IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/36/2012**
A0951/2011

In the matter between:

'MASEKHANTŠO SEKHANTŠO **APPLICANT**

And

MALUTI MOUNTAIN BREWERY **1ST RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Date: 21st November 2013
Application for review of arbitration award. Applicant raising three grounds of review. 1st Respondent raising two points of law namely that grounds raised are appeal and not review grounds; and that the grounds of review are so vague that it is difficult to determine the issues. Court finding that the grounds raised are prima facie review grounds. Further that the point relating to the vagueness of the pleadings has been overtaken by events. Court further finding merit in only one ground and dismissing the other two. Court granting the review and remitting the matter to the DDPR to be heard de novo 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 DDPR arbitration award in referral A0951/2011. Three grounds of review have been raised in terms of which Applicant seeks the review, correction and/or setting aside of the 2nd Respondent arbitration award. The matter was opposed and both parties were in attendance throughout the review proceedings. Applicant was represented by Adv. Thabane while 1st Respondent was represented by Adv. Loubser.

2. 1st Respondent had two points of law on the basis of which it sought the dismissal of the review application. The first point related to grounds raised being appeal disguised as review. The second point related to the alleged review grounds being so vague that it is difficult to identify the issues. We wish to highlight that at the commencement of the proceedings, parties indicated to the Court that they wished to adopt a holistic approach to the matter. Specifically, they stated that they would argue the points of law together with the merits. We agreed with the parties wishes and accordingly directed that they proceed to address Us. Our judgment is therefore in the following.

SUBMISSIONS OF PARTIES

3. The first ground of review is that the learned Arbitrator failed to apply Her mind to the totality of facts before Her. It was submitted in amplification that Applicant had testified that she was not the custodian of the policies of the 1st Respondent. Further, that the policies of 1st Respondent were kept and stored at a document centre and that the custodian was one of the employees of the 1st Respondent company, called the document controller. It was added that Applicant had testified that she only had a read only access, like any other employee of the 1st Respondent, unlike the document controller who had full access to the policies.

4. Applicant argued that this notwithstanding, the learned Arbitrator made a conclusion that Applicant was the custodian of the policies of the 1st Respondent and on this basis, She made a conclusion that a manipulation of the policies of the 1st Respondent and failure by Applicant to report such manipulation to the management of 1st Respondent, amounted to a dereliction of duty on her part. It was argued that in making this conclusion, the learned Arbitrator did not apply Her mind to the above evidence of Applicant. The Court was referred to pages 30 to 31 and 45 to 47 of the record of proceedings before the 2nd Respondent and paragraph 17 of the arbitration award. It was further argued that failure to consider this evidence led to the wrong conclusion being made.

5. The second ground of review is that Applicant had testified that she only became aware about the manipulation on the policy

after she had sent it out for legal opinion. She argued that this notwithstanding, the learned Arbitrator made a finding that Applicant sent a manipulated policy for external opinion, without alerting the external lawyers that the said policy had been manipulated. It was argued that this finding was unreasonable. The Court was referred to paragraph 17 of the arbitration award for this finding.

6. The third ground of review is that Applicant led evidence to explain why she could not collect the minutes of the initial hearing on time, but that this notwithstanding, the learned Arbitrator made a finding, on paragraph 21 of the arbitration award, that she did not give any explanation at all. It was argued that in so doing, the learned Arbitrator distorted the evidence of Applicant and that this constitutes an irregularity.

7. In answer, 1st Respondent submitted that the grounds raised by Applicant are review disguised as appeal. It was argued that Applicant is merely dissatisfied with the arbitration award as the grounds raised do not refer to any irregularity in the process of the hearing of her application. Reference was made to section 228F(34) of the *Labour Code Amendment Act 3 of 2000*, in support. It was added that the grounds raised are so vaguely stated that it is difficult to determine the issues that Applicant is complaining about. It was prayed that on the bases of these two points, that the matter be dismissed with costs.

8. On the first ground of review, Respondent submitted that the case before the learned Arbitrator was not over custodianship but dereliction of duty on the part of Applicant. It was added that Applicant was dismissed for dereliction of duty, in that she failed to report a manipulation on the policy to management, contrary to her obligations to do so. The Court was referred to pages 25 to 27 of the record of proceedings, for evidence on the duties of Applicant. It was highlighted that among the duties, is to report to management on any issues that relate to the policies of the 1st Respondent. It was argued that the finding of the learned Arbitrator was based on the totality of evidence before Her and that She properly applied Her mind to all facts before Her. It was concluded that

Applicant was clearly unhappy with the award of the learned Arbitrator.

9. On the second ground, Respondent's answer was that Applicant had testified that the very same document which she sent for external legal opinion, was at face value obviously manipulated. It was argued that as a result, the only conclusion that the learned Arbitrator could made was that Applicant sent a manipulated document well aware that it was manipulated and without alerting the external lawyers about it. It was added that on these bases, the conclusion of the learned Arbitrator is reasonable.

