IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/139/2013**
A0413/2013

IN THE MATTER BETWEEN

EVER SUCCESSFUL TEXTILE (PTY) LTD **APPLICANT**

AND

TAJANE TAJANE **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Applicant seeking an award for costs of application for dismissal for want of prosecution. Court finding that claim for costs is overtaken by events. Applicant having raised three grounds of review. The rule in motion proceedings being considered. Content of unreasonableness as a review ground also considered. Court refusing the review application and 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 A0413/2013. 1st Respondent was an employee of Applicant until he was dismissed for misconduct. Dissatisfied with his dismissal, he referred a claim for unfair dismissal with the 2nd Respondent. On the 17th October 2013, the 2nd Respondent issued an award wherein, it had been ordered that Applicant reinstate 1st Respondent in terms of section 73(1) of the *Labour Code Order 24 of 1992*.

2. Equally unhappy with the 2nd Respondent decision, Applicant initiated the current review proceedings to have the said award reviewed, corrected and/or set aside. Following the referral of the review application, 1st Respondent lodged proceedings for

dismissal for want of prosecution, wherein he had argued that Applicant had initiated these proceedings to delay the execution of his award and therefore that the matter be dismissed.

3. The dismissal application was duly set down for hearing on the 13th November 2014. On that day both parties appeared before this Court to present an agreement, whose terms included in the following:
   a) The matter would be postponed to the 20th January 2015 for argument in the merits; and
   b) That an award for wasted costs of the day on attorney and client scale be made in favour of 1st Respondent.

   The said agreement was made an order of this Court.

4. However, on the date of hearing, 1st Respondent sought an order for costs incurred in the application for dismissal for want of prosecution. His argument was that he had initiated these proceedings due to inactiveness of Applicant as the *dominis litis* candidate, which process would not have been undertaken had Applicant taken steps to have the matter finalised.

5. Applicant answered that the claim for costs was inappropriate as the application for dismissal was no longer in the picture. It was argued that it had been overtaken by the agreement of the 13th November 2014, to argue the merits on this day and therefore that costs cannot flow from that application. It was added that in any event, the delay was explained on that day to have been due to the illness of the previous attorney of Applicant.

6. We share similar sentiments to those held by Applicant. The application for dismissal for want of prosecution is no longer there. The purpose of that application was to dismiss the matter without hearing the merits. As a result, having agreed to have the merits heard the dismissal application object ceased to exist, and consequently the application as well. Therefore, it is improper to seek costs on the premise of a non-existent application. Having addressed the issue of costs, We shall now proceed to deal with the merits.

SUBMISSIONS IN THE MERITS

7. Applicant's case was that the learned Arbitrator erred in holding that dismissal was not an appropriate sanction because negligence was not gross. It was argued in amplification that the learned Arbitrator in making this conclusion did not consider the requirements of section 10(3) of the *Labour Code (Codes of Good Practice) of 2003*, which read as follows:

   "(a) the gravity of the misconduct in the light past infringements, the strictness of the rule, the nature of the job, health and safety and the likelihood of repetition;

   (b) The circumstances of the employee such as employee's employment record (including length of service, previous disciplinary record, and personal circumstances."

   It was argued that having failed to consider these requirements, the learned Arbitrator committed a mistake of law that materially affected His decision.

8. The second ground was that the learned Arbitrator had erred in failing to consider the evidence of Applicant that 1st Respondent had damaged a lot of property belonging to Applicant. The Court was referred to pages 24, and 32 to 33 of the record in support. It was argued that had the evidence been considered, the learned Arbitrator would have found that given the dictates of section 10(3) of the *Codes of Good Practice (supra)*, dismissal was an appropriate sanction, particularly given the amount of loss caused.

9. The third ground of review was that the decision of the learned Arbitrator was unreasonable in that contrary to clear evidence that 1st Respondent had committed misconduct, the learned Arbitrator awarded his reinstatement. It was argued that given these clear facts, the reasonable conclusion should have been otherwise and that at best re-employment as opposed to reinstatement.

10. 1st Respondent answered that all Applicant pleadings are bare as they do not have sufficient facts to support them. It was submitted that Applicant is submitting facts which have not even been pleaded and that this he is doing from the bar.

It was added that this is not allowed in motion proceedings as the rule requires that parties stand and fall by their pleadings.

