IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/80/2013**
A0810/2012(b)

IN THE MATTER BETWEEN

MASERU PREP SCHOOL
& SCHOOL BOARD **APPLICANT**

AND

MAMPHO MOTSUSI **1st**
RESPONDENT
DDPR **2nd**
RESPONDENT

JUDGMENT

Six grounds of review raised but reduced to four in argument. Applicant claiming that it was not heard, that Arbitrator erred by declining jurisdiction, that Arbitrator erred in not keeping a record of proceedings, and that Arbitrator erred in adopting a clinical approach. Court only finding merit in one argument - Arbitrator failed to keep a record. However, Applicant failing to

show prejudice occasioned by failure to keep a record of proceedings. Court not finding sufficient justification to grant the review. Review application being refused. No order as to costs being made.

BACKGROUND TO THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0810/2012 (b). About six grounds of review had been raised on behalf of Applicant, but reduced to only four in argument. The background of the matter is that Applicant had employed 1st Respondent in the position of Bursar, until her termination on 31st July 2012. Unhappy with the termination, 1st Respondent lodged a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR), whereat she challenged both the substantive and procedural aspects of her termination.

2. 1st Respondent obtained a default award before the DDPR, on the basis of which she was to be reinstated to her former position in terms of section 73 of the *Labour Code Order 24 of 1992*. Equally unhappy with the default award, Applicant lodged a rescission application with the DDPR. On the date of hearing of the rescission, both parties were made aware by the learned Arbitrator that the rescission had been filed out of time. It was at this time that the matter was postponed to another date, with an order that Applicant must have filed an application for condonation, and ready to argue the matter by the return date.

3. On the set date of hearing, the learned Arbitrator heard the matter and subsequent thereto issued an award in terms of which She declined jurisdiction to hear and determine the rescission application. She had also reinstated the default award. It is this award that Applicant wishes to have reviewed, corrected and/or set aside. Both parties were heard and Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. The first ground of review was that the learned Arbitrator erred by refusing to hear the explanation by Applicant, for failing to file an application for condonation. It was said in amplification that on the date of hearing, Applicant had told the learned Arbitrator that the application had been made and served upon 1st Respondent, safe that it had not been filed with the DDPR. It was added that the learned Arbitrator had then asked Applicant to produce a copy of the application and that this Applicant was unable to do.

5. Owing to Applicant's failure to produce a copy of the application, the learned Arbitrator concluded that there was no application for condonation and declined jurisdiction to hear and determine the Applicant's rescission application. It was submitted on behalf of Applicant that, the learned Arbitrator should have determined if the application had been made, moreso since the 1st Respondent did not even deny service of same. It was argued that Applicant had

complied with Regulation 26 of the *Labour Code (DDPR) Regulations of 2001*. It was added that if Applicant had been given the chance to state why it had not filed the application, the learned Arbitrator would have learned that the said Regulation had been fully complied with.

6. In answer, 1st Respondent submitted that no application was made as the record has shown. It was denied that 1st Respondent was ever served with the alleged application. It was further submitted that, Applicant was given an opportunity to explain itself before the learned Arbitrator. It was said that this is why Applicant was asked to produce a copy of the application as proof that it had been made, but failed to do so.

7. Applicant's case is that the learned Arbitrator refused to allow them to explain why they had failed to file an application for condonation. Refusal suggests that a request, or at least an attempt, was made to explain but that such attempt was subdued. From the narration in support of the claim, nothing points to that. Rather, the narration in amplification demonstrates that Applicant was heard. This is clear from Applicant's claim before the learned Arbitrator that the application had been served upon the 1st Respondent. Further demonstrating this, is their failure to prove same by producing the said application, when requested to do so by the learned Arbitrator.

8. In Our view, what the learned Arbitrator did was not only an effort to determine if the application existed, but one that was reasonable in the circumstances where a party had been put to terms to file an application. We are therefore inclined to agree with 1st Respondent that, not only was Applicant heard but that no application had been filed, contrary to the terms put by the learned Arbitrator. We therefore see no procedural irregularity on the part of the learned Arbitrator. There is simply no evidence of refusal to hear Applicant on the issue. The point therefore fails to sustain.

