IN THE LABOUR COURT OF LESOTHO **LC/REV/213/2006**
A1255/2003

HELD AT MASERU

In the matter between:

TLALI LEFETA **APPLICANT**

And

ARBITRATOR – C. T. THAMAE **1st RESPONDENT**
FALATSA FALATSA **2nd RESPONDENT**

JUDGMENT

Hearing Date: 5th November 2013
Application for review of the 1st Respondent arbitration award. Applicant contesting the right of 2nd Respondent to audience in the review application. Court finding that 2nd Respondent has not opposed the review application – Court further finding that having not answered the review application there is no basis to grant 2nd Respondent the right of audience. Court further finding that the filing of an answer would be the basis of the right to such audience. Court directing that the review application proceed unopposed. Court finding merit in the first ground of review that the learned Arbitrator failed to exercise His discretion judiciously - further noting that the conduct of the learned Arbitrator was tantamount to descending into the arena of dispute. Court further not finding merit in the second ground of review and dismissing same. Court reviewing the arbitration award on account of the first ground and correcting it by granting the application for rescission and ordering that the matter proceed in the merits.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 1st Respondent arbitration award. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Advocate Rafoneke, while Respondent was represented by Advocate 'Nono.

2. The background of the matter is that 2nd Respondent had referred a claim for payment of monies with the DDPR, under referral A1255/2003, wherein the 1st Respondent was the presiding Arbitrator. An award was issued in default of Applicant and he was ordered to pay to 2nd Respondent an amount of M14,000.00 as outstanding wages. Subsequent to the issuance of the said award, Applicant initiated rescission proceedings under referral A0429/2004, against the award obtained in default under referral A1255/2003. The rescission application was heard and dismissed through an arbitration award on the 30th June 2004.

3. Applicant then initiated the current review proceedings, in terms of which he sought the review, correction or setting aside of the arbitration award in referral A0429/2004. The review application was accompanied by an application for condonation. According to the records, on the 11th May 2010, the review application was dismissed for want of prosecution but later reinstated following a formal application by the Applicant. This was confirmed by both parties and their confirmation forms part of the record. The matter was then set down for hearing on this day in the merits.

4. At the commencement of the review proceedings, Applicant objected to the right of audience of 2nd Respondent. It was Applicant's case, on the one hand, that 2nd Respondent had not opposed the review application. On the other hand, it was 2nd Respondent's case that the application had been opposed and reference was made to the answering affidavit filed of record on the 28th May 2013. Both parties were allowed to make presentation on the issue, after which We found that the review application had not been opposed and excluded 2nd Respondent from the proceedings.

5. Whereas Applicant had applied for condonation together with the review application, We made a ruling that it was not necessary to apply for condonation, as the review had been filed within the prescribed time period. The award had been received on the 30th June 2004 and the review had be lodged on the 28th July 2004. That being the case, by the time that the review was lodged, the 30 days period had not lapsed. We then directed that Applicant proceed with the review application unopposed. Our full judgment is therefore in the following.

SUBMISSIONS AND FINDINGS

Right of appearance

6. Applicant submitted that the review application had not been opposed, at least formally, as 2nd Respondent only indicated its intention to oppose same. It was said that the affidavit that 2nd Respondent sought to rely on, was in effect answering their application for the reinstatement of the matter, after its dismissal for want of prosecution. It was argued that the averments in the said answering affidavit, relate to the averments contained in the application for reinstatement. It was added that the paragraphs reflected in the answering affidavit, specifically make reference to the paragraphs in the reinstatement application. The Court was referred to paragraph 4 of the founding affidavit to the application for reinstatement and the answer in issue. It was concluded that 2nd Respondent had clearly not answered the review averments.

