

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/41/2011  
A0877/2010**

**IN THE MATTER BETWEEN**

**MATSELISO TŠEISO**

**APPLICANT**

**AND**

**OK BAZAARS LESOTHO  
PTY LTD T/A SHOPRITE  
DDPR ARBITRATOR (L. NTENE)**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Application for review of the arbitral award. Applicant raising only one ground of review that Arbitrator's decision was irrational, capricious and arbitrary. Court finding that Arbitrator acted irrationally in making her award and granting the review. Court finding that it has jurisdiction to correct the award. Court accordingly correcting the award. 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 A0877/10. The brief background of the matter is that Applicant was an employee of the 1<sup>st</sup> Respondent until her dismissal for misconduct. Unhappy with the decision to dismiss her, she referred a claim for unfair dismissal with the 2<sup>nd</sup> Respondent. The matter was duly arbitrated upon at the end of which the learned Arbitrator awarded her compensation. It is this award that Applicant seeks to have reviewed, corrected and/or set aside. Both parties were heard and Our judgment follows.

## **SUBMISSIONS AND ANALYSIS**

2. Applicant's case was that the decision of the learned Arbitrator was irrational, capricious and arbitrary. It was submitted the evidence of 1<sup>st</sup> Respondent was rejected by the learned Arbitrator but that notwithstanding, She relied on the same evidence in awarding compensation, instead of reinstatement. It was argued that having found that there was no substance in the dismissal of Applicant, the Learned Arbitrator was bound by the dictates of section 73 of the *Labour Code Order 24 of 1992*, to award the remedy of reinstatement, more so because, other than the charge, no evidence of impracticality was led. The Court was referred to the case of *Edcon Ltd v Pillemer No & Others 2010 BLLR ISCA*. It was submitted that in this case, the Court having found the dismissal to be substantively unfair awarded the remedy of reinstatement. Further reference was made to the case of *Sedumo v Platinum Mines Ltd & Others BLLR 2007 (12) 1097 (CC)*, in support.
3. 1<sup>st</sup> Respondent conceded that there is irrationality in the award of compensation. However, it was argued that this Court does not have the authority to substitute its Own decision for that of the 2<sup>nd</sup> Respondent as that would amount to an exercise of appellate powers, which powers it does not have. It was submitted, that this Court can only under the circumstances order the review and remittal of the matter to the DDPR to be heard *de novo*, with specific instructions limited to the determination of the remedy.
4. In the case of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, citing with approval an extract from the case of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another, 1988 (3) SA 132 (A) at 152 A-E*, the Court identified irrationality, capriciousness and arbitrariness as grounds for review. In more specific terms they were identified as constituting a mistake of law that materially affects a decision, as anticipated under section 228F(3) of the *Labour Code (Amendment) Act (supra)*. We wish to note that this is the section that vests this Court with review powers. In the light of this legal position, We shall now proceed to deal with the merits of the argument raised.

5. Irrationality as a ground of review presuppose that the decision maker made a certain conclusion which bound him or Her to a certain route or direction. It is premised on the idea that a decision maker accepted a certain position as accurate and that on the basis of that acceptance, He or She is bound to make a particular conclusion, a deviation against which renders His or Her conclusion irrational (see *Carephone (Pty) Ltd v Marcus NO & 7 others* (1998) 11 BLLR 1093 (LAC) at 1103). This is a species of estoppel as it is based on an earlier presentation and the results that must logically follow.
6. It is Our view that it was irrational for the learned Arbitrator to award compensation in the circumstances. We say this because of Her earlier conclusion that there was no substance in the dismissal of Applicant. This in law meant that there was no valid reason for the dismissal of Applicant, which in Our view meant that it was practical to reinstate. An exception would have been where there were reasons that demonstrated the impracticality of reinstatement. However, *in casu* none were given.
7. It is Our view that the irrationality was caused by the learned Arbitrator's under reliance on the charge, specifically the allegation of dishonesty. We say this because at paragraph 11 of the arbitration award, She is recorded as follows,  
*"The respondent stated that it would be impossible to reinstate the applicants to work as they no longer trust them, as they have been charged with dishonesty. In the circumstances the applications will be compensated for the dismissal."*  
However, since this charge was not proven before Her, it cannot and could not play a role in influencing Her decision. We therefore find that the learned Arbitrator erred in making Her decision.
8. While it is suggested that this Court has no authority to alter the decision of the learned Arbitrator, We hold a different view. It is trite law that in the exercise of Our review powers, We may correct or set aside an arbitration award. Our decision to correct the arbitration award finds support in the decision of Mosito AJ in *Matsemela v Nalidi Holdings (Pty) Ltd t/a Nalidi*

*Service Station LAC/CIV/A/02/2007*, where he had the following to say,

*“When reviewing an award from the DPPR, Labour Court should also correct it ....”*

9. In essence, this Court has the power to alter by correcting a decision emanating from a procedurally irregular award, provided that the sought or suggested conclusion was the only one that was reasonable, given the circumstances of the matter. We are satisfied there are facts before Us that permit the substitution of the irregular finding with the correct one. It is clear from the record that the only reasonable conclusion would have been for the learned Arbitrator to award reinstatement in terms of section 73 of the *Labour Code Order (supra)*, as opposed to an award for compensation.

#### **AWARD**

We therefore make an award as follows:

- 1) That the review is granted.
- 2) The award is corrected as follows:
  - (1) That 1<sup>st</sup> Applicant be reinstated to her former position without loss of remuneration, seniority or other entitlements and benefits but for the dismissal.
- 3) That this order be complied with within 30 days of issuance herewith.
- 4) No order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 11<sup>th</sup> DAY OF FEBRUARY, 2015.**

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

**MR. RAMASHAMOLE**

**I CONCUR**

**MRS. THAKALEKOALA**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT :**

**MR. MOSUOE  
ADV. MABULA**