IN THE LABOUR COURT OF LESOTHO **LC/REV/37/2011**
A0647/2010 (B)

HELD AT MASERU

In the matter between:

LESOTHO FREIGHT AND
BUS SERVICE CORPORATION **APPLICANT**

And

THE DDPR **1st RESPONDENT**
M. MASHEANE (ARBITRATOR) **2nd RESPONDENT**
TEBOHO LETSIE **3rd RESPONDENT**

JUDGMENT

Hearing Date: 18th September 2013
Application for review of the 2nd Respondent arbitral award. Two grounds of review having been raised on behalf of Applicant. 3rd Respondent applying for dismissal for want of prosecution – application being withdrawn and matter proceeding into the merits. Parties agreeing on an additional ground of review from the bar and condonation thereof – Court not finding merit in all the three grounds – review application being dismissed and Court reinstating award of the 2nd Respondent.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 1st Respondent arbitral award in referral A0647/2010(B). It was heard on this day and judgement was reserved for a later date. Applicant were represented by Advocate Ntaote, while 3rd Respondent was represented by Mr. Molefi. The background of the matter is essentially that 3rd Respondent referred a claim for unfair dismissal with the 1st Respondent. The matter proceeded before the 2nd Respondent after which She issued an award in favour of the 3rd Respondent. Thereafter, Applicants lodged the current review application with this Court. Subsequently

thereto, 3rd Respondent filed an application for the dismissal of the review application.

2. However, at the commencement of the proceedings, both parties intimated to the Court that they had agreed that the dismissal application would no longer be pursued. Further that Applicant be allowed to make an additional ground of review from the bar. The parties agreement was accepted and the application for dismissal for want of prosecution was dismissed in terms of Rule 10 and the breach of Rule 16 was condoned in terms of rule 27 of the Rules of this Court. Applicant was then allowed to make an additional ground of review. It is against this backdrop that this application proceeded. Our judgment is thus as follows.

SUBMISSIONS AND FINDINGS

3. The first ground of review was that the learned Arbitrator erred by allowing the 3rd Respondent to raise a new issue during the proceedings. In amplification, it was submitted that it was never 3rd Respondent's case that he was denied the opportunity to prepare for his case. The Court was referred to the annexure "A" to the founding affidavit. It was added that this new issue only came up in the evidence 3rd Respondent in chief, after Applicant had closed its case. It was argued that it was thus wrong for the learned Arbitrator to permit this practice. Reference was made to the case of *SOS Children Village v DDPR & another LC/REV/82/2009*, where the Court held that it is wrong to direct the attention of parties to one direction and then canvass a different issue.

4. It was argued that the irregularity committed by the learned Arbitrator caused prejudice on the part of Applicant in that it was denied the opportunity to address the 3rd Respondent's case. It was added that had they been given the opportunity to address the point, they would have demonstrated that 3rd Respondent was given time to prepare for his case contrary to the suggestion, that no such time was given. It was stated that Applicant would have led evidence in the form of a notification of hearing to demonstrate this. The Court was referred to annexure "B," which a copy of the said notification of hearing.

5. In reply, it was submitted that in terms of the referral, Applicant was to answer both the substance and procedure in the dismissal of 3rd Respondent. As a result, it was the obligation of Applicant to have addressed all substantive and procedural issues of the dismissal of 3rd Respondent. It was added that this notwithstanding, at page 6 of annexure "A", it is recorded as a procedural challenge that 3rd Respondent was not advised about all of his rights. Further reference was made to page 7 of the record of proceedings, where a similar allegation was made. It was argued that in terms of the *Labour Code (Codes of Good Practice) of 2003*, the rights of parties include being given the opportunity to prepare oneself. As a result, Applicant ought to have aligned its defence with what is contained in the *Codes of Good Practice*.

6. In the case of *SOS Children Village v DDPR & another (supra)*, the learned President Lethobane, makes reference to the Labour Appeal Court decisions in *Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd LAC (1995-1999) 698* and the cases therein cited, as well as the authority in *Pascalis Molapi v Metro Group (Pty) Ltd LAC/CIV/R/09/03*. In these authorities, it was held that a party cannot be allowed to direct the attention of another to one direction and then canvass a different issue altogether. In Our view, the contrary happened in the proceedings *in casu*.

