IN THE LABOUR COURT OF LESOTHO **LC/REV/04/11**
A0857/2010

HELD AT MASERU

In the matter between:

MOHAU RASEPHALI **APPLICANT**

And

TAI YUAN GARMENTS (PTY) LTD **1ST RESPONDENT**
THE DDPR **2ND RESPONDENT**

JUDGMENT

Date: 23rd January 2013
Application for review of arbitration award. Three grounds of review having been raised in the following,
- failure to appreciate that contract was for without limit of time – Court finding ground to constitute and appeal;
- reliance by Learned Arbitrator on hearsay to make conclusion – Court finding that conclusion was based on substantial facts; and
- failure to appreciate that there is no section 64(4) in the Labour Code Order – Court finding that this was a typographic error and thus not reviewable.
All grounds failing to sustain. Review application being dismissed. The award of the DDPR remaining in force and no order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR which was handed down on the 26th November 2010 in referral A0857/2010. It was heard on this day and judgement was reserved for a later date. Only one ground of review has been raised by Applicant in this matter in terms of which He prayed that the DDPR award be reviewed, corrected and set aside. Both parties made their representations on the matter and the ruling and reasons are contained herein.

2. Facts surrounding this matter are basically that Applicant's contract of employment was terminated by 1st Respondent. Applicant then referred a claim for unfair dismissal with the 2nd Respondent which claim was decided in favour of 1st Respondent. As a result, Applicant then lodged the current application in terms of which he sought the review of DDPR award in the following,

   "...2nd Respondent had no judicial discretion to (b) deal with, an relies on hearsay for its decision in A857/10 and (a) disregard the perelmetory provision of Regulation 18.(2) of Labour Code (DDPR) Regulation 2000."

SUBMISSIONS OF PARTIES

3. In amplification of his ground of review, Applicant submitted that in terms of Regulation 18.(2) of the *Labour Code (DDPR) Regulation of 2001*, the learned Arbitrator was enjoined in law to take into account the provisions of the *Labour Code Order 24 of 1992* as amended and the *Labour Code (Conciliation and Arbitration Guidelines) Notice of 2004*. It was argued that She failed to do so and in so failing, She failed to appreciate that in terms of the law, a contract without limit of time is terminable on notice. It was submitted that the learned arbitrator failed to appreciate that Applicant's contract with Respondent was without the limit of time as She came to the conclusion that it was a fixed term contract.

4. It was further argued that as a result of the disregard of the said Regulations, the learned Arbitrator also failed to appreciate that the law deprived her of the right or discretion to rely on hearsay evidence to make her conclusion. Similarly reference was made to Regulation 18 (2) that it bound the learned Arbitrator to consider the provisions of section 228C (1) of the *Labour Code Order (supra)* that "... the arbitrator... shall deal with the substantial merits of the dispute ..." It was argued that in relying in hearsay, the learned Arbitrator had committed a gross irregularity against the dictates of the said section in that she had failed to consider this provision.

5. Reference was also made to the case of *Lesotho National Federation of Organisations for the Disabled vs. Mojalefa Mabula and another LAC/CIV/A/07/10* in support. Specific reference was made to the conclusion of the court that the

DDPR is a creature of statute and that it was bond by the provisions of the state that created it. It was maintained that section 228C is a section within the crating statute and as such it was binding to the letter upon the learned Arbitrator.

6. Applicant maintained that he had testified during the arbitration hearing that he was terminated by one 'Malerato who just told him not to report for duty anymore. However, Mr. Moshoeshoe, who admitted that he was not present when Applicant was terminated, testified that Applicant's contract terminated because the job that he had been hired to had come to an end. It was maintained that there is no way that he could have known this if he was not present when Applicant was terminated and that this is what made his testimony hearsay.

7. It was furthermore argued that, again due to the disregard of the same Regulations, she failed to appreciate that there was no section 64(4) in the *Labour Coder Order (supra)*. Applicant thus prayed that this Court ought to interfere with the decision of the learned Arbitrator by substituting it with that of its own and make an award in his favour in terms of section 73 of the *Labour Code Order (supra).* Reference was made to the case of *Matšeliso Matsemela vs. Naleli Holdings LAC/CIV/A/02/07* where the Court stated that the Labour Court has the authority to correct the DDPR award. It was argued in the alternative that if having found for Applicant, should this Court decide not to correct the award, that it remit the matter to the DDPR to be heard *de novo.*

8. In response, 1st Respondent argued that Applicant had failed to demonstrate how the provisions of Regulation 18(2) were disregarded by them. It was argued that both the averments and submissions by Applicant were so vague that they failed to make a clear case. It was thus prayed that this review application ought to fail on account of this alone. 1st Respondent then went further to address the merits of the matter in the event that this point was not up held.

