IN THE LABOUR COURT OF LESOTHO **LC/REV/04/12**
A0932/2009

HELD AT MASERU

In the matter between:

LESOTHO BREWING COMPANY **APPLICANT**

And

DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION **1ST RESPONDENT**
M. MONOKO (ARBITRATOR) **2ND RESPONDENT**
'NOKOANE MOKHATLA **3RD RESPONDENT**

JUDGMENT

Date: 26th September 2012
Application for review of arbitration award. Points in limine raised by 3rd Respondent – Court dismissing them. Three grounds of review raised by Applicant. 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 26th September 2012 and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 28th December 2011, reviewed, corrected and set aside. Facts surrounding this Application are basically that, after Applicant had filed its notice of motion with this Court, the record of proceedings was dispatched and Applicant was called to collect for transcription. There was an unexplained delay between the time of collection, the transcription and the filing of an answer to the notice of motion. As a result, 3rd Respondent filed an application for dismissal of the review application for want of prosecution. In that application, 3rd Respondent had also prayed for costs.

2. However, the application for dismissal of the review application was never moved by Applicant but only came up once more on this day. Even on this day, it was not moved as parties reached an agreement to abandon it except for the arguments on the issue of costs. In his answering affidavit, 3rd Respondent had raised two points *in limine* in terms of which he asked for the dismissal of Applicant's claim. These points were that Applicant had failed to comply with the provisions of rule 16 (5) and (6) of the Labour Court Rules; and that this application was an abuse of court processes. Both parties made representations on this issues but judgment was reserved and the Court directed them to proceed to argue the merits of the application. Parties were duly informed that in the event that points *in limine* were upheld, the Court would not bother to considered the merits. It is on these bases that the review was heard on this date.

POINTS IN LIMINE

3. It was submitted on behalf of 3rd Respondent that Applicant had failed to comply timeously with the provisions of rule 16 of the Rules of this Court and in particular sub rules (5) and (6). It was argued that contrary to the dictates of the rule, while Applicant had belatedly filed and served 3rd Respondent with the record of proceedings, it has not to date served 3rd Respondent with the notice contemplated in Rule 16. It was submitted that the gist of Rule 16 (5) and (6) is for the applying party to serve the other with record of proceedings and inform them about their intention to or not to add further grounds of review. Once this is communicated, it would then place 3rd Respondent in a position to respond and have the matter finalised expeditiously.

4. Applicant responded that it was impossible on their part to serve a copy of the record of proceedings on the 3rd Respondent within the 7 days, in the light of the fact that the record was electronic and was yet to be transcribed. In support of this argument, Applicant further submitted that once transcribed, the record then had to be served on the DDPR for certification and given its bulk, these processes could not have been fitted within the 7 days period. Respondent argued that be as it may, Applicant was still obliged in terms of the rules to apply for condonation which Applicant has not been made to date especially since this Court has the power to grant such an extension if requested. Reference was made to several cases in this regard among which were ***Khalapa vs. Commissioner of Police and Another 1999-2000 LLR-LB 350 (CA) at 354; Lesotho National Olympic Committee and Others vs. Morolong AC (2000-2004) 449 at 456G)***

to support the argument that this Court had power to grant an extension. As a result, 3rd Respondent maintained that there is still non-compliance on Applicant's part.

5. I have considered the submissions of the parties and my attitude towards this point *in limine* is that it is not sufficient to warrant the dismissal of this claim. Rather, if well argued, it can only delay the processes to give Applicant the opportunity to correct the error on their part, through measures such as an application for condonation. The error complained of, is failure to file a notice giving direction to 3rd Respondent on whether to proceed to file his answer or to wait until further grounds of review have been filed by Applicant. As at this date, no further grounds have been filed and 3rd Respondent has filed his answer. In my view, this point has been overtaken by events. At best, and given the current developments, it can be argued as a ground for the award of costs against Applicant for causing the delay occasioned by its failure to file the necessary notice, which delay may have caused a certain level of prejudice on the 3rd Respondent. Consequently, this point *in limine* cannot succeed.

