

HELD AT MASERU

In the matter between:

**LIMKOKWING UNIVERSITY OF
CREATIVE TECHNOLOGY (PTY) LTD**

APPLICANT

And

**TEBELLO MOTHABENG
THE DDPR**

**1st RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 14th March 2013

Review application of DDPR arbitral award. Applicant raising two grounds of review in the following,

- learned Arbitrator failing to consider all requirements of the doctrine of legitimate expectation – Court find that all requirements for legitimate expectation in terms of section 68 of the Labour Code Order 24 of 1992 were considered.

-learned Arbitrator ignored evidence material to the Applicant defence in the DDPR proceedings – Court finding that the learned Arbitrator ignored certain facts and not all of them.

Court finding that the ignored facts were material to the Applicant's defence and thereby committing an irregularity warranting interference with the arbitral award. Review application being granted and the matter being remitted to the DDPR to be heard de novo before a different Arbitrator. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDPR arbitral award in referral A0332/2011. It was heard on this day and judgment was reserved for a later date. Facts surrounding this application are basically that 1st Respondent referred a claim for unfair dismissal on the ground of non renewal of fixed term contract with the 2nd Respondent. The matter was heard over a

series of dates from the 3rd May 2011 to the 20th July 2011. Judgment was granted in favour of 1st Respondent on the 22nd August 2011. Thereafter, the Applicant lodged the present application.

2. In this application, the Applicant seeks to have the award of the DDPR reviewed and set aside on two grounds namely that,
*‘The learned Arbitrator therein erred and misdirected herself by in law finding that 1st Respondent had legitimate expectation on the basis of a mere allegation contrary to the requirements of the law relating to that principle.
The learned Arbitration erred and misdirected herself by ignoring evidence of the applicant to the effect that 1st Respondent’s conduct indicated clearly that her legitimate expectation, if any, had been extinguished, a factor which if considered would have led to a different finding in law and or such failure to consider the said evidence led to a wrong conclusion in law.’*

SUBMISSIONS

3. It was submitted on behalf of the Applicant that the learned Arbitrator failed to apply her mind to the legal requirements in a claim for unfair dismissal based on a legitimate expectation of the renewal of a fixed term contract. Advocate Macheli for Applicant, submitted that the doctrine of legitimate expectation is an administrative law principle which has been extended to the arena of labour law and that its requirements apply similarly. He submitted that it was irregular for the learned Arbitrator to have relied merely on the fact that a clause in the contract provided for the possibility of renewal. He argued that this is nothing but a mere base and cannot be taken as conclusive of a legitimate expectation.
4. In response, Advocate Russell for 1st Respondent argued that there was no irregularity on the part of the learned Arbitrator. She Stated that the learned Arbitrator observed all the requirements of a claim for non-renewal of a fixed term contract in the light of legitimate expectation for renewal. In particular, she submitted that the claim was based on the provisions of the Labour Code and the contract of employment of 1st Respondent. Reference was also made to the case of *Pretorius vs. Sasol Polymers [2008] 1 BALR 10 NBCCI*, where

the Court was faced with similar circumstances to the case at hand, and it came to a conclusion that a reasonable expectation for renewal of fixed term contract existed. Advocate Macheli rejected these arguments and contended that this case was not applicable as it concerned an employee who was on a fixed term contract who wanted to be placed on a permanent position, which is not the case *in casu*.

5. We have gone through all documentation presented before this Court and have noted a number of factors. Firstly, We have noted that the claim before the DDPR was made in terms of section 68 of the *Labour Code Order 24 of 1992*, and to be specific subsection (b) thereof. The provision of this section are as follows,

*“ For the purposes of section 66 “dismissal” shall include –
... (b) the ending of any contract for a period of fixed duration or for the performance of specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal; and ...”*

6. In Our view, this section governs the issue of legitimate expectation in the labour law of Lesotho and as such was applicable to the 1st Respondent’s case. As a result, anyone determining whether or not a party had a legitimate expectation of a renewal of their contract, is bound in law to consider the factors outlined in the provisions of section 68 (b) of the *Labour Code Order (supra)*. We have noted that in making her arbitral award, the learned Arbitrator premised her decision on the provision of this section in line with a clause in the contract that there was a possibility of renewal.

7. In paragraph 8 of the arbitral award, at page 3 thereof, the learned Arbitrator had the following to say,

“... Your appointment is for a period of 4 January 2010 to 4 January 2011, subject to renewal based on performance review. Now, this underlined part falls squarely within the confines of section 68 (b) of the Code. On the balance of probabilities, I can safely conclude that, applicant has managed to substantiate her legitimate expectation.”

As a result, We do not find how the learned Arbitrator could have misdirected herself as She simply acted on the basis of the law applicable to the claim before Her and facts presented

before Her as well. Consequently, We are in agreement with Advocate Russell that there was no irregularity on learned Arbitrator's part. However, We do note that the circumstances of the case of *Pretorius vs. Sasol Polymers (supra)* differ from those *in casu* and as such it is inapplicable.

