

HELD AT MASERU

In the matter between:

MOHAU RASEPHALI

APPLICANT

And

**GLOBAL GARMENTS (PTY) LTD
THE DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 24/04/2013

Review application of DDPR arbitral award. Applicant requesting the exclusion of Advocate Kao from the proceedings – Court finding that Advocate Kao was not authorised to appear in the matter and excluding him – Court further finding that the matter was not opposed and directing that it proceed in default. Applicant raising four grounds of review – Applicant withdrawing one ground and remaining with three. Review grounds being that the learned Arbitrator rejected his evidence; that the learned Arbitrator based Her conclusion on issue not raised by parties; and that the learned Arbitrator duplicated the process that took place at the plant level. Court finding no merit on all grounds raised – Court refusing the application. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDPR arbitral award in referral A0834/2012. It was heard on the 24th April 2013 and judgment was reserved for a later date. Facts surrounding this matter are basically that Applicant referred a claim for unfair dismissal with the DDPR. An award was entered against Applicant leading to the current review application. Four grounds of review have been raised by the Applicant in terms of which he seeks to have the arbitral award reviewed, corrected and set aside.

2. At the commencement of the proceedings, Applicant raised a preliminary issue to the effect that Advocate Kao had no *locus standi* to appear on behalf of the 1st Respondent in this matter. He submitted that there was neither an authority to represent nor any documents purporting to oppose this application that have been filed of record on behalf of 1st Respondent, by either Advocate Kao or 1st Respondent itself. He thus prayed that Advocate Kao be excused from the proceedings as he clearly had not been authorised to defend the matter.
3. Advocate Kao admitted, in response, that he had neither the authority to represent nor had they filed any opposing papers. He infact requested a postponement to seek mandate from the 1st Respondent. In the light of Mr. Kao's admission that he had not as yet been instructed to represent Respondent in the matter, We ruled in favour of Applicant in that We refused the application for postponement and excused him from appearing in the proceedings. In our view, he was not the right party to seek a postponement on behalf of a party that had not given its authority to do so. We then directed that the matter proceed in default as 1st Respondent was clearly not interested in defending it.
4. Pursuant to Our ruling, the proceedings commenced with Applicant withdrawing one his review grounds. The three remaining grounds are thus in the following,
That the learned Arbitrator erred in that She,
*“ Rejected the facts in both above subparagraphs 6.1 and 6.2 without being disproved and disputed,
Based itself on version not contended by either party before it, namely that i failed to it (her) certified letter, and,
Duplicated the process for establishing M896.00 rate by requiring me a certified letter.”*
Our judgment on the matter is thus follows.

SUBMISSIONS AND FINDINGS

5. Applicant's 1st ground of review is that the learned Arbitrator committed an irregularity by rejecting his undisputed and disproved evidence. He stated that in his evidence, he had testified that there was an agreement between himself and 1st Respondent for him not to report for work and that he would be paid despite the fact that he would not be working. He

stated that he had also handed in a copy of the agreement which was accepted as conclusive of its contents by the learned Arbitrator. Reference was made to paragraph 5, lines 13 to 16 of the arbitral award. He stated that in the light of this acceptance of his evidence, the learned Arbitrator ought to have found his favour. He argued that in finding otherwise, the learned Arbitrator had clearly rejected this evidence.

