IN THE LABOUR COURT OF LESOTHO LC/REV/42/09

HELD AT MASERU

IN THE MATTER BETWEEN

THABO MOHLOBO	**1ST APPLICANT**
THABISO SENGOATSI	**2ND APPLICANT**
MENTSELE MELATO	**3RD APPLICANT**
ISAAC SEPETLA	**4TH APPLICANT**
LEBOHAJOANG RANTHO	**5TH APPLICANT**
SEBOKA PUL	**6TH APPLICANT**
RAMOREBOLI CHABELI	**7TH APPLICANT**
SEPHULA LETUKA	**8TH APPLICANT**
NTIMO NKOME	**9TH APPLICANT**
JOSEPH KOABATSANA	**10TH APPLICANT**
MOTSUMI RALITAPOLE	**11TH APPLICANT**
MOEKETSI JAASE	**12TH APPLICANT**
JOBO LEROTHOLI	**13TH APPLICANT**
PHEELLO RATSOANYANE	**14TH APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**1ST RESPONDENT**
DDPR ARBITRATOR – M.M. MPHOFE	**2ND RESPONDENT**

JUDGMENT

Date: 21/04/10
Review – The court will not interfere with an award even if an error of law is committed if the DDPR is given exclusive power to determine the issue in question by the legislature – Review distinguished from appeal – Application dismissed for failing to establish reviewable irregularity.

1. This review application arises out of the dismissal of the referral of the applicants by the 2nd respondent on the 22nd June 2009. The referral was for reasons that we will show, queer and novel. The 14 applicants were admittedly employed by the 1st respondent in one of its special projects called Katse Lejone Matsoku Water Supply, Sanitation and Refusal Disposal Facilities Program (KLM-WATSAN).

2. The Project Manager was Mr. Monareng Marojane. The project duly represented by the Project Manager entered into written contracts with each of the 14 applicants. The contract stipulated, inter alia, an employee monthly salary and the mountain allowance of M300-00 per month payable to each of the applicants. Each of the applicants admittedly signed the contract with KLM WATSAN. While the dates of first engagement may differ it appears from the two contracts handed in as exhibits that the employees signed these contracts on or around 16/12/06.

3. Evidence which is common cause shows that the applicants served under these contracts until they (applicants) were retrenched in April 2008. The letter of termination which the applicants do not challenge was signed on behalf of the program by the Project Manager Mr. Marojane.

4. On the 21st July 2008, the applicants referred a dispute of breach of contract by the LHDA to the DDPR. Now this is where the novelty comes in. The contract alleged to have been breached is not specified. If it is the one entered into with KLM WATSAN, it is not particularized in what manner it has been breached. Assuming it had indeed been breached, ought it not to be noted and allowed to rest, given that the contract had been entered into in good faith and that it has run its course with neither party having any complaint about its validity?

5. The referral was set down for arbitration on the 9th March 2009. At the arbitration two witnesses testified on behalf of the applicants. In his testimony PW1 Mr. Isaac Sepetla did not testify to support the claim of breach of contract. His evidence was that he was an employee of the LHDA, a fact which is not denied by the 1st respondent, save that the latter qualified that PW1 was an unskilled

labourer, recruited to work on special projects site.

6. His testimony was further that he was governed by the LHDA Human Resources Manual and that in terms of that manual he was entitled to deprivation allowance of M1,800-00 a month. Interestingly however, when he was asked by his legal representative if he knew about the manual that he claims governed him, he said he did not. He explained further that he did not do anything about the allowance of M300-00 he was getting because he did not know of the manual and the M1,800-00 it provided for, until after the termination of his contract.

7. The question is which contract was terminated? It is clearly the one with KLM – WATSAN. PW1 was further asked at p.45 of the record, whether the deprivation allowance to which he claims entitlement formed part of his contract or the terms of his contract, he said he could not say it did. If it did not form part of his contract, the question is where did failure to pay the said allowance constitute a breach of a contract, if at all that is what is meant by the complaint of breach of contract?

8. The witness testified that the deprivation allowance was a right of employees of the LHDA – (see p.45 of the record). Surely this could not be correct if PW1's evidence that the allowance he claims did not form part of his contract is to be believed. His testimony clearly throws his claim to the class of interest disputes and not right disputes. This becomes more evident from his further evidence at p.46 of the record that two other people who worked with him earned the said deprivation allowance, when he did not.

9. The witness was referred to the contract he signed with KLM-WATSAN and asked if KLM-WATSAN was a legally instituted entity. He said it was not; as he had not seen its register. I assume he meant Registration Certificate. He was asked if KLM WATSAN could enter into a legally binding contract. His response was that it could not because "It has no authority and such a contract would have no effect in law."

