IN THE LABOUR COURT OF LESOTHO **LC/REV/92/10**
A0768/2009

HELD AT MASERU

In the matter between:

PITSO MAHLAPHA **APPLICANT**

And

NEO LEPAMO AND ASSOCIATES (PTY) LTD **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date: 18th October 2012
Application for review of arbitration award. Respondent failing to attend hearing – hearing proceeding in default. Four grounds of review raised by Applicant. All grounds failing to sustain and review application being dismissed. No order as to costs.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR. It was heard on the 18th October 2012 and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 30th September 2010, reviewed, corrected and set aside. Facts surrounding this application are that on or around the 22nd October 2009, Applicant referred a dispute to the 2nd Respondent in terms of which he claimed an unfair dismissal and underpayment of salaries. Both claims were dismissed and Applicant lodged this review proceedings. The application was opposed but 1st Respondent failed to make appearance on the date of hearing. As a result the matter proceeded on the basis of the presentation by Applicant only. It is against this background that this application was head on this day.

SUBMISSIONS

2. Several grounds of review were raised Applicant in his notice of motion and founding affidavit. However, in his submissions, he indicated that he only had four grounds against which his review application was premised. These grounds were namely that learned arbitrator failed to apply her mind to the facts as there was no valid reason for the dismissal of Applicant; that the learned Arbitrator failed to understand that there was no hearing prior to the dismissal of Applicant; that the learned arbitrator failed to appreciate that Applicant only came to know about his dismissal upon receipt of the letter of dismissal; and that the learned Arbitrator demanded irrelevant and immaterial issues not relevant to the matter, hence committing an irregularity.

3. In amplification of the first ground, Applicant submitted that in the proceedings before the DDPR, no evidence was led on the charges that led to the dismissal of Applicant. Rather, the evidence that was led related to shortage of an amount in the tune of M40.00. Consequently, Applicant argued that clearly, there was no valid reason for dismissal as the evidence adduced related to something different from what Applicant was charged and dismissed for. We have considered both the record of proceedings before the DDPR as well as the arbitration award and have discovered that evidence was led in relation to the charges that had been preferred against Applicant. The said M40.00 is what instigated the investigations into Applicant as well as the subsequent charges. Evidence was led in relation to the M40.00 and how it led to the charges. This evidence was not only led but considered by the learned Arbitrator as appears in paras 5 to 9 of the arbitration award.

4. On the second ground, it was submitted that on the day in issue Applicant was called for a meeting in which workplace issues involving him were going to be discussed. Reference was made to exhibit “PM1” which was the letter inviting Applicant to the said meeting. Applicant argued that the learned arbitrator miscarried the whole issue in holding that a hearing was held for Applicant on the date reflected in “PM1” when none of the procedural aspects for a fair dismissal were followed. In consideration of both “PM1” and Applicant’s argument, I have formed an opinion that Applicant is dissatisfied with the conclusion that the leaned Arbitrator made, in relation to the status of the meeting that was organised for Applicant prior to his dismissal. It is clear from the construction of this ground that it is not an issue of an irregularity on the part of the learned Arbitrator but her

interpretation of the "PM1" to be an invitation to a disciplinary hearing. Clearly Applicant challenges that decision of the learned Arbitrator and not the procedure or processes following in reaching her decision.

5. This Court has pronounced itself in several cases about grounds that are valid for review. It has been said over and over that review proceedings are concerned with the process or the procedure through which the conclusions were made (see ***Thabo Mohlobo & Others vs. Lesotho Highlands Development Authority LAC/CIV/A/05/2010: also see Lesotho Highlands Development Authority Thabo Mohlobo & 19 Others LC/REV/09/2012***). Applicant has not challenged the processes of procedures adopted by the learned Arbitrator in concluding that a hearing was held. The argument is simply that she miscarried or wrongly interpreted the evidence, in particular "PM1," to mean that a hearing was held. Consequently this point fails.

6. In relation to the third ground of dismissal, it was submitted that Applicant only came to know about his dismissal upon receipt of his letter of termination of employment and that in that letter no reason for the dismissal was stated. It was argued that this is contrary to the established principles of procedure in disciplinary matters. As a result, Applicant maintained that the learned Arbitrator committed an irregularity by failing to take the fact that there was no reason for the termination of Applicant. Reference was made to the letter of termination marked "PM2".

7. Upon perusal of the record proceedings before the DDPR, I have noted that Applicant had raised three procedural issues which he felt constituted procedural unfairness in his hearing. These issues are reflected under his opening statements as follows,
   "1) I have never been given a letter of hearing.
   2) I was not called for a hearing.
   3) No rights contributing to hearing given to me for example
      i. To be represented.
      ii. To be given a hearing record.
      iii. To be given a hearing decision
      iv. To mitigate before disciplinary committee and others
   4) therefore the reason for dismissal is not valid."

