

HELD AT MASERU

In the matter between:

MPHASA SETATI

APPLICANT

and

**LESOTHO FREIGHT & BUS SERVICE
CORPORATION**

1st RESPONDENT

**DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

2nd RESPONDENT

JUDGMENT

DATE: 30/05/14

Review of an arbitral award - On allegations that the Arbitrator failed to apply his mind to such factors as:- failure on the part of the employer to consult the trade union prior to effecting the dismissal; that the applicant could not afford to effect payments and drive the bus; that it was the employer who bore the brunt for the safety of collections; and that the employer was inconsistent - The Court found the grounds raised unsustainable as they challenged the decision and not the procedure - Review application dismissed.

INTRODUCTION

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 A 0751/10. The applicant lost in an unfair dismissal claim against the 1st respondent wherein he had challenged the substantive and procedural fairness of his dismissal.

BACKGROUND TO THE DISPUTE

2. The facts surrounding this dispute were that the applicant was engaged as a bus driver, and was dismissed on 27th July, 2010 following a charge of fraud and negligence. The incidents that led to his dismissal were, *inter alia*, that he was found on two occasions found to have been ferrying passengers who had no

boarding tickets. In another incident a house rented by the Bus Corporation at Ribaneng, in the Mafeteng district burned down and in the process bus fares estimated at One Thousand and Five Hundred Maloti (M1, 500.00) were destroyed. It emerged that the money was in the custody of the Bus Conductor when it ought to have been with the applicant. Applicant's house had not been affected by the fire. Evidence had been adduced on behalf of the 1st respondent at the DDPR that the applicant was quite conversant with the operational procedures of the Corporation as he had been duly inducted on them when he assumed his duties.

GROUNDS OF REVIEW

3. Some of the grounds of review raised by the applicant were repetitive and the Court attempted to summarise them. The applicant contended that the learned Arbitrator committed the following irregularities:-

- (i) That the learned Arbitrator erred and misdirected himself by ignoring applicant's evidence that the 1st respondent did not consult the union before dismissing him;
- (ii) By ignoring or omitting evidence that there were no rules regulating the security of its cash. As far as he is concerned, management itself failed to manage the security of the cash by not providing a strong room;
- (iii) By ignoring the fact that the burning of the house was neither the applicant's nor the conductor's fault;
- (iv) In concluding that the Bus Conductor was the one responsible for the payment of fares;
- (v) By ignoring the fact that the applicant could not drive and accept fares at the same time; and lastly
- (vi) That the 1st respondent was inconsistent in the punishment that he meted out to the applicant.

4. In essence, applicant's case was that the 1st respondent failed to prove its case before the DDPR. In reaction to this application, respondent's Counsel argued

that the grounds raised by the applicant were not review but appeal grounds as they were directed at the decision of the learned Arbitrator and demonstrated nothing else but unhappiness with the decision arrived at by the learned Arbitrator. He contended that as is evident from the award the learned Arbitrator considered all the elements that were raised by the applicant.

THE COURT'S EVALUATION

5. 1st respondent's case was that the applicant was the one who was responsible for the safety of the bus fares. It was submitted on its behalf that the bus had a wayfarer machine which was operated by the applicant as a driver. He was said to have been the only one who could operate it and issue receipts as it was accessible by a private PIN (Personal Identification Number).

6. On the safety of cash, the learned Arbitrator considered the issue and found on the evidence tendered before him that the procedure was such that the cash collected had to be in the custody of the applicant and not the Bus Conductor. It however, emerged that the money that got burned was found to have been with the conductor. The 1st respondent had fielded three witnesses, namely, Motlalepula Mokemane, Ts'olo Mohale and Moeketsane `Mote who all testified and confirmed that the Bus Corporation's operational procedure was such that passengers had to pay upon embarking on the bus and be issued with receipts from the wayfarer machine operated by the driver.

