IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

LAC/CIV/05/2010

LC/REV/77/08

In the matter between:

LEBOHANG KULE	1ST APPELLANT
TS'ELISO MPHALE	2ND APPELLANT
MAEBO MOHLAKOANA	3RD APPELLANT
JOBO MOHLAKOANA	4TH APPELLANT
POULO KATSE	5TH APPELLANT

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	RESPONDENT

CORAM: HONOURABLE DR K. E. MOSITO AJ

ASSESSORS: MR L. MOFELEHETSI

MR R.L. MOTHEPU

HEARD: 20TH JANUARY 2011

DELIVERD: 26TH JANUARY 2011

SUMMARY

Appeal from Labour Court – Arbitrator having not considered the evidence presented before him – mistake of law materially affecting the decision resulting from such failure – appeal succeeding and matter remitted to the DDPR for hearing de novo. Costs of appeal to be borne by respondent

JUDGMENT

MOSITO AJ

1. The appellants were employed by the respondent and were deployed under its project called Katse Lejone Matsoku Water Supply Sanitation and Refusal Disposal Facilities Programme (KLM-WATSAN).

2. The appellants made a referral at the DDPR claiming non-payment of mountain allowance by the respondent to which they claimed entitlement in terms of the personnel regulations. Evidence led on behalf of the respondent showed that the applicants entered into written contracts which did not entitle them to payment of mountain allowance. The reason for not paying mountain allowance was said to be that they were residents

of Katse area where the project they were employed on was working. They had in fact been paid such allowances when they were working at Mohale which is the area where they were not resident at.

3. The appellants for their part sought to challenge the contracts they entered into and said the contracts they entered into with KLM-Watson were unlawful because KLM-Watson was not a juristic entity. Furthermore, they claimed that the contract had the effect of unequal treatment in as much as it provides for less favourable terms than those contained in the HR manual, which entitled employees deployed outside metropolitan area to such mountain allowance.

4. The dispute was conciliated and was arbitrated after conciliation failed. The learned arbitrator rejected the arguments of the applicants and found that even though the contracts were concluded with KLM-Watson, evidence established that the appellants were in fact being employed by the respondent. The learned arbitrator further rejected the argument of unequal treatment of on the ground that appellants had failed to prove that the employees whom they claim were being paid mountain allowance were in similar set of circumstances like them.

5. He relied on the case of **Remaketse Molaoli & 9 others v LHDA** and found that nothing prevents an employer to administer his business using two sets of policies provided that neither was imposed on the employees. Accordingly, the referral was dismissed. The appellants sought a review and setting aside of that award before the Labour Court.

6. The grounds on which the said award was being sought to be reviewed are contained in paragraphs 9-12 of the Founding Affidavit of Lebohang Kule. They are in a nutshell the following:

(a) The learned arbitrator misdirected himself in holding that applicants entered into written contracts when these contracts had been entered with a non-juristic entity called KLM-Watson which was just a special project.

(b) The said contracts are unlawful in that they have the effect of unequal treatment since they provide for less favourable terms than those contained in the 1st respondent's HR manual.

(c) 1st respondent failed to produce any written policy which provides that people deployed in their places of origin are not entitled to maintain allowance or deprivation allowance.

(d) The learned arbitrator erred and misdirected himself in holding that applicants signed contracts while aware that the employer could use more than one policy when there was in fact no such policy of the employer.

7. This is similar to the case of **Thabo Mohlobo & 13 Others v. LHDA & Another LC/REV/42/09**. The appellants were also contesting that they were being differently treated from the head office staff of the respondent,

who were paid M1, 800.00 mountain allowance while the applicants were paid M300.00. It turned out from evidence that the M300.00 appellants got was purportedly regulated by the contracts that the appellants had allegedly entered into with the respondent.

8. Exactly the same arguments as in this case were raised and the arbitrator rejected them and ruled that applicants' relationship with the respondent was governed by the contracts they signed with KLM-Watson which was a special project of the respondent. The applicants sought review of that award and as counsel in both cases were the same persons; Mr Pheko for the respondent raised exactly the same points namely; that the so-called review was in fact an appeal disguised as a review. We must say basically the same grounds of review were relief upon in **Thabo Mohlobo & 13 Others v. LHDA & Another** case as in this case. As a result the Labour Court dismissed the application.

