IN THE LABOUR COURT OF LESOTHO **LC/REV/100/2011**
A0754/2009

HELD AT MASERU

In the matter between:

LESOTHO REVENUE AUTHORITY **APPLICANT**

And

'MAMONYANE BOHLOKO **1st RESPONDENT**
MR. M. KETA (ARBITRATOR) **2nd RESPONDENT**
THE DDPR **3rd RESPONDENT**

JUDGMENT

Hearing Date: 5th June 2013
Application for review of the 2nd Respondent arbitration award. 1st Respondent raising a jurisdictional preliminary point that this is an appeal disguised as a review. Applicant arguing that mistake of law, failure to consider and apply a mind, unreasonableness; and failure to follow procedure are not review grounds. Court finding that all these are reviewable grounds and that the averments contained in the founding pleadings of the Applicant make out a prima facie case for review. Applicant withdrawing one ground of review and remaining with only three grounds. Court not finding merit in the remaining review grounds and refusing the review application. Court ordering the reinstatement of the 2nd Respondent arbitration award. 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 in referral A0754/2009. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Adv. Mofilikoane, while 1st Respondent was represented by Advocate Ntaote. The 2nd and 3rd Respondents were cited for convenience.

2. The background of the matter is that sometime in October 2009, 1st Respondent instituted proceedings before the 3rd Respondent wherein She challenged the fairness of her dismissal. It was 1st Respondent's case that the non-renewal of her contract of employment amounted to an unfair dismissal as she had a reasonable expectation that it would be renewed. The 2nd Respondent was the presiding Arbitrator in these proceedings and He issued an award in favour of the 1st Respondent. In terms of the award, the Applicant was ordered to pay to 1st Respondent an amount of M250,200.00 as compensation for the unfair dismissal.

3. Applicant then initiated the current review proceedings wherein it sought the review, correction or setting aside of the said award. At the commencement of the review proceedings, 1st Respondent raised a preliminary point arguing that the grounds raised were appeal disguised as review. The suggestion was strongly opposed by Applicant. Both parties were given the opportunity to make addresses after which the Court declined to pronounce itself, and directed parties to address the merits as well. The Court had then informed the parties that it would only consider the merits if the preliminary point is not upheld.

4. In terms of the heads of argument of Applicant, there are only four grounds of review namely failure to consider and apply one's mind, mistake of law, unreasonableness and failure to follow the correct procedure. However, during argument in the merits, Applicant withdrew the ground relating to unreasonableness and remained with only three. It is in the light of this background that Our judgment is recorded in the following.

SUBMISSIONS AND FINDINGS

Preliminary point

5. It was submitted on behalf of 1st Respondent that all grounds raised on behalf of the Applicant are not review but appeal grounds. It was stated Herbstein and Van Winsen, in their book *"The Civil Practice of the Supreme Court of South Africa, 4 edition,* draw the distinction between an appeal and a review. In that book, the following were identified as grounds of review, *" a) Absence of jurisdiction on the part of the court;*

b) interest in the cause, bias, malice or corruption on the part of the presiding officer;
c) gross irregularity in the proceedings; and
d) the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence."

6. It was submitted that the grounds raised by Applicant related to failure to apply one's mind, mistake of law, unreasonableness as well as failure to consider evidence. It was argued that these are not competent review grounds as shown from the authority above, but an appeal. It was added that they reflect dissatisfaction on the part of the Applicant against the conclusion of the 2nd Respondent. It was stated that the awards of the 3rd Respondent are final and binding upon parties and as such a dissatisfied party only has a review for a remedy and not an appeal. On these premises, it was prayed that this review application be dismissed.

7. In answer, Applicant submitted that all grounds are competent review grounds. It was stated that the law on review provides that an award may be reviewed on any grounds permissible in law and any mistake of law that materially affects it. Reference was made to section 228F (3) of the *Labour (Amendment) Act 3 of 2000* as amended, wherein the following is provided for,
"The Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision."

8. To augment the above submission, the Court was further referred to the case of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)* at 152 A-E, where the following was recorded,
"Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. Such failure may be shown by proof, inter alia that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the

interference that he had failed to apply his mind to the manner aforestated."