7. What 3rd Respondent simply did was to lay out specific issues that he wanted the Applicant to address in his opening statements. That notwithstanding, he later canvassed a different issue which was not stated in his opening statement. According to the dictates of the principle highlighted in the above authorities, the learned Arbitrator ought not to have allowed 3rd Respondent to canvass any other issues which were not specifically laid out in the opening statements.

8. We say this because the purpose of opening statements is to advise a party in advance of what they are expected to answer (see *Albert Makhutla v Lesotho Agricultural Development Bank 1995-1996 LLR-LB 191 at 195)*. This essentially requires that the claims must be stated with clarity and specificity as opposed to the generalist approach that Applicant alleges to have adopted. A claim by its nature is broad and general. As a

result, opening statements aid to narrow it down and direct the attention of parties to specific issues that need to be addressed. A deviation from this approach would surely undermine the very purport as well as principles behind the opening statements.

9. The argument that Applicant ought to have addressed all the procedural requirements as provided for under the *Codes of Good Practice* cannot hold. We say this because 3rd Respondent was specific in relation to some of the procedural requirements that appear under the same section and left out others. In so doing, he clearly communicated to both the learned Arbitrator and Applicant his intention not to rely on the omitted procedural requirements for his procedural challenge. As a result, the learned Arbitrator ought not to have allowed 3rd Respondent to canvass an issue that was not specifically stated in the opening statements.

10. It is Our opinion that having allowed 3rd Respondent to bring a new issue, which was never the basis of his procedural challenge, Applicant was prejudiced. Annexure "B" clearly illustrates that 3rd Respondent was given at least 4 days before his hearing after he had been served with the notification of hearing. Had Applicant been alerted about this issue, it would have addressed it and that could have influenced the learned Arbitrator to find no fault on its part in this regard. The learned Arbitrator thus committed an irregularity.

11. The second ground of review is that the learned Arbitrator disregarded the evidence of the minutes of the disciplinary enquiry, wherein 3rd Respondent admitted guilt of the offences charged with. It was added that the said evidence was disregarded on the ground that 3rd Respondent had not signed the minutes of the enquiry. Applicant argued that it was wrong for the learned Arbitrator to have disregard the said evidence on this ground as there is no legal requirement that the record must be signed.

12. It was further argued that the fact that 3rd Respondent denied admitting guilt as well as the fact that he did not sign the minutes, did not mean that he did not admit guilt in the enquiry. It was argued that the learned Arbitrator ought to

have considered and interrogated the issue of the record, more so given that Applicant did not state what his defence was in the said enquiry. Further that She at least ought to have invited those who were in the hearing to come and testify to what happened. It was added that had the learned Arbitrator not disregarded the said record, She would have found that Applicant was guilty of misconduct. On these bases, it was prayed that the Court find that 3rd Respondent admitted guilt and therefore that his dismissal was fair.

13. In reply, 3rd Respondent submitted that the record of proceedings before the 1st Respondent was not a true reflection of what took place in the disciplinary enquiry. Over and above the fact that Applicant denies its contents or ever admitting guilty, the record reflects inconsistent version of 3rd Respondent evidence. At page 2 of the said record, he is recorded to have admitted guilt. At page 4 of the same record, he is recorded to have stated that he was not guilty.

14. Further, in the arbitration proceedings, at page 114 of the record, Applicant denied committing any act of misconduct or even admitting guilt at any point during his disciplinary proceedings. It was submitted that this clearly exhibits the fact that the record was not a true reflection of what took place in the disciplinary enquiry. It was concluded that given these said, the learned Arbitrator was right in not giving any weight at all to the record of the disciplinary enquiry.

15. We agree with 3rd Respondent that the learned Arbitrator gave the record of the disciplinary enquiry no weight at all, as well as the alleged grounds upon which this decision was based. At Paragraph15 of the arbitral award, the learned Arbitrator recorded that Applicant did not lead any evidence to rebut the suggestion by 3rd Respondent that he did not admit guilt, and that the minutes did not reflect the true picture of what took place in the hearing. The learned Arbitrator has further recorded that minutes were not given to 3rd Applicant to authenticate.

