

HELD AT MASERU

In the matter between:

MOSIUOA MOLATOLI

APPLICANT

And

**CGM INDUSTRIAL (PTY) LTD
THE DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 13th February 2013

Review application of DDPR arbitral award. Respondent challenging the jurisdiction of this Court to entertain Applicant's claim – 1st Respondent relying on the Labour Appeal Court decision in Lesotho National Federation of Organisations of the Disabled & another vs. Mojalefa Lobhin & another - Court finding a distinction between the two cases – Court finding that it has jurisdiction. Applicant raising four grounds of review in the following – all grounds failing to sustain and review application being dismissed. 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 A0876/2010. It was heard on the 13th February 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. The matter was finalised through a settlement agreement, in terms of which 1st Respondent was to pay certain amounts of money to Applicant. Thereafter, Applicant approached the 2nd Respondent to have the settlement agreement turned into an award on the ground that 1st Respondent had failed to fully comply therewith. Applicant argued that an amount in the sum of M3,711.41 was still outstanding. The application was refused leading to the current application for review.

2. Four grounds of review were raised on behalf of the Applicant in terms of which he sought to have the arbitral award review, corrected and set aside. However at the commencement of the proceedings, 1st Respondent raised a preliminary issue to the effect that this Court had no jurisdiction entertain this matter. Both parties were then given the opportunity to make their addresses on the preliminary issue. Having heard their submissions, the Court then ruled that it had jurisdiction to entertain this matter. Parties were thereafter promised the full reasons in the full written judgment. The matter was then heard in the merits and Our full judgment on all issues is in the following.

SUBMISSIONS AND FINDINGS

Preliminary issue

3. It was submitted on behalf of the 1st Respondent that this Court had no jurisdiction over this application in that it involved a settlement agreement which was concluded before the DDPR. Advocate Matooane for 1st Respondent argued that through this process, Applicant was in effect seeking to enforce the settlement agreement made before the 2nd Respondent. It was further argued that this Court had no jurisdiction to enforce a settlement agreement made before the DDPR. Reference was made to the Labour Appeal Court case of *Lesotho National Federation of Organisations of the Disabled & another vs. Mojalefa Lobhin & another LA/CIV/A/07/2010*, in support.
4. Advocate Matooane furthermore argued that the authority in the above matter applied retrospectively over the Applicant's claim in as much as this issue was dealt with and finalised before the DDPR prior to the delivery of the above cited judgment. He indicated that the Court of Appeal of Lesotho has on a prior occasion ruled in favour of retrospective application of the law. In support of this argument reference was made to the case of *Sole Masupha vs. LHDA C of A (CIV) NO. 26 of 1999*.
5. Advocate Rasekoai for Applicant, replied that this court had jurisdiction over this matter in that what they sought was not the enforcement of the settlement agreement, as put by 1st Respondent. He submitted rather that they only sought to review the award of the DDPR on the ground of it being irregular, in terms of the procedure that was followed in its

making and not its substantive content. He argued that the authority in *Lesotho National Federation of Organisations of the Disabled & another vs. Mojalefa Lobhin & another (supra)* was misplaced and inapplicable to the present case.

6. Advocate Rasekoai further replied that assuming, without admitting, that this application sought to enforce the settlement agreement of the DDPR, the authority in *Sole Masupha vs. LHDA (supra)* does not apply to this case in that sense. He argued that in the same authority the Court ruled that retrospectivity undermines legality, particularly in the case where it affects the substantive rights of a party concerned. He confirmed that the award being reviewed was issued before the *Lesotho National Federation of Organisations of the Disabled & another vs. Mojalefa Lobhin & another (supra)* and that in view of the *Sole Masupha vs. LHDA (supra)*, the former authority would not apply.
7. Having considered the submissions made and authorities referred to by the parties, We came to the conclusion that this Court had jurisdiction to entertain this review application. We had considered the fact that a review application, as a matter of principle, deals with the procedure that was adopted by a lower court in reaching its decision. As a result, We in effect agree with counsel for Applicant that this application is not concerned with the substance of the matter before the DDPR but rather the procedure adopted to make the conclusion. As a result, it cannot be accurate that Applicant seeks to enforce the settlement of the DDPR.
8. In our view, the authority in *Lesotho National Federation of Organisations of the Disabled & another vs. Mojalefa Lobhin & another (supra)* does not apply to this case to divest it of the jurisdiction to entertain this review application. Our opinion is fortified by the distinctions that lied between the above case and *in casu*. In the above case, the matter involved an enforcement of the award of the DDPR before this Court, which had turned a settlement agreement into an award. *In casu*, Applicant seeks to review the award of the DDPR on the alleged grounds of irregularity stated in their notice of motion. As a result the two cases are totally distinct. In view of our conclusion, We find it unnecessary to consider and comment

on the rest of the argument of the parties on this preliminary point.

