

IN THE LABOUR COURT OF LESOTHO LC/REV/50/09

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO STONE (PTY) LTD

APPLICANT

AND

HOLOANE MOLEFI

1ST RESPONDENT

DDPR

2ND RESPONDENT

ARBITRATOR (M. KETA)

3RD RESPONDENT

JUDGMENT

Date: 19/08/2010

Review - conciliation - It is irregular to proceed with arbitration without first seeking to resolve a dispute by conciliation - Collusion - Employer's representative colluding with employee's representative not to seriously defend employer's case - Entire arbitration proceedings discredited by such conduct - Award reviewed, corrected and set aside.

1. This is an application for the review and setting aside of the award of the 3rd respondent in which he ordered the applicant company to pay 1st respondent M18,094-35 being underpayments for 17 months, severance pay for one year and three days leave. The award was for all intents and purposes a default award because the person who allegedly represented the company said he agreed with all applicants' claim. Now this attitude leaves much to be desired. It smacks of a collusion, but more of this later.
2. After the award was issued it was served on the applicant which

- detected that it did not know the Mr. Makhutla who had purported to represent them at the DDP, but dismally failed to do so. Applicant says they had mandated one Khethisa Letsie of an Association called Employers Relations Organisation. They then approached Mr. Letsie to apply for the review of the award.
3. Mr. Letsie did apply for the review of the award advancing a single ground that the arbitrator acted irregularly in proceeding with the arbitration in the absence of the Managing Director who had gone to China at the time. He however, did not apply for stay of execution. The application for review was filed on the 17th August 2009.
 4. The Managing Director deposes that sometime in December 2009, the 1st respondent, and his union representative approached him in the company of Mr. Letsie demanding that he should effect payment. The MD avers that he enquired from Letsie what was the status of the review application that he instructed him to file. Mr. Letsie said he must pay. It was then that the MD realized that there was something wrong and he told them he would consult with the company's lawyers first.
 5. On the 14th March 2010 the 1st respondent applied for the enforcement of the award. The applicant was summoned to appear in terms of section 34 of the Labour code Order 1992 on the 29th March 2010. On the 28th March Counsel for the applicant applied for stay of execution and also filed supplementary grounds of review. The main ground of review was that Mr. Makhutla who purported to represent the applicant was not mandated and that he is not even known by the applicant.
 6. The applicant contended that if it had been properly represented it would have shown that 1st respondent was not a fulltime employee, but an independent contractor who was engaged on agreed pay rates to provide welding services whenever such services were required. Once he had finished he would leave and be recalled only when a need for welding arose. Applicant argued as a result that 1st respondent could

not claim payment of minimum wage or claim severance pay and leave as those did not apply to him.

7. It is not for this court to determine the merits whether 1st respondent was an employee or an independent contractor as alleged. Neither is it for us to decide whether he was entitled to be paid in accordance with the Minimum Wages scales applicable at the time. All these fall within the province of the DDPR to determine by arbitration if conciliation failed.
8. Now this leads us to the next ground of review raised by the applicant. This is that there is no indication that the dispute was conciliated prior to arbitration. If that is so, there is no doubt that the arbitration proceedings were irregular. If the response of Mr. Makhutla who purported to represent applicant is anything to go by, this referral ought to have been concluded at conciliation. That the concessions to 1st respondent's claim were made at arbitration is evidence enough that conciliation was not done prior to arbitration. That renders the entire arbitration irregular.
9. Applicant says it never mandated Mr. Makhutla to represent it. Mr. Letsie was the one who ought to have represented the applicant. Neither Mr. Makhutla nor Mr. Letsie have denied applicant's averrements in regard to each of them. Indeed if 1st respondent wanted to dispute applicant's averrements in regard to these two he could have obtained their supporting affidavits to the contrary.
10. What is apparent to this court is that there is a dirty game of bogus employers' organizations/associations which collude with individual employees and some trade unions to trick employers using the DDPR and this Court to extort money from such employers and employees as well.
11. It is quite unfortunate that a system that was designed by the Government to benefit employers and workers of Lesotho is being abused right in front of our eyes by unscrupulous elements. It is clear that Mr. Makhutla and Mr. Letsie corruptly sought to appear as representatives of the applicant while at the

sametime colluding with the 1st respondent and his union that they would not defend the claims. How could Mr. Letsie be party to demanding that applicant must pay while he still held the brief to review the award? It is time that relevant offices act to arrest the rot before it is too late.

12. We have no doubt that the arbitration proceedings were irregular as conciliation was not held prior thereto. Even if it were not for the foregoing this Court would not uphold the award in view of the transparently dirty manner in which the claim was conducted by the representatives of the applicant in ostensible collusion with the 1st respondent and his representative. For these reasons the award is reviewed, corrected and it is set aside. Copy of this judgment must be served on the Labour Commissioner and the Director of the DDPR to note the concerns herein raised and consider what appropriate remedial measures should be put in place.

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

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. SETLOJOANE
MR. HABASISA