IN THE LABOUR COURT OF LESOTHO

LAC/REV/73/06
LC/REV/532/06

HELD AT MASERU

IN THE MATTER BETWEEN

CHUN CHUN ENTERPRISES (PTY) LTD **APPLICANT**

AND

MOSUOE SEQOKOFA **1ST REPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date of hearing: 31/05/07
Delivery date: 15/06/07
Arbitrator proceeding with arbitration with the employer not able to participate due to lack of an interpreter – Regulation 22 of LN 194 of 2001 – requires parties to arbitration to assist each other with securing an interpreter – arbitrator arbitrarily refusing request for a postponement to enable company representative to secure interpretation service - Ignoring the representative's inability to comprehend the proceedings against him denied the company audi alteram partem. Award reviewed and matter ordered to start afresh. No costs ordered.

1. The applicant company (the Company) has applied for the review of the award of the 2nd respondent (DDPR) dated 15th April 2006. The said award directed the company to pay the 1st respondent an amount of M5,776-00 as compensation of eight months wages for unfair dismissal.

2. The review application was filed on the 14th June 2006. Since this was admittedly outside the 30 days within which a review application has to be made, (sec.228F(1)(a) of Act No.3 of 2000) the applicant accompanied his notice of motion with an application for condonation of the late filing of the review application. The condonation was duly granted.

3. The facts of the matter are briefly that, the 1st respondent was employed by the company as a shop assistant on the 10th May 2002. On the 11th August 2005, he was dismissed. In his evidence before the DDPR the 1st respondent said the Managing Director Mr. Duojin Lin simply told him that he was dismissed without giving him any reasons.

4. The 1st respondent testified further that he felt that that was unreasonable. He then sought a dismissal letter. The Managing Director told him to go to the Labour Department and that he would get his dismissal letter there. Infact he said Labour is the one that would make him such a letter.

5. The 1st respondent then filed a referral of unfair dismissal with the DDPR. The company was duly served and in due course it was served with a notice of set down. It is conceded by both sides that a notice that the company should bring along a Chinese interpreter was attached to the notice of set down. The said notification was written in Chinese.

6. The hearing was scheduled for the 7th March 2006. On that date parties appeared before the DDPR. However, the Managing Director who is Chinese and speaks neither Sesotho nor English appeared without any interpreter.

7. The hearing was postponed to the 16th March to enable the Managing Director to once again go and look for an interpreter. However, on the 16th March the Managing Director still came without an interpreter. He is said to have been accompanied by a friend who also could not communicate neither one of the two official languages.

8. The arbitrator made a decision to proceed with the arbitration "….in the language that we can all understand." (see p.15 of the paginated record). In her award the arbitrator goes further to say that she "….felt (that the) respondent had been given a fair opportunity to defend the case against him, he simply did not take the proceedings at the DDPR seriously. I therefore proceeded in respondent's presence but without him making any sort of statement."

9. The 1st respondent was then sworn and he proceeded to give his evidence as hereinbefore stipulated. No effort was made to establish if despite their difficulty of language the two representatives of the company could be able to put any questions in cross-examination. Immediately the 1st respondent concluded his testimony, his representative was invited to make closing arguments. In due course an award was handed down which directed the company to pay a sum of money to the 1st respondent as compensation for unfair dismissal.

10. The company has sought that the award be reviewed on the following grounds:

    (a) It was irregular for the arbitrator to proceed with the matter without providing the Managing Director with an interpreter.

    (b) It was irregular for the arbitrator not to give the Managing Director enough time to look for an interpreter despite his plea to that effect.

    (c) It was irregular for the learned arbitrator to deny complainant a fair hearing by proceeding with the matter in his presence without being heard.

    (d) It was irregular for the arbitrator to conclude that the Managing Director was not serious in looking for an interpreter without proper investigations to prove that he was not making an effort to look for an interpreter.

11. It may just be mentioned that in his founding affidavit the Managing Director averred that he made all efforts to find an interpreter but he could not secure one. The two interpreters he approached were all not available on the 16th. He avers further that he then attempted to apply for a postponement to enable him to make a further search for an interpreter. His request for a postponement was refused because it was alleged that he was not serious.