10. We wish to comment that the approach agreed upon by parties has to a large extend been to the benefit of the Applicant. We say this because in taking this approach, Respondent opened doors for Applicant, not only to establish that the grounds raised are *prima farcie* review grounds, but also argue with the reference to the record in support of her defence. With due regard to the submissions made above, We are in no doubt that the grounds raised are review and not appeal grounds as claimed by the 1st Respondent. Essentially, the above grounds sound in procedure. What therefore remains is whether, they have enough merits to sustain the relief sought.

11. On the issue of the review grounds being vague, We also find no merit in the argument. The premise of Our finding is basically that 1st Respondent has been able to plead in defence to the Applicant's grounds of review, without even indicating any difficulty to do so. This essentially means that 1st Respondent is clear on the case of Applicant. If 1st Respondent truly found the review grounds vague, the proper procedure would have been to raise a point of law prior to filing its answer. We therefore find that this point of law has been overtaken by events and as such it is not competent at this stage. In the light of this finding, We make no order as to costs and proceed to deal with the merits of the review.

12. On the first ground of review, the issue relates to the finding of the learned Arbitrator at paragraphs 17 and 18 of the arbitration award. It is under these paragraphs that She made

a finding that Applicant was guilty of dereliction of duty. We have carefully considered these two paragraphs, in line with the submissions of parties and the referenced portions of the record of proceedings. We wish to confirm that pages 25 to 27 relate to the duties of Applicant, while pages 45 to 47 relate to the evidence in relation to there being a documents centre and Applicant's access. In essence, the content of these pages is as parties have put.

13. However, upon careful considerations of the award, the conclusion that Applicant had derelicted seems to flow from an earlier finding that Applicant had conceded that she was the custodian of the policies of 1st Respondent. Applicant has denied that she ever made such a concession, but rather says that the learned Arbitrator failed to apply Her mind to her evidence refuting this suggestion. This has not been denied by 1st Respondent. Rather, 1st Respondent has reacted by simply arguing that custodianship was not the issue.

14. It is trite law that where there is no evidence to contradict the evidence of a party to proceedings, then the court must proceed to make a decision on the basis of the unchallenged evidence of that party and then make an appropriate order (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242; and Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623).* As a result, We accept the Applicant's version that she never made such a concession but refuted it, as she alleges and the record reflects.

15. We have also noted from Our perusal of the record that the learned Arbitrator did not apply her mind to the evidence of Applicant challenging the alleged custodianship to the policies of 1st Respondent. In fact, Our observation is that the learned Arbitrator did not consider this issues at all and consequently could not apply her mind to what had not been considered. It is Our view that the evidence of Applicant challenging her custodianship to the policies of 1st Respondent was material to the determination of the issue of dereliction. Diffidently put, the learned Arbitrator ought to have considered and applied Her mind to that evidence. In failing to do so, She erred.

16. Regarding the second ground of review, it is an established principle of law that whenever the conclusion of the trier of facts is termed unreasonable, the basic principle is that there should be no link between the accepted facts by the trier of facts and the final conclusion made. Supportive of Our view is the authority in *Carephone (Pty) Ltd v Marcus NO & 7 others (1998) 11 BLLR 1093 (LAC)* at 1103, where the Court held that there must be a rational objective justifying the connection made by the decision-maker between the material available and the conclusion made, in order for the conclusion to pass the test of being reasonable.

17. *In casu,* Applicant alleges unreasonableness on the part of the learned Arbitrator without laying its basis. Applicant only makes reference to the conclusion without stating the accepted facts, or even referring the Court to the accepted facts on record, that make the conclusion unreasonable. We therefore find that Applicant has failed to establish unreasonableness.

18. 1st Respondent has not reacted to the third ground of review at all. As a result, We proceed on the basis of the acceptance of the factual averments of Applicant, that she gave evidence of an explanation, as correct. We have already stated the principle involved and see no need to reiterate. We wish to confirm that the finding of the learned Arbitrator is that Applicant failed to provide an explanation for failure to collect the minutes of the initial hearing on time. In fact, the learned Arbitration has made reference to specific scenario of failure to provide an explanation. However, in Our view, this is a case for failure to consider evidence on record. A claim for distortion of evidence is not recognised as a review ground in Our law.

19. Our Courts have stated the recognised grounds review in Our jurisdiction in several cases. Authoritative in this regard is the authority in *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)*. This authority has been cited with approval by Our courts with specific reference to page at 152 A-E, where the following is 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."

20. Consequently, this ground stands to be dismissed on these basis. However, given Our earlier finding on the first ground of review, the review succeeds.

AWARD

Our award is therefore in the following terms:

a) That the application for review is granted;
b) The matter is remitted to the DDPR to be heard *de novo* before a different arbitrator;
c) Applicant must have the matter set down for hearing within 30 days of receipt herewith; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st DAY OF MARCH 2014.

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

Mrs. RAMASHAMOLE **I CONCUR**
MEMBER

Mr. MATELA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. N. G. THABANE**
FOR 1st RESPONDENT: **ADV. P. J. LOUBSER**