

HELD AT MASERU

In the matter between:

**ELLERINES FURNISHERS
LESOTHO (PTY) LTD**

APPLICANT

And

**THE DDPR (M. MONOKO)
ATANG RABOSHABANE
PALESA KHESWA
PATRICIA MOSHABESHA
JOHN LESHOTA
'MAMOIPONE NTSHIHLELE**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

JUDGMENT

Date: 7th February 2013

Application for review of arbitration award. Court finding that the learned arbitrator ignored facts which were common cause in making his finding. Court finding that the grounds raised were review and not appeal grounds but dismissing them for want of merit. Court granting the review application on the basis of the first ground of review alone and remitting the matter to the DDPR to be heard de novo before a different arbitrator. 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 22nd March 2011 in referral A0804/2010. It was heard on this day and judgement was reserved for a later date. Four grounds of review has been raised by Applicant in this matter in terms of which they pray that the DDPR award be reviewed, corrected and set aside. At the commencement of the proceedings, this Court sought the position of parties in relation to the preliminary issues raised.

Both parties agreed that these issues went into the merits of the matter and as a result they wished to argue them together. Pursuant to their agreement, they both made representation on the entire matter and the ruling and reasons are contained herein.

2. Facts surrounding this matter are basically that Applicant's contracts of employment terminated. They were thereafter paid their pensions except their severance payments. As a result, they lodged their claims of severance pay with the DDPR. At the DDPR, they prepared pre-arbitration conference minutes in terms of which they agreed as follows:

“1.1 The Respondent herein is Ellerines Furnishers Lesotho (Pty) Ltd.

1.2 Ellerines Furnishers Lesotho (Pty) Ltd is a registered company in Lesotho.

1.3 Applicants signed their employment contracts with Ellerines Holdings Limited.

1.4 Ellerines Holdings Limited is a South African Company

1.5 Ellerines Holdings Limited is duly exempted in terms of section 79 (3) of the Labour Code, 1992.”

3. Parties had further agreed that the following issues were in dispute:

“2.1 Whether Applicants were employed by Respondent. (Applicants to prove same)

2.2 Whether Ellerines Holdings Limited which is a foreign company can be granted exemption.

2.3 Whether Ellerines Furnishers Lesotho (Pty) Ltd is a subsidiary of Ellerines Holdings Limited as Applicant contend.

2.4 Whether the exemption granted to Ellerines Holdings Limited applies to Ellerines Furnishers Lesotho (Pty) Ltd.”

4. It was furthermore agreed by parties that on the basis of the pre-arbitration minutes, they would only address the Learned Arbitrator on issues of law and that no evidence would be led. Pursuant to the agreement, the matter proceeded and an award was issued in favour of 2nd to 6th Respondent herein. Applicant then lodged this matter in which it raised four grounds of review against the award of the DDPR as follows;

“13.3.1 he failed to apply the facts the parties agreed to when he ignored the fact that Respondents were not employed by Applicant;

13.3.2 by considering submissions by counsel for Respondents on matters which were not agreed upon such as;

13.3.2.1 where[ther] the labour Commissioner had jurisdiction or authority to exempt an employer who was not a Lesotho company;

13.3.2 .2 that Applicant should have applied for exemption even when it common cause that Applicant was not the employer;

13.3.2.3 that Applicant was not exempted.

13.3.3 he went outside the agreed pre-arbitration minutes by for instance finding that Applicant never denies services were rendered from their premises when this was neither in dispute nor relevant to the case nor to the claim for severance pay.

13.3.4 he ignored the fact that the Labour Commissioner granted exemption which decision or authority to grant the exemption was never challenged by Respondent.

SUBMISSIONS OF PARTIES

5. In amplification of its grounds of review, it was submitted on behalf of Applicant that there was no evidence to the effect that 2nd to 6th Respondent were employees of Applicant but that despite this, the learned Arbitration went ahead and concluded that they were. In so doing, he ignored the facts as agreed upon in the pre-arbitration minutes that these Respondents were employed by Ellerines Holdings Limited and not Ellerines Furnishers Lesotho (Pty) Ltd.

6. Further, it was submitted that the learned Arbitration went beyond the agreed pre-arbitration minutes and considered issues not included in the pre-arbitration minutes such as the authority of the Labour Commissioner to grant exemption to Ellerine Holdings Limited; that Applicant was not exempted and that as a result, it ought to have applied for same; and that it was not denied that services were rendered by the Respondents at the premises of Applicant. It was argued that the above issues were never in issue and that they had no bearing on the claim that was before the learned Arbitrator.

7. It was furthermore argued that the amounts that were awarded as severance payment to the Respondents were done so unilaterally as no evidence of any kind was let in relation thereto. It was prayed that on these basis, this application ought to be granted with costs. Reference was made to the case of *WASA vs. Moramane Mabina & Another LC/REV44/2008*, where the Court stated that the test in a review is whether the learned Arbitration applied his/her mind to the case beforehand. It was maintained that the learned Arbitrator had failed in this regard and as such the award warranted interference with.
8. In response, Respondents submitted that there was ample evidence in the form of documents which were tendered that reflected that Ellerines Furnishes Lesotho (Pty) Ltd was the employer. As a result, it was maintained that no facts were ignored. Respondents replied that there was no error on the part of the learned Arbitrator in unilaterally awarding severance pay amounts. It was argued that the amounts were never contested by Applicant and as such they were taken to have been admitted as they appeared in the referral forms. Reference was made to the case of *Moonlite Taxis vs. Phomolo Seboka C of A 06/2007* where the Court concluded that there was no misdirection where the magistrate had granted a default judgment over a claim that had been proven.
9. Respondent further submitted all the issues raised therein for review are appeal grounds disguised as review grounds in that they challenged the merits and not the procedure. Reference was made to the cases of *JDG Trading (Pty) Ltd t/a supreme furnishers vs. M Monoko & 2 others LAC/REV/39/04*; *Teaching Service Commission & 3 others vs. The Judge of the Labour Appeal Court and 4 others C of A (CIV) 21/2007* and *Tšepang Manyeli & Another vs. DDP & another LC/REV/49/2008* to make highlight the distinction between a review and an appeal. Respondents thus prayed that Applicant's case be dismissed. Reference in support was made to the case of *'Maholomo Mpali vs. The learned Magistrate – Mrs Nthunya & 2 others CIV/APN/269/2011*.

