IN THE LABOUR COURT OF LESOTHO **LC/REV/87/2011**
A0288/2010

HELD AT MASERU

In the matter between:

STANDARD LESOTHO BANK **APPLICANT**

And

RAPHAEL MPHEZULU **1st RESPONDENT**
THE DDPR **2nd RESPONDENT**

JUDGMENT

Date: 20th February 2013
Review application of DDPR arbitral award. Applicant raising three grounds of review – that 2nd Respondent granted the relief not sought by 1st Respondent; that 2nd Respondent failed to apply its mind on all evidence presented; and that 2nd Respondent awarded an inappropriate relief. Court not finding merit in all review grounds and dismissing application. 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 A0288/2010. It was heard on this day and judgment was reserved for a later date. Three grounds of review have been raised in respect of which Applicant seeks to have the said DDPR arbitral award reviewed, corrected and set aside. Having heard the presentations of parties, Our judgment is in the following.

SUBMISSIONS AND FINDINGS

2. Advocate Rafoneke submitted on behalf of the Applicant that the learned Arbitrator erred in law by granting a remedy that was not sought by the 1st Respondent. He stated that the learned Arbitrator granted 1st Respondent reinstatement without loss of earnings when 1st Respondent had not asked for such a remedy. He stated that in term of the referral form,

1st Respondent only wanted to be reinstated. Reference was drawn to page 5 of the referral document. It was further submitted that it is the duty of the party to seek a specific remedy, as 1st Respondent had done, and not for the Court to grant a party what they had not asked for. Reference was made to the authority in *Phetang Mpota vs. Standard Bank LAC/CIV/A/06/2008* in support.

3. In reply, Advocate Monesa submitted that the *Phetang Mpota vs. Standard Bank (supra)* authority was misplaced and inapplicable *in casu*. He argued that in that case, Appellant had asked for payment of his salaries without complaining about his dismissal. He stated that the Court had then said that the Appellant was asking for an ancillary relief without a substantive remedy. He submitted that it was within that context that the Labour Appeal Court held that Mpota could not be granted what he had not asked for. Advocate Monese argued that in the present case, the learned Arbitrator was enjoined in terms of section 73 of the *Labour Code Order 24 of 1992*, to award reinstatement together with lost earnings.

4. Remedies for an unfair dismissal are provided for under section 73 of the *Labour Code Order (supra).* Of relevance to the case at hand is section 73 (1) thereof, which provides as follows,
   " (1) if the Court holds the dismissal to be unfair, it shall, if the employee wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal..."

5. In addressing Applicant's first ground of review, We wish to start with the authority cited in support. We have gone through it and have noted a number aspects that distinguish it from the case at hand. As rightly pointed out by Advocate Monesa, in that case, Appellant had asked for salaries as damages for his termination without challenging the fairness of his dismissal. In essence, Applicant had asked for the ancillary relief without a substantive remedy. He wanted a relief that flows from the substantive issue without contesting the substantive aspect of his dismissal.

6. *In casu*, 1st Respondent had asked for both the substantive remedy and the ancillary relief, which are the declaration of the dismissal as unfair and an order for reinstatement, respectively. In Our view Applicant has been specific as to the remedy that he sought in redress of his complaint. Clearly the circumstance of the cases are different and as such the authority that Applicant seeks to rely upon is not only inapplicable but also misplaced *in casu*.

7. Assuming that the issue was the principle enunciated, that a Court, which in this case would be the 2nd Respondent, has no competence to grant an order not sought, Applicant's argument would still not hold water. *In casu*, 1st Respondent had asked for his dismissal to be declared as unfair and that he be reinstated. In Our opinion, 1st Respondent was granted exactly what he sought and in terms of the applicable provisions of the law. The issue of the lost wages, seniority and other entitlements or benefits is ancillary to the order sought and the granting thereof is mandatory, in terms section 73 of the *Labour Code Order (supra).*

8. In essence, given the position of the law, it followed that where reinstatement is granted under section 73, it must be without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The construction of the provisions of this section are not permissive and cannot in any way be interpreted to mean that they may be varied as Applicant suggests. Consequently, this point fails.

9. It was further submitted that the learned Arbitrator erred in law by failing to apply her mind to the evidence from the disciplinary hearing. It was submitted that this evidence was intended to establish what had transpired during the disciplinary hearing. It was argued that had the learned Arbitrator applied her mind to the said evidence, She would have come to the conclusion that the dismissal of Applicant was fair.

10. In reply, Advocate Monesa submitted that the learned Arbitrator applied her mind to all the evidence that was before her. He submitted when a case for unfair dismissal has been brought before the DDPR, it is heard *de novo*. He stated that

this essentially means that Respondent to an unfair dismissal case, is expected to lead evidence to show that the dismissal was fair and not to rely on what is contained in the initial disciplinary hearing record for its evidence.

11. Advocate Monesa submitted further that in any event where certain evidence has been ignored, then that conduct is not reviewable. He made reference to the case of *Moloi vs. Euijen & another (1997) 8 BLLR 1022 (LC)* where the Court stated that disregarding certain evidence did not warrant a review. In reply, Advocate Rafoneke argued that this case is in conflict with section 73 (1) and further that even if it is not, it is persuasive and not binding upon this Court.