9. It was further submitted that among the review grounds raised are that the 2nd Respondent committed a material mistake of law that goes to the root of the matter, in that He had erroneously concluded that Applicant cannot raised poor work performance as a ground for non-renewal. Secondly, that the 2nd Respondent failed to apply His mind to the evidence before him that good work performance was a precondition for renewal of the contracts while poor work performance would lead to non-renewal.

10. Furthermore, it was stated that the 2nd Respondent failed to consider evidence before him that the Commissioner General was entitled to interrogate the score prior to making a recommendation for renewal, which facts were material towards the fair determination of the matter. Lastly, that the learned Arbitrator failed to follow the correct procedure in dealing with the matter in that He failed to determine the claim that was before Him, which was the fairness or otherwise of the dismissal of the 1st Respondent. Applicant concluded that all grounds raised find support in the above referred authorities and are thus competent review grounds.

11. It is an established principle of Our law that whenever a preliminary point of this nature has been raised, the Court must consider the founding pleadings of the applicant party alone and determine if they *prima facie* make out a case for review. The test was laid down in the case of *Khajoe Makoala v 'Masechaba Makoala C of A (CIV) 04/2009* as follows,
"... whether the applicant's affidavits make out a prima facie case. Consequently the applicant's affidavits alone have to be considered and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point."

12. *In casu*, the 1st Respondent's case is premised on the review grounds as suggested by Herbstein and Winsen. We wish to comment that We have dealt with this issue before in the case of *Nedbank Lesotho Limited v Lefosa & others LC/REV/01/2011*. At paragraph 10 of the Our Judgment, We remarked as follows,

"It is Our opinion that the grounds suggested by Herbstein & Van Winsen are merely illustrative and not conclusive. …. It is Our opinion that they only go to the extent of demonstrating the circumstances under which review proceedings are a proper procedure."

We therefore find no compelling reasons to deviate from Our earlier held view safe to maintain it.

13. This above said notwithstanding, We are of the view that the grounds raised by Applicant are *prima facie* review grounds. They are not only supported by the authorities referred to above, but in their own standing sound in procedure. To mention but a few, in the process of making a decision, an arbitrator is bound in law to apply his/her mind to all facts and evidence before him/her in as much as he/she is obliged to consider all material evidence and to follow procedure in order to make a just and equitable decision. Failure to do so amounts to an irregularity.

14. It is therefore Our view that both the provision of section 228E(3) as well as the authority in the case of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another (supra),* cover all the grounds that have been raised by Applicant, as being review grounds. The averments that have been made by the Applicant in its founding pleadings to support these grounds make out a *prima facie* case for review which must be answered by the 1st Respondent. Simply put, the 1st Respondent has a case to answer.

15. While We acknowledge that in terms of section 228E(5) of the *Labour Code Act (supra)*, that the awards of the 3rd Respondent *"Shall be final and binding"*, they are nonetheless reviewable in terms of section 228F(1), of the same Act. Further that We acknowledged that it goes without saying that Applicant is dissatisfied with the arbitration award, that does not make its approach an appeal. In the case of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004*, the court stated as follows,

"*The reason for/ bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgment already given."*

16. In the same Judgment, the Court went on to make a distinction between an appeal and a review in the following, *Where the reason for wanting to set aside a judgment is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of an appeal. where on the other hand, the real grievance is against the method of the trial, it is proper to bring the case for review.*

17. In view of the above authority, it is within Applicant's right to approach this Court to address its dissatisfaction with the arbitration award. The reason is not hard to find as both an appeal and review are made to address the same complaint, which is the dissatisfaction with the judgment given. However, for this Court to entertain such a dissatisfaction, it would rest on the dissatisfaction being premised on procedural irregularities, as anything short of that will border along jurisdictional issues. Having found that the grounds raised by Applicant are *prima facie* review grounds, We accordingly dismiss the point in limine.

