IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/10/2013**
A0927/2011(b)

IN THE MATTER BETWEEN

RELIABLE TRANSPORT COMPANY **APPLICANT**

AND

TSEKO KOBILE **1st RESPONDENT**
DDPR **2nd RESPONDENT**
ARBITRATOR (N. MOSAE) **3rd RESPONDENT**

JUDGMENT

Application for review of the arbitration award. Three grounds of review having been raised – failure to consider relevant issues, unreasonableness and biasness. Applicant only succeeding in respect of the first review ground. Court finding the said ground sufficient to warrant the granting of the review.

The application being granted and the award being reviewed and set aside. The matter being remitted to the DDPR for a rehearing in the condonation application before a different Arbitrator, with 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 A0927/2011(b). The Applicant had employed 1st Respondent until he was terminated from employment. Unhappy with the termination, 1st Respondent had then referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR).

2. The matter was heard in default of Applicant, allegedly on the ground that he had come late for the proceedings, and after the learned Arbitrator had decided to proceed in its default. An award was later issued in favour of the 1st Respondent. Applicant then filed an application for rescission against the default award. On the date of hearing, Applicant was advised by the learned Arbitrator that the said application had been filed out of time, and that a condonation application had to be made. Although parties were in agreement that the condonation be made from the bar, the learned Arbitrator insisted on a formal application. The matter was therefore postponed without mention.

3. Later on, some months later, Applicant filed its application for condonation. The condonation was heard and dismissed,

giving rise to the current application. Applicant is in these proceedings asking this Court to find that the learned Arbitrator failed to consider relevant issues, that he acted unreasonable and that he was biased. On these bases, Applicant is asking that the award be reviewed, corrected and/or set aside. Both parties were heard and Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. Applicant's first review ground was that the learned Arbitrator erred in that he failed to take into account relevant considerations and that this led to him making a wrong conclusion. It was argued that the learned Arbitrator rightly noted in his award the factors to consider in determining an application for condonation. It was submitted that at paragraph 10 of the arbitration award, the learned Arbitrator noted six factors to be considered namely, degree of lateness, good cause shown for the delay, prospects of success, importance of the case, convenience of the court and avoidance of unnecessary delay in the administration of justice.

5. It was argued that having noted these factors, the learned Arbitrator went against his own caution by only considering the fact that the condonation application had been filed late, thus ignoring the other factors earlier noted. It was added that in so doing, the learned Arbitrator failed to make the

relevant considerations for the purpose of an issue for determination before him.

6. The Court was referred to the case of *Mahoko Setipe v Nien Hsing International (Pty) Ltd LC/REV/62/2011*, where the principle of irrelevant considerations was defined and explained. It was submitted that at page 5 of the judgment, the Court stated that an irrelevant consideration occurs where a decision maker ignores what should be considered and considers issues extraneous to the subject matter for determination. It was further argued that discernible from this definition is the position that not making relevant considerations constitutes a reviewable irregularity. It added that had the learned Arbitrator considered the relevant factors, he would have made a different conclusion.

7. In answer, 1st Respondent submitted that the learned Arbitrator made the relevant considerations. It was argued that while not all factors were considered by the learned Arbitrator, as Applicant has rightly put, the one factor considered was sufficient to dispose of the matter, due to its strength. It was argued that it is not uncommon in law for one factor to be the decisive element in exclusion of others, and that this is what transpired *in casu*.

8. We have perused the arbitration award and wish to confirm that at paragraph 10, the learned Arbitrator notes the factors to consider in determining an application for condonation. At this paragraph, the following is recorded,

"Factors to be considered in determining an application for condonation were laid down by Molahlehi J in the case of National Union of Metal Workers of South Africa & Others vs Criburd (Pty) Ltd (2008) 29 ILJ 694 as follows; degree of lateness, explanation of lateness/good cause for the delay prospects of success in the main case, importance of the case, the convenience of the court and avoidance of unnecessary delay in the administration of justice."

9. It is undoubted that all the factors were not considered by the learned Arbitrator as shown by the submissions of both parties. We have also considered the award and have also confirmed the position to be true. We therefore agree with Applicant that in not considering the noted factors the learned Arbitrator went against His own caution. We also agree with Applicant that these factors, which the learned Arbitrator failed to consider, were relevant for purposes of determining whether or not to grant the condonation application. This is clear from the referenced authorities above.

