IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU	**LC/REV/116/12** **A0536/2012(b)**

IN THE MATTER BETWEEN

TEACHING SERVICE COMMISSION	**1st APPLICANT**
THE ATTORNEY GENERAL	**2nd APPLICANT**

AND

SAMUEL TEBOHO MOKOBOCHO	**1st RESPONDENT**
DDPR	**2nd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Applicant raising one ground of review and citing six incidents of irregularity. All incidents being based on allegation that Arbitrator excluded both the pleadings and submissions of 1st Respondent but relied on same to dismiss Applicants case. Court finding no merit in all grounds raised. Court dismissing the review application and reinstating the arbitration award. 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 A0536/2012(b). Six grounds of review have been raised in terms of which the review, correction and/or setting aside of the arbitration award in issue is sought.

2. The brief background of the matter is that 1st Respondent had referred a claim for unfair dismissal with the 2nd Respondent. In the matter, the claim was made against the 1st Applicant herein as the 2nd Applicant was not cited. The matter was heard in default of the 1st Applicant and an award was issued in favour of the 1st Respondent.

3. Upon receipt of the default arbitration award, the Applicants initiated rescission proceedings with the 2nd Respondent. The said application was opposed by the 1st Respondent but his answer was filed out of time. On the date of hearing this issue was raised by the Applicants. The learned arbitrator having been addressed on the issue decided to adopt a holistic approach to the matter. He resolved that he would only consider the submissions and pleadings of 1st Respondent if He resolved to accept the late answer filed on behalf of the 1st Respondent.

4. On the 17th October 2012, an arbitration award was issued in terms of which the learned Arbitrator had decided not to accept the answer filed on behalf of the 1st Respondent and further dismissing the rescission application. It is this award that Applicants wish to have reviewed, corrected and/or set aside. Essentially only one ground of review has been raised as all the grounds raised relate to the allegation that the learned Arbitrator considered the averments of 1st Respondent, yet he had decided not to accept his late answer. Our judgment therefore follows.

SUBMISSIONS

5. The first incidence of irregularity was that the learned Arbitrator erred in dismissing Applicants' explanation that they failed to attend the hearing because they had neither been cited in the matter nor served with both the referral and the notice of set down of the matter. It was submitted that in dismissing the said explanation, the learned Arbitrator relied on the 1st Respondent submission that it was the 1st Applicant's responsibility to inform its representative, 2nd Applicant, about the matter and the date of hearing.

6. The Court was referred to page 5 of the record of proceedings before the 2nd Respondent, where the following submissions of 1st respondent are recorded:
   "Why, because, it is immediately apparent that [was] the attorney general's office was aware that there was such a matter scheduled to take place on that particular date."

7. 1st Respondent answered that the learned Arbitrator did not rely on the submissions and/or pleadings of the 1st Respondent to dismiss the Applicant's argument. It was submitted that these in fact were not his submissions but the individual opinion of the learned Arbitrator. It was added that given the submissions of Applicant, the learned Arbitrator was bound to the decision made.

8. We have considered page 5 of the record of proceedings together with the arbitration award, specifically at paragraph 15, which deals with the explanation for the default. At page 5 of the record, the 1st Respondent merely points out that it is apparent from the submissions that the offices of the 2nd Applicant were aware of the matter and the date of hearing. At paragraph 15 of the arbitration award, the learned Arbitrator makes a definitive conclusion that:
"With due respect, this explanation is feeble in several respects, it was already clear per the referral form and notice of set down that respondent had preferred lodging his claim only against 1st applicant. This therefore means that it was imperative for the 1st applicant to have made its representatives aware of the referral form and the notice of set down."

9. In Our view, what is contained at page 5 of the record of proceedings is in all respects distinct from the reasoning of the learned Arbitrator, at paragraph 15 of the arbitration award. At page 5 of the record, 1st Respondent submits that the offices of the 2nd Applicant were aware of the matter, while the learned Arbitrator at page 5 says it was the responsibility of the 1st Applicant to make 2nd Applicant aware. This being the case this ground fails.

