

HELD AT MASERU

In the matter between:

SUN TEXTILES (PTY) LTD

APPLICANT

And

LESOLE TAU
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date: 3rd October 2012

Application for review of arbitration award. 1st Respondent raising two points in limine – first point being failure to comply with the oaths and Declaration Order – Court not finding issue sufficient to warrant dismissal of claim. 2nd point being review application being disguised appeal – Court finding for 1st Respondent and dismissing the review application. An order of costs being made against Applicant for its abuse of court process.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR in referral 0795/2012. It was heard on the above referred date and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 20th November 2010, reviewed, corrected and set aside. The history of this matter is that after the review application had been lodged with this Court by Applicant, 1st Respondent instituted an application for the dismissal of this application for want of prosecution. The application was duly opposed by both parties. However, on the date of hearing, they informed the Court that they had agreed to abandon that application but to proceed with the main review proceedings.

2. At the commencement of the proceedings, 1st Respondent brought it to the attention of the Court that he had raised two *points in limine* and wished to argue them. These points were that Applicant had failed to comply with the Oaths and Declarations Regulations No. 80 of 1964; and that the relief sought in this application did not disclose the cause of action under review proceedings. Both parties made representations on this issues but judgment was reserved and the Court declined to hear the merit before pronouncing itself on these issues. It is on these bases that the review was heard on this date.

POINTS IN LIMINE

3. It was submitted on behalf of 1st Respondent that Applicant had failed to comply with the ***Oaths and Declarations Regulations No. 80 of 1964*** in that the Applicant's affidavit in the notice of motion was neither deposed to nor commissioned. He argued further that the last page of the affidavit had not been stamped with a M2.00 revenue stamp in terms of the rules of this Court. He argued that on the basis of these procedural flaws, this review application must be dismissed.
4. Reference was made to the case of ***CGM Garments and DDPR vs. Matsoko LAC/REV/38/2004*** where the Court stated that it is grossly irregular and contrary to the rules of this Court not to commission evidence. However, 1st Respondent argued that in the event that this Court holds that the defect be corrected, he is asking for costs against Applicant. Applicant replied that documents filed with the Court were in order. He stated that there was an error on their part in dealing with papers served upon the 1st Respondent. He argued that this defect is correctable and thus cannot lead to the dismissal of the review application.
5. We have considered the submission of parties on this point and are in agreement with Applicant that the defect in his papers are correctable. We have also considered the case of ***CGM Garments and DDPR vs. Matsoko (supra)*** and have found it inapplicable in this case. The circumstance therein are different from the present circumstances in their entirety. In that case, the learned arbitrator had allowed witnesses to testify without swearing them in and subsequently thereto made a determination on the basis of their unsworn testimony.
6. As a result, the only way of correcting the defect was to have the matter heard afresh which by necessity required the interference with the award of the learned Arbitrator. In the current scenario, the matter has not

proceeded in the merits, which in effect means that the Applicant still has an opportunity to correct the defect complaint of. Consequently, this point does not warrant the dismissal of Applicant's claim but for it to be given an opportunity to correct the defect. The essence of our argument is that the point raised by 1st Respondent is merely dilatory. However, the real effect of this defect on the proceedings as well a request for an award of costs, will be determined by how this court will rule on the second *point in limine*.

7. On the second *point in limine*, it was submitted on behalf of 1st Respondent that the relief sought did not disclose the cause of action under review proceedings. This was premised on the argument that the substance of the application made a point for appeal and not a review. It was argued that the grounds raised are appeal grounds as they directly challenge the merits and not the procedure adopted in making the decision. Reference was made to the case of ***Teaching Service Commission and Others vs. Judge of the Labour Appeal Court and Others CofA/CIV/21/2007*** where the Court made a distinction between an appeal and a review.
8. Applicant replied that it does dispute the fact that the grounds raised are appeal and not review grounds. It however, argued that its major concern relates to paragraph 7.3 of the DDPR award on the issue of compensation. In response, 1st Respondent submitted that in not denying that grounds raised are appeal and not review, that disposed of Applicant's case. Further, that the way 7.3 of the Applicant founding affidavit is phrased, makes it an appeal and not a review ground.
9. In view of the submissions of the both parties, and in particular those of Applicant, we are in agreement with 1st Respondent that the submissions by Applicant, that it does not dispute the argument that its grounds are appeal and not review, disposes of their claim before this Court. This Court is only seized with reviewing powers so that once a claim lodged does not fall within the scope of its powers, then it immediately lacks jurisdiction to entertain such a claim. It is trite that one an allegation is not denied or challenged, then it is taken to have been admitted. In not challenging the averment that the grounds raised are appeal, Applicant is in essence admitting the it has wrongly approached this Court as the remedy it seeks is outside its scope of authority.
10. Despite Applicant's stance on this point *in limine*, we have gone further to consider the grounds of review raised by Applicant per its notice of motion and in particular paragraph 7 which is phrased as follows,

