IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/129/11**
A0767/2011

IN THE MATTER BETWEEN

THABISO RALETHOKO **APPLICANT**

AND

LESOTHO STEEL PRODUCTS **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. 1st Respondent arguing that the grounds raised are appeal and not review. Court finding merit only in respect of three of the grounds and declining jurisdiction over them. Applicant only arguing one out of the two grounds remaining. Applicant arguing unreasonableness of the decision of Arbitrator. Court not finding any irregularity in the decision of the learned Arbitrator and refusing the review application. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for review of the DDPR arbitration award. Five grounds of review have been raised on behalf of Applicant in the following:
   "6.1 The decision made by the learned madam arbitrator is grossly unreasonable to an extent that no reasonable man could have arrived at the same decision.
   6.2 The learned arbitrator erred and misdirected herself in holding that the applicant had taken the grinder without informing his supervisor.
   6.3 The learned arbitrator erred and misdirected herself in failing to take into consideration that there was a store man when the applicant took the grinder.

6.4 The learned arbitrator erred and grossly misdirected herself in holding that the applicant had lied that his grinder of which he had replaced the 1st respondent's belonged to the 1st respondent.

6.5 The learned arbitrator erred and grossly misdirected she in holding that the applicant has confirmed that there was a valid reason and evidence for his dismissal."

2. In reaction to those grounds of review, 1st Respondent raised a point of law in terms of which it sought to challenge the jurisdiction of this Court. The argument was essentially that the grounds raised were appeal and not review grounds. Parties were heard on both the point of law and the merits of the matter, with the rider that We would only consider the merits of the matter if We dismissed the point of law. Having heard the submissions of parties, Our judgement follows.

SUBMISSIONS AND ANALYSIS

Point of law

3. 1st Respondent argued that the grounds raised relate to, and place a challenge to the factual conclusions of the learned Arbitrator, without highlighting any procedural irregularities. It was added that the recognised grounds of review are irregularity, illegality and irrationality and that these have not been alleged by the Applicant.

4. In answer, Applicant submitted that all the grounds raised are review and not appeal. He stated that the main complaint against the award is that the learned Arbitrator has failed to appreciate the facts before Her and that this led Her into making an unreasonable and wrong conclusion of facts. It was added that even assuming that the grounds raised are appeal and not review, section 226 of the Labour Code Order 24 of 1992, gives this Court jurisdiction to entertain and determine them.

5. Where a preliminary point of this nature is raised, the question to ponder upon is if the grounds raised *prima facie* establish any reviewable irregularities. The test was laid down in the case of *Khajoe Makoala v 'Masechaba Makoala C of A (CIV) 04/2009* as follows,

"... whether the applicant's affidavits make out a prima facie case. Consequently the applicant's affidavits alone have to be considered and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point."

6. We have analysed all the five grounds pleaded by Applicant and have found that at least only two of them meet the requirement. By this we mean that only two of them sound in procedure and therefore make out a case for review. As for the other three grounds namely 6.2, 6.4 and 6.5, they are all levelled against the learned Arbitrator's factual conclusions. In the This being the case, they are appeal as opposed to review grounds. We therefore decline jurisdiction over them.

7. Our conclusion above finds support in the Labour Appeal Court decision in *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, where the Court in explaining the distinction between an appeal and a review had the following to say,
   "The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgment already given. Where the reason for wanting to set aside a judgment is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of an appeal. where on the other hand, the real grievance is against the method of the trial, it is proper to bring the case for review."
   In the light of these reasons, We now proceed to deal with the merits of the matter in respect of the two remaining grounds.

8. However, before We proceed to do so, We wish to note that during submissions, Applicant did not address both remaining grounds but only one. He only addressed the ground numbered 6.1. As a result, even Our analysis will be limited only to the ground in respect of which submissions were made.

Merits

9. It is Applicant's case that the learned Arbitrator's finding is so unreasonable that no reasonable court could have come to the similar conclusion. In amplification, it was submitted that the learned Arbitrator made a finding that Applicant had taken the

grinder belonging to 1st Respondent without authorisation and therefore that his dismissal was fair. It was said that this decision was contrary to the evidence place before the learned Arbitrator, hence the argument that the decision was unreasonable.

10. The Court was referred to page 5 of the record of proceedings, where the following exchange is recorded:
    "AC: Ntate, let us talk about the issues that have brought you before this court. How do you operate when you borrow your work equipment while you are going to deal with private arrangements?
    AW1: I borrow the equipment from my supervisor who is in charge of the site where we are working.
    AC: And during that time, who was your supervisor whom you had borrowed that equipment and what equipment did you borrow?
    AW1: Henry
    AW1: It was a grinder."

11. At page 6, the following is recorded:
    "AC: Did Henry agree with you?
    AW1: Yes, he indicated that I could take it if we do not have much work.
    AC: Did you eventually take it?
    AW1: That is so?"

