IN THE LABOUR COURT OF LESOTHO **LC/REV/24/2012**
A0745/2011

HELD AT MASERU

In the matter between:

LESOTHO PRESCIOUS GARMENTS **APPLICANT**

And

THE DDPR **1st RESPONDENT**
L. NTENE (ARBITRATOR) **2nd RESPONDENT**
MPITI ROBEA **3rd RESPONDENT**
NTHABISENG TJOTJOSI **4th RESPONDENT**
'MAPOHO MAKOPANE **5th RESPONDENT**

JUDGMENT

Date: 3rd July 2013
Application for the review of the DDPR arbitral award in referral A0948/2003. Applicant raising a preliminary point in terms of which he objected to the use of the DDPR record of proceedings - Applicant arguing that the record is not a true reflection of the proceedings before 2nd Respondent and that this amounts to an irregularity. Applicant requesting the Court to remit the matter to the DDPR for a fresh hearing on the basis of this preliminary point. Court finding that this point is not properly raised as a preliminary point but that it ought to have been raised as an additional review ground. Court dismissing the preliminary point. The matter proceeding in the merits – from the three grounds of review – one ground being withdrawn and only two remaining. All remaining review grounds failing to sustain. Review application being refused. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for review of the DDPR arbitral award in referral A0745/2011. It was heard on this day and judgment was reserved for a later date. The background of this matter is basically that 3rd to 5th Respondents lodged claims for unfair

dismissal with the 1st Respondent, in which they challenged both the substantive and procedural fairness of their dismissals. The arbitration proceedings were before the 2nd Respondent and She issued an award on the 16th March 2012, whereby She ordered the reinstatement of Applicants, in terms of the section 73 of the *Labour Code Order 24 of 1992*. This is the award that Applicant seeks to have reviewed, corrected or set aside.

2. At the commencement of the proceedings, Applicant raised a preliminary point wherein it raised an objection to the use of the 1st Respondent record of proceedings on the ground that it was incomplete. It was alleged that this is an irregularity for which they sought the remedy of remittal of the whole matter to the 1st Respondent for a hearing *de novo*. In the merits, four grounds of review were raised in the following,

   "a) The arbitrator uttered words to the effect that the applicant company had no case against the respondents before evidence was complete and before hearing respondent's evidence.
   b) The arbitrator refused me an opportunity to call other witnesses as I had called enough witnesses and that she was in hurry for another case.
   c) The arbitrator found in favour of 2nd and 3rd respondents yet they elected not to testify on their behalf.
   d) The arbitrator found the dismissal to have been unfair procedurally after denying us the opportunity to call the witnesses to testify on the issue of appeal, which evidence would have rebutted the respondent's allegation."

3. During the proceedings ground c) was withdrawn and grounds b) and d) were taken as one ground in that, they related to the refusal on the part of the 2nd Respondent to allow Applicants the opportunity to call witnesses. This essentially meant that Applicant now had two grounds of review. We elected to adopt a holistic approach to the proceedings in that We dealt with the preliminary point, reserved Our judgment on the matter and directed the parties to address Us on the merits of the application. We had indicated to both parties that that if We upheld the preliminary point raised by Applicant, then there would be no need to consider the merits, so that We would only do so if the preliminary point was not upheld. It was on these

basis that the matter proceeded on this day. Our judgment on all issues is thus reflected hereunder.

SUBMISSIONS AND FINDINGS

Preliminary point

4. Advocate Ntaote submitted that he objected to the use of and reliance on the record of the proceedings before the 2nd Respondent in that, part of the proceedings relating to their grounds of review were not reflected on the record submitted. It was stated that the record neither reflected the portion where the learned Arbitrator made utterances the Applicant had no case nor where the learned Arbitrator refused to allow Applicant to bring additional witnesses.

5. Advocate Ntaote further submitted that the witnesses who were precluded from giving evidence were going to lead evidence to address the issue the procedural fairness of the dismissals of 3rd to 5th Respondents and was thus crucial for their case. It was added that as proof that the record was indeed incomplete, it did not even reflected the part where the learned Arbitrator made interjections during the proceedings, yet same were made. Further that not even the communication by the representatives of the parties were reflected, yet the parties were represented in the proceedings. Advocate Ntaote prayed that the matter be remitted to the 1st Respondent to be heard *de novo*.

6. When asked whether it was appropriate to object to the use of its own evidence, it being the record of proceedings before the 2nd Respondent, Applicant submitted that the record was not part of its evidence, but a record of the Court which was intended to aid It to make a fair and just determination. When further asked if it would not have been proper to have raised this issue as an additional review ground, Applicant submitted that it would not, as an incomplete record cannot be a basis for the granting of a review. He submitted that Rule 19 (1) (e) of the *Rules of this Court*, justified the approach he adopted.

