

IN THE LABOUR COURT OF LESOTHO

LC/REV/396/2006  
LAC/REV/115/2005

HELD AT MASERU

IN THE MATTER BETWEEN:

TIEHO POTLAKI

APPLICANT

AND

LESOTHO ELECTRICITY CORPORATION  
DDPR

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

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## JUDGMENT

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**Date: 14/10/08**

**Review - Applicant bringing appeal under the cloak of a review - principles distinguishing review from an appeal revisited - sec. 228(F)(1)(b)-Review of an award to be made within 30 days of applicant knowing about the award - application dismissed.**

1. The applicant was employed by the 1<sup>st</sup> respondent as a supervisor responsible for the commercial branch. He was stationed at Thaba-Tseka. He was a supervisor side by side with one Richard Mothobi who was supervisor responsible for the engineering branch. According to the evidence of DW1 Mr. Hofnie Lebone, even though the two were both supervisors, Mr. Mothobi was senior, and as such the applicant was responsible to him for the day to day supervision and authorization of expenditure.
2. The applicant was dismissed from his work on the 6<sup>th</sup> April 2004, following a disciplinary enquiry in which he faced a charge of falsification of records in that he had made a fraudulent claim for meal allowance for the dates, 17<sup>th</sup> and 20<sup>th</sup>

December 2002, 20<sup>th</sup> and 25<sup>th</sup> February 2003 and the 3<sup>rd</sup> March 2003.

3. Evidence led before the arbitrator was that, in terms of the 1<sup>st</sup> respondent's personnel regulations an employee who proceeded on tour of duty out of his normal place of work for at least six continuous hours, is entitled to claim allowance for meals for each day he is out of his duty station. Breakfast is claimable if the employee leaves his duty station at or before 6.00 in the morning.
4. During the period forming the subject of this litigation the applicant was supposed to be attending a computer course in Mokhotlong which is a different district from that in which applicant was normally based. He thus qualified to claim for meals for the days he was in Mokhotlong. The evidence shows that the applicant claimed for the days mentioned in the preceding paragraphs when he was in fact still in his duty station Thaba-Tseka. Evidence of 'Matumelo Marabe was led to show that the machines that sell electricity to the public were able to show that on the days in question the applicant had been one of the operators at Thaba-Tseka, a clear indication that he was not in Mokhotlong.
5. Evidence further showed that Mr. Mothobi who was the one who was supposed to authorize and pass applicant's claim for payment, refused to sign it because he knew that applicant had not been to Mokhotlong on those dates. It was further testified by DW1 that the applicant telephoned DW1 himself, to tell him that Mr. Mothobi was refusing to sign his claims and that they had been laying in Thaba-Tseka for a long time. DW1 said he advised applicant to report the matter to Mr. Mothobi's Manager so that the latter could find out why Mothobi was refusing to process staff's claims.
6. It does not look like applicant followed that advice. He instead took his claims to Human Resources Specialist (Mr. Mpota) in Maseru, who signed and passed the claims for payment. Evidence of DW1 is that the applicant's claim was duly paid by cheque numbers 0001367 and 000572 on the 25<sup>th</sup> July 2003.