12. We have gone through the DDPR arbitral award, and in particular on the learned Arbitrator's analysis of evidence, from paragraphs 8 to 11. We do concede that no mention has been made about the record of proceedings as Applicant suggests. This essentially implies that the evidence of the record of proceedings of the initial hearing was ignored. However, We also wish to comment that it is also true, as suggested by 1st Respondent at least to some extent, that the mere ignorance of certain evidence in reaching a conclusion does not necessarily warrant interference with a decision so made *(See JD Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004).*

13. Essentially, from the above said, where an allegation of ignorance of evidence has been made, the alleging party must go beyond just that mere allegation to state such evidence and show how it being ignored has affected the decision reached. Put differently, the alleging party must state the evidence and show the probative effect of the ignored evidence towards influencing the decision maker to a desired conclusion. To support this suggestion is the principle of law that he who alleges bears the onus of proof *(see Schwikkard P. J, et al, (2nd Ed.), Principles of Evidence, at page 536). In casu*, Applicant has not stated what this evidence was as well as the effect in that it has barely alleged that, in ignoring evidence of the record of proceedings the learned Arbitrator committed an irregularity.

14. We wish to further comment on a few issues raised by parties in arguing this point. We do not see how the authority

in *Moloi vs. Euijen & another (supra)* is in conflict with section 73 (1) of the *Labour Code Order (supra)*. This section deal with an award of the remedy of reinstatement while the authority cited was meant to support the principle that ignorance of certain evidence does not warrant interference with an award. Whilst We do concede that the said authority is only of persuasive value to this Court, the argument raised against it does not hold water.

15. Furthermore, We confirm that claims of unfair dismissal are indeed heard *de novo* before the DDPR, at least on the merits. The effect of this position is that, the one making a positive assertions will have to discharge their burden by leading evidence in support of their assertions. If this is the case, clearly what happened in the initial disciplinary hearing cannot be used to determine the substantive fairness of dismissal of an applicant party before the DDPR. Rather, the evidence of the record of proceedings may be used to illustrate a procedural unfairness of the dismissal at the plant level.

16. It was furthermore submitted that the learned Arbitrator erred in law by ordering that 1st Respondent be reinstated. Advocate Rafoneke argued that reinstatement as a remedy, is in law determined by the evidence before Court. Reference was made to the case of *Seotlong Financial Services vs. 'Makhomari Morokole LC/REV/32/2009*. Advocate Rafoneke submitted that the learned Arbitrator awarded reinstatement on the ground that Applicant had failed to lead circumstances that make reinstatement impractical, when She was never addressed on the issue of practicality of reinstatement. He submitted that worse still is the fact that no evidence was led by Applicant to prove that reinstatement was practical.

17. In reply, Advocate Monesa submitted that contrary to what Applicant suggests, there was evidence on the issue of reinstatement. He specifically referred the court to paragraph 7 of the arbitral award, under the learned Arbitrator's summary of evidence where it is reflected that *"Applicant wants to be reinstated of the unfair dismissal."* He submitted that under the circumstances, it was the duty of Applicant to lead evidence to show that the remedy sought would not be practical.

18. Upon inspection of the DDPR arbitral award, We have noted that 1st Respondent did pronounce himself in relation to the remedy that he sought from 2nd Respondent. In fact this is not in dispute that 1st Respondent did pray for the remedy of reinstatement. In view of this said, We do not see what could have prevented Applicant from leading evidence about the impracticality of reinstatement as a remedy especially when it was known to them what remedy 1st Respondent sought. Further, Applicant has not even alleged anything on the part of the learned Arbitrator that could have caused them not to lead such evidence.

19. In law, reinstatement is the principal remedy in cases of unfair dismissal. This basically means that it should be granted at all times where a dismissal has been found to be unfair, unless a dismissed employee does not wish to be reinstated or unless the employer has shown that it is not practical to reinstate. As a result, it was the obligation of Applicant, given the nature of the claim being argued, to lead evidence to show that reinstatement was not the suitable remedy. Applicant has clearly failed to do so and the 2nd Respondent cannot be held to its omission. In line with the dictates of the principle enunciated in *Seotlong Financial Services vs. 'Makhomari Morokole (supra),* the learned Arbitrator made a determination on the basis of the available evidence, which in this case is the 1st Respondent's unchallenged claim for reinstatement. Consequently, this ground cannot succeed.

COSTS

20. Advocate Rafoneke asked for costs on the ground that Applicant's concerns with the arbitral award are obviously valid. Further, that 1st Respondent is aware that there is an obvious irregularity in the arbitral award in that he was granted the remedy that he did not seek. He submitted that as a result, 1st Respondent ought not to have opposed this matter and that in so doing, he is guilty of frivolity. 1st Respondent replied that an order of costs should be made against Applicant for the reason that their case is frivolous as their grounds are not valid. 1st Respondent prayed for costs at a higher scale.

21. We decline to make an award of costs. Our view is based on the fact that costs are awarded in extreme circumstances where a party *totally* has no basis for a claim or defence. The intention behind making an ward of costs is not to intimidate parties away from enforcing or defending their rights, but mainly to discourage abuse of court processes. We do not find the current circumstances to justify an award of costs against either party. To make such an award in the current circumstances would be to undermine the spirit and purport for making an award of costs.

AWARD

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

a) That this application for review is refused;
b) The Arbitral award of the DDPR in referral A0288/2010 remains in force;
c) Applicant must comply with the said award within 30 days of receipt herewith; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 27th DAY OF MAY 2013.

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

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

Mrs. L. RAMASHAMOLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RAFONEKE**
FOR 1ST RESPONDENT: **ADV. MONESA**