IN THE LABOUR COURT OF LESOTHO **LC/REV/58/12**

HELD AT MASERU

In the matter between:

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY LESOTHO (PTY) LTD **APPLICANT**

and

MOSIA NKOKO **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

DATE: 05/02/14

Review of an arbitral award - Fixed term contracts - Employee engaged on successive fixed term contracts - Whether renewal thereof gave birth to a fresh contract independent of its precursor - Applicant alleging Arbitrator committed an irregularity by holding that the dismissal of an employee for a misdeamour that allegedly occurred during the subsistence of an earlier contract was improper as the two contracts were independent of each other - Court concludes on the basis of Section 3 of the Labour Code Order, 1992 that upon renewal, the employee's fixed term contracts became continuous - Review application succeeds.

MATERIAL FACTS

1. The applicant had engaged the 1st respondent as a Lecturer in terms of a series of successive fixed term contracts of employment running for one year in each term initially from 14th July, 2008 to 30th July, 2009; renewed from 15th July, 2009 to 15th July, 2010; and again from 15th July, 2011 to 17th July, 2012.

2. It is common cause that the 1st respondent was dismissed by the applicant on 29th September, 2011 following a disciplinary hearing on charges of misconduct held on 5th July, 2011. He was subsequently dismissed. He challenged the said

dismissal before the Directorate of Dispute Prevention and Resolution (DDPR) and was successful. The DDPR ordered payment of a sum of One Hundred and Eighty Thousand and Nine Maloti, Eight Cents (M180 009.08) as compensation for unfair dismissal.

3. The applicant is before this Court seeking to have the said award of the DDPR reviewed, corrected and set aside. It is its contention that the award is reviewable on the following grounds; that the learned Arbitrator:-

(i) granted the 1st respondent a relief that he had not sought through taking irrelevant considerations into account and ignoring relevant ones;

(ii) erred and misdirected itself by making a finding that was not supported by evidence; and lastly

(iii) misinterpreted the law by finding that the dismissal was based on an expired employment contract thereby failing to appreciate that the disciplinary hearing was on - going when the subsequent contract was entered into.

4. Applicant's Counsel submitted that the failure to have the award supported by facts and evidence, culminated in the learned Arbitrator awarding what was not sought for. He contended that because there were no submissions on substantive irregularities, the reason for the dismissal was never challenged and parties only dwelled on procedural impropriety which he submitted was irregular. Regarding the last ground of review, he argued that because of the renewals, 1st respondent's contract was continuous.

5. On his part, 1st respondent's Counsel submitted that the renewed contract was a new contract which constituted a new employment relationship. According to him, at the expiration of each fixed term contract, the contract automatically came to an end. Thus he argued that the 1st respondent was dismissed following disciplinary proceedings undertaken during the then expired term of office. He maintained that when 1st respondent's contract was terminated on ***29th September, 2011,*** the employment relationship between the parties had ceased to exist, and the applicant could therefore not terminate 1st respondent's contract.

6. It is important to note that when the dismissal was effected on ***29th September, 2011***, it was during the subsistence of the renewed fixed term contract whist disciplinary proceedings were held on ***5th July, 2011***, in the course of the previous term of 1st respondent's contract. 1st respondent's case is that the dismissal was executed beyond the contract period, which was illegal. He argued that the 1st respondent was essentially accused of conduct that allegedly occurred during the subsistence of an otherwise expired contract. Counsel relied for his submissions on two cases ***viz., Selloane Mahamo v Nedbank Lesotho Limited LAC/CIV/04/11*** (Saflii) and ***Lesotho Highlands Development Authority (LHDA) v Motumi Ralejoe LAC/CIV/A/03/2006*** (***Saflii***).

THE COURT'S ANALYSIS

7. The first and second grounds of review are interrelated. In substantiating the two grounds, Applicant's Counsel argued that whist the 1st respondent had referred a case of unfair dismissal to the DDPR; the learned Arbitrator only traversed procedural issues, thereby going against what was contained in the referral form. He argued that the issues raised were not supported by any affidavit or oral evidence leading to him granting a relief that was not sought, and a finding unsupported by any evidence. He contended that the reason for the dismissal ought to have been challenged in order to ascertain whether the dismissal was fair. According to him, by dwelling only on procedural aspects of the dismissal, the learned Arbitrator committed a serious irregularity.