9. 1st Respondent conceded that a contract without the limit of time was terminable on notice as put by Applicant, but argued that the contract in issue was for a specific task which ended when the task was complete. Reference was made to section 62 (4) of the *Labour Coder Order (supra)* that a contract for a

specific job ends when the job ends and that no notice is required. It was argued that the style that Applicant had been hired to do was no longer made and that meant that his contract had ended.

10. It was also denied that the learned Arbitrator relied on hearsay to make Her decision to dismiss Applicant's claim. It was argued on behalf of 1st Respondent that hearsay refers to, *"statement of fact made by a party who is not before court, which statement is tendered to prove the truthfulness of that statement."*
It further argued that assuming that the said evidence of Mr. Moshoeshoe was hearsay, Section 228C would only come into the picture and not as suggested by Applicant. It was submitted that in terms of section 228C, the DDPR does not adhere strictly to the rules of procedure.

11. 1st Respondent argued that there is nowhere where Mr. Moshoeshoe in his statement, at least on record, where he said that he was told by someone that Application was terminated because the job that he had been hired for had ended. He argued that as a result, it cannot be accurate that his evidence was hearsay and therefore that it ought to have been disregarded. It was maintained that Mr. Moshoeshoe being the Human Resources Manager had firsthand knowledge that the job that Applicant had been hired for had come to an end that therefore that his contract had terminated.

12. It was argued that the *Lesotho National Federation of Organisations for the Disabled vs. Mojalefa Mabula and another* case was not applicable in this case as it involved the power of the learned Arbitrator to turn a settlement agreement into an award. It was further argued that the case beforehand deals with the issue of hearsay which issue is totally different from the issue in the said case.

13. In relation to the issue on validity of section 64(4), 1st Respondent replied that this was clearly a typographic error as the content of the argument related to section 62(4) of the same law. It was maintained that in the *Labour Code Order (supra),* the only section dealing with contracts for a specific task is section 62(4). It was thus prayed that this applicant be dismissed and that if the Court held otherwise, that the matter

be remitted to the DDPR to be heard *de novo*. It was argued that it would be absurd and a given error if this court were to replace the decision of the DDPR with that of its own.

ANALYSIS

14. In our view, unorthodox and farfetched as it may seem, Applicant has to some extent attempted to link Regulation 18 (2) of the *DDPR Regulations (supra)* with his submissions. However, what remains is whether there is merit in his arguments. As a result, this matter cannot be dismissed on this ground alone. We therefore proceed to consider the merit of this review application.

15. We have observed and noted that although Applicant argues that that he has only one review ground, there are in fact three grounds that derive from a misdirection in respect of one rule of procedure. The rule in issue is Regulation 18 (2) of the *Labour Code (DDPR) Regulation of 2001.* We have gone through the said Regulation and confirm that indeed it enjoins the learned Arbitrator to consider the provisions of both the *Labour Code Order (supra)* and the *Conciliation and Arbitration Guidelines (supra)* in conducting the arbitration proceedings. This is the background against which We will do our analysis of the parties submissions.

16. Applicant has attempted to argue that learned Arbitrator failed to appreciate that in terms of the *Labour Code Order (supra)*, his contract of employment was without the limit of time and not for a specific task as She concluded. From his submission, it is clear that according to him, the learned Arbitrator would have been right if she had found that his contract was without the limit of time. In our view, Applicant's submissions on this issue are concerned with the merit of the learned Arbitrator's decision and not so much about Her breach of any rule of procedure.

17. Although, Applicant has attempted to demonstrate a reviewable irregularity on the part of the learned Arbitrator, We do not find any direct link between regulation 18 (2) and the alleged act of misdirection on the part of the learned Arbitrator. The inference that Applicant seeks to have drawn is too far to lead to a single conclusion in his favour. It does not follow that because the learned Arbitrator did not find that his contract

was for a specific task meant that the She had failed to consider the provisions of the *Labour Code (supra)* and by necessity a breach of procedure in terms of the *DDPR Regulations (supra)*. Consequently, We do not see how Regulation 18 (2) was breached in this regard.

