IN THE LABOUR COURT OF LESOTHO **LC/REV/57/11**

HELD AT MASERU

In the matter between:

LETŠENG DIAMOND MINES (PTY) LTD **APPLICANT**

AND

SETENANE ELLIOT LIBE **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

DATE: 13/07/2012

Review of an arbitral award - In circumstances where the Arbitrator had ruled that an employee was entitled to a bonus due at the "end of the year" when his contract had terminated in September - On the ground that the Arbitrator had failed to apply his mind to the relevant clause in the contract - The Court considers the date of termination of the contract of employment in relation to when bonus payments fell due to be a determining factor - Court finds the Arbitrator to have committed a reviewable irregularity - The award reviewed and set aside .

1. This review application revolves on the payment of a bonus. The 1st respondent had been engaged by the applicant on a fixed term contract from 1st December, 2009 to 30th November, 2010. For reasons not disclosed by the parties, the said contract was prematurely terminated by mutual agreement between the parties at the end of September, 2010 (two months prior to the period agreed upon in the fixed term contract). What is the subject of the current dispute is not this termination but the payment of bonus. It further emerged that the parties had also agreed that the 1st respondent would be paid all his benefits as if he had served for the entire duration of the contract.

2. The learned Arbitrator had ruled in J 002- 11 that the 1st respondent was entitled to a bonus pay equivalent to Forty- Seven Thousand, One Hundred and Eighty-Nine Maloti, Twelve Cents (M47,189.12). Bonus pay was regulated by Clause 5 of the contract of employment and it read:

> ***There is no automatic thirteenth cheque payment. However, a discretionary bonus may be awarded at year's end based on the company profitability during the year and personal performance during the year.***

In paragraph 10 of his award, the learned Arbitrator pointed out that he interpreted Clause 5 to mean that the applicant would get his bonus at the end of the year. Applicants were not happy with this interpretation and lodged the present application to have the award reviewed, corrected and set aside.

3. In motivating the review application, applicant's Counsel argued that this was a misdirection on the part of the learned Arbitrator because bonuses fell due at ***"year's end"*** in terms of Clause 5 and at the material time the 1st respondent was no longer applicant's employee. 1st respondent's Counsel in turn argued that the interpretation of Clause 5 cannot stand as a ground for review as it would be tantamount to challenging the decision of the learned Arbitrator. He submitted that applicants are basically saying the interpretation was wrong, and as far as he was concerned this is a ground of appeal over which this Court would have no jurisdiction. He contended that the learned Arbitrator did his job of interpreting Clause 5 and whether or not he came to a wrong conclusion, it is not for this Court to say.

THE COURT'S ANALYSIS

4. It was common cause that bonus payments fell due in December. The gist of this review application is that the learned Arbitrator misconstrued the agreement between the parties when he concluded in paragraph 10 of his award that Clause 5 ***"is applicable to the applicant*** (1st respondent herein) ***as it appears in his contract of employment and properly construed it means that the applicant will get his bonus year end."*** The learned Arbitrator went further to point out at paragraph 11 of his award that because one of the conditions of termination was that 1st respondent's benefits would not be affected by the premature termination ***"all the benefits due to the applicant will fall due as if he served the entire duration of his contract and as a consequence thereof he will be entitled to bonus equivalent to his basic salary."*** Applicant's Counsel contended that by misconstruing and not properly interpreting Clause 5, the learned Arbitrator failed to apply his mind

properly to the wording of Clause 5 thereby committing a gross irregularity. 1st respondent's Counsel insisted that this could not stand as a ground for review.

REVIEWS GENERALLY

5. Courts are generally reluctant to interfere with decisions of functionaries statutorily vested with power to make decisions. They can only interfere where the decision is found to be arbitrary, capricious, irrational, actuated by malice or by ulterior or improper motive - See ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (2003) 24 ILJ,803(LC)***. Indeed, as aptly captured by 1st respondent's Counsel, judicial review is concerned not with the decision but with the decision-making process. What then does the concept of ***"applying one's mind"*** entail?

6. In distinguishing a review from an appeal, the Court held in ***Coetzee v Lebea NO & Another (1999) 20 ILJ, 129 (LC)*** at p. 130, that;

> ***The seeds of the distinction between the two remedies lie in the phase so commonly used to describe a process failure in the reasoning phase of the tribunal's proceedings - "the failure to apply one's mind." That test is different from the one that applies to an appeal, namely, whether another Court could have come to a different conclusion. Accordingly, once a reviewing Court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion… The emphasis is on the range of reasonable outcomes not on the correct ones.***

7. ***"Failure to apply one's mind"*** puts an emphasis on the rationality or the reasonableness of a decision. The concept was explained by Corbett JA., in ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (AD) at 152 C-D*** as;

> ***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 [Commissioner] 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 [Commissioner] was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.***

8. Adopting the reasonableness/rationality test, the issue this Court is confronted with is whether the learned Arbitrator applied his mind to Clause 5 of the contract between the parties when he concluded that the words ***"year's end"*** meant at the end of the 1st respondent's contract. In our view, the key element in the determination of this question is whether bonus was part of the benefits due to the 1st respondent at the termination/expiration of his fixed term contract. As it is, the question of ***entitlement*** kicks in here and it can only be answered in the wording of Clause 5.

