IN THE LABOUR COURT OF LESOTHO **LC/APN/56/2012**

HELD AT MASERU

In the matter between:

'NOKOANE MOKHATLA **APPLICANT**

And

LESOTHO BREWING COMPANY (PTY) LTD **1ST RESPONDENT**
THE MANAGING DIRECTOR - LBC **2ND RESPONDENT**
THE HUMAN RESOURCE MANAGER - LBC **3RD RESPONDENT**

JUDGMENT

Date of Hearing: 13th February 2013
Application for contempt of Court and committal – Respondents failure to honour judgment in LC/REV/04/2012. Applicant raising preliminary issue questioning,
– right of Human Resources Manager to depose to affidavit without authority to represent – Court finding that an authority to represent was not necessary given deponent's position – further finding that there were sufficient facts to lead to the conclusion that she was duly authorised – court furthermore finding it farfetched that deponent was on a self serving mission in defending the matter- Court dismissing preliminary issue.
In the merits, Court finding that failure to comply with the DDPR award and judgment of this Court is not wilful and/or mala fides – Court finding reinstatement to be impracticable and ordering the determination of compensation in terms of section 73 before the DDPR.

BACKGROUND OF THE ISSUE

1. This is an application for contempt of Court and Committal to jail of the Respondents for failure to honour the judgment of this Court in LC/REV/04/2012. This judgement was effectively giving effect to the award of the DDPR in A0932/2009. The application was heard on this day and judgment was reserved for a later date.

2. At the commencement of the proceedings, Applicant raised a preliminary issue to the effect that the deponent to Respondents opposing affidavit had no right to depose thereto for the reason that she was not authorised to do so. Applicant prayed that on this basis, the Court should declare the matter unopposed and proceed on the basis of submissions of Applicant alone. Both parties made representations on the preliminary issue and then further proceeded to argue the contempt application. The Court in the end made them aware that it would not consider the submissions of Respondents in opposition in the event that It found in favour of Applicant on the preliminary point.

3. Facts surrounding this case are basically that Applicant was dismissed from employment sometime in October 2009. He thereafter referred a claim for unfair dismissal with the DDPR, and obtained an award in his favour on the 28th December 2011. Thereafter, 1st Respondent referred an applicant for review of the DDPR award with this Court. On the 26th September 2012, the review application was heard and judgment was delivered on the 31st October 2012 in favour of Applicant herein. The effect of the judgment was that the DDPR award remained in force. It is this judgment that Applicant seeks to enforce through this application.

4. *In casu*, Applicant has approached this Court for a remedy in the following,
   "1. That 2nd and 3rd respondent be committed to prison for such period as may be determined by this Honourable Court for contempt of court and/or for such period as they may have complied with the award of the Directorate of Dispute Prevention and Resolution in A0932/2009.
   2. That respondents pay costs hereof.
   3. That applicant be granted such further and/or alternative relief as this Honourable Court may deem meet.

   ALTERNATIVELY;
   1. That respondents pay applicant compensation as determined by this Honourable Court in accordance with evidence herein and before the Directorate of Dispute Prevention and Resolution in A0932/2009.
   2. That respondents pay costs hereof.
   3. That applicant be granted such further and/or alternative relief as this Honourable Court may deem meet.

SUBMISSIONS

Preliminary issue

5. It was submitted on behalf of Applicant that Ms. Maleshoane Kemeng, the Human Resources Manager of first respondent, who had deposed to the affidavit in opposition of this application was not duly authorised to deposed thereto. The reason behind that contention was that there was nothing authorising her to defend the review proceedings on behalf of the Respondent company. It was further argued that in spite of the absence of such authority, she had not even alleged in her affidavit that she had such authority.

6. Furthermore, it was argued that the Court should be careful not to interpret the phrase that *"I am duly entitled to depose hereto,"* per paragraph 1 of the founding affidavit to mean that she had such authority. It was submitted that the word *"entitled*" did not carry the said meaning in this instance, particularly because the deponent had an interest in the matter. It was argued that she is the 3rd Respondent in this matter and that the issues revolve around her decision surrounding the dismissal of Applicant at the plant level. It was thus prayed that on account of these, the Court ought to declare that the matter has not been opposed.

