

HELD AT MASERU

In the matter between:

LESOTHO EXPRESS DELIVERY SERVICES (PTY) LTD

APPLICANT

And

THE ARBITRATOR – DDP
NKOTO MIRIAM CHABANE

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date: 30th October 2012

Review application of DDP award. Respondent raising three preliminary points on jurisdiction of this Court. First point being lack of jurisdiction to entertain a review in respect of a reviewed matter – second point being late referral of the review application - third point being an appeal disguised as a review. Court dismissing the later two points and declining jurisdiction to entertain Applicant's claim on the basis of the third point. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDP. It was heard on the 30th October 2012 and judgment was reserved for a later date. Facts surrounding this application are basically that 2nd Respondent initially referred a claim for unpaid wages with the DDP sometime in 2003, under referral number A0939/2003. This claim was granted in favour of 2nd Respondent in default by Arbitrator Rantsane. Applicant then made an application for rescission which was unsuccessful. Thereafter, Applicant lodged a review application with this court under case number LC/REV/252/2006. This court made the conclusion that the matter be heard *de novo* before a different Arbitrator. The matter was duly remitted to the DDP before Arbitrator Thamae, whose award is subject of review in this proceedings.

2. In this application, Applicant seeks to have the arbitration award before Arbitrator Thamae, handed down on the 10th February 2010, reviewed, corrected and set aside. In his answering affidavit, 2nd Respondent raised three points *in limine* on jurisdiction, in terms of which he asked for the dismissal of Applicant's claim. The points in limine were that, it is irregular to review the same matter twice; that the review application had been lodged out of the prescribed time limits; and that this application is an appeal disguised as a review. Having heard the submission of parties on these points, the Court declined to hear the merits before pronouncing its self on the preliminary issues. It is on these bases that this matter proceeded on this date.

SUBMISSIONS

3. It was submitted on behalf of 2nd Respondent that this Court lacks jurisdiction to entertain this review for the reason that Applicant is asking the Court to review the same matter twice. It was argued in support that, referral A0939/2003 was first reviewed under LC/REV/252/2006 and remitted to the DDPR to be heard on a specific issue sometime in 2006. This issue was whether 2nd Respondent had received a letter of dismissal. The learned Arbitrator had decided that Applicant had not, which was a similar conclusion to the one reached by the learned Arbitrator who presided over the matter prior to the first review. It was argued that to allow this review would be permitting 2nd Respondent to review the same matter twice, when the proper remedy is an appeal.
4. Applicant responded that they are reviewing the conducts of two different Arbitrators at different times. In the initial review, the conduct complained of was by Arbitrator Rantsane while in this matter, it is the conduct of Arbitrator Thamae. As a result, the acts complained of are acts of two different functionaries at two different times. It was thus argued that the procedure adopted by Applicant is proper in the circumstances.
5. I have taken the liberty to peruse LC/REV/252/2006. I have found that in this matter, the Court came to the conclusion that referral A0939/2003 be heard afresh before a different arbitrator. This, I wish to highlight, is contrary to the allegation of 2nd Respondent that the matter was remitted back to the DDPR only in respect of a particular issue. Our law is clear on issues of contradictions in averments of parties that such averments cannot be relied upon. However, since this is not the thrust of this application, I will deliberate on its further. If then it is the position that in terms of LC/REV/252/2006, referral A0939/2003 was to be heard afresh, I see no

wrong in Applicant lodging this review. There is no rule of law, that I know of or which 2nd Respondent has referred to, that prevents Applicant from taking this route. I am in agreement with the submissions of Applicant that the current matter is concerned with the conduct of a different arbitrator altogether. I further add that this review is premised on the conduct of the latter Arbitrator during the conduct of arbitration proceedings before him and not the conduct of the former Arbitrator.

