IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/11/2013**
A0896/2012

In the matter between:

ZINYATHI TRADING (PTY) LTD **APPLICANT**

And

DDPR	**1ST RESPONDENT**
MOSITO MOELETSI	**2nd RESPONDENT**
MAKHOANA K'HENENE	**3Rd RESPONDENT**
MALEFANE KOBOKHOLO	**4th RESPONDENT**
THABANG 'MATLI	**5th RESPONDENT**
TŠELISO MOKATI	**6th RESPONDENT**
TUMELO MORAKABI	**7th RESPONDENT**
MOTLALEPUSO RAPOTSANE	**8th RESPONDENT**

JUDGMENT

Application for review of arbitration award. Applicant having raised six grounds of review. All grounds failing and review application being dismissed. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 1st Respondent arbitration award in referral A0896/2012. It was heard and judgment was reserved for a later date. The facts surrounding the matter are that 2nd to 8th Respondents were employees of 1st Respondent until they were dismissed for misconduct. Thereafter, they referred a claim for unfair dismissal with 1st Respondent. The matter was duly heard, after which an award was issued in favour of the 2nd to 8th Respondents. In terms of the award, Applicant was directed to pay 2nd to 8th Respondents, each an amount equal to their 6 months wages in compensation. It is this award that the Applicant wishes to have reviewed, corrected and/or set aside.

2. At the commencement of the proceedings, parties noted that they no longer wished to pursue the points of law raised in their pleadings in favour of the merits of the matter. The Court noted and accepted the parties proposal and directed that they proceed to address the merits. Having heard their submissions and having considered their pleadings, Our judgment is therefore in the following.

SUBMISSIONS OF PARTIES

3. It was Applicant's case that the learned Arbitrator had erred by concluding that the dispute was right based when in fact it was an interest based dispute. It was argued in amplification that the Respondents were dismissed for embarking on strike. The Court was referred to page 5 of the record of proceedings where the following is recorded,
   "Before this issue the workers did work until two o'clock and after that they took the lunch and went home. Seven people out of three hundred and twenty people said "we will not work if we did not eat." You have to understand that the law is very clear on that matter to say that there must be a break after five hours for one hour if they worked continuously for five hours but there must be a mutual agreement between the employees and employer which were signed and that's why we stated that it is not unfair dismissal. There was agreement signed between employees and employers. So, on that I am finished."

4. Respondent rejected the Applicant's case on the ground that it was never Applicant's case that Respondents had been dismissed for participation in a strike. It was added that in the arbitration hearing, parties had agreed on the factual issues, to which dismissal for participation in a strike was not an issue. It was submitted that it was from these issues that parties made submissions. It was rejected that the quoted extract indicated that the Respondents were dismissed for participation in an illegal strike.

5. We are in agreement with Respondents that nothing in the quoted extract either indicates, suggests or even gives the impression that Respondents were dismissed for participation in a strike. Rather, it merely illustrates that they refused to work continuously for more than five hours without a break. Further, there is nothing in the argument of Applicant that

indicates a procedural breach on the part of the learned Arbitrator, in making a conclusion that the dispute in issue was right based as opposed to interest based. Rather, what is clear to Us is that Applicant is merely unhappy with the decision of the learned Arbitrator, as it specially challenges the conclusion.

6. It is trite law that mere unhappiness with the decision is not a ground for review. Rather for an unhappiness with the decision to sustain as a review grounds it must establish the absence of a rational connection between the facts presented and the decision made (see *Carephone (Pty) Ltd v Marcus NO & 7 others (1998) 11 BLLR 1093 (LAC)* at 1103). *In casu*, no irrationality has been suggested in the finding, and We also find none from both the quoted extract and the decision of the learned Arbitrator. The quotation from the extract does not paint the alleged picture by Applicant. The Applicant's argument simply cannot sustain.

7. Further, Respondent does not deny or reject the suggestion that the defence that Respondents were engaged in a strike is only being raised for the first time on review. If this is the case, the proceeding before this Court are an improper forum to canvass this point. We have stated before that the maxim of *audi alteram partem* applies both ways, that is, it must be afforded to all parties concerned and that includes the learned Arbitrator. By this We mean that the issue should have been raised with the learned Arbitrator to give Her the opportunity to address it. We have stated this position in *Phakiso Ranooana v Lesotho Flour Mills (Pty) Ltd & another LC/REV/59/2011,* where We relied on the finding of the Court of Appeal in *Puleng Mathibeli v Sun International 1999-2000 LLR-LB 374 (CA*)).

8. The second ground of review was that the learned Arbitrator erred and misdirected herself by failing to explain the implications of a pre-arbitration conference to Applicant. It was submitted that owing to this omission on the part of the learned Arbitrator, Applicant left out some of his crucial evidence and that this delivered a fatal blow to his case.