7. Respondent replied that the deponent was duly authorised to depose to the opposing affidavit to the claim by Applicant. It was submitted that given her position, it was not necessary in law for her to bring a copy of the resolution of the board of directors. It was further argued that contrary to Applicant suggestion that she had not even alleged authorisation, she had and that this is contained in paragraph 1 of the Respondent opposing affidavit. Particular reference was drawn to the last line read as *"I am therefore duly entitled to depose hereto."* It was further argued that in law, the word "*entitled"* carried the same meaning as the word *"authorised."* Reference was made to the decision of this Court in the case of *Water and Sewage Authority vs. Moramane Mabina LC/REV/44/08*, where it was held that these two words carried the same meaning.

8. It was further argued that on the issue of the resolution of the Board of Directors, there is no legal requirement for a resolution to be filed on behalf of a juristic person to render its representation duly sanctioned. Reference was made to the decision of the Labour

Appeal Court in *Central Bank of Lesotho vs. Phoofolo LAC (1985-1989) 253* at pages 258 – 259. It was furthermore argued that the fact the deponent was cited as 3rd Respondent did not make her a party in the matter. It was submitted that she had been cited in her official and not personal capacity and that as a result, it cannot be accurate to suggest that she was on a self serving mission. Respondent concluded that above all, there was no substance in the claim of lack of authority as Applicant had simply barely denied such authority being in existent. It was argued that a bare allegation without supporting facts was insufficient to lead to the granting of a remedy sought. Reference was made to the case of *Lesotho Revenue Authority & others vs. Olympic off sales C of A (CIV) 13/2006,* in support.

9. We have perused the opposing affidavits filed on behalf of Respondents and have noticed that the only documents relating to authorisation to represent, concern the Respondent representative. As a result, We confirm that there is no formal resolution authorising the deponent to either oppose the matter or to appoint someone to act on behalf of Respondent. However, We cannot ignore the authoritative nature of the conclusion of the Labour Appeal Court in the above referred case of *Central bank of Lesotho vs. Phoofolo*. In this case, the Court had the following to say in relation to a resolution authorising an employee to depose to an affidavit,
" There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts."

10. Clearly while there is no invariable rule, the dictates of the above authority suggest that the need to produce a formal resolution depends on the possibility that the existence of such authority may be deduced from other facts in the affidavits and whether there are such facts. In Our view, the use of the words *"entitled"* suggest that authorisation has been obtained by the deponent from the relevant authorities to defend the matter in their place. This Court has pronounced itself over this issue in several cases before the present matter, among which is the *Water and Sewage Authority vs. Moramane Mabina (supra).*

11. We are further inclined to maintain the position in the above cited case by the fact that *in casu*, Applicant has not presented anything substantive to support his argument that the deponent is not authorised to defend the matter. Applicant has simply relied on the absence of the resolution as well as the fact that the deponent has been cited as 3rd Respondent in the matter. We have already disqualified the argument about the absence of the resolution and thus will not go any further.

12. About the deponent being a party in the matter, We do not find any merit in the argument for the simply reason that she is cited in her official capacity. Further, the contents of her opposing affidavit address the entire matter on behalf of the Respondent and are not intended to dissociate herself from the proceedings and/or from any liability arising therefrom. As a result, We find it very farfetched that she could have a personal interest and thus act in the proceedings without authorisation. Consequently, We find that the deponent is duly authorised to represent and depose to all documentation on behalf of Respondent in these proceedings.

The merits

13. It was submitted on behalf of the Applicant that following the judgment of this Court in LC/REV/04/2012, Respondents failed to honour both the award and judgment of this Court. It was argued that rather than to reinstate Applicant, they sought to negotiate him on an alternative remedy arguing that reinstatement had since become impracticable. The negotiations did not bear fruit as Respondent's offer was unacceptable to Applicant. Applicant is thus asking that Respondents be compelled to comply with both the DDPR award and the order of this Court, which they have clearly wilfully and *mala fides* failed to comply with.