6. It was further argued that this application for review amounts to abuse of court processes in that the grounds for review raised are without merit. It was maintained that the grounds of review relate to issues that were deliberated upon by the leaned Arbitrator in the proceedings. This according to 3rd Respondent has led them to the conclusion that Applicant simply wants to delay the execution of the DDPR award granted in their favour. Reference was made to the case of ***Remington vs. Scoles (1897, 2 Ch.D at 5)*** to illustrate the point that where the court finds that the conduct of a party amounts to an abuse of process intended to delay there proceedings, then the court may dismiss such a claim. Applicant responded that there is merit in its application as all the grounds raised relate to the serious irregularities by the learned Arbitrator which if approved will entitle this Court to correct the award in issue.

7. The manner in which this point *in limine* is structured and in view of the framing of the review grounds, requires this Court to consider and make a determination on the merits of the matter. Having done so, this Court will be in position to validly make a conclusion on whether or not Applicant's claim is without merit and intended to delay the execution of 3rd Respondent award. In view of this said, it cannot stand as a point *in limine* but a ground for costs, again if well argued. Although 3rd Respondent relied

on the ***Remington vs. Scoles (supra)*** case to support his argument, the circumstances in the two cases are different. In that case, there was *prima facie* evidence that the defendant was abusing court processes in that he had barely denied each and every substantial claim of the Applicant. In the present matter, Applicant has made allegations with supporting averments. Clearly the circumstances are different and as such that case is not applicable in this instance. Consequently, both points *in limine* fail.

THE MERITS

8. Three grounds of review were raised by Applicant alleging gross irregularities on the part of the learned Arbitrator in the following,

   "a) By awarding cellphone allowance to the third respondent when the was no evidence adduced in relation thereto.
   b) By failing to investigate whether or not the Applicant company's rules allowed bringing of new evidence on appeal.
   c) By failing to inquire why third Respondent sought to bring in new evidence on appeal and what nature of evidence he had sought to bring in on appeal, otherwise there was no basis for finding that the procedure was flawed as he did."

9. Respondent answered that all these grounds raised by Applicant are unfounded as all the issues were duly addressed in the proceedings and as such there was no irregularity as suggested. In relation to the first ground of review, reference was made to page 142 of the record. It was submitted that at this page, evidence was led that 3rd Respondent was given airtime allowance on a monthly basis. I have considered both the submissions of the parties and the record of proceedings before the DDPR. I have discovered that indeed evidence was led at page 142 of the record, by 3rd Respondent himself that he was entitled to a monthly airtime allowance of M100.00. Therefore, contrary to Applicant assertion of absence of such evidence, I have confirmed that there was and I accordingly dismiss this ground.

10. In relation to the second ground, 3rd Respondent argued that there was evidence during cross examination of one Mr. Motselebane to the effect that the rules of Applicant company allowed for the bringing in of new evidence on appeal. Reference was made to pages 83, 201, 202 and 203 of the DDPR record of proceedings. Similarly, as suggested by 3rd Respondent, evidence of one Motselebane and 3rd Respondent was led in pages 83 and

201-203 of the record, respectively. Their evidence was to the effect that the bringing of new evidence was allowed on appeal in terms of the rules of Applicant company. If this is the case, there was no need for the learned Arbitrator to make an inquiry in the suggested fashion and accordingly no irregularity was committed on his part.

11. On the third ground, Applicant argued that it was incumbent upon the learned Arbitrator to inquire about the nature of evidence that 3rd Respondent wanted to bring on appeal. Further that, the learned arbitrator had to investigate what evidence this was, that would have influence on the chairman of the appeal to find otherwise. Without doing this, the learned arbitrator misdirected himself concluding that it was wrong for 3rd Respondent to have been denied the chance to bring in new evidence on appeal. To further fortify this point, it was alleged that in the hearing, 3rd Respondent did not state the evidence that he wanted to bring on appeal but simply testified that he wanted to bring in new evidence on appeal but was denied the chance without stating what is was.