10. We wish to note that We acknowledge the explanation of irrelevant considerations from the authority of *Mahoko Setipe v Nien Hsing International (Pty) Ltd (supra),* and further accept the proposition by Applicant that ignorance of relevant considerations is a reviewable irregularity *(see Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd and Another, 1998 (3) SA 132 (A) at 152 A- E).*

11. We wish to further note that We also agree with the 1st Respondent that in certain cases one factor may be decisive over others in determining an issue before court. However, that should not be misconstrued to mean that other factors do not need to be considered. All factors must be considered and an explanation must be given why one particular factor carries more weight than others. This is the only way that it can be determined if the decision maker considered them. We therefore find in favour of Applicant on this point and further note that Our finding on this ground alone is sufficient to lead to the granting of this review. However, We will proceed to consider other grounds raised on behalf of Applicant.

12. The second ground of review was that the learned Arbitrator's decision to dismiss the condonation application without considering its merit but on the basis that it was late, also taking into account that the said condonation application was unopposed, is unreasonable. It was argued that the unreasonableness occurred as a result of strict application of the rules regarding the time for filing an application for condonation. It was argued that in dismissing the condonation application on these grounds, the learned Arbitrator ignored the prejudice that would occasion on the Applicant as a result of His decision.

13. It was argued that the attitude and practice of strictly applying the rules of the court was discouraged by the Court

of Appeal of Lesotho in the case of *National University of Lesotho & Another v Motlatsi Thabane C of A (CIV) 3/2008*. It was submitted that in this case, the Court stated that prejudice should be a guiding principle in deciding whether or not to apply the rules in their strict sense.

14. The Court was further referred to the case of *Rustenburg Platinum Mines Ltd v Crause 45/2004*, where the Court stated that courts should not be tyrannised by their own rules and ignore documents simply because of non-adherence to the rules, as in so doing they would be denying themselves the opportunity to dispense substantive justice. It was argued that in ignoring the condonation application on account of non-observance of the rules, the learned Arbitrator erred.

15. Respondent answered that the Rules of Court are not mere ornaments and must be observed at all time. It was added that it is thus the duty of courts of law to ensure that they are observed by strictly applying them. The Court was referred to the case of *Thabo Makenete v Major General Justin Lekhanya and others C of A (CIV) 17/1990*, in support. It was argued that in this case the Court stated that not observing the rules of the court borders on contempt of court, and that it should be discouraged.

16. We wish to note that while unreasonableness is a reviewable irregularity, it should not be so loosely used to justify the granting of a review against the Arbitrator's

conduct. We have defined unreasonableness in a number of cases before, with the view to guide parties regarding when to raise it.

17. In the case of *Tai Yaun Garments (Pty) Ltd v Machere Leraisa & Another LC/REV/17/2012*, at paragraph II, relying on the authority of *Carephone (Pty) Ltd v Marcus No & 7 Others (1998) 11 BLLR 1093 (LAC) CH 1103*, this Court made the following remark,

"Unreasonableness is the only instance in which an award may be challenged on the conclusion. The conditions for this challenge to succeed are that there must be evidence, which evidence must be accepted. With the evidence having been accepted, there must only be one reasonable conclusion against which the decision maker strayed."

18. *In casu*, the stated conditions have not been met as no evidence has been identified to have been accepted and no allegation has been made that with the accepted evidence, a particular conclusion was the only one that was reasonable but that the learned Arbitrator strayed against same. Consequently, Applicant has failed to make out a case for unreasonableness. That notwithstanding, We will comment on the arguments raised by parties as We bear the duty to educate those below Us.

19. In the case of *Johannesburg Stock Exchange and another .v. Witwatersrand Nigel Ltd and another (supra),* at page 152 A – E, the Court stated that review grounds include,

"...unwarranted adherence to a fixed principle...."

We do concede that Rules of the Court are not mere ornaments as 1st Respondent has put. However, they should not be applied in isolation, but in consideration of other factors.

20. In the case of *National University of Lesotho & another .v. Motlatsi Thabane (supra),* that has been referenced by applicant, the Court at paragraph 4 makes the following remark,

"Thus what amounts to purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of the appeal on merits."

This in Our view means that while courts are designed to ensure that their rules are observed, but that should not be at the prejudice of parties.

21. Supportive of Our view is the approach taken by the Court of Appeal of Lesotho in *Thabo Makenete v Major General Justin Lekhanya and others C of A (supra)*. In this case, the Court having expressed its displeasure at non-observance of the rules, went ahead to allow a party that had breached the rules to file an application for condonation. This is captured as thus,

"It has become clear during the present session that many practitioners are displaying a lamentably lax attitude to the rules of court bordering on the contemptuous. The attitude evinced seems to be that the rules are unimportant, can be disregarded at will and that non-compliance will simply be overlooked or condonation granted as a matter of course and right. It is time that practitioners minds were disabused of this much mistaken impression and the misconceived idea that their disregard of the rules will be overlooked because of the prejudice their clients might suffer."