10. The witness and his counsel were clearly blind fishing and engaging in a dangerous exercise of speculation. In the absence of hard and direct evidence that KLM WATSAN was not registered, there was no

way that a definitive conclusion could be made that it could not enter into a legally binding contract. Let alone that no authority was advanced for the proposition that assuming the correctness of the suspicion that KLM WATSAN is not a legally registered entity; it could not enter into legally binding contract as a specialised program of the LHDA.

11. It seems to this court however, that if indeed it was correct that KLM-WATSAN could not legally enter into the contracts it purported to enter into with the applicants, that would not advance the case of the applicants an inch. If the contracts were illegal it would mean the end of the story for applicants, because the LHDA would rightly disown them as illegally engaged personnel. However, the long and short of all this is that, the fact that KLM WATSAN was not a registered entity as alleged, does not establish a case of breach of contract as alleged by the applicants.

12. The 2nd witness on behalf of the applicants, was Mr. Moeketsi Jaase. He had started to work with the 1st respondent under the special contract KLM-WATSAN in 2004. His testimony was that he was told upon engagement that he was an employee of KLM-WATSAN. He was asked if KLM-WATSAN could enter into a contract with him as an employer. The witness answered yes. (see p.52 of the record). He was asked if he signed a contract. He initially denied, but when he was shown the contract he accepted that he signed a contract with KLM-WATSAN.

13. In response to further questions from his counsel the witness indicated that there were some people who were under him at KLM-WATSAN who were paid by the LHDA and received mountain allowance of M1,800-00 from the LHDA. He testified that this caused a confusion as a result they met with the Project Manager enquiring about the disparity. (see p.52 of the record). The Manager allegedly promised to meet with the bosses, but never came back to give a feedback.

14. PW2 testified further that when the Project Manager did not come back to them to give them a feedback, they took the matter to court. This testimony conflicts with the response the witness gave to a question whether the M300-00 mountain allowances was ever raised since 2004, when he was employed until 2008 when he was

terminated. His answer was no. Furthermore, his response to the question from Mr. Pheko whether he ever complained about the mountain allowance was again a no. This witness was clearly by and large fabricating his testimony.

15. The witness was asked why he felt he was entitled to the higher allowance, he said he was entitled to it like his colleagues who were getting it. This is a further indication that this is an interest dispute, since PW2 just like PW1 feels he is entitled because others are getting it, not because their contract entitled them to it. In any event the evidence of this witness just like that of PW1 did not establish a breach of contract which the applicants are complaining about.

16. At the close of the proceedings, the arbitrator made an award in which she found that there is nothing in law or practice that disallows an employer to have two different contracts with his workers. She found further that the applicants entered into valid written contracts with LHDA under the KLM WATSAN Project. She found further that the 1st respondent has discharged the onus to show why the applicants were treated differently from the permanent staff based at the headquarters. "The operations of the LHDA make it necessary to at times deploy unskilled labourers to perform some duties. It would be a fallacy for them to expect to be paid as for example engineers," she opined. Against the backdrop of these findings the learned arbitrator dismissed the referral and stated that the 1st respondent performed its obligation to pay applicants M300-00 as stipulated in the contract.

17. Against this award the applicants sought a review on the ground that the learned Arbitrator erred, misdirected herself and made a mistake of law which materially affected her decision in holding that:

    a) The contracts which the applicants signed with KLM WATSAN were valid contracts despite the fact that the said KLM WATSAN was not a registered entity in law.

    b) The contracts with KLM WATSAN were legally signed with the 1st respondent without any purported legal delegation or authority.

    c) The 1st respondent HR manual did not apply to the

applicants as part of their contracts of employment which could not be changed without their consent.

d) The 1st respondent was entitled to treat the applicants differently in law or exempt applicants from the application of the HR manual.

18. In their Answering Affidavits the 1st respondent raised a point in limine that: the grounds articulated by applicants are infact grounds of appeal and not grounds of review. As would be expected the court was prepared to deal with and dispose of the point in limine before attending to the merits of the review. However, at the start of the proceedings counsel for the applicants rose to record that they had agreed with counsel for the 1st respondent to adopt a holistic approach in the interest of time and convenience of all parties. This was accepted; bearing in mind that the court will only proceed to consider the merits if the point in limine does not succeed. If it is however upheld that will be the end of the matter.