12. In reaction to the third ground, 3rd Respondent argued that it was not the responsibility of the learned Arbitrator to inquire about the nature of evidence that 3rd Respondent wanted to bring but that of Applicant. It was further argued that in any event, the nature of the evidence that 3rd Respondent wanted to bring on appeal appears at para 3 on page 220 of the DDPR record as being the evidence that would contradict the charges against him.

13. In terms of section 25(3) of the ***Labour Code (Conciliation and Arbitration Guidelines) of 2004***,
"Unless there are good reasons for doing otherwise, the arbitration proceedings are inquisitorial in nature. This means that, it is the arbitrator's task to find out the truth by asking questions requiring parties to produce documentary or other forms of evidence that may lead to a just and expedited determination of the dispute."

14. In view of this above quotation, it is clear as put by Applicant, that the learned Arbitrator had an obligation to require the inquire about the evidence that 3rd Respondent alleges to have been denied the opportunity to tender on appeal. However, this is subject to such evidence having not been adduced by one or both parties and such evidence being necessary for the dispute to be determined fairly. According to the record, in particular at

page 220, 3rd Respondent testified that he wanted to bring evidence in the form of correspondence to his seniors to show that he elevated the shortage to them and had thus followed the procedure. If then this is the case, 3rd Respondent explained why he wanted to bring in new evidence and the nature of the evidence he wanted to tender. Clearly, there is no defect in the conduct of the learned Arbitrator as there has no need for him to engage into such an inquiry. In making his conclusion that there was a flaw in the appeal procedure of Applicant company, he had made the necessary considerations in the light of evidence before him. Therefore, this ground fails.

COSTS

15. 3rd Respondent argued that in the event that this court finds in his favour, an award of costs be made against Applicant. He argued that because Applicant had handled this matter in a dilatory manner without a satisfactory explanation, coupled with the fact that there is no merit in the application, the Court should made an order of *costs de bonis propriis* and/or on attorney and client scale. Reference was made to the cases of ***Lesesa vs. Khutlisi LAC (2007-2008) at page 145 at 147-148*** and ***LUTARU vs. NUL 1999-2000 LLR-LB 52 at 64*** an order of *costs de bonis propriis* was made. 3rd Respondent maintained that as a result of the conduct of Applicant, he has suffered prejudice in that he has failed to maintain his wife and two daughters whose lives have been compromised and have thus deteriorated since his loss of employment.

16. In reaction, Applicant submitted that 3rd Respondent had failed to illustrate how Applicant was at fault in occasioning the delay in prosecution of the matter. It was further submitted that given the bulk of the record, it was only reasonable that it was completed at the time it was. It was further argued that the discretion to condone the breach of rules lies with the court. Reference was made to the observation of the court in ***JHL Real Estate Ltd. Vs. Samuel Brandt Masia LC/90/2005*** where this view was expressed. In reaction to this, 3rd Respondent argued that no application for condonation had been made so that there was still a breach of the rules which caused an unnecessary delay.

17. I have found the explanation given by Applicant to be satisfactory except that it did not follow the proper procedures to have the delay condoned. However, the issue of condonation is not the basis of the 3rd Respondent application for costs but that the manner in which the proceedings were

dealt with was dilatory and without satisfactory explanation. An award for costs in intended to discourage certain unwanted behaviour from happening or continuing. It is not in any way intended to intimidate parties from exercising their respective rights and as such it must be given in very extreme circumstances such as where *prima facie* there is no claim or defence. In this matter, this was not the situation hence why an application for dismissal of the matter on account of abuse of process was refused. As a result, this Court declines to make an award of costs.

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 31st DAY OF OCTOBER 2012,

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

..... **I CONCUR**
Mr. S. KAO
MEMBER

..... **I CONCUR**
Mr. R. MOTHEPU
MEMBER

FOR APPLICANT: **ADV. NTAOTE**
FOR RESPONDENT: **ADV. THULO.**