6. We have gone through the arbitral award and in particular the portion referred to. Upon inspection, We have noted that the portion that Applicant is referring to, relates to the learned Arbitrator's summary of evidence and not Her finding in the matter. As a result, it cannot be accurate in paragraph 7 of the arbitral award, that the learned Arbitrator was in fact accepting the said evidence as conclusive of entitlement of Applicant to his wages claim. Further, having captured this evidence in the summary, it did not necessarily follow that judgment would be entered in favour of Applicant more so given that the matter was opposed.
7. It is trite that one making a claim against the other has the duty to satisfy the Court that he is entitled to that claim (see *Pillay vs Krishna 1946 AD 946 at 951*). As a result, the fact that judgement entered was against Applicant, does not mean that his evidence was rejected but rather that he had failed to satisfy the learned Arbitrator that he was entitled to his claim for unpaid wages. The Applicant's claim of irregularity is based on an assumption that his evidence was rejected and thus too feeble to lead this Court to conclude that an irregularity exists on the part of the learned Arbitrator. Consequently this ground of review fails.
8. In amplification of his 2nd ground of review, Applicant submitted that it was wrong for the learned Arbitrator to have relied on the absence of the certificate of service when it was not the defence of the 1st Respondent. He stated that 1st Respondent claim was simply that Applicant was not underpaid as he was a trainee with less than 6 months in employment. In his opinion, it was wrong for the learned Arbitrator to have based her decision on a defence not raised by 1st Respondent, it being the absence of the certificate of service. In support of this argument, reference was drawn to

the case of *Mathabelo Mbangamthi vs. Puleng Sesing-Mbangamthi C of A (CIV) 06/2005*. The attention of the Court was further drawn to paragraph 7, lines 10 to 12 of the arbitral award.

9. We have gone through the stated portion of the arbitral award which read as thus,

“The applicant testified that he was a certified machine operator and as such was supposed to be paid M896.00 but he did not produce any certification of this nature to the tribunal, he just made an averment.

10. Our understanding of the above extract is that the Applicant’s claim was dismissed for a simple reason that he just made an averment without any proof to back it up with. Applicant’s case was that he was entitled to be paid at the rate of M896.00 because he was a certified machine operator with a certificate to that effect. The issue of the presence of the certificate was raised by Applicant and also formed the basis of his claim. This being that case, it is Our strong view that the learned Arbitrator had to comment on the issue in making Her finding, whether for or against Applicant. If She had not considered this issue, She might have run the risk of ignoring facts relevant to the claim before Her and thus committing a gross irregularity (See *Lesotho Electricity Corporation vs. Ramoqopo and others LAC/REV/121/2005*) .

11. In respect of his 3rd ground of review, Applicant submitted that at the plant level, he had handed over his certificate of service to the 1st Respondent as proof that he was a certified machine operator and thus entitled to the pay rate of M896.00. He stated that the certificate was rejected by 1st Respondent who then underpaid him. According to Applicant, by requiring him to tender that certificate in proof of his claim, the learned Arbitrator duplicated the process of establishing the rate of M896.00, which he claimed. He argued that in so doing, the learned Arbitrator committed a gross irregularity. In his view, all that the learned Arbitrator had to do was to determine if the process of underpaying him was right or not.

12. From the submissions of Applicant on this point, he seems to harbour under the impression that all trade disputes,

including his current claims of underpayments and unpaid wages are brought on review before the DDPR. This is not accurate as the only claims that are subject to review before the DDPR are unfair dismissal claims as far as the procedure adopted in dismissing an employee is concerned. As a result, as far as other claims are concerned, they are heard before the DDPR as the forum of first instance. This in essence means that all other claims, including Applicant's claims and except the procedural fairness of a dismissal, are heard and determined on their substance and not procedure contrary to Applicant's suggestion.

13. In view of the above background, it is Our opinion that by requiring Applicant to produce the certificate of competence as a machine operator, the learned Arbitrator was acting well within the bounds of Her authority. In terms of section 25 (3) of the *Labour Code Conciliation and Arbitration Guidelines of 2004*, the proceedings before the DDPR are by nature inquisitorial. This in essence gives the learned Arbitrator the right to seeks clarity from both parties or to require certain information or documents to aid in making a fair and equitable determination. This is irrespective of whether the same thing may have been done at the plant level where the dispute arose or not. Consequently, the learned Arbitrator cannot at any point be validly said to duplicate the plant level proceedings. We therefore find no merit in this ground.

AWARD

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

- a) That this application for review is refused;
- b) The Arbitral award of the DDPR in referral A0834/2012 remains in force; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 6th DAY OF
MAY 2013.**

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

**Ms. P. LEBITSA
MEMBER**

I CONCUR

**Mrs. M. MOSEHLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**IN PERSON
NO APPEARANCE**