

IN THE LABOUR COURT OF LESOTHO LC/REV/88/08

HELD AT MASERU

IN THE MATTER BETWEEN

KHOASE PALI

APPLICANT

AND

**FIRST NATIONAL BANK
DDPR (MS MALEBANYE)**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 19/04/11

Review - Counsel for 1st respondent conceding reviewable irregularity - Award reviewed and remitted to DDPR to be arbitrated by different arbitrator.

1. Applicant was dismissed by the 1st respondent on 12th February 2008 for dishonesty. He referred a dispute of unfair dismissal to the DDPR. The dispute was arbitrated by arbitrator Malebanye who confirmed the dismissal as procedurally and substantively fair.
2. Applicant applied for the review of the award on a number of grounds. Of these, counsel for the first respondent conceded two grounds and agreed with counsel for the applicant that the award be reviewed and remitted to the DDPR to be heard de novo by a different arbitrator.

3. The first irregularity complained of was that the arbitration proceedings were conducted in Sesotho and yet without the benefit of an interpreter the evidence was recorded in English. I enquired where in the regulations of the DDPR there is a requirement that the proceedings must be interpreted into English or vice versa. It emerged that counsel for the 1st respondent had wrongly relied on rule 20(1) of the Labour Court Rules which says the “proceedings of the court shall be conducted and recorded in English.” This rule does not apply to the arbitration proceedings of the DDPR.
4. Regulation 18(2) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001, provides that “the arbitrator shall conduct the proceedings taking into account the provisions of the Code and Conciliation and Arbitration Guidelines made under the Code.” In terms of Regulation 22(2) the parties shall hold a pre arbitration conference when so agreed or when so directed by the Director. At such conference the parties shall attempt to reach consensus on, inter alia, “whether an interpreter is required and if so, for how long and for which language.”
5. Clause 26(2) (c) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004, provides that as one of the first steps in conducting arbitration the arbitrator must state “the language in which the proceedings are to be conducted and if there is a need for translation ensuring the presence of a translator.” Clearly, the requirement for a translator is not mandatory, but is premised on agreement of the parties.
6. Both in the regulations and in the guidelines the need for translation is left to agreement between the parties. Mr. Ntlhoki conceded this fact but went further to show that the arbitrator is nonetheless enjoined to state the language to be used and to enquire if there will be need for translation. He stated that in casu the arbitrator did not do as the guidelines direct namely state the language and to enquire whether translation would be needed. Mr. Fraser for the 1st respondent conceded that this was not done and that failure to do so constituted an irregularity.

7. However, the court was of the view that the irregularity was not so serious as to warrant interference with the award. However, two other factors emerged which warranted that the court interfere with the award. The first which was raised by the applicant in his founding affidavit was that the 1st respondent was allowed to be represented by a lawyer while the applicant was not. Applicant did protest during the arbitration that 1st respondent was represented by counsel to his detriment as he was not made aware that 1st respondent was going to be so represented.
8. The arbitrator's attitude was that applicant should have raised the concern at the start of the arbitration proceedings. She thus denied him the opportunity to secure the services of a lawyer. This was wrong and it constituted a reviewable irregularity.
9. Finally it emerged that a good part of the record is missing. The record of the proceedings of 16th June 2008 is missing. This means that the entire evidence of Mr. Poloko Mokone who testified for the 1st respondent is missing. For these reasons the award was reviewed, corrected and set aside and remitted to DDPR to start de novo before a different arbitrator.

THUS DONE AT MASERU THIS 1st DAY OF JANUARY 2011

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. NTLHOKI
MR. FRASER