IN THE LABOUR COURT OF LESOTHO **LC/REV/101/2007**
A0650/2006

HELD AT MASERU

In the matter between:

KOPANO TEXTILES **APPLICANT**

And

THE DDPR **1st RESPONDENT**
THERESIA LETSELA **2nd RESPONDENT**

JUDGMENT

Hearing Date: 10th September 2013
Application for review of the 1st Respondent arbitral award. Several grounds earlier raised withdrawn and only one left. Court finding merit in the remaining ground and granting the review application. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for review of the 1st Respondent arbitral award in referral A0650/2006. It was heard on this day and judgement was reserved for a later date. Applicant was represented by Advocate Mohapi while 2nd Respondent was represented by Advocate Khalane. The brief background of this application is that 2nd Respondent had referred a claim for unfair dismissal with the 1st Respondent. The matter was heard after which the 1st Respondent issued an award in favour of 2nd Respondent. In terms of the award, Applicant was to pay 2nd Respondent an amount of M8,700.00 as compensation for his unfair dismissal. It is this award that Applicant seeks to have reviewed, corrected or set aside. Several grounds of review had been raised on behalf of Applicant. However, they were withdrawn leaving just one on the basis of which this review was sought. Having heard the submissions of parties, Our judgment is as follows.

SUBMISSIONS AND FINDINGS

2. Applicant's case is that the learned Arbitrator erred in that She descended into an arena of dispute. In amplification, it was submitted that the learned Arbitrator cross examined witnesses who testified on behalf of the Applicant in the proceedings. It was further submitted that this appears in several pages of the record of proceedings, from page 3 to page 27, where the evidence of Applicant's witness, by the names of Lineo, is recorded.

3. It was argued that in these pages, the learned Arbitrator was doing more than just seeking clarity on the issues, but that She was rather on a mission to discredit that evidence of Applicant's witnesses. It was further submitted the learned Arbitrator would also pass remarks that showed Her disbelief of the evidence of Applicant witnesses. However, when Applicant's witness gave evidence, the learned Arbitrator did not interfere in manner that She did during the evidence in chief of Applicant. The Court was referred to page 28 to page 30 of the record, wherein 2nd Respondent was giving her evidence in chief.

4. It was submitted that the approach of the learned Arbitrator was unfair on Applicant and that this rendered the proceedings irregular. The Court was referred to the case of *Solomon & another NNO v De Waal 1972 (1) SA 575 (A)* at 580E-H, in support. It was argued that the facts of this case are similar to those *in casu*. In this case, the Court held that by descending into an arena of conflict, the learned judge had disabled himself from assessing the probabilities and credibility relating to the issues with due impartiality. Applicant submitted that having descended into the arena of dispute, the leaned Arbitrator committed an irregularity that warrants interference with Her award.

5. In reply, it was submitted on behalf of 2nd Respondent that the learned Arbitrator's role in the arbitration proceedings is to seek clarity and to avoid being partial. It was argued that from the line of questioning during the arbitration proceedings, the Learned Arbitrator was doing no more than just seeking clarity. It was added that in fact, Her approach towards the witnesses

was similar in both cases. The Court was referred to pages 30 to 32 of the record.

6. It was argued that while it may appear that the learned Arbitrator was interrogating the witness, but that was well within the bounds of the law, as Her interrogation was not aggressive. The Court was referred to the case of *National Union of Security Officials and Guards v Minister of Health and Social Services 2005 (4) BLLR 373*, in support of this proposition. It was submitted that the interrogation of witnesses in arbitration proceedings is not an irregularity but that what is irregular is the aggressive nature of the interrogation.

7. In reply, Applicant submitted that the learned Arbitrator was very aggressive in her interrogation of the issues. To illustrate this point, the Court was referred to page 11 of the record where the learned Arbitrator is record to have uttered the following words,
"If you can't prove it, then stop saying 'M'e here bought the sick leave because you don't have the prove of what you are saying."
It was submitted that this clearly shows the lack of impartiality on the part of the learned Arbitrator as She unfairly intervened in the proceedings.

