IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/155/13**

A0855/2013

IN THE MATTER BETWEEN

PUSELETSO MAFATLE **APPLICANT**

J & S FASHION (PTY) LTD **1st RESPONDENT**

DDPR **2nd RESPONDENT**

JUDGMENT

Applicant for review of arbitration award. Several grounds of review raised. 1st Respondent raising two points in limine against the additional review grounds – non-compliance with the Rules and Lack of relevance of averments. Points being upheld and additional grounds being struck off. Applicant proceedings with two grounds. Court not finding merit in them and dismissing the review application. Distinction between and

appeal and review being considered. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the award in referral A0855/2013. The brief background of the matter is that Applicant was an employee of 1st Respondent until she was dismissed for misconduct. Unhappy with the dismissal, she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). An award was issued on 25th day of October 2013, dismissing her claim.

2. Equally unhappy with the arbitration award, Applicant approached this Court for review. About six grounds were raised on her behalf, in terms of which the review, setting aside and/or correction of the said award was sought. In answer to the application, 1st Respondent had raised two *points in limine*, specifically attacking the additional grounds of review. Both parties were heard on all claims and Our judgment follows.

SUBMISSIONS AND ANALYSIS

Points in limine

Non-compliance with Rule 16 (6)

3. 1st Respondent's case was that the documents filed on behalf of Applicant purportedly under Rule 16 (6), did not comply

with that Rule. It was argued that in terms of the said Rule, there has to be a notice to amend the Notice of Motion, accompanied by an affidavit that states the grounds being added or amended. It was submitted that these said documents are short of the requirement and should be struck off.

4. Applicant answered that Rule 16 (6) has been complied with. It was submitted that in the main review, they had reserved the right to add grounds of review and this is what they did. It was argued that the documents in issue are supplementary papers and did not need to take the form of a Notice of Motion.

5. We have gone through Rule 16 of the Labour Appeal Court Rules of 2002, which are now the Rules of this Court in cases of review of arbitration awards. In terms of that Rule, and in particular sub-rules 2 and 3,

"(2) A party wishing to review a decision shall file a notice of motion with the registrar....

(3) The Notice of Motion shall –

....

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside."

6. Now sub-rule (6) thereof provides that,

“The applicant shall, within 7 days after the Registrar has made the record available, either -

(a) by delivering a notice and accompanying affidavit, amend add to or vary the terms of the notice of motion and supplement the supporting affidavit; or”

7. Applicant has filed additional grounds upon which she relies to have the arbitration award corrected or set aside. A procedure has been laid out under Rule 16 (2) and (3). This being the case, Applicant is bound by that procedure. We are of the view that, a notice and affidavit required under 16 (6) is one contemplated under Rules 16 (2) and (3). Sub-rule (6) does not operate in isolation but flows from the sub-rules that precede it. Therefore, We are in agreement with 1st Respondent that Applicant has failed to comply with Rule 16 (6).

Lack of relevance

8. 1st Respondent’s case is that the averments contained in the supporting affidavit to the notice to file additional grounds are irrelevant. It was argued that the said averments have no relation at all with the proposed additional grounds, as they neither support nor augment them. It was submitted that rather they state the obvious facts which have already been pleaded in the initial Notice of Motion. It was prayed that the supporting affidavit be struck off as being irrelevant.

9. Applicant answered that the averments are relevant as they support the additional ground. It was further argued that, that notwithstanding it is improper for 1st Respondent to raise this issue as *point in limine*. It was added that the issue would have been properly raised as a defence to the merits rather than in this fashion. It was said that the practice adopted by 1st Respondent was discouraged by the Court of Appeal of Lesotho in *Makoala v Makoala C of A (CIV) 04/2009*.

10. We have perused the authority of *Makoala v Makoala (supra*). In that authority, the learned Melunsky J warns the Courts against the practice of treating defences to the merits as *points in limine* and also advices that rather than to dismiss matters on issues that are otherwise dilatory, the courts should hold proceedings and allow parties to correct defects in their pleadings. For purposes of the matter at hand, this authority does not advance Applicant's case as it does not declare the *point in limine* raised as being improper.

11. We have also perused the provisions of Rule 7 of the Rules of this Court. That Rule permits a party to raise a point of law at any stage of the proceedings, if among others it relates to irrelevance. The section is couched as follows,

"7(1) Subject to sub-rule (3), the Court may, at any stage of proceedings, of its own motion, order to be struck out any document filed in the proceedings or anything contained therein, on the grounds that it is scandalous, vexatious, frivolous, irrelevant or an abuse of the process of Court.

In view of this said, We find in favour of 1st Respondent that the point is properly raised.

12. We have also considered the content of the affidavit under scrutiny. We do confirm that its content is irrelevant. We say this because it does not set out both the factual and legal grounds upon which the additional grounds of review are based, to sustain a case for review. We therefore find in favour of 1st Respondent and strike out the said affidavit. It therefore follows that without a supporting affidavit, there is no notice to add grounds as contemplated by Rule 16 (6). We will therefore only consider the main application alone.

