IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/54/2010**
A0795/2008

IN THE MATTER BETWEEN

STEM (PTY) LTD **APPLICANT**

AND

NTŠIUOA SEFALE **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. Applicant raising three grounds of review – unreasonableness; irrelevant considerations; and ignorance of evidence. Court finding an irregularity in respect of the third ground. However, Applicant failing to satisfy Court that irregularity warrants review. Court refusing the review application and 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 A0795/2008. Applicant had referred claims for unfair dismissal, unpaid leave and unpaid wages. The rest of the other claims were resolved at conciliation, save for the unfair dismissal claim. It was duly arbitrated upon at the end of which an award was issued, directing Applicant herein to reinstate 1st Respondent and payment of lost earnings. It is this award that Applicant wishes to have reviewed, corrected and/or set aside. We wish to note that several grounds of review had initially been raised on behalf of Applicant, but that only three were argued while the rest were withdrawn. Having heard the arguments of parties and having considered their pleadings, Our judgement follows.

SUBMISSIONS

2. The first ground of review was that the learned Arbitrator had erred in ordering reinstatement when no evidence had been led to show that it was possible. It was added that over and above this, the Applicant had led evidence that 1st Respondent had been dismissed for dishonesty and that, this on its own ought to have influenced the learned Arbitrator not to order reinstatement of 1st Respondent. The Court was referred to the book by Hebsten entitled *Civil Practice of Supreme Court, 3rd Edition at page 751*, where it was recorded that a judgment in support of which no evidence has been led, is reviewable.

3. In answer, 1st Respondent submitted that this is an appeal disguised as a review. It was argued in support that Applicant is suggesting that the learned Arbitrator cannot order reinstatement. Moreover, it was argued that it was the Applicant's responsibility to lead evidence of impracticality, moreso given that it was aware of the remedy sought by 1st Respondent, which was reinstatement.

4. We wish to confirm the principle laid in Hebstein's book above. However, that principle is misplaced *in casu*. We say this because, and as 1st Respondent has rightly pointed out, it was the responsibility of the Applicant to lead evidence of impracticality of reinstatement, particularly bearing in mind that 1st Respondent had claimed to be reinstated. In terms of section 73 of the *Labour Code Order 24 of 1992*, in particular, sub-section (1) therefore, where the court finds the dismissal of an employee to have been unfair, the principal remedy is reinstatement.

5. A deviation from the provisions of section 73, that is, the award of the principal remedy, occurs only where the Court is of the view that reinstatement is not practical. This is elegantly captured under Sub-section (2) therefore as follows,
   "(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."

In Our view, it is the responsibility of an employer party to the proceedings to influence the Court to deviate from the principal remedy, by pleading impracticality and supporting same with evidence.

6. We have perused the arbitration award and have confirmed that no challenge was placed against the remedy of reinstatement. Rather the evidence that Applicant is attempting to rely on, to justify the refusal of reinstatement, was only led in opposition of 1st Respondent claim of unfair dismissal. Clearly, what Applicant suggests that should have happened is that the learned Arbitrator ought to have, on own motion considered its unsuccessful defence of dishonesty to refuse the principal relief sought by Applicant. Had the learned Arbitrator adopted that approach, She would have been guilty of descending into the area of dispute. That approach is highly shunned upon as it is not the responsibility of the learned Arbitrator to built a case for parties (see *Kopano Textiles v DDPR and another LC/REV/101/2007)*. We therefore find that there was no irregularity on the part of the learned Arbitrator.

7. We wish to comment that this ground is a review and not an appeal ground. We say this because, it challenges the reasonableness of the decision of the learned Arbitrator to award reinstatement, where there was no evidence to support an award. Our point is essentially that any challenge against the decision which places an attack on the reasonableness or otherwise of same, is a ground for review. Our view finds support in the authority of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)*, which has been cited with approval by Our courts with specific reference to page at 152 A-E. The Court explained the review grounds as follows,
"Broadly, in order to establish review grounds it must be shown that … or that the president 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 president was so grossly unreasonable as to warrant the interference that he had failed to apply his mind to the manner aforestated."