8. The fact that no reason for the termination of his employment was given is an afterthought as it was not among them. It is being raised for the first time at the review stage. It was never part of the issues that Applicant

complained of in the DDPR proceedings and as such there was no way that the learned Arbitrator could have considered it. Applicant cannot at this stage be heard to allege an irregularity on the part of the learned Arbitrator over this issue. This Court has stated in ***Central Bank of Lesotho vs. DDPR and Others LC/REV/216/2006*** that it will not allow for a procedural issue to be raised for the first time on review as to do so would be prejudicial on the other party.

9. Lastly, it was argued that the learned Arbitrator committed an irregularity in that on the date of hearing, whereas Applicant had attended the proceedings alone, the learned Arbitrator did not proceed with the matter by way of default but caused it to be postponed. The reason for postponement was that the learned Arbitrator question the right appearance of the union representative and demanded a copy of the constitution of Applicant representative's union. According to Applicant, in doing so she demanded irrelevant and immaterial issues not relevant to the matter at hand and thus committed an irregularity. It was argued that the learned Arbitrator's conduct was also contrary to the established rules of procedure that where one of the parties is not in attendance, as it was the case, the matter ought to have proceeded by way of default. Reference was made to section 227 (8) of the ***Labour Code Amendment Act 3 of 2000*** in support of this argument.

10. As rightly pointed out, section 227 (8) of the ***Labour Code Order 24 of 1992*** as amended, provides the procedures that may be followed in dealing with a case in which only one of the parties is in attendance. This section is phrased as follows;
" if a party to a dispute contemplated in subsection (4) fails to attend the conciliation of hearing of an arbitrator, the arbitrator may –
(a) Postponed the hearing;
(b) Dismiss the referral; or
(c) Grant an award by default."

11. From the simple reading of the section, the use of the word "may" suggests that it is within the discretion of the learned Arbitrator to exercise any of the three options listed in that section from (a) to (c). This being the case, there is nothing that bound the learned Arbitrator to proceed by way of default in the absence of the other party, as suggested by Applicant. In referral A0768/2009, the learned Arbitrator had a choice of two options to either postpone or proceed by way of default. Clearly, she exercised her

discretion and made a choice to postpone the matter to allow for the presentation of the union constitution.

12. The DDPR is specialised labour disputes Tribunal that was established, among others, to protect and enforce the rights of both employers and employees. As a result, this places an obligation on the officers of this Tribunal, in particular Arbitrators, to act in line with its spirit and purport and this includes raising issues that may affect the protection and/or enforcement of rights of parties. It is alleged that the learned Arbitrator demanded irrelevant issues when she demanded a copy of the constitution of union that appeared on behalf of Applicant to determine its *locus standi* in the matter. Demanding the constitution of a party's trade union is an issue of representation.

13. Representation of parties before the DDPR is regulated under section 228 of the ***Labour Code Order (supra)***. This section states the people who may represent litigants in a referred dispute. As a result, it is the obligation of the DDPR to ensure that representation is made in line with the provisions of the law and that it does not undermine the rights of parties. It is this court's view in demanding a copy of the constitution of a union, purporting to be appearing for a party to a dispute, the learned Arbitration was executing her mandate. As a result, her conduct of demanding the constitution of the union representing applicant was not immaterial or irrelevant as it affected the rights of the other party, whether present or not.

14. Even assuming that it were to hold that it was irregular for the learned Arbitrator to have demanded a copy of the constitution of the representing union rather than to proceed by default, this point would not be sufficient to warrant the review and setting aside of the arbitration award. This is so in that even if the matter had proceeded, that would no guarantee that judgment would be entered in favour of Applicant. Whether a dispute is opposed or not, it is within the Courts discretion after consideration of all evidence led, to decided to either grant or refuse the claims. In view of this said above and assuming there was an irregularity in this conduct, this ground of review raised by Applicant would not materially affect the decision of the learned arbitrator to render it reviewable.

AWARD

Having heard the submissions of parties and having considered all papers filed of record, We hereby make an award in the following terms:

a) That the review application is dismissed;
b) That the award in referral A0768/2009 remain in force;
c) The said award be complied with within 30 days of receipt of this judgement; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 23rd DAY OF NOVEMBER 2012,

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

Ms. P. LEBITSA **I CONCUR**
MEMBER

Mr. R. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. MOSUOE**
FOR RESPONDENT: **NO APPEARANCE.**