

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/75/2012
A0244/2012**

In the matter between:

CHABELI LETEBELE

APPLICANT

And

**LESOTHO ELECTRICITY
COMPANY (PTY) LTD
DDPR - ARBITRATOR M. SENOOE**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 27th November 2013

Application for review of arbitration award. Respondent arguing that the ground raised is an appeal disguised as a review. Court finding that the ground raised is a review and not an appeal as it relates to the method of trial. Court however, not finding merit in the said review ground and dismissing it. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 2nd Respondent arbitration award in referral A0244/2012. Seven grounds of review were raised on behalf of the Applicant in the founding affidavit to the notice of motion. However, the grounds were reduced to only one during submissions. Both parties were in attendance and/or represented and made submissions.
2. The brief background of the matter is that Applicant was first employed by the Respondent company on the 14th August 1990, in the position of Trainee Technician. He was later, in 2001, placed in the position of Personnel Officer. On the 3rd December 2004, he was transferred to the position of an Electrician. Owing to the latter transfer, on or around the 3rd February 2012, Applicant referred a claim for underpayments

with the 2nd Respondent institution. The premise of his claim was that he had been unfairly transferred from the position of Personnel Manager to that of an Electrician and that as a result of the unfair transfer, he incurred underpayments.

3. The said claim was accompanied by an application for condonation. The condonation application, which was duly opposed, was heard and finalised on the 10th July 2012 and an award was issued about 8 days later, on the 18th July 2012. The said award dismissed the condonation application and the referral. It is this arbitration award that Applicant wishes to have reviewed, corrected and/or set aside. Having heard the submissions of parties, Our judgment is therefore in the following.

SUBMISSIONS OF PARTIES

4. Applicant claimed that the learned Arbitrator “*erred and misdirected herself in stating that Applicant had not provided good and sufficient reasons of the delay in following up on the matter internally and in bringing it to the DDPR.*” It was argued in support that in determining an application for condonation, the learned Arbitrator was bound to consider the principles enunciated in the Court of Appeal case of *Morena Sello v Mametsing Sello & others C of A (CIV) 22 of 2011* that an applicant party “*must establish good cause for condonation. In this regard he must explain his failure to act timeously. He must show that he was not wilful. He must show that he has good prospects of success on appeal.*”
5. The Court was further referred to the Labour Appeal Court case of *TEBA & others v Lesotho Highlands Development Authority LAC/CIV/A/06/2009*, where the learned Judgment stated the following principle,
“*those factors include not only the degree of non compliance, the explanation for it, the prospects of success and the importance of the case but also the respondent’s interest in the finality of his judgment, the question of prejudice to him, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.*”
6. It was argued that in the light of the above authorities, the learned Arbitrator ought to have found that the Applicant had

provided good and substantial reasons for the delay in both following up on the matter internally and/or in bring it to the DDPR. In amplification of the argument, it was submitted that Applicant had lead evidence establishing that he delayed due to a promise by the then Human Resources Officer/Industrial Relations Officer, that he would have his grievance addressed. Owing to the promise, he waited in anticipation until he later realised that this was just an attempt to discourage him to pursue his claim.

7. In reaction to the Applicant's claim, Respondent argued that Applicant is challenging the correctness of otherwise of the decision of the learned Arbitrator rather than the decision making process. He argued that this being the case, this is an appeal disguised as a review. He relied on the authority in *Pretoria Portland Cement Co. Ltd & another v Competition Commission & others* 2003 (3) SA 385 (A) at 401 to 402C. It was added that at paragraphs 34 and 35, the learned Schultz JA held that a review is not directed at correcting the decision on the merits but that it is aimed at the maintenance of legality, which is the means by which those in authority are compelled to act.
8. Further reference was made to the authority in *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1909 TS 111, where the learned Innes CJ held that a review is "... the process by which ... the proceedings of inferior courts of justice, both civil and criminal, are brought before the court (i.e. the reviewing superior court) in respect of grave irregularity's or illegalities occurring during the course of such proceeding." Further reference was made to the case of *Chief Constable of the North Wales Police v Evans* [1982] 3 ALL ER 141 at 154.
9. In answer to the merits, it was argued that there is no error or a misdirection on the part of the learned Arbitrator. It was submitted that She made a decision to dismiss the condonation application on the basis of the information that parties had tendered before Her. As a result, the learned Arbitrator fully applied Her mind to the matter that she was seized with. Further that She duly referred to relevant authorities to come to Her conclusion. In addition, the Court was referred to the case of *Coetzee v Lebea N.O & another*

(1999) 20 ILJ (LC) for the test in determining whether a presiding officer in the *court a quo* duly applied their mind.

