

IN THE LABOUR COURT OF LESOTHO

**LAC/REV/111/05
LC/REV/397/06**

HELD AT MASERU

IN THE MATTER BETWEEN

LETSENG DIAMONDS (PTY) LTD

APPLICANT

AND

**DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
M. F. MOCHEKOANE
SEKAKE PHAKISI**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

*Date of hearing : 12/09/07
Review of DDPR award - The DDPR dispatched incomplete record to the Registrar - Evidence of all witnesses who testified not captured by the record - Review application based on alleged misconstruing of evidence by the arbitrator - The court not able to properly determine the validity of the claim in the absence of evidence complained of from the record - Incomplete record constitutes irregularity - Award reviewed and remitted for a fresh hearing.*

1. This is an application for the review of the award of the learned arbitrator Mochekoane dated 16th June 2005. The award followed arbitration proceedings before the Directorate of Dispute Prevention and Resolution (DDPR) in which the 3rd respondent challenged his dismissal from the employ of the applicant.

2. Third respondent had been employed by the applicant as Assistant Supervisor of the sub-contractors and Assistant Security Manager of the applicant. On Saturday 9th April 2005, the 3rd respondent admittedly went out in a vehicle of one of the sub-contractors of the applicant. The vehicle was being driven by the driver by the name of Tsepo. The trip was admittedly not official but a private trip of the two occupants.
3. On their way back from the trip the vehicle overturned. The pair had to get back to the camp by foot. Tsepo reported the vehicle to the police as stolen. It would appear that 3rd respondent did nothing to report either to the police or the management what happened to the vehicle. He failed or neglected to take steps to report that incident in which he was involved until the management called him to explain what happened to the vehicle.
4. This was the following Monday. Upon being asked, the 3rd respondent disclosed that the vehicle had in fact overturned and that he had been one of the occupants. The 3rd respondent was subsequently charged with:
 - (a) Attempting to conceal the actual circumstances in which the vehicle overturned so that it would appear as if the vehicle had indeed been stolen. He had further allegedly directed the security officer at the gate not to disclose that they were occupants of the vehicle.
 - (b) He was further charged with failing to report the incident to the management.
5. He was found guilty as charged and was dismissed. He referred a dispute of unfair dismissal to the DDPR which ruled in his favour that his dismissal was substantively unfair. The DDPR ordered that he be reinstated in his job with effect from 1st August 2005.
6. The company filed an application for the review of that award on a number of grounds. In the meantime they sought the stay of execution of the award of the DDPR and an order

directing it (the DDPR) to dispatch the record of the proceedings to the Registrar of this Honourable Court. The record was duly transferred and transcribed as provided by the rules.

7. It was then filed in terms of the rules and served on all the parties. The applicant then availed itself of the provisions of rule 16(6) of the Labour Appeal Court Rules 2002 as amended which provides:
- “(6) The applicant shall, within 7 days after the Registrar has made the record available, either:*
- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or*
- (b) deliver a notice that the applicant stands by its notice of motion.”*

8. To that end applicant filed a supplementary affidavit deposed to by its Human Resources Manager in which he stated in paragraph 3 that:

“I (have) read the award of the 2nd respondent and the record of proceedings of the 1st respondent in this matter. A reading of the record reveals that the record is incomplete.”

He stated further in paragraph 4 that the complaint of the applicant in the founding affidavit is that the 2nd respondent failed to analyse the evidence before her properly and she made wrong assumptions from that evidence. He stated therefore that *“it is of cardinal importance that the evidence presented to the arbitrator be carefully scrutinized in order to make a finding whether the allegations made in the founding affidavit are correct.”* He concluded by stating that this cannot be done in the absence of evidence referred in the application from the record and that the case has to be remitted for hearing before a different arbitrator.

9. None of the respondents filed any opposing affidavits. However at the hearing before this court 3rd respondent was duly represented by counsel, who submitted that they have not filed

- any opposing affidavits because they are in agreement with applicant that the record being significantly incomplete, the court cannot be able to perform its review powers properly. Accordingly they agree with applicant that the matter be remitted for fresh hearing.
10. In our view in the light of the agreement of counsel it will serve no useful purpose to seek to deal with the other grounds of review which Mr. Loubser sought to suggest the court could still do with the limited record placed before it. We do not share that view. Judging from the summary of the evidence in the award of the arbitrator no less than five witnesses testified at the arbitration. Three on the part of the present applicant namely Messrs Makatjane, Qoo and Marupelo. On the side of the 3rd respondent two witnesses testified namely, the 3rd respondent himself and the driver Tsepo.
 11. With the exception of the evidence of the 3rd respondent none of the other witnesses' evidence is captured by the record. Even that of the 3rd respondent, it is only the cross-examination part that is contained in the record. His evidence in chief is also missing. The whole review application is based on the alleged misconstruing of the evidence by the learned arbitrator.
 12. In the meantime the learned arbitrator bases her award on what she calls the summary of the evidence presented before her. To be able to perform its duty the court must be able to scrutinize all the evidence tendered and compare same with the facts considered or not considered by the learned arbitrator in reaching her decision. In the absence of evidence of the witnesses the court is not in a position to determine the validity of the claim that the arbitrator misconstrued the evidence.
 13. We cannot speculate whether the record was kept as required by the rules or not, what is clear however is that no proper record has been dispatched to the Registrar in terms of the rules and the order of the court calling for such record. Counsels were therefore correct in agreeing that in the absence of the evidence of the witnesses there cannot be a proper exercise of review powers on the grounds raised. That default

however constitutes a grave irregularity for which the award falls to be reviewed and set aside. The matter is remitted to the DDPR for a fresh hearing before a different arbitrator.

There is no order as to costs.

THUS DONE AT MASERU THIS 20TH DAY OF SEPTEMBER 2007.

L. A. LETHOBANE
RRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. LOUBSER
MR. MOLAPO