IN THE LABOUR COURT OF LESOTHO **LC/REV/01/2011**
A0420/2009

HELD AT MASERU

In the matter between:

NEDBANK LESOTHO LIMITED **APPLICANT**

And

SETSABE LEFOSA AND 17 OTHERS **1st RESPONDENT**
THE DDPR (ARB. LEBONE-MOFOKA **2nd RESPONDENT**

JUDGMENT

Date: 30th July 2013
Review application of DDPR arbitral award. Three grounds of review raised. 1st Respondents arguing that grounds are appeal disguised as review. Court finding that grounds are prima facie review grounds. Court finding no merit in all the grounds raised. Review application being dismissed. 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 A0420/2009. It was heard on the this day and judgment was reserved for a later date. Three ground of review were raised in terms of which Applicant sought the review, correction and/or setting aside of the arbitral award of the 2nd Respondent.

2. The background of the matter is essentially that, 1st Respondents were employees of the Applicant until their dismissal for participation in an illegal strike. After their dismissals, they referred a claim for pension against the Applicant with the 2nd Respondent. 2nd Respondent made an award in their favour on the 3rd December 2010. It is the said award that Applicant seeks to have reviewed. In their opposing affidavits, 1st Respondent have pleaded to the effect that the grounds raised by Applicant in appeal disguised as a

review and have asked that they be dismissed. Both parties were given the opportunity to make presentation and Our judgment is thus in the following.

SUBMISSIONS AND FINDINGS

Appeal disguised as a review

3. Advocate Ntaote for 1st Respondent, submitted that the grounds raised by Applicant are appeal and not review. His argument was based on the book by Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa, 4th Ed.*, where the following are identified as valid review grounds,

"a) absence of jurisdiction on the part of the court;
b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
c) gross irregularity in the proceedings; and
d) the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

4. Advocate Ntaote added that the grounds raised by Applicant are not the recognised grounds of review, at least as suggested by the authors above. It was added that all the grounds raised are in effect appeal grounds as they are aimed at challenging the decision or the conclusions made by the learned Arbitrator. It was said that the complaints merely demonstrate a mere unhappiness on the part of Applicant about the decision reached in the arbitral award. The Court was referred to the authority in *JDG Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, where the learned Judge Dr. Mosito K had the following to say,

"Where the reason for wanting to have the judgment set aside is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where, on the other hand, the real grievance is against the method of the trial, it is proper to bring a case on review. An appeal is thus in reality a re-evaluation of the record of proceedings in the court a quo."

5. Further reference was made to *Herbstein & Van Winsen (supra)* at page 932-933, where the learned authors observed in the following,

"The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attached ..... The giving of a judgment not justified by the evidence would be a matter of appeal and not of review, upon this. The essential question in review proceedings is not the correctness of the decision under review but its validity."

6. Furthermore, reference was also made to the LTM Harms in *Civil procedure in the Supreme Court: Student Edition, 2nd Ed.*, at page 313, footnote 4, where the learned authors wrote as thus,
   "An incorrect judgment is not an irregularity; an irregularity refers to the method of conducting the trial..."
   On the basis of the above said, 1st Respondents prayed that the application be dismissed.

7. Advocate Phafane for Applicant, submitted that no details have been set out for the contention that the grounds are appeal and not review. Without advancing this point further, Advocate Phafane added that, that notwithstanding this said, the contention is untenable on the ground that section 228F of the *Labour Code (Amendment) Act 3 of 2000*, vests this Court with the jurisdiction to set aside an arbitral award on the grounds permissible in law and any mistake of law that materially affects the decision.

8. He went on to submit that the review grounds are that the learned Arbitrator committed an irregularity by failing to apply her mind to the evidence before her, which lead her to come to an unreasonable conclusion. It was added that the ignorance of material evidence constitutes a ground for review. Advocate Phafane went on to submit that the second ground of review is that the learned Arbitrator failed to consider the uncontroverted evidence before her, while the third one is that the learned Arbitrator awarded a remedy that was not sought. He argued that these are grounds of review.

9. Advocate Phafane made reference to the case of *Coetzee v Lebea NO & another (1999) 20 ILJ 129 (LC)* at page 130, wherein the Court stated that failure to apply one's mind constitutes a ground for review. He stated that the Court went on to state that the best way of applying one's mind is

whether the outcome can be sustained by the facts found and the law applied. He added that this authority was cited with approval in the case of *Security Unlimited (Pty) td v Lesotho Security and Allied Workers Union & others LC/REV/05/2006(unreported),* wherein the Court held that failure by the arbitrator to appreciate the issue before her, constituted a ground for review. Further reference was made to the authorities in *Mohlobo & others v Lesotho Highlands Development Authority LAC/CIV/A/2/2010*; and *Johannesburg Stock Exchange & another v Witwatersrand Nigel & another 1988 (3) SA 132 (A)* at 152A-E, in support.

