

LAC/REV/04/11

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

TJALE MATJAMA

APPLICANT

AND

LESOTHO BAKERY (PTY) LTD

1ST RESPONDENT

THE PRESIDENT LABOUR COURT

2ND RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: Mr L. Matela

Mrs M. Mosehle

Heard on: 27TH JANUARY 2012Delivered on: 30TH JANUARY 2012**SUMMARY**

Application for review of an enforcement decision of the President of the Labour Court – the court having altered the provisions of its judgment relating to terminal benefits without hearing the enforcement applicant – it is necessary for the Labour Court once it is minded to vary or alter its judgment, in the process of enforcing its judgments, to afford a judgment creditor an opportunity to make representations and to be heard before making a final decision thereon.

Application for review granted with costs on the basis that enforcement applicant was not granted an opportunity to be heard.

JUDGEMENT**MOSITO AJ**

1. This is an application for an order in the following terms:
 1. Calling upon the respondents to show cause, if any, why:-
 - (a) Administrative decision of the 2nd respondent to refuse to enforce the order of the Labour Court in LC/REV/04/08 against the 1st respondent for payment of all the terminal benefits of the application shall not be reviewed, corrected and set aside.
 - (b) The 2nd respondent's decision to fail to call the applicant to make representation pertaining to all the outstanding terminal benefits shall not be reviewed, correct and set aside.
 - (c) The 1st respondent shall not be ordered to pay the applicant his balance of correct severance pay and all his terminal benefits as per the Labour Court Judgment in the amount of M7,126.62(seven thousand Maloti one hundred and twenty six Maloti and eighty six Lisente).
 - (d) The 2nd respondent shall not be ordered and directed to enforce the payment of the said amount or balance to the applicant forthwith in accordance with the law.
 - (e) Directing the 1st respondent that if they wish to oppose this application they have to file opposing affidavits if any within five (5) days.
 - (f) The 1st respondent shall not pay costs of this application.
 - (g) Application shall not be granted further and alternative relief.
2. The facts that led to the present application are largely common cause. They are that in January 2008, applicant filed an application for the review of the decision of the Directorate of Dispute Prevention and Resolution in LC/REV/04/08. The matter was duly heard and, on the 25th October 2010 the Labour Court delivered its judgment holding that the applicant was entitled to all his terminal benefits including his severance pay because the respondent had not paid him any benefits at all.
3. However on or about 10th December 2010 the 1st respondent paid the applicant a less amount than that to which he was entitled. The respondent paid him only M8, 534.58 (Eight thousand, five hundred and

thirty four Maloti and fifty eight Lisente). The applicant averred that, he is entitled to severance pay in the amount of M10,140.79 (Ten thousand, one hundred and forty Maloti and seventy nine Lisente); the amount M1,733.89 as leave days; M797.43 as balance of notice pay; plus set-off deducted M2,989.33 as his unpaid earnings terminal benefits in accordance with the said judgment and award. He avers that, the total amount due to him was M15, 661.44 less paid M8, 534.58 = M7, 126.86.

4. On the 9th day of February 2011, applicant approached the Labour Court for enforcement of its judgment presumably in terms of section 34 of the **Labour Code Order 1992**. However the Labour Court President considered the issue and held that applicant had been duly paid his severance pay, and that the respondent had duly complied with the judgment notwithstanding that applicant had not been paid all other terminal benefits as ruled by the court including the set-off which had been deducted from applicant's salary by the Arbitrator. Applicant averred further that when the President considered the above issue, Applicant was not even given a hearing or called or given any opportunity to make any representations before the said President.
5. When applicant's present attorneys of record approached the said President, he failed to give them any hearing and said that he had already considered the payments and found it to be in accordance with the judgment. Applicant contends that it is clear that the correct payment of severance pay and his other terminal benefits have been frustrated by the decision of the President which had to be reviewed in accordance with the law.
6. The respondents have not filed any answering affidavits to the present application. As a result, this court will assume the correctness of the

version of the applicant. When the matter was argued before us, Advocate Ntaote for the 1st respondent, sought to argue that the application falls to be dismissed because the applicant ought to have approached this court by way of appeal and not review. His contention was that this application is misconceived because the President of the Labour Court could not be separated from the Labour Court itself. He submitted that the present application is therefore an application to review the decision of the Labour Court. He argued that the decision of the Labour Court President or the Labour Court itself could only be appealed against to this court. For this submission he relied on section 38A(1)(a) of the **Labour Code (Amendment) Act 2000** which provides that the Labour Appeal Court has exclusive jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court. He contended further that in making a decision on whether or not to enforce its own decision the Labour Court exercises a judicial function and not an administrative function. For this submission he relied on the judgment of this court in **Thato Putsoa v Standard Lesotho Bank LAC/REV/03/07**. He therefore submitted that the application falls to be dismissed for want of jurisdiction of this court with costs.

7. As indicated above, the applicant brought an enforcement application before the Labour Court in terms of section 34 of the Labour Code Order 1992. When the applicant had not been invited to come and make representations before the President, and the 1st respondent had been summonsed to appear before the President to explain his default of payment in terms of section 34, the President did not stop at enforcing or

refusing to enforce compliance on the 7th day of March 2011. He went further to comment as follows:

“Applicant was paid his severance pay on 01.01.11 being what this court found as his Basic salary namely M1997.43. Apparently the reason for this enforcement is to get severance pay calculated at basic salary of M3014.00 which both the DDPR and this court found not to contribute to applicant’s basic salary. That requirement is unfounded. Respondent has clearly complied with judgment.

