IN THE LABOUR COURT OF LESOTHO **LC/REV/41/2012**
A0734/2011

HELD AT MASERU

In the matter between:

LESOTHO ELECTRICITY COMPANY (PTY) LTD **APPLICANT**

And

MPAIPHELE MAQUTU **1st RESPONDENT**
ARBITRATOR SENOOE **2nd RESPONDENT**
THE DDPR **3rd RESPONDENT**

JUDGMENT

Hearing Date: 09/10/2013
Application for review of the 2nd Respondent arbitral award. Applicant moving for the recusal of the learned Deputy President from the proceedings on account of subjective bias. Court finding no merit in the ground and refusing the recusal application. Applicant having raised only two grounds of review. Court dismissing one ground and granting the other. Court finding that the decision to award 10 years compensation was irrational. Court directing that the matter be remitted to the 3rd Respondent for determination of the compensation amount, before a different Arbitrator. 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. Woker, while 1st Respondent was represented by Adv. Ntaote. The background of the matter is that, 1st Respondent had referred a claim for unfair dismissal with the 3rd Respondent. The matter was duly presided over by the 2nd Respondent, who after hearing all evidence issued an award in favour of 1st Respondent. In terms of the said award, Applicant had been

directed to pay 1st Respondent 10 years salary as compensation, 150,000 units of electricity and severance payment for the period of 16 years, 10 of which were assumed.

2. Applicant then initiated review proceedings before this Court, to have the said award reviewed, corrected or set aside. However, the review application was dismissed for want of prosecution. The Court had found that period of delay in prosecuting the matter, as well as the circumstances surrounding the delay were unreasonable. Applicant then appealed to the Labour Appeal Court and obtained judgment that the matter must be head in the merits before this Court. The matter was subsequent thereto brought before this Court and set down for hearing on this day.

3. At the commencement of the review proceedings, Applicant made an application for the recusal of the learned Deputy President (myself), on the ground of a perceived bias. The application was strongly opposed by 1st Respondent. Both parties were then given the opportunity to make their address, after which We refused the recusal application, deferred the reasons and directed that the matter proceed in the merits, as directed by the Labour Appeal Court. Our full judgment on all issues is therefore in the following.

SUBMISSIONS AND FINDINGS

Application for recusal

4. Advocate Woker for Applicant, submitted that the learned Deputy President had initially made a finding against Applicant, wherein He had dismissed the review application. Having successfully appealed against His decision, Applicant feared the likelihood that the learned Deputy President would not make an award in favour of a party that had His decision reversed, even if such was well deserved. He added that the Appeal Court had stated that the learned Deputy President was wrong in his decision. He stated that on this premise, they were in fear of a possible bias, borne by the circumstances of the matter.

5. Advocate Ntaote for 1st Respondent, replied that there has to be an objective basis and not a mere suspicion of bias, in order for an application for recusal to succeed. It was added that the suspicion of bias is unfounded as the matter that was

dismissed is entirely different from the matter that is up for determination. Further, that the Labour Appeal Court did not find that the learned Deputy President was wrong, as the matter was remitted back to the Labour Court by agreement of both parties. It was further submitted that the issue of a different presiding officer being allocated was argued before the Labour Appeal Court, but was rejected by the Appeal Court.

6. At paras 5, 6 and 7 of the judgment of the Labour Appeal Court in *Lesotho Electricity Company (Pty) Ltd v Mpaiphele Maqutu & others LAC/CIV/A/01/2013*, the learned Judge states as thus,
   " 5. ... the DDPR record had not been transcribed by appellant, ... the record had now actually been transcribed and it was now before court.
   6. Before us, the parties agreed that the proper way to deal with the matter would be to uphold the appeal and set aside the judgment of the Labour Court and, order that the matter be remitted to the Labour Court for hearing of the review application.
   7. Consequently, and in the light of the above, the following order is made:
   1. The appeal succeeds."

7. In view of this above extract, We found that the appeal was granted by agreement of the parties. Further, that the circumstances under which it was granted were, that new evidence which was not present when the matter was dismissed, had come up. This essentially meant that the appeal was not granted due to an error on the part of the learned Deputy President, but rather due the existence of new evidence and an agreement by both parties that it be remitted back to this Court. Consequently, the basis of Applicant's perception of bias falls off. We therefore no longer see the need to comment on the rest of the submissions of parties.

The Merits

8. Before We deal with the merits of this application, We wish to note that 1st Respondent had raised an objection to the grounds of review raised by Applicant, on the ground that they were not pleaded in the founding affidavits. This suggestions was strongly rejected by Applicant, who went on to demonstrate to the Court where these grounds are pleaded.

