

HELD AT MASERU

In the matter between:

SECURITY LESOTHO (PTY) LTD

APPLICANT

And

**LESIA NKALOSI
THE DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 25th April 2013

Review application of DDPR arbitral award. Applicant arguing that the conclusion of the learned Arbitrator was so unreasonable that no reasonable Court could have arrived at – 1st Respondent arguing that the argument constitutes an appeal and not review ground. Court finding the argument to constitute a review ground - Court further finding the conclusion to be reasonable and dismissing review applicant. Respondent praying for costs – Court declining to make such order.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDPR arbitral award in referral A0393/2010. It was heard on the this day and judgment was reserved for a later date. Facts surrounding this matter are basically that 1st Respondent referred a claim for unfair dismissal with the DDPR. The matter was decided in favour of 1st Respondent which award lead to the current application for review. Only one ground of review has been raised in terms of which Applicant seeks to have the said arbitral award reviewed, corrected and set aside. Our judgment on the matter is in the following.

SUBMISSIONS AND FINDINGS

2. It was submitted on behalf of the Applicant that the learned Arbitrator erred in that His decision “*is grossly unreasonable to*

an extent that no reasonable man could have arrived at the same conclusion.” In amplification of this ground, reference was drawn to page 3 of the award, and in particular paragraphs 2 and 3, lines 3 to 5; and 5 to 7, respectively. These read as follows,

Paragraph 2

“ It should be noted that in the employment arena a charge sheet does not have to be couched in legal and precise terms as indictments of a fully fleshed court of law, ...”

Paragraph 3

“It is my considered view that the applicant could not have been reasonably expected to answer the charge due to the ambiguous nature of the charge sheet.”

3. Advocate Mohapi for Applicant submitted that in the matter before the DDPR, 1st Respondent’s case was that his dismissal was unfair because the charge against him was so ambiguous that he was not able to respond to. He argued that in terms of paragraph 2 of the arbitral award, the learned Arbitrator made a legal conclusion that the said charge did not need to be precise. Advocate Mohapi stated that this legal conclusion is supported by a number of legal authorities. He referred this Court to the cases of *Seboloki Leleka vs. LTA Group 5 (Mohale Joint Venture) LC/131/1996* and *Montoe Mphaololi vs. Unity English Medium School and Others LC/150/1995*.
4. He argued that despite the above legal conclusion, the learned Arbitrator went ahead to find that the dismissal of Applicant was unfair, on account of the fact that his charge was ambiguous. He stated that in his view, the factual conclusion made was not supported by the legal conclusion that was earlier made by the learned Arbitrator. He stated that in his opinion, the factual conclusion made was so unreasonable that no reasonable Court could have come to the same conclusion.
5. In response, Mr. Mahlehle argued that the ground raised by Applicant was in fact an appeal and not a review ground. He argued that Applicant challenged the conclusion made by the learned Arbitrator in finding that the charges against 1st Respondent were so unclear that they vitiated his entire dismissal. Mr. Mahlehle further submitted that there is no irregularity on the part of the learned Arbitrator as he acted within the confines of the law. He prayed that this application

ought to be dismissed with costs as it is an abuse of court process.

6. In reply, Advocate Mohapi submitted that although this ground may sound like an appeal, it was in fact a review. He further submitted that the ground raised related to the unreasonableness in the conclusion of the learned Arbitrator, which in law is a valid ground of review. Reference was made to *Baxter L, (1984) Administrative Law* at page 343 in support. He also argued that should this Court find that his review ground is valid, it ought to take the Applicants pleadings as unchallenged and thus a true and accurate reflection of what took place. His argument was based on the fact that 1st Respondent only challenged the validity of the review ground and not the merits of the matter. Reference was made to the case of *Smith vs. Smith 1954 (3) SA 434* in support.
7. 1st Respondent defence is preliminary in nature. What this essentially means is that a determination should be made on it before We proceed to consider the merits of the review application. He essentially argues that Applicant's case is an appeal disguised as a review while Applicant argues on the contrary. We are in agreement with Applicant that unreasonableness is a valid review ground. Other than the authority relied upon by Applicant, this principle also finds support in our case law. Reference is drawn to the case of *JD Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko and others LAC/REV/39/2004*. In view of Our finding, We shall now proceed to deal with the merits of the application.
8. Before We deal with the actual merits of the matter, We find it prudent to address Applicant's request for this Court to make a finding solely on the basis of his submissions. Applicant's argument in support of his request suggests that this Court should make a finding without investigating the validity of the claims that it makes. It Our opinion that it would be grossly irregular if this Court were to adopt this approach. It is this Court's duty to determining the substance of a claim placed for its consideration.
9. The fact that 1st Respondent has not opposed the merits of the review application does not mean that the onus on the part of Applicant to prove entitlement to the remedy sought, falls off. It

is trite that one making a claim against the other has the duty to satisfy the Court that he is entitled to that claim (see *Pillay vs Krishna 1946 AD 946 at 951*). Consequently, Applicant is duty bound to substantiate its claim and it is on this basis that We will proceed to analyse the merits of the matter.

10. In support of its claim, Applicant had made reference to certain paragraphs of the arbitral award. We have considered these paragraphs and have noted a problem in Applicant's argument. The quoted extract from paragraph 2 is incomplete. Fully quoted, the said extract proceeds to add that "*... however a charge sheet should be drafted in such a way as to allow the other party to come prepared to answer the allegation that he knows.*" When read with the extract that Applicant relies on for its claim, it essentially says that although a charge need not be couched in legal and precise terms, it should be clear enough to allow a party to answer it.
11. If the extract from paragraph 2 is read in full, and together with the extract from paragraph 3, there is a link between a legal conclusion drawn from paragraph 2 and the factual conclusion from paragraph 3. At paragraph 3, the learned Arbitrator makes the conclusion that the charge was not clear enough to allow 1st Respondent to respond to. This being the case, both the legal conclusion and the following factual conclusion negate the argument raised by Applicant that the learned Arbitrator's conclusion was unreasonable. Consequently, We find that the learned Arbitrator did not err.
12. On the issue of costs, 1st Respondent had premised his request on the idea that these proceedings were an appeal disguised as a review. Although We have dismissed Applicant's claim, We see no reason to award costs as prayed by 1st Respondent. We found against Applicant on account of its failure to substantiate its claim, a ground that is materially distinct from the ground against which 1st Respondent had based his request. Consequently, We declined to make an order of costs. We are inclined to this finding by the fact that We also do not find the circumstances of this matter befitting of an order for 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 A0393/2011 remains in force; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 6th DAY OF MAY 2013.

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

**Ms. P. LEBITSA
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MOHAPI
MR. MAHLEHLE**