IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/162/13**
A0660/2013

IN THE MATTER BETWEEN

PRESITEX ENTERPRISE (PTY) LTD **APPLICANT**

AND

SOAI LETSIE **RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. 1st Respondent raising a point in limine of non-joinder. Court finding that the requirements for a plea of non-joinder were not met and dismissing the point in limine. In the merits, four grounds of review having been raised, one relating to misapplication of the law and the other three relating to ignorance of evidence. Court finding that the law was properly applied but that the evidence of a witness was ignored. Court further finding that the ignored evidence was material and granting the review. Matter being remitted to the DDPR for a

hearing de novo before a different Arbitrator, with specific terms. 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 A0660/2013. Five grounds of review had been raised on behalf of Applicant but only four were argued. The second, fourth and fifth grounds were argued together, while the first one was argued separately.

2. The brief background of the matter is that 1st Respondent was an employee of Applicant until his dismissal for misconduct. He was dismissed for use of profane and abusive language towards his fellow employee. Unhappy with his dismissal, 1st Respondent referred an unfair dismissal claim with the Directorate of Dispute Prevention and Resolution (DDPR). An award was thereafter issued wherein 1st Respondent was to be reinstated to his employment, in terms of section 73 of the *Labour Code Order 24 of 1992*. Equally unhappy with the said award, Applicant initiated the current review proceedings.

3. In reaction to the review, 1st Respondent raised a *point in limine,* to the effect that the Applicant had failed to join the learned Arbitrator who made the decision, as a Respondent party. He argued that this was an irregularity in the procedure of the Court, which irregularity warranted the dismissal of this review application. We had then directed

parties to address Us holistically on the matter, with the rider that We would only consider the merits, if We did not uphold the *point in limine*. Having heard parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

Point in limine – non joinder

4. 1st Respondent submitted that in terms of the mandatory provisions of both Rule 16 and 17 of the *Labour Appeal Court Rules of 2002*, also the Rules of this Court in review proceedings, the Notice of Motion which shall require the decision maker to show cause why a review shall not be granted, must be served upon the decision maker. It was argued that decision maker contemplated by these sections is the learned Arbitrator who made the decision, and not the DDPR as an institution.

5. Respondent answered that the decision maker is the DDPR as an institution and not an individual arbitrator. It was argued that the individual arbitrator in making his/her conclusion, does so in an official capacity so that their actions are those of the DDPR. It was submitted that in view of this said, joining the learned Arbitrator would be for convenience as no harm would occasion against them, should the award be set aside.

6. It was argued that the principle of non-joinder requires that a party be joined if the decision to be made would affect both

their direct and substantial interests, or if the order given cannot be carried into effect without affecting their rights. It was argued that *in casu*, the test is not satisfied as the learned Arbitrator neither has direct or substantial interests and will not be prejudiced by the decision of this Court should the review be granted.

7. The Court was referred to the book by *Herbstein & van Winsen, the Practice of the Supreme Court of South Africa, 4th ed., Juta & Co., 1997, at page 170*. Further reference was made to the case of *Nafisa Moosa & another v Directorate of Dispute Prevention and Resolution & another LC/REV/570/2006*, in support of the 1st Respondent argument.

8. We do confirm that for a plea of non-joinder to succeed, a party that is sought to be joined must have both a direct and substantial interest in the matter. This is clear from the extract at page 170, of Herbstein and Van Winsen's book. This is recorded as thus:
   "A direct and substantial interest in any order that the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party...."

9. Further, still on the same principle in the case of *I. Kuper (Lesotho) (Pty) Ltd v Benjamin Maphate & others C of A (CIV)*

40/2010, the Court of Appeal of Lesotho held that, at paragraph 7,

"In my view the learned judge erred in upholding the point of non-joinder. None of the parties mentioned by the first respondent had a direct and substantial interest in the application, which is what is required before a plea of non-joinder can be successfully raised."

10. It is Our view that the learned Arbitrator who made the decision in question does not have a direct and/or substantial interest in the matter. We say this because, as Applicant has rightly pointed out, She was acting in Her official capacity as an officer of the DDPR. It is then the DDPR that has such an interest. Citing the individual arbitrator in these proceedings would only be for convenience. Therefore failure to cite the learned Arbitrator does not affect the decision that this Court will make.

11. This view was also expressed by the Labour Court of Lesotho in the case of *Nafisa Moosa & another v Directorate of Dispute Prevention and Resolution & another (supra),* as rightly reference by 1st Respondent. In this case, this Court held that where a party can only be cited for convenience, then its non-joinder does not materially affect the decision to be made. We consequently dismiss the *point in limine*.

The merits

12. The first ground of review was that the learned Arbitrator misapplied the rule on inconsistency/consistency in the sanction of its employees. It was argued that evidence had been led that the circumstances of the misconduct of the two employees in question were different, but that notwithstanding the learned Arbitrator found that the Applicant was inconsistent in meting out punishment. The Court was referred to pages 11 and 12 of the record of proceedings and page 6 of the arbitration award at paragraph 13. Further reference was made to the case of *CGM Industrial (Pty) Ltd v Moliekeng LC/REV/61/2007*, in support of the argument.

