IN THE LABOUR COURT OF LESOTHO **LC/REV/26/2011**
A0416/2010

HELD AT MASERU

In the matter between:

MASIANOKENG HIGH SCHOOL **1st APPLICANT**
MASIANOKENG HIGH SCHOOL BOARD **2nd APPLICANT**

And

MAKAMOHELO MOKONE **1st RESPONDENT**
ARBITRATOR DDPR
(MRS M. LEBONE – MOFOKA) **2nd RESPONDENT**

JUDGMENT

Date: 05/03/13 & 07/05/2013
Application for the review of the DDPR arbitral award in referral A0416/2010. Four ground of review raised by Applicant. Applicant not arguing all review grounds and further failing to prove any reviewable irregularities on the part of the learned Arbitrator. Applicant also raising new grounds of review from the bar and court dismissing them. Review application being dismissed and the arbitral award in referral A0416/2010 being reinstated. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for review of the DDPR arbitral award in referral A0067/2011. It was heard on this day and judgment was reserved for a later date. Four ground of review were raised in terms of which Applicant sought the review, correction and setting aside of the arbitral award of the 2nd Respondent. The background of the matter is that 1st Respondent is an employee of the Applicant, at least as the time that the initial arbitration proceedings took place. She was placed at the Environmental Centre, a project that had been initiated by the Irish with the knowledge and consent of the Lesotho Government.

2. Eventually the Irish withdrew from the project, and this included withdrawal of payment of allowances to 1st Respondent. Then the 1st Applicant school, took over from the Irish and started making allowance payments to 1st Respondent. Payment of the allowances was later stopped, after 10 years, resulting in the institution of a claim for breach of contract, by 1st Respondent with the 2nd Respondent. 1st Respondent had claimed payment of certain monies being allowances payable to her by the Applicants. The Applicants had denied liability on the ground that 1st Respondent was an employee of the Lesotho government. On the 28th February 2011, an award was issued in favour of the 1st Respondent.

3. It is the said award that Applicants wish to have reviewed. The grounds of review have been phrased as thus,
"8.1 The 2nd Respondent ignored the fact that the 1st Respondent is an employee of the Lesotho Government;
8.2 The 2nd Respondent ignored the fact that the 1st Respondent's terms and conditions of employment are governed by the Education Act 1995 and Regulations made thereunder.
8.3 The 2nd Respondent ignored the fact that any payment of allowances or agreement to pay allowances not done in accordance with the Education Act and its Regulations is unlawful and therefore unenforceable.
8.4 That 2nd Respondent gave an award in favour of the 1st Respondent when there was no evidence to support such an award, and such was insupportable in law. A copy of the said award in attached hereto marked 'B'."

4. We wish to highlight the fact that although the review grounds raised were four in number, Applicants did not argue them all, both during their oral submissions and in their written submissions. Rather, in the written submissions, they argued new grounds which were not pleaded in their founding review documents. Although Applicant did not challenge the new grounds, We have addressed them in Our Judgment. Our judgment is thus in the following.

SUBMISSIONS AND FINDINGS

5. It was submitted on behalf of Applicants that the 2nd Respondent ignored the fact that the 1st Respondent was an employee of the Lesotho Government. It was stated that 1st Respondent had, during the arbitration proceedings, testified

to the effect that she was employed by the Teaching Service Commission. The Court was referred to page 12 of the record of proceedings. It was added that this being the case, 1st Respondent was a government employee and not an employee of the 1st Applicant.

6. The Court was referred to section 52 of the *Education Act of 2010,* to illustrate the distinction between a government employee and a privately employed teacher by the school. It was argued that, that notwithstanding, the learned Arbitrator went ahead and made a conclusion that it was common cause that 1st Respondent herein, was an employee of the Applicant, herein. It was added that, in so doing the learned Arbitrator committed a grave irregularity that led her to both a wrong factual and legal conclusion.

7. It is not in dispute from the pleadings of both parties that Applicant did testify that she was employed by the Teaching Service Commission and that this meant that she was a Lesotho Government employee. We have in fact confirmed that she was recorded testifying that she was employed by the Teaching Service Commission. This is reflected at page 12 of the record as thus,
   "Arb: The question is which documents were you given? How were you hired? By the school or the teaching service commission (TSC).
   A: I was hired by the Teaching Service Commission."

