LAC/REV/47/2005

IN THE LABOUR APPEAL COURT OF LESOTHO

Held at Maseru

In the matter between

VODACOM LESOTHO (PTY) LTD APPLICANT

AND

THE DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION 1ST RESPONDENT

H. MOSHOESHOE, ARBITRATOR 2ND RESPONDENT

MOTSIELOA LEBETE 3RD RESPONDENT

ITUMELENG MAKOETLANE 4TH RESPONDENT

CORAM: THE HON. MR. **ACTING JUSTICE** K.E. MOSITO

PANELISTS: MRS M. E MOSEHLE
MR. L. C MOFELEHETSI

HEARD: 26 JULY 2006

DELIVERED: 28 JULY 2006

SUMMARY

Review and appeal – arbitrator not allowing examination – effect thereof. Matter remitted to DDPR for re-arbitration – there being no prayer for costs – no order as to costs.

JUDGEMENT

1. This is an application in which the applicant seeks an under in the following terms:

> "(a) That the ruling issued by the second respondent on 17 March 2005 under referral No. AO142-05 declaring the third and fourth respondents to have been employees of the applicant be reviewed and set aside.
>
> (b) That the matter be remitted to the first respondent for a new ruling by another arbitrator on the question whether the third and fourth respondents' were employees of the applicant.
>
> (c) That the applicant be granted such further and/or alternative relief as the Honourable Court may deem fit."

2. The notice also called upon the second respondent to deliver to the Registrar within fourteen (14) days of service of the papers, the record of the proceedings, and any reasons the second respondent is required to give or wishes to give relating to his ruling.

3. The grounds of review of the final award of second respondent relied upon by the applicant are that, the way in which the second respondent came to his finding constituted an irregularity finding. The real complaint is that the second respondent could not rely on oral evidence not given under oath and not subjected to proper cross-examination. The complaint goes further to say that failure to comply with the aforegoing procedure resulted in denying applicant a proper opportunity to be heard.

4. The application is opposed by the 3rd respondent on basically two main grounds. Firstly, he contends that, the present application for review is in essence, an appeal in disguise in as much as what the applicant is attacking is the "wrongfulness or correctness of the decision made by the second respondent," as opposed to irregularities. Secondly, he actually goes into the merits of justifying why the decision

was correct. The fourth respondent has not opposed this application.

5. In terms of Section 228 F (3) of the Labour Code (Amendment) Act No.3 of 2000, this court has jurisdiction to entertain final reviews from the Directorate of Dispute Prevention and Resolution.

6. The present application arises out of arbitration proceedings before the second respondent in which the 3rd and fourth respondents contended that they were employees of the applicant, while the applicant denied that they were such employees.

7. When the matter came up for arbitration, advocate Lindiwe Sephomolo for the present applicant raised what she called a preliminary issue. The so-called preliminary issue turned out actually to be the real issue. The issue was whether there had been an employment relationship between the Applicant and the 3rd and 4th respondents.

8. With the permission of the arbitrator, Advocate Sephomolo addressed the arbitrator at length even handing in

documents, which were marked exhibits 1 to 9. The 3rd and 4th respondents then answered, and were allowed also to testify at length about how they became employees of the applicant, pointing to a number of issues which they contended were evidence of the existence of an employment relationship between them and the applicant. At the end of that apparently long exercise, the arbitrator gave a lengthy arbitral award on the 17th day of March 2005. It is against the above exercise that the present application has been brought on the grounds outlined in paragraph 4 above.

9. As indicated in paragraph 4 above, the 3rd and 4th respondents' case is that, the present application is but an appeal through the back door, so to speak. Are the said respondents correct in characterizing the application as an appeal through the back door? This necessitates the drawing of a distinction between an appeal and a review.

10. The learned counsel for the 3rd and 4th respondents correctly submits that a right of appeal may be thought of as a second chance: an opportunity to have one's case heard a second time by a new decision-marker, with the possibility of a different decision being reached. Appeal is concerned with the merits of the case, meaning that the second decision-marker is entitled to declare the first decision right or wrong. A review by contrast, so the learned counsel submits, is not

concerned with the question whether the decision was right or wrong, but whether the way the decision was reached is acceptable. The learned counsel refers to the case of ***Chief Constable of North Wales Police Evans (1983) 3. All ER 141 at 154,*** that judicial review is concerned, not with the decision, but with the decision-making process itself. There is no doubt that these principles are correct.

11. ***In Johannesburg Consolidated Investment Co. v. Johannesburg Town Council 1903 TS 111,*** Innes CJ pointed out that in its first and most usual signification, the term judicial review denotes the process by which apart from appeal, the proceedings of inferior courts of justice in respect of gross irregularities occurring during the cause of such proceedings. Secondly the learned Judge points out that, there is a second species of review analogous to the one with which he have dealt, but differing from it in certain well-defined respects. He points out that whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, the court may be asked to review the proceedings complained of and set aside or correct them. Then as to the third significance of the word, the legislature has from time to time conferred upon the court or a judge a power of review which, is meant to be far wider than the powers which it

possesses under either of the review procedures alluded to above.

