

IN THE LABOUR COURT OF LESOTHO

LC/REV/123/07

HELD AT MASERU

IN THE MATTER BETWEEN:

NIEN HSING INTERNATIONAL
LESOTHO (PTY) LTD

APPLICANT

AND

KOSAKA DILLANE
DDPR

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date: 15/07/08

Review - Arbitrator conducted pre-arbitration conference contrary to the rule that the parties themselves shall hold the conference - Arbitrator using the conference to extract admissions and as substitute for arbitration itself - Award reviewed and set aside.

1. The applicant company applied for the review of the award of the learned Arbitrator Ntene who had after conciliation sought to proceed to arbitration stage in terms of the law. However, before proceeding with the arbitration the learned arbitrator purported to hold a pre-arbitration conference. The said conference was chaired and conducted by herself.

2. The minutes of the conference show that, the learned arbitrator sought to be addressed on issues pertaining to evidence which could only be adduced at the arbitration hearing itself. For instance she enquired whether the employer had evidence that directly connect the 1st respondent with the offence with which he was charged. When the representative of the applicant said they did not have direct evidence, she concluded that the applicant was wrongly charged and said that the parties are in agreement in this regard because the company had no evidence. She then concluded that there was no fact that remained in dispute.
3. The approach of the learned arbitrator was fraught with difficulties. Firstly, Regulation 22 of the Labour Code (Directorate of Dispute Prevention and Resolution) Regulations 2001, which deals with pre-arbitration conferences provides that “the parties to the proceedings shall by agreement or when so directed by the Director hold a pre-arbitration conference” There is clearly no room in the regulation for the arbitrators to hold the pre-arbitration conference themselves.
4. Furthermore, the regulation stipulates the matters that the conference must deal with. Requiring the parties to show what evidence they have to support their claim/defence is not one of them. Thus even if the parties had themselves held the conference it would have been remiss of any party to compel the other to disclose the evidence they possess to prove their case.
5. The approach of the learned arbitrator lead her into the trap of turning the conference into an arbitration itself. This was not proper. Infact the concessions she sought from the applicant that they did not have direct evidence ought to have been made at conciliation. That they were not made was a clear indication of the existence of a dispute. Indeed evidence need not only be direct. Even circumstantial evidence could still help to establish applicant’s case.
6. Even though the learned arbitrator had said she was holding a pre-arbitration conference she found herself making an award

which can only flow from an arbitration. This shows that the learned arbitrator held an arbitration under the disguise of a pre-arbitration conference. This was clearly improper and irregular. This much was wisely conceded by Ms. Senooe for the 1st respondent. For these reasons the award is reviewed, corrected and it is set aside. As no proper arbitration was held the matter is remitted to the DDPR for proper arbitration to be conducted by a different arbitrator.

THUS DONE AT MASERU THIS 15TH DAY OF AUGUST 2008

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MS. SEPHOMOLO
MR. SENOOE