

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/23/2013

A0223/2012(b)

IN THE MATTER BETWEEN

RAMPAR TRADING (PTY) LTD

t/a DODO'S SHOES

APPLICANT

AND

NTHABISENG JOYCE SEETSI

1st

RESPONDENT

DDPR

2nd

RESPONDENT

JUDGMENT

Application for review of the arbitration award. Four grounds of review having been raised. Court not finding merit in same and dismissing the review. The arbitration award being reinstated. No order as to costs being made. Principles considered: distinction between review and appeal; requirements for a

condonation application; and the rule against reliance on issues not canvassed.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0223/2012 (b). The brief background of the matter is that 1st Respondent was employed by Applicant until her contract terminated. She then referred a claim for severance payment and notice with the Directorate of Dispute Prevention and Resolution (DDPR). 1st Respondent obtained judgment in default of Applicant.
2. Unhappy with the default award, Applicant initiated the current review proceedings, wherein it sought the review, correction and/or setting aside of the arbitral award in issue. However, due to a delay in the prosecution of the matter, 1st Respondent applied for the dismissal of the review for want of prosecution. In reaction to this application, Applicant filed its reply to the 1st Respondent answer, together with an application for condonation.
3. On the date of hearing, parties agreed to abandon all the other applications, that is, the dismissal application as well as the condonation, in favour of the merits of the matter. They agreed on the granting of condonation for the late filing of the reply. Having considered the basis of the condonation application and having found merit in same, We granted it

and directed parties to address Us on the merits of the main review. Five grounds of review had been raised but only four were argued.

SUBMISSIONS AND ANALYSIS

4. Applicant's case was that the learned Arbitrator erred by going against Her own caution, that the requirements in an application for condonation should be taken together, as they are interrelated and not individually decisive. It was said that the learned Arbitrator did this by only considering the explanation for the delay and the prospects of success, and disregarding the other factors. The Court was referred to the arbitration award for evidence of this.

5. We have gone through the arbitration award and wish to confirm that indeed at paragraphs 8, 9 and 10 of the arbitration award, the learned Arbitrator states the applicable principles. In particular, She states the factors to consider from the authority of *National Union of Metal Workers of South Africa & Others v Cribard (Pty) Ltd (2008) 29 ILJ 694*. Six factors are listed in the award. The learned Arbitrator further states that these "*factors are not individually decisive but they are interrelated and must be weighed against each other.*"

6. In the same arbitration award, the learned Arbitrator has recorded the submissions of Applicant. From the record, Applicant only made submissions in respect of the reason for

the delay and the prospects of success. The record has not been challenged not to be a true reflection of what took place. It is trite law that what has not been challenged is taken to have been accepted as true and accurate (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242*).

7. If the above position is to hold, then the learned Arbitrator was right in not considering the other factors, as they were never issues before Her. Supportive of our view is the authority of *Phetang Mpota v Standard Bank LAC/CIV/A/06/2008*, where the Learned Dr. K. E. Mosito, at paragraph 22 of the typed judgement stated that,

“... the Court of Appeal and this Court have more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation.”

The learned Arbitrator was therefore right to have limited Her analysis only to the issues raised by Applicant before Her. Consequently, We find no irregularity in the learned Arbitrator's approach.

8. The second ground of review was that the learned Arbitrator erred by making a finding that was not supported by facts. It was argued in amplification that Applicant had given evidence of cases which 1st Respondent former colleagues had referred against Applicant. It was added that these cases involved similar issues as those involved in the Applicant's case, that is, the same cause of action, the same

legal grounds and the same relief. It was submitted that it had been indicated to the learned Arbitrator that Applicant had won these cases. It was argued that this was evidence of prospects of success and that any finding otherwise was not based on facts. The Court was referred to the arbitration award.

9. Respondent answered that Applicant did not succeed in these cases as they were dismissed. It was submitted that Applicant had shown a certificate of exemption from paying severance payment, and that owing to the certificate the learned Arbitrator dismissed the claims. It was argued that this did not mean that Applicant had won.

