IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU | **LC/REV/140/2013**

IN THE MATTER BETWEEN

MASECHABA MOTHIBELI
& 120 OTHERS | **APPLICANT**

AND

LESOTHO PRECIOUS
GARMENTS(PTY) LTD | **1st RESPONDENT**
DDPR | **2nd RESPONDENT**

JUDGMENT

Application for the review of arbitration award. Two grounds of review having been raised – Arbitration was held without the matter having first been conciliated; and unreasonableness of an award of costs. Applicant attempting to raise a new ground from the bar – 1st Respondent objecting to the ground and Court upholding objecting. Court dismissing the first ground and upholding the second ground of review. Award being reviewed and corrected. 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 A0183/2013. Applicants had referred claims for unfair dismissal with the 1st Respondent. An award was issued on the 25th September 2013, wherein their referral was dismissed. The dismissal was coupled with an order for cost in the sum of M5,000.00, against the Applicants representative for frivolity. It is this award that Applicants wish to have reviewed, corrected and/or set aside. Having heard the submissions of parties, Our judgement follows.

SUBMISSIONS

2. Applicants' first review ground is that the learned Arbitrator erred by proceeding to hear the matter in arbitration, without first having conciliated same. It was submitted in support that if the learned Arbitrator had held conciliation, it would have reflected on record, that is, either in the arbitration award or in the record of proceedings. It was added that having failed to hold conciliation, the learned Arbitrator acted in breach of the Regulation 15 of the *Labour Code (DDPR) Regulation of 2001*, which makes it mandatory that conciliation be held.

3. In answer, 1st Respondent submitted that conciliation is an off the record process, which is also confidential in nature. Further, that conciliation was conducted in the case under review and failed to yield results, hence why the matter went to arbitration. It was argued that nothing in law requires mention of conciliation having been undertaken, either in the arbitration award or in the record of proceedings.

4. It was further argued that, if it was not held as Applicants suggest, they should have raised it as an objection during arbitration proceedings. It was concluded that having failed to do so, illustrates that all dispute resolution procedures were adhered to, including conciliation. It was added that Applicants have not shown how the alleged failure to hold conciliation has prejudiced them, or put different, how the process may have benefited them.

5. We wish to confirm that conciliation is an off the record process, which even if recorded, such record cannot be used to the prejudice of either party. This is clear from the *Labour Code (Conciliation and Arbitration Guidelines) Notice of 2004*. Section 4(3) thereof provides that,
   "(3) Conciliation proceedings are private, confidential and without prejudice."
   This being the case, there is no obligation on the part of the learned Arbitrator to maintain a record of the conciliation proceedings, or to present same before Court as proof that conciliation was conducted.

6. We wish to further confirm that there is no law that compels the learned Arbitrator to mention, either during arbitration

proceedings or in the arbitration award, that conciliation was held before proceeding into arbitration. Rather, section 227(4)of the *Labour Code (Amendment) Act 3 of 2000*, r/w section 227(7) thereof, provide that,

"(4) if the dispute is one that should be resolved by arbitration, the Director shall appoint an arbitrator to attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.

...

(7) if a dispute contemplated un subsection (4) remains unresolved after the arbitrator has attempted to conciliate it, the arbitrator shall resolve the dispute by arbitration."

In view of the above sub-sections, the argument that conciliation was not held, merely on the premise that it was not mentioned either at the arbitration proceedings or that it does not appear in the arbitration award, does not and cannot hold.

7. We in fact agree with 1st Respondent that the odds are in favour of the dismissal of this point. Our view is based on two basic arguments. Firstly that no objection was ever raised on behalf of Applicants, during arbitration proceedings, against the alleged omission to conduct the conciliation proceedings. Secondly, there is no concrete evidence before Us, that conciliation was not held before the matter proceeded into arbitration. Rather, Applicant merely makes unsubstantiated allegations. This makes it more probable that there was nothing irregular in the proceedings. We therefore dismiss this review ground.

8. The second ground of review was that the learned Arbitrator failed to consider the evidence of a lay off agreement concluded between 1st Respondent and Lesotho Clothing and Allied Workers Union (LECAWU). It was argued had the learned Arbitrator considered this evidence, She would have come to the conclusion that refusal by Applicants to work on the 27th October 2012 and 3rd November 2012, was justified. The Court was referred to the authority in *National Union of Public Service & Allied Workers Union & others v National Lotteries Board [2014] ZACC 10*. In this Authority the Court held that in determining insubordination, one had to examine if the

conduct of the employee objectively amounted to insubordination. It was added that having made this conclusion, the learned Arbitrator would have found that Applicants had not been insubordinate.