18. On the second ground of review, Applicant has attempted to argued that the learned Arbitrator relied on hearsay evidence to come to the conclusion that his dismissal was fair. We have noted the submissions of Applicant as well as the authorities that he has cited in support and We agree with him in principle tat hearsay evidence is inadmissible. As a result, if this Court finds in his favour that the learned Arbitrator relied on hearsay evidence to make Her conclusion, then her conduct was so irregular that it warrants interference with Her award.

19. We have gone through both the record of proceedings before the DDPR as well as the arbitral award and have made two major discoveries. Firstly, that the learned Arbitrator relied on the evidence of Applicant's contract of employment to come to the conclusion that he had been hired for a specific task, which was to sew style 8884A. Secondly, the learned Arbitrator relied on the knowledge of Mr. Moshoeshoe, witness for 1st Respondent in his position as the Human Resources Manger that the style that Applicant had been hired for had since been completed hence his termination from employment.

20. The presence or the absence of Mr. Moshoeshoe when Applicant was terminated by the said Ms. 'Malerato, or what is alleged to have been said to Applicant by 'Malerato when she terminated Applicant, does in any way make his testimony hearsay. The logic behind Our reasoning is that, and as rightly argued by 1st Respondent, Mr. Moshoeshoe neither relied on what was told to him or what he had heard from a third party. His evidence was based on his knowledge and what was contained in the 1st Respondent official records, namely the Applicant's contract of employment. This is the same contract that Applicant neither denied ever being a party to either during the DDPR proceedings or even during proceedings before this Court.

21. In essence, We are in agreement with the 1st Respondent that the evidence that the Learned Arbitrator relied on in

coming to her conclusion was not hearsay. However, We fail to appreciate how its reference to section 228C of the *Labour Code Order (supra)* to the effect that the learned Arbitrator was not bound to stick strictly to the rules of procedure could have advanced its case. In Our opinion, the existence of this provision does not in any way permit the learned Arbitrator to rely on same to make her conclusion.

22. Where or not the learned Arbitrator was correct in coming to Her conclusion is not a matter for this Court to make a determination on. What matters is whether the manner in which the decision was reached was well in line with the rules of procedure (see *JDG Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & 2 Others LAC/REV/39/2004; also Teaching Service Commission & others vs. The learned Judge of the Labour Appeal Court & others C of A (CIV) 21/2007*). In Our opinion, the learned Arbitrator observed the relevant procedural rules in this respect. Consequently, We find that the learned Arbitrator did not rely on hearsay evidence to come to Her conclusion.

23. In relation to the third ground of review, We are of the opinion that it is clearly a typographic issue. We agree with 1st Respondent that it is a typographic error for a simple reason that it is deducible from the content of the argument of the learned Arbitrator the She meant to refer to section 62(4) of the *Labour Code Order (supra)* as this is the only section that relates to contracts for specific tasks. As a result, this point cannot be a valid review ground as it does event hint a suggestion that there was a procedural flaw on the part of the Learned Arbitrator. Consequently, it cannot hold.

24. On the basis of the above analysis, We find it unnecessary to consider the parties' submissions on the issue of the remedy sought. In Our view, to do so would only serve academic purposes, the purpose of which this Court was not established

COSTS

25. Applicant prayed that this review application be granted with costs. He argued that the 1st Respondent has defended a defenceless case which amounted to their conduct being frivolous. It was admitted that this is a clear case of hearsay evidence which was erroneously admitted and considered by

the learned Arbitrator in finding against Applicant. 1st Respondent argued that an award of costs is made in extreme circumstances where the Court finds that one of the parties was so unreasonable in continuing with the proceedings. 1st Respondent submitted that an award of costs should in fact be made against Applicant for the reason that he ought to have known from start that he has no case but is simply wasting the Curt's time.

26. We decline to make an award of costs. Our view is based on the fact that costs are awarded in extreme circumstances. The intention behind making an ward of costs is not to intimidate parties away from enforcing or defending their rights but mainly to discourage abuse of court processes. We do not find the current circumstances to justify an award of costs against either party. To make such an award in the current circumstances would be to undermine the spirit and purport for making an award of costs.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

a) That this application is refused;
b) The award in A0875/2010 remains in force; and
c) That there is no order as to costs.

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

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

Mrs. R. MOTHEPU **I CONCUR**
MEMBER

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

FOR APPLICANT: **IN PERSON**
FOR RESPONDENT: **ADV. MOHAPI**