

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/10/11**

**HELD AT MASERU**

In the matter between:-

**`MAFOKASE LETSOSA**

**APPLICANT**

and

**STANDARD LESOTHO BANK  
DIRECTORATE OF DISPUTE PREVENTION  
AND RESOLUTION**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

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***JUDGMENT***

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**DATE: 19/05/14**

*Review of an arbitral award - Where an employee had been found to have been grossly negligent where a customer's deposit had disappeared - Review based on a number of grounds including that the Arbitrator committed an irregularity by, among others, allowing legal representation where the other party was not legally represented; allegedly ignored evidence that the applicant was overworked due to understaffing; and that the employer failed to provide sufficient security - Court finds grounds raised not reviewable - Review application therefore dismissed.*

1. The applicant is herein seeking the review, correction and setting aside of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in referral number AO 262/10. The award followed the institution of an unfair dismissal claim by the applicant in which she challenged both the substantive and procedural fairness of her dismissal. She had been dismissed following a disciplinary action in which she was charged with negligence and failure to account for a customer's money that was in her custody and care. It is common cause that a customer's deposit parcel containing an amount of Twenty Thousand, Five Hundred and Twelve Maloti (M20 512.00) received and signed for by the applicant could not be traced, and the bank had to refund it. Dissatisfied with the DDPR award, she lodged this review application.

## ***GROUNDS OF REVIEW***

2. The applicant averred in her founding affidavit that the learned Arbitrator's award was fraught with a number of irregularities. She alleged that he erred and misdirected himself in the following respects:-

- a) In allowing the 1<sup>st</sup> respondent to be legally represented when the applicant was not so represented;
- b) By failing to appreciate that the bank had violated its own security procedures by putting the money in bags/sacks instead of lockable trolleys, thereby compromising security. She further indicated that the movement of cash had to be done in the presence of two people;
- c) By ignoring applicant's evidence that there was shortage of staff thereby rendering it difficult for the applicant to carry out her duties diligently;
- d) By not acknowledging that the applicant had been summoned to do another task whilst she was still in the process of allocating money to tellers; and lastly
- e) She also accused the bank of inconsistency in that she contended this was not the first time that this kind of mishap occurred, but the affected employees including her were not dismissed.

3. In reaction, 1<sup>st</sup> respondent's Counsel submitted that Mr Macheli appeared before the DDPR in his capacity as an officer of an employer's organisation to which the 1<sup>st</sup> respondent was a member. She further contended that the issues raised by the applicant were not reviewable because the learned Arbitrator had applied her mind to them and made a finding thereon. She reminded the Court that in a review application what is at stake is not that the arbitrator came to a wrong conclusion but the method of the trial. She submitted that the grounds raised by the applicant are actually appeal grounds.

## ***LEGAL REPRESENTATION IN LABOUR DISPUTES***

4. It was not disputed that the 1<sup>st</sup> respondent was a member of the Association of Lesotho Employers and Business, and that Mr Macheli was an employee of the

said Association. *Section 228 A of the Labour Code (Amendment) Act, 2000* on representation of parties before the DDPR provides that:-

- (1) *In any proceedings under this Part, a party to the dispute may appear in person or be represented only by -*
  - (a) *a co-employee;*
  - (b) *a labour officer, in the circumstances contemplated in section 16 (b);*
  - (c) *a member, an officer of a registered trade union or employers' organisation (underlining added for emphasis);or*
  - (d) *if the party to a dispute is a juristic person, by a director, officer or employee.*

The fact that the 1<sup>st</sup> respondent was represented by Mr Macheli, an officer of an employers' association, was not amiss as it is envisaged by *Section 228A (c)* above.

5. The applicant's representative cited a number of authorities in support of his objection to Mr Macheli's appearance before the DDPR. These were, however, cited out of context. They included the case of *Queen Komane & Another v City Express LAC/CIV/A/5/2002* which dealt with *Section 28 (1) (b) of the Labour Code Order, 1992* which clearly prohibited legal representation in the Labour Court where the other party is not so represented. The judgment explicitly refers to representation by an attorney/legal practitioner and does not address the question of representation by an official of an employers' organisation (*vide* paragraphs 12 - 17 of the judgment). In the same breadth, the decision of *Lenka Mapiloko v President of the Labour Court, and Pannar Seeds (Lesotho) (Pty) Ltd LAC/REV/05/07* revolved around *Section 28(1) (b)* of the *Labour Code Order, 1992*.

6. Applicant's representative further relied on an earlier decision of this Court in *Lesotho Commercial, Catering, Food and Allied Workers' Union v M.K.M Society and Another LC/45/99*. This case is also not relevant in that the case was before the Labour Court and the objection to on representation by a legal practitioner related to Advocate Mohau KC's representation of the respondents in his capacity as a legal practitioner and not as a representative of an

employers' organisation. The Section in issue was still *Section 28 (1) (b) of the Labour Code Order, 1992*. The Court held that his representation was inappropriate as the other party was not legally represented. We couldn't agree more with this decision. The law seems to draw a distinction between representation by legal practitioners *sensu stricto* and representation by officials of trade unions and employers' organisations.

