

IN THE LABOUR COURT OF LESOTHO
HELD AT MASERU

LC/REV/27/07
A0040/07

IN THE MATTER BETWEEN

MOHLOMINYANE LEBITSA

APPLICANT

AND

THABO KHETLA
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date : 18/03/09

Review – It is irregular for the arbitrator to use information obtained at conciliation to formulate an award because conciliation is a confidential and off the record process – award reviewed, corrected and set aside.

1. This review arises out of the award of learned arbitrator Malebanye dated 9th March 2007. In that award the learned arbitrator ordered the applicant to pay 1st respondent M16,288-00 in monthly installments of M400-00.
2. On the 3rd April 2007 the applicant filed an application for the review and setting aside of the award. The applicant deposed to a sworn affidavit that he had employed the 1st respondent from February 2005 to December 2006 when the latter absconded without giving notice. He averred that when 1st respondent resurfaced he was suing him at the 2nd respondent claiming M25,085-00 being alleged underpayments for the period February 2003 to December 2006.
3. Applicant avers further that the 2nd respondent found for the 1st respondent and ordered him to pay the amounts as stipulated in

paragraph 1 above. He filed for review of the award alleging procedural irregularities and improprieties in the following respects:

- (i) 2nd respondent erred in finding that I am indebted to 1st respondent in the sum of M16,288-00.
- (ii) 2nd respondent erred in not mentioning how the sum of M16,288-00 is arrived at and the period it covered.
- (iii) 2nd respondent erred in finding that I have to pay M400-00 without taking into consideration the amount of money I make per month.
- (iv) 2nd respondent erred and misdirected herself in finding that there has been an agreement at the conciliation that I am indebted to 1st respondent in the sum awarded.
- (v) 2nd respondent erred in not accepting my evidence that 1st respondent took annual leave and rest days during the time of his employment.
- (vi) 2nd respondent erred and misdirected herself in not giving me an opportunity to give evidence of how 1st respondent was being paid when he started working for me.

4. We have taken the deposed averrements from the founding affidavit of the applicant because there is nothing either in the record or in the award of the learned arbitrator that tells us about the background to this dispute. Accordingly, the applicant cannot be faulted when he deposes under oath to deficiencies as outlined in paragraph 3 above. Both the record and the award are dead silent about all those alleged deficiencies in the conduct of the arbitration proceedings.
5. Even though I use the word arbitration it is not evident from the record that arbitration was held. It looks like conciliation instead was held. The record and the award are a reflection of what went on during the conciliation process. This was patently irregular, because pursuant to the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004 clause 8 (3) (b) and (d), conciliation is a confidential and off the record and without prejudice process. Clause 8 (3) (d) (ii) specifically provides that:

“the parties undertake not to use anything said in confidence or any offer made during proceedings in any court or arbitration.”

6. I have emphasized the word arbitration to underscore that to refer to what was said in conciliation at arbitration as was done in casu is contrary to the guidelines. Conciliation itself as a process cannot give rise to an award, but to a settlement agreement. (see clause 8 (7) of the guidelines). In the present matter conciliation seems to have resulted in an award which procedurally can only flow from an arbitration. There is no indication that conciliation was concluded and steps to enter an arbitration stage were initiated. All indications are that information gathered at conciliation is the one that was used to formulate the award. This is wrong and it accordingly calls for this court's interference with the learned arbitrator's award.
7. The record starts by showing that the learned arbitrator confirmed that there was no dispute over what is owed and that what was disputed was only the mode of payment. Whilst she obtained positive responses on the face of the record, the responses were given without any oath being administered on either party in terms of Clause 26 (8) of the guidelines which provides that:
“the arbitrator must first swear or affirm the witness in and advise the witness of the process of questioning.”
 It follows that whatever concessions or admissions the parties made about the so-called agreement are not admissible in as much as they were not made on oath. In the circumstances the award in A0040/07 stands to be reviewed, corrected and set aside due to it being irregular and procedurally improper in as much as it has not been made in compliance with the conciliation and arbitration guidelines and the regulations. There is no order as to costs.

THUS DONE AT MASERU THIS 25th DAY OF MARCH 2009

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENTS:

ADV. MAHAO
NO APPEARANCE