8. It was further argued by Advocate Macheli that Applicant is also seeking a review of the DDPR arbitral award for the reason that the learned Arbitrator, in her analysis, ignored certain evidence that was adduced during the arbitration proceedings. Advocate Macheli argued that this evidence was very crucial as it formed the crux of their defence against the 1st Respondent claim. He argued that if such evidence had been considered, then the learned Arbitrator would have come to a different conclusion or that She would not have come to the wrong conclusion in law. The evidence was said to include certain admissions by Applicant which extinguished her legitimate expectation as well as the letter of complaint about her performance which was written to the HR.

9. In support of the above arguments, reference was made to the DDPR record of proceedings where the following exchange was recorded, in relation to first argument,

“Mr. Macheli: You said you knew that your contract was expiring on the 04th of January, 2011, correct?”

TM: Correct.

Mr. Macheli: So it is right to say [that] the letter you received in December (to remind you that your contract is ending) also told you what you could do if you wish to be re-employed.

TM: Correct.

Mr. Macheli: so you filled a form for re-employment?

TM: Correct.

Mr. Macheli: it wasn't renewal but re-employment application form.

TM: You are correct

Mr. Macheli: So applied to be re-employed [and] not renewal of your contract?

TM: Yes

Mr. Macheli: You wanted a new contract when you applied.

TM: you are right.

Mr. Macheli: Do you agree with me that it is the decision of the employer whom she calls for interview [and] whom she doesn't?

10. Advocate Macheli argued that clearly from the above exchange, 1st Respondent was not desirous to be renewed but that she wanted to be re-employed. He maintained that had the learned Arbitrator considered this exchange in analysing the matter in her arbitral award, She would not have come to a correct conclusion in law. He stated that the learned Arbitrator would have realised that 1st Respondent legitimate expectation had been extinguished so that she could not later claim to have had any such expectation.
11. Reference was also made to the record of proceedings where the following exchange was recorded, in relation to second argument,
“If the court could wish to know how her performance was before when she went on maternity leave, we will show that her boss had complaints about her and [d]oing her work properly, that is when two days before her leave, her boss asked that she is leaving a lot of work undone and such matters were passed on to the HR’s office which I am in charge, an example is for the past four months where have not been financial reports and stock taking, there were the core of her daily work I think that is all my lord. Thank you.
12. Advocate Macheli argued that the above exchange indicates that 1st Respondent performance was in question so that at that stage she was aware of the possibility that her contract might not be renewed on account of her performance. He maintained that in the same vein, the question of her performance extinguished her legitimate expectation of renewal. It was stated that this evidence was ignored by the learned Arbitrator in analysing the matter and that in so doing She ignored facts material to the matter which conduct warrants interference with Her award.
13. In Response, Advocate Russell submitted that the learned Arbitrator did not ignore any evidence at all. She referred the Court to page 3 of the DDPR arbitral award at paragraph 6 and stated that all the evidence that Applicant alleges was ignored is infact reflected in that paragraph. She further argued that it cannot be accurate that all the evidence led extinguished the 1st Respondent’s legitimate expectation for the reason that

Applicant failed to renew 1st Respondent's contract contrary to the provision of the *Labour Code Order (supra)*.

14. We have gone through the DDPR arbitral award and have made the following observations. In relation to the first argument on this 2nd ground, We have noted that there is nowhere in the arbitral award where these issues were considered. What simply transpired is that on paragraph 6 of the Arbitral award, the learned Arbitrator only made reference to these issues for purposes of providing the summary of the evidence presented before Her. However, She did not take them into consideration in making her final arbitral finding as her analysis of the facts only starts from paragraph 7.
15. We are of the view that these issues were very material to the case of Applicant as it denied the existence of a legitimate expectation on its part. We share a similar sentiment with Applicant that these issues had the possibility of influencing the learned Arbitrator to a different conclusion. In law this mere possibility is sufficient to warrant the review and setting aside of an arbitral award if facts carrying such weight are ignored.
16. In relation to the 2nd argument, We have noted that the relevant evidence was not ignored but rather considered and given less weight. Paragraph 12 of the arbitral award deals with that evidence and the learned Arbitrator pronounced herself on the arguments then raised. She came to the conclusion that the manner in which Applicant treated 1st Respondent's case was inconsistent with how he treated other employees. In our view, what the learned Arbitrator did was well within the confines of her discretion and that she cannot be held against conduct. However, in view of our finding on the first leg of the second ground of review, this application for review succeeds.

AWARD

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

- a) That the application for review is granted;
- b) That the mater in referral A0322/2011 be heard *de novo* before a different Arbitrator; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 18th DAY OF MARCH 2013.

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

**Mrs. N. THAKALEKOALA
MEMBER**

I CONCUR

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR 1ST RESPONDENT:**

**ADV. MACHELI
ADV. RUSSELL**