16. On the above premise, She concluded that the said minutes were not binding upon 3rd Respondent and gave no weight to them at all. In Our view, this essentially means that the

evidence of the record of proceedings was not ignored, contrary to Applicant's suggestion, but rather that the learned Arbitrator gave it no weight for reasons advanced in paragraph 15 of the arbitral award. She essentially interrogated the record and came to the conclusion that it did not bind 3rd Respondent. Consequently, We find no irregularity on this ground.

17. We also wish to highlight that proceedings before the 1st Respondent are heard *de novo,* at least on the substance. This essentially makes it the obligation of parties in the proceedings before the 1st Respondent to bring all evidence to prove the substance of their claims. *In casu*, it was clear that 3rd Respondent challenged the substance of all claims against him in respect of his dismissal. This essentially meant that he challenged all allegations of guilt on his part, including the said record of proceedings. It was therefore, the responsibility of Applicant to bring evidence to substantiate the content of the minutes by contradicting the evidence of 3rd Respondent or to even discredit the 3rd Respondent's evidence.

18. Having failed to bring evidence to contradict or to even discredit the evidence of 3rd Respondent, the learned Arbitrator cannot be held at fault for not acting *ultra vires* Her functions. The functions of the learned Arbitrator are to seek clarity where issues are not clear. Given that 3rd Respondent's stance was clear, in that he unequivocally denied liability or even admitting guilt at any stage, there was nothing that required the learned Arbitrator to seek clarity on.

19. While We acknowledge the fact that there is no legal requirement that the record must be signed by parties to proceedings, it is not accurate that the learned Arbitrator's decision was based on the fact that the record was not signed by 3rd Respondent. Rather, She stated in paragraph 15, that Applicant was not bound by the contents of the record, for the reason that he denied them, and that the said record was never given to him for authentication. It was on this ground that the record was not given any weight and not that it was disregarded or ignored.

20. The third ground of review is that the learned Arbitrator erred in concluding that Applicant had an obligation to find 3rd Respondent a representative. It was argued that having made this conclusion, the learned Arbitrator committed a mistake of law. It was said that this conclusion was based on the opinion of Grogan J in his book entitled W*orkplace Law*. It was argued that there is no law in Lesotho that places an obligation on the part of the employer to find a representative for an accused employee. Rather that the law merely requires that a party be given the chance to find a representative.

21. In reply, 3rd Respondent submitted that the learned Arbitrator was right in relying on the opinion of Grogan J to make Her finding. He stated that the practice finds support n the conclusion of the decision of High Court of Lesotho in *Lesotho Brewing Company t/a Maluti Mountain Brewery v Lesotho Labour Court President & another CIV/APN/435/1995*. In this case, the learned Ramodibeli J, relied on a quotation from the remarks by Rose Innes in the book entitled, *Judicial Review of Administrative Tribunals in South Africa* to conclude that administrative tribunals have the liberty to rely on other sources other than the law and that would not constitute and irregularity. In reply, it was argued that this extract is not applicable *in casu,* as the 1st Respondent is not an administrative tribunal but a quasi-judicial tribunal.

22. We wish to first deal with the authority cited by 3rd Respondent. We are in agreement with Applicant that it is inapplicable *in casu* for the same reason that he has advanced, that is, that the 1st Respondent is a quasi-judicial and not an administrative tribunal. While We acknowledge that the learned Arbitrator had the liberty to source authorities outside the Lesotho legal jurisprudence, but that is subject to a number of limitations, among which is if the law in Lesotho is silent on the issue in question.

23. In Lesotho, the law does not place any obligation on the employer to find representation for an employee. Rather, and as correctly pointed out by Applicant, it merely provides that an employee be given the opportunity to find a representative. This essentially means that in terms o the laws of Lesotho, it is the obligation of the employee to secure a representative of

their choice. This being the case, the legal position in Lesotho is clear with regard to this issue and any deviation in interpretation from this position constitutes a mistake of law. Consequently, We find that the learned Arbitrator committed a mistake of law in this regard.

24. The above notwithstanding, We perused the authority that the learned Arbitrator relied upon in making Her finding. At page 197, the learned Author writes as follows,
"If the employee declines to bring a representative, however, the employer is under no obligation to provide one."
We have underscored the word "*no*" for the reason that it appears to have been erroneously omitted by the learned Arbitrator in citing the opinion of Grogan. The same opinion, in similar words, appears in the different editions of Grogan's *Workplace Law*. It was this omission that led Her to commit the above mistake of law.

