IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/110/12**
A0183/2011

IN THE MATTER BETWEEN

G4 SECURICOR SECURITY SERVICES (PTY) LTD **APPLICANT**

AND

MAKHALA MOFUBE **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. Applicant raising only one ground of review. 1st Respondent raising a point of law from the bar, that pleadings do not contain sufficient averments to enable her to plead. Court finding that this point should have been pleaded as it amounts to an ambush upon Applicant. Further that having pleaded 1st Respondent cannot raise this point. Court dismissing the point of law. 1st Respondent claiming that Applicant is arguing what is not pleaded and as such is making out a case from the bar. Further that Applicant review ground does not disclose the irregularity and as such is bare. Court finding upholding 1st Respondent arguments and dismissing the review application. Court declining to make an award of costs.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0183/2011. Only one ground of review was been raised on behalf of the Applicant. The review application was opposed by the 1st Respondent who had also raised a point of law. In terms of the point of law, 1st Respondent claimed that the Applicant's pleadings did not contain sufficient averments to enable her to plead in defence. On this premise, she prayed

that the review application be dismissed with costs. We then directed parties to address Us on the whole matter holistically, first starting with the point of law. Having heard the parties' submissions, Our judgment follows.

SUBMISSIONS AND ANALYSIS

Point of law

2. 1st Respondent's case was that Applicant had failed to set out sufficient facts to both support its claim and to enable her to plead issuably in answer. It was submitted that Applicant had simply averred that the learned Arbitrator's decision was grossly unreasonable without indicating how this is so. As a result, 1st Respondent had to speculate the basis of the alleged unreasonableness and this had greatly prejudiced her.

3. In answer, Applicant submitted that this kind of argument was addressed by this Court in the case of *Masekhantšo Sekhantšo v Maluti Mountain Brewery & Others LC/REV/36/2012*. It was submitted at paragraph 11 of the judgment, the Court had the following to say,
   "On the issue of the review grounds being vague, We also find no merit in the argument. The premise of Our finding is basically that 1st Respondent has been able to plead in defence to the Applicant's grounds of review, without even indicating any difficulty to do so. This essentially means that 1st Respondent is clear on the case of Applicant."

4. It was argued that the circumstances of the case *in casu*, are similar to those in the above referred authority, in that 1st Respondent has answered the Applicant's case without indicating any difficulty to do so and that as such this point should be dismissed. Applicant prayed for costs on the ground that the point was meant to waste this Court's time and delay justice.

5. It was further Applicant's case that it is improper for 1st Respondent to have raised a point of law for the first time in her heads. It was submitted that this point ought to have been pleaded and linked to the facts pleaded. The Court was referred to the case of *Mathabelo Mbangamthi v Puleng Sesing Mbangamthi C. Of A (CIV) 06/2005*, where the Court, relying on

the decision in case of *Teaching Service Commission and Others v St. Patrick's High School & Another C of A (CIV) 26/2004*, concluded that it was both irregular and without merit to attempt to raise a point of law on the date of hearing.

6. Further reference was made to the case of *Margret Tuane & Others v National Executive committee & Others CIV/APN/61/12*, where the learned Moiloa J stated in dictum, that it is wrong for litigants to raise *points in limine* for the first time in their heads of argument, but that they must be pleaded and linked to the facts of the matter.

7. We have perused the authorities cited by parties in support of their arguments. We are persuaded by these authority to agree with Applicant that 1st Respondent had pleaded in defence to the Applicant's claim without indicating any difficulty to do so. This being the case, We see no reason to deviate from Our earlier decision in the case of *Masekhantšo Sekhantšo v Maluti Mountain Brewery (supra)*. There no factors influencing such deviation. We are infact satisfied that the circumstances of the two cases are similar enough to warrant the maintenance of the principle in place.

8. On the 2nd issue, We also are in agreement with Applicant that 1st Respondent should have pleaded this point of law. We say this because it related to the merits of the Applicant's claim in a direct manner. The situation may have been different if the circumstances were different, in which case an indulgence would be granted. This view finds support in the Court of Appeal decision in the case of *Mathabelo Mbungamthi v Puleng Sesing Mbangamthi (supra)*, where the court had stated that;
"Counsel submitted that he was entitled to do so "because a point of law could be raised at any time, even for the first time on appeal". There are circumstances in which such an indulgence will be granted, however, only in circumstances where it would be fair and proper to do so."

9. On the basis of the above reasons, We find no merit in the point of law raised on behalf of 1st Respondent and dismiss same. Both parties had asked for an award of costs. We will

address it at a later stage. We now proceed to address the merits of the main review application.

The merits

10. It was Applicant's case that the learned Arbitrator had made a grossly unreasonable decision which no reasonable man could have made. It was submitted in support that Applicant had been charged and dismissed for breach of offence number 5.10, in the Applicant's disciplinary code. In terms of the said code, an offence under 5.10 is a dismissible offence. It was argued that having accepted that 1st Respondent committed an offence under 5.10, the learned Arbitrator made a conclusion that 1st Respondent should have been given a final written warning. It was argued that this decision was contrary to the disciplinary code, which provides for the punishment of dismissal. It was argued that as a result, the learned Arbitrator's decision was unreasonable. The Court was referred to paragraph 9 of the arbitration award and page 44 of the record of proceedings.