8. The second ground of review was that the learned Arbitrator made irrelevant considerations in two instances. Firstly, that She compared the situation of Applicant to that of someone who absented themselves from work on account of illness, which was not applicant's case. Secondly, She relied on the case of *Edcon Ltd v Pillermer NO and others (2009) 30 ILJ 2642 (SCA),* to determine if the dismissal of 1st Respondent was an appropriate sanction. It was added that the facts in both cases are distinct and therefore cases are incomparable. 1st Respondent answered that the learned Arbitrator relied on the principle outlined in that authority and not on the facts. It was added that while the facts may have been different, but the principle was nonetheless applicable as the issues for determination were similar, namely the breach of trust relationship.

9. We have perused the arbitration award and have confirmed that at paragraph 15 of same, the learned Arbitrator made reference to the situation of someone who is absent from work on account of illness. In fact the statement is recorded as follows;
"I see no direct link between applicant's dishonesty about her absence and the loss the respondent company alleges to have suffered. I do appreciate the fact that she was trusted in this area of work; assuming that she had been absent for any other justifiable reason like illness, would the respondent be justified in blaming her for the loss it suffers due to her absence? Definitely no."
In Our view, the hypothetical scenario was not presented as a deciding factor in Applicant's case, but to merely buttress the already made decision that there was no link between the dishonesty about absence from work and loss suffered. Consequently, Applicant's argument cannot hold.

10. On the second leg of the 2nd review ground, We have perused the authority in *Edcon Ltd v Pillermer NO and others (supra),* and have noted that indeed facts are distinct. However, the issues in dispute are similar as they relate to whether the conduct of the accused employee warranted their dismissal. Therefore, the learned Arbitrator was right in relying on this authority, as it concerned the issue that fell to be determined

by Her. We wish to comment at this stage, that We confirm that facts need not be similar in order for an authority to be applicable to another case.

11. The third ground of review was that the learned Arbitrator ignored the evidence of contents of the letter written by 1st Respondent. It was said that this letter showed that 1st Respondent was not trustworthy. It was argued that had this evidence been considered, it would have influenced the learned Arbitrator not to award reinstatement. The Court was referred to paragraph 12 of the arbitration award where the letter is mentioned. In answer, 1st Respondent submitted that the said letter was considered by the learned Arbitrator in Her arbitration award. The Court was referred to paragraph 10 of the arbitration award.

12. We have perused paragraph 10 of the arbitration award and have noted that the letter in issue was the report that is alleged to have been written by 1st Respondent, to explain the events of the day on which she was absent from work. Our findings demonstrate that it was indeed considered. However, although considered, nothing in the analysis of the learned Arbitrator touches on the content of the letter. What the learned Arbitrator simply does is to recount the reaction of the 1st Respondent to allegation that she was the author of the said letter. It is recorded that,
"She even denied the report which was alleged to have been written by her. Despite the overwhelming evidence against her, she insisted that was not her report."

13. Paragraph 12 of the arbitration award, further fortifies the Applicant's argument that the content of the letter was not considered. Rather, and as recorded at paragraph 10 of the arbitration award, the learned Arbitrator simply recited that evidence of parties that 1st Respondent denied ever writing the said letter and concluded that on the basis of the evidence of Applicant, She was convinced that Applicant's denial was bare. Evidently, nothing in Her analysis touched on the content of the said letter.

14. However, neither the arbitration award, nor any of the parties have dared to reveal the content of the letter to Us. Rather, Applicant merely alleged that had the letter been considered, it would have demonstrated that 1st Respondent was untrustworthy and thus impossible to reinstate. We have often stated before that the mere fact that evidence was ignored is not sufficient to justify the granting of a review application. Parties bear the responsibility of demonstrating to the Court that had the evidence not been ignored, it would have lead to a different and perhaps correct conclusion being made. This exercise involves an investigation into the probative effect or the relevance of the evidence alleged to have been ignored, in relation to the issue for determination.

15. *In casu*, and as We have stated, neither the parties nor the arbitration award make reference to the content of the letter. As a result, it is difficult, if not impossible, on Our part to determine either the relevance or probative effect of the content of the concerned letter. Consequently, We find that Applicant has failed to show that the irregularity complained of warrants interference with the arbitration award. We wish to rely on the authority in *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another (supra)*, to support Our finding.

AWARD

On the strength of the above reasons, We make an award in the following;

(1)The review application is dismissed;

(2)The award in referral A0795/2008 remains in force; and

(3)No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF JULY 2014.

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

MRS. MALOISANE **I CONCUR**

MS LEBITSA **I CONCUR**

FOR APPLICANT : ADV. MABULA
FOR RESPONDENT : ADV. MOLEFI