IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/109/12**
A0143/2012

IN THE MATTER BETWEEN

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY (PTY) LTD **APPLICANT**

AND

MALISEMA MAKOA **1st RESPONDENT**
NKAKU KABI **2nd RESPONDENT**
MAMASWATI SOPENG **3rd RESPONDENT**
THE DDPR **4th RESPONDENT**

JUDGMENT

Application for review of arbitration award. Four grounds of review having been raised - that award lacked both a legal

basis and consideration; ignorance of evidence; failure to apply mind; and ultra vires. Court not finding merit in all grounds raised and refusing the review application. Principles considered; the rule in motion proceedings, legitimate expectation, and considerations in assessing a fair and equitable award. No order at to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0143/2012. The brief background is that the 1st to 3rd Respondents were employees of Applicant until their contracts terminated by effluxion of time. Subsequent thereto, they referred claims for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR), whereat they claimed non-renewal of their fixed term contracts when they legitimately expected renewal.

2. The claims were duly heard and finalised, and an award later issued. In terms of the award, Applicant was ordered to compensate 1st to 3rd Respondents with an amount equivalent to their two years salaries. Dissatisfied with this award, Applicant initiated the current proceedings. The matter has been duly opposed and having heard both parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

3. The first ground of review was argued together with the third one. It was Applicant's case that the learned Arbitrator had

erred by awarding the quantum of compensation that She did. It was submitted that the awarded quantum rendered Her decision both irrational and unreasonable. It was further submitted in addition that, the learned Arbitrator's decision on the quantum of compensation was not supported by any legal basis or consideration, and was therefore made without regard to the correct application of the law.

4. It was submitted that the award of two years' salary as compensation was not justified by the learned Arbitrator. It was argued that this is contrary to the dictates of section 73(2) of the *Labour code Order 24 of 1992*, that a compensation award must be both just and equitable. The Court was referred to the cases of *LTC v Rasekila LAC (1990-1994) 261; Lesotho Bank v Moloi LAC (1995-1999) 275; and Pascalis Molapi v Metro Group (Pty) Ltd LAC/REV/CIV/09/2003*, for the above propositions. The Court was further referred to page 4 of the arbitration award at paragraph 14, for evidence of the alleged unjustified award of two years salaries.

5. Respondent answered that there is justification for the award that was made and that the justification appears at paragraphs 12 to 13 of the arbitration award. It was submitted that on these paragraphs, the learned Arbitrator states that compensation will be based on Respondents two years basic salaries, as that equals to the duration of the lapsed contracts.

6. It was argued that it is an established principle of law that where a court finds that an employee who was on a fixed term contract has been unfairly dismissed, the remedy awarded is normally the remainder of the contract. It was submitted that *in casu*, the remainder was the full term, as the contracts had unfairly not been renewed for the said two years. The Court was referred to the case of *Standard Lesotho Bank Ltd v Ntšihlele LC/146/2000,* in support of the proposition.

7. It was added that in the authority of *Standard Lesotho Bank v Ntsihlele (supra)*, the Court states the factors to consider in awarding a just and equitable compensation. These are said to be a breach on the part of both parties and mitigation of loss by the employee. It was submitted that in terms of this authority at least one of the two requirements must be considered, and that this is what the learned Arbitrator did.

8. We endorse that section 73(2) of the *Labour Code Order (supra)*, requires that the amount of compensation be just and equitable. This sections further requires that in determining this amount, the breach of contract on the part of either party must be considered, as well as whether an employee complaining of an unfair dismissal mitigated their loss. The said section is couched as follows,

"... In assessing the amount of compensation to be paid, account shall be also 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 loss."

9. We also wish to endorse that in the authority of *Standard Lesotho Bank Ltd v Masechaba Ntšihlele LC/REV/28/2012* and not *LC/46/2000* as referenced by Respondents, the Court extends the factors to consider beyond just the two stated under section 73(2) of the *Labour code Order (supra)*. In fact, that authority does not fix a number of factors to consider but merely gives an illustrative list of what may be considered. The interpretation of section 73 in this authority suggests that there is no mechanical requirement that at least a certain number of factors must be considered, so that consideration of even one factor is sufficient, as Respondent has suggested.