8. It is trite law that in a claim for unfair dismissal a party may challenge the dismissal on both substantive and procedural grounds or challenge only the substantive or procedural aspects thereof. The record of proceedings reflects that it was by mutual arrangement between both Counsel that submissions be made only on the law. To this end, the learned Arbitrator in summarising the issues for his determination pointed out at page 1 of the record that ***"There is a further agreement that there is no need to call … any oral evidence in*** [these] ***proceedings***." Advocate Macheli, for the applicant, confirmed this at page 2 of the record by indicating that ***"We started off as a case of unfair dismissal but we now agree not to lead oral evidence."*** This arrangement was corroborated by 1st respondent's Counsel, Advocate Mosotho, when he stated at page 2 of the record that ***"We have no problem, we can start and we agree that the submissions shall only be on the position of the law."***

9. Clearly, there was an agreement between the parties that the question for determination impinge on whether it was proper for the employer to have dismissed the 1st respondent over an alleged misconduct that occurred in the course of an expired fixed term contract. Nowhere in the record does applicant's Counsel object to the approach adopted by the learned Arbitrator.

10. Since the procedure that was followed at the arbitration proceedings was by mutual consent between the parties, applicant's first and second grounds for review are found unsustainable and are therefore dismissed. The issue that remains for determination is whether the learned Arbitrator misconstrued the law by concluding that the applicant dismissed the 1st respondent outside the contract period.

THE ALLEGED MISINTERPRETATION OF THE LAW

11. 1st respondent's Counsel premised his case before the DDPR on ***Section 7(2) of the Labour Code (Codes of Good Practice) Notice, 2003*** which provides that:

> ***"if an employer has employed an employee on a fixed term contract, the employer may only dismiss the employee before the expiry of the contract period if the employee materially breaches the contract. If there is no breach by the employee, the only way that the employer may terminate the contract lawfully is by getting the employee to agree to early termination.***

12. His argument was that the applicant dismissed the 1st respondent on the basis of a disciplinary enquiry that occurred outside the existent contract period. He submitted that when 1st respondent's services were terminated on ***29th September, 2011***, it was already outside the scope of his fixed term contract as it had expired on ***15th July, 2011***. Indeed the dismissal occurred during subsistence of the contract running from ***15th July, 2011*** to ***17th July, 2012***. 1st respondent's Counsel contended that when the contract was terminated the 1st respondent had not breached any term of the employment contract in the said period, and it was therefore improper for the applicant to have dismissed him for a breach that purportedly occurred in a previous contract.

13. As far as he was concerned the applicant was in breach of the employment contract because from the ***15th July, 2011*** to ***17th July, 2012*** the 1st respondent was in a fresh contract and could not be accused of incidents that occurred in an

otherwise expired contract. 1st respondent's Counsel argued that each fixed term contract automatically terminated upon its expiration. The applicant disputed this line of reasoning and argued in turn that when 1st respondent's contract was renewed on ***15th July, 2011***, the employment contract became continuous and the employer had every right to take disciplinary steps against him. He submitted that the learned Arbitrator therefore misconstrued the law in finding that the applicant dismissed the 1st respondent over a disciplinary enquiry that took place in a period that fell outside the contract period.

14. That an employee can only be dismissed during the subsistence of his or her employment contract is settled law. This is only logical because if the contract of employment no longer exists there will be no employment relationship between the parties. The issue then becomes whether in 1st respondent's case we can say that the previous fixed term contract was independent of the renewed one. In ascertaining whether the applicant has a case the answer seems to lie in the probe whether 1st respondent's three fixed term contracts were independent of each other or mutually exclusive.

