IN THE LABOUR COURT OF LESOTHO **LC/REV/92/11**

HELD AT MASERU

In the matter between:

`MALERATO AKHENTE **APPLICANT**

and

LESOTHO TELECOMMUNICATIONS AUTHORITY **1st RESPONDENT**

THE DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

DATE: 22/01/14

Practice and procedure - Review of an arbitration award - Applicant claiming automatic elevation following her acquisition of a degree qualification - Having been unsuccessful at arbitration she raised objections at the manner in which the arbitral process was conducted including inter alia that she was denied an opportunity to lead viva voc`e evidence and reliance by the arbitrator in his decision on documents not handed in as evidence - Court discerned no irregularities in the DDPR proceedings – The review application was therefore dismissed.

BACKGROUND TO THE DISPUTE

1. Facts giving rise to this review application are briefly that: the applicant had been under the employ of the respondent as a Secretary at ranked at Grade 4, for salary purposes. She then held a diploma in Administration and Secretarial Studies, but later obtained a degree qualification. She averred that upon her completion of a degree in Human Resources Management in March, 2008, she duly apprised her employer of this development with the expectation of an increase to her salary.

2. With the increment not forthcoming, she lodged a claim with the Directorate of Dispute Prevention and Resolution (DDPR). The basis of her claim was that by virtue of having attained a degree qualification, she automatically qualified

to be remunerated at Grade 6, an entry point for degree holders. She contended that her continued placement at Grade 4 constituted a breach of the Company policy styled ***LTA Organisational Structure, 2001*** and led to her being underpaid. Attached to her referral form was a computation of the difference in salary from June, 2008 to July, 2011 when she lodged her claim before the DDPR. The computation included telephone, housing and car allowances. Her claim was dismissed on the basis that the policy document did not automatically entitle her to an elevation in salary as claimed, and concluded that the respondent was not in breach of the Company policy. He therefore dismissed her claim.

3. The applicant has approached this for the review, correction and setting aside of the award on the following grounds;

(i) That parties' representatives were only required to make submissions without leading any evidence culminating in the learned Arbitrator making a decision not supported by any evidence. She pointed out that an objection was raised to the proceedings being conducted in that manner but the learned Arbitrator proceeded despite the objection and even failed to reflect that on the record; and

(ii) That the learned Arbitrator based his decision on documents ***to wit*** the ***LTA Organisational Structure, 2001*** that had not been tendered as evidence. Applicant's Counsel contended that it was irregular for the learned Arbitrator to have decided that there had not been any breach of 1st respondent's policy when such policy had not been handed in to form part of evidence.

4. Motivating applicant's case, applicant's Counsel insisted that evidence has to be led in arbitration proceedings. He submitted that parties never agreed to confining themselves to the making of submissions, but even if this was the case, it was irregular. He argued that the applicant was denied an opportunity to present her case through ***viva voc`e*** evidence which was contrary to ***Section 18 (2) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001*** and ***Section 26 (8) and (9) of the Labour Code (Conciliation and Arbitration Guidelines) Notice, 2004.*** Counsel prayed that the matter be remitted to the DDPR to start ***de novo*** before a different arbitrator.

5. In reaction, 1st respondent's Counsel argued that Mr `Mako (applicant's representative) read from the policy document during the proceedings, and he

found it queer for him to suggest that there was no policy document that was placed before them. He submitted that the record belied their version. He argued that if Mr `Mako was not happy with the procedure he ought to have objected during the proceedings.

6. He therefore prayed that the application be dismissed with costs for frivolity. He submitted that the documents that were before the DDPR were there by agreement, and in putting reliance on the policy document, the learned Arbitrator committed no irregularity that can be said to have materially affected his decision.

THE COURT'S EVALUATION

7. As it is, the applicant was represented by Mr `Mako from the Labour Department. The procedure that was adopted at the DDPR was that following the introduction of the dispute by the learned Arbitrator, Mr `Mako proceeded to present applicant's claim. Subsequently, 1st respondent's representative gave their side of the story following which applicant's representative made his closing remarks.

8. There is nowhere in the record where applicant's representative requested to lead ***viva voc`e*** evidence nor where the learned Arbitrator orders parties to dwell on their submissions. Applicant's Counsel alleged that this opportunity was denied, and the learned Arbitrator failed to record this. This was disputed by the 1st respondent. A dispute of fact having arisen there was a need for the applicant to substantiate the purported irregularity by evidence. It does not come out whether the proceedings were recorded electronically or not.