22. Having expressed displeasure as demonstrated above, the Court then went on to say that,

"We do not however, wish to close the door finally on the appellant and will accordingly make an order which will enable the applicant, if so advised, to bring a proper application for condonation to this court at its next session which, if granted, would enabled the matter to be heard at such next session."

In essence, if properly raised, We could have been inclined to find that the learned Arbitrator had erred by strictly adhering to a fixed principle, being the rules on the filing of applications, without considering the extend of prejudice that would occasion from His decision.

23. The third ground of review was that the learned Arbitrator was biased in the matter and that he should have recused himself from the proceedings. In support it was argued that

bias was first manifested when the learned Arbitrator disallowed Applicant's representative to take part in the proceedings for being late by just four minutes. Secondly, that the learned Arbitrator showed biasness by requiring Applicant to file a formal application for condonation for late filing of the rescission, when no objection was raised to the application being made from the bar.

24. Lastly, that it was submitted that biasness was further demonstrated when the learned Arbitrator dismissed the Applicant's application for condonation without considering its merit simply because it had been filed late. It was argued that this incident, together with other two above, demonstrate that the learned Arbitrator had an interest in the matter, which was to maintain and uphold his initial biased conclusion, to exclude Applicant's representation in the proceedings.

25. 1st Respondent answered that there is no biasness, at least from the narrated chronology of events. It was submitted that there was rational justification why all that was done, was in fact done. It was argued that, in fact this ground and the other two are appeal disguised as review as they all challenge the conclusion of the learned Arbitrator. The Court was referred to the case of *Action Statistical Investment (Pty) Ltd t/a Pick n Pay v Lesia Monanabela & another LC/REV/33/2011*, where the Court made a distinction between an appeal and a review.

26. Where an allegation of biasness is made against a presiding officer, the test to be applied is an objective one. The elements of the test were laid out in the case of *S v Roberts 199 (4) SA 915 (SCA) at 924-E – 925D* as thus:

"...(2) The suspicion [of bias] merit be that of a reasonable person in the position of the accused or litigant.

(3) The suspicion must be based on reasonable grounds.

(4) The suspicion is one which the reasonable person referred to would, not might, have."

27. The reasoning proposed by Applicant in its claim for biasness, on the part of the learned Arbitrator, falls short of the requirements. We say this because nothing has been shown by Applicant that the learned Arbitrator had an interest in one of the litigants before Him, or in the outcome of the matter. By this We mean that Applicant has failed to show the benefit that would come to the learned Arbitrator in maintaining His decision, to exclude Applicant's representatives from the proceedings and in requiring Applicant to make a formal application for condonation, as well as in not considering all elements in determining an application for condonation. It therefore cannot be said that the Applicant's suspicion of bias is a reasonable one.

28. We are supported in Our conclusion by the authority of *Bernet v ABSA Ltd (2010) ZACC 28*, where the Court stated hat apprehension of bias by a reasonable man may arise,

"either from the conviction of interest that the judicial officer has in one of the litigants before court or from the interest that the judicial officer has in the outcome of the case."

We are therefore of the view that the claim for bias is bare and unconvincing. It is trite law that bare allegations cannot be relied to make a decisive conclusion in favour of the party making such allegations (*see Mokone v Attorney General & others CIV/APN/232/2008*).

29. Regarding all grounds being appeal disguised as review, We hold a different view. All grounds alleged sound in the method of trial, safe that only one of them has merit. As 1st Respondent has correctly pointed out, We made the distinction between an appeal and a review in a number of Our decisions including the case of *Action Statistical Investment (Pty) Ltd t/a Pick n Pay v Lesia Mananabela (supra).*

30. Relying on the authority of *J.D. Trading t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2014*, We have made the said distinction with specific reference to paragraph 6 of the judgement, where the following is recorded,

"The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgement 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 trial, it is proper to bring a case for review."

We therefore dismiss the 1st respondent contention in this regard.

AWARD

We therefore make an award as follows,

1) That the arbitration award is reviewed and set aside.
2) The matter is remitted to the DDPR for a hearing *de novo* of the condonation application before a different Arbitrator.
3) The order in (2) to be complied with within 30 days of issuance herewith.
4) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 10th DAY OF AUGUST 2015.

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

MR. MOTHEPU **I CONCUR**

MRS. THAKALEKOALA **I CONCUR**

FOR APPLICANT: **ADV. NDEBELE**

FOR RESPONDENT: MR. MAIEANE