

**HELD AT MASERU**

**In the matter between:**

**MISSION AVIATION FELLOWSHIP**

**APPLICANT**

**And**

**LINEO HLALELE  
DDPR**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Date: 2<sup>nd</sup> September 2013*

*Application for review of the ruling of the 2<sup>nd</sup> Respondent on urgent basis. 1<sup>st</sup> Respondent raising three preliminary points and abandoning one. Court also raising a preliminary point on the breach of its Rules – Court condoning the said breach. Applicant succeeding on the remaining grounds. Court dismissing the application. No order as to costs being made.*

**BACKGROUND OF THE ISSUE**

1. This is an application for the review of the ruling of the 2<sup>nd</sup> Respondent in referral A0239/2007. The matter was heard on urgent basis on this day and judgment was reserved for a later date. The background of this matter is essentially that 1<sup>st</sup> Respondent instituted a claim for unfair dismissal with the 2<sup>nd</sup> Respondent. In that hearing, Applicant had then raised a preliminary point to the effect that Applicant could probate and reprobate, by taking his terminal benefits and then later challenging his dismissal. This point was dismissed by the learned Arbitrator through a ruling. The matter was then set down for hearing in the merits, to the 4<sup>th</sup> September 2013.
2. Applicants seek to have the said ruling reviewed and corrected or set aside. In reaction to this application, 1<sup>st</sup> Respondent has raised three preliminary points in terms of which she challenges the jurisdiction of this Court over the application;

the approach used by the Applicant; and the lack of urgency in the matter as well as prejudice suffered by Applicant. From the three points, 1<sup>st</sup> Respondent withdrew the one relating to urgency and prejudice, leaving the former two points.

3. In addition to the preliminary points raised by 1<sup>st</sup> Respondent, We also raised a point in relation to breach of the rules of this Court. We intimated that whereas this was a review application, Applicant had used trial proceedings to lodge their claim and that this is contrary to Rule 16 of the *Labour Appeal Court Rules*, which apply *mutatis mutandis* to this Court by virtue of section 27A, of the Labour Court Rules of 1994 as amended. Both parties made their addresses on the points after which We condoned the breach of the Rules of this Court but delivered a ruling dismissing the application for want of jurisdiction. Our full judgment on the matter is thus in the following.

### **SUBMISSIONS AND ANALYSIS**

4. It was submitted on behalf of the 1<sup>st</sup> Respondent that this Court lacks jurisdiction to entertain this claim, as it involves a ruling within a pending claim. It was argued that this Court only has jurisdiction to review final decisions which are contained on the arbitral awards. It was added that on these grounds, these proceedings are irregular as the Courts of law of Lesotho have and continue to pronounce themselves that, incomplete proceedings should not be a subject of review. It was submitted that this amounts to the shunned piecemeal approach to litigation. The Court was referred to the case of *MDA & another v DPP 2000 – 2004 LAC 850* at 957, in support.
5. It was further submitted that even if this application were to be dismissed on the basis of the above arguments, Applicant would not be prejudiced in any manner. It was submitted that Applicant would still retain its right to review the entire proceedings of the DDPR before the 2<sup>nd</sup> Respondent, on all matters including the one in issue. On the issue of the proceedings being irregular by virtue of the breach of its rules, 1<sup>st</sup> Respondent submitted that this Court has a discretion to condone the breach of its rules especially where the interests of justice demand, as is the case *in casu*.

6. Applicant replied that this Court has jurisdiction to entertain this matter in terms of section 228 of the *Labour Code (Amendment) Act 3 of 2000*, read with Rule 22 (4) of the *Labour Court Rules of 1994*. It was submitted the two sections authorise Applicant to approach the Court by way of originating application, which is normally used in trial proceedings, instead of motion proceedings. Applicant added that if the Court found that the approach adopted was irregular in terms of the rules of the Court, it prayed for condonation against the said breach.
7. It was added that this Court has jurisdiction to review the ruling of the learned Arbitrator by virtue of section 228, which gives this Court the power to intervene at any stage. It was added that by virtue of section 228 of the *Labour Code (supra)* read with Rule 22 (4) of the Rules of the is Court, this claim is not piece meal but has been properly raised. It was further submitted that Applicant stands to suffer prejudice in the event that this application is not granted. In amplification, it was said that the said reasons for the dismissal of the said claim before the 2<sup>nd</sup> Respondent, will determine the strength of the Applicant's case in the main.
8. It is without doubt that this is an application for review. In terms of Rule 16, an application for review follows motion and not trial proceedings, as Applicant has done. This is therefore a clear breach of the Rules of this Court. However, Applicant has prayed for the condonation of the said breach, arguing that that this Court has the discretion to condone any breach of its Rules. However odd the reaction of the 1<sup>st</sup> Respondent to his issue is, she seems to agree to the condonation of the breach of the Rules of this Court.
9. We say that the reaction of 1<sup>st</sup> Respondent is odd because, she had also raised certain procedural challenges against the entire claim of Applicant. If it is the attitude of 1<sup>st</sup> Respondent, that the interests of justice demand the granting of the condonation against the breach of the Rules, We see no reason not to grant the application. We accordingly condone the breach of the Rules and excuse the form used in bringing this review application. This essentially means that this is a review

application made in terms of section 228F of the *Labour Code (supra)* and no longer a claim referred in terms of section 227.

10. If an application for review is made in terms of section 228F, a review contemplated therein is made against an arbitral award. *In casu*, Applicant seeks to review the ruling of the learned Arbitrator in referral A0239/2007. Clearly, what applicant seeks to do, is not contemplated in the section against which this matter has been referred. If that is the case, there is no legal basis against which the jurisdiction of this Court is found over the Applicant's claim. Put in simple terms, section 228F does not vest this Court with the jurisdiction to review the rulings of the DDPR.
11. Even assuming that the claim was brought in terms of section 228 read with Rule 22 (4), Applicant's claim would not hold. We say this because section 228 deals with claims referred to this Court in terms of section 227, which Applicant claimed to have been in error, when she sought the condonation of the form that she used. By virtue of the turn of events occasioned by the condonation application, section 228 is no longer applicable to the proceedings *in casu*. In relation to Rule 22 (4), this is a rule that governs the proceedings before this Court. By this, We mean that it relates to interim or interlocutory applications, in respect of a claim that is proceedings before this Court and not as suggested by Applicant. Consequently, it is also inapplicable *in casu*.
12. On the issue of prejudice, it is Our view that the fear raised is unfounded as it attempts to pre-empt the decision of the learned Arbitrator. Applicant wants to know the decision of the learned Arbitrator in order to be able to speculate the possible outcome in the event that the matter goes into arbitration. This is merely an issue of convenience on their part and not to avoid prejudice. We agree with 1<sup>st</sup> Respondent that this is not the end of the matter for Applicant as it will still have an opportunity to contest any irregularities that occurred during the arbitration proceedings including issues that arose from the point in issue, *in casu*. To entertain this claim would be a piece meal approach to the review of the proceedings in this referral which, as correctly pointed out by 1<sup>st</sup> Respondent, Courts have and continue to shun as a practice.

**AWARD**

We therefore make an award in the following terms:

- a) That the application is dismissed; and
- b) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 9<sup>th</sup> DAY OF  
SEPTEMBER 2013.**

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

**Mrs. M. MOSEHLE  
MEMBER**

**I CONCUR**

**Mr. L. MATELA  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. MOKEBISA  
ADV. MOLATI**