IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/11/2015**
A0079/2014

IN THE MATTER BETWEEN

NATIONAL UNIVERSITY OF LESOTHO **APPLICANT**

AND

PHEELLO NTHAKENG SELINYANE **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Six grounds of review having been earlier raised. 1st Respondent challenging them as being appeal disguised as review. Court finding merits in argument at least in relation to three grounds. Applicant succeeding on the remaining grounds of review and Court granting the review. Award being set aside and matter being remitted to the DDPR to heard de novo 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 A0079/2014. Six grounds of review had been raised on behalf of Applicant but only three were argued. The matter was duly opposed and both parties were in attendance and did make presentation.

2. The brief background of the matter is that Applicant had employed 1st Respondent in the position of a Lecturer. He was dismissed after being found guilty of dereliction of duty. Unhappy with his termination, 1st Respondent had then

referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). Conciliation was duly conducted, at the end of which no resolution had been reached.

3. The learned Arbitrator is claimed to have then, on his motion, raised a *point in limine* and required parties to address him on it. The point was *'whether it was correct or not, in law, for ASAC to enhance the disciplinary sanction of a final written warning that was recommended by the chairman of the disciplinary inquiry against applicant to a more severe sanction of dismissal as was confirmed by the Council.'* In the end, an award was issued wherein the Applicant was ordered to reinstate 1st Respondent without loss, in terms of section 73 of the *Labour Code Order 24 of 1992*. It is this award that Applicant wishes to have reviewed, corrected and/or set aside.

4. We wish to note that at the commencement of the proceedings, two major developments took place. Firstly, parties applied to the Court to hear and determine the review without the transcribed record of proceedings. The arguments advanced were that no evidence was led at the DDPR on the matter; that the award was sufficient for purposes of this review; and that it was by consent of both parties that the record was not necessary.

5. We granted the application, primarily on the basis of the second argument, that the award was sufficient for the determination of the issues raised. As for the other reasons, they are not valid grounds upon which the application could be granted. We have stated in a number of cases, the purpose of a record of proceedings, which is to provide evidence of an irregularity complained of. Where the record would not serve that purpose, then it is not necessary.

6. The second development was the *point in limine* raised on behalf of the 1st Respondent that the grounds are appeal and not review. We were addressed on the issue after which We ruled that three of the grounds raised were appeal and not review, and dismissed them for want of jurisdiction. We then

directed parties to address Us on the remaining grounds and promised them Our reasons for the decision of the *point in limine* at a later stage. Our reasons and the decision on the main review therefore follow.

SUBMISSIONS AND ANALYSIS

Point in limine

7. 1st Respondent's case was that this is an appeal disguised as a review, in that Applicant was challenging the conclusions as opposed to the method of trial. The Court was referred to the case of *Chief Constable of the North Wales Police v Evans [1982] 3 ALL ER 141,* where the concept of judicial review is explained.

8. Further reference was made to the case of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)*, where the following is said,
   "'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice" ... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

9. It was submitted that the above quotation demonstrates what constitutes a review ground. It was stated that among what was identified to constitute review grounds are
   - Disregard of evidence
   - Mistake of law; as well as
   - The wrong application of the law.

10. It was submitted that none of these have been alleged by Applicant in its motion and founding affidavit. Specific reference was made to ground 5.1 that,
"The learned arbitrator erred and/or misdirected himself in law by holding as he did that 1st respondent was subjected to double jeopardy when his punishment was enhanced by Academic Staff Appointments Committee (ASAC)."

11. Further reference was made to the cases of *Kule and Others v Lesotho Highlands Development Authority and another LC/REV/77/2008* and *Thabo Mohlobo and 13 others v Lesotho Highlands Development Authority and Another LC/REV/42/2009,* in support of the above argument.

12. Applicant answered that all grounds are based on the fact that no evidence was heard before a decision was made by the learned Arbitrator. It was argued that this constitutes a reviewable irregularity as the complaint is procedural. With regard to the 1st ground of review, it was submitted that the decision that Applicant was being subjected to double jeopardy was not based on any evidence, and that as such it was a procedural irregularity. Similar sentiments were expressed in relation to the rest of the grounds of review. It was prayed that the *point in limine* be dismissed.

13. Whenever a challenge of this nature is made, the claim is that *prima facie* the arguments do not make a case for review but for an appeal. We have considered the review grounds raised on behalf of Applicant and they are couched as follows,

"5.1 The learned arbitrator erred and/or misdirected himself in law by holding as he did that 1st respondent was subjected to double jeopardy when his punishment was enhanced by Academic Staff Appointments Committee (ASAC).
5.2 The learned arbitrator erred and misdirected himself in holding as he did that the respondent should be paid all lost emoluments without having head evidence on whether the 1st respondent did mitigate his loss or not. The learned arbitrator therefore misconstrued the principles governing an

award of compensation in labour matters as the compensation awarded is not equitable.