12. The Managing Director's averments with regard to his request for a postponement and the presiding officer's attitude that he was not serious do not appear from the record. Perhaps understandably so because the opening part of the record is incomplete. It is clear that a good part of what the arbitrator said before making a ruling to proceed was not able to be transcribed because the tape was inaudible.

13. It is however, significant that neither of the two respondents have denied those averrements. The 1st respondent has only taken issue with the averrement that the two interpreters that were allegedly approached have not been mentioned by name and that they have not furnished supporting affidavits to back up what the deponent to the founding affidavit has said about them. This is not an issue that needs to detain us save to say the 1st respondent is clearly not in a position to deny that the deponent met and sought the assistance of the two persons he alleges to have approached.

14. We now come to the grounds of review which we shall deal with seriatim. The first ground is that the learned arbitrator proceeded with the matter without providing the deponent with an interpreter. In his answering affidavit the 1st respondent has correctly stated that it is not the arbitrator's duty to furnish deponent with an interpreter. However, the arbitrator has the duty to assist. Regulation 22 of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001 provides that:

> *"22(1) The parties to the proceedings shall, by agreement or when so directed by the Director, hold a pre-arbitration conference dealing with the matters referred to in sub-regulation (2).*
>
> *(2) In a pre-arbitration conference, the parties shall attempt to reach consensus on the following:*
>
> *"(g) whether an interpreter is required and if so, for how long and for which languages."*

15. The view that we hold is that the regulation envisages that the determination of a need for an interpreter ought to be a joint exercise of all parties at a pre-arbitration hearing. Naturally once that has been done, the parties are able to assist each other in the search for an interpreter. This is totally different from shouldering the responsibility to furnish and consequently pay for the costs of interpretation by the arbitrator. In casu the arbitrator placed heavy reliance on the form that was sent to the company together with the notice of set down. While that is an innovative and commendable step it must not have been made to take the place of a legally established step of calling parties to a pre-arbitration conference to agree on the need for an interpreter.

16. The second ground is that the arbitrator refused the representative of the company more time to look for an interpreter. As we have said this averrement has not been denied. A postponement can be granted at the discretion of the court. Such discretion must be exercised judicially upon consideration of the facts of each case.

17. The case of the company is that its representative made unsuccessful attempts to secure an interpreter as those that he approached were not available. He thus sought more time. The only reason we can discern from the award, for refusing the request is that the arbitrator felt that the company representative had been given a fair opportunity to

defend the case and that he was not taking the proceedings seriously.

18. This statement of the arbitrator leads to the next concern of the applicant that the arbitrator had made no investigation and therefore she had no proof that he was not taking the proceedings seriously. Indeed other than her feeling the arbitrator advances no evidence to support this very serious statement. The irresistible conclusion is that the refusal to afford the representative of the company more time to search for an interpreter was arbitrary. That is irregular and it calls for interference with the award.

19. Lastly, counsel for the company contended that it was irregular that the representative of the company was denied opportunity of a fair hearing by proceeding with the matter in his presence without him being heard. We have already said that there is no sound evidential basis for denying the company a postponement they requested to enable them more time to look for an interpreter. Proceeding with a case of a party in his presence without him taking part purely on the ground of language is an unheard of parody of justice.

20. In his heads of argument Mr. Chobokoane for the applicant submitted that whilst there is no obligation in casu, to furnish interpreters like in criminal cases, litigants still have to be assisted to secure interpreters because "the underlying requirement is the strict observance of the rules of natural justice *(audi alteram partem)*". We have already said the need to assist parties in securing interpreters is provided for by the regulations. Indeed fair hearing entails that the applicant ought to be heard before it can be landed with such a huge compensatory award. If at all the arbitrator felt the Managing Director was not serious, an order of costs would have adequately compensated that lack of seriousness. To proceed with the hearing in his presence without his participation went too far. For these reasons we find that the arbitration process in referral C012/06 was irregular. The award resulting therefrom is accordingly reviewed and set

aside. The case to start *de novo* before the DDPR. There is no order as to costs.

THUS DONE AT MASERU THIS 8TH DAY OF JUNE 2007

L. A. LETHOBANE
PRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. CHOBOKOANE**
FOR RESPONDENT: **MR. RAMAKHULA**