IN THE LABOUR COURT OF LESOTHO **LC/REV/07/2010**
A0240/2009

HELD AT MASERU

In the matter between:

NATIONAL AIDS COMMISSION **APPLICANT**

And

KEKETSO SEFEANE **1ST RESPONDENT**
DIRECTOR - DDPR **2ND RESPONDENT**

JUDGMENT

Date: 9th October 2012
Application for review of arbitration award. Applicant raising five 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. 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 and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 3rd February 2010, reviewed, corrected and set aside. This application is premised on five grounds of review. The application was duly argued and the ruling and reasons are in the following.

SUBMISSIONS

2. It was submitted on behalf of Applicant that the learned Arbitrator did not notify parties about the date and time on which he would be ready to deliver his verdict or to even invite both parties for that purpose. According to Applicant, when the learned Arbitrator eventually decided to issue the award, it was served on parties at different times, in that it was served upon 1st Respondent on the 5th February 2010 while Applicant received it on the 15th February in its mail. Applicant maintained that the way in which the

learned Arbitrator handle the dispute *vis-a-vis* the parties constituted a gross irregularity and a sufficient ground to warrant the setting aside of the arbitral award.

3. 1st Respondent denied the argument on the premise that both parties were at the close of the arbitration proceedings, informed that the award would be issued within a period of 30 days, in terms of the section 228E of the ***Labour Code (Amendment) Act of 2000***. Further, that the learned Arbitrator having said that, it was the responsibility of the parties to make a follow up on the availability of the award, which responsibility Applicant failed to shoulder thus leading to its awareness of the award at a later date than 1st Respondent. 1st Respondent argued that the only irregularity that occurred was the late issuance of the award by almost 6 months, which irregularity does not warrant the setting aside of the arbitral award.

4. As rightly pointed out by 1st Respondent, the issuance of the arbitral awards is provided for under section 228E of the ***Labour Code (Amendment) Act of 2000***. However, we feel that is important to highlight that the proper citation of the relevant law is section 228E (3) of the ***Labour Code Order 24 of 1992*** as amended, which reads as follows,
   " (3) within 30 days of the conclusion of the arbitration proceedings –
   (a) the arbitrator shall issue an award with brief reasons singed by that arbitrator;
   (b) the Director shall serve a copy of the award to each party to the dispute or the person who represented the party in the arbitration proceedings; and
   (c) the director shall file the original of that award with the Registrar of the Labour Court."

5. From a simple reading of the above section we have noted that it neither requires the learned Arbitrator to deliver a verdict before the parties, nor for the learned Arbitrator to give a specific date and time of delivery of the verdict or even to require or compel the Director to serve copies of the award on parties at the same time or even to place the time limits on service of awards. In view of this said and the quoted extracts of the law, we do not see the basis of Applicant's alleged irregularity. We are therefore in agreement with the 1st Respondent that once the learned Arbitrator had announced that the award would be ready within a period of 30 days in terms of the above cited law, it was the responsibility of parties to make a follow-up on the availability of the award. We however reserve our

comment in relation to the second argument raised by 1st Respondent, as it is not the subject of the application before us.

6. Further, Applicant submitted that in that hearing, it had raised an issue of lack of jurisdiction on the part of the DDPR to entertain the 1st Respondent claim. It had argued that the claim fell within the exclusive jurisdiction of the Labour Court. Applicant submitted that this was for the reason that 1st Respondent was not dismissed as his contract had ended by effluxion of time. It therefore maintained that he had no legitimate expectation of it being renewed. Applicant argued that the learned Arbitrator failed to apply his mind to this issue that it raised.

7. 1st Respondent replied that it was wrong for Applicant to have raised this issue as the claims referred fell within the jurisdiction of the DDPR, in terms of section 226 (2) of the ***Labour Code (Amendment) Act of 2000***. He stated that the claims were unfair dismissal, leave pay, underpayments and unlawful deductions. 1st Respondent maintained that when his contract of employment between himself and Applicant was terminated, Applicant failed to intervene contrary to its responsibility as his employer to ensure its renewal as provided for under the contract and the section 11 of the Applicant Act of 2009. He concluded that on these bases he had a legitimate expectation of a renewal and the learned Arbitrator duly applied his mind on all issues before him.

8. We have considered both the submission of the parties and the arbitral award. We have noted that the issue of jurisdiction was raised, argued and deliberated upon by the learned Arbitrator. In the end, He made the conclusion that the DDPR had jurisdiction to determine the dispute before him. We have noted that all the issues raised were considered by the learned Arbitrator safe that he came to a different conclusion than that anticipated by the Applicant. All these are reflected under paragraph 3 of the arbitral award. Clearly, Applicant is dissatisfied with the conclusion of the learned Arbitrator.