Merits

18. Applicant laid the basis of its submissions by outlining the applicable principles on legitimate expectation. The Court was referred to a number of authorities and principles enunciated therein. Among the authorities were the cases of *Thabo William Van Tonder v Lesotho Highlands Development Authority LAC/CIV/APN/06/2004; National Director of Public Prosecutions v Phillips and others 2002 (4) SA 60 (w) at Para 28; Diereks v University of South Africa (1999) 20 ILJ 1227 (LC) at page 1246, para 133, South African Clothing & Textile Workers Union v Cadema Industries (Pty) Ltd [2008] ZALC 5; and Mediterranean Woollen Mills (Pty) Ltd v S. A Clothing & Textile Workers Union (1998) 19 ILJ 731 (SCA) at 733-734.* In the light of this legal background, Applicant proceeded to address the merits of its application.

19. However, before We deal with the merits of the review application, We wish to note that We have gone through all the authorities referred to by Applicant, when laying the basis of its subsequent submissions. We acknowledge the principles enunciated therein, safe to say that Applicant has not made any link in its submission to the authorities referred to, as it has simply laid out the principles. Having failed to do so, it is

not for this Court to establish the link as that would be tantamount to this Court making out a case for Applicant. Such a conduct would be a serious irregularity rendering Our judgment worthy of being set aside (see *Solomon & another NNO v De Waal 1972 (1) SA 575 (A)* at 580E-H, cited with approval by this Court in *Kopano Textiles v DDPR and another LC/REV/101/2007).* We now proceed to deal with the submissions of parties.

20. The first ground of review was that the learned Arbitrator failed to apply His mind to the relevant issues in accordance with the *"behest of the statute and the tenets of justice"*. It was stated that 1st Respondent had claimed an unfair dismissal based on non-renewal of her contract of employment, while it was the defence of Applicant that the expectation for renewal had been extinguished by 1st Respondent's poor work performance, and the fact that she had earlier been warned about same. It was said that the learned Arbitrator only applied His mind to the claim by 1st Respondent and excluded the defence of Applicant.

21. The Court was referred to the evidence of one Lesenyeho and Letjama at pages 201 to 216; and 257 to 282, respectively, It was said that this evidence was clear that Applicant was underperforming and that this was fundamental for the fair and equitable determination of the matter. It was argued that in failing to consider this evidence, the learned Arbitrator clearly failed to apply his mind or to consider if an employee whose work was poor and who had also been cautioned about poor work performance could have had a legitimate expectation for renewal.

22. It was further submitted that the learned Arbitrator failed to consider and apply His mind to the evidence that the Commissioner General was not a rubber stamp. It was added that after the recommendation for renewal had been made, the Commissioner General reserved the right to interrogate the scores allocated to a recommended employee, before accepting the recommendation for renewal. It was argued that had this evidence been considered, the learned Arbitrator would have realised that the recommendation for renewal, that was made to the Commissioner General, did not give rise to the expectation for renewal.

23. It was furthermore submitted that the learned Arbitrator made an award that was based on the fact that 1st Respondent earned an amount of M20,850.00 per month, notwithstanding the fact that 1st Respondent testified that she earned the amount of M20, 668.00 per month. It was added that the amount that used in calculating the award amount was more than the amount pleaded by 1st Respondent as her salary. It stated that both amounts, i.e. the amount used and that pleaded by 1st Respondent, are different from the amount that Applicant testified to as being the 1st Respondent salary per month. It was said that the learned Arbitrator therefore assumed the salary of 1st Respondent and did not consider the evidence of Applicant or the 1st Respondent salary regarding her salary.

24. It was submitted in reply that the learned Arbitrator considered and applied His mind to all facts before him. It was stated that the case before the learned Arbitrator was for legitimate exception and not poor work performance. It was added that the learned Arbitrator had to consider if there were factors upon which the 1st Respondent relied upon for her case, which He did. It was stated that the learned Arbitrator addressed the issue of poor work performance under paragraph 16 of the arbitration award, wherein He addressed both parties arguments.

25. We are in agreement with the 1st Respondent that the case before the learned Arbitrator was for legitimate expectation and not for poor work performance. However, while this may be the case, the learned Arbitrator was nonetheless enjoined in law to consider any evidence in defence that attempts to negate the existence of the alleged expectation. It is common cause that the defence of the Applicant in the arbitration proceedings was that 1st Respondent had no expectation of renewal, by virtue of her poor work performance and the fact that she had previously been cautioned about same.

