IN THE LABOUR COURT OF LESOTHO **LC/REV/27/2012**
A0329/2008

HELD AT MASERU

In the matter between:

KHOASE PALI **APPLICANT**

And

FIRST NATIONAL BANK **1st RESPONDENT**
THE ARBITRATOR (DDPR) **2nd RESPONDENT**

JUDGMENT

Hearing Date: 5th November 2013
Application for the review of the 2nd Respondent Arbitration award. Two grounds of review being raised – that Arbitrator ignored the law in finding that a pre-suspension hearing has no bearing on the procedural requirements of a dismissal – that Arbitrator ignored the law that an employee must be given time to prepare their case prior to the actual hearing date. Court finding that the law was not ignored and further that a pre-suspension hearing was not necessary in casu – further the irregularity committed by Arbitration in ignoring the law does not warrant interference with the award, in the absence of prejudice suffered. Court finding no merit in both grounds and dismissing the review application. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 2nd Respondent arbitration award. It was heard on this day and judgement was reserved for a later date. Applicant was represented by Adv. Mochesane, while 1st Respondent was represented by Adv. Loubser. The background of the matter is that, Applicant was employed by 1st Respondent as a teller, until his dismissal for misconduct. It was alleged that he had stolen money, belonging to the 1st Respondent bank, from his co-teller and only

returned it when confronted by his managers, on the following day.

2. Following his dismissal, he referred a claim for unfair dismissal with the 2nd Respondent, challenging only the procedural aspect of his dismissal. After hearing the matter, the learned Arbitrator issued an award, in terms of which Applicant's claim was dismissed. It is this award that Applicant seeks to have reviewed, corrected or set aside. Two grounds of review have been raised on behalf of Applicant, against which the review is sought. Having read all documents submitted of record and having considered the submissions of parties, Our judgment is in the following.

SUBMISSIONS AND FINDINGS

3. It was submitted on behalf of Applicant that the learned Arbitrator had erred in that he ignored the applicable case law and the *Labour Code (Codes of Good Practice) of 2005*, that an employee must be heard before being suspended. It was added that as a result of His ignorance of these authorities, the learned Arbitrator incorrectly held that a suspension has no bearing on the procedural requirements of a fair hearing before dismissal. It was submitted that it is a requirement of law that an employee must be heard before he is suspended.

4. It was stated that a pre suspension hearing is intended to enable an employee to know in advance about their case and to be able to prepare for it. The Court was referred to the cases of *SALDCAWU v Advance Laundirs t/a Stork Napkins 1985 ILJ 544 (IC);* and *Evans v CHT Manufacturing (Pty) Ltd 192 ILJ 585 (IC)*. It was concluded that having failed to hold a pre-suspension hearing, and contrary to the above authorities, the dismissal of Applicant was procedurally unfair.

5. In reply, it was submitted that whereas it may be a principle of law that a pre-suspension hearing must be held prior to the actual suspension, it was not necessary *in casu*. It was stated in support, that Applicant had taken money belonging to the Respondent bank and only returned it on the following day when confronted about it. The decision to suspend him was made immediately after he had handed over the money. It was

added that as a teller, Applicant was entrusted with keeping money belonging to the bank.

6. It was further submitted that, being suspected of having stolen same, it was not necessary to give him a hearing before effecting the suspension. It was further submitted that in any event, he suffered no prejudice from the suspension without hearing, in that he conceded during arbitration proceedings that he was aware of what he was being suspended for. The Court was referred to pages 18, 20 and 24 of the record. It was concluded that even if a pre-suspension hearing was necessary, it did not render the dismissal of Applicant a nullity *in casu*.

7. The right to be heard is a fundamental part of Our law (see section 12 of the *Constitution of Lesotho*). While We concede that before any decision affecting the rights and status of a party is made, such a party must be heard, Applicant has failed to illustrate how the authorities that he relied upon support his case, that the learned Arbitrator was wrong in His conclusion. Applicant has barely alleged that such authorities were ignored by the learned Arbitrator, in making His award. That notwithstanding, a suspension affects the status of an employee within the employment sphere and as such, an employee must be heard before such a decision is made.

8. The decision being challenged is reflected at page 3 of the arbitral award as follows,
   "I will point out that suspension whether done fairly or otherwise have no bearing whatsoever on the procedural requirements of fair hearing before dismissal."
   It is this extract that forms the basis of a challenge against the conclusion of the learned Arbitrator. 1st Respondent seems to agree with the suggestion, as it does challenge same. Rather, it attempts to justify failure on its part to hold the pre-suspension hearing and further argues that while a pre-suspension hearing may have an effect on dismissal, it was not the case *in casu.*

9. It is an established principle of law that what has not been challenged is deemed to have been accepted as true and accurate (see *Theko v Commissioner of Police and Another 1991-*

1992 LLR-LB 239 at 242; also see *Standard Lesotho Bank v Tsietsi Polane & DDPR LC/ REV/77/07)*. We wish to point out that the application of this principle is only limited to factual and not legal propositions. This essentially means that whether challenged or not, the correctness or otherwise of a legal proposition, made by a party to any proceedings is the sole determination of the Court, subject to persuasion by parties.