9. Assuming without acceding that the learned Arbitrator refused the leading of ***viva voc'e*** evidence, and there was no agreement between the parties to rely purely on their submissions, the question arises: was there a need for viva voc`e evidence in the circumstances of this case? In our view the dispute before the DDPR rested on the interpretation of 1st respondent's policy documents which included the ***LTA Organisational Structure, 2001*** and its personnel rules. This was a question of law as rightly pointed out by the learned Arbitrator in his opening remarks.

10. It does not necessarily follow that in each and every case ***viva voc`e*** evidence has to be led. It all depends on the issue at hand, whether it is a question of law or fact. Clearly, the bone of contention in applicant's case

revolved on the interpretation of the 1st respondent's organisational policy which as aforementioned is a legal question. The main issue being whether or not it entitled the applicant to automatically be elevated to Grade 6 upon her acquisition of a degree qualification.

11. On the objection that the learned Arbitrator committed an irregularity by making a determination not backed up by evidence; applicant's Counsel did not disclose the nature of the evidence that the applicant intended submitting that would have perhaps persuaded the learned Arbitrator to have made a determination in her favour.

12. It has emerged that at the centre of the dispute was the ***LTA Organisational Structure, 2001.*** The applicant herself referred to the organisational policy in her referral form. Under the nature of the dispute, she wrote: ***"According to the employer's policy, l must have been graded at 6. The reason being that pursuant to LTA's Ranking system, the (sic) degree holders are graded at 6."*** We find it absurd for her to turn around to challenge the learned Arbitrator's reliance on the ***LTA Organisational Structure, 2001*** in his decision on the basis that it was never tendered as evidence, when the very same policy was the basis of her claim.

13. It must be noted that the DDPR is not a Court of law, and is not expected to abide by the strict tenets of the law of evidence. Legal formalities are discouraged in alternative dispute resolution mechanisms such as the DDPR. Circumstances of each case dictate how it should be handled.

14. It should be underscored that it was the applicant's representative himself who introduced the policy document on applicant's behalf. At Page 4 of the record Mr `Mako remarked: ***"Now, our case rests on underpayment, as per the employer's policy; known as the Lesotho Telecommunications Authority Organisational Structure."*** The learned Arbitrator had to analyse this policy document in order to establish whether applicant's claim to Grade 6 is sustainable in terms of the policy.

15. The learned Arbitrator's conduct of the proceedings was consistent with the provisions of ***Section 228 C (1) of the Labour Code (Amendment) Act, 2000*** which enjoins arbitrators in the conduct of DDPR proceedings to:

…conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly, but shall deal with the substantial merits of the dispute with the minimum of legal formalities.

16. On page 4 of the record, 1st respondent's representative, Mr Sefako, asked that in ascertaining whether or not the applicant is entitled as a right to remuneration commensurate with her academic qualification, the ***LTA Organisational Structure, 2001*** should be read together with Clause 4.1.1 of the Authority's personnel rules. According to Mr Sefako, the said Clause provided that the salary scale of an individual employee shall be in accordance with the post occupied. The emphasis here is the post one occupies not the qualifications a person possesses.

17. In review applications, the Labour Court is empowered by ***Section 228 F (3) of the Labour Code (Amendment) Act, 2000*** to set aside an award on ***"any grounds permissible in law and any mistake of law that materially affects the decision."*** The Court held in ***Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2008 (4) SA (CC)*** at p. 44 B that the test in review proceedings is whether the decision maker properly exercised the powers entrusted in him or her. According to the decision in ***Johannesburg Stock Exchange v Witwatersrand Nigel 1988 (3) SA 132 (AD) at p. 152 C-D*** a matter would be reviewable upon:

[p]roof, 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 or improper purpose; or that [the presiding officer] ***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*** [presiding officer] ***was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter aforestated.***

18. The case has been relied upon in a number of decisions of this Court including that of ***Econet Telecom Lesotho (Pty) Ltd v Seqao Phenya and the DDPR LC/REV/10/10 (N0. 2)*** (reported in Lesotholii). The Lesotho Labour Appeal Court reiterated the review test laid down in ***Johannesburg Stock Exchange (supra)*** in ***Thabo Mohlobo & Others v Lesotho Highlands Development Authority LAC/CIV/A/05/2010 at pp. 6-7*** when it pointed out 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.

