IN THE LABOUR COURT OF LESOTHO **LC/REV/09/2013**
A0111/2010

HELD AT MASERU

In the matter between:

MOEKETSI MOROKA **APPLICANT**

And

FRASERS LESOTHO (PTY) LTD **1st RESPONDENT**
THE ARBITRATOR (MR. KALAKE) DDPR **2nd RESPONDENT**

JUDGMENT

Date: 27th August 2013
Review application of DDPR arbitral award. Applicant having raised only ground of review. 1st Respondent requesting postponement of the matter – Court refusing to grant postponement – 1st Respondent having not filed an intention to oppose – matter proceedings unopposed. Court not finding merit in Applicant's claim – Court dismissing the review 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 A0111/2010. It was heard on the 27th August 2013 and judgment was reserved for a later date. Only one ground of review was raised, in terms of which Applicant sought the review, correction and/or setting aside of the arbitral award of the 2nd Respondent.

2. The facts surrounding this matter are basically that, Applicant was an employee of the 1st Respondent until his dismissal on the 2nd December 2009. At the time that Applicant was dismissed from employment, the 1st Respondent business was owned by Metcash Africa Limited. Subsequent to his dismissal, Applicant then referred a claim for unfair dismissal with the 2nd Respondent, sometime in February of 2010.

3. The matter was conciliated upon in terms of section 227 (4) of *Labour Code Amendment Act 3 of 2000* and conciliation having failed, it proceeded into arbitration. At the commencement of the arbitration proceedings, 1st Respondent raised a preliminary point arguing that it was the wrong party to be sued. In motivation, it had been argued that, on or around the 2nd November 2010, Metcash Africa Limited sold 1st Respondent business as a going concern to Moosa Cash and Carry. Further that it was a material term of the sale that all liabilities of 1st Respondent business while under the ownership of Metcash would remain with Metcash. It was 1st Respondent's case that Applicant having been dismissed before the sale, his claim laid with Met cash.

4. Applicant's argument was that the mere fact that 1st Respondent business was sold as a going concern, meant that it was still liable for the debts of its predecessor. It was argued that this argument found support in the agreement of the sale of 1st Respondent business to Moosa Cash and Carry, and in particular clause 9 thereof. The said clause provided that the agreement shall be governed by the laws of the Republic of South Africa. On that note, Applicant had argued that the particular law applicable to their case was section 197 of the South African *Labour Relations Act of 1995*. In terms of the said section, where a business is sold as a going concern it carries all the asserts and liabilities of its predecessor.

5. The learned Arbitrator issued an award on the 14th December 2012, in favour of 1st Respondent. In the award, He had found that the South African law was inapplicable to Applicant's case and concluded that 1st Respondent was not properly sued. It is this award that Applicant seeks to have reviewed, corrected or set aside. It is Applicant's argument *in casu* that, the learned Arbitrator committed an irregularity by refusing to apply the law of contract chosen by parties.

6. The matter was not opposed as no formal intension to oppose, in terms of the Rules of this Court, had been filed. Rather, at the commencement of the review proceeding, 1st Respondent through its Human Resources Manager, Ms. Nkuebe, sought a postponement of the matter. She had argued that they had initially instructed the Association of Lesotho Employers to

represented them in the proceedings. However, they had later withdrawn as their counsel of record.

7. Ms Nkuebe further stated that they had then instructed one Mr. Mohapi Motlere, who had just informed them that he would not be able to represented them. She stated that they were all along under the impression that both the former and latter representatives had duly filed all relevant papers in the matter. They were thus asking for an indulgence to find a new representative to carry over. She concluded that the interests o justice demanded the granting of the application for postponement.

8. Advocate Mohau (KC) was strongly against the postponement. He argued that the matter had dragged for a very long time and that this was prejudicial to Applicant. He specifically pointed out the fact that this matter stems from as far back as in 2009. Further, that after the withdrawal of the initial representative of 1st Respondent in March 2013, nothing was done by 1st Respondent to advance the mater. He added that both prior to its withdrawal and thereafter, no intention to oppose was ever filed on behalf of 1st Respondent, to indicate is willingness to defend the matter.

9. Furthermore, Advocate Mohau (KC) stated that there was no proof that 1st Respondent had instructed Mr. Mohapi Motlere, to represent them. He maintained that in the absence of such proof, Mr. Mohapi Motlere was never appointed to act and that failure by 1st Respondent to oppose the matter is inexcusable. He concluded in the light of this said above, the interests of justice demanded that the mater proceed as it stood, that is without further delay and unopposed.