7. It was further submitted that even if it were to be taken that the averments contained in the answer were meant to address the review application, the complains brought on review had not been answered and as such the review was unopposed. It was argued that the review application being unopposed, that meant in law that the 2nd Respondent cannot be allowed to address the Court on the arguments, where no basis was placed in the form of an answer. The Court was referred to the case of *Kaone Leoifo v Bokailwe Kgamena & another CA/048/2007*, where in Ramodibeli AJ had the following to say,

   "*It is trite that a case can only be decided by the court on the pleadings and evidence before it. It is not for the court to make out a case for the litigants. Nor can this Court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded."*

8. It was submitted that 2nd Respondent had the opportunity to place the facts and evidence on through an answer, which would then form the basis of the arguments to persuade the Court not to grant the review. Further that having failed to do so, the Court would have no basis in deciding on the facts that could have been pleaded in the answer. It was added that the rule in motion proceedings is that what is said in affidavits, which is not contradicted must be taken as true and accurate, as it the case *in casu*. The Court was referred to the case of

Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623, in support. On this premise it was prayed that the Court find that the review is unopposed and that it proceed on the basis of the unchallenged averments of Applicant.

9. In reply, 2nd Respondent submitted that whereas the numbering may give the impression that the answer was responding to the application for reinstatement, that was not the case as it was addressing the review application. The Court was referred to paragraph 6 of the founding affidavit which was alleged to have been answered by paragraph 5 of the answer. The Court was referred to paragraph 9 of the answer, where it prayed that the review application be dismissed.

10. It was stated that to further fortify the argument was the fact that the said answer was filed after the application for reinstatement had been granted. It was added that the deponent was in fact reacting to the review application and that the confusion in the numbering was caused by the fact that there were two applications in the same file, before Court. It was further submitted that 2nd Respondent could not have answered an application in respect of which a final order had already been issued. It was prayed that on these bases, 2nd Respondent be permitted to address the review application.

11. We have perused the record, and in particular the founding affidavits to the main review application and the application for reinstatement, as well as the answer filed on the 28th May 2013. We have not only looked at the specific paragraphs that the parties have made reference to, but to those pleadings in their totality. We have discovered that the numbering in the answer bears no reference to the main review application, but to the application for reinstatement. Further, that the averments in the answer specifically address the allegations made in the main review application, as Applicant has suggested.

12. As a result, and notwithstanding the fact that the answer was filed after the reinstatement had been granted, it was nonetheless reacting to the application for reinstatement and not the review application. Further, it cannot in any way be taken to have been addressing the review application given the specific nature with which it has been framed. Furthermore,

the fact that 2nd Respondent had prayed for the dismissal of the review application cannot be interpreted to mean that the answer was addressing the review. The answer directly opposed what was sought by the reinstatement, which was the resuscitation of the review application.

13. In essence, what the 2nd Respondent has merely done in these proceedings has been to indicate its intention to oppose the review application, without actually doing so. As a result, the review application is unopposed. We wish to highlight that We acknowledge and accept the quotation from the authority cited by Applicant in *Kaone Leoifo v Bokailwe Kgamena & another (supra*), as it was cited with approval by Our the Labour Appeal Court in the case of *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v LHDA LAC/CIV/17/2009*.

14. The crux of the quotation from the authority in *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v LHDA (supra),* is that arguments are based on pleadings and therefore that without pleadings, then there is no basis for arguments. By necessary implication, 2nd Respondent having not pleaded in the review application, there is no basis for this Court to allow him to address the Court on the review application. By not pleading, 2nd Respondent extinguished the premise on which his right of audience would be based.

15. We wish to further comment that even if We were to assume that there was some form confusion in the numbering of the paragraphs, that would not advance the 2nd Respondent case in any way. We say this because We have confirmed that the grounds for review have not been addressed by the averments in the answer and are therefore in law deemed to have been admitted by 2nd Respondent. On the premise of the rule in *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd (supra)*, the review grounds would nonetheless remain unopposed.

16. In the above case, the Court cited with approval the quotation from the decision of Van Wyk in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd, 1957 (4) SA 234 (C)* at p 235, in the following,
"Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

This principle has been cited with by Our Courts in a plethora of cases (see *Makhoabe Mohaleroe v Lesotho Public Motor Transport Company (Pty) Ltd C of A CIV/06/2009*; *Mathiba Malothoane v Commissioner of Police & another C of A CIV/18/2009*).