7. In response, Advocate Tlapana for 3rd to 5th Respondents submitted that Applicants cannot raise this point, whether right or not, at this stage. He submitted that Applicants were furnished with the record as far as in November 2012 and that

they are only raising this issue now. He further stated that from the time Applicant became seized with the record, it was its obligation to ensure that it was in order, rather than to adopt the approach they have elected now. Advocate Tlapana added that having chosen not to react earlier, Applicant is bound by the rule in motion proceedings to stand and fall by their pleadings. He prayed that the Court consider the pleadings as they stand and make Its determination.

8. He stated that Applicant is only raising this issue to address the Respondent averments in their answering affidavits. He argued that the issue of the record not being incomplete, ought to have at least been raised in the Applicant's replying affidavit. He submitted that Applicants having not replied, Respondents' averments in their answering affidavit remain unchallenged and ought to be taken as true and accurate. Reference was made to the case of *Theko v Commissioner of Police and another LAC (1990-94) 239* at 242 in support.

9. Advocate Tlapana added that what makes Applicant's case worse on this issue is the fact that it has not even filed affidavits of those who were present in the proceedings at the 1st Respondent before the 2nd Respondent, to support its allegations that the record is not complete. He stated that if this had been done, the said affidavits would reflect that the alleged utterances were made and that Applicant was denied the opportunity to call further witnesses. He concluded by denying that the alleged utterances were ever made and that the Applicant was not refused the opportunity to call further witnesses.

10. We have perused the record of proceedings before the 2nd Respondent and have made a number of notes. Firstly, We have confirmed that the record does not reflect the incidents relating to the grounds of review raised by Applicant. Secondly, the record does not reflect if parties were represented or not, if at all they were. Thirdly, the record does not reflect any exchange that the 2nd Respondent may have made during the proceedings, if at all She did. We wish to comment that the absence of these above does not necessary lead to the conclusion that the record is indeed incomplete as alleged,

more so given that they are highly contested by 3rd to 5th Respondents.

11. The above notwithstanding, the salient issues to ponder on are, whether it is proper for the Applicant to have raised a preliminary point objecting to the use of and reliance by the Court on the record of proceedings filed of record. If so, can the Applicant ask for remittal of the matter to the 1st Respondent for a hearing *de novo* on the basis of the said preliminary point. Lastly, would it not have been proper for the Applicant to have raised this argument as an additional ground of review in terms of Rule 16(6) of the *Rules of this Court*. The answer to the second and third issues will follow from the answer to the first one. As a result, We will now proceed to deal with the first issue.

12. In his valuable work, *Beck's Theory and Principles of Pleadings In Civil Actions, Butterworths, 5th edition*, at page 385, Isaacs, comments on the purpose of the record in review proceedings as thus,
"in order to properly prepare his or her case a copy of the record or proceedings is required, ..."
In Our view, this above essentially highlights the point that an Applicant to a review proceedings needs the record of proceedings of the inferior court to support their case. Therefore, the said record is part of the evidence of an applicant party.

13. *In casu*, what the above said basically means for Applicant is that, it is in effect objecting to the use of its own evidence, being the record of proceedings. The ultimate effect of this move is that Applicant is withdrawing the record of proceedings as part of its evidence. If this is the case, Applicant simply implying that it will only rely on its pleadings in support of its case, which pleadings Respondents argue that have not challenged their defence. If this is so, it then means that this Court would be bound by the principle in the *Theko v Commissioner of Police and another (supra).*

14. Further, the record of the proceedings before the 2nd Respondent forms part of the records of this Court and cannot in any way be excluded unless it falls within the category of

excluded documents in proceedings. It is not alleged that it is inadmissible evidence. Worse still, it is the party which filed the record that wants it to be excluded. Even where an objection to the use of or reliance of evidence is raised, it is properly raised by a defendant as a defence to the case they are answering. Clearly, from both the submissions of Applicant and those of Respondent, Applicant simply wants to withdraw or object to the use of the record for a simple reason that it does not support its case, but that of the Respondents. This practice is not countenanced by Our law and neither is it supported by any principle of law.

15. We have closely studied rule 19 (1) (e) of the *Rules of this Court* and have not found any qualification as Applicant has suggested. This rules reads as thus,
" 19. (1) A record shall be kept of all proceedings before the Court including
(e) the proceedings of the Court Generally."
This Rule relates to the proceedings before the Labour Court and not those any other Court or forum. The authority is thus misapplied and inapplicable to issues *in casu*. Applicant has essentially failed to cite any authority sanctioning the route that he has opted to adopt.

16. Even assuming that the point had been properly raised, the remedy sought is one flowing from the merits of review proceedings. In a review application, if successful, the available remedies are either the correction of the award of an inferior court or the setting aside of same and its remittal to be heard *de novo*. Applicant seeks to invoke these remedies without having established its case for review. It is Our opinion that Applicant ought to have invoked the provisions of Rule 16 (6) of the *Rules of this Court* and added this point as an additional review ground.

