

**HELD AT MASERU**

**In the matter between:**

**‘MAKAMOHELO MOLEFI  
LERATO KABI  
MOHLOAI MOHLOAI**

**1<sup>st</sup> APPLICANT  
2<sup>nd</sup> APPLICANT  
3<sup>rd</sup> APPLICANT**

**And**

**TAI YUAN GARMENTS (PTY) LTD  
ARBITRATOR THAMAE N/O  
THE DDPR**

**1<sup>ST</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT**

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**JUDGMENT**

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*Date: 28<sup>th</sup> March 2013*

*Application for the review of the DDPR arbitral award in referral A0453/2011. Respondents having failed to attend hearing, matter proceeded in default. Four grounds of review raised – one ground being withdrawn and three remaining. All three grounds failing to sustain. Review application being dismissed. 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 A0453/2011. It was heard on this day and judgment was reserved for a later date. Four grounds of review were raised, in terms of which Applicant sought an order reviewing, correcting and/or setting aside the arbitral award. However, during the proceedings, Applicants withdrew the fourth ground of review, leaving just three. Only Applicants were in attendance and the matter proceeded by way of default. Applicants having made their submissions, Our judgment in the matter is thus in the following.

## **SUBMISSIONS AND FINDINGS**

2. Applicants' first found of review is that,  
*"The learned Arbitrator's decision was in error and or misdirected because it failed to make a comprehensive legal analogy of a 'lay off' vis-a-vis 'suspension' as proposed by the applicants."*
3. It was submitted in support that, the learned Arbitrator had failed to make a proper distinction between a lay off and a suspension. It was added that there was evidence that Applicants had been suspended, but that that learned Arbitrator made a conclusion that they were on a lay off. It was argued that in so doing He failed to appreciate the distinction between a lay off and a suspension. It was further submitted that the learned Arbitrator has misapplied the law to the facts, in that an act that falls to be defined as lay off, was defined as a suspension. It was argued that this is a reviewable irregularity.
4. Applicant's argument about failure to make a proper distinction between a lay off and a suspension, suggests that the learned Arbitrator made a wrong conclusion either on the law or facts or a combination of both. If this is the case, then clearly Applicant is discontent with the conclusion of the learned Arbitrator, on either the law or the facts or both as the case may be. It is an established principle of our law that where a party is discontent with the conclusion and not the process of reaching the said conclusion, then the proper route is by way of appeal and not a review. (see *Thabo Mohlobo & Others v Lesotho Highlands Development Authority* LAC/CIV/A/05/2010; also see *JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others* LAC/REV/39/04).
5. We are strongly led to this conclusion by the fact that, even the Applicants supporting averments on the issue, have not been substantiated. What Applicants have merely done, has been to make bare allegations of facts not supported by any evidence. It has been alleged by Applicant that there was overwhelming evidence of a suspension as opposed to a lay off. However, the Court has not been directed to anywhere wither in the record of the award where the said evidence appears. In Our opinion, this amounts to a bare allegation of facts.

6. 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. In view of this said, Applicants’ first ground of review fails.

7. Applicants second ground of review is that,

*“In essence the learned Arbitrator based the decision on irrelevant considerations by making a conclusion to the effect that the determination of sufficiency of work is the exclusive prerogative of the employer without any evidential basis.”*

8. It was submitted in support that the learned Arbitrator relied on the argument that, it is only the employer that determines whether or not there is work, in making his conclusion. based on this argument, the learned Arbitrator came to the conclusion that Applicants were not suspended but on a lay off. It was argued that this was an irrelevant consideration to the matter, which is wrong in law and misplaced. It was added that the sufficiency of work cannot be the sole determination of the employer.

9. In terms of the arbitral award, it was Applicants case that they were unlawfully suspended, while 1<sup>st</sup> Respondent had argued that Applicants were on a lay off. This is reflected at paragraph 7 of the arbitral award. The evidence relating to work including who determines its availability was necessary to aid the learned Arbitrator to determine if indeed there was a lay off, as suggested by 1<sup>st</sup> Respondent. However, in relation to the conclusion that it was the exclusive prerogative of the employer to determine the availability of work, it is Our opinion that this concern directly challenges the factual conclusion of the learned Arbitrator. We have expressed our attitude in cases of this nature and as such do not need to reiterate same (see

*Thabo Mohlobo & Others v Lesotho Highlands Development Authority (supra); also see JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others (supra).* Consequently, We find that this aspect is not a review but an appeal disguised as a review.

10. Applicants third ground of review is that,

*“The learned Arbitrator erred by failing to apply the mind to peculiar facts alluded to and appreciating the fact that there was sufficient evidence placed before the tribunal which was indicative that the ‘lay off’ and or ‘suspension’ was malicious in both nature and form.”*

11. In motivation of this ground, Applicants submitted that the learned Arbitrator failed to appreciate that 1<sup>st</sup> Respondent’s conduct was not only a lay off or suspension, but that it was also malicious. When asked whether this issue was raised before the DDPR, Applicants submitted that they did not but maintained that it was the responsibility of the learned Arbitrator to have detected and raised it. It was added that the learned Arbitrator was seized with overwhelming evidence that Applicants were threatened. It was added that in spite of this evidence, the learned Arbitrator engaged in the act of relying on a fixed principle of a lay off. Reference was made to paragraphs 19 to 21 of the arbitral award.

12. It was further submitted that the conduct of the learned Arbitrator in this respect, is a gross irregularity that warrants interference with the award. Reference was made to the case of *Johannesburg Stock Exchange vs. Nigel Ltd & another* where the Court had the following to say,

*“Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the “behests of the statute and the tenets of natural justice .... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; ....”*

13. It is clear from the submissions of Applicants that the argument about the lay off or suspension being malicious is only coming up for the first time on review. The attitude of this

Court has been expressed before in a number of cases. This Court has stated that to allow a point to be raised for the first time on review is contrary to the rules of natural justice, in that this Court would have denied the inferior court the opportunity to address the issue before finding them at fault (see *Leoatle v G4S Cash Solutions & another LC/REV/57/2010*; *Molatoli v CGM Industrial (Pty) Ltd & another LC/REV/56/2011*). Consequently, We will not entertain this issue at this stage.

14. We further wish to comment against Applicants proposition that it was the learned Arbitrator's duty to raise the issue of malice on own motion. This proposition does not hold water for the reason that the learned Arbitrator had no obligation to make a case for any of the parties to a dispute. It was the responsibility of Applicants to raise this issue and having failed to do so, the learned Arbitrator cannot be held accountable to their own omission.
15. The evidence at paragraphs 19 to 21 of the arbitral award does not establish threat of any kind. What is contained therein is that the conclusion of the learned Arbitrator that it is the prerogative of the employer to determine the availability of work and that there was no work at the time, hence the lay off. It is further said that, those who failed to meet the set target were given warnings as it a trite practice in the Respondent's employ. Clearly, the contents of these paragraphs do not depict what is suggested by Applicants. The learned Arbitrator made a finding that Applicants were on a lay off on the basis of the evidence of Respondent that there was no work to be done. Consequently, this ground of review fails as We have not found any unwarranted adherence to any fixed principle.

### **AWARD**

We hereby make an award in the following terms:

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

**THUS DONE AND DATED AT MASERU ON THIS 1<sup>st</sup> DAY OF  
JULY 2013.**

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

**Mrs. M. MALOISANE  
MEMBER**

**I CONCUR**

**Ms. P. LEBITSA  
MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENTS:**

**ADV. RASEKOAI  
NO ATTENDANCE**