26. Therefore, the learned Arbitrator was duty-bound to consider and apply His mind to the Applicant's evidence of 1st Respondent poor work performance, as it was relevant to the matter before Him. Our conclusion finds support in the case of *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 AD at 152 C-D,* where the court in explaining the

phrase *"failure to apply one's mind*," stated that it is a reviewable irregularity where the commissioner (Arbitrator in our jurisdiction),
"took into account irrelevant considerations or ignored relevant ones;"
This essentially means that an arbitrator is duty-bound to ignore irrelevant issues and to only consider the relevant ones.

27. We have perused the arbitration award, and in particular paragraph 16. The said paragraph is recorded as follows,
"The respondent's main contention was that the applicant was not renewed on the basis of poor work performance. I will point out that evidence was led by respondent which showed the applicant's poor work performance. There was further evidence that was furnished to show that applicant had been cautioned of her performance and urged to improve on those areas. I will mention that a fixed contract is not a substitute for taking action for poor work performance. There is a procedure to be followed when dealing with an employee who is under performing. The respondent cannot sit back and watch an employee who is not performing without taking any action and when it is time to renew the contract bring up the issue of non performance as a reason for non-renewal"

28. A simple reading of paragraph 16 shows an acknowledges of the existence of the evidence of poor work performance and the caution made to 1st Respondent about her poor work performance. Clearly, this demonstrates that the learned Arbitrator considered and accepted all evidence of poor work performance. The learned Arbitrator is further recorded to have dismissed the Applicant's defence on the ground that it ought to have dealt with 1st Respondent through the prescribed procedures, than to resort to non-renewal of her contract. This again clearly demonstrates that the learned Arbitrator applied His mind to the facts before Him.

29. However, We confirm that the learned Arbitrator failed to consider the effect of poor work performance on the 1st Respondent's alleged expectation for renewal of her contract and the evidence that the Commissioner General reserved the right to interrogate the scores prior to renewal of the contracts. It is Our view that having disqualified the evidence of poor work performance, as He did, it would only have served

academic purposes for Him to evaluate both the effect of poor work performance on the alleged expectation, as well as the professed role of the Commissioner General in the recommendation processes.

30. Further, it is alleged that the learned Arbitrator assumed the salary of 1st Respondent as He failed to consider the evidence of both Applicant and 1st Respondent regarding the said salary. While this averment has not been challenged by 1st Respondent, Applicant nonetheless has the responsibility to support such allegations with the record. We have stated the reason behind this requirements before in the case of *Molahli v Morija Press Board & another LC/REV/25/2012*, at paragraph 12 of the judgment. This is recorded in the following,

"Whenever it is alleged that the learned Arbitrator ignored or disregarded certain evidence, of an applicant party to review proceedings, the Court must be referred to a specific portion of the record of proceedings, wherein the ignored or disregarded evidence is reflected. This requirement is premised on the fact that the party against whom allegations of irregularities are made, is not and cannot be brought before Court to state their side. This abnormally is cured by reference to the record of proceedings to prove the allegations of irregularities. This is the essence of a record of proceedings in review matters, irrespective of whether the review is opposed or not."

31. *In casu*, Applicant has barely made these allegations of failure to consider evidence without referring the Court to the record of proceedings where such allegations were made. It is a trite principle of law that bare allegations of facts are unsatisfactory and unconvincing and cannot be relied upon to make a binding finding (see *Molefi & others v Tai Yuan Garments (Pty) Ltd & others LC/REV/119/2011; LC/REV/25/2012; LC/REV/24/2012).* In view of this finding, Applicant has failed to make out a case for failure to consider the evidence of the 1st Respondent salary.

32. The second ground of review was that the learned Arbitrator committed a material mistake of law in making a finding that Applicant cannot raise poor work performance as a ground for non-renewal. The Court was referred to the last sentence at paragraph 16 of the arbitration award, where this finding is

alleged to have been made. It was argued that in making this finding, the learned Arbitrator clearly relied on some fixed rule or conventional understanding which disabled him from his obligation to consider all the circumstances of the case before him, particularly that good performance was the ground for renewal while poor performance would lead to non-renewal. It was concluded that this is a clear mistake of law.