- When Mr. Mothobi realized that the applicant and one Mr. Pule with whom they were both making false claims had been paid even for the days they were not supposed to claim, he insisted that they should pay back the money for those days.
7. This caused a friction between Mr. Mothobi on the one hand and applicant and Mr. Pule on the other hand. However Mr. Mothobi stood his ground and insisted that they must repay the money. Applicant and Mr. Pule sought to silence Mr. Mothobi by filing a claim of defamation against him in the Magistrate Court, in his capacity as the 1<sup>st</sup> respondent's supervisor. The 1<sup>st</sup> respondent was sued as the 2<sup>nd</sup> defendant. Evidence of DW1 is that the 1<sup>st</sup> respondent was served with the civil summons sometime in December 2003. The 2<sup>nd</sup> respondent was completely in the dark as to what had resulted in it being sued together with Mr. Mothobi.
  8. On the 29<sup>th</sup> December 2003, the management of the 1st respondent set up a team to investigate the reasons behind the litigation. The committee interviewed among others Mr. Mothobi who was the co-defendant with the 1<sup>st</sup> respondent. Having given the committee the origins of the court action and the fact that the applicant and his colleague had in fact made fraudulent claims for meals, the committee submitted its report on the 28<sup>th</sup> February 2004.
  9. On the 4<sup>th</sup> March 2004 the applicant was charged as aforesaid. The hearing was held on the 15<sup>th</sup> March 2004. He was found guilty and dismissed. He referred a dispute of unfair dismissal to the DDPR. Evidence as hereinbefore narrated was adduced by DW1. It is significant that that evidence was not challenged. In an effort to save his skin applicant came with a completely new story which had not been put to DW1 to enable him to deal with it, during cross-examination.
  10. That story was in any event contradictory. He averred that, the claim which the respondent alleges is false was authorized by his manager because he (the manager) had convinced himself that it was correct. He averred that he explained the claim to

the manager and the latter accepted his explanation and authorized the claim.

11. The explanation goes like this. Applicant says he submitted the claim for the 17<sup>th</sup> and 20<sup>th</sup> December 2002 even before he went to Mokhotlong because the firm was about to close for Christmas holidays. He testified that he wanted the claim to reach Maseru before closure so that he could get payment as soon as they reopened after the Christmas holidays.
12. Applicant testified further that when he had already sent the claim to Maseru, it happened that on the 17<sup>th</sup> and 20<sup>th</sup> December he failed to go to Mokhotlong due to work commitment. He averred that on the 21<sup>st</sup> December 2003 he was able to go to Mokhotlong and that he went again on the 10<sup>th</sup> January 2003. He explained the gap between the 21<sup>st</sup> December 2002 and 10<sup>th</sup> January 2003 by stating that the course they were attending was closed for Christmas on the 21<sup>st</sup> December and that it reopened on the 10<sup>th</sup> January 2003.
13. Applicant testified further that on the 20<sup>th</sup> January 2003, he came to Maseru to submit a claim for the dates 13<sup>th</sup> to the 16<sup>th</sup>, presumably of January 2003. He stated that he had excluded the 21<sup>st</sup> December and the 10<sup>th</sup> January from this claim to compensate the 17<sup>th</sup> and 20<sup>th</sup> December which he had already claimed and yet he had failed to attend the course. He averred that he explained the situation to the manager who then authorized the claim because he understood his explanation.
14. It was put to him during cross-examination that he should have called the manager to whom he allegedly reported to come and confirm his story. He said he did not deem it necessary to call him. This is a clear indication that applicant was fabricating. The learned arbitrator was also not eluded by applicant's machinations. Not only should he have called that manager, even during the investigations he should have been able to advance that version and roped in the alleged manager to confirm the version of the defence attributed to him.

