

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/131/2013

A0594/2013

IN THE MATTER BETWEEN

'MAKATLEHO MOLEKA

APPLICANT

AND

U SAVE SHOPRITE (PTY) LTD

1st

RESPONDENT

DDPR - M. MASHEANE

2nd

RESPONDENT

JUDGMENT

Application for the review of the arbitration award. Applicant having filed additional grounds of review. 1st Respondent applying that the additional affidavit be disregarded as it is contrary to the Rules of this Court. Court finding merit in the argument and disregarding the Applicant's additional affidavit. Court directing that parties proceed to argue the review on the basis of the grounds contained in the main motion. Court raising

a point in limine on own motion that grounds raised are disguised appeal. Court maintaining its stance and dismissing the application for want of jurisdiction. Court further finding confidence in its decision for lack on merit on the grounds, even if they were to be treated as review grounds. 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 A0594/2013. Several grounds of review had been raised on behalf of Applicant but only three were argued.
2. The brief background of the matter is that Applicant was an employee of 1st Respondent until she was dismissed for misconduct. Unhappy with the decision, she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR).
3. An award was later issued wherein, the Applicant's claim was dismissed. It is this award that Applicant wishes to have reviewed, corrected and/or set aside. Both parties were present and duly made presentations. Having heard therein, Our judgment follows.
4. We wish to note that two *points in limine* were raised during the proceedings. One point was raised by 1st Respondent and it primarily placed an attack on the additional affidavit which purported to add review grounds. The other point was

raised by the Court on own motion, and it related to whether or not the grounds raised on behalf of Applicant were in fact review or appeal, at least *prima facie*.

SUBMISSIONS AND ANALYSIS

Points in limine

Additional grounds

5. 1st Respondent's case was that the affidavit filed on behalf of Applicant purporting to add grounds of review was irregular and improper and that it should be disregarded. It was argued that the affidavit was contrary to Rule 16 (6) of the *Labour Appeal Court Rules of 2002*, now rules of this Court in review matters.
6. It was submitted that in terms of that Rule, an Applicant party after receiving the record, must file a notice to either amend or vary or to stand and fall by its motion. It was stated that *in casu*, Applicant had indicated that she stood by the original motion, but then filed additional grounds. It was submitted that having elected to stand by the original motion, the affidavit purporting to add grounds should be disregarded as being improper and/or irregular.
7. Applicant answered that by filing a notice that she stood by the notice of motion, she meant that she stood by the prayers contained therein, namely;
 - 1) Dispatch of the record
 - 2) Stay

3) Review; and

4) Costs.

It was submitted that the interpretation proposed by 1st Respondent, that a notice that one stands and falls by the notice of motion, means that they do not wish to add further grounds, is therefore wrong.

8. It was added that the Rule in issue provides that an Applicant party may file an additional affidavit to support prayers in the notice of motion that they stand and fall by. It was stated that this is what Applicant did and that there is nothing improper in the approach taken.

9. The provisions of Rule 16 (6) of the *Labour Appeal Court Rules (supra)* are as follows:

“(6) The applicant shall within 7 days after the Registrar has made the record available, either –

(a) By delivering of a notice and accompanying affidavit, amend, add to or vary the terms of the Notice of Motion and supplement the supporting affidavit; or

(b) Deliver a notice that the applicant stands by its Notice of Motion.”

10. Applicant has elected to stand and fall by her notice of motion, by filing a notice in terms of Rule 16 (6) (b). This has then left the status of the additional affidavit in question. We wish to note that in law, an additional affidavit may be filed under any of the two conditions,

- 1) With leave of the court; and
- 2) Under a specific law or rule.

11. *In casu*, no leave has been obtained by Applicant to file an additional affidavit. Secondly, the additional affidavit has not been filed in terms of Rule 16 (6) (a), as it is not accompanied by a notice of intention to either add, amend or vary the initial notice of motion. It is also not filed in terms of Rule 16 (6) (b), as that Rule relates to a notice not to add grounds, which is clearly contrary to the purported intention behind the additional affidavit filed of record.
12. We wish to add that while this Court is vested with the discretion to condone a breach of any of its Rules, but that is subject to any of the conditions being present,
- 1) Applicant applying for condonation; or
 - 2) Applicant accepting a breach but not seeking condonation, in which case the Court can on own motion condone same.
13. This procedure is provided for under Rule 27 of the *Labour Court Rules of 1994*. It is couched as follows, specifically at sub Rule (2),
- “Notwithstanding anything contained in these Rules, the court may in its discretion, in the interests of justice, upon written application, or oral application at any hearing, or of its own motion, condone any failure to observe the provisions of these Rules.”*

14. *In casu*, Applicant has not applied for condonation of the breach. In fact Applicant contents that there is no breach, which invariably ousts Our jurisdiction to exercise Our discretion, to condone the breach. We therefore reject and disregard the affidavit filed in addition, as being without a basis, and direct that parties proceed on the premise of the grounds contained in the main notice of motion. We, in essence, agree with the interpretation of Rule 16 proposed by the 1st Respondent, and reject the Applicant's interpretation.

