IN THE LABOUR COURT OF LESOTHO

LC/REV/364/06
LAC/REV/75/05

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**APPLICANT**
AND	
TUMISANG RANTHAMANE	**1ST RESPONDENT**
DDPR (ARBITRATOR MOSISIDI)	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGMENT

Date of hearing : 06/02/07
Respondent applying for absolution from the instance at the close of applicant's evidence – Application refused – DDPR regulations do not provide3 for the procedure of absolution at close of plaintiff's case – Arbitrator enjoined to settle the dispute before him to finality – Absolution does not finalise the dispute – Arbitrator's ruling refusing absolution is an interlocutory ruling – It is therefore not appealable or reviewable – Application for review of ruling of DDPR dismissed.

INTRODUCTION

1. At the start of the hearing counsel for the applicant raised a preliminary point that 1st respondent's opposing affidavit must be thrown out because it was filed some two months after the notice of motion was served on the respondents contrary to rule 17(6) of the Labour Appeal Court Rules 2002.

2. Rule 17(6) is identical to rule 16(7) save that the former applies to reviews of awards of the DDPR specifically while the latter deals with reviews generally. To the extend that the two rules conflict with regard to the time within which an opposing affidavit should be filed rule 16(7) should take precedence because that is the rule that deals with reviews of awards of the DDPR.

3. In any event it is clear that there is an error in the reference to sub-rule (2) in rule 17(6). The proper reference which will be consistent with that in rule 16(2) should be sub-rule (5). With that correction it will become clear that the dates start to count after distribution of the record of proceedings and after the applicant will have indicated if he supplements his supporting affidavit or he stands by his notice of motion. Applicant themselves have not complied with rule 17(5). They cannot therefore be heard to say respondents have not complied with sub-rule (6). Applicant's point limine therefore falls away.

THE MAIN CASE

4. This is an application for the review of the award of the 2nd respondent refusing to grant an application for absolution from the instance at the close of the first respondent's evidence. The latter had filed a referral with the 2nd respondent claiming payment of 192.6 days being balance of leave accrued to him but not taken.

5. 1st respondent tendered evidence that he was employed by the applicant as guard supervisor on the 1st December 1991. His employment terminated on the 31st March 2003 when major works of the Highlands Water Project came to an end and the repeater stations they were employed to guard ceased to be operated by the applicant Authority.

6. 1st respondent testified further that he was entitled to 17 days of leave per annum. However due to the operational demands of his job he was never able to proceed on leave throughout the time that he was under the employment of the applicant.

7. He stated that he as a result accumulated 192.6 leave days. The applicant only processed and paid 50 days and failed to pay 142.6

days which he claimed to be paid in the referral he made to the 2nd respondent.

8. At the close of the 1st respondent's evidence, Ms Matshikiza for the applicant herein, was asked by the arbitrator if she had any witnesses. Her response was "I don't have any 'Me. Can I please apply that this case be dismissed?" (see page 70 of the paginated record).

9. Following this, an exchange took place between the arbitrator and Ms Matshikiza. It would appear from the record, page 91 of the paginated record, that the arbitrator did not understand what it was that Ms Matshikiza sought to do if she was not going to lead evidence.

10. Infact the arbitrator even warned Ms Matshikiza thus;

Arbitrator: "You are saying that you are not leading any evidence?"

Ms Matshikiza: "Yes me"

Arbitrator: "Do you know the implications of making an award having considered evidence from one side?"

Ms Matshikiza: "I don't know how the procedure stands. But I thought that I am applying for absolution. I would come to show how he has not proved his case."

Arbitrator: "You are not giving evidence what are you doing?"

Ms Matshikiza: "I am applying for absolution me"

Arbitrator: "Isn't it that I was giving you the opportunity to state your case?"

11. The exchange went on until at page 73 of the paginated record, where the arbitrator ruled that where leave is in issue it suffices that the claimant should state that he is owed leave. The contention that the applicant has not spelled out the actual amount

owed does not carry the day because applicant had shown that he earned 17 days of leave each year and how much he had accrued for the period that he was employed and how many of those have been paid and how many remain owing.