15. The representative for the 1<sup>st</sup> respondent went further to ask the applicant which days of the week they were supposed to attend the course. He said Monday to Friday. It was then put to him that he could not have attended the course on the 21<sup>st</sup> December 2002 because it was a Sunday. He changed and said because he had missed some days the course facilitator had said he could attend “....anytime when I have a chance as I am behind with my studies I should come even on Sundays he will help me, that is why I even attended on Sundays...” (See p.75 of the transcribed record). Clearly applicant’s lie that he paid back the fraudulent claims by not claiming for the days such as the 21<sup>st</sup> December was exposed.
16. It cannot possibly be true that the applicant paid back the claims for 17<sup>th</sup> December and 20<sup>th</sup> December 2002 by not claiming for the 21<sup>st</sup> December and 10<sup>th</sup> January 2003 as he alleged. The cross-examination exposed that he was not telling the truth. Furthermore, applicant had been charged of claiming fraudulently for the 20<sup>th</sup> and 25<sup>th</sup> February and the 3<sup>rd</sup> March 2003. He made no attempt to advance a plausible defence to the accusation relating to those dates.
17. Against the backdrop of these facts the learned arbitrator came to the conclusion that the dismissal of the applicant was fair. He accordingly dismissed the referral on the 30<sup>th</sup> June 2005. On the 29<sup>th</sup> July 2005, the applicant purported to file a Notice of Appeal against the award of the learned arbitrator. This was an irregular step in as much as arbitral awards of the DDPR are final and binding (see Sec. 228E(5) of the Labour Code (amendment) Act No.3 of 2000, (the Act). The DDPR awards may not be appealed against and a party seeking to challenge the outcome of an arbitral award may only do so by applying for review of the award within 30 days of the award coming to his notice. (See Sec. 228F(1)(a) of the Act).
18. On the 6<sup>th</sup> April 2006, the applicant, acting through his attorneys of record purported to file a Notice of Motion in which he prayed for the review and setting aside of the award of the learned arbitrator dated 30<sup>th</sup> June 2005. The Notice of Appeal issued on the 29<sup>th</sup> July 2005 was neither withdrawn nor sought to be

substituted with the application for review. In essence therefore, this court is faced with two actions flowing from the same award.

19. Applicant sought to have the award reviewed and set aside on the following grounds;
- (i) The learned arbitrator erred in dismissing my claim because I explained that those claims I had made were substituted by other traveling to Mokhotlong which I did not claim for.
  - (ii) Learned arbitrator erred in holding that I was getting money through false records because my manager was informed and officers responsible had signed the claims.
  - (iii) The learned arbitrator erred in rejecting my evidence.
  - (iv) The learned arbitrator erred and misdirected himself by holding that I had not disclosed how the act was resolved.
20. In their Answer the 1<sup>st</sup> respondent raised two preliminary points. These were that:
- (i) Applicant has made no case for review. On the contrary he has argued the matter as though it was an appeal.
  - (ii) The review application is hopelessly out of time as it has been lodged almost after a year since the award was handed down.

On the date of hearing the court was addressed on the preliminary points after which it reserved its ruling and adjourned the proceedings *sine die*. This is now that ruling.

21. Mr. Shale for the 1<sup>st</sup> respondent contended that applicant's review is a disguised appeal. He submitted that the review procedure is appropriate where the real grievance is against the method of trial. With regard to the lateness Mr. Shale referred us to section 228F(1)(a) of the Act which provides that, a party seeking to review any arbitration award issued under this part shall apply to the Labour Court for an order setting aside the award:

*“within 30 days of the date the award was served on the applicant, unless the alleged defect involves corruption.”*

He contended that the court is not in a position to condone applicant’s lateness in terms of subsection (2) because the applicant has not shown good cause why his late filing of the review should be condoned.

22. In support of his argument that the review procedure is appropriate where the complaint is against the method of trial, Mr. Shale referred to the case of LEC .V. Liteboho Ramoqopo & Anor. LAC/REV/121/05 (unreported). In that case Mosito A.J. relying on the decision in Johannesburg Consolidated Investment Co. .v. Johannesburg Town Council stated that:
- “the term judicial review denotes the process by which apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before this court in respect of gross irregularities occurring during the course of such proceedings.”* (See p 11-12 para 14 of the typed judgment).
23. Put differently, since the primary function of the courts is to apply the law in the resolution of disputes the courts supervise the legality of administrative action through the process of judicial review. In the exercise of its review powers:
- “a court will seldom substitute its own decision for that of the administrative body in question, it will usually only set it aside or prevent it being implemented.”*  
(see Lawrence Baxter, Administrative Law, 1984 Juta & Co. pp. 305 and 307).
24. The distinction between review and appeal has been restated in more or less similar terms in many other decisions such as the court of appeal decision in Teaching Service Commission and 3 Others .v. Judge of the Labour Appeal Court & 4 Others C. of A(CIV) No.21 of 2007, where the learned Judge of Appeal stated that, “review is not directed at correcting a decision on the merits. It is aimed at maintenance of legality.” (P.5 of the typed judgment). In Paul Mosa Mosuoe .v. Judge of the High Court Mr. Justice S. N. Peete & 4 Others C. of A (CIV) No.18/07 the Appeal Court held that it has jurisdiction “... to entertain

review proceedings instituted against decisions of the High Court on bail applications on grounds of gross irregularity or illegality which result in failure of justice or render such decision a nullity.” (see pp 7-8 of the typed judgment).