10. The second ground of review was that the learned Arbitrator relied on the evidence of 1st Respondent that there was no single averment on the type of misrepresentation alleged to have been made, and further that there was a clear letter of recommendation of 1st Respondent from the school board into the position in issue. It was argued that this evidence was relied upon to dismiss the Applicant's argument that 1st Respondent was employed under a misrepresentation and that there was no recommendation from the board for his

appointment. It was added that this was done contrary to the principle in the authority of *Kaone Leoifo v Bokailwe Kgamend & another CA/048/2007*, that a case be decided on the basis of the pleadings. It was added that the learned Arbitrator erred as He went beyond the pleadings, having resolved to exclude 1st Respondent pleadings in the matter.

11. In answer, 1st Respondent submitted that Applicants merely made bare allegations of misrepresentations without stating the type committed. It was argued that this made their argument of prospects of success bare hence the conclusion that applicants had no prospects of success. It was denied that the learned Arbitrator relied on the averments of 1st Respondent to make this decision, that is, to dismiss the argument for prospects of success.

12. The prospects of success are addressed at paragraph 16 of the arbitration award. We confirm that the learned Arbitrator made a conclusion that:
"There is no single averment in applicant's founding affidavit which touches on the type of alleged misrepresentation. It leaves one with having to speculate on the nature of such misrepresentation alleged by applicants. There is a clear letter of recommendations for respondent into the clearly defined position per the secular."

13. That notwithstanding, 1st Respondent denies that the above decision was reached in reliance of his submissions. This being the case, it remains the responsibility of the Applicants to go further to show that what 1st Respondent claims or disowns is not true. This would be done by among others referring the Court to the record. Our view is premised on the principle that in law, *"he who makes a positive assertion is generally called upon to prove it with the effect that the burden of proof generally lies on the person who seeks to alter the status quo. Thus he who asserts the positive is the one with the burden of proof" (see Schwikkard, Principles of Evidence, 2nd Ed. At page 538).*

1. Further fortifying Our attitude is the authority of *Kriegler v Minitzer & another 1949 (4) SA 821 (A)* at page 828, where the

learned Greenberg JA, relying on a statement from *Phipson Evidence*, 8th Ed. At page 27, stated as thus,

"The burden of proof … rest upon the party, whether plaintiff or defendant who substantially asserts the affirmative of the issue.

Applicants have *in casu* has not discharged this burden. This is evidence from their submission that they cannot refer the Court to any specific portion of the record where this was recorded as the evidence of 1st Respondent.

14. This being the case, We have no option but to take on 1st Respondent argument that the learned Arbitrator did not rely on his submissions but on the Applicants pleadings. In view of this finding the rule in the *Kaone Leoifo v Bokailwe Kgameng and another (supra)* has been complied with. In that authority the Court stated that:

"It is trite that a case can only be decided by the court in the pleadings and evidence before it. It is not for the court to make out a case for litigation. Nor can this court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded."

15. We also wish to comment that the legal requirement in respect of the prospects of success in an application for rescission, is that the allegation of prospects of success must *prima facie* establish a case in the main. The phrase *prima facie* case means that on the face of pleadings it must be evident that there is a case to answer. As a result, a mere allegation that does not meet this requirement is competent to be classified on bare.

16. The authority in *Mokone v Attorney General & others CIV/APN/232/2008,* is very instructive in dealing with bare allegations. In this authority, the court made the following remark,

"As can be seen respondents have just made a bare denial. It would not be enough to just make a bare denial …. If one does not answer issuably then his defence will be considered no defence at all,"

It is Our view that this principle equally applies in relation to claim by parties. As a result, where a party has barely alleged

a claim, that is not enough for the court to make a finding in their favour. Consequently, where a bare claim has been made, it becomes both unsatisfactory and unconvincing and should be considered no claim at all. This being said We wish to highlight that contrary to 1st Respondent suggestion that he learned Arbitrator dismissed the arguments for prospects of success as being bare is not accurate. The reasons advanced are poles apart from those suggested by 1st Respondent.

17. The third ground of review was that the learned Arbitrator erred in holding that 1st Respondent was denied a hearing prior to his dismissal. It was submitted that the learned Arbitrator relied on the evidence of 1st Respondent to come to this conclusion. However, the Applicants could not refer the Court to the record of proceedings at the initial hearing, where the alleged irregularity is alleged to stem from.

18. In answer, 1st Respondent submitted that it is inaccurate to suggest that the learned Arbitrator relied on his evidence. It was argued that the learned Arbitrator relied solely on the evidence of Applicant to come to this conclusion. It was said that evident to this is the fact that there is nowhere in the record where reference has been made to the 1st Respondent by the learned Arbitration in His analysis of the evidence and submissions in the matter.

