IN THE LABOUR COURT OF LESOTHO **LC/REV/38/2012**
A1123/2011

HELD AT MASERU

In the matter between:

TEBA LIMITED (PTY) LTD **APPLICANT**

And

THE DDPR **1st RESPONDENT**
NORDEEN GLOVIS GOOLAM **2nd RESPONDENT**

JUDGMENT

Date: 15th May 2013
Application for the review of the DDPR arbitral award in referral A1123/2011. Three grounds of review raised by Applicant. Applicant succeeding to prove its claim and the application for review being granted. 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 A1123/2011. It was heard on this day and judgment was reserved for a later date. Three grounds of review were raised on behalf of Applicant, in terms of which it sought the review, correction or setting aside of the award of the 1st Respondent. This matter has a rather peculiar history, which involves my participation in its attempts at resolution, whilst before the 1st Respondent Directorate.

2. 2nd Respondent was an employee of the Applicant until his dismissal for misconduct. He then referred a dispute for unfair dismissal with the 1st Respondent, in terms of which he claimed that his dismissal was unfair both procedurally and substantively. When the matter was first conciliated upon in terms of section 227 (4) of the *Labour Code Order of 1992* as amended, it was before myself, but then in my capacity as an

arbitrator. This was before I was appointed to the position of the Deputy President of this Court.

3. At the commencement of the proceedings before this Court, We had brought the fact of my initial involvement to the attention of both parties. The intention was to enquire from them, if it was proper for me to sit in this review application, given my initial involvement. They were both of the view that this Court was only concerned with the procedure in the proceedings before the 1st Respondent and not the substance of the claim, and therefore that I was properly allocated to hear and determine this review. In view of the attitude of parties, We resolved to proceed to with the matter as We were constituted. Our judgment is thus in the following.

SUBMISSIONS AND FINDINGS

4. The first and second grounds of review were addressed together. It was submitted that the learned Arbitrator had failed to consider the evidence of Applicant, to the effect that he was guilty of the conduct that he had been charged with. It was argued that if She had considered the said evidence, the learned Arbitrator would have awarded compensation and not reinstatement. It was added in awarding reinstatement, the learned Arbitrator clearly failed to interrogate the practicality of reinstatement, and that this is irregular.

5. The Court was referred to the case of *Seotlong Financial Services v Morokollo Makhomari LC/REV/32/2009*, where the award of the learned Arbitrator was found to be irregular. It was said that in that case, the learned Arbitrator had made a finding that the dismissal was substantively fair, but went ahead and ordered reinstatement. It was said that this conduct was held to be highly irregular. It was further said that what is shocking in the case *in casu*, is that fact that the learned Arbitrator did not even make a finding that the conduct of the Applicant did not warrant his dismissal.

6. It further submitted that the learned Arbitrator ought to have at least called on parties to address her on the practicality of reinstatement, as anticipated by section 73 of the *Labour Code Order (supra)*. The Court was referred to the case of *Kobese Hlatsi v Teba LC/02/1998*, where it was said that the court is

vested with the discretion whether to award compensation or order reinstatement. It was argued that on the basis of this authority, both parties ought to have addressed the learned Arbitrator on the issue, to aid in its determination of the remedy to grant. When asked whose responsibility it was to lead the evidence of impracticality, Applicant respondent that it was the learned Arbitrator's duty to require parties to lead such evidence.

7. In reply, 2nd Respondent submitted that he had asked for reinstatement in his prayers. He stated that this being the case, it was Applicant's duty to lead evidence to demonstrate the impracticality of the remedy sought. Further that, having failed to lead such evidence, to contradict the suggestion that reinstatement was practical, the learned Arbitrator was right in awarding same. The premise of this argument was that what is not opposed is taken to have been accepted as accurate. It was added that the learned Arbitrator would only be bound to look into the practicality of reinstatement if it was opposed. In relation to the *Kobese Hlatsi v Teba (supra)* authority, it was submitted that the extract referred to supported the finding of the learned Arbitrator as She exercised her discretion and awarded reinstatement, which was an appropriate remedy.

8. In Our opinion, the evidence of the guilt of the 2nd Respondent was duly considered by the learned Arbitrator. This was the main reason why the leaned Arbitrator made a finding that the dismissal of 2nd Respondent was substantively fair. This essentially meant that the learned Arbitrator found that the reason for the dismissal of 2nd Respondent was valid. In view of the finding made by the learned Arbitrator, We are in agreement with 2nd Respondent that She failed to interrogate the issue of the practicality in respect of the remedy of reinstatement.

9. Once the learned Arbitrator had made a finding that the dismissal of 2nd Respondent was substantively fair, it meant that She approved that the dismissal of Applicant was an appropriate sanction given the nature of his conduct. This meant that the learned Arbitrator had found that the reason for the dismissal of Applicant was valid, which meant that the continued employment relationship was no longer possible. It

therefore, went without saying that an award for reinstatement would not be appropriate under the circumstances.

10. Having found that the reason for the dismissal was valid, the subsequent order for reinstatement did not tally with both the factual and legal conclusion earlier made by the learned Arbitrator. On the basis of both the factual and legal conclusion that She made, She was bound to award any other remedy that is short of reinstatement. This Court has emphasised this point in a plethora of cases among which it the authority in *Seotlong Financial Services v Morokollo Makhomari (supra),* that Applicant has cited. Having nonetheless awarded reinstatement, the learned Arbitrator failed to exercise Her discretion judiciously by making an irrational decision. We therefore find that the learned Arbitrator committed a gross irregularity, that warrants interference with Her award.