12. An application for review, does not in itself, have the effect of staying execution of judgment that is sought to be reviewed. If execution of judgement is sought to be stayed, the party seeking to stay such execution must specifically apply for such a stay pending finalisation of the review proceedings.

13. Unlike in the case of a review, the noting of an appeal has the effect of staying execution of judgement at common law.

14. Section 228F(3) of the Labour Code (Amendment Act 2000, provides that the Labour Appeal Court may set aside an award [of the DDPR] on any grounds permissible in law and any mistake of law that materially affects the decision. As shown in paragraph 11 above, one of the grounds of review permissible in law is procedural irregularity. It is clear from paragraph 3 above that the present applicant complains of a procedural irregularity that occurred before the arbitrator.

15. In advance of determining whether such an irregularity as is complained of in paragraph 3 above did actually occur, it is at this stage appropriate to examine the law relating to the said subject. Section 26 (8) and (9) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004 provides as follows:

"(8) The arbitrator must first swear or affirm the witness in and advise the witness of the process of questioning.

(9) The process of questioning should be as follows:

(a) The arbitrator or (representative of any party to the dispute) should lead the witness. At this stage, the arbitrator must avoid cross-examining the witness. The object of the questioning is to elicit the evidence of the version in support of which the witness is giving evidence.

(b) The arbitrator should then permit the other party/representative to cross - examine the witness.

(c) The arbitrator should then permit the party who called the witness to ask any additional questions in order to clarify questions asked in cross-examination.

(d) If necessary, the arbitrator should ask questions in order to ascertain the truth of the

witness' testimony. Those questions may be in the form of cross-examination.

(e) The arbitrator then permits the other party to the dispute to call his/her witness and to lead evidence. The arbitrator may also ask questions merely to elicit the evidence of the version in support of which the witness is giving evidence.

(f) The arbitrator then permits the other party/representative to cross-examine the witness.

(g) The arbitrator then permits the party/representative of the party who called the witness to ask questions in order to clarify questions asked in cross-examination.

(h) The testimony given by witnesses must be recorded by hand or tape or both."

16. Section 228 C (2) of the Labour Code (Amendment) Act confers upon the parties to a dispute before the first respondent a right to give evidence to call witnesses and to question the witnesses of any other party. The second respondent is enjoined, in terms of Regulation 18(2) of the Directorate of Dispute Prevention and Resolution, L.N. 194

of 2001 to conduct the proceedings taking into account the provisions of the code Section 26 (1) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004, L.N. No.1 of 2004, provides for six stages that may be followed in arbitration proceedings Stage No.4 of the six stages relates to the hearing of evidence.

17. Section 26 (8) of the Guidelines provides that the arbitrator must swear or affirm the witness in and advise the witness of the process of questioning. Section 26 (9) (a) – (h) of the guidelines provides that the arbitrator must permit cross – examination of the witnesses.

18. The question is whether such cross-examination and the questioning process as outlined in paragraphs 15 and 17 above was observed in the case before the arbitrator. The applicant's case is that the cross-examination procedure and the swearing in was not followed, and yet evidence was given by both the applicant and 3rd to 4th respondents. The said respondents contend that it was not necessary that the swearing in of witnesses and cross-examination take place in as much as the issue was a preliminary one.

19. It may well be true that the issue was taken as a preliminary one, but evidence was led by both parties without an oath and without cross-examination. This was clearly a gross irregularity, which justifies interference with the award.

20. It is common cause that the said procedure was not followed in the proceedings before the arbitrator. The learned arbitrator allowed the parties to testify without observing the above guidelines as well as section 228 of the Labour Code (Amendment) Act of 2000 read with Regulation 18(2) of the Labour Code (Directorate of Dispute Prevention and Resolution) Regulations 2001.

21. Failure to follow the aforementioned provisions of the law did constitute a grass irregularity justifying interference with the award of the second respondent.

22. It is obvious that the conclusion to which this court comes is that; the application is bound to succeed. The application is accordingly granted in terms of prayers 1 and 2 of the Notice of Motion.

23. There being no prayer for costs on either side, there shall be no order as to costs.

24. This matter has taken too long to be resolved due to a number of problems not attributable to the parties at all. The justice of this matter will be met by ensuring that the DDPR hears this matter as soon as possible.

25. The first respondent is therefore directed to ensure that this matter is heard by a different arbitrator within 30 days of this order.

_____

K.E. MOSITO

JUDGE OF LABOUR APPEAL COURT

_____

Mrs. M. E. Mosehle — I agree

_____

Mr. L. C. Mofelehetsi — I agree

For applicant: Mr. P. J Loubser

For respondents: Ms R. Ntene