

IN THE LABOUR COURT OF LESOTHO LC/REV/07/09

HELD AT MASERU

IN THE MATTER BETWEEN

**LESOTHO TEXTILE EXPORTERS
ASSOCIATION**

APPLICANT

AND

**DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
C. T. THAMAE (ARBITRATOR)
THABO MOHALEROE**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

Date: 25/03/10

Review – There is no irregularity when arbitrator relies on documents handed in by consent and whose contents are not in dispute – It is irregular to arbitrate a dispute before attempting to resolve it by conciliation – Award reviewed corrected and set aside – Dispute to be heard de novo by DDPR.

1. The 3rd respondent is the former Executive Director of Lesotho Textile Exporters Association (LTEA). He resigned his post sometime in June 2008. He subsequently referred a dispute to the DDPR claiming constructive dismissal.
2. The referral was set down for hearing on the 19th February 2009. The 2nd respondent was the arbitrator appointed to resolve the dispute. At the start of the proceedings the representative of the applicant proposed that he would like to raise two preliminary points which if decided in applicant's favour, might dispense the need to enter into conciliation.

3. He was allowed to raise the points and these were that the 3rd respondent was not an employee of the applicant. He contended that 3rd respondent is a lawyer, who was engaged as a service provider which included among others, representing the Association and its members in the courts of law. He contended further that the 3rd respondent was himself an employer as he appointed and managed support staff to run the office of the Association.
4. At the end of the submissions the learned arbitrator handed down an award in which he dismissed the points in limine and ruled instead that 3rd respondent was an employee of the applicant. The applicant approached this court for the review of the award on the ground that; the arbitrator made the determination that 3rd respondent was an employee without hearing oral evidence. Furthermore, the applicant complained that the arbitrator irregularly relied on two memorandums of agreement between 3rd respondent and applicant, without those memorandums being handed in by a sworn witness.
5. The 3rd respondent opposed the application and duly filed opposing affidavits. The record of DDPR proceedings was duly filed and the matter was set down for hearing. At the hearing Mr. Ntaote for the applicant abandoned the first ground of review and relied entirely on the 2nd ground namely; that the arbitrator irregularly relied on the two memoranda referred to by agreement by both sides, because those documents were not handed in by a sworn witness.
6. It is common cause that there was no dispute on the memorandums. Their contents were common cause between the parties. Infact counsel for the applicant is the one who first relied on them to prove his point that 3rd respondent was not an employee. Were their argument to carry the day they would be benefiting from their own mistake. However, we find nothing untoward in the manner the documents were handed in as it was by agreement. There is equally no irregularity in the arbitrator relying on them as their content was not in dispute.

7. The court raised a point whether the award itself is regular in the light of the fact that it was issued prior to the dispute being conciliated. Mr. Ntaote as well as Mr. Mohaleroe rightly conceded that it was not. Section 227 (4) and (7) of the Labour Code (Amendment) Act 2000 provide thus:

“(4) If the dispute is one that should be resolved by arbitration, the Director shall appoint an arbitrator to attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.”

“(7) If the dispute contemplated in sub-section (4) remains unresolved after the arbitrator has attempted to conciliate it, the arbitrator shall resolve the dispute by arbitration.”
8. In casu, the representative of the applicant forced the arbitrator to enter arbitration prior to conciliation. We use the word “force” because from the record it is clear that the arbitrator was aware that he had entered into arbitration before exhausting conciliation procedures. (see p.4 of the record of DDPR proceedings). However, Mr. Ntlhoki for the applicant insisted on the irregular procedure he had adopted.
9. Whilst conceding that the procedure by which the award herein was arrived at was flawed Mr. Mohaleroe impressed on the court not to set the award aside. That is not possible. If the award, however justified on the merits, was irregularly arrived at; it cannot stand. In the circumstances the proceedings which resulted in the award under review are declared irregular as well as the award that resulted from those proceedings. They are accordingly reviewed, corrected and set aside. The dispute in referral A0867 which is pending before the DDPR is to start de novo following legally prescribed procedure as herein pronounced. There is no order as to costs.

THUS DONE AT MASERU THIS 16st DAY OF APRIL, 2010.

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR 3RD RESPONDENT:

MR. NTAOTE
IN PERSON