11. In answer, 1st Respondent argued that Applicant did not plead all the issues advanced in its submissions and that it is attempting to make out its review case from the bar. It was added that review proceedings are brought by way of motion and that the rule in motion proceedings is that parties are bound by their pleadings. It was submitted that to allow the practice adopted by Applicant, would be to offend the *audi alteram partem* rule. The Court was referred to the case of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No & Another (2009) 30 ILJ 279 LAC,* at paragraph 25, in support.

12. It was furthermore argued that the pleadings of Applicant do not make out a case for review in that they barely allege unreasonableness on the part of the learned Arbitrator, without indicating how this is so. It was added that even if the Court were to dismiss this claim, it would find that the learned Arbitrator's decision was not unreasonable, but that it was rather premised on the evidence before Her. It was submitted that in terms of the disciplinary code, 1st Respondent ought to have been given a final written warning as the learned arbitrator correctly found.

13. We are in agreement with 1st Respondent that Applicant has not pleaded any of the facts and arguments raised in submissions but is in fact attempting to plead from the bar. Applicant has merely pleaded in the following, at paragraph 6 of its founding affidavit,

"The following are the grounds of review:

6.1 The decision made by the learned Arbitrator is grossly unreasonable to an extent that no reasonable man could have arrived at the same decision.

6.2 The Applicant reserves the right to include and/or add further grounds of review upon the receipt of the record."

14. In view of the above extract and on the premise of the principle in motion proceedings, We are persuaded to agree with 1st Respondent that it is improper approach for Applicant to attempt to argue what was not pleaded. We infact agree with 1st Respondent that Applicant is attempting to make out its case on submission and from the bar. It is without doubt that this is an ambush against the 1st Respondent, which should not be taken lightly. It is therefore Our view, and as the authorities dictate, that Applicant is confined to its pleadings.

15. Our view finds support in the above referenced authority of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No & Another (supra).* At paragraph 25, the Court had the following to say,

"In my view it is not open to the appellant to now argue the case which it did not foreshadow in its founding affidavit.... If after reading the applicant's papers, you conclude that there is absolutely no case for you to answer in the light of the contentions or grounds of the application as disclosed in the founding affidavit and you decide to abide by the decision of the court, you would feel legitimately aggrieved if you subsequently learned that the award was aside by the court not on the grounds contained in the founding affidavit but on grounds that were advanced in oral argument which were not foreshadowed in the founding affidavit and without you being afforded an opportunity to oppose the new case. on my understanding the rule that in motion proceedings the applicant must make his

case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applied."

16. Further supporting Our view, is the authority of *Thabo Phoso v Metropolitan Lesotho LAC/CIV/A/10/2008,* where the Court had the following to say,
"In several of its decisions the Court of Appeal of Lesotho has more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation.
Consequently, We find that Applicant is attempting to make out a case from the bar, as it has not pleaded any of the averments made, and is therefore bound to what has been pleaded.

17. Regarding the second issue raised by 1st Respondent, and in view of Our conclusion above, We in agreement with her that the Applicant's pleadings are bare as they lack supporting facts. Applicant has merely pleaded that the learned Arbitrator made an unreasonable decision without stating how this is so. In law where there are no facts to support a claim in the pleadings, such pleadings pale into the status of being bare allegations. It is trite law that bare allegations are unconvincing and cannot be relied upon to make a decisive conclusion in favour of the party making such allegations (*see Mokone v Attorney General & others CIV/APN/232/2008*).

18. We therefore find that the pleadings of Applicant, as they stand, do not make out a case for review as they do not indicate how the learned Arbitrator has actually erred. As a result, there is nothing to review. In view of this finding, We find it unnecessary to even consider the rest of the submissions on the point. Consequently, the review ground is dismissed.

COSTS

19. Regarding the issue of costs, the prayer for costs in the merits falls off on account of Our decision to dismiss the review application. With regard to the point of law taken by 1st Respondent, the circumstances in Our view do not warrant the granting of costs against 1st Respondent. We say this because 1st Respondent has successfully relied on the same argument raised as *point in limine,* to argue for the dismissal of the

review. The fact that she has succeeded demonstrates that there is merit in her argument and that it was not merely raised to delay the ends of justice or to waste the Court's time. We therefore decline to make an award of costs.

AWARD

We thus make an award as follows:

1) The review application is refused.
2) The award in referral A0183/2011 remains in effect and must be complied with within 30 days of issuance herewith;
3) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 15th DAY OF SEPTEMBER 2014

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

MR. MATELA	**I CONCUR**
MRS. MOSEHLE	**I CONCUR**
FOR APPLICANT:	**ADV. MATEE**
FOR RESPONDENT:	**ADV. TUMAHOLE**