19. This issue has been addressed at paragraph 17 of the arbitration award. In that paragraph the learned Arbitrator makes reference to a document labelled *AG1* and referenced by the Applicant. Having considered that document, he makes a conclusion that:
"It was also alleged with reference to AG1, which was said to be the minutes of the disciplinary hearing that applicant was afforded a hearing before his dismissal. I have had some time to go through the said document in its entirety, specifically from its very title and the paragraph reading welcome remarks, with due respect this does not suggest there to have been held a hearing as anticipated by the Labour Code and Labour Code (Codes of Good Practice) of 2003."

20. Clearly, the above extract corroborates the argument of 1st Respondent that the learned Arbitrator relied solely on the evidence of Applicants. This has the effect of making the 1st Respondent claim more probable than that of Applicants as it reduces the risk of being wrong. Our view is influenced by the attitude of the Court of Appeal in *Molupi Piti & another v Rex CRI/A/36/91,* where the court had this to say,
"Some form of corroboration becomes necessary to reduce the risk of wrong conviction..."

21. As the record reflects *AG1* was referenced by Applicants and on its basis, the learned Arbitrator made the conclusion that no hearing was held prior to the dismissal. We further confirm that there is nowhere in the record where reference has been made by the learned Arbitrator to the 1st Respondent. This further fortifies the argument of 1st Respondent with which We agree. Consequently this point also fails to sustain.

22. The fourth ground of review was that the learned Arbitrator erred by dismissing the Applicants case that 1st Respondent had not exhausted the local remedies before bringing the matter before the 2nd Respondent. It was submitted that in dismissing this argument, the learned Arbitrator relied on the evidence and submissions of 1st Respondent that a dispute, under the *Education Act of 2010*, can only go for arbitration by agreement of parties and that where there is no agreement the 2nd Respondent is the proper forum.

23. The Court was referred to page 8 of the record of proceedings where this evidence and submissions are reflected. The Court was specifically referred to the following extract:
"In terms of that Act e bontsa feela hore a dispute of dispute of right joaloka ena ea applicant should only be referred to arbitration if parties agree, arbitration ea bona mono mohlomphehi if parties agree, not this one, if the parties agree. So there was no agreement between the parties hore lets refer the matter to arbitration. So what do you mean that the respondent has not exhausted the local remedies? What local remedies were there in place for him to exhaust? The matter is properly before the DDPR."

24. In answer, 1st Respondent submitted that the Applicants failed to prove the existence of the Teaching Service Tribunal before the learned Arbitrator. In view of this failure, the learned Arbitrator made a conclusion that the DDPR was the proper forum. It was denied that the learned arbitrator relied on the referenced evidence and submissions of the 1st Respondent, particularly because no reference was made to 1st Respondent.

25. As rightly referenced by Applicants, this issue is addressed at paragraph 17 of the arbitration award. In that paragraph, the following conclusion is made:
"In terms of the Education Act of 2010, it clearly specifies that dispute of right should be referred to arbitration if parties agree..... It is further material to note that for a party to lodge his or her referral before this tribunal, exhaustion of local remedies is not a prerequisite in terms of the Labour Code."

26. We wish to note that indeed the finding of the learned Arbitrator echoes similar sentiments to those expressed by 1st Respondent, in his submissions which were disregarded. However, We are inclined to agree with 1st Respondent that the learned Arbitrator did not rely on the submissions of 1st Respondent to dismiss the applicants' arguments. We say this because as rightly pointed out by 1st Respondent no reference has been made by the learned Arbitrator to him.

27. Further fortifying Our attitude is the fact that the learned Arbitrator relied on the *Education Act* to come to the conclusion that He made. This Act was introduced and relied upon by the Applicants. Further the learned Arbitrator relies on the *Labour Code and the Labour Code (Codes of Good Practice) of 2003* for His conclusion that the issue of exhaustion of local remedies does not bar the referral of the dispute to the DDPR. This was infact the learned Arbitrator's view which was not said in the submissions of the 1st Respondent, at least in the referenced portion. Consequently, this point also fails.