10. We have gone through the arbitration award from paragraphs 11 to 14, where the awarded compensatory amount is formulated. In formulating the award the learned Arbitrator considered the nature of the contract in issue, that is, that it was a two year contract. From this consideration, She then made a decision to award Respondents their two years' salaries as compensation. This consideration is in line with the authority in *Standard Lesotho Bank Ltd v Masechaba Ntsihlele (supra)*.

11. We say this because in the above authority, the nature of employment is one of the requirements that were identified

in determining a just and equitable compensation. The Court in this authority, at paragraph 15 of its typed judgment, and relying on the ILO publication on *Protection against Unjustified Dismissal, ILO, Geneva, 1995* at paragraph 229, stated that factors to consider in determining a just and equitable compensation,

".....may include one or several factors such as the nature of employment, ..."

12. We are therefore, based on these above said, of the view that the award of a two year compensation was justified by the learned Arbitrator and was therefore based on the law, and with due regard to the correct application of the law. The first and third review grounds therefore fail to sustain.

13. The second ground of review was that the learned Arbitrator erred by ignoring the evidence of Applicant showing that 1st to 3rd Respondent expectation of renewal had been extinguished. It was argued that if considered, the said evidence would have influenced the Court to find otherwise. The Court was referred to pages 32-34, 42-44, 51-52, 59 and 60 of the record of proceedings before the DDPR.

14. It was argued that the mere possibility that evidence could have influenced the outcome, is sufficient to warrant the granting of a review. The Court was referred to the case of *Limkokwing University of Creative Technology (Pty) Ltd v*

Tebello Mothabeng LC/REV/88/2011, in support of the proposition. It was added that the case *in casu* falls within the four corners of the above authority.

15. Respondents answered that evidence contradicting the evidence of Applicant on the extinction of a legitimate expectation was not led. It was argued that in fact evidence led showed that a legitimate expectation could only be extinguished by bad performance. It was submitted that the evidence of bad performance was not led by Applicant. It was further argued that the learned Arbitrator did not ignore any evidence. The Court was referred to paragraph 9 of the arbitration award for evidence of the suggestion.

16. We have considered the referenced pages by Applicant. At pages 32-34, is the evidence of the 2nd Respondent that he submitted an application for re-employment with the Applicant. At pages 42-44 is the evidence of 3rd Respondent that she also applied and that she was one of the employees who went on strike. At pages 51 and 52 is the evidence of 1st Respondent that she also applied for re-employment. At pages 59 and 60 is the evidence of Applicant's witness, one Lintle Hlapisi, that if an employee wishes to continue to work with Applicant then they must reapply, and that this was the practice within the Applicant employ.

17. We have also considered paragraph 9 of the arbitration award. We do confirm that the above evidence was

considered by the learned Arbitrator in making Her award. At this paragraph She is recorded as thus,

"There was no time during the course of applicants' contract that respondent showed any dissatisfaction about their performance. Therefore applicants did have an expectation of renewal. Respondent's act of giving them a notice and encouraging them to apply did not in any way terminate the expectation especially in the light of the fact that here were no reasons advanced for non renewal. Furthermore, it was the practice of respondent to provide each employee with re-employment form when their contract was about to terminate, this did not in anyway alarm applicants."

Evidently, the evidence of Applicant was considered by the learned Arbitrator. This ground must also fail.

18. We wish to comment that the mere fact that an employee applies for the job in respect of which they claim to have had a legitimate expectation for its renewal, does not in any way extinguish such expectations. We say this because, it is a legal requirement in law that a dismissed employee claiming an unfair dismissal must mitigate loss, by among others seeking alternative employment. This is clear from the provisions of section 73(2) of the *Labour Code Order (supra)*, as We have shown above at paragraph 8 of this judgment.

19. Further, in terms of the current law of Lesotho, in particular section 227(1)(a) of the *Labour Code (Amendment) Act 3 of 2000*,

"(1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate –

(a) If the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal;"

20. In that six months and beyond, the requirements under section 73(2) of the *Labour Code Order (supra),* remain binding on the dissatisfied employee. It would thus defy the dictates of both section 73(2) and section 227(1)(a), to conclude that applying for a job in issue extinguishes an expectation. This is more so where an employee has demonstrated either their dissatisfaction with being terminated, or have shown their intention to challenge their termination.

21. The fourth ground of review was that the learned Arbitrator failed to apply Her mind to the facts before Her. It was argued that failure to apply a mind is a reviewable irregularity. The Court was referred to the case of *Telecom Lesotho (Pty) Ltd v Seqao Phenya LC/REV/10/2010,* in support of the proposition.