12. At that point Ms Matshikiza remarked that the arbitrator was wrong in making a ruling before she had addressed her. Indeed even before this court the gravemen of the applicant's submission was that the arbitrator erred in that she made a ruling before she could be addressed on the merits of the application for absolution.

13. Two things need to be said about this contention. First the extract of the exchange between the arbitrator and Ms Matshikiza quoted in paragraph 6 above is a clear sign that, the arbitrator was not accepting counsel's attempt to apply for absolution.

14. The arbitrator made it clear that she was inviting counsel to lead evidence or else close her case in which case the normal procedure of closing arguments would follow. Her reason for saying so was clear and that was that in her opinion 1st respondent had made out a *prima facie* case.

15. In our view the arbitrator was in all fours with the provisions of section 228C(1) of the Labour Code (Amendment) Act No.3 of 2000 (the Act) which provides:

> **"(1) In any arbitration proceedings under this Part, the arbitrator may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly but shall deal with the substantial merits of the dispute with the minimum of legal formalities."**

16. The court put a question to counsel for the applicant whether it is not procedurally right and fair for a presiding officer to make his attitude known about an application before him, to counsel in advance, while leaving his mind open to be persuaded or dissuaded as the case may be, either way. Whilst counsel conceded this was right, she felt that in casu the arbitrator's mind was long made up

and whatever she purported to do thereafter in hearing her representation was simply going through motions.

17. Assuming the correctness of counsel's submission that the arbitrator formed an opinion even before she addressed her on the absolution application, I find nothing wrong with that opinion, because it was based on the evidence that the arbitrator had heard. That is precisely the duty she ought to perform, that is, to hear evidence and on the basis thereof formulate a conclusion. Counsel's intended submissions are in law an *ipse dexit* which is not binding as they do not constitute evidence. (See P.J. Schwikkard et al Principles of Evidence; Juta & Co. 1997 p.16.).

18. The third point that must be recorded about the approach of counsel in seeking to apply for absolution is that she was importing the rules of the ordinary courts into the way the DDPR functions. There is no provision in the DDPR regulations for the procedure of absolution at the close of the plaintiff's evidence before the DDPR. Section 227(4) and (7) of the act provide:

> **"(4) If the dispute is one that should be resolved by arbitration, the Director shall appoint an arbitrator to attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration."**
> **"(5)**
> **"(6)**
> **"(7) If a dispute contemplated in subsection (4) remains unresolved after the arbitrator has attempted to conciliate it, the arbitrator <u>shall</u> resolve the dispute by arbitration." (emphasis added).**

19. It is trite that absolution is not a final determination of the dispute. According to the law, absolution is akin to discharge of an accused person at the close of evidence for the prosecution in a criminal case. That case is not final as it can always be reopened when the state or the plaintiff as the case may be has collected sufficient fresh evidence to establish their case. In a way therefore, absolution from the instances if granted, derogates from the chief

function of the arbitrator which is to arbitrate the dispute which means settling the dispute to finality.

20. The above conclusion leads us to the next inevitable finding that a ruling refusing absolution is an interlocutory ruling. This must be distinguished from the ruling to grant absolution, because the latter has a final effect and as such may be appealed against.

21. According to Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, Juta & Co. 1997, 4th Edition page 829:

> **"No appeal at all lies from certain interlocutory and other orders…. And no appeal lies from a rule or order by a magistrate not having the effect of a final judgment."**

Refusal to grant absolution is not a final judgment. It is actually a ruling that says let us continue with the case. No appeal or review can lie against such an order.

22. In summary therefore, this review application is misconceived. The application is therefore dismissed with costs, as a mark of displeasure that the applicants have unduly delayed the finalization of the hearing of the referral at DDPR for reasons that we find frivolous. Practitioners ought to know that it is against public policy to take advantage of lay person and unduly protract finalization of their claim and in the process cause them to suffer unnecessary costs. This is what happened *in casu*.

23. The referral of the 1st respondent which had already been partly heard by the 2nd respondent shall be set down for finalization of the hearing by the arbitrator who heard it initially without undue delay.

THUS DONE AT MASERU THIS 14TH DAY OF FEBRUARY 2007

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA **MEMBER**	**I CONCUR**
M. THAKALEKOALA **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MS MATSHIKIZA**
FOR RESPONDENT:	**MR. H. SEKONYELA**