19. Section 228E (5) of the Labour Code (Amendment) Act 2000 (the Act) provides that:

> *"(5) An award issued by the arbitrator shall be final and binding and shall be enforceable as if it was an order of the Labour Court."*

The Act has incorporated the known rule of common law that courts should not venture to question the merits or wisdom of administrative decisions without statutory authority. To do so would be usurping the power entrusted in the administrative body in question by the legislature. It is this reason which informs the often relied upon principle of the finality of administrative decisions, except when the legislature has authorized that an appeal should lie to a court of law from that body's decisions. In *hoc casu* the legislature has opted for finality and the court must respect that clear intention of the legislature.

20. Section 228F of the Act allows a party to a dispute before the DDPR who seeks to review any arbitration award issued by an arbitrator to apply to the Labour Court for an order setting aside an award on any

grounds permissible in law and any mistake of law that materially affects the decision. The phrase "any grounds permissible in law…" was considered in the case of JDG Trading (Pty) Ltd t/a Supreme Furnitures .v. M. Monoko & 2 Others LAC/REV/39/04 (unreported). It was found to cover the broad common law grounds of review as laid down in such cases as Johannesburg Stock Exchange & Another .v. Witwatersrand Nigel Ltd & Anor. 1988 (3) SA 132 at 152 A-E.

21. In the Supreme Furnitures case the Labour Appeal Court also had occasion to consider the ground of review based on "mistake of law that materially affects the decision." The learned Mosito A.J stated as follows:

> *"The ambit of review for error of law was considered by Corbett CJ in Hira & Another .v. Booysen & Another 1992 (4) SA 69 (A) at 93A-94A where the learned judge pointed out that; to sum up the present-day position in our law in regard to common law review is in my view as follows:*
>
> *i) Generally speaking the non performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the court for relief by way of common law review.*
>
> *ii) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it a tribunal) has taken a decision, the grounds on which the court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited.*

(iii) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically upon whether or not the legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(iv) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions including the meaning to be attached to the statutory criterion and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common law review."

22. There are more guidelines proferred by the learned judge but for the purposes of this judgment we can safely stop here. The dispute referred to the DDPR by the applicants is one of breach of contract. This is one of those disputes listed under section 226(2) of the Act, which the DDPR is given exclusive jurisdiction to resolve by arbitration. (see Sec. 226 (2) (b) (ii) of the Act. It follows from this that in terms of the principle laid in Hira's case supra, if the DDPR committed a material error of law as alleged by the applicants and that error relates to the application or interpretation of a contract of employment, the principle of finality of arbitral awards contained section 228 E (5) of the Act will be strictly adhered to and the courts will refrain from interfering. It follows that on this ground alone the point in limine ought to be upheld.

23. However, looking at the grounds of review, as articulated in the Founding Affidavit of Thabo Mohlobo, they dismally fail the test which was so aptly captured by Mosito AJ in the Supreme Furnitures case supra at p.8 paragraph 13 where the learned judge stated:

"Where the reason for wanting to have a judgment set aside is that the court came to the wrong conclusion on the facts or the law the appropriate remedy is by way of appeal. Where, on the

other hand, the real grievance is against the method of the trial it is proper to bring the case on review."

24. It is clear from the grounds of review of the applicants that their complaint is that the learned arbitrator came to a wrong conclusion on the law, to the extent that she said the contracts were valid despite the fact that:

    i) KLM WATSAN which purported to employ applicants is not a registered entity.

    ii) There was no proper delegation of authority to either KLM WATSAN or Mr. Marojane by the LHDA to enter into the contracts with applicants on its behalf.

    iii) The HR Manual which applied to the applicants provided for higher mountain allowance was not complied with because the Arbitrator said it did not apply to applicants.

    iv) The applicants were discriminated against by being treated differently from the head office staff.

    All these do not point to any irregularity in the conduct of the proceedings for whatever reason. They point to dissatisfaction with the conclusions reached by the learned arbitrator on the points raised. For this reason they are proper grounds of appeal where a higher tribunal would be invited to substitute its findings after reevaluating the evidence, for those reached by the arbitrator.

25. In any event the points raised on review constitute a completely different case from that referred to the DDPR which was a case of breach of contract. Even if the learned arbitrator may have been led to comment on them, they were not the case pleaded by the applicants. However having made a decision on them as she did, the decision she made is final and not subject to appeal as the applicants sought to do despite under the cloak of review. Accordingly, we are satisfied that the point in limine was well taken. It is accordingly upheld and the application for review is dismissed.

There is no order as to costs.

THUS DONE AT MASERU THIS 21st DAY OF MAY, 2010.

L. A. LETHOBANE
PRESIDENT

L. MATELA — I CONCUR

R. MOTHEPU — I CONCUR

FOR APPLICANTS: ADV. B. SEKONYELA
FOR 1ST RESPONDENT: ADV. PHEKO