IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/20/2007**
A0384/2006

IN THE MATTER BETWEEN

MANTSANE RANTEKOA **APPLICANT**

AND

NEDBANK LESOTHO **1st RESPONDENT**
NAPO RANTSANE **2nd RESPONDENT**
DDPR **3rd RESPONDENT**

JUDGMENT

Application for the review of the arbitration award. Applicant claiming that Arbitrator failed to consider all the elements of section 10 of the Codes of Good Practice. Further that Arbitrator allowed for unfair questions to be put to Applicant and also misquoted evidence of Applicant. Court finding that Arbitrator is not obliged to consider all elements laid out in section 10 of the Codes of Good Practice except to those raised for determination. Further that Applicant has failed to demonstrate how both the unfair questions and misquoted evidence render the award reviewable. Court further finding no sufficient reasons to awards costs. 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 A0384/2006. The brief background of the matter is that Applicant was an employee of 1st Respondent until her dismissal for misconduct. She had then, following her dismissal, referred the matter to the 3rd Respondent where the 2nd Respondent sat as the arbitrator. Following the conclusion of arbitration proceedings, an award was issued wherein the

referral was dismissed on the ground that Applicant's dismissal was both procedurally and substantively fair.

2. Dissatisfied with the award, Applicant initiated the current proceedings, wherein she sought the review, correction and/or setting aide of the said award. The matter came before the President of the Labour Court, Mrs. Khabo and was dismissed. She had found that the grounds raised were a disguised appeal. Applicant then lodged an appeal with the Labour Appeal Court against the said decision and obtained judgment. The matter was then remitted before this Court for hearing of the merits.

3. On the first date of hearing before, following the remittal, it had been argued on behalf of the 1st Respondent that the record of proceedings before the DDPR was incomplete. However that argument was withdrawn and parties agreed that the facts that are available were sufficient for purposes of this review. We endorsed this agreement and proceeded to hear the matter. Having heard the arguments of parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. Applicant's case was that the learned Arbitrator erred in that He failed to consider all the elements of misconduct which constituted the alleged disobedience of the rule of employment. It was argued that in terms of the *Labour Code (Codes of Good Practice) Notice of 2003*, a person determining whether a dismissal is fair or not, is obliged to consider if the rule was contravened, if it was reasonable, clear and unambiguous, if the employee knew about it, if it was consistently applied and if dismissal was an appropriate sanction.

5. It was submitted that *in casu*, the learned Arbitrator only considered the requirements on knowledge of the rule and if dismissal was an appropriate sanction. It was argued that in so doing, the learned Arbitrator committed an irregularity warranting interference with His award. It was argued that if the learned Arbitrator had considered all other requirements, He would have found that the dismissal was unfair in that the rule was invalid, unclear and ambiguous and was not consistently applied.

6. It was argued that evidence had been led that the rule was invalid as it was discriminatory contrary to section 66(3) of the *Labour code (Order) 24 of 1992* and *Convention 156 of the ILO Standards*. It was submitted that the rule allowed for the 1st Respondent to dismiss an employee for reasons connected with family responsibility. It was argued that joining clubs at 1st Respondent employ, was one way of carrying out family responsibility of providing for Applicant's family.

7. It was argued that the rule was unclear in that it did not demonstrate how being a member of a grocery club could conflict with the banking business. It was also argued that the rule was not consistently applied in that other employees who were members of the same club, were not charged but rather immunised from prosecution.

8. 1st Respondent answered that while Applicant appears to be dissatisfied only with the finding of guilt on the count of dishonesty for allowing a conflict, there were other charges for which he was found guilty, which carry the similar sanction of dismissal. It was explained that Applicant had been charged of two counts of dishonesty and one for insubordination. It was submitted therefore that even if Applicant is to succeed on this ground, it would not warrant the review of the award as other charges still stand.

9. About the validity of the rule it was argued that the learned Arbitrator addressed the issue at page 18 of the arbitration award, where He also made reference to the *Labour code (Codes of Good Practice) (supra),* on the requirements. It was added that while the learned Arbitrator did not expressly say that the rule was invalid, it is nonetheless implicit in the award, in as much as He was not obliged to expressly say so.

10. We wish to note that in addressing the three elements alleged not to have been addressed by the learned Arbitrator, 1st Respondent only confined himself to the issue of the validity of the rule. This thus means that 1st Respondent accepts the applicant's version as being true and accurate on those elements. We say this because in law what is not challenged is deemed to have been accepted (see *Theko v Commissioner of*

Police and another LAC (1990-94) 239 at 242; and Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623). In view of this said, We shall now proceed to deal with the rest of the arguments on this ground.

11. Notwithstanding the above said, We are in agreement with 1st Respondent that while there are three charges that led to the dismissal of Applicant, she has only challenged one by way of review. We share the similar sentiment that Applicant's conduct demonstrates contentment on her part with the verdict for those charges. As a result, We are also led to conclude, in agreement with 1st Respondent, that a change in verdict by this Court on the charge complained of, would not alter the decision to dismiss. Consequently, it is Our view that it would only be academic to consider the rest of the arguments of Applicant given the circumstances outlined.