The Merits

9. It was submitted on behalf of the Applicant that the learned Arbitrator relied on unsubstantiated facts to come to a conclusion that an amount to the tune of M3,711.41 was diverted to tax payment. He argued that there was no evidence placed before court to the effect that tax was deducted and that, if so, it was in the stated amount. It was submitted on behalf of 1st Respondent that there was evidence and that it has been annexed to the record of proceedings. It was stated that the evidence consists of a letter from the Lesotho Revenue Authority to the Accountant of the 1st Respondent, in terms of which 1st Respondent was being authorised to deduct an amount of M3,711.41 as tax from Applicant settlement amount.
10. We have gone through the record of proceedings and have made the following discoveries. At page 5 of the record, evidence has been led to the effect that the Lesotho Revenue Authority had authorised the deduction of an amount of M3,711.41 by 1st Respondent. Secondly, there is also a copy of the letter annexed to record which was from the Lesotho Revenue Authority to both the Applicant and 1st Respondent. This letter authorises the 1st Respondent to deduct an amount of M3,711.41 as income tax. It letter reads as follows,
“Please deduct the sum of M3,711.41 being tax charged in accordance with section 18 of the Income Tax Order No. 9 of 1993 ...”
In Our opinion, and given the fact that this letter forms part of the record of the DDPR proceedings, there was supporting evidence led and tendered to justify the tax deduction made contrary to the argument of Applicant that there was none. Consequently, the argument about the absence of supporting evidence cannot succeed.
11. It was further submitted that the learned Arbitrator failed to apply her mind to the facts placed before her and that she also failed to appreciate the dynamics of tax regulations. It was argued that in law the obligation to pay taxes is not on the employee but on the employer so that the employer is not in law empowered with the right to deduct monies for tax

purposes from the employees salary without their consent and authorisation. It was also submitted that the learned Arbitrator's decision is flawed in that he failed to apply his mind to the fact that a settlement agreement cannot be subjected to tax. In response, 1st Respondent submitted that it is in law incumbent upon the employer to pay income tax on behalf of its employees and that this is called pay as you earn (PAYE). As a result, 1st Respondent maintained that there was no irregularity on the part of the learned Arbitrator as His conclusion was sanctioned by law.

12. Upon consideration of the arbitral award and in particular under paragraph 10 and 11, the learned Arbitrator has stated why He came to the conclusion that tax had to be paid on the settlement amount. He stated that in law, all income is subject to tax hence the deduction of M3,711.41 from the Applicant's settlement amount. He also considered the evidence of the 1st Respondent to the effect that the amount of M3,711.41 was deducted upon the advice of the Lesotho Revenue Authority. This is in Our view demonstrates that the dynamics of tax regulation were considered by the learned Arbitrator and that he applied his mind to the facts placed before him.
13. It was furthermore submitted that the learned Arbitrator's decision is misdirected and that He failed to apply his mind to the facts placed before him in so far as they relate to the prejudice suffered by Applicant resulting from the deduction or non payment of the balance of M3,711.41. It was submitted in response, that there was no such evidence before the 2nd Respondent. It was stated that the issue of prejudice is only coming up for the 1st time on review and that it should not be entertained. It was further submitted that the learned Arbitrator could not have been expected to pronounce himself or consider an issue that was not raised by either of the parties. In reply this was admitted by Applicant that they did not raise this issue as it was clear from the facts that Applicant was being prejudiced and as such they did not need to argue it.
14. This court has pronounced itself before over issues raised for the first time on review. We have said over and over again that the presiding officer of a lower court cannot be held to an issue in respect of which s/he was denied the opportunity to consider. It is common cause and as admitted by counsel for

Applicant, that this issue was not raised before the DDPR. As a result and in view of Our attitude, it cannot be proper to allege a wrong doing either by act or omission on the part of the learned Arbitrator over an issue that was not argued in the proceedings over which He presided.

15. Lastly, it was submitted that the learned Arbitrator erred law in that He delved into the merits of the matter whereas He was just called to turn the settlement agreement earlier reached, into an award. In response, it was argued that given the nature of the claim before the learned Arbitrator, there was no way that it could have been determined without going into the merits. It was argued that a settlement agreement could only be turned into an award if one of the parties had failed to comply with it without a justifiable course. As a result, it was necessary for evidence to be led on the circumstances that led to the failure on the part of the 1st Respondent to fully comply, in order for the learned Arbitrator to make His decision.

16. We have noted that there is a term in the settlement agreement to the effect that in the event that there is a dispute arising in the application of the settlement agreement, then an aggrieved party may approach the 2nd Respondent for a remedy. In our view, in order to resolve a dispute the parties concerned must lead evidence to prove failure to comply. This is intended to aid the one presiding to come to a fair and equitable conclusion. In the case before the 2nd Respondent, there was no way that the determination over the dispute between the parties could be resolved blindly without considering the circumstances that led to it arising. Consequently, the merits of the matter were material towards such determination as they were the basis of the claim. This point accordingly fails.

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 A0876/2010 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**

**Mrs. P. LEBITSA
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. RASEKOAI
ADV. MATOOANE**