

**IN THE LABOUR COURT OF LESOTHO      LC/REV/09/10**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**LESOTHO BREWING CO. (PTY) LTD      APPLICANT**

**AND**

**SELLO MAFEREKA**

**1<sup>ST</sup> RESPONDENT**

**TSOEU MOHLOKI**

**2<sup>ND</sup> RESPONDENT**

**DDPR**

**3<sup>RD</sup> RESPONDENT**

**M. MASHEANE – ARBITRATOR**

**4<sup>TH</sup> RESPONDENT**

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## **JUDGMENT**

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*Date: 07/06/2011*

*Review of award of arbitrator ordering reinstatement without hearing the parties on the practicability of reinstatement – Award reviewed and remitted to DDPR for parties to address arbitrator on practicability of reinstatement.*

1. This matter has an unfortunate history of not coming to an end. Efforts to conclude it tend to always get frustrated by a side that has always wanted to deal with the case without the participation of the other side. Regrettably the presiding officers have in ostensible pursuit of the policy of expediency in the resolution of labour disputes, become unconscious fellow travellers with that side which has always sought to exclude the other from also putting its side of the story.
2. The dispute giving rise to this matter first arose in November 2005. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were the only forklift drivers at the Mafeteng depot of the applicant, where the dispute arose. They were charged with misconduct in that they had not followed stacking patterns of stock prescribed by the applicant.

They were charged because stacking was their responsibility as forklift drivers and the prescribed patterns was meant to prevent theft of stock. Following the disciplinary hearing the respondents were found guilty and dismissed on the 7<sup>th</sup> December 2005.

3. 1<sup>st</sup> and 2<sup>nd</sup> respondents referred a dispute of unfair dismissal to the DDPR. On the 31<sup>st</sup> March 2006, the arbitrator handling the dispute handed down an award in which he ruled that the two respondents had indeed been unfairly dismissed and ordered that they be reinstated. Applicant took the award and the entire arbitration proceedings on review to the Labour Appeal Court as the court vested with powers of review of DDPR awards at the time.
4. The matter remained pending on the roll of the Labour Appeal Court until Parliament enacted a law that vested review of DDPR awards in the Labour Court in December 2006. The Labour Court duly heard the review and on the 8<sup>th</sup> July 2008 remitted the matter to start de novo before a different arbitrator on account of incomplete record and the witnesses who had testified without being sworn. This is where procrastination started to manifest itself.
5. Following remittal, the matter first came before arbitrator Masheane on the 8<sup>th</sup> September 2008. Applicant was represented by its Human Resources Manager Mrs. Sekhantso, while the respondents were represented by a trade union official, Mr. Tsepiso Matete. The latter objected to the applicant being represented by Mrs. Sekhantso on the ground that she is a legal practitioner. The objection was upheld notwithstanding that:
  - (a) There was no evidence to show that Mrs. Sekhantso is/was a legal practitioner as defined in the Legal Practitioner's Act No.11 of 1983.
  - (b) Mrs. Sekhantso is/was an employee of the applicant who is a juristic person and as such entitled to be represented by its employees in terms of section 228A

(1)(d) of the Labour Code (Amendment) Act No.3 of 2000.

The matter was postponed to the 6<sup>th</sup> October 2008, to enable the company to arrange representation other than by a lawyer.

6. On the 6<sup>th</sup> October 2008, applicant was represented by Advocate Sephomolo of the Association of Lesotho Employers and Business (ALEB). A postponement was again sought as parties were desirous to settle the matter out of court. It was postponed to the 1<sup>st</sup> December 2008. Even before that date, parties approached the DDPR for a further postponement as the 1<sup>st</sup> of December was not suitable to both of them. It was postponed to the 21<sup>st</sup> January 2009.
7. On the rescheduled date of hearing applicant appeared again represented by Mrs. Sekhantso who had already been barred from appearing for applicant. The respondents were still represented by Mr. Matete. Mrs. Sekhantso did not however, purport to be there to represent the applicant. She, however, informed the arbitrator of applicant's request for a further postponement. This may be understandable because Ms. Sephomolo who had stood in to represent the applicant and had suggested an out of court settlement was not there.
8. The arbitrator sought to know if a formal application for the postponement had been filed. Mrs. Sekhantso said it had been, but no copy of it was found in the file. The arbitrator refused the requested postponement when no formal application was found. Since Mrs. Sekhantso had already previously been excluded she had no option but to leave. The arbitrator decided to proceed in the absence of the applicant or its representative. No effort was made to establish what the fate of the mooted settlement had been. Arbitration proceeded with only one side present. As would be expected in a one man contest, 1<sup>st</sup> and 2<sup>nd</sup> respondent emerged victorious and the arbitrator ordered their reinstatement with effect from the 1<sup>st</sup> March 2009.