9. The second review ground was that the learned Arbitrator had erred by declining jurisdiction over the rescission application. It was submitted in amplification that rescission applications are governed by Regulation 29 of the *DDPR Regulations (supra).* It was said the said Regulations do not give the DDPR the power to decline jurisdiction to hear and determine a rescission application. It was added that the *DDPR Regulations (supra)* do not even require a party to file a condonation application, where a rescission has been filed outside the prescribed time periods. It was argued that the learned Arbitrator should therefore have determined the rescission application, rather than to decline jurisdiction, or at least dismiss it for want of jurisdiction, if She felt strong on that approach.

10. 1st Respondent answered that the learned Arbitrator was right in declining jurisdiction to hear and determine the

rescission application as it had not been condoned. It was added that because there was no condonation before Her, the learned Arbitrator was right in Her approach. It was argued that there are authorities to support this. The Court was referred to the case of *Lesotho Highlands Development Authority v Ralejoe LAC/CIV/A/03/2006*, where the Court stated that,

"whenever an appellant realises that he has not complied with a Rule of Court he should apply for condonation without delay."

11. It was argued that in terms of Regulation 29 of the *DDPR Regulations (supra),* a rescission application must be made within ten days of the date on which an Applicant party became aware of the decision subject of rescission. It was added that having filed the application outside the prescribed time limits, the authority in *Lesotho Highlands Development authority v Ralejoe (supra),* took effect.

12. It was argued that that having failed to apply for condonation, the learned arbitrator had no jurisdiction, hence the conclusion. It was argued that this approach find support in the authority of *Lehloenya & Others v Lesotho telecommunications corporation LAC(CIV)4/2003*, where the learned Justice Peete J, relying on an extract from the case of *Lesotho Brewing Company v Labour Court President CIV/APN/435/95*, stated that without a condonation being granted, then a court has no jurisdiction.

13. It was added that in principle, the proceedings before the DDPR must be heard and determined expediently. It was submitted that Applicant was given a chance to file a condonation, with the condition to proceed on the elected date. Having failed to comply with the terms of the postponement, any other route other than the one that was ,adopted would have gone against the ambition to hear and determine disputes expediently.

14. We are in agreement that the *DDPR Regulations (supra)* are silent on the issue, that is, what is to be done where a rescission has been filed out of time and without a condonation application. However, where a regulation or statute is silent on a particular issue, reference is normally made to other laws such as common law or even case law.

15. The authorities cited by 1st Respondent are clear on the law, or at least in practice, regarding a rescission application or any application that has been made in breach of the rules. It is clear that such an application must first be condoned before jurisdiction to determine can or may arise. Consequently, the learned Arbitrator could not have been validly expected to determine the rescission application, as Applicant wants to suggest.

16. We wish to comment with much appreciation that indeed the DDPR has as its one of the main purports, the idea of

speedy resolution of disputes. While that is the case, speedy resolution should not be at the expense of justice. The conduct of the learned Arbitrator *in casu* was well in line with both the idea of speedy resolution and justice to parties. Applicant was given an opportunity to make an application for condonation and was also heard before the decision was taken that it had not filed a condonation application.

17. We also wish to comment that We agree with Applicant that the learned Arbitrator should have expressly stated that the rescission application was dismissed for want of jurisdiction. While We agree with Applicant on the issue, the effect of the decision to decline jurisdiction is the same and can at best be cured by seeking direction on the order from the learned Arbitrator, where parties are doubtful. However, this is an issue that cannot render the award reviewable.

18. The third ground of review was that the learned Arbitrator erred in failing to keep a record of proceedings of both the condonation and rescission applications. It was submitted that dispatched record only accounts for the default proceedings. It was argued that this is contrary to Regulation 30 of the *DDPR Regulations (supra)*. It was said that the said Regulation requires that a record be kept and is couched in mandatory terms.