14. According to Applicant the wilful and *mala fides* on the part of Respondent, is further demonstrated by the fact that the said position remained open for about 2 years and was only filled after the award in favour of Applicant was issued by the DDPR. According to them, the conduct of Respondent was intended to frustrate the execution of the DDPR award and accordingly the judgment of this Court. Applicant submitted that clearly the position was capable of being kept open until the matter had finalised, so that Respondent was unreasonable in filling it before then.

15. Applicant further argued that Respondent is a big company with 4 depots in Lesotho and that as such it was possible for them to find a suitable position for him at other depots other than the Maseru depot. It was argued that the latter alternative would have been valid because the word *reinstate* does not mean to the same exact position but to a similar position that does not make Applicant worse off. Reference was made to the cases of *Commissioner of Police & Another vs. Ntlo-Tšoeu (2005-2006) LAC 156 at 159*; *Consolidated Frame Cotton Corporation LTD vs. President of the Industrial Court and others: Consolidated Woolwashing and Processing Mills Ltd vs. President of the Industrial Court and others 1986 ILJ 489 (A) 494H-I; 1986 (3) SA 786; SADTU & others vs. Head of the Northern Province Department of Education [2001] 7 BLLR 829 (LC) 836 para 23; and Lerotholi polytechnic & another vs. Blandina Lisene C of A (CIV) 25/2009.*

16. It was further submitted that in the event that this Court found that reinstatement was not practical, that it may make an award for payment of Applicants 12 years emoluments, which include his salaries and bonus from the date of his dismissal, with interest at the rate of 6% per annum. Applicant argued that this Court is seized with such power and authority in terms of sections 73 read with section 24 (2) (e) and (i) of the *Labour Code Order 24 of 1992* as amended.

17. In response, Respondent replied that indeed after the delivery of the judgment in LC/REV/04/2012, Applicant was invited to negotiations with a view to find an alternative solution, as his former position had since been filled. It was submitted that another driving factor behind that invitation to negotiate was that, there was nowhere within Respondent company where Applicant could be placed. Respondent further submitted that in the negotiations Applicant, who is now 45 years of age, made an unrealistic and unreasonable demands as he wanted the Respondent to compensate him with his salaries from date of termination up to his retirement age of 60 years.

18. Respondent submitted that they have not been contemptuous contrary to Applicant argument as they tried all reasonable efforts to give effect the award of the DDPR and the order of this Court, but for the unreasonable conduct on the part of Applicant. They submitted that the fact that they took about 2 years to fill the

position does not mean that it was capable of being kept open beyond that time and that as a result they were wilful and *mala fides,* in failing to comply with the award and judgment of this Court. They stated that in law, they have a right to fill a vacant position when the need arises, as they did, or when they can no longer keep it open. Reference was made to the case of *Lerotholi Polytechnic & another vs. Blandina Lisene C of A (CIV) 25/2009.* Respondents prayed that this Court remit this matter to the DDPR for purposes of determining compensation as they have been able to illustrate that reinstatement is not practical. They maintained that they had been able to demonstrate that they were not wilful or malicious in failing to comply with the award of the DDPR to reinstate Applicant.

19. It was further submitted that the existence of the undeniable fact that the position of Applicant had already been filled goes on to forty their argument of the lack of wilfulness and mala fides. It was argued that in law, where there is no wilfulness and *mala fides* in failing to comply with a order of court, then failure to abide would not constitute contempt. Reference was made to the case of *Fackie NO vs. CCII Systems (Pty) Ltd 2006 (4) SA 326* in support. It was also argued that it would be improper for this Court to determine compensation as it was only called to determine whether Respondents were contemptuous or not and not for purposes of reviewing and correcting the decision of the learned Arbitrator in A0932/2009.