ANALYSIS

10. It has become a common practice for parties to argue new issues not canvassed in their founding documents when making their verbal submissions. The proceedings in this matter are not exception to this as both the Applicant and Respondent have done so. We have deliberately shown the submissions on the issue of unilateral award of severance payment under paragraph 8 above to illustrate our contention as this issue was never canvassed in the founding papers. As a result, in our analysis We have only focused on submissions of parties that address the averments as appears in their founding papers. The premise of this approach is simply that in motion proceedings, one stands and falls by their papers.

11. Before we proceed to deal with the merits of the matter, We wish to highlight from the word go that in Our opinion, the grounds raised by Applicant are review and not appeal grounds as suggested by Respondents. These ground sound in procedure contrary to Respondents' suggestion that they attach the merits of the matter. Consequently, this suggestion cannot hold. However, We further wish to highlight that we acknowledge the dictates of the principle in *Moramane Mabina & another vs WASA (Supra)* and many other authorities cited by Respondents.

12. In our analysis of the first review ground, We have noted that at paragraph 4 on page 5 of the DDPR award, the learned Arbitrator has stated in clear terms that His analysis would be solely based on the issue of "*whether the exemption granted to Ellerine Holdings Limited applies to Ellerines Furnishers (Pty) Ltd.*" We have gone through the award of the Learned Arbitrator and have satisfied ourselves that indeed this is what He did. He then made the determination that the latter was not exempt and further that the two were separate entities. As a result, He ruled that the latter was liable to Applicants to pay them their severance payment.

13. This being the case, He clearly ignored some of the facts which parties had agreed upon, at least as appears in their pre-arbitration minutes. Particular reference is made to point 1.3, that "*Applicants signed their employment contracts with Ellerine Holdings limited.*" This point was of particular

importance as it went to the root of 2nd to 6th Respondents case. A claim for severance payment depends upon the existence of the employment relationship between parties so that in the absence of same, such a claim cannot be made. Point 1.3, which was clearly agreed upon by parties as common cause, suggests that a contractual relationship existed between 2nd to 6th Respondents with Ellerine Holdings Limited and not Ellerines Furnishers Lesotho, against which they are making their claim. Consequently, in ignoring this issue, the learned Arbitrator committed a gross irregularity that warrants interference with this award.

14. On the second ground of review, and in particular point 13.3.2.1 thereof, We are of the view that there is no irregularity on the part of the learned Arbitrator. Upon our inspection of His award, We have not found anywhere where He considered this issue to make his determination. What he simply did was to reiterate the submissions of the parties on the issue. Even assuming he had, it was a term within the pre-arbitration minutes that it was in dispute whether Ellerine Holdings Limited being a foreign company could be granted exemption. This in essence put the authority of the Labour Commissioner to grant same exemption and by necessity the investigation as to whether She had such powers.
15. In relation to points 13.3.2.2 and 13.3.2.3, having formed an opinion that the exemption related to Ellerine Holdings Limited and not Ellerines Furnishers Lesotho (Pty) Ltd, it went without saying that to be exempt they would have to have applied. It was common cause that the exemption related to Ellerines Holdings Limited and not Ellerines Furnishers Lesotho which in effect meant that the latter was not exempt. Consequently, in the premise of His findings that the exemption related to the former and not the latter, We do find how the learned Arbitrator could have misdirected himself as far as the grounds of review under point 13.3.2 are concerned.
16. On the third ground of review, We hold the view that the learned Arbitrator did not go outside the pre-arbitration minutes. In our view this issue is related to point 2.1 of the pre-arbitration minutes on “*whether Applicant were employed by Respondent (Applicant to prove).*” As a result, it cannot be

accurate that this issue was not in dispute or relevant to the case at hand. We have already pronounced ourselves that to claim severance payment, there has to be an employment relationship between parties. Consequently, there is no irregularity on the issue.

17. On the fourth point, in the award of the learned Arbitrator, it has been clearly stated and conceded to that the Labour Commissioner did grant exemption to Ellerine Holdings Limited, which issue was common cause to both parties. This is reflected under point 1.5 of the pre-arbitration minutes where parties have declared it common cause that “*Ellerine Holding Limited is duly exempted in terms of section 79 (3) of the Labour Code, 1992.*” As a result, nothing has been ignored except that the learned Arbitrator went further to pronounce Himself that the exemption granted to Ellerine Holdings did not apply to Applicant herein. Consequently, this point falls away.

COSTS

18. Applicant prayed that this review application be granted with costs. 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 award 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, more so in the light of the fact that Applicant has not given this Court enough justification to awards costs in their favour.

AWARD

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

- a) That this application is granted;
- b) This matter be heard at the DDPR before a different arbitrator; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF
FEBRUARY 2013.**

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

**Mr. L. MATELA
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MPAKA
ADV. LESAOANA**