25. 3rd Respondent further argued that all the grounds raised by Applicant are purely procedural yet the matter was also decided on substance. It was argued that the grounds of review are based on the irregularities on the part of the learned Arbitrator in dealing with the procedural fairness of the 3rd Respondent's dismissal. It was added that having found that the dismissal of 3rd Respondent was substantively unfair, the learned Arbitrator should not have even bothered to consider the procedural fairness, as Her finding was sufficient to warrant the setting aside of 3rd Respondent's dismissal.

26. It was argued that this review is purely academic as even a finding that there were irregularities, will not vitiate the decision of the learned Arbitrator. Reference was made to the case of *Bofihla Makhalane v Letšeng Diamonds (Pty) Ltd LAC/CIV/A/09/1999*, wherein the learned Mosito AJ, quoted an extract from the judgment in *Ellies v Morgan, Ellies v Desai 1909 TS 576* at 580 that,
"...an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of trial..."

27. It was argued that on the basis of the above authority, the irregularity committed by the learned Arbitrator in dealing with the procedural fairness of 3rd Respondent's dismissal does not

mean that the decision of the learned Arbitrator is wrong. It was added that in terms of the *Bofihla Makhalane v Letšeng Diamonds (Pty) Ltd (supra)*, for the entire decision to be invalidated, it must be established that the irregularity is likely to result an injustice or other forms of prejudice.

28. It was further submitted that the Mosito AJ, goes further to cite a quotation from the case of *Napolitano v Commissioner of Child Welfare, Johannesburg 1965 (1) SA 742 (A)* at 745G – 746B where the Court is recorded as thus,
"That, however, does not end the mater because the reviewing Court will not interfere if satisfied that the applicant has suffered no prejudice. ...the Court is not interested in academic situations.

29. It was argued that the application before this Court is academic, for the reason that the decision of the learned Arbitrator is not purely based on procedure but also substantive. 3rd Respondent prayed that the review be refused on this ground. Applicant briefly replied that the review application was not academic as the procedural challenges go to the substantive fairness of the 3rd Respondent's dismissal.

30. We are in agreement with the 3rd Respondent that learned Arbitrator having found that the dismissal was substantively fair, it was not necessary for Her to consider the procedural fairness of the said dismissal. The correctness or otherwise of the procedure adopted in the dismissal of 3rd Respondent would not alter the invalidity of the reason for the dismissal of 3rd Respondent. We are also in agreement with 3rd Respondent that all the review grounds are procedural. By this We mean that they relate to the procedure that was adopted in the proceedings before the 1st Respondent institution.

31. An application for review is only granted in the circumstances whereby the irregularity committed has materially affected the decision made. This therefore means that the review will be made where the Court is satisfied that it was not for the irregularity, the decision would have been different from that which has been made. If the finding on this enquiry is in the negative, then the application will be

academic. This is the proposition that 3rd Respondent has attempted to make.

32. We wish to highlight that, the extract from authority in *Ellies v Morgan, Ellies v Desai (supra)* has been misapplied. It does not support the proposition that the irregularity committed by the learned Arbitrator in dealing with the procedural fairness of 3rd Respondent's dismissal does not mean that the decision of the learned Arbitrator is wrong. Rather, it merely illustrates what an irregularity entails. That notwithstanding, We acknowledge and confirm the rest of authority cited.

33. It is Our view that the irregularities committed by the learned Arbitrator do not warrant interference with the arbitral award. The reason is simply that they are purely based on procedure and that they have no impact on the substance of 3rd Respondent's dismissal. We are of the view that even if the learned Arbitrator had disallowed the argument that 3rd Respondent had been denied the opportunity to find a representative or if She had found that Applicant had no obligation to find a representative for 3rd Respondent, that would not have altered the substantive conclusion that he was not guilty of misconduct. These are different issues that require different facts to substantiate and none is dependent on the other to stand. Consequently, We find that the irregularities committed do not warrant interference with the arbitral award and that this review application is merely academic.

AWARD

We therefore make an award in the following terms:

a) The application for review is refused;
b) The award in A0647/2010 remains in force;
c) That the said award be complied with within 30 days of receipt herewith; and
d) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 14th DAY OF OCTOBER 2013.

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

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

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

FOR APPLICANT: **ADV. NTAOTE**
FOR RESPONDENT: **MR. MOLEFI**