IN THE LABOUR COURT OF LESOTHO **LC/REV/427/06**

HELD AT MASERU

IN THE MATTER BETWEEN

MOHAU RASEPHALI **APPLICANT**

AND

LESOTHO PRECIOUS GARMENTS **1ST RESPONDENT**
DDPR **2ND RESPONDENT**

JUDGMENT

Date: 25/02/10
Application for review of DDPR award – Applicant repeating evidence adduced and challenging the merits of the findings of arbitrator – Such not constituting reviewable irregularity – Record – Applicant alleging arbitrator did not keep record yet record of arbitration proceedings duly filed – Document allegedly handed in and not recorded is not in dispute as such it does not constitute reviewable irregularity – Application dismissed on account of failing to disclose reviewable irregularities.

1. This application is a classical example of the nightmare that a court of law goes through where a lay person seeks to prosecute their own review application. In order that the message is brought home to everyone, it is important that we start with the brief history of this matter.

2. The applicant was employed by the 1st respondent on the 3rd January 2003. Sometime early in 2004, he was treated for psychological disorder. His doctor recommended that he be given a lighter job and advised that his treatment might take 12

months for a full recovery. Management assigned him lighter duties as recommended. However, the management felt that he was still not working well. Accordingly, on the 8th April 2004, the General Manager released him to go home and nurse his illness and said he should come back when he had fully recovered.

3. Applicant was paid for days worked and released. He proceeded on what turned out to be unpaid sick leave. On the 20th September 2004, applicant referred a dispute of unpaid wages for the time he was out of work at the instance of the employer. The General Manager sought to show that the applicant had been given unpaid sick leave. The arbitrator disagreed and said the Manager was not qualified to decide whether applicant ought to be sent on sick leave and that only a medical doctor could say so. Since the letter of the doctor had not said applicant was in any way unfit to perform his duties, or that he needed sick leave, the employer had only himself to blame for giving applicant leave and such leave could not be unpaid. The arbitrator then ordered that applicant be paid his wages from the date of unpaid leave to date of judgment which was in November 2004.

4. It would appear that the money awarded by the arbitrator was not paid until the applicant went to enquire on the 7th March 2005. He met with the Personnel Manager Mr. Tsepe Tsepe in the presence of Molete Makeoane another personnel officer. Evidence is that Mr. Tsepe instructed applicant to report to work on 10th march 2005. He failed to report as directed. On the 16th March, applicant was written a letter inviting him for a disciplinary hearing on the 19th March 2005. He again did not turn up for the hearing. On the 21st March 2005 he was written a letter of dismissal which he apparently got the same day and reacted to it promptly.

5. The following day applicant referred a dispute of unfair dismissal to the Directorate of Disputes Prevention and Resolution (DDPRD). His evidence was that he was wrongly dismissed for not being on duty on the 10th and 19th March and yet he was on duty on those dates. He conceded that he was at

the premises of 1st respondent on the 7th March 2005 and that he met with Mr. Tsepe. He however denied that Mr. Tsepe directed him to come to work on the 10th March.

6. In his closing remarks applicant said he was not bound to report to work on the 10th March because the previous Manager Mr. Phakisi had said he should only come to work when he was fit and he had not been certified fit by the Doctor. This of course is an untenable submission given that the Doctor never said he (applicant) was unfit. It was further a contradiction of his evidence in chief that he was on duty on the dates in question.

7. Applicant sought to raise a new issue which he had not dealt with in his evidence that he was not afforded a hearing prior to dismissal. However, the letter of dismissal adequately dealt with this issue in as much as it reiterated that applicant was called for a hearing on the 19th March, but failed to attend without tendering any excuse.

8. In his award the learned arbitrator found that the applicant had been fairly dismissed as the balance of probabilities showed that he had been told to come to work on the 10th March 2005 but failed to do so. The arbitrator was also pissed off by the fact that applicant failed to respond to the order to report to work and the notice to attend disciplinary hearing, yet when he received the letter of dismissal he responded immediately.

9. The applicant applied for the review of the award. This is where the drama began. Applicant alleged in paragraph 5 of his Founding Affidavit that;

> *"I had referred a matter concerning unfair dismissal to 2nd respondent that I was never given a hearing before my dismissal and illegitimately dismissed by unfair reasons."*

We have already shown that the dispute of the applicant at the arbitration was challenging the substantive fairness of his dismissal, because he said he was on duty on the days he was alleged to have not reported for work. Failure to afford him a hearing was never part of his case. He is clearly attempting to

make a new case and that cannot be allowed.

10. In the paragraphs that followed the applicant sought to relate the story he allegedly told the arbitrator (vide paragraph 6). Even then the things he alleges to have testified about are not borne by the record of the arbitration proceedings. He went on in paragraph 7 of the affidavit to attack the findings of the arbitrator as untruthful and accused the arbitrator of failing to take the record and of defending the 1st respondent. The record of the proceedings kept by the arbitrator was duly filed both in handwritten form and in a type-written form. It is therefore, untenable to allege that the arbitrator did not take the record when the applicant is the one who has filed that record.

11. The next paragraphs are incomprehensible; but the long and short of their message is that they again seek to challenge the substantive merits of the award. He seeks to repeat what he alleges he said and what documents he handed in at the arbitration. Most of what he says he testified on or documents he alleges to have handed in, are not supported by the record. At the arbitration his statement was very brief. He simply denied that he was not at work on the 10th and 19th March 2005 as alleged.

12. The 1st respondent filed an opposing affidavit of Tsepe Tsepe the Personnel Manager. He deposed that the issues raised by the Founding affidavit of the applicant are matter for appeal and not review. He further disputed applicant's factual averrements. He concluded by averring that there is no evidence that the arbitrator defended the 1st respondent as alleged. Indeed other than making that bald statement applicant proffered no evidence to support his claim that the arbitrator was hell bent to defend the 1st respondent.