25. In the case of Charles Montoe Mphaololi .v. President of the Labour Court 1997 - 1998 LLR-LB 247, the appellant had sought a review of the decision of the Labour Court in the High Court. His application was dismissed. He then appealed against the High Court decision to the Court of Appeal. In dismissing his appeal the court considered the primary enquiry as being:

*“whether the judgment of the Labour Court is vitiated by some irrationality or procedural impropriety which required the court a quo to interfere with its order. No suggestion of procedural impropriety was made. And in my view its finding that the appellant was the author of his own misfortune, is not only not irrational, but cannot be faulted.”* p.261.

In the case of National Union of Retail & Another .v. Court President (Labour Court) & Another 1997 - 1998 LLR-LB 495 at 503, in dismissing the appeal the Court of Appeal noted that “no evidence was adduced in the High Court relating to the conduct of the proceedings in the Labour Court as a ground of review consisting of for example any irregularity committed by the Labour Court.”

26. Reverting to the facts of the instant case, and the grounds of review, none relate to the conduct of proceedings in the DDPR consisting of any irregularity procedural impropriety or illegality which calls for this court’s interference with the award of the arbitrator. All the grounds of review raised by the applicant seek to have the award set aside on the grounds that the arbitrator came to a wrong conclusion on the facts. As it was held in JDG Trading (Pty) Ltd case supra once a party seeks to have an award set aside on that ground namely; that the arbitrator came to a wrong conclusion on the facts, the correct approach is an appeal.



27. It is clear from these grounds that the applicant is dissatisfied with the outcome. Hence the grounds of review simply dispute the conclusions the learned arbitrator reached. They (the grounds) are not aimed at the maintenance of legality. They are instead seeking to invite this court to substitute its decision in place of that of the arbitrator, a function which is not, except in rare exceptional cases, performed by a review court. (see Lawrence Baxter supra at p.307 and the Teaching Service Commission case supra at p.6.). It follows from these observations that the conclusion to which we must arrive is that the first preliminary point is well taken. It must therefore succeed.
28. The above conclusion namely that applicant's review is an appeal in disguise, completes the determination of this matter. Save to add that even the 2<sup>nd</sup> preliminary point is bound to succeed given that the appeal step taken on the 29<sup>th</sup> July 2005 was an irrelevancy which is not necessary to deal with. The correct step was the review application which was filed approximately a year after the award.
29. The act requires that a review application must be filed within 30 days of a party seeking the review got to know of the award. Applicant has not disclosed when he received the award. We can however safely conclude that he received it before the 29<sup>th</sup> July 2005, this being the date on which he filed an appeal against the award. Counting from July 2005 to 4<sup>th</sup> April 2006 when he filed the review that is approximately ten months.
30. Section 228F(2) empowers the court to condone the late filing of a review application "on good cause shown." In other words the court is vested with discretion to condone the lateness if the defaulting party shows good cause for his default. Applicant herein did none of that. He approached the court as though everything was legally and procedurally in order when the exact opposite was the case. Accordingly, we find that even the second preliminary point is well taken and as such it must succeed. In the premises this review application ought not to succeed. It is accordingly dismissed. We have made no order as to costs.

THUS DONE AT MASERU THIS 30<sup>TH</sup> DAY OF OCTOBER 2008

**L. A. LETHOBANE**  
**PRESIDENT**

**M. THAKALEKOALA**  
**MEMBER**

**I CONCUR**

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

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. LEPHUTHING**  
**MR. SHALE**