9. The Labour Appeal Court has set a precedent over this issue in the case of ***Thabo Mohlobo & Others vs. Lesotho Highlands Development Authority LAC/CIV/A/05/2010***. The Court in this case held that review proceedings are concerned with the procedures of making a conclusion and not whether the conclusion was right or wrong or if a different conclusion would have made by a different Court. This position has been adopted by this Court in a plethora of cases (see ***Lesotho Highlands Development Authority vs. Thabo***

Mohlobo & Others LC/REV/09/2012; Lesotho Delivery Express Services (Pty) Ltd and Another LC/REV/18/2010). In view of this said, we find that a review is not the proper recourse for Applicant for the reason that it challenges the merits and not the procedures.

10. Furthermore, Applicant argued that the leaner Arbitrator made a conclusion that is both irrational, unreasonable and unsustainable in law in that while he had dismissed 1st Respondent Claim for retrospective adjustment of his salary, he proceeded to award 1st Respondent compensation on the basis of the same adjusted salary. 1st Respondent replied that the learned Arbitrator had erred by dismissing the claim for retrospective adjustment in view of the provisions of the contract of employment of 1st Respondent. He further stated that the amount used to calculated 1st Respondent's compensation was based on the fair and reasonable salary in the market for the position of the Chief executive, in which 1st Respondent was.

11. Moreover, Applicant argued that 2nd Respondent misdirected himself in finding for 1st Respondent on his claim of unlawful deductions when there was evidence that he had contrary to the policies of Applicant purchased a cell phone in the sum of M5,394.74, which amount was deducted from his terminal benefits. Applicant submitted that there was evidence in the proceedings that its policy prohibited such conduct. 1st Respondent replied that the cell phone that 1st Respondent purchased was intended to facilitate the execution of the work of the Chief Executive. Further that the said cell phone remained the property of Applicant hence why it was retuned when 1st Respondent was terminated.

12. The arguments raised in respect of the two above grounds of review relate to the merits of the matter and in no way demonstrate a procedural flaw on the part of the learned Arbitrator, either in support or in defence. In respect the first of the two above grounds, Applicant's submission seem to suggest that because the learned Arbitrator had dismissed the claim for a retrospective salary adjustment, then he ought not to have calculated 1st Respondent compensation on the basis of the adjusted salary. Similarly, in respect of the second ground, Applicant seems to suggest that because there was evidence of the policy of the employer prohibiting Applicant from purchasing a cell phone, then the learned Arbitrator ought to have found in its favour.

13. Applicant does not in any way suggest that there is evidence was not considered or that there are other grounds of procedural irregularity on the

part of the learned Arbitrator in making his conclusion. Clearly, Applicant's attitude is that given the circumstances surrounding both issues, the conclusion ought to have been different. In our view, this argument takes us back to the issue of a party that is dissatisfied with the conclusion of the Court without demonstrating the irregularity in the process of making such a conclusion. In the same vein we reiterate our stance as stated above on this issue.

14. Lastly, it was argued that the learned Arbitrator committed a gross irregularity in that he failed to apply his mind to the issue before him. In support, it was submitted that Applicant had argued that it was the wrong party to be sued in the matter in that an employment relationship existed between the Lesotho government and 1st Respondent and not with it. Applicant submitted that it had tendered a copy of the contract of employment of 1st Respondent which corroborated its argument. Applicant further stated that in spite of this, the learned Arbitrator ignored these issues and went ahead to make an award against it.

15. 1st Respondent the argued that the augment that the contract of employment was between the Lesotho Government and 1st Respondent was misguided hence why it was dismissed by the learned Arbitrator. He further submitted that the fact that contract has been signed by the Government secretary does not make the employer the Lesotho Government as the Government Secretary was signing on behalf of the Applicant, as at the time its Board of Directors was not yet in place. 1st Respondent further argued that this does not in any way constitute an irregularity as suggested by Applicant.

16. We have gone through both the DDPR record of proceedings and the arbitral award to verify the arguments of both parties. We have discovered that in the record of proceedings, the above issue arose when Applicant testified that 1st Respondent was an employee of the Lesotho Government and not itself. Upon our inspection of the arbitral award, we have not found anywhere in the award where this issue was considered by the learned Arbitrator. This in our view goes on to fortify the Applicant argument that the learned arbitrator has ignored this issue altogether and/or failed to apply his mind to same. We find this to be a gross irregularity that justifies interference with the arbitral award. We have found this issue to be very important as it touches upon the rights of the parties and legal obligations attendant thereto. If ignored, as it is the case, there is a high likelihood that

judgment in the DDPR proceedings could have been entered against a wrong party. Consequently, this application succeeds on this point alone.

COSTS

17. 1st Respondent prayed that of the basis of his submissions above, this application be dismissed with costs in his favour. In view of the fact that we have resolved to grant the application for review, we do not find it proper to make an award of costs against Applicant or even 1st Respondent for that matter. The circumstances of this matter do not warrant the granting of such a request.

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 23rd DAY OF NOVEMBER 2012.

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

Mr. M. MPHATŠOE **I CONCUR**
MEMBER

Mrs. L. RAMASHAMOLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. LOUBSER**
FOR RESPONDENT: **ADV. MATOOANE**