10. It is Our opinion that the grounds suggested by Herbstein & Van Winsen are merely illustrative and not conclusive. Evident to this is a plethora of authorities cited by Advocate Phafane in substantiation of his argument, that the grounds raised are review and not appeal grounds. This said notwithstanding, We wish to comment that We do note and accept the principles cited in the many authorities that Advocate Ntaote has referred to, other than Herbstein & Van Winsen. It is Our opinion that they only go to the extent of demonstrating the circumstances under which review proceedings are a proper procedure.

11. However, where a challenge of this nature has been placed, the test to be applied can be found in *Khajoe Makoala v 'Masechaba Makoala C of A (CIV) 04/2009* at page 4 thereof, where the Court had the following to say,
"... whether the applicant's affidavits make out a prima facie case. Consequently the applicant's affidavits alone have to be considered and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point."

12. It is Our opinion that the Applicant's averments *prima facie* make out a clear case of review. The grounds raised relate to the procedure that was adopted in reaching the conclusion and are not so much concerned with the conclusions, as 1st Respondent would like to suggest. While it may be true that all allegations of irregularity touch on the conclusion, this in Our opinion is the extend that the conclusion is affected by the irregularities alleged. Conclusions are therefore secondary and not the primary

question in these proceedings. The grounds raised find support under section 228F of the *Labour Code (Amendment) Act (supra),* and the several other legal authorities cited by Applicant, to qualify as *prima facie* review grounds. In view of this finding, We now proceed to deal with the merits of the review application.

Merits of review

13. On the fist ground of review, Advocate Phafane for Applicant submitted that the learned Arbitrator ignored material evidence showing that payment of pensions was made to employees and certainly not to persons dismissed as a result of malfeasance. It was added that as a result, the learned Arbitrator failed to appreciate that she could not draw a comparison between dismissed employees and those that had been re-engaged. It was added that there is a distinction between employees and non employees. It was said that this was more so given that it was common cause, per the pre-arbitration conference minutes, that an employee dismissed for malfeasance would not be entitled to payment. He further submitted that it was irrational for the learned Arbitrator to have applied the principle of inconsistency where the circumstances of the two classes of employees were distinct.

14. In reply, Advocate Ntaote submitted that no evidence was ignored by the learned Arbitrator. He stated that in fact the learned Arbitrator did not only consider all material evidence, she applied her mind to all evidence. He referred the Court to paragraph 12 of the DDPR arbitral award. He added that, having considered and applied he mind to all evidence, the learned Arbitrator held that the fact that the employees who received their pensions had been re-employed did not act as a distinguishing factor that disentitled 1st Respondents from payment of same. He added that this was the basis of the conclusion of the learned Arbitrator that Applicant had been inconsistent in the application of its rules.

15. We have perused paragraph 12 of the DDPR arbitral ward. We have observed that this is the key paragraph in the award as it addresses the bulk of the parties case and defence, respectively. We have noted that the learned

Arbitrator has considered all the evidence material towards the determination of the matter, contrary to the Applicant's suggestion. The learned Arbitrator acknowledged that some of the employees were paid on the basis of the fact that they had been re-employed but disqualified that as a distinguishing factor. The comparison made in the award was not between the dismissed employee and those re-employed by but rather the entitlement of some to the exclusion of others, yet all employees had been dismissed for malfeasance.

16. In coming to Her conclusion, the learned Arbitrator had relied on the legal principle from a plethora of authorities that She cited. She made reference to the cases of *CGM Industrial (Pty) Ltd v Nkalitsoe Molieleng & another LC/REV/61/2007, CEPPWAWU & others v Metrolife (Pty) Ltd [2004] 2 BLLR 103 (LAC; SRV Mills Services (Pty) Ltd v CCMA & others [2004] 2 BLLR 184 (LC);* and *Cape Town City Council v Masitho (2000) 21 ILJ 1957 (LAC)*. The principle relied upon is record as thus,
"Consistency is not a rule as such but a principle of fairness. Where two employees have committed the same misconduct and there is nothing to distinguish them, they should be generally dealt with in the same way."