8. We have also gone through the arbitral award and have confirmed that this part of the evidence of Applicant was not considered. If it were, the learned Arbitrator would indeed not have come to the conclusion to which she did, but rather that 1st Respondent was employed by the Teaching Service Commission. The provisions of section 52 of the *Education Act (supra)* make this distinction very clear. Having failed to consider these facts, the learned Arbitrator acted contrary to an established principle of law that, an arbitrator must consider all facts presented during arbitration proceedings in making an award (see *Thabo Mohlobo & others v LHDA LAC/CIV/A/02/2010*). Her failure to observe this principle led Her to a wrong conclusion on the facts.

9. However, the cardinal question is whether the failure to observe the rule in *Thabo Mohlobo & others v LHDA, in casu* warrants a review. The test applicable is laid out under section 228F (3) of the *Labour Code (Amendment) Act 3 of 2000 as follows,*
".. Court may set aside an award on any ... mistake of law that materially affects the decision."
Simply put, the test to be applied *in casu*, is whether the mistake committed materially affects the decision made. For this to happen, the decision made must directly flow from the mistake.

10. *In casu*, the Leaned Arbitrator made a mistake by ignoring evidence of the 1st Respondent and concluded that she was an employee of the Applicants. Clearly, as a result of the mistake, a wrong conclusion was made. However, the ultimate decision in the matter was not based on this conclusion. From Our analysis of the matter, the decision of the Learned Arbitrator was premised on the continued payment of the allowances which had, by that time, spanned for over 10 years.

11. This above said is clearly reflected under paragraph 7 of the arbitral award as thus,
"It must be borne in mind that respondent's representative was not there and this went on for a period of approximately ten (10) years. This therefore became a tacit term and/or condition of complainant's contract."
In view of this said, this irregularity does not warrant interference with the arbitral award as it does not materially affect it, as envisaged by Section 228F (3) of the *Labour Code (Amendment) Act (supra).*

12. Applicants had further submitted that the Learned Arbitrator erred by ignoring the fact that being an employee of the Lesotho Government, 1st Respondent salaries and allowances were determined by the Minister Responsible for education. The Court was referred to section 53 (1) of the *Education Act (supra)*, which provides as follows,
"Notwithstanding any other law,
The terms and conditions of service, including ...
Allowances ... of a teacher paid by the Government shall be prescribed by the Minister."

13. 1st Respondent responded that this above is a self misdirection on the part of Applicants. It was explained that the said section does not prohibit or exclude the employees of the Lesotho Government from receiving any income or revenue from other sources other than the government. It was concluded that on the basis of the above said, there was no misdirection on the part of the learned Arbitrator.

14. In Our view, this ground of review flows from the previous one. It is premised on the view that the Court having found that the learned Arbitrator was in error, in concluding that 1st Respondent was not an employee of Applicants, She was bound to ignore the fact that 1st Respondent was an employee of the Lesotho Government and further that her terms and conditions of employment are determined by *Education Act* and its *Regulations*. Clearly, this was not part of the arguments before the learned Arbitrator and Applicants are not suggesting that they were.

15. The Labour Appeal Court in *Thabo Phoso v Metropolitan Lesotho LAC/CIV/A/10/2008* held that issues not raised or pleaded before the initial court could not be properly raised before the appellate or reviewing body, as the initial court would have been denied the opportunity to consider them. If this is the case *in casu*, the learned Arbitrator could not have considered these issues unless they had been brought to Her attention. Having failed to consider these issues in the circumstances, the learned Arbitrator cannot be held to have committed an irregularity in not considering them.

16. Even assuming that they had been brought to her attention, the dispute before her was not over who determines the terms and conditions of the employment of 1st Respondent. Rather, the issue was whether the 1st Respondent was entitled to be paid her allowances, which she had been receiving for over 10 years, until Applicants stopped paying. This being the case, the fact of who determines the terms and condition of the employment of Applicant was not relevant towards the determination of the issue. Having not been considered, those facts did not affect the conclusion of the learned Arbitrator by reason of their irrelevance.

