

IN THE LABOUR COURT OF LESOTHO

LC/REV/67/07

HELD AT MASERU

IN THE MATTER BETWEEN

J. D. GROUP (LESOTHO) (PTY) LTD
t/a PRICE & PRIDE

APPLICANT

AND

LABOUR COMMISSIONER (obo)
MOLAHLI MOLAHLI
ARBITRATOR KETA NO

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date : 06/11/08

Review of DDPK award - Applicant noted an appeal under the guise of a review - Conflict of laws - Section 242 of the Code enjoins a court in Lesotho to apply the lex fori - Application dismissed.

1. This review is brought against an award and not the proceedings of the 2nd respondent where he directed the applicant to effect payment of the proceeds of the pension fund benefit due to Mr. Molahli, its former employee. There is no dispute that Mr. Molahli, the former employee of the applicant qualifies for M26,237-79 pension fund benefits following termination of his services with the applicant company.
2. When the benefit delayed to be paid Mr. Molahli reported his dissatisfaction to the Labour Commissioner who instituted a claim on his behalf at the DDPK. The applicant through its attorney conceded its indebtedness and undertook to facilitate the transfer of the funds to Mr. Molahli within an agreed time frame. The promise was not fulfilled and the learned arbitrator summoned the parties back before him.

3. It was at this meeting that Mr. Molete, who then represented the applicant herein reported that in his efforts to pursue payment of the money he encountered problems in the form of correspondence he received from Alexander Forbes, a company contracted to manage the pension fund, which told him that the pension payable to Mr. Molahli is regulated by the South African Income Tax Act. The same was corroborated by the South African Revenue Services.
4. It must be stated for the sake of clarity that the application of the South African Income Tax Act was not just in respect of the tax payable which would be difficult to resist given the origin of the pension fund benefit. The application of the Act was with regard to how the pension fund benefit should be paid out to Mr. Molahli. It was submitted that the law required that Mr. Molahli be paid 1/3 of the benefit and that 2/3 be applied to buy him a monthly pension cover.
5. The nature of Mr. Molahli's referral to the DDPR was that he needed to be paid the full benefit in one lump sum. This was the common understanding of the parties until Mr. Molete reported his predicament to the Arbitrator, who after hearing the report asked "Ntate are you aware that the income tax act that you referred to is not applicable to the applicant as the applicant was employed in Lesotho?" Mr. Molete responded that he was aware. The learned arbitrator asked him further:
"Arb : So what do you suggest we do?
Mr. Molete : I think it is for this court to pronounce itself on the basis of what I have submitted."
6. The learned Arbitrator did precisely that and ruled that:
"the applicant in the present matter was not employed by the South African Revenue Services or Alexander Forbes. He was employed by the respondent a company registered in Lesotho and subject to the laws of Lesotho and not the laws of South Africa."
 The learned Arbitrator ruled that the applicant herein should pay Mr. Molahli his pension fund benefit. That was on the 14th March 2007. On the 11th June 2007, the applicant filed for the

review of the award and also sought condonation of its late filing of the review. The condonation was not opposed as such it was granted as prayed.

7. Under paragraph 4 of the Notice of Motion the applicant prayed for:

“reviewing, setting aside, and correcting the arbitration award of the DDPR dated 14 March 2007.... And directing that the applicant shall pay M26,144-15 pension benefit due to Molahli Molahli from applicant’s pension fund administered by Alexander Forbes only in accordance with the applicant’s pension fund rules and subject to South African Revenue Services directives in terms of the South African Income Tax Act and other laws that govern pension managers in South Africa.”

This prayer points to no irregularity on the part of the learned Arbitrator in the exercise of the powers vested in him by the law. It is trite that a review is a procedure by which proceedings of inferior courts are corrected by this court “in respect of gross irregularities occurring during the course of such proceedings.” (See LEC .v. Liteboho Ramoqopo & Anor. LAC/REV/121/05 (unreported at p.12 of the typed judgment)).

8. We have pointed out herein before that the learned Arbitrator sought to be guided as to what he should do with the South African law that was being raised in argument before him. Counsel for the applicant herein submitted that he should make a ruling on the submission he had made. The learned Arbitrator has made a ruling which we may or may not like. However, in terms of section 228E(5) of the Labour Code (Amendment) Act 2000, that finding that he has made is final. What the applicant is calling this Court to do is to substitute its decision for that of the Arbitrator, which will in effect be a clear appeal. Not only is that prohibited by the Act, but it will also infringe the general rule applicable to reviews namely that in a review, “a court will seldom substitute its own decision for that of the administrative body in question” (See Lawrence Baxter Administrative Law 1984 Juta & Co. p.305, see also Tieho Potlaki .v. LEC & Anor. LC/REV/396/06 (unreported)).

9. It was contended that the award should be reviewed because the arbitrator's choice of the *lex fori* of the parties was wrong and that he failed to appreciate that *situ* of the benefit chosen by the contracting parties in the case was South Africa... There was no evidence before the learned Arbitrator that the parties had chosen South Africa as the *situ* of the benefits. Even assuming that was so, the learned Arbitrator was enjoined by section 242(2) of the Code to apply the *lex fori*. The said section provides:

“(2) In any case where both the laws of Lesotho and the laws of another state could be applied in regard to the rights or entitlements of employees their survivors or heirs, a court shall be bound to apply the Laws of Lesotho.”

In the circumstances we are of the view that this application ought not to succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE IN MASERU THIS 28TH DAY OF NOVEMBER 2008

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I AGREE

M. MOSEHLE
MEMBER

I AGREE

FOR APPLICANT :
FOR RESPONDENT :

MR. MOILOA
MS RUSSEL