Appeal disqualified as review

15. We had intimated to Applicant that the review grounds raised were in fact an appeal, as opposed to a review. We stated that these grounds challenged the conclusion of the learned Arbitrator and not the method of reaching the conclusion.

16. We had then directed Applicant to the case of *J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko and Others LAC/REV/39/2014*, which is very instructive on the distinction between the two, that is, a review and an appeal. We in fact made specific reference to paragraph 13 of the typed judgment 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 judgment 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 the trial, it is proper to bring the case for review.”

17. Applicant submitted that the grounds raised were review and not appeal. She stated that what determines if a ground is review or appeal is not how it is framed or how it appears *prima facie*, but the reasons given in support. The Court was referred to the case of *J. D. Trading (Pty) Ltd t/a supreme Furnishers v M. Monoko and Others (supra)*, in support, specifically at paragraph 18 of the typed judgment.

18. To demonstrate the above argument, it was stated that at paragraph 18, the court relied on the quotation from the case of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)* that,

“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' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F - G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1972 (3) SA 726 (A) at 895B - C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1972 (3) SA 726 (A) at 14F - G). 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.”

19. Applicant submitted that in her review grounds, she had shown that the learned Arbitrator erred by holding that the sanction was not too harsh; that she had erred by holding that Applicant had contravened a non-existent rule; and that she had erred by holding that the Applicant trade union was consulted before Applicant was disciplined. Applicant stated that what she did is in line with the extract quoted above from the case of *J. D. Trading (Pty) Ltd t/a supreme Furnishers v M. Monoko and Others (supra)*.

20. Although, Applicant had not challenged the status of grounds raised, he was given an opportunity to comment. He brief submitted that the grounds raised were in actual effect targeted at the net of effect of the award, which is the dismissal of the Applicant’s referral. It was submitted that none of the grounds raised demonstrated any procedural

irregularity, at least as they appear in the notice of motion and supporting affidavit.

21. We wish to note that there is a concession that the grounds raised do not make out a case for review, at least *prima facie*. The Applicant has attempted to justify the approach that she adopted in framing her review grounds, by relying on the authority of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko and Others (supra)*.

22. We have carefully considered the authority and disagree with Applicant that it dictates that the reason given for the complaint, determines if a claim is a review or appeal. The proper interpretation is rather on the contrary, that is, that the reasons follow to justify the *prima facie* established review ground. There is nothing in the grounds raised, or any suggestion *prima facie*, that the complaint is procedural and therefore a reviewable irregularity. We are therefore of the view that the grounds raised are in fact appeal and not review.

23. In terms of section 228E (5) of the Labour Code (Amendment) Act 3 of 2000, the awards of the DDPR,
".....shall be final and binding and shall be enforceable as if it was an order of the Labour Court."

24. They are however, only subject of review before the Labour Court, in terms of section 228F (1) of the *Labour Code (Amendment) Act (supra)*. The section is couched as follows, *“Any party to a dispute who seeks to review any arbitration award issue under this part shall apply to the Labour Court for an order setting aside the award.”*

25. The above position of the law has been confirmed in the case of *Thabo Phoso v Metropolitan Lesotho LAC/CIV/A/10/2008*, where the Labour Appeal Court had this to say,

“In my opinion this is a ground of appeal and not review. The Labour Court is not empowered to entertain appeals from the DDPR. It might be the Labour Court have come to a different decision from that reached by the DDPR on the issue whether or not to grant rescission. However, the Court was not entitled to intervene in these regard as no reviewable irregularity was disclosed by the facts.”

26. On the basis of the above said, We find that We have no jurisdiction to determine the grounds raised. We are ousted by their nature from determining them.

27. We find confidence in Our decision to dismiss the Applicant’s review because, even if We were to consider the grounds as if they were review, they would not stand for want of merit. We say this because We have had the

opportunity to hear both the Applicant and Respondent's case on the merits as well.

