

HELD AT MASERU

In the matter between:

STRUGGLING (PTY) LTD.

APPLICANT

AND

PALESA PAKELA
MATHUSO KOREISI
LERATO RAMASEI
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

DATE: 25/09/12

Practice and Procedure - DDPDR dispute settlement machinery two - pronged - The arbitration process has to be preceded by conciliation - Some cases are settled at conciliation - The issue at hand is whether if a settlement agreement is reached at conciliation and the other party reneges from it the DDPDR is competent to turn such an agreement into an arbitration award - Answer is in the negative.

1. The Directorate of Dispute Prevention and Resolution (DDPR) operates a dispute settlement machinery generally referred to as Con - Arb (Conciliation - Arbitration). The system entails that every arbitration be preceded by a conciliation process. Sometimes parties reach a settlement at conciliation, a thing generally encouraged in the settlement of labour disputes. The problem however arises if one of the parties reneges from an undertaking he made in the settlement agreement. The general trend if a party fails to abide by the terms of the agreement is for Arbitrators to turn the settlement agreement into an arbitration award, so that it may be enforceable in law. The present review application revolves around this very same issue of whether the DDPDR has power to turn a settlement agreement reached at the conciliation stage into an arbitration award. It would be prudent to mention at this juncture that the

Labour Court can only enforce arbitration awards as envisaged by ***Section 228 E (5) of the Labour Code (Amendment) Act, 2000***. The Section provides that;

[An] award issued by the arbitrator shall be final and binding and shall be enforceable as if it was an order of the Labour Court.

2. In *casu*, following conciliation, parties had entered into a settlement agreement at the DDPR which was duly signed by both parties. There was a further clause to the effect that the agreement was in full and final settlement of the agreed issues without any further recourse. It was one of the terms of the agreement between the parties that 1st, 2nd and 3rd respondents be reinstated to their former positions and that they be paid their salary arrears. The applicant failed to honour this settlement agreement within the stipulated timeframe. The 1st, 2nd and 3rd respondent then moved an application before the DDPR to have the settlement agreement turned into an award which would be enforceable in law. The DDPR turned the settlement agreement into an award and it is the very same award that is the subject of the present application.

3. The applicant is challenging this procedure. He is herein seeking the review, correction and setting aside of the DDPR award in A/008 - 10 (b) on the basis that the learned Arbitrator had no powers to turn the settlement agreement into an award. Applicants' Counsel, Advocate Mohapi argued that the DDPR is a creature of statute that created it and as such derives its powers from such a statute. He pointed out that since there is no statutory provision that empowers it to turn settlement agreements into awards, it acted beyond its powers. He submitted further that this issue was settled by the ***Labour Appeal Court in Lesotho National Federation of Organisations of the Disabled (LNFOD) v Mojalefa Lobhin Mabula & the DDPR LAC/CIV/A/07/2010*** per C.J. MUSI AJ., The Labour Appeal Court decided therein that the DDPR has no jurisdiction to turn settlement agreements into awards. It held that once a settlement agreement has been reached it becomes a contract enforceable in the ordinary Courts of law. The Honourable Judge underscored at paragraph 14 of the said judgment that the cause of action should be treated as an ordinary breach of contract as opposed to a trade dispute.

4. Advocate Russel from the Labour Department, representing the 1st, 2nd and 3rd respondents argued in converse that the learned Arbitrator committed no irregularity in turning a settlement agreement into an award. As far as she was concerned, the learned Arbitrator was empowered to do so by Regulation 26 of the Labour Code (DDPR) Regulations, 2001. She contended that the Regulation empowers the DDPR to turn settlement agreements into arbitration awards. She further argued that since this issue was never raised before the DDPR, the applicant cannot be heard to raise it at the review stage.

THE COURTS ANALYSIS

The DDPR was created by Section 46 B of the Labour Code (Amendment) Act, 2000 and indeed there is no provision in the said statute that empowers it to turn settlement agreements into arbitration awards.

5. The Labour Appeal Court case referred to above was a review of this Court's judgment in *Lesotho National Federation of Organisations of the Disabled & Ano., v Mojalefa Lobhin & Ano., LC/REV/08/10* in which this Court had concluded that if settlement agreements were not to be turned into settlement agreements the conciliation process would be rendered futile. This would also run counter to the purpose of labour legislation which encourages settlement of disputes through amicable means which include negotiation, agreement or conciliation where there is third party intervention. To this end, ***Section 46B (5) of the Labour Code (Amendment) Act, 2000*** outlines as some of the functions of the DDPR as being:

(a) ***to attempt to prevent and resolve trade disputes through conciliation***

6. The Labour Appeal Court overruled this decision and insisted that the DDPR being a creature of statute has to derive the powers to turn settlement agreements from the said statute. The Honourable Judge in the Labour Appeal Court case distinguished the Lesotho position from that of the Republic of South Africa where the Labour Relations Act, 1995 as amended in 2002, empowered the Commission for Conciliation, Mediation and Arbitration (CCMA), the DDPR counterpart, to turn settlement agreements into awards. He continued at paragraph 24 of his judgment that the CCMA is therefore competent to turn settlement agreements into arbitration awards, unlike the DDPR which does not derive the said powers from the enabling statute.

7. Indeed, as aforementioned there is no legal provision empowering arbitrators to turn settlement agreements into awards. Furthermore, the Labour Court being subordinate to the Labour Appeal Court is bound by its decisions. It is on these factors that this Court has no alternative but to uphold applicant's Counsel's argument. We conclude that the DDPR having no statutory powers to turn settlement agreements into arbitration awards acted beyond its powers. The award in A/ 008 - 10 (b) is therefore reviewed and set aside. Clearly, the fact that Arbitrators have resorted on their own accord to turn settlements agreements into arbitration awards in an attempt to help parties execute agreements reflects a dire need to have in place a legal provision aimed at ensuring that parties honour agreements they have committed themselves to. The Ministry would therefore be advised to assist in this

regard lest the conciliation process be turned into a sham. It will be in the interests of the users of the system, particularly workers, that disputes that arise out of employer/employee relationships are dealt with within the confines of labour dispute resolution mechanisms which are specialised, expedient, informal, affordable and easily accessible.

8. On the second objection raised by Advocate Russel that the applicant cannot be heard to raise the point that he raised at the review stage when it was not raised at the DDPR. The legal position is that the point regarding jurisdiction being a legal point, can be raised anytime and at any stage of the proceedings. According to the Court of Appeal case of *Basotholand Congress Party & Ors v Director of Elections & Ors C of A (CIV) No. 14/98*. The Court held that a point of law can be raised any time during proceedings. In the above case it was raised as late as at the Court of Appeal level. This case was cited with approval in *Ambassadors FC & Ano., v Lesotho Football Association & Ors (CIV/APN/395/01) [2001] LSCA 122*.

9. As aforementioned, the review application is upheld. Applicant's Counsel indicated that he was not insisting on costs. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 25TH DAY OF SEPTEMBER, 2012.

F.M. KHABO
DEPUTY PRESIDENT

P. LEBITSA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR THE APPLICANT:

ADV., P.L. MOHAPI

FOR THE 1st, 2nd and 3rd RESPONDENT:

ADV., N. RUSSEL