13. Even before the matter was heard, the applicant moved to amend his pleadings. The notice of amendment was filed on the 26th March 2007. His amendment was in respect of two areas we have already dealt with namely; that the arbitrator failed to take the record and that the documentary evidence he handed in has not been attached as part of the record. The

record does not show that applicant handed in any exhibits. Even assuming he did, it turned out from him during his submissions that the document he complains of, is the letter of dismissal which is not disputed by either side. Furthermore, he has himself included that letter as part of the record presented before this court. There is therefore nothing irregular in respect of that letter not being annexed to the record, which can call for the review of the award of the arbitrator.

14. Apart from that applicant again repeated the evidence that was led on behalf of both sides and criticized the manner the arbitrator dealt with that evidence and the conclusions he reached. Needless to emphasize those paragraphs were adequately addressed by 1st respondent's opposing affidavit that they do not constitute grounds of review.

15. In a surprise turn of events it emerged that, the applicant had on the same day i.e. 26/03/07 filed an application for judgment by default. As we said the 1st respondent had already filed its opposing affidavits on the 8th November 2006. The application was however, not supported by an affidavit specifying why it was necessary that a default judgment be entered in the circumstances. Needless to say the application for default judgment was irregular.

16. The application was set down for hearing on the 29/05/07. The matter came before the President. From what has been said above, this review application ought to have been dismissed outright as none of the alleged grounds of review disclosed reviewable irregularities. Noting however, that applicant is a lay person, I exercised the discretion not to dismiss the matter and gave him a second chance to properly formulate the review. I postponed the matter with a specific advice that applicant should seek legal guidance in order that he can formulate a proper review application.

17. On the 10th July 2007, applicant filed another amendment to his review application. There was really no amendment in

substance, because the applicant had again complained of the record not being taken something he had said in all previous amendments. He further complained that the arbitrator had said in his award that during cross-examination he (applicant) asked irrelevant questions and yet in his view he never asked irrelevant questions. This once more is disputing the remarks and observations of the arbitrator and as such does not constitute reviewable irregularity.

18. The matter was scheduled to proceed on the 27th September 2007. It however, did not proceed as counsel for the 1st respondent had gone to New York on an ILO mission. It was set down for 21st November 2007. It came before my Sister Khabo DP, who ruled that despite the amendment, the papers still do not disclose reviewable irregularities in a clear manner. She postponed the matter with another advise that applicant seek legal assistance or approach the legal division of the Department of Labour who usually assist litigants in the position of the applicant free of charge.

19. On the 10th September 2008, applicant sought to again amend his papers. Once again applicant repeated what he alleges he told the arbitrator at the hearing. The story allegedly narrated by him materially differs from what he claimed on previous affidavits. Significantly however, this time he admitted that on the 7th March he was ordered to come to work on the 10th March. He again narrated what he said was the evidence adduced on behalf of the 1st respondent. In short, other than repeating the evidence, no new grounds of review were raised, by this latest amendment.

20. On the 10th November 2009, applicant filed an application for judgment by default. The reason for the application was said to be that the 1st respondent had not opposed the latest amendment. The application was opposed. In his opposing affidavit Tsepe Tsepe recalled that the applicant had been advised by the court on numerous occasions to seek legal assistance. He averred further that even the amendment the applicant is seeking default judgment on the basis of, has not been formally moved to be accepted by the court as a formal

amendment of applicant's pleadings. This is very true, and it is enough to dispose of the application for default judgment. In any event the amendment raised nothing new from what the previous amendments had purported to allege.

21. The matter was set down for hearing on the 25th February 2010. It came before the President and I decided to adopt a holistic approach and deal with the application for default judgment and the merits of the review itself. At the start of the proceedings, the court asked Mr. Mohaleroe to recuse himself and bring the company representative to lead its defence as Mr. Rasephali was appearing in person. The hearing was briefly adjourned to enable the representative of the company Mr. Tsepe to make it to court.

22. From the outset it should be stated that the default application is not regular because the 1st respondent has filed opposing affidavits and it has all along shown the interest to defend these proceedings. Furthermore, the amendment on which applicant purports to base his application has never been moved to be accepted by the court as a new set of pleadings which 1st respondent can now be called upon to rebut. Too many amendments have been filed by the applicant. It would not be fair to expect 1st respondent to have been responding to every one of those, especially when they hardly raised anything new. If 1st respondent had done so, it would have suffered irreparable harm as a result of cost they would have incurred with little or no hope of recovering them from the applicant.

23. We have already shown that even this latest amendment has not advanced the case of the applicant any further. It still falls squarely to be dismissed in terms of 1st respondent's opposing affidavit which said applicant's Founding Affidavit does not disclose grounds of review. This has been the case since 2007 and applicant has been given more than enough opportunity to get professional help to enable him to formulate a proper review. He has not heeded the advice with the result that today, we are still where we were nearly three years ago when applicant was first advised to get professional advice.

24. Even today we are still faced with the application which contains only the noise and not a single reviewable irregularity. As we said, we have been postponing this matter much to the prejudice of the 1st respondent because they were entitled to judgment dismissing this application from day one. They have been very patient. We cannot stretch their patience any further. What that means is that they are entitled to judgment on the ground that applicant's application fails to disclose any reviewable irregularity. It is accordingly so ordered and this application is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 19th DAY OF MARCH 2010

L. A. LETHOBANE
PRESIDENT

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

R. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANT: **IN PERSON**
FOR RESPONDENT: **MR. TSEPE**