IN THE LABOUR COURT OF LESOTHO **LC/REV/77/08**

HELD AT MASERU

IN THE MATTER BETWEEN

LEBOHANG KULE	**1ST APPLICANT**
TSELISO MPHALE	**2ND APPLICANT**
MALEBO MOHLAKOANA	**3RD APPLICANT**
JOBO MOHLAKOANA	**4TH APPLICANT**
POULO KATSE	**5TH APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**1ST RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION & RESOLUTION	**2ND RESPONDENT**

JUDGMENT

Date: 11/05/10
Review distinguished from appeal – point in limine that review is a disguised appeal upheld – Review dismissed.

1. The applicants were employed by the 1st respondent under its special project called Katse, Lejone, Matsoku Water Supply Sanitation and Refusal Disposal Facilities Program (KLM-Watsan). The project was headed by Mr. Monareng Marojane, who recruited applicants and entered into written contracts with them on behalf of KLM-Watsan.

2. The applicants made a referral at the DDPR claiming none

payment of mountain allowance by the 1st respondent to which they claimed entitlement in terms of the personnel regulations. Evidence led on behalf of the 1st respondent showed that the applicants entered into written contracts which did not entitle them to payment of mountain allowance. The reason for not paying mountain allowance was said to be that they were residents of Katse area where the project they were employed on was working. They had infact been paid such an allowance when they were working at Mohale which is the area where they were not resident at.

3. The applicants for their part sought to challenge the contracts they entered into and said the contracts they entered into with KLM-Watsan were unlawful because KLM-Watsan was not a juristic entity. Furthermore, they claimed that the contract had the effect of unequal treatment in as much as it provides for less favourable terms than those contained in the HR manual, which entitled employees deployed outside metropolitan area to such mountain allowance.

4. The dispute was conciliated and was arbitrated after conciliation failed. The learned arbitrator rejected the arguments of the applicants and found that even though the contracts were concluded with KLM-Watsan, evidence established that the applicants were infact being employed by the 1st respondent. The learned arbitrator further rejected the argument of unequal treatment on the ground that applicants have failed to prove that the employees whom they claim were being paid mountain allowance were in similar set of circumstances like them.

5. He relied on the case of Remaketse Molaoli & 9 Others .v. LHDA and found that nothing prevents an employer to

administer his business using two sets of policies provided that neither was imposed on the employees. Accordingly, the referral was dismissed. The applicants sought a review and setting aside of that award.

6. The grounds on which the said award is being sought to be reviewed are contained in paragraphs 9-12 of the Founding Affidavit of Lebohang Kule. They are in a nutshell the following:

    a) The learned arbitrator misdirected himself in holding that applicants entered into written contracts when these contracts had been entered with a non-juristic entity called KLM-Watsan, which was just a special project.

    b) The said contracts are unlawful in that they have the effect of unequal treatment since they provide for less favourable terms than those contained in the 1st respondent's HR manual.

    c) 1st respondent failed to produce any written policy which provides that people deployed in their places of origin are not entitled to mountain allowance or deprivation allowance.

    d) The learned arbitrator erred and misdirected himself in holding that applicants signed contracts while aware that the employer could use more than one policy when there was infact no such policy of the employer.

7. In response, Mr. Pheko for the 1st respondent raised a point in limine which he presented in very brief words that "this is an appeal brought under the guise of a review from the decision

(arbitration award) of the DDPR handed down by arbitrator Keta under case No. C125/07 on the 15th August 2008." Mr. Sekonyela for the applicants submitted in response that applicants have disclosed the grounds for review as articulated in section 228F(3) which provides that the Labour Court may set aside an award on any ground recognizable in law and on any mistake of law which materially affects the award.

8. This case is identical to the case of Thabo Mohlobo & 13 Others .v. LHDA & Another LC/REV/42/09. The applicants were also contesting that they were being differently treated from the head office staff of the 1st respondent, who were paid M1,800-00 mountain allowance while the applicants were paid M300-00. It turned out from evidence that the M300-00 applicants got was regulated by the contracts that the applicants entered into with the employer.

9. Exactly the same arguments as in this case were raised and the arbitrator rejected them and ruled that applicants' relationship with the 1st respondent was governed by the contracts they signed with KLM-Watsan which was a special project of the 1st respondent. The applicants sought review of that award and as counsel in both cases are the same persons, Mr. Pheko for the 1st respondent raised exactly the same point namely; that the so-called review was infact an appeal disguised as a review. We must say basically the same grounds of review were relied upon in that case as in this case.

10. After reviewing authorities on the subject of review .v. Appeal the court came to the conclusion that the point in limine raised by Mr. Pheko ought to be upheld. In particular the court ruled that the grounds relied upon did not point to

any irregularity in the conduct of the arbitration proceedings. On the contrary they pointed to dissatisfaction with the conclusions reached by the learned arbitrator, as such they could only properly be raised in an appeal.

11. The findings of the court in the Thabo Mohlobo case are as much relevant to the present case. We fully associate ourselves with them. All the grounds of review raised by the applicants relate to the issues on which the learned arbitrator has made specific findings. Applicants raised them because they do not agree with the findings on the facts and on the law and would wish this court to come to a different conclusion to that the arbitrator reached.

12. That is not allowed. Section 228E(5) of the Labour Code (Amendment) Act provides in clear terms that "the award issued by the arbitrator shall be final and binding…" The court is enjoined to respect this clear intention of the legislature that awards of the DDPR must not be a subject of appeal, even in a disguised form as is the case in casu. Furthermore, the distinction was made crystal clear in JDG Trading (Pty) Ltd t/a Supreme Furnitures .v. Monoko & 2 Others LAC/REV/39/04 (unreported) that a party seeking to have a judgment set aside because he feels the court *a quo* came to a wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. This is the case *in casu*. Applicants are not as was stated in that case grieving against the method of the trial. For these reasons the point in limine is upheld and the application is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 28TH DAY OF MAY, 2010.

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **MEMBER**	**I CONCUR**
M. MAKHETHA **MEMBER**	**I CONCUR**
FOR APPLICANT:	**SEKONYELA CHAMBERS**
FOR RESPONDENTS:	**ADV. T. PHEKO**