6. 2nd Respondent further argued that this matter had been lodged with this Court out of time without an application for condonation. It was alleged that the referral was served upon Applicant more than 30 days before it was lodged with this Court. As a result, this Court had no jurisdiction to entertain this application. Applicant responded that the matter was well within prescribed time limits, as they received the award on the 1st March 2010 and then lodged a review application by the 31st of the same month. Reference was made to the stamped notice of application. Applicant submitted that by the time they filed this application, the 30 days period had not lapsed.
7. It is trite that he who makes an allegation bears the onus of proof (see ***United Clothing vs. Phakiso Mokoatsi & Another LC/RV/436/2006***). My conclusion on the averments of 2nd Respondent about the lateness of the referral of this review application, is that they are bare. 2nd Respondent has simply made an allegation about lateness, which allegation has been denied by Applicant with supporting evidence. The effect of this has been to place a burden on the 2nd Respondent to bring evidence to support his allegations or contradict the evidence of Applicant. In the absence of such evidence, I find the allegation about the matter having been referred out of time to be unsatisfactory and unconvincing. This court has expressed this view in many of its decisions (see ***Kopano Textiles (Pty) Ltd vs. Motšhare Qokolo & Others LC/REV/19/09***). Consequently, this point fails.
8. It was submitted on behalf of 2nd Respondent that the grounds raised by Applicant in its notice of motion are appeal and not review grounds. This was said to be premised on the fact that the grounds so raised only echoed the dissatisfaction of Applicant with the decision of the learned Arbitrator in the initial hearing. It was emphasised that the grounds relate to both the substance and application of law which issues are not reviewable but appealable. It was further argued that there is no allegation of a procedural irregularity in the application. 2nd Respondent argued that in view of his

contention above, this Court has no jurisdiction to hear appeal from the DDPR decisions.

9. Applicant responded that grounds raised are review grounds. It was argued that the use and non use of the words “irregularity” do not change their approach to an appeal. It was submitted that grounds raised clearly relate to a review and not an appeal as they highlight a mistake of law on the part of the learned Arbitrator which materially affect his decision. Reference was made to the case of **Thabo Mohlobo & Others vs. Lesotho Highlands Authority LAC/CIV/A/02/2010**, in which this principle was applied. In reply, 2nd Respondent argued that in the above case, the Court went further to state that the mistake of law contemplated must relate to the procedure or processes of reaching the conclusion in issue.

10. I have gone through the notice of motion and founding affidavit of Applicant and have the ground of review phrased as follows;

“1. That the learned Arbitrator failed to adequately apply his mind to the matter as required by law and the standard of proof and came to a conclusion which is not supported by the evidence and facts presented before him; and

2. The learned Arbitrator failed to adequately apply his mind to the matter as required by law in awarding the 2nd Respondent M280 000.00 in outstanding wages as from paragraph 5 of his own award the second Respondent had no reasonable and legitimate expectation of being paid or employed by the Applicant, at latest, since 28th August 2003.”

11. I have noted, as suggested by 2nd Respondent that there is no use of the word “irregularity” in the grounds of review raised by Applicant. However, I am in agreement with the Applicant to the extent that the use or non use of the word “irregularity” is not the only determining element of what does or does not constitute grounds of review. What is important is for the parties to highlight the points of defect in respect of the procedures adopted in reaching the conclusion complained of. This has been reflected in the case of **Thabo Mohlobo & Others vs. Lesotho Highlands Development Authority LAC/CIV/A/05/2010**) and in applied in **Thabo Mohlobo and 19 Others vs. Lesotho Highlands Development Authority LC/REV/09/2012**.

12. However, I have found both grounds of review raised by Applicant to constitute appeal grounds as they express Applicant’s dissatisfaction with the conclusion that the learned arbitrator made. I have not found any

allegations of processes or procedures being flawed or it being indicated how they were in effect flawed. In view of the 1st ground of review, Applicant is alleging that the conclusion so reached should not have been on the basis of the standard of proof in proceedings of this nature. What he is effectively saying is that a different conclusion would have been reached given the evidence that was presented in the hearing.

13. The effect is the same even on the second ground of review, that it is an appeal and not a review ground. Applicant is suggesting that the decision of the learned arbitrator was wrong when he allegedly found in favour of Applicant in the sum stated. Applicant had argued that on the balance of probabilities, the learned Arbitrator ought to have found that 2nd Respondent had no legitimate expectation of continuing to be employed, at latest since the 28th August 2003. Clearly, the issue here is the ultimate conclusion of the learned arbitrator as Applicant had failed to indicate how procedural flaw occurred in these proceedings. This being the case, Court has no jurisdiction to entertain Applicant's claim for the reason that it is an appeal and not a review ground.

AWARD

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

- a) That this application is dismissed on lack of jurisdiction; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st 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. R. MOTHEPU
MEMBER**

I CONCUR

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**Mr. S. KAO
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MOKEBISA
ADV. NTŠENE**