12. It was argued that the above factual averments notwithstanding, at page 20 of the award, the learned Arbitrator made a finding that Applicant was not authorised to take the said grinder. It was submitted that the finding is grossly unreasonable and stands to be reviewed and annulled. Applicant specifically prayed that the Court find the dismissal unfair and order 1st Respondent to pay him compensation of two years salaries, unpaid overtime and Sunday's pay as claimed in DDPR referral forms.

13. In answer, 1st Respondent submitted that the learned Arbitrator has not committed any unreasonableness at all. The Court was referred to pages 5 and 6 of the record of proceedings, at the above quoted extracts. It was suggested

that the said extracts only demonstrate that 1st Respondent manager, one Henry, was only informed of the decision to borrow the equipment and that no authorisation was given thereafter.

14. It was further submitted that, fortifying the argument that Applicant was not authorised to take the grinder, is the fact that one Mafethe of 1st Respondent asked Applicant about the grinder claiming that it was missing. The Court was referred to page 6 of the record where the following exchange was recorded:

"AC: When did you return it?
AW1: I returned it to Lesotho Steel after Mr. Mafethe had come and indicated that there is a missing grinder."

15. It is trite law that where, on the one hand, a challenge is levelled against the method of trial, the proper route is by way of review. Where, on the other hand, the challenge is levelled against the conclusion of the arbitrator, the proper route is by way of appeal (see *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others (supra)*. However, where a challenge in the conclusion is premised on irrationality or unreasonableness, a review is the proper route. This in Our view is an exception to the general rule in reviews and appeals.

16. Supportive of Our conclusion above, is the Labour Appeal court decision in *Thabo Mohlobo and Lesotho Highlands Development Authority LAC/CIV/A/2/2010*. In this authority, the Court had an occasion to unpack and explain the scope of section 228E(3) of the Labour Code (Amendment) Act 3 of 2000. In explaining the scope of section 228E(3), the Court earmarked unreasonableness to be one of the lawful grounds against which a party may seek the review, correction and/or setting aside of a decision made.

17. For a claim of unreasonableness or irrationality to sustain, a litigant must successfully establish that there is no rational connection between the law, facts and the conclusion made (see *Carephone (Pty) Ltd v Marcus NO & 7 others (1998) 11 BLLR 1093 (LAC)* at 1103). Put different and in simple terms, such a party must successfully show that on the basis of the

facts accepted by the learned Arbitrator and the law applied, the conclusion made does not follow. That is to say, that the conclusion made is illogical or that it totally defies the rules of logic.

18. *In casu*, Applicant claims that there was evidence of authorisation but that in spite of same, the learned Arbitrator made a conclusion that he was not authorised to take the grinder in issue. Clearly, his protestation is not premised either on irrationality or unreasonableness for he does not claim that such evidence was considered and accepted but that the conclusion made thereafter does not go with the law applied. In Our view, there is no evidence of unreasonableness or irrationality, at least from both the pleadings and submissions of Applicant.

19. The above notwithstanding, We wish to note that it is not accurate that the dismissal was confirmed as fair on the ground that Applicant had taken a grinder without authorisation. Rather the learned Arbitrator, at paragraphs 5 and 6 of his arbitration award finds that:
".....applicant through his testimony went an extra mile to show that he was dismissed for taking and using respondent's grinder for personal gain. He confirmed that when he took it he no longer informed his supervisor as he had previously been given permission to take it. He further agrees that instead of returning it, he replace it with his old one and lied that it was respondent's grinder."

20. At paragraph 6, the learned Arbitrator further states:
"Surely, applicant himself confirms that under such circumstances there was a valid reason and evidence for his dismissal and this make the dismissal substantively fair."

21. Clearly, the finding of the learned Arbitrator was premised on other grounds other than the one suggested by Applicant. The decision of the learned Arbitrator is based on the fact that Applicant did not inform his supervisor that he was taking the grinder and not that he was not authorised. The learned Arbitrator accepted that authorisation had been made earlier. Further, the decision was premised on the fact that Applicant

had taken and used the Respondent's grinder for personal gain and that he lied about his old grinder being Respondent's.

22. We wish to further comment that it is inaccurate to suggest that the evidence shows that Applicant was not authorised to take the grinder. In fact in Our view, the evidence, as appears on pages 5 and 6, shows that Applicant was authorised to take the grinder, but that he did not take it immediately. Further, the fact that Applicant returned the grinder after it was sought by one Mafethe does not go anywhere to support the suggestion made by 1st Respondent. This notwithstanding, and premised on the reasons advanced in earlier, We find no reviewable irregularity.

AWARD

We therefore make an award as follows:

1) That the review application is refused.
2) The award in referral AO767/11 remains in force.
3) That there is no order as to costs.

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. RAMASHAMOLE	**I CONCUR**
MRS. THAKALEKOALA	**I CONCUR**
FOR APPLICANT:	**ADV. KUMALO**
FOR 1st RESPONDENT:	**MR. MATEISI**