15. A fixed term contract automatically terminates on the date specified for its termination.[1] It however, appears that the position changes as soon as such a contract is renewed. Applicant's Counsel submitted that upon renewal, the fixed term became continuous. A look at the definition of continuous employment will be helpful. ***"[C]ontinuously employed"*** as defined in ***Section 3 of the Labour Code Order, 1992***

> ***means employed by the same employer, including the employer's heirs, transferees and successors in interest <u>for a period that has not been interrupted for more than four weeks in each year of such employment,</u>*** (emphasis added) ***during which four - week period there was no contract of employment in existence and no intention on the part of the employer to renew it once that period has elapsed…***

16. The above Section treats a fixed term contract to be continuous if it has not been interrupted for more than four weeks in a year. 1st respondent's contracts were renewed on 15th July, 2009; 15th July, 2009; and lastly on 15th July, 2011. There was no interruption between them. Because of this absence of any interruption between these fixed term contracts, the 1st respondent became continuously employed as envisaged by Section 3 above.

[1] Section 62 (3) of the Labour Code Order, 1992

17. In our analysis a reading of this Section in relation to 1st respondent's circumstances tells us that when he was dismissed on 29th September, 2011; the employment relationship between the two parties still existed. By virtue of the renewal of his fixed term contracts, the employment relationship became continuous. It appears the learned Arbitrator misconstrued the provisions of ***Section 3 of the Labour Code Order, 1992*** particularly because they were duly brought to his attention by applicant's Counsel. Another critical point to consider would be whether the 1st respondent picked his terminal benefits each time his fixed term contract came to an end. This issue did not come up before the DDPR. Clearly, if the employment is continuous the question of terminal benefits will not arise.

18. The authorities relied on by 1st respondent's Counsel are distinguishable from the case at hand. A brief analysis of the facts of these two cases will give an insight into the distinction. ***Selloane Mahamo v Nedbank Lesotho Limited (supra)*** was an appeal against the judgment of this Court. In that case the appellant had been suspended on 10th March, 2006 pending investigations into an alleged shortage that occurred on 8th March, 2006. Following investigations, the applicant when confronted confessed to having taken the money, and followed it up with a letter dated 31st March, 2006. On the same day she drew a cheque making good the missing cash. On 3rd April, 2006, she purported to resign from her employment with immediate effect.

19. The bank responded on 4th April that it still considered her as its employee until her disciplinary case had been finalised. It on the same day served her with disciplinary charges accusing her of gross dishonesty and/or theft. The hearing was scheduled to take place on 10th April, 2006, but was postponed and ultimately took place on 13th April, 2006. The applicant had indicated that she would not attend as she was no longer respondent's employee. True to her word, she did not attend. She was found guilty ***in absentia*** and dismissed. She approached the DDPR on a claim of constructive dismissal, and lost, proceeded to the Labour Court on review and lost as well.

20. The Labour Court confirmed the DDPR finding that the applicant had not been dismissed but resigned on her own accord, and she could therefore not claim constructive dismissal. On appeal, the Labour Appeal Court held that the appellant was entitled to her terminal benefits because the disciplinary hearing and her dismissal were effected post her resignation. Dates were very critical in the case. The case is far removed from the one before us in that when the 1st

respondent ***in casu*** was dismissed, he was in a continuing relationship. The dismissal flowed from a disciplinary hearing that was undertaken during the subsistence of an on - going relationship. The fact that 1st respondent's fixed term contracts bore expiry dates made no difference in his case because they were renewed each time. His initial and second fixed term contracts would have automatically terminated on their expiration dates as envisaged by ***Section 62 (3)*** of the ***Labour Code Order, 1992*** if they had not been renewed.

21. A distinction can also be drawn between the case before us and the Labour Appeal Court decision of ***Lesotho Highlands Development Authority (LHDA) v Motumi Ralejoe LAC/CIV/A/03/2006.*** This was an appeal against this Court's decision in LC 36/06. In this case the appellant gave the respondent a notice of termination on operational grounds (retrenchment) on 15th November, 2005 effective from 31st January, 2006. On 27th January, 2006, interestingly, during respondent's farewell party organised in his honour by the appellant, the latter served him with a letter inviting him to a disciplinary enquiry to be held on 31st January, 2006, the last day of his service.

