

HELD AT MASERU

In the matter between:

THABELO KEBISE

APPLICANT

And

**LESOTHO BREWING COMPANY (PTY) LTD
THE DDPR**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 29th November 2012 and 21st February 2013

Application for review of arbitration award. Applicant raising a preliminary issue towards the exclusion of Respondent representative from the proceedings – Court finding no merit and dismissing the preliminary point. Applicant asking for recusal of the presiding Judge from the proceedings – Applicant failing to meet the requirements of a recusal application – application being refused. Applicant seeking a review on the following grounds,

- Challenging the decision of the learned Arbitrator to allow Mr. Ntaote to appear for Respondent.*
- Contesting that the Respondent representative convinced the learned Arbitrator into finding their evidence more probable than his.*

Court not finding both grounds valid review grounds and dismissing the review application.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR which was handed down on the 5th September 2011 in referral A0355/2011. It was heard on the above stated dates and judgement was reserved for a later date. Two grounds of review were raised by Applicant in this matter in terms of which he prayed that the DDPR award be reviewed, corrected and set aside.

2. However, at the commencement of the review proceedings, Applicant raised a preliminary issue to the effect that Mr. Ntaote, who had appeared on behalf of the Respondent, be excused from the proceedings. He argued that Mr. Ntaote was learned in law and that as a result, he would not be able to argue with him at the same level. Further that he was not able to afford legal representation in order to be at par with Respondent, as he had no sufficient financial muscle. Applicant had made reference section 28(1) (b) of the *Labour Code Order 24 of 1992 as amended* and to the Labour Appeal Court authority in *Lenka Mapiloko vs The President of the Labour Court & another LAC/REV/05/2007*, in support of his argument.
3. Mr. Ntaote had argued that the fact that he was a legal practitioner was not sufficient justification for his exclusion from these proceedings. He stated that although he was a lawyer by profession, he was appearing in terms of section 28 (1) (a) of the *Labour Code Order (supra)*, as an officer of the employers organisation to which Respondent is a member. He stated that his representation and its capacity was known to applicant as far as when he was served with the opposing affidavits. He stated that Applicant ought to have taken reasonable steps to ensure that he was also equally represented in these proceedings.
4. He submitted that the *Lenka Mapiloko vs The President of the Labour Court & another (supra)* was misplaced as it did not bar legal representation before this Court totally. He stated that rather, the authority provides that an unrepresented party must be afforded the opportunity to seek legal representation with the view to balance the scale of arms. As a result, in failing to exercise his right to legal representation from the time he became aware of Respondent representation, that does not take away the Respondent right to be legally represented.
5. Having considered all the submissions of parties, We then came to the conclusion that We would not exclude Mr. Ntaote from the proceedings but rather to give Applicant the opportunity to seek legal representation in order to balance the scale of arms. In reaching Our conclusion, We had considered all the authorities cited by the parties in support of their submissions. We were satisfied that Adv. Ntaote was appearing

as an officer of an employers association appearing on behalf of the Respondent, as reflected in their authority to represent. This in effect meant the applicable section in his case was section 28 (1) (a).

6. Further, in considering the *Lenka Mapiloko vs The President of the Labour Court & another (supra)*, We noted that legal representation was not totally barred as put by Respondent. What the Court had simply said was that where one of the parties could not afford legal representation or where it was impossible for the unrepresented party to acquire legal representation, then presiding Judge may exclude legal representation on behalf of the other party that is represented. *In casu*, affordability was not an issue as there were several options available to Applicant.
7. The 1st option was the offices of the Labour Commissioner which has legally trained staff, who often appear on behalf of indigent Applicants before this Court. The 2nd option is the offices of the Chief Legal Aid Counsel, which equally provides similar services with legally trained staff, which has also made appearances before this Court. Now both offices offer their services free of charge and as a result Applicant could and can afford to secure himself legal representation. As a result, Applicant was advised to seek assistance from these offices and the matter was postponed by almost 2 months to 21st February 2013.
8. On the return date, Applicant had now applied for the recusal of the learned Presiding Judge (myself) over these proceedings. In amplification of his application, he had submitted that he had no faith that the learned Presiding Judge would be impartial. He stated that his fears were born by the fact that contrary to clear provisions of the *Labour Code Order (supra)* as well as the authority of *Lenka Mapiloko vs The President of the Labour Court & another (supra)*, the Court had decided against him on his application for the recusal of Mr. Ntaote. He stated that this was proof that the learned Presiding Officer was inclined to agree with Mr. Ntaote on every submission he made. To further fortify his fear of impartiality, Applicant submitted that after his application for the exclusion of Mr. Ntaote was refused, the learned Presiding Judge advised him to withdraw the matter and that this was said on record in court.