11. In relation to the suggestion that the learned Arbitrator was required to call on parties to address her on the practicality of reinstatement, We hold a different view. Applicant has relied on the provisions of section 73 of the Labour Code Order 24 of 1992, which provides as thus,

"73. Remedies

(1)If the Labour Court holds the dismissal to be unfair, it shall, if the employee so 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. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in the light of the circumstances.

(2)If the Court decides that it is impracticable in the light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement"

12. It is clear from the extract quoted above that section 73 does not in any way require the learned Arbitrator to call on parties,

to make addresses on the practicality of reinstatement. It merely provides for alternative remedies availed to an employee where their dismissal has been found to be unfair, and nothing more. The responsibility to lead evidence in support of a claim or to contradict same lies with parties. This essentially means that *in casu*, it was the Applicant's responsibility to lead evidence to contradict the claim for reinstatement by pleading its impracticality.

13. While We agree with 2nd Respondent that what is not opposed is taken to be true an accurate and that the learned Arbitrator had no obligation to look into what was not disputed, the suggestion is inapplicable *in casu*. We say this because, the moment that the learned Arbitrator found that the dismissal of 2nd Respondent was substantively fair, that extinguished the possibility of reinstatement, whether it was opposed or not. We therefore find that the authority in section 73, has been misapplied by Applicant, in as much as same has been done with regard to the authority in *Kobese Hlatsi v Teba (supra).* The latter authority mere speaks to the exercise of discretion in implementing the provisions of section 73.

14. The third ground of review was that the learned Arbitrator determined the validity of the final written warning, which warning had not been challenged by 2nd Respondent, to find that his dismissal was unfair. It was submitted that in determining the fairness of the dismissal of Applicant, on the basis of the validity of the notice that was never questioned, the learned Arbitrator committed a grave irregularity. It was added that She infact, in so doing, substituted the finding of the chairperson of the initial enquiry with Hers.

15. It was submitted that the practice of substituting the decisions of the initial trier in employment maters is highly shunned upon by the Courts of law. The Court was referred to the case of *Mondi Craft v PPWAWU & others 1999 (10) BLLR 1057*. It was said that in this case, the court gave a strict caution against conduct that amounts to a substitution of the finding of the initial trier in labour disputes, especially where the issues considered in making the said substitution were not supposed to have been traversed.

16. 2nd Respondent replied that it was his case that the warning that led to his dismissal was unprocedural in that it was given without hearing him and that this was contrary to the rules of the Applicant organisation. It was added that the warning was the basis of the dismissal, as was its cumulative effect that resulted in the decision to dismiss 2nd Respondent. It was further added that, the issue of the warning is addressed by the learned Arbitrator at paragraph 7 of the arbitral award, where 2nd Respondent is said to have refrained from challenging the warning out of fear of losing his employment.

17. The issue for determination before the learned Arbitrator was whether the dismissal of 2nd Respondent was fair or not. This notwithstanding, the learned Arbitrator entertained a claim that was intended to invalidate a final written warning, whose cumulative effect led to the dismissal of 2nd Respondent. Clearly, the learned Arbitrator traversed into an arena in which She was not initially called to navigate through. The effect of the travession has been the substitution of the decision of the Applicant, in its issuance of a final written warning to 2nd Respondent with a new one altogether.

18. The learned Arbitrator invalidated the initial warning thus distinguishing its cumulative effect. In so doing the learned Arbitrator went beyond the proceedings before Her, into the initial plant level hearing. She essentially determined the validity of the warning that was accepted by Applicant at the plant and based on Her determination, found the dismissal of Applicant to be unfair. This is the type of behaviour that Courts of law continuously condemn. Evident to this is the authority in *Mondi Craft v PPWAWU & others (supra),* that has been cited by Applicant. We therefore find that the learned Arbitrator also committed an irregularity in this regard, that warrants interference with Her arbitral award.

COSTS:

19. Applicant, on the one hand, submitted that it left the issue of costs in the hands of the Court. 2nd Respondent, on the other hand, specifically prayed for an award of costs in cause. He stated that in his opinion, the review application was frivolous as the learned Arbitrator committed no irregularity. In answer, Applicant submitted that the review is necessary. It

was added that the circumstances that led to the current proceedings were occasioned by the defect in the award and thus no one's fault.

20. Applicant has not requested costs, but has rather left it in the discretion of the Court to make an award if it deems fit. Rather, it is the 2nd Respondent who has asked for costs, specifically that they must follow the suit. Having granted the review application in favour of Applicant, a prayer for costs in favour of 2nd Respondent automatically falls off. An award of costs against a losing party is made in extreme circumstances that involve, among others, frivolity that amounts to an abuse of the Court's process, as well as vexatious conduct during the proceedings. In Our view, the circumstances of the case *in casu*, fall short of the requirements for an award of costs. We therefore decline to make same.

AWARD

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

a) That the review application is granted;
b) This matter in referral A1123/2011 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 2nd DAY OF SEPTEMBER 2013.

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

Mr. L. MATELA **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. SEPHOMOLO**
FOR 2nd RESPONDENT: **ADV. MOJELA**