

HELD AT MASERU

In the matter between:

LEBOHANG MOEPA

APPLICANT

And

DDPR
SECURITY LESOTHO

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date: 28th November 2012

Application for review of arbitration award. Respondent failing to attend hearing – hearing proceeding in default. Applicant having raised two grounds of review. Applicant succeeding only on one ground of review. Court finding ground sufficient to justify interference with the award of the DDPR. DDPR award being review and set aside and matter remitted to the DDPR for a rehearing before a different arbitrator. No order as to costs is made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR. It was heard on this day in default of 2nd Respondent and judgment was reserved for a later date. In this application, Applicant sought to have the arbitration award handed down on the 17th February 2011, reviewed, corrected and set aside. 2nd Respondent had also lodged a counter claim to the Applicant review application but however failed to attend. In view of this, this Court dismissed counter claim and proceeded with the Applicant claim in default and unopposed. The applicant's review was premised on two grounds. Applicant duly made submissions and the ruling and reasons are in the following.

SUBMISSIONS

2. It was submitted on behalf of Applicant that the learned Arbitrator had erred in law in that he failed to apply his mind properly to the totality of the evidence presented in the case. In support, Applicant argued that the learned arbitrator ignored their evidence challenging the authenticity of documentary evidence of rest days tendered by 2nd Respondent. Applicant submitted that they had testified that this evidence was contrary to the Occurrence book in the possession of the employer which showed both days on and off duty.
3. We have considered both the record of proceedings before the DDPR and the arbitral award. We have noted that there was evidence as suggested by Applicant, in particular at pages 5 to 7 of the DDPR record of proceedings. We have also noticed that such evidence was not considered by the learned Arbitrator in the arbitral award. This court has stated before that it is irregular for the learned Arbitrator to ignore the evidence of parties, particularly where such evidence is central to the claim before court (see ***National Aids Commission vs. Keketso Sefeane and DDPR LC/REV/07/2010***). This being the case, we are of the opinion that it was wrong for the learned Arbitrator to have ignored this evidence as it was central both to the Applicant's claims and the Respondent defence to the claims referred. As a result, this is a gross irregularity that justifies the interference with the arbitral award.
4. Applicant had also submitted that in the DDPR proceedings, they had discharged the onus in respect of both their weekly rest days and public holidays but that the learned arbitrator awarded them lesser days than those proved. In support, Applicant stated that it was not in dispute that Applicant was owed 186 days but that despite this, he was awarded 160 days payment. He submitted that the learned Arbitrator ignored the fact that the 186 days were common cause between the parties.
5. Upon consideration of both the record and the arbitral award, we have noticed that it was not in dispute that there were 186 days owed to Applicant. There was also other evidence of days given *in lieu* of these days which led to the reduction of the total number of days owed to a lesser figure than the 186. In the referral, this issue was considered and in concert with the rest of the evidence, an award was made leading to the award of payment for lesser days. In our view, this issue was considered and as such we do not find any irregularity to this extend. We are of the view that Application is in this instance dissatisfied with the conclusion of the learned

arbitrator. This Court has pronounced itself before that where this is the position, a review is not the proper route (see ***Lesotho Highlands Development Authority vs. Rosalia Ramoholi and Another LC/REV/33/2012***). However, in view of our conclusion on the first review ground, this review application is upheld.

AWARD

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

- a) That this application is granted;
- b) This matter be heard at the DDPR before a different arbitrator; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 30th DAY OF NOVEMBER 2012.

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

**Ms. P. LEBITSA
MEMBER**

I CONCUR

**Mrs. L. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MR. K. MAHLEHLE
NO APPEARANCE**