Having satisfied Ourselves with the defence raised by Applicant, to the objection, We find that these grounds are not new, but that they have been pleaded. In view of this finding, We now proceed to deal with the submissions of parties and Our findings.

9. Advocate Woker for Applicant started his submissions with a narration of issues that were common cause between parties. He recited incidents that led to the dismissal of 1st Respondent, up to the proceedings before this Court. In his narration, Advocate Woker indicated that 1st Respondent was the Company Secretary for Applicant, until his dismissal for misconduct. The Court was referred to pages 3, 28 and 32 of the list of exhibits, in support. It was further narrated that after his dismissal, he referred a claim for unfair dismissal with the 3rd Respondent and that the 2nd Respondent was the presiding officer. Thereafter, the 2nd Respondent issued an award in favour of 1st Respondent. It was concluded that it is this award that is the subject of review herein. In the light of this background, he proceeded to motivate the review grounds.

10. The first ground of review was that the learned Arbitrator had ignored the real dispute before Her and concentrated on irrelevant issues. It was submitted, in amplification, that 1st Respondent had initially been dismissed for misconduct. However, on appeal he was found guilty and dismissed for incompatibility. In support, the Court was referred to the conclusion of the chairman of appeal at page 59 of the record, where he stated as thus,
"I accordingly recommend a penalty of dismissal for Mr. M. Maqutu. I go further to add that the atmosphere as stated by Mr. Moiloa and Mr. Maqutu himself at this workplace should not be allowed to continue any further."

11. It was added that this notwithstanding, the learned Arbitrator interrogated the fairness of 1st Respondent's dismissal on misconduct, as opposed to dismissal for incompatibility. The Court was referred to a series of pages in the record, where issues demonstrating incompatibility came up in the hearing. It was argued that the determination of the fairness of the dismissal for misconduct was something that is totally different from what the learned Arbitrator had been called to determine. It was argued that in so doing, the learned

Arbitrator committed a gross irregularity warranting the review and setting aside of Her decision. Reference was made to the case of *Thabo Mohlobo & others v Lesotho Highlands Development Authority LAC/CIV/A/05/2010*, in support.

12. In reply, it was submitted on behalf of the 1st Respondent that Applicant was charged and dismissed for misconduct. Further that in the arbitration proceedings, it was never argued that 1st Respondent had been dismissed for incompatibility, either by Applicant or the 1st Respondent himself. It was added that the issue before the learned Arbitrator, was the fairness of the dismissal of 1st Respondent for misconduct. It was further submitted that Applicant was uncertain about the reason for the dismissal of 1st Respondent in that at some point he alleges dismissal misconduct and later claims incompatibility.

13. Furthermore, it was submitted that whilst issues demonstrating incompatibility may have come up in the hearing, but that was neither the case of 1st Respondent nor the defence of Applicant. Further, the suggestion that Applicant was dismissed for incompatibility on appeal was rejected. It was submitted that the appeal chairman confirmed the dismissal of 1st Respondent for misconduct and no more than that. It was concluded that this ground of review should be dismissed as it is not only devoid of merit, but also an appeal disguised as a review.

14. In *Thabo Mohlobo & others v Lesotho Highlands Development Authority (supra),* in dealing with the circumstances under which a review may be made, the learned Mosito AJ made the following observation regarding the authority of an arbitrator in arbitration proceedings,
"The authority of an arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid."
In the light of this authority, We now proceed to deal with the Applicant's review ground.

15. It is Applicant's case under facts that are common cause that, 1st Respondent was dismissed for misconduct. This has been confirmed by 1st Respondent and also finds support in the list of charges on page 3 of the exhibits list, that Applicant

earlier referred the Court to. Further, We have considered the extract from page 59 of the record that Applicant has relied upon to argue that the dismissal of 1st Respondent was for incompatibility. In Our view, the extract was not a finding but an additional comment after the finding that merely expresses the chairman's attitude, in so far as the work relations were concerned. We do not see how the extract assists Applicant's argument that the dismissal on appeal was for incompatibility.

16. We therefore have no doubt that Applicant was indeed dismissed for misconduct. Further fortifying Our finding is the fact that all the charges on page 3 of the exhibit list, sound in misconduct. As a result, We are in agreement with 1st Respondent that Applicant is indeed uncertain about the reason for dismissal as at one point it is submitted, on behalf of Applicant, that the dismissal of 1st Respondent was for misconduct and later that it was for incompatibility. This marks inconsistencies in the evidence and submissions of Applicant, which suggests a fabrication. The shift from Applicant's initial position is merely premised on convenience and it cannot be countenanced by this Court.