11. It was further argued that nothing in the pleadings of applicant show any procedural flow on the part of the learned Arbitrator. It was argued that therefore, Applicant has failed to make a case for review. It was further argued that without any procedural flaws, the arguments raised are clearly aimed at questioning the conclusion of the learned Arbitrator and that they are therefore appeal and not review. It was prayed that the application be dismissed.

12. In relation to the second ground of review, it was argued that the learned Arbitrator considered all evidence relating to the damage and made a conclusion. The Court was referred to paragraph 8 – 11 of the arbitration award in support thereof. It was concluded that Applicant is simply unhappy with the decision and that mere unhappiness is not a review ground.

13. We have gone through the Applicant's pleadings and have observed, particularly in relation to the first ground, that the averments made or set out are bare. Where an allegation is made against averments as being bare, that allegation implies that no facts have been pleaded to support the allegation made (*see Mokone v Attorney General & others CIV/APN/232/2008*). Indeed *in casu*, Applicant has merely alleged that the learned arbitrator erred in His decision that dismissal was not appropriate because negligent was not gross, without giving sufficient substance to the claim.

14. We are therefore in agreement with 1st Respondent that all the factual arguments made on behalf of Applicant on the first review ground have not been pleaded. rIt is trite law that in motion proceedings, parties are bound to the content of their pleadings. Instructive on this position is the authority of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No & Another (2009) 30 ILJ 279 LAC*, where at paragraph 25 of the judgment, the Court held as thus,
"In my view it is not open to the appellant to now argue the case which it did not foreshadow in its founding affidavit…."

Given the dictates of the rule in motion proceedings, Applicant is bound by the content of his pleadings. As they stand, Applicant has failed to make out a case for review on this ground. It is therefore dismissed.

15. On the second ground, We have gone through the referenced pages in support. At page 24, We have been directed to the following extract:

"Mr. Bohloko: Yes, what did you find? Was it intentional or accidental?

"Mr. Molefi: I found out as if it was intentional because he was denying that it was himself."

At page 32 – 33

"Mr. Bohloko: It never happened?

Mr. Molefi: Yes sir. It can happen intentionally, that Mistake he made."

16. From the above extracts, nothing speaks to the value of the alleged damage. We say this because, most of the emphasis is place on the value of the loss sustained by Applicant to suggest that the gravity of the misconduct warranted dismissal as a sanction. The extract does not even touch on the quantity that is alleged to have been damaged. We do not find the basis of the argument that the learned Arbitrator ignored evidence showing that a lot of property had been damaged.

17. We wish to that the evidence of damage to property was considered from paragraph 8 to 11 of the arbitration award. In this portion of the arbitral award, the learned Arbitrator makes a deeply considered analysis which is also backed by authorities. Therefore, it cannot be accurate that the said evidence was not considered. We do confirm that the learned Arbitrator considered the relevant evidence to the matter. Consequently, Applicant's argument fails.

18. On the last ground, it is Our view that unreasonableness, where pleaded in a claim, suggests that given a conclusion made, a particular result is the only one that is reasonable so that any other that deviates from that inevitable conclusion or result is unreasonable (see *Carephone (Pty) Ltd v Marcus NO &*

7 others (1998) 11 BLLR 1093 (LAC) at 1103). *In casu*, Applicant is not suggesting that the learned Arbitrator made a conclusion but rather claims that the evidence was clear. He is not even suggesting that the clear evidence was accepted by the learned Arbitrator in order to compel Him to a certain specific conclusion. This therefore cannot be the promise of a claim for unreasonableness.

19. Even assuming that such a conclusion had been made that the 1st Respondent had committed the misconduct, the sanction of dismissal was not the only possible and/or appropriate sanction. The appropriateness of the sanction depends on several factors including those contained under section 10(3) of the *Codes of Good Practice (supra)* as outlined by Applicant above at paragraph 7 of this judgment. Therefore, the argument must also fail.

AWARD

We therefore find that,

1) The review application is refused.
2) The award in referral A0413/13 remains in force 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 11th DAY OF FEBRUARY, 2015.

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

MR. MATELA	**I CONCUR**
MRS. RAMASHAMOLE	**I CONCUR**
FOR APPLICANT:	**ADV. NONO**
FOR 1st RESPONDENT:	**ADV. RASEKOAI**