“I received Arbitration Award No. A-0795/2010 on behalf of the Applicant on the 02nd December 2010.

7.1 It is the said Arbitration Award that this Honourable Court will be asked to review correct or set aside on the following grounds:

7.2 That the arbitrator of the 1st Respondent erred and or misdirected herself in holding that the 2nd Respondent and Mpho (complainant) were friends who normally play a fighting game. This is because being friends and playing fighting game does not necessarily meant that the 2nd Respondent could not intentionally fight and injure Mpho-the complainant.

7.3 There was no evidence before the 1st Respondent of actual loss suffered by the 2nd Respondent herein, whereas such evidence is pre-requisite in determining the amount of compensation due.

7.4 The Respondent ought to have enquired into the alternative employment in mitigation of damages. 2nd Respondent was employed on the 29th June 2008, having been paid in lieu of notice in 16th July 2010.”

11. It is our view that these ground are aimed at challenging the merits of the matter as opposed to the procedure adopted by the learned Arbitrator in reaching her conclusion. The Court of Appeal court in ***Teaching Service Commission and Others vs. Judge of the Labour Appeal Court and Others (supra)*** has stated in several other cases that a review is concerned with the procedures or process in which the conclusions were made. This position of the law has been adopted by this Court in several cases including ***Thabo Mohlobo & Others vs. Lesotho Highlands Development Authority LAC/CIV/A/05/2010; Lesotho Highlands Development Authority vs. Thabo Mohlobo & Others LC/REV/09/2012; Lesotho Delivery Express Services (Pty) Ltd vs. DDP and Anotehr LC/REV/18/2010***).

12. In this matter, no averment has been made by Applicant to suggest any procedural irregularity on the part of the leaned Arbitrator as the grounds are purely premised on evidence. Applicant is in effect arguing that a different decision ought to have been reached on the basis of the evidence led which on its own is an appeal ground. His arguments lack the necessary ingredients to render them review grounds. Consequently we find that the grounds raised are appeal and not review grounds and as such this Court lacks jurisdiction to entertain Applicant’s claim.

COSTS

13. 1st Respondent asked for the dismissal of this review application with costs on attorney and client scale. His reasons were that the matter had been dealt with the Applicant in cavalier manner and contrary to the rules to his

prejudice. Applicant made no representation on this issue but rather left it to the court to make a fair and equitable determination. It is our view that indeed as suggested by 2nd Respondent, the conduct of Applicant warrants the award of costs in favour of 2nd Respondent to discourage it from further improper use of the processes of this Court.

14. We have found its conduct to have been cavalier, as suggested by 1st Respondent, in that it failed to ensure that its founding documents are in order and further that it proceeded with this matter knowing that they had no claim. We have been led to this conclusion by the submission of Applicant that it did not challenge the averment that they had no review grounds. We are of the view that their conduct has been nothing but an abuse of the processes of this Court, which conduct cannot be ignored. Consequently an award of costs is made against Applicant on attorney and client scale.

AWARD

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

- a) That the review application is dismissed on lack of jurisdiction;
- b) The DDP award in A0795/2012 remains in force;
- c) That the said award be complied with within 30 days of receipt of this judgment; and
- d) That an order of costs is made against Applicant on client and attorney scale.

THUS DONE AND DATED AT MASERU ON THIS 14th DAY OF NOVEMBER 2012,

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

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR 1ST RESPONDENT:**

**ADV. MATETE
ADV. RASEKOAI.**