22. In amplification of the argument, it was submitted that the learned Arbitrator failed to apply Her mind to the law on amount of compensation. Further that She had also failed to apply Her mind to the fact that though no appraisals were made for purposes of determining the renewals of Respondents. Furthermore, that She failed to apply her mind

to the fact that Respondents did not have a clean record as they had final written warnings, and that this ought to have contradicted their expectation. Applicant added that although these said were not pleaded in their Motion, the Court should consider them as this is a Court of equity and fairness.

23. Respondents answered that in law one must stand and fall by their pleadings to avoid taking others by surprise. It was submitted that they were being taken by surprise as these facts and arguments were not pleaded by Applicant. It was prayed that they should not be considered.

24. We agree with Respondents that in motion proceedings, one is confined to their pleadings. In the case of *Pascalis Molapi v Metro Group Ltd (supra)*, the Court stated that it is irregular for a court to allow a party to canvass issues not pleaded. (*Also see Netherbum Engineering CC t/a Netherbum Ceramics v Mudau No. and another (2009) 30 ILJ 279 LAC* at paragraph 25, *Thabo Phoso v Metropolitan Lesotho LAC/CIV/A/10/2008, Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623).*

25. The effect of Our attitude is that the Applicant's review ground stands unsubstantiated. It is trite law that bare allegations without substantiating facts and arguments are unconvincing and unsatisfactory. They simply cannot be relied upon to make a conclusion that affects another *(see*

Mokone v Attorney General & others CIV/APN/232/2008). Consequently, this ground stands to fail as well.

26. The last ground of review was that the learned Arbitrator acted *ultra vires* by holding that it was alarming that Respondents were not called for an interview by Applicant. It was argued that in so doing, the learned Arbitrator descended into an arena of the employer and thus interfered with the employees' prerogatives. The Court was referred to paragraph 19 of the award for the alleged finding. Further reference was made to the case of *Pheko Mafantiri v Lesotho Revenue Authority LC/13/2008,* in support of the argument.

27. Respondent answered that the referenced record was not a finding but a remark of the learned Arbitrator. It was argued that the decision of the learned Arbitrator was not based on that remark. It was submitted that that remark cannot invalidate the award as it carries the same effect as an *obiter dicta* in a judgment.

28. We acknowledge the authority in *Pheko Mafantiri v LRA (supra)*. We have perused the arbitration award, specifically at the referenced page and paragraph. The learned Arbitrator is recorded as follows,

""There was no time during the course of applicants' contract that respondent showed any dissatisfaction about their performance. Therefore applicants did have an expectation of renewal. Respondent's act of giving them a notice and

encouraging them to apply did not in any way terminate the expectation especially in the light of the fact that there were no reasons advanced for non renewal. Furthermore, it was the practice of respondent to provide each employee with re-employment form when their contract was about to terminate, this did not in anyway alarm applicants. The applicants have stated that they thought it was a formality to fill in the forms. Respondent failed to even call them for an interview, which is alarming considering that applicants did well in performance of their duties."

29. We wish to highlight that the issue before the learned Arbitrator was if the Respondents had a legitimate expectation of renewal or not. At paragraph 9 of the award, the learned arbitrator makes a conclusion that an expectation existed notwithstanding the fact that respondents reapplied for employment. Clearly the decision of the learned Arbitrator was not based on failure to call Respondents for an interview. The statement that Applicant *in casu* failed to call Applicants for an interview has no connection with the conclusion that an expectation existed. No such connection is established in the award in as much as none has been shown by Applicant. We therefore agree with Respondents that the referenced record was nothing but a remark, an *obiter dicta*.

30. Assuming that it was part of the findings that led to the final conclusion of the learned Arbitrator, even if found to

have been irregular, it would not invalidate the award. We say this because there are other reasons given for finding for there to have existed an expectation for renewal on the part of Respondents. Paragraph 9 of the arbitration award is explicit on these and needs not to be reiterated. We therefore maintain Our stance and dismiss this ground.

AWARD

We therefore find that,

1) The review application is refused.

2) The award of the DDPR is reinstated.
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

MRS. MOSEHLE **I CONCUR**

MRS. THAKALEKOALA **I CONCUR**

FOR APPLICANT: **ADV. MACHELI**
FOR RESPONDENT: **ADV. MOSOTHO**