9. The appellants then approached this court appealing against the judgment of the Labour Court and the grounds of appeal were as follows:

> (1) That the ground relied upon by the appellants did not point to any irregularity in the conduct of the arbitration proceedings, notwithstanding, inter alia, that the learned Arbitrator:
>
> (a) Failed to consider specific provisions of the HR manual which inter alia forbade
>
> (i) Issues of unequal treatment of employees and

(ii) Provided for specific procedures which had to be followed to exempt any employees from application of the HR manual.

(b) Erroneously considered and ruled that the employer had two sets of policies when in fact, apart from the HR manual, **no other policy was presented in evidence** which provided that people deployed in their places of origin were not entitled to deprivation allowances.

2. That the appellants raised the grounds of review because they do not agree with the findings on the facts and on the law warranting the Labour Court to come to a different conclusion to the one reached by the Arbitrator, notwithstanding, inter alia that the learned Arbitrator made a serious misdirection and mistakes of law by holding that the contracts which appellants signed with "WATSON" were valid contracts since the said WATSON was not a juristic person nor was it delegated in accordance with the HR manual.

3. That the appellants' review is in a disguised from as an appeal under the circumstances.

10. It will be realised that save for minor variations, the present appeal is similar to the appeal in **Thabo Mohlobo &13 Others v Lesotho Highlands Development Authority LAC/CIV/A/02/2010** whose judgment is to be handed down on the same day as the present appeal. In **Mohlobo's** case we have considered the various principles that apply for the review of an arbitral award of the DDPR's arbitrator. The same grounds as raised above

and arguments as advanced in Mohlobo's case were advanced in the case before us.

In our view and for the reasons advanced in **Mohlobo's** case, it was incumbent upon the arbitrator seized with the matter to consider the Human Resource manual of the respondent. The reason for this is that the Human Resource manual clearly provides that all workers of the respondent who are placed in rural areas are paid M1, 800.00 per month as a so-called mountain allowance. There was evidence before the Arbitrator of the Human Resources Manual which provided in part that (to mention but a few)**, t**he regulation, policies and procedures contained in this manual shall apply to all employees of the LHDA, excluding persons who are not citizens of Lesotho and are remunerated (See Para 2.4.1), it further provided that where these policies and procedures are in conflict with the terms and conditions of contracts for employees, the contracts shall prevail, unless agreed otherwise between such employee and LHDA. (See Para 2.4.2). The Human Resources Manual provided further that in some cases exemptions from policies and procedures laid down in this manual may be necessary. In these circumstances, the HR branch shall authorize the exemptions in writing after obtaining approval from the chief executive, subject to LHWC approval. Had the arbitrator considered all these issues, she would have in all probability come to a different view. Her failure to consider the Human Resources Manual was clear error of law which materially affected her decision.

11. As we indicated in **Mohlobo's** case, the above provisions of the manual were central to the nature of the case that the arbitrator had to consider. The arbitrator in **Mohlobo's** case as in the present one did not consider the import of the above provisions notwithstanding that the manual forms the regulations of the respondent. The reason for this is that an employer is in employment law, bound by his own regulations. Failure by an arbitrator to consider such regulations to the extent pertinent to the issue presented before her/him constitutes a mistake of law that materially affects the decision the arbitrator comes to at the end of the arbitration. We have dealt with the relevant principles in **Mohlobo's** case and for the same reasons; we do not see how the present case can be decided differently. In our view the present case is one in which the arbitrator did not address his mind to all the evidence that was before him thereby resulting in his coming to the kind of decision that he has come to in the present case.

12. The employer's manual prohibits unequal treatment of employees. It also provides for procedures that should be followed in order to take out the employees out of the scope of the Human Resource Manual. The arbitrator ought to have considered even the "other policy" which he referred to in his award in order to clearly bring it up as to why it is said that the present appellants were outside the scope of the Human Resource Manual.

13. For the above reasons and as we have considered them in the **Mohlobo's** case, we do not agree that the present case before the Labour Court amounted to an appeal through the back door.

14. In all the circumstances we come to the conclusion that the same result as in **Mohlobo's case** should obtain in the present case.

15. In the result we order as follows:

(a) The appeal succeeds and the order of the Labour Court is altered to read "the award of the DDPR is reviewed and set aside".

(b) This case is remitted to the DDPR for hearing *de novo* before a different arbitrator.

(c) The respondent is to bear the costs of this appeal.

16. This is a unanimous decision of the court.

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DR K.E.MOSITO AJ

Judge of the Labour Appeal Court

FOR THE APPELLANTS: Advocate B. Sekonyela

FOR THE RESPONDENT: Advocate P.J. Loubser