

IN THE LABOUR COURT OF LESOTHO

LC/REV/08/10

HELD AT MASERU

In the matter between:

LESOTHO FEDERATION OF ORGANISATIONS OF THE DISABLED (LNFOD)	1 st APPLICANT
THE BOARD OF LNFOD	2 nd APPLICANT

and

MOJALEFA LOBHIN MABULA	1 st RESPONDENT
DIRECTORATE OF DISPUTE	2 nd RESPONDENT
PREVENTION AND RESOLUTION	

JUDGMENT

DATE: 28th Sept, 2010

Practice and procedure - Settlement agreement - Applicants submitting that the DDPR has no power to convert a settlement agreement into an arbitral award - Court established the existence of a settlement agreement - No allegation of irregularity in the settlement agreement, for instance, that it was reached involuntarily or by coercion - Review application dismissed.

1. This application revolves around a settlement agreement entered between the applicant and the 1st respondent at the Dispute Prevention and Resolution (DDPR) on 1st June, 2009. The bone of contention in the application is the fact that the DDPR converted the said settlement agreement into an arbitral award styled A 0003/09. The applicants are seeking to have this award reviewed and set aside. They are challenging the said award on basically two grounds; firstly, that the DDPR acted *ultra vires* in that being a creature of statute it did not have power to convert a settlement agreement into an arbitration award, secondly, that the applicants were not even afforded a hearing prior to the conversion. Applicant's Counsel contended that the DDPR failed to comply with Regulation 18 (1) of the

Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001 which enjoins the Directorate to;

give parties at least 15 days' notice of an arbitration hearing unless the parties to the dispute agree to less.

2. Parties had agreed in terms of the said agreement that the applicant compensate the 1st respondent for the alleged unfair dismissal in the sum of Thirty-Seven Thousand, Six Hundred and Seventy Maloti (M37, 670.00). The applicant did not honour this agreement. The explanation given on applicant's behalf in the pleadings was that subsequent to entering into this agreement, applicants sought a legal opinion, and they were advised that they ought not have entered into the said agreement, and they decided not to honour it. It was upon failure by the applicant to honour the agreement, that the 1st respondent approached the DDPR with a view to having the settlement agreement converted into an arbitration award, apparently to facilitate enforcement. It is important to note at this juncture that an agreement reached at conciliation can only be enforceable by the Labour Court if it is in the form of an award. Section 228 E (5) of the Labour Code (Amendment) Act, 2000 provides that;

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

3. The 1st respondent having filed his application to have the settlement agreement converted into an arbitration award, the applicant failed to file a reply thereto, and only attempted to file opposing papers on the date of hearing. The DDPR did not accept this, and went ahead to convert the settlement agreement into an arbitration award.

4. As aforementioned, applicant's case is that the DDPR acted beyond its powers as it has not been empowered by statute to convert settlement agreements into arbitration awards. Applicant's Counsel, adv., Setlojoane submitted that this was irregular and it was irrational on the part of the DDPR to have converted the agreement into an arbitration award without first hearing the applicants. Hence, the review application.

Advocate Maleke for the 1st respondent opposed this review application. He advanced a number of reasons. He contended that the applicants cannot renege from an agreement which was explicit, having been duly advised by the DDPR on

the procedure, and therefore knew the implications of the agreement. He underscored the fact that the applicants only brought the review application after the agreement had already been turned into an award, and did not even advance reasons behind the legal advice. He submitted that the applicants are bound by the terms of the settlement agreement, and prayed that the award be implemented.

THE COURT'S ANALYSIS

5. The DDPR was established under Section 46B of the Labour Code (Amendment) Act, 2000, and its functions are outlined under Subsection (5) thereof as follows;

(5) The function of the Directorate shall be:

(a) to attempt to prevent and resolve trade disputes through conciliation;

(b) to resolve trade disputes through arbitration;

(c) ...

(d) ...

6. The DDPR uses a form of an alternative dispute resolution (ADR) mechanism system styled Con - arb through which an Arbitrator is first and foremost enjoined to promote a settlement between the parties through conciliation. If parties fail to settle, the Arbitrator has to tender a certificate to the effect that the dispute remains unresolved. In terms of Section 227 (6) of the Labour Code (Amendment) Act, 2000, if the dispute is resolved at the conciliation stage -

(a) the conciliator or arbitrator shall issue a report; and

(b) the settlement shall be reduced to writing and signed by the parties to the dispute.

In the case before us, the dispute between the applicant and the 1st respondent was settled at the conciliation stage.

7. As it is, the system adopted by the DDPR is two pronged *viz* conciliation and arbitration and both processes are very important in the settlement of labour

disputes. Parties reach a settlement voluntarily. The Arbitrator's role during conciliation is solely to assist parties to reach an agreement and he/she cannot force parties to settle. In facilitating settlement, the Arbitrator has to ensure that settlement is reached within the confines of the law. As the learned Authors ***Du Toit et al., in Labour Relations Law – A Comprehensive Guide, 4th ed., 2003 at p.102*** put it, conciliation has to take place “*in the shadow of the law*”. The Arbitrator merely acts as an umpire to ensure that the power balances are kept in check.