22. The proceedings were postponed to 8th February, 2006 following respondent's objection that he had not been given sufficient time to prepare his defence. On the day, the respondent pointed out to the appellant that he was no longer an employee of LHDA and had just attended out of courtesy for the employer. The proceedings continued for several days 8th, 9th and 10th February, 2006. On the 10th of February, 2006 the respondent was found guilty as charged and dismissed. He was later informed that he would not receive his severance pay as he had been dismissed for misconduct.

23. Dissatisfied with this decision, he approached this Court for relief. The Court gave judgment in his favour and ordered the release of his severance pay and all other outstanding benefits as it held the respondent was holding on to them illegally. This case is distinguishable from the present in that by the time the respondent in the LHDA case was served with a letter summoning him to a disciplinary hearing he was already serving notice of termination following the employer's notice that it was retrenching him, and only to turn around and come up with a misconduct case. The Court ruled that when the disciplinary hearing was held the respondent was no longer an LHDA employee. Apparently the misconduct was only discovered after the respondent had already been notified of his retrenchment, and the disciplinary hearing was held after the effective date of the retrenchment.

WHETHER MATTER REVIEWABLE

24. The test for ascertaining whether a matter is reviewable or not was aptly captured in the judgment of ***Sidumo & Another v Rustenburg Platinum Mines (Pty) Ltd & Others 2008 (4) SA (CC)*** at p. 44B. It was held in that case that the test in review proceedings is whether the decision maker properly exercised the powers entrusted in him or her. On the proper exercise of the discretion, the Labour appeal Court held in ***Thabo Mohlobo & Others v Lesotho Highlands Development Authority LAC/CIV/A/05/2010)*** at paragraph 6 pages 6-7 that:

> ***In arriving at her decision the arbitrator had to act bona fide, not to be prompted by any ulterior motive and properly apply her mind to the matter. Included under the rubric of failure to apply the mind to the matter is capriciousness, a failure to appreciate the nature and limits of the discretion to be exercised, a failure by the person concerned to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach and an application of wrong principles*** (emphasis added).

This decision has been cited with approval in a number of this Court's decisions.

25. ***Section 228 F (3) of the Labour Code (Amendment) Act, 2000*** as amended clearly confers a discretion on the part of the Labour Court. It empowers the Labour Court to:

> ***... set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision.***

Mistake of law, if established, is therefore reviewable. Broadly speaking, in order to establish review grounds it must be shown that the presiding officer failed to apply his mind to the relevant issues in accordance with the ***"behests of the statute and the tenets of natural justice."*** Mistake of law was also considered as a ground for review in ***Tao Ying Metal Industry (Pty) Ltd v Pooe N.O & Others 2007 (5) SA 146 (SCA)*** in which the Court held that a decision would be reviewable if it is found ***"not to be accordance with the law."*** This judgment has also been relied on by this Court on a number of occasions including in the recent judgment of ***`Malerato Akhente v Lesotho Telecommunications Authority & the DDPR LC/REV/92/11.***

26. For the reasons enunciated in the body of the judgment the Court finds the learned Arbitrator to have misconstrued the provisions of ***Section 3 of the***

Labour Code Order, 1992 in concluding that 1st respondent's fixed term contracts were independent and separable. It is pursuant to this Section that the Court finds 1st respondent's dismissal to have flowed from the disciplinary hearing that was held in the second tenure of his fixed term contract. All the fixed term contracts had been continuous by virtue of their renewal.

27. The Court accordingly comes to the following conclusion:

(i) That the review application succeeds;

(ii) That the matter is remitted to the DDPR to be heard on merits before a different Arbitrator to determine the propriety of 1st respondent's dismissal if he is still interested in pursuing the unfair dismissal claim; and

(iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 05th DAY OF FEBRUARY, 2014.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

S. KAO **I CONCUR**
ASSESSOR

M. MOSEHLE **I CONCUR**
ASSESSOR

For the applicant: **Adv., T. D. Macheli**

For the 1st respondent: **Adv., T. Mosotho**