17. It was further submitted that the learned Arbitrator committed an irregularity by concluding that, the fact that Applicant had continued to receive her allowances for over 10 years, that became a tacit term of her contract of employment. It was said that this conclusion was in error in that there is no way that a third party, being 1st Applicant, could alter the terms of the contract of employment between 1st Respondent and the Lesotho Government.

18. It was further submitted that the person who made the decision to pay 1st Respondent, was the principal of the 1st Applicant school and without the authority of the School Board. It was added that even assuming that the School board had authorised the payment, it would not have had the competence to do so, as 1st Respondent was a Lesotho Government employee.

19. This ground is independent of the grounds pleaded by Applicants in their founding papers. This in essence means that it is only being canvassed for the first time from the bar. This is in contravention to the rule of procedure in motion proceedings that parties must stand and fall by their pleadings (see *Pascalis Molapi v Metro Group Limited & others LAC/CIV/R/09/2003*). This principle essentially means that a party cannot go beyond their pleadings in presentation of their case in Court.

20. Further, the content of these new grounds challenges both the factual and legal conclusion of the learned Arbitrator, in making a finding that the continued payment of allowances to 1st Respondent for over 10 years, amounted to a tacit term of her contract. Being a challenge on the conclusion of the learned Arbitrator, it amounts to a ground of appeal as opposed to review. Our conclusion is based on the finding of the Labour Appeal Court in *JDG Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004*, where the Court drew a clear distinction between what constitutes and appeal and a review. On the basis of this said, this ground is dismissed.

21. It was further submitted that the learned Arbitrator erred by ignoring the fact that for a legitimate expectation to arise, certain requirements must be met. It was argued that

paragraph 9 of the award, suggest that 1st Respondent became entitled to payment of her allowances by virtue of the doctrine of legitimate expectation, which was based on the fact that she had been paid for over 10 years. The Court was referred to the case of *South African Veterinary Council & another v Szymanski 2003 (4) SA 42 (SCA)* at 49F-H, for the requirements of a legitimate expectation.

22. In reply, 1st Respondent submitted that the learned Arbitrator rightly found in her favour, as it was 1st Applicant's duty to pay her the said allowances. It was added that the Irish's role in the project was merely to aid. This meant that when they left it was the responsibility of the Applicants to take over the payment of the allowances. It was said that this they rightly did for over 10 years. It was further submitted that in the 10 years, Applicant had acquired the right to be paid the said allowances and a legitimate expectation to continue to be paid. It was further said that these rights could not in law, be taken without giving her a hearing.

23. 1st Respondent relied on the authorities in *R v Secretary of State for the Home Department Ex parte Ruddock & others (1987) 2 ALL ER 518 QB* at 528; *Schmidt & another v Secretary of state for Home Affairs (1969) 1 ALL ER 904* at 909 C and F. In these authorities, the Court stated that the existence of a regular practice gives rise to a legitimate expectation on the part of the claimant that the practice will continue happen. Further that once that expectation has been created, a right arises which right cannot be taken away without a hearing.

24. While both parties seem to harbour under a similar impression that paragraph 9 of the arbitral award relates to the doctrine of legitimate expectation, that is inaccurate. We say this because the point being made therein, is that a contract of employment can only be varied by mutual consent, especially if the concerned variation is prejudicial to the employee. The learned Arbitrator further goes on to state that where a prejudicial variation has been made, the concerned employee will continue to be entitled to receive the benefit until the variation has been acceded to, by both parties.

25. The considered principle in paragraph 9 of the arbitral award, is that of mutual consent, that derives from the law of

contract and not the administrative law doctrine of legitimate expectation. These two concepts are different in both content and form, as they clearly derive from different subjects. Consequently, there is no irregularity in not considering the requirements for a legitimate exception to arise.

AWARD

We therefore make an award in the following,

a) That the Review application is dismissed.
b) That that award of the DDPR in A0416/2010 is reinstated;
c) That the said award must be complied with within 30 days of receipt herewith;
d) That no order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 2nd DAY OF SEPTEMBER 2013.

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

Mr. S. KAO **I CONCUR**
MEMBER

Mr. R. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANTS: **ADV. MOHAU (K.C)**
FOR 1st RESPONDENT: **ADV. LEROTHOLI**