Merits

13. Applicant's case is basically that the learned Arbitrator failed to make the distinction between absenteeism and late arrival at work. It was argued that although Applicant's case was that the sentence was too harsh, the learned Arbitrator needed to make a distinction between late arrival and absenteeism in order to make the proper decision over the issue.

14. Secondly, that the learned Arbitrator erred in finding that Applicant was guilty of misconduct. It was argued in amplification that there was no evidence establishing the misconduct. It was added that the available evidence showed that on an earlier occasion, that led to the issuance of the last warning, Applicant had been allowed to be late at

work but that notwithstanding he was charged and given a final warning.

15. 1st Respondent answered that one of the elements in an application for review is prejudice. It was submitted that a party applying for a review must show that as a result of the alleged irregularity, they suffered prejudice. It was argued that Applicant has failed on this requirement and therefore that the review be refused.

16. It was further argued that Applicant’s case before the learned Arbitrator was not for a distinction between late arrival and absenteeism. It was submitted that rather the misconduct was not the issue but that Applicant was of the view that the sentence was too harsh. It was argued that Applicant is pleading a new case on review. It was added that Applicant is also raising a new ground of review from the bar as no such argument has been raised in the affidavit to the Notice of Motion.

17. On the second argument, it was submitted that this is an appeal as it does not show any procedural irregularity. It was argued that assuming it is properly raised, the fact that there was acceptance of misconduct, makes the argument baseless. It was added that Applicant never denied the misconduct as his case was that the sentence was too harsh. The Court was referred to paragraph 3 of the arbitration award.

18. We have considered the submissions of both Applicant and 1st Respondent. We do confirm that Applicant had complained only about the harshness of the sanction before the DDPR. Supporting this is the arbitration award on paragraph 3 where the following is recorded,

"Applicant is challenging the dismissal on the ground that the sanction to dismiss her was too harsh."

Clearly, there was acceptance of misconduct for if there had been none, Applicant would have questioned the substantive aspect of her dismissal, namely that she was charged and dismissed for what she had not done.

19. In view of the above said, the learned Arbitrator could not have determined the distinction between lateness and absenteeism as the reason for dismissal was never the issue. We wish to reiterate that if the reason for the dismissal was the issue, it would have been expressly raised, which was not the case *in casu*. Consequently, the learned Arbitrator did not err in not making the distinction between absenteeism and lateness. If the learned Arbitrator had, She would have determined an issue in respect of which She was not called. She would have therefore acted contrary to the dictates of the authority of *Phetang Mpota vs. Standard Bank LAC/CIV/A/06/2008.*

20. In the above authority, the learned Dr. K. E. Mosito AJ, held at paragraph 20 of the typed judgment that,

"The Court of Appeal and this court have on several occasions deprecated the practice in terms of which the courts grant order that nobody has asked for. In several of its decisions the Court of Appeal has deprecated the practice of granting orders which are not sought for by the litigants."

At paragraph 22, the Learned Dr. K. E Mosito went on to say, *"Similar, 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."*
On the strength of this authority and the above reasons the argument of Applicant fails.

21. We wish to also comment that We agree with 1st Respondent that Applicant does not argue failure to make the distinction between lateness and absenteeism in her pleadings, at least in the founding pleadings. Rather the argument was made in the additional grounds which have unfortunately been struck out, on account of both non-compliance with Rule 16 (6) and Rule 7 of the Rules of this Court, respectively. Consequently, at this stage, Applicant would, if allowed, be making a new case from the bar. We wish to add that we are also in agreement with 1st Respondent that Applicant has not shown the prejudice occasioned by the alleged irregularity.

22. On the second ground, We also find in favour of 1st Respondent that the grounds raised are appeal and not

review grounds. The distinction between the two, that is an appeal and a review, has been made the case of *JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2014*. It was stated in that case that,

"Where the reason for wanting to set aside judgment is that the court came to wrong conclusion on the facts or the law, the appropriate remedy is by way of 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."

23. The Applicant's second ground of review appears under paragraph 1 of the pleadings as such,

"The learned arbitrator erred and or misdirected herself by holding that the applicant was guilty of misconduct."

Clearly, this is challenge against the conclusion and not the method. Applicant is merely asking this Court to make a finding on the basis of the evidence he alleges to have been presented, that Applicant was not guilty of misconduct. She wants Us to substitute the decision of the learned Arbitrator with Our own, as would be in an appeal situation.

24. We wish to further comment that We agree with 1st Respondent that even if We had found in favour of Applicant that the ground has been properly taken, the misconduct had been accepted before the DDPR by Applicant. We say this because it was not challenged. We have shown by reference to the arbitration award and the submissions of parties that

Applicant was only concerned with the appropriateness of the sanction and not the conduct charged and dismissed for.

AWARD

For the above reasons, We find as follows,

1) That the review application is refused.
2) The award of the DDPR is reinstated.
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**
MRS. THAKALEKOALA	**I CONCUR**
FOR APPLICANT:	**ADV. LEBAKENG**
FOR 1st RESPONDENT:	**ADV. ‘NONO**