28. The fifth review ground was that the learned Arbitrator erred by dismissing the argument of Applicants that it would

be prejudicial to them if 1st Respondent were to be reinstated per the award in issue, as the 1st applicant intended to downgrade the position of 1st Respondent. It was submitted that in dismissing this argument the learned Arbitrator relied on the evidence of 1st Respondent that its argument was speculative. The Court was referred to page 9 of the record where the said evidence and submissions are recorded:
"They are saying they are going to downgrade batla suffera prejudice. Somebody says we are intending to downgrade the position, that would not prevent them to reinstate him to his position as he has pointed out, he has averred in his affidavit that the issue of downgrading of my position can be done anytime if the employed deem that proper and would be an operational requirement matter, mohlang ba etsang hore joale re etsa downgrade the position ho tla bonahala mohla ba etsang joalo mohlomphehi, haeba ho tla hlokahala hore ba etse joalo, they would justify that haeba etlaba ntho e tlaba justifiable by then but cannot hona joale nthoe eo bae intenda hoetsa in future bare etlaba sufarisa prejudice if ntate a khutlisetsa mosebetsing oa hae."

29. In answer, 1st Respondent submitted that whereas the Applicant had claimed prejudice on account of impracticality of 1st Respondent reinstatement because 1st respondent's position faced a future downgrade, the learned Arbitrator found this to be speculative. It was denied that this was the argument of 1st Respondent as 1st Respondent did not say that which is alleged.

30. We have considered both the reference part of the record and the portion of the arbitration award dealing with prejudice. We do confirm that in the award the learned Arbitration dismissed the Applicant claim for prejudice as being speculative. Speculation, in this sense, entails the Court relying on what may or might happen to make a conclusion and this is highly shunned upon (see *Pascalis Molapi v Metcash Ltd Maseru LAC/CIV/R/09/2003).*

31. The issue of speculation is however not the evidence of the 1st Respondent as the extract from the record echoes

something different altogether. In that extract, 1st Respondent argues that Applicants should reinstated and that when the time for downgrading comes, they will downgrade 1st Respondent position, and that in the process they would not be prejudiced. 1st Respondent does not ague speculation at all but rather Applicants seem read it into his arguments. Consequently this point also fails.

32. On the last ground of review, it was submitted that the learned Arbitrator erred by bringing into the application for rescission evidence from the main case. It was submitted that in so doing the learned Arbitrator was relying on the evidence and submission of 1st Respondent yet both were excluded by order of the learned Arbitrator. The said evidence was an alleged letter of recommendation of 1st Respondent into the position in issue.

33. 1st Respondent answered that the learned Arbitrator was right to rely on the evidence from the main rescission application. It was argued that the letter in issue had been admitted into evidence and that the learned Arbitrator was bound to consider it.

34. In law, the Court is bound to make a decision on the basis of the evidence and pleadings before it *(see Kaone Leoifo v Bokailwe Kgamena and another (supra)*. We are of the view that the learned Arbitrator erred as suggested in that he acted contrary to this principle. The evidence of the letter of recommendation was not part of the Applicants' evidence in the rescission application and therefore could not be relied upon to make a conclusion that matter. It clearly did not form part of the record, it being the pleadings of Applicants. Therefore the learned Arbitrator erred in this respect.

35. In view of Our finding above, We shall now determine the effect of the irregularity complaint of, on the decision made. To answer this question, We must consider the probative effect of the considered evidence of 1st Respondent, on the conclusion made. Put differently, if not considered, would the learned Arbitrator have made a different conclusion, as Applicants argue *(See J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M.*

Monoko & others LAC/REV/39/2004). If the answer is in the affirmative, then the conduct of the learned Arbitrator will not only have amounted to an irregularity but one that is reviewable.

36. In the proceedings before the 2nd Respondent, the dismissal of the application for rescission was not only based on the letter of recommendation. There were other factors considered such as the conclusion that Applicant was not afforded a hearing, that Applicant failed to show the type of misrepresentation committed, and that the issue of exhaustion of local remedies does not apply to the case at hand. This being the case We find that the irregularity committed does not warrant interference with the award in issue.

AWARD

We therefore make an award in the following:

1) The review application is dismissed;
2) The award in referral A0536/12(b) is reinstated;
3) The award to be complied with within 30 days of Issuance herewith; and
4) There is no order as to cost.

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

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

MRS. MOSEHLE	**I CONCUR**
MR. MATELA	**I CONCUR**
FOR APPLICANTS:	**ADV. MK'HENA**
FOR 1ST RESPONDENT :	**ADV. NTAOTE**