10. In view of this said above, We deem it apposite to highlight the position of the law in relation to the requirements for a procedural fairness of the dismissal of an employee. Section 11 of the *Labour Code (Codes of Good Practice) Notice of 2003,* outlines the requirements for a fair procedure in a case of dismissal for misconduct as follows,

"(1) An investigation should normally be conducted by the employer to ascertain whether there are grounds for dismissal before a hearing is held.

(2)The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3)The employee should be entitled to a reasonable time to prepare a response and to seek the assistance of a trade union representative or fellow employee.

(4)The hearing should be held and finalized within a reasonable time.

(5)The employee should be given a proper opportunity at the hearing to respond to the allegations and to lead evidence if necessary.

(6)If an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee.

(7)After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of the decision.

(8)Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(9)If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer a dispute concerning the fairness of the dismissal to the Directorate.

(10) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.
(11) Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the action taken by the employer and the reasons for the actions.
(12) In case of collective misconduct, it is not unfair to hold a collective hearing."

11. None of the outlined requirements touch on the issue of a pre-suspension being a requirement towards the validity of the procedure, in the dismissal of an employee. Therefore, in as much as a hearing is required before a suspension is effected, it is not a determining factor for purposes of the procedural fairness of a dismissal. Rather the purpose of a pre-suspension hearing, is to enable a party to state why s/he may not be suspended. We therefore find that whether or not the learned Arbitrator ignored the cited authorities, His conclusion finds support in the applicable law, in determining the procedural fairness of a dismissal for misconduct.

12. Even assuming that it was one of the requirements that an employee must be afforded a pre-suspension hearing, prior to their dismissal being found to be procedurally fair, such an employee would have to go further to demonstrate the prejudice suffered from failure to afford the said opportunity. *In casu*, Applicant has failed to show how the decision of the learned Arbitrator may have caused prejudice upon himself. He alleges mainly that a pre-suspension hearing would have alerted him about the possible charges that he was likely to face, yet he concedes on record that he was aware why he was being suspended.

13. The Court has been referred to pages 18, 20 and 24 of the record of proceedings. In these pages, Applicant is recorded to have testified that he was aware that his suspension was in connection with the money that he had taken. This clearly illustrates awareness of the charges he was likely to face and the absence of prejudice on his part, on account of failure by 1st Respondent to hold a pre-suspension hearing. We are in agreement with 1st Respondent that given the circumstances of the matter, it was not even necessary to hold a pre suspension

hearing for Applicant. This view finds support in the case of *Phutiyagae v Tswaing Local Municipality (2006) 27 ILJ 1921 (LC),* where the Court held that, in circumstances where knowledge of the allegations are apparent from the surrounding circumstances, a pre suspension hearing is not necessary. Consequently, this grounds fails. We decline to comment on the rest of the submissions and arguments as they address the merits of the arbitration proceedings and not the review application.

14. On the second ground of review, it was submitted that the learned Arbitrator ought to have found the dismissal of Applicant procedurally unfair, on account of the fact that he was not given sufficient time to prepare his defence. It was added that he was given 12 hours to prepare his case, whereas the *Codes of Good Practice of 2005 (supra),* prescribe at least 48 hours for preparations. The Court was referred to section 8(1), Division 2 on disciplinary procedure, at stage 3. It was concluded that given the circumstances of the matter, the learned Arbitrator ought to have intervened and found the dismissal procedurally unfair. It was concluded that by ignoring the provisions of the *Codes of Good Practice 2005 (supra)*, the learned Arbitrator committed an irregularity that led to an incorrect conclusion.

15. In reply, it was submitted that while the *Codes of Good Practice of 2005 (supra)* may make that provision, the alleged breach does not warrant interference with the arbitration award. It was submitted in amplification that, whereas Applicant had alleged that the short notice prevented him from organising a recorder, he failed to illustrate how that prejudiced him in the initial hearing. Secondly, that whereas Applicant alleged that he was not able to call a witness due to the short notice, he failed to state what the witness would say that advanced his case. The Court was referred to pages 27 to 31 of the record.

16. It was added that during the arbitration proceedings, Applicant conceded that he never brought the issue of a short notice or the need to organise a recorder, to the disciplinary panel. The Court was again referred to pages 27 to 31 of the record. It was further submitted that nothing was ignored by

the learned Arbitrator in dealing with this issue and further that if this issue had been ignored, short notice is not always an element of procedural unfairness. The Court was referred to the case of *FAWU & others v Amalgamated Beverage Industries Ltd (1992) 13 ILJ 1552 (IC),* in support.

17. We have indicated the procedural requirements that must be met, in order for a dismissal for misconduct to be procedurally fair. Of relevance to the issue at hand, are the provision of section 11 (3) of the *Codes of Good Practice 2003 (supra)*, which provide as follows,
"The employee should be entitled to a reasonable time to prepare a response and to seek the assistance of a trade union representative or fellow employee."
It is therefore undeniably clear from the above provision, that it is a pre-requisite that an employee facing charges of misconduct must be afforded time to prepare their case.