10. We refused the application for postponement mainly on three grounds. Firstly, that the matter was unopposed in terms of the Rules of this Court and that nothing justified the condonation for the breach of the rules in as much as no such application was made. Having not opposed the matter, it would have been illogical to grant a respondent party the postponement of a matter that is not opposed. Secondly, explanation given for the request was not satisfactory. There was no proof that after the withdrawal in March 2013,

attempts were made to advance the matter. Having failed to provide such proof, 1st Respondent failed to explain why they could not find a representative in the period between March 2013 and this day. Thirdly, given the circumstances of the matter, its history in particular, the principles of justice demanded that it proceed without further delay. We then directed that it proceed unopposed. Our judgment in the merits of the matter is thus as follows.

SUBMISSIONS AND FINDINGS

11. Advocate Mohau (KC) submitted that the learned Arbitrator was obliged in law to apply the law as agreed upon by the parties. Having failed to do so, He committed a grave irregularity warranting the review of His arbitral award. The Court was referred to the case of *Standard Bank of South Africa Limited v Efroiken and Newman 1924 AD 171* at 185, where De Villiers J held that that in a contract, the law applicable is ordinarily that of the country where the subject of agreement is situated. The learned judge went further to say that where parties agree that the law applicable will be that of the country where the agreement was concluded, then the latter will prevail. He added that the agreement concerned was concluded in Bloemfontein in the Republic of South African and that in terms of the agreement of parties, the law applicable is that of the country in which the agreement was concluded.

12. He further submitted that in terms of the agreement of parties, the law applicable was section 197 of the South African *Labour Relations Act (supra)*, which provided that, a business that has been sold as a going concern, carries along the asserts and liabilities of its predecessor. He furthermore submitted that the learned Arbitrator ought to have found that 1st Respondent was properly sued and proceed to deal with the merits of the matter. He submitted that at best, the learned Arbitrator ought to have declined jurisdiction and referred the matter to the Labour Court, if He felt that He had no authority to apply the laws of the Republic of South Africa, rather than to dismiss the matter. He prayed that this Court review the said arbitral award and to order that this matter be recommenced before the Labour Court and no longer the 2nd Respondent for reasons of jurisdiction.

13. Having heard the full submissions of Advocate Mohau (KC) on the matter, We suggested to him that he seemed to place a challenge on the conclusion of the learned Arbitrator, as opposed to the procedure that the learned Arbitrator adopted in coming to His conclusion. He rejected the suggestion and argued that the learned Arbitrator erred in that He refused to interpret and apply the law as agreed upon by the parties.

14. It is Our view that a single point, my stand as either a review or an appeal ground, depending on how it is both framed in pleadings as well as how it is argued during submissions. The distinction between an appeal and a review lies in the nature of the challenge itself. By this We mean that, if a challenge is placed against the procedure, then it is a review and if the challenge is placed against the conclusion, then it is an appeal (see *J. D. Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004).* Where the former prevails, this Court has jurisdiction and if the latter prevails, the contrary holds.

15. The essence of the arguments by Advocate Mohau (KC), is essentially that the learned Arbitrator ought to have found that the 1st Respondent was properly sued in referral A0111/2010. He premises his argument on clause 9 of the agreement of sale of 1st Respondent to Moosa Cash and Carry, as well as the finding of the Court of Appeal in the South African appeal judgment of De Villiers J in *Standard Bank of South Africa Limited v Efroiken and Newman (supra).*

16. In Our view, Advocate Mohau (KC) is essentially saying that given the circumstances of the matter, a different conclusion ought to have been reached by the learned Arbitrator. Advocate Mohau (KC), has gone further to prescribe possible alternative conclusions that the learned Arbitrator could have made at best. These are, to find that 1st Respondent was properly sued and proceed into the merits, or to decline jurisdiction and refer the matter to the Labour Court as a court of first instance, in terms of section 227(5) of the *Labour Code (Amendment) Act 3 of 2000.*

17. Nothing in either the pleadings as they *prima facie* appear or in the submissions in amplification thereof, sounds in a

procedural irregularity on the part of the learned Arbitrator, in the manner in which the award was made. Having made this finding, We find that the Applicant has failed to establish a reviewable irregularity on the part of the learned Arbitrator. In fact, We are of the view that the challenge is nothing but an appeal disguised as a review, as it directly challenges the conclusion of the leaned Arbitrator. Each of Our findings in the aforementioned is sufficient to warrant the refusal of the review application.

AWARD

We therefore make an award in the following terms:

a) The review application is refused;
b) The award of the 2nd Respondent in A0111/2010 remains in force;
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 2nd DAY OF SEPTEMBER 2013.

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

Mr. KAO **I CONCUR**
MEMBER

Mrs. MALOISANE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. MOHAU (K.C)**
FOR 1ST RESPONDENT: **MS. NKUEBE - HR**