7. It is trite that in terms of ***Section 228F of the Labour Code (Amendment) Act, 2000*** awards of the DDPR are only reviewable. Both the Labour Appeal Court and this Court have reiterated over and over as to what constitutes grounds for review. Review is not the re - opening of the case that was before the Court *a quo* but it attacks any procedural improprieties in the conduct of proceedings (the method of the trial). On the other hand, appeals are broader and reassess the whole case even on the facts. Remarking on the distinction between reviews and appeals, Herbstein & Van Winsen in their work - ***The Civil Practice of the Supreme Court of South Africa*** 4th ed., at p. 932 pointed out that the reason for bringing proceedings under review or appeal is usually to have a judgment set aside and observed that:

Where the reason for wanting this is that the Court came to a wrong conclusion on the facts ... the appropriate remedy is by way of appeal. Where, on the other hand, the real grievance is against the method of the trial it is proper to bring the case on review.

8. The above observation was cited with approval by the Labour Appeal Court in *JDG Trading (Pty) Ltd t/a Supreme Furnishers v Monoko* (Arbitrator) & *Another LAC/REV/39/04* at p. 8 para. 13. Regarding mistake of law the common law position has been changed by statute in that a wrong conclusion on the law now constitutes a reviewable irregularity - *Section 228F (3) of the Labour Code (Amendment) Act, 2000*.

9. The renowned authors continued at pages 932-933 that:-

The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not of review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity.

10. The grounds raised on review are the very same grounds that were raised before the DDPR and applicant's representative contended that the learned Arbitrator ignored or omitted the evidence that was tendered before him. It was not made clear to the Court how. What is clear is that the learned Arbitrator applied his mind or considered the grounds that were raised by the applicant and made a determination thereon.

11. Regarding the first ground on failure to consult the trade union prior to dismissal, the issue was addressed by the learned Arbitrator at paragraph 17 of his award, and it emerged that it was the very same trade union official Mr Molefi who represented him at the disciplinary hearing. Paragraph 9 - 15, and 19 of the learned Arbitrator's award dealt with 1st respondent's operational procedures, and the purported destruction of the money collected as bus fares. Paragraph 16 of the award covered inconsistency.

12. On the point raised by applicant's representative that the applicant could not afford to drive and collect fares, this is not an area we dare venture into as Courts of law. It is a managerial prerogative as it touches on the intricacies of applicant's job which he had accepted. Courts cannot usurp management roles and dictate to employers how best to run workplaces. That would be going far beyond their mandate, which is basically to uphold the rule of law and ensure that justice and fairness prevail. All the grounds raised by the applicant pertained to facts and not the validity or legality of the learned Arbitrator's decision. In ordinary circumstances, where an arbitrator has given fair

consideration to the matter which has been submitted to him for decision, he or she cannot be found to be guilty of misdirection even if the Court were to come to a different conclusion - *Dickenson & Brown v Fisher's Executors 1915 AD 166 at 176*. All in all, we find the learned Arbitrator to have properly exercised a discretion that was endowed on him.

13. The grounds raised for review reflect a general dissatisfaction with the learned Arbitrator's determination. The Court is constrained in intervening by way of a review in the circumstances. Applicant's representative cited the right authorities dealing with review but could not relate the principles raised thereon to his case. The significance of citing authorities is to show their relevance to the prevailing facts, and how they support one's case, it is not for mere reciting.

THE FINDING

14. Assessing the award of the DDP and the record of proceedings, the learned Arbitrator appears to have considered all the points that were raised by the applicant in motivation of his claim together with submissions made by the union representative on his behalf. The Court therefore comes to the following conclusion:-

- (i) The review application is dismissed;
- (ii) The DDP award in *A0751/10* stands;
- (iii) 1st respondent's Counsel had sought an order of costs, the Court however feels not persuaded by the prayer, and there is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 30th DAY OF MAY, 2014.

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

M. THAKALEKOALA
ASSESSOR

I CONCUR

R. MOTHEPU
ASSESSOR

I CONCUR

FOR THE APPLICANT:

**L.J. MOLEFI - Lesotho Wholesalers,
Catering & Allied Workers` Union**

FOR THE 1ST RESPONDENT: ADV., N.T. NTAOTE -Employers` Forum