18. It is Applicant's case that this was ignored by the learned Arbitrator, in making His conclusion hence the conclusion that the dismissal was procedurally fair. It would similarly seem from the submissions and arguments of 1st Respondent, that it does not challenge this ground as well as both the factual and legal propositions made in support. We therefore wish to reiterate Our stance in paragraph 9 above and proceed to address the issues in the following.

19. We wish to highlight that there are no Labour Code Codes of Good Practice, other than those published in the Government Notice of 2003. However, in 2005 and pursuant to section 15(1) of the *Public Service Act of 2005*, *Codes of Good Practice 2005* were published. Having failed to find the sections that Applicant relied upon within the *Codes of Good practice 2003 (supra),* We took the liberty to peruse the *Codes of Good Practice 2005 (supra).*

20. Our discovery has been to the effect that the section relied upon by Applicant is from the *Codes of Good Practice of 2005*, which are applicable only to public officers. It is common cause from the pleadings, that the 1st Respondent employer is not the Government of Lesotho. As a result, the *Codes of Good Practice*

2005 (supra), are inapplicable to Applicant and consequently, the learned Arbitrator was right in ignoring same.

21. Our conclusion above, notwithstanding, the principle alleged to have been within the *Codes of Good Practice of 2005 (supra),* is also provided for in the *Codes of Good Practice 2003 (supra),* which are on the contrary applicable to Applicant. However, there is no specific period of notification that is prescribed, between the time of notification of the hearing and the time for the actual hearing, within these Codes. This is essentially left in the discretion of the Court, that is seized with a claim of procedural unfairness on this ground. For purposes of this case, it would have been the 2nd Respondent.

22. It is common cause that Applicant was not given enough time to prepare his case. Whereas 1st Respondent does not challenge the allegation that the learned Arbitrator ignored the law relating to the provision of sufficient time for preparation, it rather attempts to disqualify that as warranting the granting of the review of the arbitral award in question. We are in agreement with 1st Respondent that in the absence of prejudice arising from the breach of procedure by the learned Arbitrator, failure to give sufficient time to prepare does not readily warrant interference with the award made.

23. Whereas, Applicant had alleged that he needed time to organise a recorder and to call a witness, he has failed to show how that prejudiced his case. An effective way of demonstrating the said prejudice would have been by illustrating the value of the recording device as well as the witness to his case. This Applicant failed to show both before the 2nd Respondent and before this Court. We have confirmed this from pages 27 to 31 of the record referred to by 1st Respondent. Consequently, *even* if the learned Arbitrator had ignored the provisions of section 11 (3), that would not warrant interference with the award for the above reasons. Consequently this point fails.

24. We have italised the word *even* for the reason that upon perusal of the arbitral award, We have discovered that the provisions of section 11(3) of the *Codes of Good Practice (supra)*, were not ignored. At page 3 of the arbitral award, the learned Arbitrator made the following finding,

"The appellant ought to have been notified in advance. Be that as it may, the appellant knew in advance of the case that was going to be put forth against him adn he was able to put forth his case.
To add to that, the appellant did not raise this issue at the disciplinary hearing not suggest the prejudice that he suffered. the irregularly committed if any, does not warrant interference of this tribunal."

25. The finding clearly demonstrates that the principle or provision in issue, was considered as well as the factors surrounding the matter, to find that Applicant was not prejudiced by the decision, hence a finding of procedural fairness. This also find support in the submission of 1st Respondent before this Court. Consequently, We maintain Our stance in paragraph 23 above and this review ground fails.

26. 1st Respondent, on the one hand, prayed that this review application be dismissed with costs. Applicant, on the other, replied that this be left to the discretion of the Court. It is a trite practice in the ordinary Civil Courts that costs follow suit. This essentially means that an award of costs is made in favour of a party that wins in the proceedings. The situation in rather different in this Court. As a court of equity and fairness, this Court is not bound by the practice in the ordinary civil courts *(see LEWCAWU & 35 others v Metcash Trading Limited CIV/APN/38/99; George Kou v Labour Commissioner LC/13/1994; LEWCAWU & 33 others v Metcash Lesotho Limited & another LC/44/1999)*. Rather, for an award of costs to sustain, an applicant party must illustrate that the circumstances of the matter warrant the granting of same.

27. We have stated in a plethora of cases that the yard stick is frivolity in bringing or defending a claim and vexatious conduct during the proceedings *(see Thabo Moleko v Jikelele Services LC/40/2013; Kopano Textiles v DDPR & another LC/REV/101/2007; Sefatsa Mokone v G4S Cash Solution (Pty Ltd LC/31/2012)*. In applying for costs, no motivation was made on behalf of Applicant that would lead Us to concluded that Applicant has been frivolous in bring this application or that he has been vexatious during the proceedings. Consequently, We decline to award costs.

AWARD

We therefore make an award in the following terms:

a) The application for review is refused;
b) That the award in referral A0329/2008 remains in force; and
c) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF NOVEMBER 2013.

T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)

THE LABOUR COURT OF LESOTHO

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

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

FOR APPLICANT: **ADV. MOCHESANE**
FOR RESPONDENT: **ADV. LOUBSER**