Signed: 07/03/11”.

8. It will be realized that what the Labour Court did while trying to decide whether to enforce or not to enforce its judgment, it went into determining the correct amounts relating to severance pay which in its opinion were the appropriate ones as opposed to those that it found inappropriate to grant. It also ultimately found that the present applicant’s calculation on the basis of the basic salary of M3,014.00 was not justified, he therefore declared that the respondent the respondent had already complied with the judgment. The problem is that, when it made this determination, the applicant was not present and not represented. He was never heard when the decision not to enforce was arrived at. This is the main complaint of the applicant.
9. Section 34 of the **Labour Code Order 1992** provides that:

34. Enforcement of payment

Where the Court has given judgment against a party to pay any sum under a contract of employment or under the provisions of the Code and the party fails to make any such payment within the time specified in such

judgement, the President of the Court may, on the application of a party or a labour officer acting on behalf of any person to whom such sums are due, summon such party to appear before the President of the Court to answer why payment has not been made.

If such party fails to satisfy the President of the Court that the failure to make payment was due to no fault on his or her part, the President of the Court may order the party's detention in prison until the payments mentioned in the order are made or for a period of six months, whichever be the shorter period. The person entitled to enforce the judgment shall not be responsible for the expenses of such detention. (*Underlining added*)

10. It may be accepted that on the face of it, the above provision does not require the President of the Labour Court to hear person to whom such sums are due. The Labour Court of course has declared itself to have jurisdiction to review and alter or vary awards of the DDPR as well as (by necessary implication, its own judgment) in the process of enforcing it. In **Tsebetsalaka v Phelanyane LC/ENF/340/03** The Labour Court was seized with an application for the enforcement of an award of the Arbitrator dated 2nd October 2003. The application was made in terms of Section 34 of the **Labour Code Order 1992** (the Code) read together with Section 228E(5) of the **Labour Code (Amendment) Act 2000 (the Act)** which provide in reverse order as follows:

228 E(5) "An award issued by the Arbitrator shall be final and binding and shall be enforceable as if it was an order of the Labour Court."

11. In handing down judgment in the above the Tsebetsalaka's case, the Labour Court went on to point out that:

In any event at common law a court of law has power to correct its decisions if it has been made in error upon the error coming to its attention at anytime before execution. By legal fiction decisions of the DDPR have in terms of Section 228E (5) of the Act been made the decisions of this court. It follows that the court can in the same way that it can correct its natural decisions if there is error in them also correct errors and mistakes discernable in the awards of the

DDPR. It can be added further that having exercised the option to file the award with this court for enforcement the parties have submitted to the jurisdiction of this court to exercise all lawful powers of a court of law over the decision. They are therefore estopped from seeking to object to its jurisdiction as indeed the court cannot be powerless in the face of infringement of a law which it is within its power to enforce. I accordingly come to the conclusion that this court has the jurisdiction in enforcement cases of the DDPR to exercise all powers it has under the enabling statutes including the common law power to correct and put right any misdirection's inherent in such award.

14. In my opinion, assuming the correctness of the above quotation, it seems to me that if the Labour Court is to make any amendments to an existing award of the DDPR or judgment of the Labour Court, it must afford the person in favour of whom such award or judgment was granted an opportunity to make representations before any alterations or corrections or variations can be made in respect of the said award or judgment. The reason is not hard to find. It is that the applicant would have acquired a right arising out of such an award or a judgment. It cannot just be altered or varied without the enforcement applicant's involvement. It is on this ground that we feel that it would be unfair and improper in the present case to allow the enforcement decision to stand when the applicant had not been given a hearing.
15. In all the circumstances it will be clear that this enforcement decision made in the absence of the applicant was bound to prejudicially affect him. In the result, we are obliged to set aside the enforcement decision on the basis that the applicant was not afforded a hearing when the President proceeded to carry out the enforcement of the Court's judgment, yet the applicant had specifically applied to the Labour Court for enforcement of its judgment.

16. This court finds consequently that the decision of the President to fail to call the applicant to make representations pertaining to all outstanding terminal benefits must be reviewed, corrected and set aside. The matter must therefore be referred to the Labour Court for a proper enforcement of its judgment.
17. In the result the following order is made:
 - (a) The decision of the 2nd respondent to refuse to enforce the order of the Labour Court in LC/REV/04/08 against the 1st respondent for payment of all the terminal benefits due to the applicant is hereby reviewed, corrected and set aside.
 - (b) The 2nd respondent's decision to fail to call the applicant to make representations pertaining to all the outstanding terminal benefits is hereby reviewed, corrected and set aside.
 - © The 2nd respondent is directed to enforce the applicant's entitlement to severance pay in accordance with the judgment of the court in LC/REV/04/08.
 - (e) The 1st respondent is directed to pay costs of this application.
18. This is an unanimous decision of this court.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

FOR APPLICANT : Adv. B. Sekonyela

FOR 1ST RESPONDENT : Adv. N.T. Ntaote