

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/57/2013
A1144/2012**

IN THE MATTER BETWEEN

NTHABELENG NTŠEKHE

APPLICANT

AND

**LPKM MOTORS/VISION MOTORS
DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Application of the review of the arbitration award. Applicant raising only one grounds of review that Arbitrator failed to consider and apply Her mind to all her claims. Court finding that the alleged claims were not referred before Arbitration but only raised for the first time on review. Further finding that Arbitrator was right not to consider such claims. Court not finding merit in review and refusing same. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A1144/2012. The brief background of the matter is that Applicant was an employee of Respondent until her dismissal for misconduct. She had then, following her dismissal, referred a claim for unfair dismissal with the 3rd Respondent. An award was issued on the 15th March 2013, wherein her referral and claim were dismissed. It is this award that she wishes to have reviewed, corrected and set aside. Having heard the submissions of parties, Our judgment is thus as follows.

SUBMISSIONS AND ANALYSIS

2. Applicant's case is that the learned Arbitrator erred in that She failed to consider and apply Her mind to the procedural fairness of Applicant's dismissal. It was argued that Applicant had challenged both the substantive and the procedural fairness of her dismissal. However, and to her dismay, the learned Arbitrator only considered the substantive aspect of her dismissal to the exclusion of the procedural aspect. It was added that had the learned Arbitrator considered both aspects, She would have found the dismissal to have been unfair on account of the fact that Applicant was denied the opportunity to defend herself against the allegations made towards her. It was submitted that annexure MM1, which is the letter of dismissal, shows that Applicant was denied a hearing.
3. It was further claimed that the learned Arbitrator erred by not considering the fact that Applicant was owed her wages for the period that she was on suspension. It was submitted that evidence showed that Applicant was suspended indefinitely and that she was only paid her salaries in January 2012 and not thereafter. The Court was referred to annexures NN2 and NN3.
4. In answer, 2nd Respondent submitted that the claim before the learned Arbitrator related only to the substantive fairness of the Applicant's dismissal. It was said that as a result, the learned Arbitrator only confined Her analysis to the claims before Her. It was added that if the learned Arbitrator had considered the procedural aspect of the dismissal of Applicant, She would have misdirected herself.
5. On the second issue, it was submitted the claim before the learned Arbitrator was an unfair dismissal claim which had not been coupled with any other claim. As a result, and in the same vein, the learned Arbitrator only confined Herself to the claims before Her, for if She had not, She would have misdirected Herself. It was denied that Applicant was owed any monies.

6. It was further submitted that in law a party cannot raise a new claim for the first time on review, which is what Applicant is attempting to do. The Court was referred to paragraphs 2 and 6 to illustrate that the case before the 2nd respondent was an unfair dismissal case, premised only on the substantive aspect of the dismissal.
7. We have carefully considered both the arbitration award, the pleadings and submissions of parties. We do confirm that the record affirms the 1st Respondent position that the referred claim was aimed at challenging only the substantive aspect of the Applicant's dismissal. This is clear from paragraph 2 of the arbitration award where the following is recorded, under the background to the dispute,
"applicant contends that her dismissal was substantively unfair."
8. This being the case there is no procedural irregularity on the part of the learned Arbitrator as She only considered and applied Her mind, rightly so, to the claim before Her. We do confirm that if She had gone beyond the substantive fairness of the Applicant's dismissal, that would have been an irregular step as She would have exited the bounds of Her powers.
9. On the second claim, and in the same vein, the record confirms that the referred claim related to the fairness or otherwise of the dismissal of Applicant. This is captured under the introductory paragraph of the arbitration award as thus,
"Applicant referred a dispute for unfair dismissal to the Directorate of Dispute Prevention and Resolution on 31st October 2012."
10. The above being the case, the learned Arbitrator was right not to consider the issue of the unpaid wages of Applicant while on suspension. We have already pronounced Ourselves over the obligations of the learned Arbitrator in these circumstances and therefore see no need to reiterate on the issue. Our conclusion is premised on the remarks of the

learned Mosito AJ in *Thabo Mohlobo & others v Lesotho Highlands Development Authority (supra)*, as thus
“The authority of an arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid.”

11. We wish to comment that We agree with 1st Respondent that Applicant is attempting to bring in new claims for the first time on review. As We have already determined, both the procedural aspect of Applicant’s dismissal and the unpaid wages claims were never part of the claims in the proceedings before the 2nd Respondent. We have stated before that this practice is forbidden in review proceedings as it is contrary to the principle of *audi alteram partem* (see *Phakiso Ranoana v Lesotho Flour Mills (Pty) Ltd & another LC/REV/59/2011; Zinyathi Trading (Pty) Ltd v DDPR & others LC/REV/11/2013*) . The principle 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 essentially mean that the two issues should have been raised with the learned Arbitrator to give Her the opportunity to address them.

AWARD

We therefore make an award in the following terms:

- (1) The review application is refused;
- (2) The award in referral A1144/12 remains in effect; and
- (3) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 16th DAY OF JUNE 2014

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

MR. MOTHEPU

I CONCUR

MR KAO

I CONCUR

FOR APPLICANT: ADV. SEKATLE
FOR RESPONDENT: ADV. MABULA