IN THE LABOUR COURT OF LESOTHO **LC/REV/57/08**
A0189/08

HELD AT MASERU

IN THE MATTER BETWEEN

LEADER PROPERTIES CONSTRUCTION **APPLICANT**

AND

RAKUBUTU MASIEA **1ST RESPONDENT**
MOTLALEPULA MOILOA **2ND RESPONDENT**
LEKHOLO LITABE **3RD RESPONDENT**
TSOTLEHO CHOMANE **4TH RESPONDENT**
DDPR **5TH RESPONDENT**

JUDGMENT

Date : 06/05/09
Review – Arbitrator committing a mistake of law which materially affected his decision – Award reviewed and set aside in terms of sec. 228F (3) of the Labour Code (Amendment) Act 2000.

1. The first four respondents were applicants in the DDPR referral no. A0189/08, which was heard and finalised by Arbitrator Nko on the 4th July 2008. The applicants had with the assistance of their union, Construction and Allied Workers Union (CAWULE) referred a dispute concerning alleged underpayments of wages. They alleged that their employer classified them as retail workers while they were infact construction workers. They contended that as a result of that wrong classification they were underpaid wages in as much as the minimum wage applicable to a construction worker is higher than that applicable to a retail worker.

2. The matter was conciliated and when conciliation failed it proceeded to arbitration. It is common cause that arbitration the respondent company, though represented at the arbitration did not lead any evidence because the company representative said he was waiting for the Managing Director Mr. Kenneth who did not show up. The matter was therefore as good as determined by default.

3. Be that as it may the learned arbitrator was well aware of the nature of the dispute before him. It was clearly one which involved the proper classification of the applicants before him, whether in terms of the relevant Minimum Wages Order, the applicants were indeed construction workers as they alleged. It follows that even on the basis of evidence of one side the learned Arbitrator ought to have come to an informed conclusion of what the proper classification of the applicants was. This was more so because the nature of the business of the applicant herein was never in dispute.

4. Even though the applicant company is called a construction, it is however trading as a hardware store. The four respondents herein work at this store. These are the facts that were before the learned Arbitrator and he has found as much that the respondent owns a retail store which is where the four applicants are said to be working.

5. The four respondents contended before the DDPR that they loaded and unloaded construction vehicles and constructed firms at Maputsoe and Thetsane industrial estates. If this was the case, it was plainly illegal for a hardware store to operate as a construction company when there are companies which are registered to carry out that kind of work.

6. Instead of the union standing up to expose the fraud being perpetrated by the applicant if indeed any was being perpetrated, it referred a dispute to the DDPR that the respondents be paid as construction workers. No investigation was conducted to establish the veracity of the allegations that the respondent doubled as a construction company. However, hard evidence known to the learned Arbitrator and confirmed by

production of a trading licence before us is that the applicant is trading as a hardware store and this is where the respondents work.

7. This notwithstanding the learned arbitrator found that the respondents were construction workers. He based his finding on the definition of constriction sector as defined in the Labour Code Wages (Amendment) Order 2008, which provides:

> *"construction sector" "means any business or undertaking operating in the building of infrastructure or structure e.g. roads foot patches, houses, bridges, walls or related structures and this includes those undertakings operating in the manufacture and collection of such building material, e.g. crush stones and brickmaking."*

He proceeded to award that the respondents be paid certain monies as differences between what they were paid as retail employees and what they would have been paid if they had been properly classified as construction sector workers. He awarded payment of a total of M22,818-00 plus M1,000-00 payable to each of the respondents as costs.

8. Against this award the employer applied for review on the ground that:

> *"the learned Arbitrator committed a serious irregularity by classifying the applicant company as belonging to construction while it was infact a hardware as it fully reflects on the Annexure "A" to the affidavit, this aspect accords with the nature of the work that the applicant company is undergoing. The Arbitrator did so despite the fact that this issue was fully canvassed before him and it was clear that the company is a hardware store."*

In seeking to deny the truthfulness of this ground of review in paragraph 6 of their Answer, the respondents, stated that the averrement is stated for the first time as it was not raised at the arbitration. They contended further that in any event "a hardware is classified under the construction sector in terms of the Labour Code Wages Orders 2005 and 2006 respectively."

9. The first basis on which the respondents attack the applicant's ground of review relates to what we said earlier that even though the applicant did not testify at the arbitration, the learned Arbitrator had got to know at least at conciliation that the applicant is a hardware store. When he got to arbitration, he knew that he was dealing with employees of a hardware who wanted to be classified as construction workers. Thus the really enquiry would have rested on the respondents' second ground of attack namely that in terms of the Labour Code Wages Orders a hardware store is to be classified as construction sector.

10. The respondents further sought to put the applicant to the prove of the averrements they make that they are a hardware store. As already stated, this fact would have already been known to the learned Arbitrator in as much as the parties would have identified themselves who they were at their very first encounter. This was not disputed, but for the allegation that the applicant sometimes carries out construction activities, which is not what it is registered to do. The representative of the applicant had gone a step further and annexed a trading licence which showed that the applicant is licensed to trade as a hardware.

11. It seems to this court that the required prove was infact produced in the form of a trading licence and the undenied fact that the respondents are employed by the hardware store which is licensed to trade at Matsoatlareng in Maseru. The respondents bore the onus to prove that they were employed by a construction company and not the hardware store.

12. From their contentions they could not discharge this onus. They wanted the court to find that as hardware store employees they should be classified as belonging to the construction sector. This is the simple straight forward issue which the learned Arbitrator was called upon to decide. Can a hardware store be classified as construction sector in terms of the minimum wages order.

13. The learned Arbitrator clearly misconstrued his responsibility which is to do "substantial justice between the parties before (him)." He adopted an erroneous approach that he should find for the party present before him even when the finding is clearly contrary to the law.

14. From the definition of "construction sector" that is provided in the Wages Order, it is clear that a hardware store cannot fit into that definition. For it to qualify as a construction sector it must operate a construction company just like the applicant operates a hardware store. No evidence was placed before the learned arbitrator that the hardware operated a registered construction company which if it did, would operate as a separate company from the hardware store.

15. In the premises we found that the learned Arbitrator completely misconstrued the law to the extent that he sought to classify a hardware store as a construction company which in any event was not proved to be. For this reason the award was reviewed, corrected and set aside.

16. To make matters worse, the learned Arbitrator awarded exhorbitant costs of M1,000-00 for each of the respondents. No indication was given in the award why it was necessary to award costs in the circumstances. By all accounts the imposition of costs was itself a high handed arbitrary punitive act, which was imposed by the learned Arbitrator unilaterally. In the circumstances the award of the learned Arbitrator is reviewed, corrected and it is set aside. There is no order as to costs.

THUS DONE AT MASERU THIS 15th DAY OF MAY 2009

L. A. LETHOBANE
PRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **MR. KENNETH**
FOR 1ST – 4TH RESPONDENTS: **MR. CHAOATSANE**
OF CAWULE