9. In answer, Respondent submitted that the learned Arbitrator explained the process to both parties. It was argued that if

Applicant did not fully appreciate the process, it ought to have raised it with the learned Arbitrator immediately after the explanation was given. It was further argued that Applicant cannot plead ignorance over something that he had ample opportunity to have cleared. It was further submitted that, even still, ignorance of the law is no excuse In Lesotho. It was added that a pre-arbitration conference is provided for and explained in the Labour Code.

10. It was further submitted that Applicant is attempting to challenge the pre-arbitration minutes to which it is a signatory. It was said that by appending its signature to same, it signalled its consent and agreement to the contents of the said minutes. It was added that Respondent is in law barred from any attempt to renege against what it attested to.

11. A pre-arbitration conference is held in terms of Regulation 22 of the *Labour Code (DDPR) Regulation of 2001*. Indeed as Respondent has put, the said section outlines the pre-arbitration process and its purpose. Applicant is an employer and as such it is enjoined in law to acquaint itself with the applicable laws to its trade. As a result, Respondent cannot be heard to claim ignorance to the labour laws of Lesotho and this includes the Rules and Regulations. Our conclusion finds support in the High Court of Lesotho Authority in *Linkoe FC v LEFA & others CIV/APN/1/1994*, where an applicant party had pleaded ignorance of the rules applicable to the disputed issue. In rejecting this defence, the Court relied on the principle that ignorance of the law is no excuse.

12. Further, Applicant has not denied the allegation that the process and purpose of the conference were explained to parties by the learned Arbitrator. If this is so, then We agree with Respondent that Applicant had ample opportunity to seek clarity from the learned Arbitrator if it did not fully appreciate the pre-arbitration procedure. We are therefore drawn to the conclusion that Applicant is attempting to use these proceedings to avoid what it committed itself to. We simply cannot allow this practice as that would unduly undermine the principle of *caveat subscriptor,* i.e., that once an agreement has been reduced to writing and signed by parties, then parties are bound by the terms contained therein as signature signifies

assent thereto (see *Burger v Central South African Railways 1903 T.S. 571,* cited with approval in High Court of Lesotho decision in *Letuka v Motinyane and others CIV/APN/340/2001*)

13. The third ground of review is that the learned Arbitrator erred by not giving Applicant the opportunity to lead evidence explaining why workers were told to work more than 5 hours without a break. It was argued that the learned Arbitrator only restricted the parties to the fairness of otherwise of the dismissals of Respondents. The Court was referred to page 3 of the record of proceedings where the following is recorded,
"The only matter that is in dispute is whether the dismissal of the applicants was fair or not. What is going to happen is that the parties are going to give their submission to the court as to whether the dismissal was fair or not."

14. In answer, Respondent submitted that Applicant was not denied the opportunity to lead evidence. Rather, all the evidence of parties was noted in the pre-arbitration minutes and that that at arbitration, all that parties needed to do was to make legal submissions over both the agreed and disputed facts. It was added that Applicants had a chance to make submissions and that this is reflected from pages 3 to 5 of the DDPR record of proceedings.

15. We have perused the said record of proceedings in the above referred pages. Although the quoted extract on page 3 of the record suggests that parties would not lead any evidence but only submissions, the subsequent parts of the record that run up to page 5, indicate that Applicant lead evidence, and not only so but without any interruptions on the part of either the learned Arbitrator or Respondents. Further, it is not Applicant's case that it had referred other claims other than an unfair dismissal claim. The statement of the learned Arbitrator would be found to be restrictive, in the sense suggested by Applicant, if it had referred other claims other than an unfair dismissal claim. As a result, We are inclined to agree with Respondents that Applicant was not denied the opportunity to lead evidence.

16. The fourth ground of review is that the learned Arbitrator erred and misdirected herself by not taking into consideration

the evidence of Applicant that parties had agreed that workers should work for more than 5 continuous hours without a break and why such agreement was reached. It was said that this evidence was not included in the pre-arbitration conference minutes and further that the learned Arbitrator disallowed Applicant from leading same. It was added that the said evidence is in the form of a collective agreement and is annexed as exhibit ZT2 to the notice of motion.

17. Respondent replied that it is inaccurate that Applicant was disallowed from leading any evidence at all. It was added that even if ZT2 had been led, the learned Arbitration would have found that the said agreement was unlawful as it was contrary to the provisions of the Labour Code. As a result, the said evidence, even if considered, would not have advanced the Applicant's case at all. It was further submitted that the said evidence would have been irrelevant as it was meant to explain why the agreement to work for more than 5 hours was reached, whereas the case for determination was an unfair dismissal claim.