12. However, We wish to set the record straight in relation to section 10 of the *Labour code (Codes of Good Practice) (supra).* While We admit that the laid out procedure is couched in mandatory terms, it is subject to there being a dispute on any of the given requirements. That is to say, where parties are clear on which issues are common to them and on which there exists a dispute, the decision maker cannot be expected to determine issues not in dispute, but to only focus on what requires their determination. It is therefore inaccurate that the learned Arbitrator was obliged to consider all the elements laid out under section 10 of the *Codes of Good Practice (supra).*

13. Applicant's case was also that the learned Arbitrator allowed oppressive questions to be put to her and further that He misquoted her evidence. Regarding the oppressive questions, it was submitted that Applicant had objected to the statement by 1st Respondent representative that Applicant was limited only to asking questions on clarity and not attempt to explain her evidence in chief. Further, Applicant claimed that in another incidence, an unfair question was put to her and when she objected to it, rather than to address it, the learned Arbitrator reserved His ruling for a final analysis in the arbitration award. Furthermore, it was submitted that when Applicant objected to a question put to her, the learned

Arbitrator refused to refer back to the record to determine if the objection had merit or not. It was argued that this was irregular and contrary to the principle in *Maliehe & Others v Rex 1995-1999 LAC 258 at 263.*

14. In answer, 1st Respondent submitted that Applicant has not given a single instance of an oppressive question either in her founding affidavit or in the record. It was argued that Applicant is attempting to make a case from the bar which is different from what she had in her affidavit canvassed. It was submitted that this should not be allowed. The Court was referred to the cases of *Port Nolloth Municipality v Xhalisa* and *Lawalala v Port Nolloth Municipality 1991 (3) SA 98 (c) at 111 B21*, in support.

15. It was further argued that the learned Arbitrator had no obligation in law to go back to the record to confirm what was being put to witness. Further that in addition to the non-existence of a legal obligation, it is not even suggested that the learned Arbitrator did not back track on the record. Further that it is not even suggested that the learned Arbitrator relied on distorted evidence or even the oppressive statements to confirm the dismissal of Applicant. It was prayed that this point be dismissed.

16. It is a procedural obligation of any decision maker to ensure that the processes involved in their decision are fair. This includes protecting the parties to the proceedings. Our point is basically that it is wrong for a decision maker to default on their obligation to ensure fairness. However, it is important that a party complaining about a breach of this obligation go further to demonstrate what or how that unfairness has affected the decision made. The Court cannot speculate this as that practice is strongly shunned by Our Courts (see *Pascalis Molapi v Metcash Ltd Maseru LAC/CIV/REV/09/2003)*

17. *In casu*, We agree with 1st Respondent that Applicant has failed to demonstrate how both the alleged unfair question or the distortion in the evidence has affected the decision of the learned Arbitrator, so as to warrant a review of His decision. This is in addition to the fact that no reference has been made

to the record where the both the unfair questions or the distorted evidence is alleged to appear. Our attitude applies even in relation to the argument that the learned Arbitrator refused to back track on his record, notwithstanding the fact that indeed there is no legal obligation of the learned Arbitrator's part to do so. Even the authority cited by Applicant, relating to the argument to refer back on the record, does not make or impose such an obligation. It is thus misplaced in the current circumstances. Therefore this point fails as well and We deem it unnecessary to consider the rest of its content.

COSTS FOR POSTPONEMENT ON 16/09/2014

18. 1st Respondent asked that the review be dismissed with wasted costs for the previous day. It was argued that the matter had been scheduled for the 16th September 2014 and that it was postponed on account of Applicant's attorney of record. It was argued that notwithstanding a number of reminders sent to Applicant's attorney, namely the notice of hearing and the monthly roll, he failed to attend claiming unawareness. It was argued that by causing the matter to be postponed to the following day, that caused 1st Respondent to incur additional charges which could have been avoided had the matter been heard as scheduled.

19. Applicant argued in response that this matter is incidental to an unfair dismissal claim and that in terms of *the Labour code Order (supra)*, no award of costs may be made. It was further argued that the matter was not postponed due to Applicant's representative, but a clash in the case roll. It was said that the matter could not proceed on that day because another case had been placed on the same time slot with it. It was added that in any event there is nothing to suggest unreasonableness on the part of Applicant given the real reason for the postponement.

20. We wish to confirm and as We have already shown above that the matter was postponed due to a clash in time slots allocated to matters before Us on the day in question. Further, an award of costs is sought against the Applicant and not the attorney. Even if we had found merit in the prayer for

costs it would be unfair to punish an Applicant party who did not even need to attend these proceedings given that they are by way of motion. Consequently no order as to costs in warranted.

AWARD

We therefore make an award as follows,

1. The review is refused;
2. The award in referral A0384/2006 remains in force; and
3. No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF FEBRUARY, 2015.

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

MR. MOTHEPU **I CONCUR**

MR KAO **I CONCUR**

FOR APPLICANT: **ADV. TEELE**
FOR 1st RESPONDENT: **ADV. KENNEDY**