8. We have gone through the record of proceedings before the 1st Respondent and have confirmed, as alleged by Applicant, that the approach of the learned Arbitrator was so aggressive that it constituted an act of cross examination of the Applicant's witness. The record is marred with questions that seek to discredit the evidence of the Applicant' witness as well as remarks that indicate a sense of disbelief towards the witness. We therefore do not deem it necessary to quote the incidents in which this is recorded as that would lead us to the reproduction of the whole record in this judgment. This is clearly reflected in the questions posed by the learned Arbitrator towards the Applicant's witness by the name of Lineo, as appears from pages 3 to 27 of the record.

9. A similar approach was not adopted during the evidence of Applicant. This particularly illustrates the distinction in the approaches of the learned Arbitrator and highlights the

aggressive nature of Her inquiry on Applicant's witness. In so doing, the learned Arbitrator was going beyond her prescribed role of seeking clarity, to an act of aggressive interrogation of a witness, which is normally done by a defending party during cross examination. While the entire record is marred with several instances of procedural irregularities, the extract from page 11 of the record exemplifies the nature of exchange that was taking place between Applicant witness and the learned Arbitrator, which We find to be of such an aggressive nature that it constitutes an irregularity.

10. As the authority in *National Union of Security Officials and Guards v Minister of Health and Social Services (supra)* suggests, such conduct is prohibited in any proceedings. Having engaged in this conduct, the learned Arbitrator appears to have taken a side and is thus guilty of descending into the arena of dispute. In line with the dictates of the authority in *Solomon & another NNO v De Waal (supra)*, We find that the conduct of the learned Arbitrator, disabled Her from being impartial and as such Her award stands to be reviewed and set aside.

11. Applicant prayed that the review application be granted with costs. It was argued that it is trite law that a successful party in litigation must be awarded costs. It was further argued that in instances where the Labour Court has declined to award costs, It relied on section 74 of the *Labour Code Order 24 of 1992*. It was submitted that the authority in *Boliba Multipurpose v Kubutu Makara*, the Court held that the provisions of section 74 are limited to dismissal cases and as such they do not apply to review applications. It was submitted that in review proceedings, costs follow suit.

12. In reply, 2nd Respondent submitted that it would be improper for this Court to make an award of costs against 2nd Respondent. It was submitted in amplification that, 2nd Respondent is represented by the office of the Labour Commissioner, in terms of section 16 of the *Labour Code Order (supra),* due to his indigence. It was added that should such an order be made, it would not only be unfair and inequitable but that it would also be impossible to meet.

13. We have stated Our stance in relation to the issue of costs in a plethora of cases before that, as a Court of fairness and equity, We make an award of costs in extreme circumstances. We have also indicated examples of what constitutes extreme circumstances for these said purpose. Among such examples is where one of the parties or both have been vexatious in their conduct during the proceedings or where a party brought or defended a frivolous claim. It is therefore inaccurate that this Court relies on section 74 in dealing with this issue. As a result, the cited authority falls away as inapplicable. Moreover, Applicant has not shown that the circumstances of this matter are worthy of an award of costs save that costs normally follow suit.

14. Having disqualified his argument, Applicant's prayer for costs lacks the sufficient basis to be upheld. Assuming, it were to hold, the question of the indigence of 2nd Respondent has not been challenged and neither has the award of costs been sought against the Representative on a *costs de bonis propriis* basis. It would thus be both unfair and inequitable to award costs against a party who can barely afford legal representation to vindicate its rights. It would also be irregular to make an award against the Labour Commissioner when it was not sought, assuming it would find support in law to do so. We therefore decline to make an award of costs in favour of Applicant.

AWARD

We hereby make an award in the following terms:

a) That the review application is granted;
b) This matter in referral A0650/2006 be heard *de novo* before a different Arbitrator; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 14th DAY OF OCTOBER 2013.

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

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

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

FOR APPLICANT: **ADV. MOHAPI**
FOR 2nd RESPONDENT: **ADV. KHALANE**