18. We have already made a determination that Applicant was not prevented from leading any evidence at all, to support its defence. What is clear is that the evidence in issue, i.e. annexure ZT2, did not form part of the evidence before the learned Arbitrator. What is further clear is that the learned Arbitrator did not consider that evidence, as it was not led before Her. It is Our view that the learned Arbitrator was right in not considering the said evidence. She could not have been expected to consider what was not brought before Her for consideration. Consequently, she did not commit any irregularity.

19. We wish to state that We agree with Respondent that even if the agreement had been tendered as part of the Applicant's case, it would have been irrelevant to Applicant's case, specifically in the light of the purpose for which it was meant. Further, assuming that it were tendered and considered, the learned Arbitrator would have been bound by the provisions of section 118(2) of the *Labour Code Order 24 of 1992*, to find the said agreement invalid. The said section provides as follows,

"No employee shall be required to work continuously for more than five hours without being given a rest period from work of not less than one hour during which time he or she shall not be required or permitted to perform any work."

20. The fifth ground of review is that the learned Arbitrator erred in awarding six months wages, when Respondent did not ask for same. It was said that Respondent just asked for compensation and not the wages. It was said that in giving six months wages, the learned Arbitrator awarded Respondent what they had not asked for and that She did so on Her own motion. It was argued that in so doing, the learned Arbitrator committed a grave irregularity.

21. In answer, Respondents submitted that they had sought compensation in terms of section 73 of the Labour Code and that this is what the learned Arbitrator awarded. It was said that the six months wages were what the learned Arbitrator considered to be just fair and equitable under the circumstances of the case before Her. It was added that in making this award, the learned Arbitrator exercised the discretion duly conferred upon Her by the law, judiciously.

22. Section 73 of the *Labour Code Order (supra)* makes provision for remedies that are available to parties in a claim for unfair dismissal. There are two remedies namely reinstatement or compensation. The said section specifically provides as follows,
"(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entailments or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impractical in the light of the circumstances.

(2) If the Court decides that it is impracticable in the light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case."

23. The provisions of section 73, vest a wide discretion on the learned Arbitrator to determine the amount of compensation, where it is clear that reinstatement is not practical or is not desired. This essentially means that the learned Arbitrator can fix any amount as compensation provided that Her discretion in so doing is exercised judiciously. *In casu*, the learned Arbitrator has, in Her own wisdom, decided to award to Respondents compensation equal to six months wages of Respondents. She clearly exercised Her discretion in making this award. We therefore find that She acted within Her scope of authority and that there is no irregularity committed.

24. The last ground of review was that the learned Arbitrator erred by allowing hearsay evidence. In amplification, it was submitted that the learned Arbitrator allowed one Hlalefang Seoa-Holimo to lead evidence of what he had been told, something in respect of which he had no first hand knowledge. The Court was referred to page 7 of the record where the said witness is said to have lead evidence. It was submitted in addition that, it is clear from the evidence contained at that page that Seoa-Holimo testified to what he had been told. It was said that the evidence was considered by the learned Arbitrator in making Her award at page 5 of the arbitration award, specifically at paragraph 12.

25. In answer, Respondent submitted that it led no evidence at all during the arbitration proceedings. Rather, Respondent stated that what it did was to make legal submissions over the facts, i.e. both accepted and disputes facts, as contained in the pre-arbitration conference minutes. The Court was referred to page 3 of the record of DDPR proceedings to the effect that at arbitration, all that parties had to do was to make legal submissions. At page 3 of the record, the Court was specifically referred to the following record,
"What is going to happen is that the parties are going to give their submission to the court as to whether the dismissal was fair or not."

26. We wish to state that the admission of hearsay evidence is a reviewable irregularity. However, upon Our perused page 7 of the record and We have not found anywhere where what is said, whether in submission as Respondent alleges or as

evidence, indicates hearsay. We say this because, hearsay evidence relates to statement of fact that is made by a party who is not before court, which statement is tendered by a party that is before court, to prove the truthfulness of that statement (see *Schwikkard & van Der Merwe (2009), Principles of Evidence, Juta & Co.).*

27. Our perusal of the record has revealed that Mr. Seoa-Holimo was relating what he knows as in some instances he uses the first person, in which case he refers to himself as having taken part, or the second person, in which case he refers to himself as having taken part with others. We do confirm that this said at page 7 of the record, has been considered by the learned Arbitrator in Her arbitration award. However, in view of Our finding that it does not constitute hearsay, We do not find any irregularity on the part of the learned Arbitrator, at least as suggested by Applicant.

AWARD

Our award is therefore in the following terms:

a) That the application for review is refused;
b) The award in referral A0896/2012 remains in effect; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 19th DAY OF MAY 2014.

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

Mrs. MALOISANE **I CONCUR**
MEMBER

Mr. MATELA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. TŠOLO**
FOR 2nd TO 8th RESPONDENTS: **MR. SESINYI**