

**HELD AT MASERU**

In the matter between:

**BOLIBA MULTI - PURPOSE CO-OPERATIVE**

**APPLICANT**

and

**TEBOHO SOPENG  
DIRECTORATE OF DISPUTE PREVENTION  
AND RESOLUTION**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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**DATE: 24/10/14**

*Review of an arbitral award - Access to information - Applicant alleging it was unreasonable for the Arbitrator to have concluded that the employee had been denied access to the documents he required in order to prepare for his defence when the applicant had indicated that the documents related to pending litigation and its disclosure would harm it - Applicant insisting that the employee was given reasonable access - Court finds Arbitrator's decision unreasonable and sets it aside.*

**INTRODUCTION**

1. This review application follows a successful referral application over an unfair dismissal claim to the Directorate of Dispute Prevention and Resolution (DDPR) in *A 1034/12* wherein 1<sup>st</sup> respondent's dismissal was found to have been procedurally unfair and it was ordered that he be compensated by an amount representing six months of his salary.

**FACTUAL BACKGROUND**

2. It is common cause that the 1<sup>st</sup> respondent had been engaged by the applicant as its Chief Executive Officer for a fixed term contract of three years beginning 1<sup>st</sup> February, 2009 and ending 31<sup>st</sup> January, 2012. He was, however, dismissed for misconduct on 14<sup>th</sup> September, 2009 prior to the expiration of this contract, following a disciplinary hearing. An array of allegations relating to financial irregularities in the handling of applicant's accounts were levelled against the 1<sup>st</sup> respondent including that he had engaged one Firm for accounting and audit purposes which is apparently an irregularity in terms of principles of accounts;

had the Firm paid a fee amounting to Thirty Thousand and Six Hundred Maloti (M30, 600.00) which was above applicant's allowed limit without the Board's approval; hid a letter from Auditors to applicant's Board because it put him in a bad light and that there were some inconsistencies in applicant's financial statements. He was charged with; *inter alia*, fraud and gross dishonesty.

3. Having challenged both the procedural and the substantive fairness of the dismissal, the learned Arbitrator concluded that the dismissal was substantively fair, that is, that the applicant had a valid reason to dismiss him, but failed to follow a fair procedure. As aforesaid, the 1<sup>st</sup> respondent was awarded six months' salary as compensation.

4. The applicant not being satisfied with the award seeks to have it reviewed and set aside on the following grounds:-

- (i) That it was grossly unreasonable; and
- (ii) That the learned Arbitrator erred and misdirected himself by applying criminal law principles in labour matters. The applicant did not pursue this ground during proceedings.

### ***1<sup>ST</sup> RESPONDENT'S REACTION***

#### ***Points in limine***

5. 1<sup>st</sup> respondent's Counsel's first reaction was to raise two points *in limine* one relating to prescription and the other to the objection that the applicant had failed to abide by the Rules of this Court in that it just made bare allegations which did not disclose a cause of action.

#### ***(i) Review out of time***

Counsel pointed out that the DDPR award was issued on 2<sup>nd</sup> November, 2011 and received by the applicant on 23<sup>rd</sup> November, 2011. It, however, only filed review proceedings on 13<sup>th</sup> February, 2012, far beyond the thirty days prescribed by ***Section 228F (1) (a)*** of the ***Labour Code (Amendment) Act, 2000*** and to make matters worse failed to apply for condonation for its late filing. 1<sup>st</sup> Respondent's Counsel, however, decided to abandon this issue during proceedings.

### ***Bare Allegations***

1<sup>st</sup> respondent's Counsel argued that the learned Arbitrator has not committed any irregularity and the applicant has failed to point out to any irregularity committed by the Arbitrator except to make some sweeping statements and bare allegations. He maintained that the averments contained in applicant's pleadings were vague and embarrassing and did not show how the learned Arbitrator erred. He submitted further that applicant also failed to show how the Arbitrator applied criminal law principles in a labour matter. He therefore prayed that the application be dismissed with costs.