10. It was argued that in the above authority, the Court stated that *“the best demonstration of applying one’s mind is whether the outcome can be sustained by the facts found and the law applied.”* It was submitted that *in casu*, the outcome is sustained by the facts found. The Court was referred to paragraphs 7 to 12 of the arbitration award. It was added that there is a clear indication, from the arbitration award, that Applicant is merely calling upon this Court to substitute the decision of the learned Arbitrator with that of its own. It was argued that not only is this prohibited in law but that it would also infringe the general rule applicable to reviews.
11. In reply, Applicant rejected the suggestion that this is an appeal disguised as a review. The Court was referred to the case of *JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others* LAC/REV/39/2004, where the Court made a distinction between an appeal and a review, in the following, *“where the reason for wanting to have the judgment set aside is that the court came to a wrong conclusion on facts or the law, 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 a case on review. An appeal is thus in reality a revaluation of the record of proceedings in the court a quo.”*
12. It was argued that *in casu*, Applicant is challenging the method of trial and specifically that the learned arbitrator failed to apply Her mind to his evidence that explains the delay in filing the referral on time. It was added that in terms of the above authority, this constitutes a valid review ground and not an appeal ground as Respondent suggests. The Court was specifically referred to the authority of *Coetzee v Lebea N.O & another (supra)*, where the Court confirmed failure to apply one’s mind as being a ground of review.
13. Further reference was made to the authorities of *Phakiso Ranoana v Lesotho Flour Mills (Pty) Ltd & another* LC/REV/59/2011; *Coetzee v Lebea N.O & another (supra)*; *Fahhida Supermarket (Pty) Ltd v Ikhetheleng Sibolla & another* LC/REV/107/2012; *Global Garments v Mosemoli Morojele*

LC/REV/354/2006; Carephone (Pty) Ltd v Marcus N.O & others (1998) 19 ILJ 1425 (LAC) and County Fair Foods (Pty) Ltd v CCMA & others (1999) ILJ 1701, on the same principle.

ANALYSIS

14. The question concerning the status of the claim brought before Us, is a jurisdictional issue. As a result, notwithstanding the fact that parties opted to take a holistic approach in these proceedings, We will first address it before We proceed to deal with the merits of the matter. We note and accept the authorities cited by parties in highlighting the distinction between an appeal and a review. Specifically, We confirm that where the grievance relates to the procedure, then the correct route is a review but that where it relates to the decision, then the proper route is an appeal. We deem it pertinent to state at this point that in the latter route, this Court would have no jurisdiction to hear and determine such a claim at all.
15. *In casu*, Applicant claims that the learned Arbitrator failed to apply Her mind to his evidence and that as a result She came to a wrong conclusion that he had no good and substantial reasons for late referral of his claim. In Our view, this is *prima facie* a review ground which if well substantiated may lead to the granting of the review of the arbitration award. The challenge is aimed at the method of trial and is as such a review ground. Our view also finds support in the authorities cited above, with specific reference to the authority in *Coetzee v Lebea N.O & another (supra)*, where the Court went further to layout the test for failure to apply one's mind. In the light of this finding, We now proceed to address the merits of the matter.
16. We have perused the arbitration award, in particular from paragraph 7 to paragraph 12, which relates to an analysis of the evidence of Applicant in the arbitration proceedings. We have found from these paragraphs that the learned Arbitrator considered the evidence of Applicant explaining the delay in referring the matter. Further that the learned Arbitrator found them insufficient to sustain the requirements of a condonation application.

17. In fact not only was the evidence of Applicant considered, but that the learned Arbitrator also fully applied her mind to it. We say this because, there is also a rational connection between the conclusion made and the facts presented. We say this because from the award the learned Arbitrator considered and applied her mind to the explanation given by Applicant. At paragraph 8 of the arbitration award, the evidence shows that Applicant claimed to have waited due to a promise from the Industrial Relations Officer that he would see to it that his grievance is addressed. In dismissing this explanation, at paragraph 8 of the arbitration award, the learned Arbitrator had the following to say,

“Applicant alleges that he waited because the Industrial Relations Officer had promised him that the matter would be dealt with but fails to rebut respondent’s evidence that he could not rely on a junior officer where the Chief Executive had already given him a response. Over and above that, there is no evidence that the said Industrial Relations Officer made such a promise especially where in his affidavit Para 7 indicated that the said officer even said he was afraid of reprisals by the company hence he kept making promises until he left respondent Company.”

18. In view of this said, We find that the learned Arbitrator has fully complied with the test in *Coetzee v Lebea N.O & another (supra)*. She considered the principles applicable in an application for condonation, in particular an explanation for the delay, as laid out in both *Morena Sello v ‘Mametsing Sello & others (supra)* and *TEBA & others v Lesotho Highlands Development Authority (supra)*. Consequently, We find no irregularity in the arbitration award.

AWARD

Our award is therefore in the following terms:

- a) That the application for review is refused;
- b) The award in referral A0244/2012 remains in effect; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 12th DAY OF MAY 2014.

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

**Mrs. RAMASHAMOLE
MEMBER**

I CONCUR

**Mr. MATELA
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR 1st RESPONDENT:**

**ADV. MOTŠOARI
ADV. NTŠIHLELE**