9. In answer, 1st Respondent submitted this ground is being raised for the first time from the bar. It was added that this ground is not one of review grounds pleaded by Applicants. Further, that even before the DDPR, the said lay off agreement was never tendered as evidence, as it was never the issue before the learned Arbitrator. As a result, the learned Arbitrator could not have considered what had not been placed before Her. It was prayed that this point also be dismissed.

10. We have perused the parties pleadings and have noted that there are only two grounds of review that have been pleaded by or on behalf of Applicants. As a result, and as 1st Respondent has rightly put, this ground is only coming up for the first time in submission. The two grounds raised in pleadings are on conciliation and the award of costs. Review proceedings are brought by way of motion. The rule in motion proceedings is that parties stand and fall by their pleadings (see *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623)*. This essentially means that they cannot be allowed to submit beyond what they have pleaded. Consequently, We dismiss this ground on account of it having not been pleaded and further decline to address the rest of the submissions made on it.

11. The third ground of review is that the learned Arbitrator erred when awarding costs of M5,000.00 against Applicants' representative. It was submitted in support that, there is no basis against which the said award has been made in that the learned Arbitrator simply made an award without justification. It was argued that the learned Arbitrator's conduct is arbitrary and capricious. The Court was referred to page 6 of the arbitration award, where the issue of costs is reflected.

12. In answer, 1st Respondent submitted that there was no irregularity on the part of the learned Arbitrator, in that Her award was based on the history of the matter. It was stated

that the Applicants representative had also been involved in similar claims before the DDPR, wherein it was held the employer has a right to call an employee to work if the circumstances so required. Further that, this notwithstanding the Applicants' representative elected to proceed to prosecute the Applicants' case, thus causing 1st Respondent to incur unnecessary costs.

13. We have considered the arbitration award, in particular at page 6 from paragraphs 14 up to the award. At paragraph 14, the learned Arbitrator notes that 1st Respondent has made a prayer for costs premised on frivolity. At para 15, the learned Arbitrator makes reference to section 228E(2) of *Labour code Act (supra),* which empowers Her to make an award for costs due to frivolity and vexations conduct. Thereafter the learned Arbitrator makes an award of costs in sum of M5,000.00 against Applicants' representative.

14. The above being the case, it is clear that 2nd Respondent did not lay a factual basis for concluding that an award of costs was proper against Applicants' representative. Not only does the learned Arbitrator fail to state the facts against which She based Her decisions, to award costs, but She has also failed to justify the amount awarded. This makes Her decisions arbitrary and therefore irregular and illegal. Our finding finds support in the authority of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)* at 152 A-E, where the following was recorded,
"Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. Such failure may be shown by proof, inter alia that the decision was arrived at arbitrarily or capriciously…."

15. Further, the facts alleged to have been the basis of the award, by the 1st Respondent, have not been relied upon by the learned Arbitrator in making this conclusion, and neither has the 1st Respondent relied on same for asking for costs, at least as reflected at para 14 of the arbitration award. In Our view, 1st Respondent is merely speculating the basis of the learned Arbitrator's for making an award of costs against Applicants

representative. Likewise, 1st Respondent wants Us to rely on speculated reasons to concluded that the award for costs made against Applicant representative was proper. The authority in *Pascalis Molapi v Metcash Ltd Maseru LAC/CIV/REV/09/2003* discourages this practice. The Court held that,

"The Decision maker cannot be guided by a gut feeling or speculation in determining the practicality or impracticality of reinstatement but that the evidence must be led to that effect."

Consequently, We find that the learned Arbitrator's decision was arbitrary and stands to be reviewed and corrected.

AWARD

On the premise of the above reasons, We make an award in the following:

(1) The first two grounds of review are dismissed.

(2) The third ground of review succeeds and the award is corrected to read:

"The Applicants' referral is accordingly dismissed; and

"There is no order as to costs.

(3) No order as to costs in made in these proceedings.

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. RAMASHAMOLE **I CONCUR**

MR KAO **I CONCUR**

FOR APPLICANT: **ADV. TLAPANA**
FOR RESPONDENT : **ADV. LETSIE**