

HELD AT MASERU

In the matter between:

ROMAN CATHOLIC CHURCH

APPLICANT

And

MOTŠOENE MASUPHA
TRANSPORT AND SECURITY WORKERS UNION
DDPR

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

JUDGMENT

Date: 16th October 2012

Application for review of arbitration award. Two grounds raised by Applicant. First ground - Applicant failing to raise a procedural issue before the DDPR – only raising it for the first time before this Court. Court finding no fault on the part of the learned Arbitrator. Second ground - Court finding the second ground of review as constituting an appeal ground. Review application being dismissed. No order as to costs.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR. It was heard on the 16th October 2012 and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 30th August 2010, reviewed and set aside. This application was duly opposed and both parties made representations. It is on these bases that the review was heard on this date.

SUBMISSIONS

2. Applicant raised two rounds of review namely that the learned Arbitrator erred in law by proceeding to determine a matter against the Roman Catholic Church when there is no such legal person. Secondly, that the learned Arbitrator erred by refusing to accept the oral evidence that Respondent was

employed as a domestic servant and thus not entitled to the claims he made before the DDPR.

3. On the first ground, Applicant submitted that the Roman Catholic Church was not the right party to sue, for the reason that there is no such legal person in Lesotho. It was submitted that what exists is the Roman Catholic Church in the Diocese of Maseru as an Association, established in terms of the laws of Lesotho. It was submitted that this issue was raised and argued in the DDPR proceedings and but that the learned Arbitrator nonetheless decided to proceed with the matter as referred. This thus resulted in a reviewable irregularity. Although there was a prayer for costs in the event of opposition of this review application, no submissions were made.

4. On the second ground, Applicant submitted that there was evidence before the DDPR, by Fr. Mokhele and Sr. Moeketsi, that Respondent had been employed as a chauffeur at the then Archbishop Mohlalisi's private residence. Applicant further submitted that the evidence of these two was sufficient to establish that Respondent was a domestic servant and thus not entitled to make the claims he did before the DDPR. It was argued that this evidence was rejected by the learned Arbitrator and/or he failed to apply his mind to the fact that the Sr. Moeketsi's evidence corroborated that of Fr. Mokhele to prove that Respondent was a domestic servant, as opposed to an employee per the Labour Code.

5. Respondent replied that he was employed as a driver by Applicant for the whole period of his service. He maintained that the question of the legal personality of Applicant was never raised at any point, in particular at the DDPR and as such should be disregarded. He stated that if it was indeed true that there is no such legal person, Applicant would not have forgotten to raise it at the DDPR. He further submitted that all the grounds raised by Applicant are appeal and not review grounds. He thus prayed that this review be dismissed.

6. In analysing the first ground raised by Applicant, I have considered the conclusion of this court in the case of ***Slagment (Pty) Ltd vs. Building Construction and Allied Workers Union (1994) 15 ILJ 979 (A)***. In this case, the Applicant had failed to comply with its own procedures in relation to the composition of its disciplinary committee. The irregularity was only raised for the first time when the decision of the initial hearing was being challenged. The court found no wrong in the conduct of Applicant on the ground that in failing to that raise this issue in the initial hearing, the Respondent had denied the

Applicant a chance to deal with the conduct complained of. This principle was cited with approval by this court in the case of **Central Bank of Lesotho vs. DDPR and Others LC/REV/216/2006**.

7. In the case at hand, I have perused both the record of proceedings before the DDPR and the arbitration award and have not found anywhere therein, where the issue of the Applicant being wrongly cited was raised and/or argued. This in essence means that, it is only coming for the first time at the review stage. As a result, in not raising this issue at the arbitration hearing, Applicant had denied the learned Arbitrator to address the issue and pronounce himself. As a result, Applicant is estopped from raising it for the first time at this stage. For this court to entertain this argument would be an absurdity which would prejudicially affect the interests of Respondent. Consequently, this argument fails.

8. In relation to the 2nd ground of review, I have noted from the record of proceedings that there was evidence of Fr. Mokhele that 1st Respondent was a domestic servant. The said evidence was indeed corroborated by that of Sr. Moeketsi safe that she stated that when she came 1st Respondent was already working with Applicant. This evidence was then challenged as hearsay for the reason that Sr. Moeketsi had no first hand knowledge of the arrangement between 1st Respondent and Applicant. As a result, the evidence of both Fr. Mokhele and Sr. Moeketsi was considered and the learned Arbitrator applied his mind to it, safe that he made a conclusion that was different from that anticipated by Applicant.

9. In view of my conclusion above, clearly Applicant is unhappy about the decision of the learned Arbitrator. As a result, this is an appeal and not a review ground. The premises of my argument is the conclusion of the Court in **Coetzee vs. Lebea NO and Another (1999) 20 ILJ, 129 (LC)**, where Court concluded that where a party feels that on the basis of the present facts a different decision could have been arrived at, that constitutes a ground for appeal. This case has been cited with approval in a number of judgments of this court (see **Lesotho Highlands Development Authority vs. Rosalika Ramoholi and Another LC/REV/33/2012**; also see **Lesotho Highlands Development Authority vs. Thabo Mohlobo and 19 Others LC/REV/09/2012**). In the same vein, it is clearly the attitude of Applicant that in the premise of the evidence presented before the learned Arbitrator, He should have held that 1st Respondent was a domestic servant and not an employee in term of the labour Code. Consequently, this ground fails.

AWARD

Having heard the submissions of parties, I hereby make an award in the following terms:

- a) That the review application is dismissed; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 22nd DAY OF OCTOBER 2012,

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**T. C. RAMOSEME
DEPUTY PRESIDENT OF THE LABOUR COURT OF LESOTHO (AI)**

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**Mr. S. KAO
MEMBER**

I CONCUR

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**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**FR. MICHEAL MOKHELE
MS. 'MAPHARINA LECHE-LECHESA.**