IN THE LABOUR COURT OF LESOTHO **LC/REV/20/11**

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO NATIONAL DEVELOPMENT CORPORATION **APPLICANT**

AND

DIRECTORATE OF DISPUTE PREVENTION & RESOLUTION **1ST RESPONDENT**
MATAMATAMA MOHAPI **2ND RESPONDENT**

JUDGMENT

Date: 08/06/2011
Review of DDPR interlocutory ruling – Interlocutory ruling in the simple or ordinary sense not appealable – Interlocutory order having final and definitive effect are appealable – A plea challenging justiciability of dispute raises the issue of jurisdiction of the court to arbitrate/adjudicate such a dispute – Preliminary point raised that dispute referred to DDPR was an interest dispute as such falls outside the jurisdiction of arbitrator – Minutes of pre-arbitration showing that parties agree that 2nd respondent was being paid in accordance with her contract of employment – Held that arbitrator's ruling that she had the jurisdiction over dispute is reviewable since dispute is not based on right but interest – Reasons for judgment reserved.

1. This review application was heard and concluded on the 18th June 2011. At the end of the hearing the court made an extempore ruling allowing the application to review the interlocutory ruling of arbitrator Senooe, but reserved the reasons for that judgment. These are now those reasons.

2. This arbitration arises out of the 2nd respondent's claim before the Directorate of Dispute Prevention and Resolution (DDPR) that the employer (applicant) has been underpaying her from the date of her employment to the date of lodging the claim in the amount of M240,793-33 gross.

3. The 2nd respondent was employed on the 18th July 2008 as Planning and Research Officer. She was placed on the salary scale of M130,978-00 PA (Grade C.3) of the 2007/2008 salary scale. It has emerged from the papers filed of record that the 2004/2005 scale had placed the same position at M180,412-00 pa (Grade C.5). 1st respondent's own contract placed her at Grade C.3 as aforesaid (see clause 6 of her contract of employment).

4. Instead of challenging the conflicting gradings for the same position, 2nd respondent filed a referral claiming payment of arrears of salary arising as a result of the difference between the two gradings. She referred a dispute of underpayments with a view to recover the difference of salary between Grade C.3 where her contract placed her, and the earlier Grade C.5 where the same position had apparently previously been placed or proposed to be placed.

5. Counsel for the parties held a prearbitration conference, minutes of which recorded in paragraphs 2 and 3 as follows:

> "2. Facts that are common cause.
> (a) That applicant (2nd respondent herein) is being paid in accordance with her letter of appointment and
> (b) Employment contract that she has signed together with annual cost of living.

(c) She was graded in accordance with 2007/2008 salary scale at Grade C.3.

"3. Precise relief claimed.
Underpayments of M91,515-40 (after tax) as at end of December, 2010. Calculations based on the difference between the 2004/2005 and 2007/2008 grades of the Planning & Research Officer position."

6. Given the above extracts of the minutes, Counsel for applicant raised a preliminary point at the arbitration that 2nd respondent's claim is not justiciable in as much as it is not based on an enforceable right to be paid on a the grade she claims, but her desire/interest to be paid at that level. The learned arbitrator rejected the argument and ruled that she could only be in a position to know whether the 2nd respondent's claim is one of right or interest after hearing evidence.

7. Mr. Poopa for the applicant swiftly applied for the review of that ruling contending that the learned arbitrator has committed a mistake of law that materially affected her decision, which constitutes a valid ground for review. In support of his argument he referred to section 226(2) which provides:

"(2) The following disputes of right shall be resolved by arbitration.
(a) a dispute referred by agreement;
(b) a dispute concerning the application or interpretation of:
(i) a collective agreement;
(ii) a breach of a contract of employment;
(iii) a wages order contemplated in section 5;
(c) a dispute concerning the underpayment or non - payment of any monies due under the provisions of the act."

Mr. Poopa contended that 2nd respondent's claim of alleged underpayments does not arise under any of the above provisions and that as the pre-arbitration minutes showed, she conceded that her payment was in compliance with her salary scale as contained in her contract of employment.