### ***THE MERITS***

6. The bone of contention in this dispute was whether or not the 1<sup>st</sup> respondent was denied reasonable access to certain documents he said he needed to enable him to prepare properly for his defence. The 1<sup>st</sup> respondent alleged that prior to the disciplinary hearing he had requested that he be allowed access to applicant's financial statements so that he could be able to prepare his defence, but was denied access to some documents.

7. The applicant disputes this and contends to the contrary that the 1<sup>st</sup> respondent was duly granted access to the documents he had requested but things only came to a head when the 1<sup>st</sup> respondent sought to access certain documents relating to a case then proceeding before the High Court between the applicant and Sheeran & Associates referenced *CIV/APN/414/10*.

8. The applicant argued that it was irrational and grossly unreasonable for the learned Arbitrator to have concluded that the 1<sup>st</sup> respondent had been denied access to the documents when he had pointed out at paragraph 41 of his award that:-

*in my view, applicant was granted access save that he was only unhappy about the reception, which was rather frustrating, that he received in these two instances. I have an opinion that instead of his reaction, he ought to have tried to open other files on the lap top or to have at least tried to search for the files that he needed among the documents availed to him at the place of the pre-arbitration conference. If he had done this and not found what he was looking for, I would be inclined to rule in his favour that the conduct of the respondent was malicious. As a result I find that he is the one that decided not to exercise his right to access information in preparation for his defence.*

9. This statement by the learned Arbitrator was a reaction to 1<sup>st</sup> respondent's averment that he had decided to leave applicant's office after being denied access to the Sheeran & Associates file from the office laptop and upon being told to find other information from the files himself as he knew where they were located. He indicated that he felt very irritated by this attitude, hence he left. After this encounter he then attempted once more to persuade the applicants to give him access to the files he needed through a letter, and the applicant failed to respond thereto. It was on the basis of this that the learned Arbitrator concluded that by not responding to 1<sup>st</sup> respondent's attempt at securing the documents this time around, the applicant had denied him access to the documents he requested thereby denying him an opportunity to prepare his defence.

10. However, having concluded that there was procedural impropriety in this respect, he went further to point out at paragraph 44 of his award that ***“the irregularity in the procedure is not to the extent that it vitiates the entire proceedings particularly because [1<sup>st</sup> respondent] had admitted to having committed the misconduct. It was his evidence that despite the letter being addressed to the Board, he decided to keep it for himself. Clearly, his conduct was deceptive in nature especially given the obvious purpose behind the said letter. It related to his duties and how he managed [applicant's] finances and keeping it for himself is a deceptive and dishonest act.”***

11. The learned Arbitrator was reacting to testimony tendered on applicant's behalf that the 1<sup>st</sup> respondent had received a letter from the Auditors addressed to the Board but he never forwarded it to them. Evidence led indicated that the letter related to the weaknesses discovered by the Auditor in applicant's financial statements. In fact at paragraph 37 of his award, the learned Arbitrator pointed out that the 1<sup>st</sup> respondent's conduct was gross in nature and warranted a dismissal, but he turned around to award compensation in his favour. This was a contradiction in terms and therefore unreasonable.

12. In review proceedings the focus is not on whether the decision of the Arbitrator was right or wrong but rather on the process and on the way in which he or she came to the challenged conclusion - see ***Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA)***. An award is reviewable if the decision reached by the presiding officer was one that a reasonable decision-maker could not have reached. The threshold of reasonableness impinges on rationality. In ***Foodcorp (Pty) Ltd v Deputy Director - General, Department of***

*Environmental Affairs and Tourism and Others 2006 (2) SA 191 (SCA)* at para 12, the Supreme Court of Appeal set out the test for review based on reasonableness. In determining what decision a reasonable decision-maker could make the Court held as follows:-

*One does not need to understand the complex process, mathematical or otherwise...to realise that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable.*

The rational basis test focuses on whether on the evidence tendered a reasonable person, acting reasonably, could have reached the decision that the learned Arbitrator reached.