13. 1st Respondent answered that the charges were the same per evidence given, in that both employees were charged of using profane and abusive language and that this was the evidence before the DDPR. The Court was referred to pages 54, and specifically to exhibits 1 and 3 of the DDPR record of proceedings. It was added that in any event, 1st Respondent's case was that the Applicant had been inconsistent in meting out punishment. It was further added that Applicant is merely unhappy with the finding of the learned Arbitrator that Applicant was not consistent.

14. We have had the liberty to peruse the arbitration award. At page 5 on paragraph 10, the learned Arbitrator notes that 1st Respondent,

“....assisted the tribunal by proving that one employee who committed the same offence he (applicant) committed, was set free while applicant received a harsh punishment of dismissal.”

Clearly from the above extract, the learned Arbitrator accepted that there had been a dissimilar treatment in the case where two employees charged of the same employment were punished differently. Having accepted this position, She correctly applied the principle of inconsistency.

15. Applicant has referred Us to the case of *CGM Industrial (Pty) Ltd v Molieleng & another (supra)*. In this case, the principle of inconsistency is explained as follows,

“consistency is a principle of fairness. Where two employees have committed the same misconduct and there is nothing to distinguish them, they should be generally dealt with in the same way.”

16. Clearly, how the principle is to be applied depends on the factual conclusion that has been made or that which is to be made. Where it is factually concluded that the situation and/or circumstances of employees were similar, the principle will apply and *vice versa*. We therefore find that in the light of the factual conclusion made, the learned Arbitrator properly applied the principle of consistency/inconsistency.

17. We do concede that evidence was given at pages 11 and 12 of the record of proceedings before the DDPR, to demonstrate that there was consistency in meting out punishment. Further that, at page 6 of paragraph 13 of the arbitration award, the leaned Arbitrator notes that Applicant was inconsistent. This evidence shows something else other than the misapplication of the principle of inconsistency or consistency.

18. We have considered both exhibits 1 and 3. These exhibits show that the charges of the two employees in issue were not entirely the same. For 1st Respondent, the charge was one of profane and abusive language while for the other employee, there were other charges in addition. While this does not similarly demonstrate misapplication of the principle of consistency/inconsistency, it relates to something else. This leads us to conclude that not only was the principle properly applied, but that Applicant is merely unhappy with the conclusion made, a cry that cannot be cured by way of a review but appeal.

19. Our attitude is fortified by the authority of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004,* where he Court makes a distinction between a review and an appeal and the consequential remedies in respect of each. This is reflected in the following, *"The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside*

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

20. The second, fourth and fifth grounds, which were argued together, were that the learned Arbitrator erred by ignoring the evidence of Applicant's key witness by the names of Rethabile Tlebere. It was argued that this witness gave evidence that showed that the Applicant had been consistent in meting out punishment in situations that were similar before. The witness was said to have further testified that the case of 1st Respondent was different as the circumstances were different.

21. It was argued that Tlebere had testified that the charges were not entirely the same, that the other employee accepted guilt and asked for mercy while Applicant denied guilt only to be found so after a hearing. The Court was referred to pages 1 to 17 of the record of proceedings before the DDPR for the evidence. Further reference was made to page 3 at paragraph 6 of the arbitration award.

22. 1st Respondent submitted in answer that if evidence of Rethabile Tlebere was not considered, that it related to issues that had been accepted as common cause, that is issues that had been confirmed by Applicant. It was argued

that it would thus not affect the outcome. It was however denied that the evidence was not considered.

23. We have gone through the record of proceedings before the DDPR. We do confirm that from pages 1 -17 is the evidence of Rethabile Tlebere. We also confirm that from the reading of paragraph 6 of the arbitration award, that evidence was not considered. At this paragraph the learned Arbitrator notes that,

"In trying to convince this tribunal about the fairness of the applicant's dismissal, the respondent company called upon Messrs Tsepo Monare and Molise Kotelo as its witnesses." Thereafter, the learned Arbitrator proceeds to analyse their evidence and then makes a conclusion.

24. Evidently, the evidence of Rethabile Tlebere was not considered notwithstanding that she was the first witness in the proceedings. Having perused the record at pages 1 – 17 of the record, we confirm that Tlebere gave evidence that showed that the circumstances of the cases being compared then were not the same. This was crucial evidence as it was the defence of Applicant against 1st Respondent case. Consequently, this evidence was material and should have been considered.

25. We reject the suggestion that it was evidence that was common cause, as 1st Respondent case and evidence was that Applicant had been inconsistent, while the evidence of

Rethabile Tlebere showed otherwise. We therefore find that the learned Arbitrator erred in not considering the evidence of Rethabile Tlebere. We are of the view that if considered, the evidence of Rethabile Tlebere may have influenced the learned Arbitrator's decision, at least in so far as the issue of consistency/inconsistency is concerned.

AWARD

We thus make an award as follows:

1) That the review application is granted.
2) The award in referral A0660/2013, is reviewed and set aside.
3) The matter is remitted to the DDPR to be heard denovo before a different arbitrator.
4) The order must be complied with within 30 days.
5) 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

MRS. RAMASHAMOLE **I CONCUR**

MISS LEBITSA **I CONCUR**

FOR APPLICANT: **ADV. K. LETSIE**

FOR 1ST RESPONDENT: **ADV. RAMPAI**