17. Applicant does not dispute the fact that 1st Respondent had referred a claim for dismissal for misconduct or that it was never the Applicant's case that 1st Respondent was dismissed for incompatibility. Rather, Applicant directs the Court's attention to allegations indicating the incompatibility of 1st Respondent within the record, as its premise that evidence of incompatibility was ignored. It is trite law that where the averments of one are not challenged by another, then the issues between parties must be resolved on the basis of the acceptance of the unchallenged evidence (see *Theko v Commissioner of Police and another LAC (1990-94) 239 at 242)*

18. Therefore, the learned Arbitrator was right in determining the fairness of the dismissal of Applicant for misconduct, as it was the referred claim before Her. If She had concerned herself with the dismissal of Applicant for incompatibility, She would have exceeded the bounds of her authority as suggested in the case of *Thabo Mohlobo & others v Lesotho Highlands Development Authority (supra)*. It is clear from the facts before Us, that the issue for determination was whether the dismissal of Applicant for misconduct was fair or not. That being the case

any other determination other than this, would have constituted a gross irregularity worthy of being set aside.

19. It is Our opinion that this ground challenges the procedure that was adopted during the arbitration proceedings. In coming to this conclusion, We are guided by the remarks of the learned Dr. Mosito AJ in *JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, where He 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."
However, given Our findings above, this grounds is devoid of merit and cannot sustain.

20. The second ground of review is that the learned Arbitrator erred in that She made an arbitrary and irrational award for compensation. In amplification, it was submitted that the learned Arbitrator did not take into account the requirements of section 73 of the *Labour Code Order 24 of 1992*, for awarding a just and equitable compensation. It was further submitted that in order to make a just and equitable compensation, the learned Arbitrator had to exercise Her discretion judiciously.

21. It was added that in order to do so, the learned Arbitrator had to have regard to all relevant considerations that have an impact on the issue. It was stated that *in casu*, the learned Arbitrator had failed to do so, for the reason that rather than to award compensation in terms of section 73 *of the Labour Code Oder (supra),* She awarded damages. It was argued that the learned Arbitrator committed a grave irregularity as She is bound by the powers conferred in terms of the governing legislation. The Court was referred to the case of *Bofihla Makhalane v Letšeng Diamonds (Pty) Ltd C of A (CIV) 14/2010*, in support.

22. It was further submitted that the learned Arbitrator had failed to consider role of 1st Respondent in the matters that led to his dismissal. It was stated that the record clearly reflects that 1st Respondent's continued conduct towards his superior,

the Managing Director, was insubordinate. Further, that She failed to consider the state of affairs within Applicant employ which all pointed out to the inevitable termination of 1st Respondent employment, in one way or the other. Further, that the ability of Applicant to pay 1st Respondent the awarded amount, given that it is a public utility, as well as the ability of 1st Respondent to acquire new and alternative employment, were not considered as well.

23. It was added that the learned Arbitrator had failed to consider the fact that 1st Respondent is a highly qualified, experienced and hence a highly employable person. The Court was referred to pages 414-415 of the record of proceedings and the case of *Lesotho Bank v Khabo LAC (2000 – 2004)*, in support. It was further submitted that given all the surrounding circumstances, an award of 6 months wages would have been proper. It was argued that the award for 10 years is baseless as the learned Arbitrator simply divided the claimed period by 2 to have 10 years as compensation. It was submitted that this was both extreme and grossly irrational. Further, that it was improper for the learned Arbitrator to have awarded anticipated severance payment, as severance payment is only paid out for actual the period served.

24. In reply, 1st Respondent submitted that the fact that 1st Respondent was given 10 years compensation, when he had claimed 20 years, shows that the matter was judiciously considered. To fortify this argument, it was added that the 20 years claimed was not even challenged and the fact that it was reduced to 10 years, shows that certain considerations were made to come to the award made. The Court was referred to paragraph 31 of the award in support. It was further submitted that, having made all the necessary considerations, the learned Arbitrator did not act beyond Her powers, as suggested, particularly because the law does not impose a limit on the amount of compensation that She may award.