13. It is trite that an employee is entitled to reasonable access to relevant information. The applicant explained to the 1<sup>st</sup> respondent that the disclosure of the information required by the 1<sup>st</sup> respondent would prejudice it in its case. Since we are talking about *reasonable access*, it is not every information that is in the employer's custody that can be easily accessible. The employee must show that the information is relevant for his cause, and that its disclosure would not cause substantial harm to the employer. The applicant argued that 1<sup>st</sup> respondent's access to files relating to Sheeran & Associates would jeopardise its pending case against it before the High Court. We feel that in the circumstances, the learned Arbitrator ought to have probed how the applicant would be harmed by 1<sup>st</sup> respondent's perusal of the said file and the other side advance its defence before making a decision. In our view, the whole dispute revolved around whether 1<sup>st</sup> respondent's request was reasonable or not.

#### ***POOR PLEADINGS VERSUS MERITS***

14. As aforementioned, 1<sup>st</sup> respondent's Counsel raised an objection to applicant's pleadings on the ground that its averments were vague and embarrassing. Indeed, the Notice of Motion failed to disclose the nature of the irregularity that the applicant complained about. Applicants had just stated that the learned Arbitrator's award was unreasonable without showing in what respects and only elaborated on the issue during proceedings. ***Rule 3 (f) of the Labour Court Rules, 1994*** is clear that an originating application shall:-

*contain a clear and concise statement of the material facts upon which the applicant relies, with sufficient particularity to enable the respondent to reply thereto.*

15. It is one of the fundamental rules of pleadings that the plaintiff must:-

*state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove... plaintiff's allegations* - see **H Daniels in Beck's Principles of Pleadings in Civil Actions 6<sup>th</sup> Ed., Butterworth, 2002 at p. 45.**

16. Looking at applicant's papers and 1<sup>st</sup> respondent's objection thereto one was tempted to dismiss this matter on the basis of bare averments but having heard applicant's Counsel's submissions on the merits made this one of the very difficult cases to determine. In raising this objection 1<sup>st</sup> respondent's Counsel had relied on the decision of the Labour Appeal Court in *Standard Lesotho Bank v Lijane Morahanye and Another LAC/CIV/A/06/08* (lesotholii). The main problem we were confronted with was that the irregularity complained of by the applicant was pleaded but not substantiated. In the *Morahanye case (supra)* the Court was concerned with the irregularity of raising new issues for the first time in Court when they were not pleaded. In *casu* the applicant had pleaded irregularity but had not expounded on it.

17. This state of affairs begged the question whether we could sacrifice consideration of merits at the expense of poor pleadings? We felt inclined in the interests of justice not to sacrifice an otherwise good case on the merits because of poor papers. It was our considered opinion that a request for further particulars could have cured the defect and felt further that this issue of disclosure of information in the employer's custody is very important as it raises the question as to what extent such information may be divulged.

18. *Section 27 (2) of the Labour Code Order, 1992* provides that it shall be the chief function of this Court to do substantial justice between the parties before it. It is in the spirit of this Section and in the interests of justice that we find in favour of the applicant on the merits and order as follows:-

- (i) **That the DDPR award in A 1034/12 is reviewed and set aside;  
and;**
- (ii) **There is no order as to costs.**

**THUS DONE AND DATED AT MASERU THIS DAY OF 24<sup>th</sup>  
OCTOBER, 2014.**

**F.M KHABO**  
**PRESIDENT OF THE LABOUR COURT (a.i)**

**P. LEBITSA**  
**ASSESSOR**

**I CONCUR**

**M. MOSEHLE**  
**ASSESSOR**

**I CONCUR**

**FOR THE APPLICANT:            ADV., P.L MOHAPI**

**FOR THE 1<sup>ST</sup> RESPONDENT:    ADV., B. SEKONYELA**