19. 1st Respondent answered that while it is true that both the condonation and rescission application records were not

kept, no prejudice has been shown by Applicant, that was suffered on as a result of this omission. It was added that, that notwithstanding, the award is also a record.

20. We have perused the dispatched record and do confirm that it does not contain both the condonation and rescission proceedings. Evidently, this is a breach of the *DDPR Regulations (supra)*. Clearly this is an irregularity on the part of the learned Arbitrator. The Regulation, which is in mandatory terms, provides that,

"The Director shall keep a record of;

(a) any evidence given in an arbitration hearing; and

(b) any arbitration award or ruling made by an arbitrator."

21. However, while We concede that there has been an irregularity, We also agree with 1st Respondent that Applicant has failed to show that the irregularity is one that warrants a review of the award. We say this, because as 1st Respondent has shown, no prejudice has been either alleged or shown by Applicant. It is now a trite principle of law that while courts should strive towards ensuring observance of their rules, mere non-observance without prejudice should not be the decisive factor. Non-observance must be accompanied by prejudice on the other party to the proceedings. Consequently, We find that the irregularity committed does not warrant the granting of a review.

22. The last ground of review was that the learned Arbitrator erred by adopting a clinical approach in dealing with the Applicant's case. It was argued that Section 25 of the *Labour Code (Conciliation and arbitration) Guidelines of 2004,* provides that an effort must be made to deal with the substantive aspect of the dispute. It was argued that the learned Arbitrator did not make the anticipated effort as She dismissed the matter purely on technicalities.

23. It was added that had the learned Arbitrator allowed Applicant to explain his failure to file the condonation application, the outcome would have been different. It was stated that given a chance, Applicant would have explained that it failed to file the condonation application because 1st Respondent had not responded to it, and that as such the matter was not ripe for hearing.

24. 1st Respondent answered that the learned Arbitrator was not clinical in Her approach. It was submitted that in fact, She made all reasonable efforts to deal with the substantive aspect of the dispute. It was submitted that Applicant was allowed to file a condonation application, and later allowed to produce proof of the existence of the condonation application, which it failed to do. It was argued that this is evidence of non-insistence on the legal formalities, because Applicant was given multiple chances which it thwarted. It was argued that the learned Arbitrator did right by declining

jurisdiction as Her hands were tied due to failure to exercise opportunities by Applicant given to it.

25. We are conscious of the sprit and purport of the *DDPR Conciliation and Arbitration Guidelines (supra)*. In fact that is the same idea behind the establishment of this Court. Both the Labour Court and the DDPR are specialised institutions, one being a tribunal and the other a court respectively, meant to dispense substantial justice. As a result, they both differ substantially from other institutions that dispense justice. Having said this We shall now address the arguments.

26. We agree with 1st Respondent that the learned Arbitrator made all reasonable efforts to deal with the substantive aspect of the dispute. Evidence has shown that after the default award, Applicant filed a rescission application. The said application was not thrown out of court for being late, but rather, Applicant was given a chance to apply for condonation. Further having failed to file the said condonation, Applicant was given a chance to produce proof that such an application existed. This in Our view was a reasonable effort on the part of the learned Arbitrator to execute the spirit and purport of the DDPR. The learned Arbitrator, evidently avoided a strict application of the law.

27. We also wish to comment that We have already ruled that there is no evidence that Applicant was refused the opportunity to explain why the condonation application was

not filed. However, assuming that such opportunity was refused, the explanation intended to be given would not have sustained. We say this because the filing of an application does not depend on the other party reacting to it. If this were to be the case, it would mean that parties to any litigation can just undermine the due processes by not reacting to the other party's claim. This is unheard off and therefore fails to stand.

AWARD

We therefore make an award as follows:

1) The review application is refused.

2) The award in referral A0810/12 (b) stands.
3) The award is 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. MATELA **I CONCUR**

MRS. MOSEHLE **I CONCUR**

FOR APPLICANT: **ADV. RAFONEKE**
FOR RESPONDENT: **ADV. MOSHOESHOE**