9. Applicant applied for the rescission of the default award. The application was scheduled for 23<sup>rd</sup> November 2009 on which date applicant was represented by Webber Newdigate. Mr. Matete for the 1<sup>st</sup> and 2<sup>nd</sup> respondent again objected to applicant's representation by a firm of attorneys. The objection was upheld and the matter was postponed to the 13<sup>th</sup> January 2010.
10. On the date on which the matter had been rescheduled the applicant failed to be present or to be represented by either a director, employee or a representative from any of its lawyers. There is no evidence that for their part the 1<sup>st</sup> and 2<sup>nd</sup> respondents were themselves represented. There is no indication whether, if they were present, their view was sought regarding the way forward. The arbitrator on her own motion concluded that:

*"I decide that applicant had lost interest in his case so I invoked section 227 (8) (b) to dismiss the referral for application for rescission in award E002/06 (b)"*

11. This is a rather disturbing conclusion to reach as no factual basis was sought and found for it. Absence of a party at a scheduled hearing can be dictated by various factors. Mere absence cannot be a conclusive proof of a party's loss of interest in their case. This is more so when regard is had to the fact that applicant had religiously attended all previous hearings only to be disabled from putting its defence by 1<sup>st</sup> and 2<sup>nd</sup> respondent's representative's persistent objection to their representation. A single telephone call would have informed the learned arbitrator's conclusion whether the applicants had indeed lost interest. This was however not done.
12. Be that as it may applicants again filed for the review of the award of the learned arbitrator, contending that in making the award to stand by her earlier decision to reinstate the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the learned arbitrator "committed an irregularity in that she totally overlooked the provisions of section 73(1) of the Labour code Order 1992, which expressly provides that an order of reinstatement shall not be made if the arbitrator

considers the reinstatement of the employee to be impracticable in the light of the circumstances.”

13. Applicant contended that the learned arbitrator failed to consider the practicability of reinstatement as she is enjoined by law to do. In paragraph 16 of her Founding Affidavit Mrs. Sekhantso averred that:

*“In this respect I humbly point out that the initial dismissal of the 1<sup>st</sup> and 2<sup>nd</sup> respondents took place on 7 December 2005. The latest award directing that the order reinstating the respondents still stands is dated 12 February 2010. The latest award was therefore issued more than 4 years after the initial dismissal.”*

Surely, the sheer passage of time between the date of initial dismissal and the making of the order reinstating the respondents, dictated that the arbitrator should consider the practicability of the order she intends to make.

14. This court is not concerned itself with whether the reinstatement of the respondents is practicable. Rather, we are seized with the requirement of the law viz. section 73(1), which enjoins the arbitrator not to order reinstatement if she considers it not practicable, in the light of the circumstances. In *Pascal Molapi .v. Metro Group Ltd* the Labour Appeal Court interpreted the words “in the light of the circumstances” to mean that “they confer a judicial discretion,” which must in all cases be exercised judicially. The court went on to say that:

*“the proper approach in cases of unfair dismissal is that it is incumbent on the court when deciding what remedy is appropriate to consider whether in the light of proved circumstances there is reason to refuse reinstatement.”*

15. We have underlined the words “proved circumstances” to underscore that the arbitrator had to hear both sides on the practicability or otherwise of reinstatement. The learned Judge went further to state; “it is for the employer, not the employee, to

raise the factors which displace such inference.” This is precisely what the applicant says in casu; that they have not been given the opportunity to raise factors which may have militated against the granting of the order of reinstatement.

16. That was plainly wrong, for in exercising the discretion vested in her by the law the arbitrator clearly acted arbitrarily. Having decided that she dismissed the application for rescission, she had the added obligation to call the parties to address her on practicability of reinstatement. This was necessary to enable her to exercise her discretion judicially. For this reason, the application for review is upheld and the matter is referred back to the DDPR for the parties to address the arbitrator on reinstatement.

THUS DONE AT MASERU THIS 19TH DAY OF AUGUST 2011

**L. A. LETHOBANE**  
**PRESIDENT**

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**L. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS:**

**ADV. LOUBSER**  
**ADV. MOTSOARI**