33. Applicant relies on the last sentence of finding of the learned Arbitrator at paragraph 16 of the arbitration award, for its claim of a mistake of law. As a result, all the issues in support of this grounds flow from the alleged mistake of law. The said finding in issue is recorded as follows,
The respondent cannot sit back and watch an employee who is not performing without taking any action and when it is time to renew the contract bring up the issue of non performance as a reason for non-renewal"

34. In Our view, Applicant's claim of a mistake of law is based on its interpretation of the above extract. We say this because neither the extract recorded above nor any part of the concerned paragraph, at least as quoted verbatim at paragraph 27 of this judgement, indicates the conclusion of Applicant that the learned Arbitrator made a finding that poor work performance cannot be a reason for non-renewal. It is therefore Our opinion that the interpretation of the finding of the learned Arbitrator by Applicant, under paragraph 16 is not accurate. In view of this, it would therefore be wrong for Us to proceed on the basis of an incorrect interpretation of the said finding, in evaluating the Applicant's case.

35. From the extract in issue, the learned Arbitrator is clear that an employer cannot continue to retain an employee who is underperforming without taking all the necessary measures and to only raise same as the basis of the non-renewal of the contract of employment. This does not in any way suggest that poor work performance is not a competent ground for non-renewal of a contract. It simply places a precondition in order for poor work performance to stand as a valid reason for non-renewal. In Our view, there is nothing wrong in the conclusion that was made by the learned Arbitrator. In fact it finds support in Our law, in particular under sections 12, 13 and 14 of the *Labour Code (Codes of Good Practice) Notice of 2003.*

These sections provide for the procedural and substantive requirements of a claim based on poor work performance.

36. The last ground of review was that the learned Arbitrator did not follow the correct procedure in dealing with the matter. It was submitted that in cases of unfair dismissals owing to non-renewal of a fixed term contract, the existence of the legitimate expectation of renewal, only establishes that dismissal occurred and not that it was unfair. As a result, having found that Applicant had a legitimate expectation, as the learned Arbitrator did, He was then enjoined to determine its fairness or otherwise. It was added that had the learned Arbitrator followed the correct procedure, He could have made a finding that poor work performance was a sufficient ground of the dismissal of 1st Respondent.

37. In reply, 1st Respondent submitted that the learned Arbitrator followed the proper procedure in dealing with the matter. It was stated that the learned Arbitrator did not only find the existence of a legitimate expectation, but also made a finding that the dismissal of 1st Respondent was unfair. The Court was referred to paragraph 17, on page 4 of the arbitration award where this was alleged to have been recorded.

38. A claim for non-renewal based on a legitimate expectation is referred in terms of section 68(b) of the *Labour Code Order (supra).* The said section provides as follows,
"Dismissal shall include –
the ending of any contract for a period of fixed duration or for the performance of a specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal;"

39. We are therefore in agreement with Applicant that in a claim for unfair dismissal based on non-renewal of contract of employment, the existence of legitimate expectation only goes to the extent of establishing that a dismissal occurred. It therefore goes without saying that having determined that a dismissal occurred the next procedural step is to determine the fairness or otherwise thereof.

40. We have been referred to paragraph 17 of the arbitration by 1st Respondent, as being indicative that the learned Arbitrator went beyond determining the existence of the dismissal, to its fairness. This paragraph is recorded in the following,
"I will not deal with the issue of the applicant's disciplinary action that was taken against as the said action was instituted after a decision not to renew was taken against applicant. On the basis of all the above I find that the non renewal of the applicant's fixed term contract amounted to unfair dismissal."

41. It is Our view that this paragraph demonstrates that the learned Arbitrator went beyond just merely determining the existence of the dismissal of 1st Respondent. In that paragraph, the learned Arbitrator makes a finding that the disciplinary proceedings were taken after the decision not to renew in the light of a legitimate expectation, i.e. the dismissal, had been taken. On the premise of this finding, coupled with His evaluation of the rest of the evidence, He found that the non-renewal, i.e. the dismissal, was unfair. We therefore find no irregularity on the part of the learned Arbitrator.

AWARD

We therefore proceed to make an award in the following terms:

a) That the application for review is refused;
b) The award in referral A0754/2009 remains in force;
c) That the said award must be complied with within 30 days of receipt herewith; and
d) That no order as to costs is made

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 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. MOFILIKOANE**
FOR 1st RESPONDENT: **ADV. NTAOTE**