10. We have gone through the award, and in particular at paragraph 6, where mention is made of cases on similar issues. In this paragraph, the learned Arbitrator has recorded the submissions of Applicant on the prospects of success. These are recorded as follows,

“In stating prospects of success, applicant representative indicated that the matter is of great importance as there are cases pending of the same issue and its outcome is likely to affect all other employees of the said provident fund scheme and not catered for in severance payment in terms of the Labour Code Order of 1992. She added that applicant already has other cases pending on the same issue and they shall make an application that they be joined together and heard once and for all.”

11. Clearly on paragraph 6, no mention has been made by either Applicant or the learned Arbitrator about the referenced cases being completed in favour of Applicant. Rather what appears is that they are pending. Evidently, this is contrary to the claims by Applicant that it had led evidence of cases in which they had been successful on same causes of action, same legal grounds and relief sought. Consequently, the premise of Applicant's claim for prospects of success fails.
12. We in fact agree with the learned Arbitrator that if this was the basis of a claim for prospects of success, then Applicant had none. Prospects of success are claims which demonstrate that likelihood or chance of success in the main case if heard (see *Phetang Mpota v Standard Bank (supra)*). *In casu*, Applicant has not shown any chance or likelihood of a win in the main case. Rather, Applicant merely refers the learned Arbitration to some pending matters whose determination is yet to be made.
13. The third ground of review was that the learned Arbitrator erred by finding that a company with operations in Lesotho must have a person who specifically, and only serves the interests of that company in Lesotho, and not in another jurisdiction. The Court was referred to paragraph 10 of the arbitration award for this finding.

14. We have gone through paragraph 10 of the arbitration award. That paragraph analyses the explanation for the delay. It is recorded that,

“10. It is applicant’s reason that manager responsible for Lesotho is also responsible for applicant’s businesses in Botswana and Swaziland while she resides in Johannesburg. He submitted that as a result, she travels between four countries and that hindered her to come to Lesotho immediately after being aware that an award has been issued against applicant in default. Another reason.....”

15. Clearly, paragraph 10 does not show the suggested conclusion. Rather it shows a record that is entirely on a different conclusion, other than what is suggested. In addition, Applicant is clearly challenging the conclusion of the learned Arbitrator. While the reasons for bringing both a review and an appeal are the same, that is to set aside judgment given, challenges placed against the conclusions are properly canvassed through an appeal mechanism and not a review (see *J. D. Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004*). Consequently, the basis of this ground falls off and in the same vein the review ground also fails.

16. The fourth ground of review was that the learned Arbitrator allowed a party that had not filed an opposing affidavit to address it in defence of the application for condonation. It was argued that by not filing an opposing

affidavit, 1st Respondent had expressed his clear intention not to oppose the condonation application. It was added that this being the case the application should have been granted. It was argued that allowing the 1st Respondent to make addresses under the circumstances, was irregular and contrary to Regulation 26 of the *Labour Code (DDPR) Regulations of 2001*.

17. 1st Respondent answered that the opposing papers were filed of record and that this is clear for paragraph 7 of the award. At that paragraph, it is recorded that the opposing papers were not considered because their late filing had not been considered. It was denied that 1st Respondent made submissions in opposition.

18. We have gone through paragraph 7 of the arbitration award where reference is made to the opposing papers. The following is recorded,

“Since respondent did not move condonation application for late filing of opposing papers, I consider this application unopposed in as much as they attempted to oppose it in the hearing.”

19. We are in agreement with 1st Respondent that she was not allowed to make submissions in defence. It is clear from the record that though an attempt was made, but such was quashed as the learned Arbitrator resolved that the matter would be treated as unopposed. Consequently, there is no

merit in the claim that the learned Arbitrator allowed a party that had not filed opposing papers to make submission in opposition.

AWARD

We therefore make an award as follows:

- 1) The review application is refused.
- 2) The award in referral A0223/12 (b) remains in force and is to be complied with within 30 days of issuance herewith.
- 3) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF MAY, 2015.

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

MR. MOTHEPU

I CONCUR

MR KAO

I CONCUR

FOR APPLICANT:

ADV. MABULA

FOR 1st RESPONDENT:

MR. LETSIE