9. Respondent replied that the grounds for recusal raised by Applicant were not valid grounds. Mr. Ntaote maintained that in an application of this nature, a party making this application had to show that there is a reasonable apprehension of bias on the part of the Presiding Judge. It was submitted that contrary to these requirements, Applicant had based his application on the fact that the learned Presiding Judge had ruled against him on his preliminary issue.
10. Mr. Ntaote for Respondent further argued that the fact that the learned Presiding Judge gave Applicant the opportunity to seek legal representation, it was an indication that the learned Judge was fair and impartial. It was furthermore submitted on behalf of Respondent that it would set a very bad precedent in law, if a party were to obtain recusal simply because a decision on a preliminary issue had been entered against them. It was denied that the learned Presiding Judge advised Applicant to withdraw the matter. Having advised Applicant to seek legal representation, there would be no basis for such advice. Mr. Ntaote submitted that the allegation of Applicant was serious and that it bothered around him being contemptuous particularly because he had bare allegation of facts against the Court.
11. Having considered all representation made by both parties, We came to the conclusion that the application for recusal could not stand and it was accordingly dismissed. Our conclusion was based on the fact that, as rightly pointed out by Respondent, there are certain requirements that must be met by the applying party. These were outlined in the case of the *President of the Republic of South Africa & others vs. South African Rugby Football Union & others* 1999 (4) SA CC at 177B-D and cited with approval by the Labour Appeal Court in *Bofihla Makhlane vs. Letšeng Diamonds (Pty) Ltd & others* LAC/CIV/APN/04/2011.
12. In the dismissing an application for recusal on a similar ground to the one *in casu*, the Labour Appeal Court outlined the requirements for a recusal application as follows,
“The question is whether a reasonable objective and informed person would, on the correct facts, reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on

the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel.”

In our view, Applicant was far from the dictates of the above cited authority as he relied on the mere fact that a ruling was made against him on an earlier occasion. We found the objection raised by Applicant to be without merit.

13. Applicant had also alleged that the Court had advised him to withdraw the matter. On this issue We decline to react thereto for a simple reason that this Court is not on trial. However, We came to the conclusion that Applicant's allegation was without merit, for a simple reason that he had made an allegation without supporting proof. It trite in law that he who alleges bears the onus of proof. No proof was put by Applicant in support of his allegation and this rendered it unsatisfactory and unconvincing. Consequently, the application for recusal was denied and the matter proceeded in the merits

SUBMISSION OF PARTIES

14. Applicant had raised several review grounds spanning from paragraph 4 to 11 of his founding affidavit. When asked to motivate his grounds of review, he submitted that in effect he had only two grounds of review, namely that the learned Arbitrator misdirected herself by deciding to allow representation of Respondent by Mr. Ntaote. Secondly, that the learned Arbitrator misdirected herself by finding Mr. Ntaote's case more probable than his, especially when he felt that his case was much stronger. Applicant further submitted that his second ground of review grounds was squarely derived from the 1st ground of review.
15. In amplification of his review grounds, Applicant argued that it was irregular for the learned Arbitrator to have refused his application to have Mr. Ntaote excluded from the proceedings. Having been allowed to stand in the proceedings, Mr. Ntaote confused the learned Arbitrator by convincing her to find in favour of Respondent. He argued that Mr. Ntaote through his skills was able to convince the learned Arbitrator that his evidence was more probable than his notwithstanding the fact that Applicant felt that his case was much stronger. As a result, he argued that this was a gross irregularity which warrants interference with the DDPR award.

16. In response, Mr. Ntaote submitted that from the submissions of Applicant, he was clearly unhappy with the decisions of the learned Arbitrator. It was argued that none of the grounds raised by Applicant were valid review grounds as they challenged the merits of the matter. Mr. Ntaote pointed out the fact that Applicant was not arguing that his evidence was not considered or a breach of any of the rules of procedure of the DDPR proceedings. He thus prayed that this review application be dismissed.

ANALYSIS

17. The principles applicable in an application for review have been stated by this Court in a plethora of cases. We have said that a review is made only where the intention is to challenge the means by which those in authority have come to their conclusion (see *Lesotho Highlands Development Authority vs. Thabo Mohlobo & Others LC/REV/09/2012; Lesotho Delivery Express Services (Pty) Ltd vs. DDPR and another LC/REV/18/2010*). As a result, where the cause of complaint is the conclusion itself, then a proper approach is an appeal and not a review. In the light of this background, We will now proceed to deal with the submissions of the parties.

18. On the first ground of review raised by Applicant, he has clearly stated that he is unhappy with the decision of the learned Arbitration in allowing Mr. Ntaote to continue to appear on behalf of Respondent despite his objection thereto. It is without doubt, and as the submission of Applicant reflect, that what he seeks to do in these proceedings is to have the conclusion of the learned Arbitrator reversed and replaced with a different conclusion. The remedy that Applicant seeks is one that can only be provided through the mechanism of an appeal and not a review. Consequently, this grounds is not a valid review ground and it accordingly cannot stand.

19. On the second ground of review, which is said to derive from the 1st ground of review, it is Our opinion that Applicant is similarly unhappy with the decision of the learned Arbitrator. It is Our view that Respondent is right that Applicant challenges the decision of the learned Arbitrator in finding the evidence and submissions of Mr. Ntaote more probable than his and thus finding in favour of Respondent herein.

20. Applicant has not alleged any procedural irregularity committed on the part of the learned Arbitrator in coming to the conclusion that Respondent's case was much stronger than his. Consequently, and in the same vein, We find that this ground is not a valid review ground and thus it is accordingly dismissed. What Applicant has only succeed to establish is that, Mr. Ntaote has been able to execute his mandate to defend Respondent case very well.

AWARD

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

- a) That this review application is refused;
- b) The award in A0355/2011 remains in force; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 4th DAY OF MARCH 2013.

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

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**Mr. S. KAO
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**IN PERSON
MR. NTAOTE**