8. The terms of the agreement between the applicant and the respondent were that -

The parties agree that the respondents pay the applicant an amount of M37,670.00 being compensation;

The amount is to be paid at the offices of the DDPR, Maseru not later than 1st July, 2009;

The parties further agree that this agreement is in full and final settlement of the agreed issues without further recourse if the parties agree with all the terms thereof;

The parties furthermore agree that no variation of this agreement will be legally binding unless reduced to writing and signed by both parties;

The parties agree that in the event of any dispute arising in the application of this settlement agreement the aggrieved party may make an application to the Director, in accordance with Regulation 26 of the Labour Code (DDPR) Regulations 2001 to turn the above settlement agreement into an arbitration award, which shall be subject to enforcement by the Labour Court.

Regulation 15 of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001 provides conciliation guidelines.

9. The matter in which the 1st respondent applied for the settlement agreement to be converted into an award was heard on 2nd November, 2009. The applicants were represented therein and an attempt was made to file an opposing affidavit dated 26th October, 2009 on the day of hearing. The DDPR refused to accept the said affidavit on the basis that it was filed out of time. The applicants had failed to file

an opposing affidavit within the five (5) days prescribed by Regulation 26 (3) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001. Applicants' Counsel alleged that the DDPR had flouted Regulation 18 (1) that requires it to give parties at least 15 days' notice of an arbitration hearing, but did not substantiate this. The applicants can therefore not be heard to say that they were not afforded a hearing when the settlement agreement had been turned into an award. The fact that they attempted to oppose the application for conversion shows clearly that they had duly been served but decided not to answer within the stipulated framework.

10. It emerged that conciliation was successful and the parties had duly signed the settlement agreement as required by Section 227 (6) (b) of the Labour Code (Amendment) Act, 2000. The issue then becomes what the effect of a settlement agreement is. The Code does not provide guidance in this regard.

11. This Court has had an opportunity to consider the issue in *'Mamalefetsane Phakoe v JD Group Trading (Pty) Ltd t/a Price 'n Pride LC 92/06* (unreported). In that case the Court had to look beyond our jurisdiction for guidance on this pertinent question. In the United Kingdom, as soon as a settlement agreement is reached before the Advisory, Conciliation and Arbitration Service (ACAS), the DDPR counterpart, the dispute ends and neither party can proceed to the Tribunal. Each party retains a copy of the signed agreement and the original is sent to the Tribunal where the dispute will be recorded as settled. The settlement is then published as a Tribunal decision - See the article - *"Conciliation in Complaints by Individuals to Industrial Tribunals - The ACAS Role" - 1982*.

12. A look at the South African experience, if conciliation succeeds at the Commission for Conciliation, Mediation and Arbitration (CCMA), the Commissioner will record the dispute as having been resolved. Unless an irregularity is detected upon review to the Labour Court, the settlement agreement stands and neither party can pursue it further - See John Grogan, *Workplace Law* 7th ed., 2003 at pp. 383- 4.

13. The case before us is distinguishable from the earlier decision of this Court in *CGM Garments v DDPR & Gibbs Matsoko LC/REV/88/06* (reported by the Southern African Legal Information Institute (SAFLII) in www.saflii.org/ls/cases). In this case the Court had decided that the DDPR had no jurisdiction to convert a settlement agreement into an arbitration award as it was a creature of Statute and could only act within the empowering legislation. The Court, citing authorities, referred to a settlement agreement as an extra - judicial compromise to be treated

as an ordinary contract enforceable in ordinary courts of law. We are able to distinguish this case from this one before us. In *casu* the settlement agreement contained a clause to the effect that parties are legally bound by the agreement and they agree that ***“this agreement is in full and final settlement of the agreed issues without further recourse if the parties agree with all the terms thereof”***. This was not the case in the *CGM Garments*’ case. The parties had agreed to the all the terms of the agreement and sealed it by appending their signatures thereto.

14. Parties cannot be allowed to sign agreements and renege as and when it suits them. This would seriously undermine or compromise the conciliation process. In the Namibian case, *Golin t/a Golin Engineering v Cloete (1996) 17 ILJ, 930 (LCN)* at p.931, it was emphasised that Courts should encourage and respect bona fide settlements by negotiation. It was pointed out per O’Lim J., at p. 931 that ***“not to accept the possibility of a settlement would be contrary to the purpose of [labour legislation] which encourages the settlement of disputes through negotiation and agreement.”*** The Court set out the principle in p. 932 that;

When a party claims that there has been a full and final settlement, the court should recognize the settlement as a termination of the issues on the merits, once the court has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, ie without duress or coercion, unequivocal and with full and final settlement of all the issues.

There was no allegation in the case before us that the settlement agreement was involuntary.

15. On the question of the settlement agreement being converted without the applicant being afforded a hearing, the Court established that the applicant had failed to file its opposing papers to 1st respondent’s application within the five days prescribed by Regulation 26 (3) (e) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001. An attempt was done on the day of hearing on 2nd November, 2009 to file an opposing affidavit, and the DDPR did not permit this. We find nothing untoward with the DDPR’s reaction as the applicant had failed to seize an opportunity that it had to have challenged 2nd respondent’s application for conversion. In the circumstances, it is our considered opinion that the applicant cannot be heard to have been denied an opportunity to be heard.

16. We find nothing irregular in the settlement agreement reached on 2nd November, 2009 between the applicant and the 1st respondent before the DDPR.

The agreement thus settled the dispute between the parties. The review application is therefore dismissed. Applicants have to honour the DDPR award within thirty (30) days from the handing down of this judgment.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 28TH DAY OF SEPTEMBER, 2010.

F.M. KHABO
DEPUTY PRESIDENT

L. MATELA
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR THE APPLICANT:
FOR THE 1st RESPONDENT:

ADV. SETLOJOANE
ADV. MALEKE