8. As a general rule an interlocutory ruling in the simple sense is neither appealable nor reviewable. As it was stated in Lesotho National Development Corporation .v. Sophia Mohapi & DDPR LC/REV/316/06 (unreported) the court will interfere in *media res* in exceptional circumstances. (see also LHDA .v. Tumisang Ranthamane LC/REV/364/06 (unreported). Mr. Poopa contended that he has numerous similar cases of staff which will inevitably follow and the respondent would suffer great prejudice by having to go through the same evidence before it can be ruled that the cases are not justiciable.

9. It is trite law that orders having final effect are appealable even if they are interlocutory in nature. As Corbett J.A. put it in South Cape Corporation (Pty) Ltd .v. Engineering Management Services (Pty) Ltd 1977 (3) SA 534 at 549F-550A.

> "(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. But orders of this kind are divided into two classes (i) those which have final and definitive effect on the main action and (ii) those known as simple (or purely) interlocutory orders or interlocutory order proper…
>
> "(b) Statues relating to appealability of judgments or orders which use the word interlocutory or other words of similar import, are taken to refer to simple interlocutory orders. In other words it is only in the case of simple interlocutory orders that the statute is read as prohibiting appeal or making it subject to the limitation of requiring leave as the case may be. Final orders including interlocutory orders having a final and definitive effect are regarded as falling outside that preview of the prohibition or limitation."

10. As Herbstein and Van Winsen in their book The Civil Practice of the Supreme Court of South Africa 1997 Juta & Co. at p.880-884, has shown, among those interlocutory orders which are regarded as having final effect are:

> "certain defences which may be raised by way of a special plea in a Magistrate Court. This will apply to decisions on;
>
> (a) a plea of lack of jurisdiction
> (b) a plea of lack of locus standi in judicio
> (c) a plea that the parties agreed to submit the dispute between them to arbitration." p881-882.

Applicant's contention that the claim of 2nd respondent is an interest dispute immediately raises the question of jurisdiction since an arbitrator does not have the jurisdiction to arbitrate interest disputes. It follows that applicants were entirely within the limits of the law in applying for the review of the interlocutory order in terms of which the learned arbitrator ruled that she had the jurisdiction over the dispute.

11. The agreed facts between the parties as recorded in the minutes of the pre-arbitration conference showed in no uncertain terms that the alleged underpayment was not based on violation of an existing right in terms of the provisions of section 226(2) of the Labour code (Amendment) Act 2000. If 2nd respondent was being properly paid according to her contract and she was not suggesting entitlement to payment on a higher scale on any other recognizable ground; such as for instance, a collective agreement, or a wages order, she was clearly blind fishing and the arbitrator had no basis to overrule applicant's contention that she had no jurisdiction in the circumstances. In the process she made an unreasonable decision which totally ignored the facts before her that 2nd respondent's claim was not based on a violation of an existing, contingent or future right.

12. In the circumstances the court upheld the application to review and set aside the order of the arbitrator that she had jurisdiction to hear the claim. As couched the claim is clearly based on interest and not a right. However in her answering affidavit 2nd respondent made the following pertinent remark:

> "5.1.4 contents are denied. The underpayment that I complained of at the DDPR was as a result of clause six of my contract of employment. Should the matter win on arbitration, the validity or otherwise of that clause would ultimately have been determined hence the claimed underpayments." (sic)

12. Challenging the validity of a clause of a contract is a completely different cause of action from claiming underpayments. If the former is the intended goal; starting with underpayments is putting the cart before the horse. Challenging the contract is the point where 2nd respondent must start in order to create an enforceable right to underpayments. It was for the reasons that whilst upholding the review application thereby dismissing 2nd respondent's referral as non-justiciable, the court observed that 2nd respondent is at liberty to resubmit a referral to the DDPR directly attacking clause 6 of her contract of employment as it sounded to be the source of misunderstanding between the parties. There was no order as to costs.

THUS DONE AT MASERU THIS 12TH DAY OF AUGUST 2011

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **I CONCUR**
MEMBER

D. TWALA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. POOPA**
FOR RESPONDENT: **MR. RAFONEKE**