28. Regarding the first ground of review, Applicant claimed that the learned Arbitrator erred in holding that the sanction was not too harsh. She however, did not dispute when 1st Respondent answered that it was not one of the issues that Applicant had complained about. If this is the case, the learned Arbitrator cannot be placed at fault for what she had not been requested to determine.

29. Supportive of Our conclusion is the decision of the Labour Appeal Court in the case of *Tsotang Ntjebe & others v Lesotho Highlands Development Authority* and *Telang Leemisa & others v Lesotho Highlands Development Authority LAC/CIV/17/2009*, where the Court in addressing the issue of complaints at an appeal level against what was not raised before the court a quo, had this to say,
"Of course as correctly stated by LEWIS, A.J.A. in Sager Motors (PTY) LTD v Patel 1968 (4) SA 98 (RA) at 104, it is not open to an appellant, in the absence of an amendment to his application, to claim on appeal something which he did not claim in the Court a quo,..."

30. On the second ground of review, Applicant claimed that the learned Arbitrator confirmed the dismissal of Applicant on the ground that she had contravened a rule. It was stated that the learned arbitrator had earlier stated that the said

rule did not apply to Applicant but nonetheless found Applicant guilty of misconduct. Respondent denied that the learned Arbitrator did not make that finding, at least as Her award reflects. It was stated that Applicant was dismissed for submitting a fake sick note, which is a crime of dishonesty.

31. Evidently, Applicant does not dispute the misconduct, but is rather concerned with the rule against which she was dismissed. Taking Applicant's argument that the learned Arbitrator did at some point rule that the rule relied upon did not apply to Applicant, that does not alter the position of Applicant. We say this because in Our law, specifically section 10(2) of the *Labour Code (Codes of Good Practice) Notice of 2003*, gross dishonesty is a dismissible offence.

32. Section 10(2) of the above authority provides that,
*"Although it is generally not appropriate to dismiss an employee for a first offence, dismissal may be justified if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Without being exhaustive, the following acts have been considered by the courts to be sufficiently serious to justify dismissal:
(a) gross dishonesty;"*

33. Therefore, it did not matter whether the rule was written in the 1st Respondent rules or not, as the *Codes of Good*

Practice (supra) sanction the punishment of dismissal where gross dishonesty has been committed.

34. On the third review ground, Applicant claims that the learned Arbitrator erred in concluding that there was no consultation with the union before Applicant was disciplined. 1st Respondent was however, able to contradict the claim by showing that the union was consulted before the hearing took place. Both parties referred the Court to pages 23 to 27 of the record of proceedings, both in support of their individual cases.

35. At page 23 of the record, the evidence of the contents of an e-mail directed to Mr. Ramochela of the Applicant's union, sent to him on the 1st of May 2013 are reflected in an exchange between one Mokete and Matebello as thus,

"Mokete: Please read it for us.

Matebello: it is then written Mr. Ramochela my below email refers you have to date not confirmed my invitation to discuss the matter below even though the Shop Steward has been paid on suspension since the 18th April 2013.

Due to financial costs that the company is incurring for paying this employee on suspension I have no option but to proceed with the disciplinary hearing on the 2nd May 2013 at 09:00 AM at King's way."

36. Evidently, the Applicant's union was consulted about the disciplinary issues concerning Applicant. From the reading of the e-mail referenced, it was just a follow up and/or a reminder to the union that since the initial communication, they have not done or said anything regarding the issues involving Applicant. In the light of this clear evidence, the learned Arbitrator was bound to reach the conclusion that she did, specially that the union had been consulted.

37. On the basis of these above said, We maintain Our stance that not only are grounds raised appeal disguised as review, but that they lack merit. We are confident that Our attempt to show the absence of prejudice on the part of Applicant in Our decision to dismiss the review, has further gone to show clearly that the grounds raised are based on the conclusions on the merit and not the procedure. Consequently, the review is dismissed.

AWARD

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We therefore make an award as follows:

- 1) That the grounds raised on behalf of Applicant are appeal and not review,
- 2) That the review application is dismissed for want of jurisdiction,
- 3) The award of the DDPR remains in force, and
- 4) That no order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 7th DAY OF SEPTEMBER 2015.

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

MRS. RAMASHAMOLE

I CONCUR

MISS LEBITSA

I CONCUR

FOR APPLICANT:

ADV. 'NONO

FOR RESPONDENT:

ADV. RAFONEKE