5.3 The learned arbitrator erred [and] misdirected himself in holing as he did that the 1st respondent should be paid amount of three hundred and twenty five thousand three hundred and ninety five Maloti (M325, 395-00) while it was clear that the 1st respondent did not render any services for the said amount.

5.4 the learned arbitrator erred and misdirected himself in law by ordering the [applicant] to reinstate the 1st respondent on a specific day without first having heard evidence as to whether reinstatement would be practicable considering that the 1st respondent has not been in the employment of the application for about fifteen months at the time of the award.

5.5 The learned arbitrator erred and misdirected himself in not enquiring whether or not there [was] incompatibility between the parties.

5.6 The learned arbitrator erred and misdirected himself in law by holding as he did that application had failed to prove that there is a law that empowers its ASAC to enhance disciplinary sanctions while in fact that the respondents had proved that based on NUL statute 40 and the judicial precedents."

14. We wish to note that We accept the position of Lord Brightman in the case of *Chief Constable of North Wales Police v Evans (supra)*, that,

"Judicial review is concerned, not with the decision but with the decision making process. Unless that restoration on the power of the court is observed, the court will in my view, under the guise of preventing abuse, be itself guilty of usurping power."

15. In fact a similar view is expressed in the case of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko and Others LAC/REV/39/2004*. At paragraph 13 the Court stated that:

"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 have the judgment set aside is that the Court came to the

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 on review."

16. In the same authority, at paragraph 16, the Court relies on a quotation from the case of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another (supra)*, which 1st Respondent has relied upon to demonstrate what constitutes reviewable irregularity, similarly with the intention to provide a guide as to what is reviewable and not. What is clear from the quotation is that only procedure is subject to review.

17. We have considered the grounds raised as well as the submissions of parties. We agree with 1st Respondent, at least to some extent that the grounds raised on behalf of Applicant are appeal disguised as review. This relates to grounds 5.1, 5.3 and 5.6. We will now demonstrate how this is so.

18. All these grounds are concerned with the conclusion and not the method of trial. Ground 5.1 merely alludes to the fact that the learned Arbitrator was wrong to have found that 1st Respondent had been subjected to a double jeopardy when his sanction was enhanced. Clearly, the complaint is factual and not procedural, at least *prima facie* the papers filed.

19. What fortifies this argument is an attempt by Applicant in answer to argue that the decision was wrong because no evidence was led. Applicant is in essence attempting to plead facts from the bar which should have been contained in its founding affidavit if that was the case. These are material facts that form the basis of Applicant's qualm that a wrong conclusion was reached. We simply cannot allow Applicant to make a new case from the bar.

20. Similar sentiments are held in respect of grounds 5.3 and 5.6. We say this because under ground 5.3, Applicant is dissatisfied with the awarded amount of M325, 395.00. The

reason is simply that no services were rendered. This is purely factual as no reference is made to any procedural irregularity that the learned Arbitrator is said to have committed. Concerning ground 5.6, applicant is essentially complaining that on the strength of the available evidence, a different conclusion should have been reached. It is in essence saying the conclusion is wrong. These are all grounds of appeal and not review.

21. Regarding grounds 5.2, 5.4 and 5.5, We are satisfied that they sound in procedure. They are all based on an allegation that no evidence was led before the decision to award both the reinstatement of 1st Respondent and the emoluments was made. This in Our view is an issue that concerns the mode of reaching the decision and thus *prima facie* review. What really remains is whether there is merit in the claim. Consequently, grounds 5.1, 5.3 and 5.6 are dismissed for want of jurisdiction and grounds 5.2, 5.4 and 5.5 stand as *prima facie* review grounds.

The merits

22. Applicant's case was that no evidence was led in the proceedings on any issue. Rather that the learned Arbitrator caused parties to address him on what He termed a point *in limine.* Subsequent to the addresses, an award was issued making a determination not only on the *point in limine*, but also on issues that in Applicant's opinion needed evidence in order to be fairly and equitably determined.

23. It was submitted that in terms of section 73 of the *Labour Code Order (supra),* an arbitrator must in determining the remedy to award, consider the circumstances of the case. It was stated that these circumstances can only come from the evidence of parties. It was argued that since no evidence was led *in casu*, there was no observance of section 73 of the *Labour Code Order (supra)*. Further reference was made to the cases of *Pascalis Molapi v Metro Group Ltd and Others LAC/CIV/R/09/2003* and *Nien Hsing v Morero Mohlahatsa LC/REV/48/2011* in support of the argument that, an assessment must be made on the basis of evidence.