ANALYSIS

20. In an application for contempt of court and committal, there are two main requirements that must be met by the applying party. These requirement were outlined in the old Court of Appeal case of *Thuso Motlalentoa and another vs. Motsoalipakeng Tlokotsi C of A (CIV) 28/1991,* as follows,
"Contempt of court flowing from disobeying its order requires a wilful disregard and a deliberate flouting thereof."
It would seem that in principle, these are the same requirements that Respondent has referred to in the above cited case of *Fackie NO vs. CCII Systems (Pty) Ltd*. In the light of this basis, We will now proceed to deal with the merits of the matter.

21. It is undisputed from the submissions of parties that the order of this Court dismissing the review application, and giving effect to

the award of the DDPR granted in favour of Applicant herein, was disobeyed. Respondents have attempted to explain their disobedience by pleading impracticality to comply with the court order. It is said that the said impracticality owes from the fact that the position that Applicant was to be resorted to, had already been filled and further that there was nowhere where Applicant could be placed within Respondent company. It is not denied by Applicant that the position has been filled. Neither is the authority of *Lerotholi Polytechnic & another vs. Blandina Lisene (supra)*, that Respondent could not be expected to keep the position open indefinitely, challenged.

22. However, Applicant only attempts to contradict the issue of keeping the space open until the matter has finalised by relying on the past conduct of Respondent. In Our view it does not necessarily follow that because the post was kept open in the past then it should continue to remain open, especially where it is argued that it was necessary to have it filled. On the issue of the availability of alternative space, Applicant has attempted to contradict same by barely arguing the that given the size of Respondent company, it should be able to find alternative space. This argument is not supported by substantial evidence safe to say that it is a mere hunch on the part of the Applicant, which has been rejected as being far from accurate by Respondents.

23. This Court has stated in a plethora of cases that unsubstantiated allegations of facts cannot be relied upon as conclusive of a fact. There rationale behind this view is that such allegations are unsatisfactory and not convincing, more so where they are denied. The undeniable fact that the said position has been filled as well as the efforts taken by Respondent to attempt to comply with the DDPR award and the order this Court, lead us to conclude that there was no wilfulness and *mala fides,* respectively on the part of Respondent in failing to comply with the DDPR award and the order of this Court. Consequently, We find that Respondent is not contemptuous as reinstatement was not practical under the circumstances.

24. Applicant had also asked that in the event of this Court finding that Respondent is not contemptuous on account of impracticality, that that it make an alternative award in terms of section 73 (2) read with section 24 (2) (e) and (i). In Our view and as rightly

argued by Respondent, We decline to make such a determination as it would be improper. Firstly, The dictates of section 73(2), on the one hand, apply to this Court only in respect of claims that were heard in their merits before this Court and not in respect of those from other forums, such as the DDPR. Section 24 (2) (e) is specific as it relates to claims concerning contracts of employment while (i) thereof relates to matters that this court has primary jurisdiction over. The latter subsection will not be applicable *in casu* as the issue is contempt and not a review of the DDPR award. In contempt proceedings, the available remedy is enforcement of the judgment as issued and not its variation.

25. Secondly, the order sought is one which would be proper to grant in the case of a review application because this is the only point at which this Court is vested with the power to vary an award of the DDPR by correcting it. As rightly pointed out by Respondent, this Court has in this instance been called to determine contempt and not to review the DDPR proceedings. Consequently, We declined to make an award of compensation. The proper forum to motivate compensation is at the DDPR which is the forum that awarded reinstatement.

AWARD

Having heard the submissions of parties, and having considered all evidence in support, We hereby make an award in the following terms:

a) That the application for contempt of court and committal is refused;
b) That the enforcement of an award for reinstatement is not practical;
c) That referral A0932/2009 is remitted to the DDPR to determine an alternative relief under section 73 of the Labour Code Order 24 of 1992; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 25th DAY OF FEBRUARY 2013.

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

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

Mr. L. MATELA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. THULO**
FOR RESPONDENT: **ADV. NTAOTE.**