9. Clause 5 has conditions attached to it, one of which is time. The Clause clearly stipulated that ***"bonus may be awarded at year's end."*** It is a basic principle of interpretation that words be given their ordinary, and grammatical or natural meaning (literal or ordinary meaning rule) - See G.E Devenish in Interpretation of Statutes, 1996 at p. 26.This confirms what was said earlier by Cross in J. Bell & G. Engle in Cross Statutory Interpretation, 1987, at p.1 that the essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand. Adopting this principle, the Court held in ***Sassoon Confirming & Acceptance Company (Pty) Ltd., v Barclays National Bank Ltd. 1974 (1) SA 641 (A) at p. 646 B*** per Jansen J.A. that:

> ***The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties.***

Aligning ourselves with this principle, the words ***"year's end"*** used in Clause 5 ordinarily mean ***'at the end of the year.'*** Unless specifically qualified as in "financial or fiscal year" ***"year's end"*** refers to the end of a ***'calendar year'***.

10. In approaching a finding, it is prudent to enquire whether the 1st respondent was ***entitled*** to the bonus due at the end of the year (December) when his contract terminated in September or in November, 2010 before the bonus fell due. Did the words ***"all the benefits due"*** in the termination agreement include bonus in 1st respondent's circumstances? As far as we are concerned, Clause 5 was no longer relevant to the 1st respondent because by the end of the year, he was no longer in the applicant's employ. His contract of employment had terminated in September, 2010 and was no longer in existence in December when bonus payments were due. Even assuming that the contract had taken its full course to 30th November, 2010, the 1st applicant would still have not qualified for a bonus which, as already indicated above, only fell due in December. It would have been a different story if 1st respondent's contract had terminated in December or any period subsequent

thereto, as he would still have been in employment or if there was a contractual term pro-rating bonuses for employees who left before year end, but unfortunately this was not the case in respect of the 1st respondent. In our view, it did not make a difference whether the contract ended in September or on 30th November, 2010. For both periods bonus had not yet fallen due.

WHETHER THIS MATTER IS REVIEWABLE

11. Is this a reviewable irregularity? Applicant's Counsel contended, among others, that the learned Arbitrator overlooked the clear wording of Clause 5. He submitted that "***the wording is clear beyond any doubt that it was a common intention of the parties that the bonus would be a discretionary matter totally dependent on a decision of the Board having regard to the profitability of the company at that specific point in time and the performance of the employee."*** In our view, the time at which termination occurred was a primary factor in the determination of entitlement to bonus.

12. As aforementioned, a review generally does not re-open the merits of a decision of the trier of the facts but only deals with the regularity of the proceedings and the legality of the process. There are however circumstances in which the reviewing Court can get into the merits of a case but as long as the reviewing Court enters into the merits not to substitute its opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order - See ***Carephone (Pty) Ltd v Marcus NO & Others (1998) 19 ILJ, 1425 (LAC) at 1426*** and ***County Fair Foods (Pty) Ltd v Commissioner for Conciliation & Others (1999)20 ILJ,1701.***These cases were cited with approval in a number of these Court's decisions including ***Global Garments v Mosemoli Morojele LC/REV/354/06***.

13. In the circumstances, we feel that the applicant could not have been held to have breached any of the terms of Clause 5 because at the time the bonuses fell due 1st respondent's employment contract with the applicant no longer existed. Timing was critical here. The applicant could only receive the bonus payment if he was still an employee of the applicant in December, 2010 when bonuses fell due. In agreeing that the 1st respondent would receive all his benefits at the end of his contract, reference was made to benefits that he would otherwise be legally entitled to, had his contract run its full course, that is, as at 30th November, 2010. The Court is not concerned with the correctness of the award but with the reasoning behind (rationality) it. The expression ***"all the benefits"*** as used in the agreement in no way conferred on the 1st respondent what he would otherwise not be legally

entitled to in terms of terminal benefits. This included the bonus pay which only accrued in December, 2010 when 1st respondent was no longer applicant's employee. It is on this ground that we find the learned Arbitrator's award unreasonable and therefore irregular. The award is reviewed and set aside.

The Court finds no reason to mulct the 1st respondent with costs. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 13TH DAY OF JULY, 2012.

F.M. KHABO
DEPUTY PRESIDENT

S. KAO **I CONCUR**
MEMBER

R. MOTHEPU **I CONCUR**
MEMBER

FOR THE APPLICANTS: ADV., P.J. LOUBSER
FOR THE 1ST RESPONDENT: ADV., N. T. NTAOTE