24. 1st Respondent submitted that in making an award in terms of section 73 of the *Labour Code Order (supra)*, two considerations apply. Firstly, that if an award concerns compensation for lost wages or *in lieu* of reinstatement, then evidence must be led. However, if compensation is not either *in lieu* of reinstatement or for lost wages, then no evidence is needed. It was argued that the latter applied *in casu*. The Court was referred to the cases of *Thandiwe Labane and others v Tai Yuan garments (Pty) Ltd LC/43/*2013 and *Standard Lesotho Bank v Raphael Mphezulu LC/REV/87/2011,* in support of the proposition.

25. It was argued that issue of practicality of reinstatement is essential in small organisations and not in big organisations, which include Applicant institution. The Court was again referred to the case of *Standard Lesotho bank v Raphael Mphezulu (supra),* to support the contention.

26. It was added that Applicant's claim should not be upheld because as complainants before the DDPR, it was their obligation to request to lead evidence. As a result, having failed to do so before the learned Arbitrator, He cannot be faulted for what was not brought to his attention. It was prayed that the application be dismissed.

27. Applicant replied that in all circumstances, at least in terms of section 73 of the *Labour Code Order (supra)*, evidence must be led in order for the assessment to be made. Regarding, the distinction between big and small organisation, a similar argument was made that evidence is needed irrespective of the size of an organisation. About the obligation on the Applicant to request to lead evidence, Applicant submitted that as the award shows on pages 2 to 3, the learned Arbitrator caused parties to address him on a preliminary issue, and not lead evidence. They therefore acted on the basis of directive from the learned Arbitrator, which does not excuse his error of procedure.

28. We have gone through section 73 of the *Labour Code Order (supra)*. We do confirm that in terms of that section, the learned Arbitrator, as a matter of procedure, was bound

to assess the circumstances to determine the appropriate relief. This is captured as thus,

"(1) If the Labour Court or arbitrator holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court or arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.

(2) If the Court or arbitrator decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court or arbitrator shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount as the court considers just an equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses."

29. As applicant has put, the determination of the proper relief depends on the circumstances demonstrated by the evidence of parties. As a result, a decision to make an award of a remedy under section 73 of the *Labour Code Order (supra)*, without evidence of the circumstances, constitutes a violation of the procedure stated under the same section, and is therefore a procedural irregularity. The effect of a decision made contrary to the said procedure makes the decision so made both arbitrary and in total conflict with the basic principles of natural justice.

30. We wish to note that We reject the 1st Respondent argument that there are instances where no evidence is required, in determining a remedy under section 73 of the *Labour Code Order (supra).* The said section does not provide for such a distinction. Rather, the section is couched in

mandatory terms so that no deviation is contemplated. Even assuming that the deviation was contemplated as suggested, the argument raised by 1st Respondent does not aid his case. We say this because the circumstances of the case in case, fall under the former instead of the alter scenario, of the two instances that he presented.

31. Regarding the authority of *Standard Lesotho bank v Raphael Mphezulu (supra)*, it does not support or aid 1st Respondent's case in any way. In that case, the Court does not state that no evidence is necessary to determine the remedy. Rather, the Court states that if an award for reinstatement is sought in terms of section 73 of the Labour Code Order (supra), then it follows that it is without loss, even if a party has simply asked for it without specifically asking for lost wages and other ancillary relief.

32. Regarding 1st Respondent claim that Applicant was under an obligation to lead evidence to contradict the remedy sought, that position does not apply *in casu*. While We agree that evidence of the practicality or otherwise of reinstatement as a remedy, is the obligation of an employer party to the proceedings, but that is where parties have been given the opportunity to lead evidence. *In casu*, no such opportunity was given. Parties were directed to make addresses on what was termed a preliminary issue.

33. The authority of *Thandiwe Labane and others v Tai Yuan garments (Pty) Ltd (supra)* does not advance 1st Respondent's argument. We say this because the circumstances of that case, the former, are different from those *in casu*, the latter. In the former, parties were at given an opportunity to lead evidence in support of other cases. *In casu*, parties were limited to only making addresses without leading evidence. Consequently, 1st Respondent's argument cannot stand, as the circumstances anticipated in the ordinary application of the principle, which is in the former, are different from those *in casu*.

AWARD

We therefore make the following award,

a) The application for review is granted;
b) The award of the DDPR is reviewed and set aside;
c) The matter is remitted to the DDPR to be heard *de novo* before a different arbitrator;
d) The order is to be complied with within 30 days of issuance herewith;
e) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 21st DAY OF SEPTEMBER 2015.

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

MR. MOTHEPU	**I CONCUR**
MRS. THAKALEKOALA	**I CONCUR**
FOR APPLICANT:	**ADV. MOLISE ASSISTED BY ADV. LEHLOENYA**
FOR RESPONDENT:	**ADV. KOMETSI**