IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/37/2014**
A1051/2013

IN THE MATTER BETWEEN

ERIC MASARA **APPLICANT**

AND

TŠEPONG (PTY) LTD **1st**
RESPONDENT
THE DDPR **2nd**
RESPONDENT

JUDGMENT

Application for the review of arbitration award. Two grounds of review having been raised – unwarranted adherence to a fixed principle of law and mala fides. Only one ground of review succeeding. Court granting the review application and remitting the matter to the DDPR for a hearing de novo before a different arbitrator with terms. No order as to costs being made. Principles considered - finality to litigation, res judicata, once

and for all, and the effect of a settlement agreement in unfair dismissal cases.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A1051/2013. Only two grounds of review have been raised on behalf of Applicant namely, unwarranted adherence to a fixed principle of law and *mala fides*.

2. The brief background of the matter is that Applicant was an employee of 1st Respondent until he was dismissed. Unhappy with the dismissal, he referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR), wherein he claimed reinstatement. However, the matter was resolved by settlement agreement on the 29th August 2013. In terms of the settlement, parties had agreed on payment of four month salaries in full and final settlement of the claim. The settlement has since been honoured.

3. Subsequent thereto, Applicant referred a claim for payment of gratuity under referral A1051/2013, which resulted in the award subject of review. The matter was not opposed but Adv. Moshoeshoe, allegedly for 1st Respondent, was before Court to confirm same, and to observe the proceedings. Having heard Applicant's case, Our judgment follows.

SUBMISSION AND ANALYSIS

4. Applicant's case is that the learned Arbitrator erred by relying on a fixed principle of law. It was submitted that the learned Arbitrator unreasonably adhered to the principle of once and for all, even where it was obviously inapplicable. It was submitted that in dismissing Applicant's claim for gratuity, the learned Arbitrator stated that Applicant should have referred the claim together with that of unfair dismissal, thereby unreasonably applying the once and for all principle.

5. It was argued that this principle was inapplicable because a party cannot claim both reinstatement and payment of gratuity in one suit. It was submitted that the claims are in direct conflict of each other, as one signifies rejection of termination, while the other signifies acceptance of same. It was argued that by insisting on once and for all, the learned Arbitrator erred in this case.

6. It was added that the claim for gratuity only arose after termination had been confirmed in the settlement agreement, hence the subsequent referral of a gratuity claim. It was further stated that the unfair termination had occurred while Applicant was in the middle of his two year contract, and that until the said contract had reached the end, the claim had still not arisen.

7. The second review ground was that the learned Arbitrator had demonstrated malice in the proceedings, by noting that parties had agreed not to lead evidence but to make

submissions. It was stated that that was not the correct position, as Applicant had insisted during the proceedings that it was necessary to lead evidence. The Court was referred to paragraph 4 at page 4 of the bundle of documents filled of record.

8. It was submitted further that both unwarranted fixed adherence to the principles of law and *mala fides* are reviewable irregularities. The Court was referred to the case of *JDG Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko NO and others LAC/REV/39/2004*. It was prayed that the review be granted and that the award be set aside and/or corrected.

9. The once and for all principle, where correctly or incorrectly referenced *in casu*, is meant to protect the right of those involved in litigation, mostly the Respondent party, against malicious litigants from bombarding them with repetition suits and actions that never end. In terms of the principle, all claims that derive from the same cause must be referred in one suit. The principle is premised on the idea that everyone has a right to finality in litigation.

10. Instructive on the principle of finality to litigation is the Labour Appeal Court decision in *Thabo Teba & 31 Others v Lesotho Highlands Development Authority LAC/CIV/A/06/09*, where the Court had this to say,

"A litigant is entitled to closure of litigation. Finality in litigation is intended to allow parties to get on with their lives."

11. However, the once and for all principle must be properly applied in circumstances that best suit its application. Where properly applied, it renders claims subsequent to the initial claim, *res judicata*. As with any other general rule of law, there are exceptions to the once and for all principle and such include where there is a conflict in the claims that arise from the same cause. *In casu,* there is both an apparent and a real conflict between the claims referred. Applicant has eloquently shown the conflict and We are satisfied at that.

12. The situation would have been different, in Our view, if Applicant had as a consequence of an unfair dismissal, claimed compensation, either as the main relief or as an alternative to reinstatement. In that case, the effect would be that termination is accepted, safe for the reason and procedure. We would therefore, in that case conclude that the once and for all principle was applicable.

13. We wish to comment on the effect of settlement agreement in a dispute where the dismissal has been challenged as unfair. A settlement agreement is a result of negotiation between parties and once reached denotes a consensus. Where concluded in an unfair dismissal claim, its effect is to cure any irregularities in termination and make

the termination mutual. It essentially eliminates fault on the part of either side.

14. We also wish to comment on the principle of *res judicata* in relation to the matter at hand. The principle of *res judicata* requires that one establish that the current and old matters are based on the same set of facts and have been finalised between the same parties on the merits of a cause of action (see *Potlako Thabane & another v Workmen's Compensation Trust Fund Committee & two others LC/08/2009*). The principle prevents litigating from litigating on a matter that has already been decided upon. *In casu*, the initial claim was not heard and finalised in the merits, as it was finalised by settlement. In essence, the principle of *res judicata* would not apply.

15. Regarding the second ground, We have gone through the arbitration award and have not found anywhere where the learned Arbitrator was recorded suggesting that parties agreed to make submissions without leading evidence. However, We do confirm that page 4, paragraph 4 of the record of proceedings, the record reflects that Applicant did state that it would have been proper to lead evidence on whether the dismissal was fair or not.

16. This is recorded as thus,

"Our submission is that and this is where I said it would have been proper to hear evidence before submissions. The

applicant was dismissed unfairly and that submission would be proved by evidence, by being unfairly dismissed the respondent made it impossible for the application to perform."

17. Applicant's claim was dismissed primarily because the learned Arbitrator was of the view that it should have been referred with the unfair dismissal claim, per the once and for all principle. Clearly, the issue at this stage was not whether the dismissal was fair or not, but whether Applicant was entitled to a gratuity payment or not. We have already shown that effect of a settlement agreement in unfair dismissal cases. Consequently, the fairness or otherwise of the dismissal was no longer an issue.

18. While We note that there is evidence that Applicant felt that evidence had to be led, it was irrelevant to the issue for determination. In addition, We have shown that there is nowhere in the record where the learned Arbitrator makes a record that parties had agreed not to lead evidence. This incidentally, is the premise of Applicant's claim for malice on the part of the learned Arbitrator. This being the case the claim cannot succeed. However, on the strength of the first ground, this review succeeds.

AWARD

We therefore make an award as follows.

1) The review is granted.
2) The matter is remitted to the DDPR to be heard *de novo* before a different Arbitrator.
3) The remittal must be done within 30 days of issuance herewith.
4) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st DAY OF AUGUST 2015.

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

MRS. MOSEHLE **I CONCUR**

MR KAO **I CONCUR**

FOR APPLICANT: **ADV. 'NONO**
FOR RESPONDENT: **ADV. MOSHOESHOE**