IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/161/2013**
C0035/2013

IN THE MATTER BETWEEN

ELLERINES FURNISHERS (PTY) LTD **APPLICANT**

AND

MAPESELA MOEJANE **1st RESPONDENT**
DDPR **2nd RESPONDENT**
B. MOKITIMI: ARBITRATOR **3rd RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. Two grounds of review having been raised on behalf of Applicant – that the learned Arbitrator made a wrong conclusion on the facts; and that the learned Arbitrator failed to apply her mind to the factors to consider in assessing compensation. Court not finding merit in the review grounds and refusing the application. Award of the DDPR being reinstated. No order as to costs being made. Principles considered: distinction between

an appeal and review; and factors to consider in awarding a just and equitable quantum of compensation.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the DDPR award in referral C0035/13. Two grounds of review have been raised on behalf of Applicant namely that the learned Arbitrator misdirected herself by concluding that refusal to accept service of notification of hearing was reasonable; and that the award of compensation was made without proper application of the mind to the factors prescribed under the *Labour Code Order 24 of 1992*.

2. The brief background of the matter is that 1st Respondent was an employee of Applicant until he was dismissed for misconduct. Unhappy with his dismissal, he referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). An award was thereafter issued in his favour. Equally unhappy with the decision, Applicant initiated the current proceedings for the review, correction and/or setting aside of the award in issue. Both parties were in attendance and made presentations. Having heard them, Our judgment follows.

SUBMISSIONS AND ANALYSIS

3. Applicant's case is that the learned Arbitrator erred in concluding that the referral by 1st Respondent to accept a notification of hearing, on the ground that it was not served

at his residential home, was reasonable. It was submitted that although 1st Respondent did not know the content of the document that was being served upon him, he suspected that it related to his suspension and that this was his statement at cross examination. The Court was referred to page 73 of the record in support.

4. It was submitted that in refusing to accept service, 1st Respondent acted unreasonably as contemplated under section 11 (6) of the *Labour Code (Codes of Good Practice) Notice of 2003*. It was stated that in terms of the said section, unreasonable refusal to attend a hearing entitles the employer to proceed with the hearing in absence of the concerned employee.

5. Regarding the compensatory award, it was submitted that the learned Arbitrator failed to apply Her mind to the consideration stated under section 73 (2) of the *Labour Code Order (supra),* for a just and equitable award. It was argued that the learned Arbitrator, in failing to make these considerations, She made a punitive award instead of one that is compensatory. It was argued that the 36 months award in this punitive and excessive.

6. 1st Respondent answered that the learned Arbitrator did not err as suggested. It was submitted that in terms of the suspension letter, Applicant was to remain at his private residence for service and notification on matters concerning

his suspension, during working hours. It was also a material term of his suspension that if intended to leave during the working hours, he had to inform one Khoele, who was the manager at Applicant company.

7. It was stated that the alleged notification, whose contents that 1st Respondent did not know, was served upon him outside the terms of his suspension, specifically at a public bar where he was indulging in alcoholic beverages, and also outside the working hours. It was added that in finding that the conduct of the 1st Respondent was reasonable, the learned Arbitrator considered the very same suspension terms. It was submitted that the learned Arbitrator therefore did not err.

8. About the compensatory award, it was submitted that the learned Arbitrator considered the factors stated under section 73 (2) of the *Labour Code Order (supra)*, and went even beyond. It was stated that at paragraph 26 of the arbitration award, the learned Arbitrator considered the remainder of the contract, breach on the part of 1st Respondent, his age and qualifications as well as his attempts to mitigate his loss.

9. It was added that due to consideration of the above factors, the award cannot be labelled punitive. It was stated that the award was made after due and careful consideration of applicable and relevant factors. The Court was referred to

the case of *Limkokwing University of Creative Technology (Pty) Ltd v Malisema Makoa & Others LC/REV/109/2012*, in support of the proposition.

10. In the case of *JDG Trading t/a Supreme Furnishers .v. M. Monoko & Others LAC/REV/39/2009*, the Labour Appeal Court stated the distinction between an appeal and a review. It was said in this case 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 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."

11. The first ground of review, while it attempts to set aside the arbitration award in question, it is based on an argument that the learned arbitrator came to the wrong conclusion. This is clearly visible in the ground itself. We are therefore of the view that the complaint is in actual effect an appeal, the mandate that this court lacks. However, We will proceed to address the ground for purposes of ironing out the apparent misconception of the law by parties.

12. We have perused page 73 of the record of proceedings, and do confirm that Applicant did state that he suspected

that it was a document that had to do with his suspension. This is captured as follows:

"Mr. Van Der Heer: You suspected it was a to do with your suspension, not so?

Mr. Moejane: Yes

Mr. Van Der Heer : And you still didn't want to know what was in there?

Mr. Moejane : Yes"

13. We have also gone through section 11(6) of the *Labour Code (Codes of Good Practice) Notice of 2003*, and do confirm that they state that,

"if an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee."

14. While We confirm the content of section 11 (6) of the *Codes of Good Practice (supra)*, We do not see how it develops Applicant's case, particularly in relation to the statement of 1st Respondent at page 73 of the record. In fact, We agree with 1st Respondent that section 11 (6), has been misapplied as it relates to a situation where an employee was notified but elected not to attend. *In casu*, there is evidence that 1st Respondent did not know the content of the document he was being served with.

15. Further, We wish to comment that the learned Arbitrator has justified Her conclusion why She found that 1st Respondent acted reasonably in refusing service. As

referenced by 1st Respondent this is contained at paragraphs 21 – 24 of the arbitration award.

16. Specifically at paragraph 22, the following is recorded,
"Applicant himself said when he was suspended he was told that he could be called or they would come to his place whenever they needed him. This evidence was left unchallenged. This leaves us with the opinion that applicant did not act unreasonably by refusing to accept the notice that was served at any place other than his place of residence since he was instructed to stay at his place of residence during working hours where respondent knew they would find him whenever they needed him."

17. Regarding the compensatory award, We have also considered the provisions of section 73 (2) of the *Labour code Order (supra)*. We do confirm that the said section provides that:
"In assessing the amount of compensation to be paid, account shall also be taken to 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."

18. At page 26 of the arbitration award under the heading *'FORMULATION OF THE AWARD'*, the learned Arbitrator justified the award made to 1st Respondent. In Her

justification, the learned Arbitrator makes reference to a number of factors which include:

1) The remainder of the contract.
2) Breach by 1st respondent.
3) 1st respondent's age.
4) 1st respondent qualifications.
5) Mitigation of loss by 1st respondent.
6) Cases of *Standard Lesotho Bank v Morahanye LAC/CIV/A/06/2008* and *Khoai Matete v Institute of Development Management LC/46/2000*.

19. In Our view this is evidence of both consideration and application of mind to the relevant factors in determining an award of compensation, that is both fair and equitable. We therefore find that the learned Arbitrator did not err.

AWARD

We make the following award.

1) The review application is refused.
2) The award of the DDPR is reinstated.

3) Award to be complied with 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

MR. MOTHEPU	**I CONCUR**
MISS. LEBITSA	**I CONCUR**
FOR APPLICANT:	**ADV. LOUBSER**
FOR 1st RESPONDENT:	**ADV. MACHELI**