

**IN THE LABOUR COURT OF LESOTHO**

**LAC/REV/25/05  
LC/REV/315/06**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**LESOTHO NATIONAL DEVELOPMENT  
CORPORATION**

**APPLICANT**

**AND**

**DIRECTORTE OF DISPUTE PREVENTION  
AND RESOLUTION  
SOPHIA MALIKOTSI MOHAPI**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**Date of hearing 10/07/07**

**Recusal –Arbitrator refusing to recuse himself from presiding –  
Arbitrator not meeting any of three disqualifying factor-arbitration  
rightly refusing to reuse himself. Practice-An interlocutory ruling not  
appealable or reviewable before completion of the entire case-  
application for review dismissed**

1. The 2<sup>nd</sup> respondent is the retired former chief executive of the applicant herein. Following her retirement she referred a dispute concerning payment of her severance pay to the Directorate of Dispute Prevention and Resolution (DDPR). The claim for severance pay was suing made in terms of section 79 (1) of the Labour Code Order 1992(the code).

2. The referral was made on the 6<sup>th</sup> December 2004, under referral number A1300/04. On the 9<sup>th</sup> February 2005, the referral was scheduled to be heard before learned arbitrator Rantsane. Both parties were represented by counsel. The representative of the applicant was its legal officer Mr. Poopa, while the 2<sup>nd</sup> respondent was represented by attorney's KEM Chambers.
3. At the start of the arbitration proceedings Mr. Poopa for the applicant raised three points in limine. The first one was that the DDPR did not have jurisdiction to arbitrate a claim of severance pay in as much as severance pay is not contemplated by section 226(22) of the Labour Code (amendment) Act of 2000 (the act). Secondly, he contended that the applicant was not entitled to be represented by a lawyer. Lastly he sought the recusal of the arbitrator Rantsane and any other arbitrator employed by the DDPR because he argued that, there was a likelihood of bias in as much as the son of the 2<sup>nd</sup> respondent is the Deputy Director of the DDPR, to whom all the arbitrators are answerable.
4. The points raised in limine were duly argued. On the 18<sup>th</sup> February 2005, the learned arbitrator issued ruling dismissing all three points. On the 1<sup>st</sup> March 2005 counsel for the applicant issued a notice of motion calling on the Labour Appeal Court to review the ruling that the learned arbitrator made on the in limine points.
5. The application was opposed and answering affidavits were duly filed. On the 12<sup>th</sup> July 2005, the records of the proceedings of the DDPR were filed as required by the rules. The matter was set down for hearing before Peete J. on the 5<sup>th</sup> May 2006. The matter was however, postponed to the 18<sup>th</sup> August 2006, for reasons that are not clear from the record. On 10<sup>th</sup> August 2006, 2<sup>nd</sup> respondent's attorney of record filed notice of their withdrawal as her attorneys of record.
6. On the 18<sup>th</sup> August only counsel for the applicant was present. As a result the matter was postponed to the 25<sup>th</sup> August 2006. On that day there was again no appearance for the 2<sup>nd</sup> respondent. The matter was again postponed to the 8<sup>th</sup> September 2006, with a warning that if 2<sup>nd</sup> respondent would still not be in attendance, the matter would proceed accordingly.

7. On the 8<sup>th</sup> September 2006, there was again no appearance for the 2<sup>nd</sup> respondent. However, the learned judge made an order referring this matter to this court pursuant to section 4 of the Labour Code (amendment) Act 2006 which vested powers of review of DDPR awards in this court.
8. The matter was scheduled to be heard before this court on the 10<sup>th</sup> July 2007. At the start of the hearing Mr. Mofoka for the applicant pointed out that he was no longer going to pursue the issue of jurisdiction in the light of the 2006 Labour Code amendment which has straightened the issue of what the right forum for determination of claims for severance pay is. It also became apparent that he was abandoning the issue of legal representation as he no longer pursued it. He submitted that he was going to pin and paint his colors on one mast namely; the issue of recusal of DDPR arbitrators from adjudicating the referral.
9. Mr. Mofoka prepared detailed heads of argument. However, his submission can aptly be summarised by what he has said on pages 2 and 5 of his heads. At page 2 paragraph 4.2 he submits that:
 

*“The basic rule is that where there is a real likelihood of bias on the part of the presiding officer or an officer exercising quasi-judicial function based on personal interest, the presiding officer should rescue himself .....*” (Emphasis added.)
10. At page 5 in the penultimate paragraph, Mr. Mofoka submitted as follows: *“it is submitted that there was a likelihood of bias when Mr. Rantsane presided over a case involving his boss’s mother. It is respectfully submitted that it is possible that Mr. Rantsane would discuss the matter with Mr. Mohapi and would either be influenced or want to impress his Boss.”*(Emphasis added)
11. The emphasized words and phrase in the above two paragraphs underscores the fallacy of counsel’s submission. In the first quotation counsel correctly submits that the disqualifying bias should be based on personal interest. We may add further that other ground that would disqualify a presiding officer from presiding would be, pecuniary interest or, any possible prejudice such an

officer might have against any of the litigants. (See Baxter's Administrative Law, Juta & co. 1996. P. 551).

12. By Mr. Mofoka own admission in paragraph 5 of his heads the arbitrator in this matter had neither personal nor pecuniary interest in the matter. The person concerned is the of mother his boss, The concern of the applicants is a fear that Mr. Rantsane might discuss the matter with Mr. mohapi or seek to impress him as his boss. All that is speculation which this court does not want to be part of.
13. What is clear to the court is that none of the three disqualifying factors apply to Mr. Rantsane or any other arbitrator of the DDPR, except Mr. Mohapi himself. Furthermore, it is common cause to the parties herein that both Mr. Rantsane and Mr. Mohapi are qualified lawyers who by the nature of their legal training know the centrality of impartiality and keeping an open mind in the process of the administration of justice.
14. Whilst the above should suffice to settle this matter, it is worth repeating that the ruling which is being sought to challenge herein is an interlocutory ruling, which has no final effect. It is a matter that could, if there is ground for doing so, be taken on review at the conclusion of the whole case.
15. In *Zondi & Others v. President Industrial court & Ors.* (1991 12 ILJ 129 at P 1300 Galgut J. aptly captured the rule concerning interlocutory rulings as following:
 

*“It is clear from what I have set out above that the proceedings before the first respondent are far from being concluded. The application for review has in other words been brought in medias res. There is no universal or absolute test governing when a court will interfere in uncompleted proceedings, but one thing is clear from the cases and that is that a court will only interfere in medias res in exceptional circumstances, the time to take any proceeding on appeal or review is at the termination thereof,”*D-E See also *Lesotho Highlands Development Authority v Tumisang Ranthamane & 2 others* LC/REV/364/06 (unreported).

16. We have been shown no special circumstances that warrant that this court interferes with the proceedings before their termination. We are of the view that this issue could well have waited until the end of the proceedings for it to be taken on review. For these reasons the review cannot succeed. It is accordingly dismissed and the matter shall proceed on the merits before the DDPR. We have made no order as to costs.

THUS DONE AT MASERUTHIS 25<sup>TH</sup> DAY OF JULY 2007

**L. A. LETHOBANE**  
**RRESIDENT**

**J. M. TAU**  
**MEMBER**

**1 CONCUR**

**M. MAKHETHA**  
**MEMBER**

**1 CONCUR**

**FOR APPLICANT: MR. MOFOKA**

**FOR RESPONDENT: MR. THOAHLANE**