19. Another review test envisaged by ***Section 228F (3) of the Labour Code (Amendment) Act, 2000*** is whether the learned Arbitrator could be said to have committed a mistake of law that materially affected his decision. Ascertaining what constitutes a mistake of law the Court in ***Tao Ying Metal Industry (Pty) Ltd v Pooe N.O & Others 2007 (5) SA 146 (SCA)*** pointed out that a decision would be reviewable if it is found ***"not to be in accordance with the law."*** The ***LTA Organisational Structure, 2001*** contains outlines employment positions (posts) existent within the Lesotho Telecommunication Authority (LTA) and salaries attached thereto, similar to the Lesotho Government's Establishment List. The issue then becomes whether in his interpretation, the learned arbitrator misconstrued the content of the policy which for our purposes now would constitute a law, it being an instrument that regulates the Company. There appears to be nothing in the policy on an automatic upgrade of an incumbent upon attainment of a higher qualification.

20. We are fortified in our decision by the Lesotho Court of Appeal decision of the ***Principal Secretary - Ministry of Tourism, Environment and Culture and 3 Others v Selloane Makha and 2 Others C OF A (CIV) NO. 35/2012***. It was a case in which applicants having resumed their work in the civil service without possession of degree qualifications, later acquired them. On the strength of having attained graduate status, they applied to the High Court for an order directing that they be remunerated at Grade F, it being a Grade applicable to their enhanced qualifications. The first two respondents were at Grade D and whilst the third one was at grade B. Their argument was based on the ***Government Circular Notice No. 8 of 2000*** stating ***inter alia*** that serving degree graduate officers would be re - graded at Grade F. The High Court granted this order. Dissatisfied with the order, the applicants lodged an appeal against it.

21. The appeal was allowed. The Court held that the circular did not provide for the re - grading of respondents' posts. The Court of Appeal pointed out that the Court ***a quo*** made a finding that was not based on any evidence that Grade F positions were available. It held that without any statutory provision, any public

service rule or regulation having been shown to exist enabling such placements to be made, the respondents could not claim a right to Grade F. This decision is on all fours with the case before us. In ***casu,*** the applicant had failed to show the learned Arbitrator that the possession of a degree qualification coupled with the ***LTA Organisational Structure, 2001*** entitled her to Grade 6. As aforesaid, the structure merely outlined positions that existed within the establishment together with commensurate remuneration. The applicant had to be appointed to a position at Grade 6 in order to qualify for the enhanced remuneration.

22. We also found the Court of Appeal decision in ***Ministry of Public Service & Another v `Masefabatho Lebona C of A (CIV) No. 6/12*** is relevant. In this case the respondent had commenced her employment as a Senior Consumer Affairs Officer in the then Ministry of Trade and Industry at Grade 10. One of the requirements for this post was a Bachelor of Laws degree. On 15th June, 1992, the Ministry of Public Service issued a Savingram setting forth revised salaries for civil servants in the legal profession. The entry point was revised from Grade 10 to Grade 12.

23. The respondent claimed that she was entitled to Grade 12 by virtue of possessing a Bachelor of Laws degree. The Court of Appeal held that the Savingram related to officers in the legal cadre, for instance Magistrates and Legal officers. The affected positions were actually spelled out in the Savingram. The Court decided that the Savingram cannot be construed to include respondent's position as a Consumer Affairs Officer much as she held a Bachelor of Laws degree because she did not hold a position in the legal cadre.

24. On the basis of the above analysis, we find the learned Arbitrator to have properly exercised the powers entrusted in him by law and to have properly construed the relevant law.

We therefore come to the following conclusion that:-

(i) The review application is dismissed;

(ii) The DDPR award in ***A O520/11*** is allowed to stand; and lastly

(iii) There is no order as to costs. The Court was not able to establish any unreasonableness on the part of the applicant in the matter. ***Section 74 (2) of the Labour Code Order, 1992*** restricts the award of costs. The Section provides that costs will only be awarded where a party against

whom it awards costs has been found to have behaved in a wholly unreasonable manner.

THUS DONE AND DATED AT MASERU THIS 22nd DAY OF JANUARY, 2014.

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

L. MATELA **I CONCUR**
ASSESSOR

M. MOSEHLE **I CONCUR**
ASSESSOR

For the applicant: **Adv., RD Setlojoane - Phafane Chambers**

For the 1st respondent: **Adv., HHT Woker - Webber Newdigate**