17. From the above legal conclusion, the learned Arbitrator came to the following recorded factual conclusion,
"The respondent has dismally failed to present factors distinguishing applicants from all other employees who got paid their pensions moneys. The fact that some were re-employed is not a distinguishing factor at all."
In Our view, the conclusion of the learned Arbitrator is sustained by the facts presented and the law that she applied. As a result, neither the attack that She failed to apply her mind to the evidence before Her or that Her conclusion was irrational, can sustain. There is a necessary link between the facts, the law and the conclusion that She made.

18. On the second ground of review, Advocate Phafane submitted that the learned Arbitrator committed an irregularity in that She failed to consider the uncontroverted evidence of parties, that those who received pensions did so

on the basis of their new contracts. He added that this issue was common cause between parties per the minutes of the pre-arbitration conference.

19. To support the above argument, reference was drawn to the case of *Standard Bank of Bophuthatswana Ltd v Reynolds NO (1995) 3 BCLR 305 (B)* at 318G, where the court held that where a decision maker ignores uncontroverted evidence, then the decision is null and void. Further reference was made to the case of *Carephone (Pty) Ltd v Marcus NO & 7 others (1998) 11 BLLR 1093 (LAC)* at 1103, where the Court held that there must be a rational objective justifying the connection made by the decision-maker between the material available and the conclusion made.

20. Advocate Ntaote submitted that the learned Arbitrator considered the alleged evidence. He again made reference to paragraph 12 of the arbitral award. It was his case that the learned Arbitrator considered the evidence alleged to have been ignored in that, She stated that while it is alleged that those who received their pensions did so on the basis of their new contracts, that was not a distinguishing factor. He added that this is indicative of the fact that that common cause issue was considered.

21. While We acknowledge the principle laid out in *Standard Bank of Bophuthatswana Ltd v Reynolds NO (1995) 3 BCLR 305* and *Carephone (Pty) Ltd v Marcus NO 7 others (1998) 11 BLLR 1093 (LAC),* We are in disagreement with Applicant on this ground. We have stated in Our analysis on the first ground of review that all material evidence was considered. We even went to the extent of quoting a portion in the arbitral award where such evidence was considered. We therefore reiterate the contents of paragraph 17 of this Judgment and find that all material evidence was considered including evidence that forms the subject of the second ground of review. Consequently, it cannot sustain as well.

22. Lastly, Advocate Phafane submitted that it was irregular for the learned Arbitrator to have awarded the 1st Respondent a relief that was not sought in their referrals. Reference was made to annexure NBIII. Advocate Phafane

submitted that this was sufficient cause to have the entire award set aside.

23. Advocate Ntaote replied that the learned Arbitrator granted what was sought, at least in terms of prayers (b) and (c) of the award. He added that at best, the learned Arbitrator can only be accused against further directing that Applicant submit that names and all necessary documents in respect of the applicants to Alexander Forbes Financial Services for processing of Applicant's pension monies, as this was not part of the relief sought. He prayed that the Court should correct the award by setting aside the award number (a) and not entire the arbitral award.

24. In terms of section 228F of the *Labour Code (Amendment) Act (supra)* and the authority in *Mohlobo & others v Lesotho Highlands Development Authority (supra),* a review is granted when the court finds that the mistake committed is of such a material nature that it vitiates the entire decision. It is undisputed that the learned Arbitrator committed a mistake in the sense that She awarded a prayer not sought. We have perused annexure NBIII and have made a discovery to the effect that the only prayer granted, which was not sought is prayer (a) in the award. What remains is whether the award would still stand had the mistake not been committed. This analogy is drawn from the legal conclusion in *Mohlobo & others v Lesotho Highlands Development Authority (supra).*

25. It is Our view that that award would still stand, which is to the effect that Applicant must pay all the 1st Respondents within 30 days of receipt of the award. Further, We are of the opinion, notwithstanding the apparent mistake of law in the final award, that what the learned Arbitrator awarded in award (a), was intended to give direction to parties on how to execute both awards (b) and (c). Consequently, this ground is not sufficient to warrant the review of the arbitral award as prayed by Applicant. We decline to correct and substitute award (a) of the arbitral award as that would be irregular under the current circumstances.

AWARD

We therefore make an award in the following terms:

a) The review application is refused;
b) The award of the 2nd Respondent remains in force;
c) That the said award must be complied with within 30 days of receipt herewith; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 12th DAY OF AUGUST 2013.

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

Mr. KAO **I CONCUR**
MEMBER

Mrs. MALOISANE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. PHAFANE**
FOR 1ST RESPONDENT: **ADV. NTAOTE**