amounted to bare allegations of facts not supported by evidence. In our view, and even before considering the response of Respondents, clearly the issue of inconsistency was part of the grounds raised by Respondents hence why evidence was led on it. With the submissions of Respondents in the picture, they go on to fortify our opinion that the issue of inconsistency was part of the grounds raised by Respondents in challenging the fairness of their dismissal.
8. Even assuming that this issue was not a ground relied upon by Respondent, the law enjoined the learned Arbitrator to consider the issue of consistency in determining whether dismissal was fair substantively. This is clearly captured under section 10 (1) (b) (iv) of the ***Labour Code (Codes of Good Practice) of 2003*** which read as follows,
10 (1) Any person who is determining whether a dismissal for misconduct is unfair should consider:...
(b) if a rule or standard was contravened, whether or not ...

(iv) the rule or standard has been consistently applied by the employer; and”

Consequently, this point cannot sustain and it is accordingly dismissed.

9. It was further submitted that the learned Arbitrator erred in law in that He awarded the reinstatement of Respondents while overlooking the fact that they had been negligent. It was further submitted that having found that the Respondents were negligent, He went ahead and awarded their reinstatement as if there was no wrong doing on their part, thus failing to take relevant considerations into account in making His decision. Respondent replied that the learned Arbitrator took all relevant facts into consideration as reflected in paras 7 and 8 of the arbitral award. Its submitted that the learned Arbitrator stated that Applicant had not complied with the law in terminating Respondents contracts hence why He made his conclusion.
10. We have considered the arbitral award and have found that the issue of negligence did in fact come up during the proceedings. This issue was considered by the leaned Arbitrator as appears from paras 15 to 20 of the arbitral award. Indeed as presented by Applicant, the learned Arbitrator found that the Respondents had been negligent in that they did not take all reasonable steps to execute their functions. However, the learned Arbitrator later found that in spite of His findings, the Applicant had been inconsistent in dealing with Respondent situation as they had earlier failed to terminate the employment contract of another employee who had committed a similar act of misconduct to that of Respondents, hence the issue of inconsistency. In our view, the learned Arbitrator considered all evidence and made a ruling with clear reasons for the decision He made. Consequently, this point cannot sustain as well and it is accordingly dismissed.
11. It was furthermore argued that the learned Arbitrator erred in law in that He decided to reinstate Respondents without regard to the unequivocal opposition to reinstatement by Applicant and without giving reasons why He overruled the said opposition. In reply Respondent submitted that there was no irregularity on the part of the learned Arbitrator in that He based His decision on the law and not on what parties liked. The decision of the Arbitrator took into account the fact that the relationship of trust between the parties had not demolished but the dismissal was a result of a misunderstanding and miscommunication which could be corrected.
12. We have gone through the arbitral award and have been able to confirm part of Applicant argument. We have found that there is nowhere in the

arbitral award where the learned Arbitrator discussed Applicant's opposition to reinstatement or even the reason why such opposition was overruled. We have also gone through the record of proceedings, and in particular from pages 4 to 86 which relate to the Applicant's evidence. In our inspection, We have not found anywhere in the record where Applicant made a clear and unequivocal opposition to the remedy of reinstatement being granted in favour of Respondents.

13. In our view, there was no need, as has been the case, for the learned Arbitrator to either consider such alleged opposition or to give reasons why he overruled same. The issue of opposition to reinstatement was never canvassed in evidence. In terms of the ***Labour Code Order 24 of 1992***, particularly section 73, reinstatement is the principal remedy, deviation from which may only be in the event that it is not practical to reinstate. In the absence of evidence that reinstatement was impractical, We do not find any irregularity on the part of the learned Arbitrator for the reason that the procedure He adopted was sanctioned in law. We therefore agree with Respondents and consequently dismiss this point.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

- a) That the review application is dismissed;
- b) The DDPR award in A0035/2012 remains in force;
- c) That the award be complied with within 30 days of receipt herewith; and
- d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 2012,

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

**Mr. L. MATELA
MEMBER**

I CONCUR

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MS. MAJARA IN PLACE OF ADV. MABULA
ADV. MAIEANE.**