25. It was further submitted that indeed the alleged breach was ignored as the matter was not heard in the merits of charges 1 and 4. Rather that the learned Arbitrator dealt with charge 6, from which She made the finding that dismissal was not an appropriate sanction. Having made this conclusion, it was not necessary to consider the breach. It was however conceded

that it was improper for the learned Arbitrator to have awarded future severance pay for the reason that severance payment is only made out in respect of the actual period served and not that which is anticipated. It was concluded that this ground ought to be dismissed as similarly, it is not only devoid of merit but an appeal disguised as a review.

26. We have gone through the arbitral award and have confirmed that indeed certain considerations were made in awarding 1st Respondent compensation. This is why among others, 1st Respondent was only awarded 10 years, instead of the 20 years compensation that he had initially claimed. We have specifically perused paragraph 31 of the arbitral award, wherein the learned Arbitrator considered the 1st Respondent's level of education, experience and his employability as well as the fact that he can manage to source income on his own, if he remains unemployed. The 10 years compensation awarded, was not reached by merely dividing the 20 years claimed by 2, but was rather the result o the above considerations.

27. However, We are of the view that having made the above factual conclusion regarding the employability of 1st Respondent, the award for 10 years salary is inconsistent with that factual conclusion. Given the factors highlighted, an award of 10 years is not a just and equitable amount but rather an unfair enrichment of 1st Respondent. We are inclined to agree with Applicant that in awarding 10 years salary as compensation, the learned Arbitrator was in fact awarding damages (see *Lesotho Bank v Khabo (supra)* for the distinction) as opposed to compensation in terms of section 73. Further, in making Her award, it was in total disregard of the ability of Applicant to pay same, given the nature its business. By necessary implication, She therefore acted beyond Her powers as suggested by Applicant. Consequently, the decision to award 10 years compensation is irrational and unreasonable.

28. We have further noted that indeed, the issue of the breach of contract on the part of 1st Respondent was not considered. The rationale for failure to consider this issue was not hard to find. 1st Respondent has rightly pointed out that this consideration was immaterial given the finding made. We only agree with 1st Respondent to some extent. Our view is premised on the fact that it was common cause that 1st Respondent was charged

and dismissed for charges 1, 4 and 6. The substance of charges 1 and 4 was never heard and determined and as such it cannot be relied upon for purposes of compensation. As for charge 6, the learned Arbitrator found that it did not warrant termination of 1st Respondent. It is Our view that the conduct of Applicant relating to charge 6, ought to have been considered in awarding compensation.

29. We have also noted that the learned Arbitrator acknowledged in Her award, specifically at paragraph 25, that the employment relationship had broken down irretrievably. She had however, failed to consider this issue in making Her award for the compensation of 1st Respondent. It is Our view that if She had considered this issue, She would have been able to make a proper projection of the possible period of continued employment. From the conclusion made relating to the employment relationship, 1st Respondent could not have been expected to remain in employment for 10 years. As a result, any conclusion that he would have, is irrational as it is not supported by the earlier factual conclusion made.

30. In essence, while We acknowledge the fact that the learned Arbitrator is not limited in terms of the amount of compensation that she may award, Her discretion in awarding compensation must be exercised judiciously (see *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v LHDA LAC/CIV/17/2009)*. In view of Our findings above, We find that the learned Arbitrator has failed to exercise this discretion judiciously and that this led to Her award being irrational. Consequently, We find that this ground is a review ground and not an appeal contrary to 1st Respondent suggestion. Further, We find that it ought to be upheld and that the matter be remitted to the 3rd Respondent for a *de novo* determination on the compensation amount before a different Arbitrator. It is Our view that it would only be in the interests of both parties that this determination be made before a new presiding officer with no prior engagement in the matter.

31. Notwithstanding that there seems to be no dispute regarding the award of future severance payment, We wish to comment on the issue. We are of the view that there was no irregularity on the approach adopted by the learned Arbitrator. We say this because section 73 of the *Labour Code Order (supra)* provides

for two sets of remedies, namely reinstatement/re-employment or compensation. Where compensation is paid out, it is to be so *in lieu* of reinstatement. The phrase *in lieu* simply means in place of. If this is the case, then the compensation award must consider all salaries, benefits and entitlements that would have been due to a concerned employee but for the unlawful termination, and this includes the entitlement to severance payment.

AWARD

We therefore make an award in the following terms:

a) The application for review is granted;
b) The matter is remitted to the 3rd Respondent for determination of the compensation amount before a different arbitrator.
c) That this award must 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 11th DAY OF NOVEMBER 2013.

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

Miss. P. LEBITSA **I CONCUR**
MEMBER

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

FOR APPLICANT: **ADV. H. WOKER**
FOR RESPONDENT: **ADV. N.T. NTAOTE**