17. As Applicant has rightly pointed our, this Court has granted reviews based on an incomplete record before, but the argument had been pleaded as an additional ground of review (see *Letšeng Diamonds (Pty) Ltd v DDPR & others LC/REV/111/2005*). Consequently, We find that this point round has not been properly raised and that it is accordingly dismissed. On the basis of Our finding, We will not comment

any further on the issues raised but to proceed to deal with the merits of the matter on the basis of the pleadings as they stand.

Merits

18. In relation to the first ground of review, Advocate Ntaote submitted that it was irregular for the 2nd Respondent to have made utterances that Applicant had no case before the matter was finalised. It was added that this showed irrationality and biasness on the part of the leaned Arbitrator. In reply, Advocate Tlapana submitted that such utterances were not made hence why they are not even reflected in the record. He added that the conclusion of the learned Arbitrator was rational and not biased and thus unreviewable. Reference was made to the case of Blandina Lisene *v DDPR & Lerotholi Polytechnic LC/REV/122/2007* in support.

19. On the second ground of review, Advocate Ntaote submitted that the learned Arbitrator committed an irregularity when She disallowed the calling of further witnesses by Applicant. It was said that the witnesses were crucial as they were going to testify on one of the aspects of the 3rd to 5th Respondent dismissal. In reply, Advocate Tlapana submitted that, there were no further witnesses in the proceedings contrary to the Applicant's submissions. He stated that if there had been, Applicant ought to have filed their affidavits confirming this, more so given that the record does not support Applicant's allegation of both refusal and about the alleged utterances. Advocate Tlapana invoked the authority in *Theko v Commissioner of Police and another (supra)* and prayed that this application be dismissed.

20. In review proceedings, the reviewing court relies on both the record of proceedings before the inferior court as well as the pleadings of parties in order to come to a just and equitable decision. Whereas the pleadings set out the claims and/or defences, the record reflects what transpired in the proceedings in order to place the reviewing court in a clear position to determine if any irregularity may have occurred, as alleged. As We have earlier said, the record is part of the evidence of the applicant party to the proceedings.

21. *In casu*, Applicant has made allegations about certain utterances being made as well as a refusal on the part of the learned Arbitrator to allow it to lead further evidence. This is not reflected in the record and is vehemently denied by Respondents. It is trite law that he who alleges bears the burden of proof. In their valuable book, *Principles of Evidence 2nd Ed.,* at page 538, P. J. Schwikkard et al, had the following to say on this principle,
"... the guiding principle which is that he who makes a positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo. Most often that will be the plaintiff and the defendant will bear the burden of proof only in relation to a special defence."

22. In view of the above principle, Applicant has not been able to discharge its burden of proof as Respondents have simply denied their claim without raising a special defence. As suggested by Respondents, if Applicant had filed affidavits of those who were present when the alleged utterances were made or even the affidavits of the witnesses who were intended to testify at the arbitrator proceedings, that might have gone a long way to establish merit in the Applicants claims. The effect of failure to discharge the burden of proof on the Applicant is that, its evidence is rendered bare allegations of facts.

23. In the case of *Mokone v Attorney General & others CIV/APN/232/2008* the Court had the following to say in relation to bare allegations,
"As can be seen respondents have just made a bare denial. It would not be enough to just make a bare denial .... If one does not answer issuably then his defence will be considered no defence at all,"
It is Our view that this principle equally applies in relation to claims by parties. As a result, where a party has barely alleged a claim, that is not enough for the court to make a finding in their favour. Consequently, where a bare claim has been made, it becomes both unsatisfactory and unconvincing and should be considered no claim at all.

24. Not only is the evidence of Applicant bare allegations of facts, but it has also failed to rebut the evidence of

Respondents in reply. This essentially means that the evidence of Respondent must be taken as both true and accurate. In coming to conclusion, We are guided by the Principle in *Theko v Commissioner of Police and another (supra)* as cited above, by Respondents. In that matter, the Court had the following to say:

"*I must point out that no attempt was made by the respondents to reply to or challenge the correctness of the averments contained in the affidavit of the attorney, Mr Maqutu. The issues in our view must therefore be resolved on the basis of the acceptance of the unchallenged evidence of an officer of this court".*

In view of this said, We find no need to comment on the rest of the submissions as that would only serve academic purposes. Consequently, Applicant's grounds of review fail.

AWARD

We therefore make an award in the following terms:

a) That this review application is refused;
b) That the award in referral A0745/2011 remains in force;
c) That the said award must be complied with within 30 days of issuance herewith; and
d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 8th DAY OF JULY 2013.

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

Mrs. M. THAKALEKOALA **I CONCUR**
MEMBER

Mrs. L. RAMASHAMOLE **I CONCUR**
MEMBER

FOR APPLICANTS: **ADV. NTAOTE**
FOR 3rd TO 5th RESPONDENTS: **ADV. TLAPANA**