

HELD AT MASERU

In the matter between:

RUMDEL CONSTRUCTION LESOTHO
(PTY) LTD

APPLICANT

and

‘MALEFU MOTJOKA
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date: 28/03/09

Review of Arbitral proceedings - Applicant complaining that the computation of the award failed to take into consideration that the employee's wages were paid by the hour and were not fixed.

1. This is an application for the review of arbitral proceedings in A 0239/07, wherein the 1st respondent, applicant's former employee, had challenged her dismissal on both procedural and substantive grounds. She succeeded on the former and was awarded compensation and wages for two weeks.

2. The applicant was dissatisfied with the computation of the award, hence these proceedings for its review. The grounds for review as stated *verbatim* are that;

(i) "The 2nd Respondent erred in not considering the presumption that, when Applicant left the workstation and went away, this constituted summary dismissal;

(ii) The 2nd respondent erred in formulating the award, that is, she

said 'the Applicant's wages for two weeks are M4.56 x 90 = M410.00'. the applicant never demanded two weeks wages and this was never said and or canvassed at the hearing and in the reasons for the award;

- (iii) The 2nd respondent erred in calculating the four months' compensation as thus: M4.56 x 195 hrs x 4 months = M3,556.80. the learned Arbitrator did not ask and or no evidence was adduced in respect of the number of hours the applicant worked in a month;*
- (iv) The 2nd Respondent failed to acknowledge that the written warnings were for different occasions, thus concluding there was double jeopardy".*

3. The first ground for review is not very clear but since it was not canvassed in Court, we will not bother ourselves with it. It should be noted at this juncture that the 1st respondent did not enter appearance and was not represented at the proceedings. Having satisfied itself that she had been properly served, the Court proceeded to hear the matter by default.

4. The circumstances surrounding the dispute are briefly that the 1st respondent had been engaged by the applicant as a Flag Clerk, a job entailing the control of traffic at a construction site. Her services were terminated on the ground that she had led traffic onto an area that had just been blasted without the foreman's instructions, thereby compromising safety. It emerged during proceedings before the Directorate of Dispute Prevention and Resolution (DDPR) that the 1st respondent had already received two warnings for the same misdemeanor and insubordination. On this occasion the 1st respondent was summoned to the office of the applicant in the presence of Messrs Chele, the Health and Safety Supervisor and Basil, her Supervisor. She apparently threw away the flag and left.

5. Following this incident, the 1st respondent was dismissed. Upon challenging this dismissal at the DDPR, the learned Arbitrator had found her guilty of misconduct, thereby finding the dismissal to have been justified substantively. She however established that the 1st respondent had not been afforded a hearing prior to the dismissal, and therefore found it to have been unfair on procedural grounds. She was awarded two weeks wages and compensation of four months wages for unfair dismissal. The applicant is querying the computation of this award on the basis that it was based on the wrong assumption that the 1st respondent's wages were fixed when she was in fact paid by the hour. It was contended on applicant's behalf that

her wages at the end of the month were determined by the number of hours she had worked in each month.

6. It is worth noting that the matter is reviewable as this Court is not reviewing the learned Arbitrator's decision *per se*, but how it was reached. It is trite that review proceedings are limited to attacking the decision-making process - see Baxter, Administrative Law, 1984, Juta at p.305 and not the decision itself. The test applied is whether the presiding officer in the Court *a quo* applied his/her mind to the case before her as illustrated in *Coetzee v Lebea No & Ano., (1999) 20 ILJ 129 (LC)* that ***"the best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied."***

7. From the record and the award at p.3, it is clear that the 1st respondent's wages in a particular month were dependent upon the number of hours she would have worked. The point was raised by Mr Chele, the Health and Safety Officer of the applicant and acceded to by the 1st respondent. Naturally, the wage fluctuated from month to month. In assessing the amount of compensation due the learned Arbitrator ought to have heard evidence on the wages for some months and then calculated the average. This would have taken into account the peculiar circumstances under which the 1st respondent had been remunerated that is, on an hourly basis. This was not a standard contract where employees normally have a fixed monthly remuneration. The award seems to have been based on the assumption that the 1st respondent was paid a regular wage, much as it has clearly been reflected in the body of the award that 1st respondent's earnings were assessed by the number of hours she had worked in a particular month.

8. The Court has a problem with the manner in which the award was reached. It is therefore ordering that evidence be led, before the same Arbitrator, on the amounts that the 1st respondent earned so as to be able to determine the average wage. On the second ground for review that the learned Arbitrator ordered two weeks wages when it was never prayed for, the Court could not identify anywhere where this prayer emerged or was motivated. In *Ventersdorp Town Municipality v President (1992) 13 ILJ, 1465*, the Court held that it is irregular to rule on issues not identified in pleadings and in respect of which no evidence is led. The Court therefore finds no basis for the learned Arbitrator to have awarded the 1st respondent two weeks wages when it appears to have not been canvassed anywhere in the record.

There being no prayer for costs, the Court is not awarding any.

**THUS DONE AND DATED AT MASERU THIS 23rd DAY OF MARCH,
2009.**

**F.M. KHABO
DEPUTY PRESIDENT**

**MR. J. TAU
MEMBER**

I CONCUR

**MRS. M. MOSEHLE
MEMBER**

I CONCUR

FOR APPLICANT: ADV. PHOKA THENE

THE RESPONDENTS WERE NOT REPRESENTED.