7. This issue has been coming up both before the Labour Court and the DDPR on numerous occasions. On these occasions, it has always been union officials objecting to employers either engaging their employees who have a legal background or officers of employers' organisations who are also legally qualified. The Court feels it is high time that the issue is tackled at the level of such fora as the National Advisory Committee on Labour (NACOLA) to get views of the social partners (*viz.*, the Government of Lesotho, the employers' and workers' representatives). This would help inform policy on the issue and perhaps lay the matter to rest or lead to an amendment of the law if need be. For us as Courts the law is clear and ours is to interpret and execute it. We have repeatedly made our stance clear.

#### ***WHETHER MATTER REVIEWABLE***

8. The other issues raised by the applicant's representative related to the learned Arbitrator allegedly failing to consider evidence to the effect that as a result of understaffing the applicant was overworked; that she had to attend to some other task whilst distributing the cash; that the bank had compromised security procedures; and lastly that the bank was inconsistent in dealing with this particular incident. Respondent's Counsel raised an objection to the effect that these are appeal grounds disguised as a review. The issue then that this Court has to deal with is whether this matter is reviewable.

9. The position regarding reviews has been stated over and over again by the Labour Appeal Court and this Court. Reviews over matters emanating from the DDPR are regulated by *Section 228 F (3) of the Labour Code (Amendment) Act, 2000 (as amended by the Labour Code (Amendment) Act, 2006)*. The Section provides that the Labour Court may set aside an award of the DDPR on any grounds permissible in law and any mistake of law that materially affects

the decision. As aforementioned, the Section has been a subject of a host of the Labour Appeal Court and this Court's decisions.

10. Applicant's representative essentially averred that the learned Arbitrator failed to apply his mind to the case that was before him, by indicating that he ignored the evidence tendered that could have led to the disappearance of the money bag. In *Lesotho Electricity Corporation v Liteboho Samuel Ramoqopo and Another LAC/REV/121/05* the Labour Appeal Court relying on the classical case on reviews of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)* stated at *p. 152 A-E* that broadly speaking, in order to establish review grounds, it may have to be shown that the tribunal failed to apply its mind to the relevant issues in accordance with the "*behests of the statute and the tenets of natural justice.*"

11. Failure to apply one's mind may be shown by proof that, *inter alia*, that the decision was arrived at arbitrarily, capriciously, mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or that the tribunal misconceived the nature of the discretion conferred upon it and took into account irrelevant considerations or ignored relevant ones; or that the decision was so grossly unreasonable as to warrant the inference that the presiding officer failed to apply his or her mind to the matter as aforestated - *Johannesburg Stock Exchange (supra) at p. 152* and *Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another 1975 (4) SA 1 (T) at 8 D-G*. The former was cited with approval in this Court's case of *Amanda Mapelaelo Shale v Lesotho Funeral Services and the DDPRLC/REV/99/ 10 at paragraph 22*.

12. On evaluating the case before us, we find that the learned Arbitrator duly addressed applicant's defences relating to linking the disappearance of the cash to lack of security as well as lack of sufficient personnel and allegations of inconsistency and determined that the applicant had failed to substantiate her case against the 1<sup>st</sup> respondent. As far as we are concerned, the learned Arbitrator duly applied his mind to the case that was before him.

13. Nugent JA., pointed out in *Tao Ying Industry (Pty) Ltd v Pooe NO and Another 2007 (5) SA 146 (SCA)* that in cases relating to arbitration proceedings, Courts have a very limited role. Their role is generally confined to overseeing

the process by way of review to ensure that it was in accordance with the law. In review proceedings two separate questions arise. The first is whether the award was made in accordance with the law. The focus in that enquiry is not whether the decision of the arbitrator was right or wrong but rather on the process and on the way in which the decision-maker came to the challenged decision. He remarked further that the second enquiry would arise only if the award is found not to have been in accordance with the law.

14. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) at 590* the Court held that in a review, the question is not whether the decision is capable of being justified but whether the decision-maker properly exercised the powers entrusted to him or her. Having found the learned Arbitrator to have applied his mind to the case, we find no reason to disturb his award.

In our view, the applicant is basically unhappy with the DDPR award and appears to be challenging the outcome itself which is tantamount to an appeal.

#### **CONCLUSION**

15. In the circumstances, we make the following order:-

- a) The review application is dismissed;
- b) The arbitration award under referral number AO 262/10 is allowed to stand;
- c) No order as to costs.

***THUS DONE AND DATED AT MASERU THIS 19<sup>TH</sup> DAY OF MAY, 2014.***

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

**S.KAO**  
**MEMBER**

**I CONCUR**

**M.MOTHEPU**  
**MEMBER**

**I CONCUR**

**FOR THE APPLICANT : L.J MOLEFI (LESOTHO  
WHOLESALEERS, CATERING & ALLIED  
WORKERS' UNION)**

**FOR THE 1<sup>ST</sup> RESPONDENT: ADV., L. SEPHOMOLO KC  
(ASSOCIATION OF LESOTHO  
EMPLOYERS & BUSINESS)**