17. On the premise of the above reasons, We therefore find that the 2nd Respondent has no right of audience in these proceedings, and the review application must proceed unopposed. In the light of this finding, We now proceeded to deal with the merits of the review application.

The Merits

18. The 1st ground of review was that the learned Arbitrator had erred in the exercise of His discretion in finding that the rescission application was without merit. In amplification, it submitted that the rescission application was not opposed and that as such the learned Arbitrator was obliged in law to accept the veracity of the unchallenged evidence of Applicant. The Court was again referred to the above extract from the case of *Kaone Leoifo v Bokailwe Kgamena & another (supra*), in support.

19. It was stated that rather, the learned Arbitrator expressed His doubt towards the said averments and then came to a conclusion that they were not accurate. It was added that the learned Arbitrator did no afford the Applicant the benefit of doubt that what he averred was accurate. The Court was referred to the unmarked page 2 of the arbitration award and specifically under the heading *"Representations"*. It was argued that in so doing the learned Arbitrator did not exercise his discretion judiciously.

20. As earlier noted, it is a trite principle of law that where one of the parties has not challenged the evidence of another, then the unchallenged evidence is to be taken as true and an accurate narration of what took place. *In casu*, the rescission application was unopposed and as such the correctness of otherwise of the averments of Applicant were not in issue.

21. In the case of *Theko v Commissioner of Police and another LAC (1990-94) 239 at 242,* Steyn JA had the following to say in relation to unchallenged evidence:
"*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".*
It is therefore Our opinion that the learned Arbitrator was bound in law to accept the factual averments of the Applicant as a true and an accurate narration of what took place, on the day of the hearing.

22. Contrary to this principle, the learned Arbitrator questioned the accuracy of the clear and unchallenged averments of Applicant. We confirm that this is evident from the unmarked page 2 of the arbitration Award under the heading "*Representations*". We have also confirmed from the summary of the submission of Applicant that, he had given an explanation for failure to attend as well as the prospect of success in the main claim. These notwithstanding, the learned Arbitrator went ahead and questioned the veracity of the allegations in support of both the explanation for default and prospects of success. In so doing the learned Arbitrator clearly erred.

23. What he was rather obliged to do in law was to consider whether the unchallenged averments made out a case as anticipated by law on an application for rescission. In essence, the learned Arbitrator was merely to determine if the explanation that Applicant had a diabetic attack was reasonable to disable him from attending the hearing, or arriving on time and if the alleged prospect of success demonstrate a *prima facie* case in the main claim, without descending into the veracity of the allegations made.

24. In Our view the learned Arbitrator committed a grave irregularity that warrants interference with His arbitration award. He did not only fail to exercise his discretion judiciously in analysing the Applicant's case, but also descended into the arena of despite. By this We mean that the learned Arbitrator now became a litigant in the rescission proceedings as He

defended the 2nd Respondent claim on his behalf. In so doing the learned Arbitrator disabled himself from assessing the probabilities and credibility relating to the issues with due impartiality (see *Solomon & another NNO v De Waal 1972 (1) SA 575 (A)* at 580E-H which was cited with approval by this Court in *Kopano Textiles v DDPR and another LC/REV/101/2007).*

25. *In casu*, the learned Arbitrator dismissed the application for rescission on the basis of what would have been the 2nd Respondent case if he had opposed the rescission application. We say this because the learned Arbitrator relied on issues that were no pleaded to disqualify Applicant's case. This is precisely what both the authorities in *Kaone Leoifo v Bokailwe Kgamena & another (supra*) and *Tsotang Ntjebe & others v LHDA and Teleng Leemisa & others v LHDA (supra),* seek to discourage.

26. The 2nd ground of review was that the learned Arbitrator overlooked the factors to consider in an application for rescission, namely the explanation for the default as well as the prospects of success. The Court was once again referred to learned Arbitrator's analysis on page 2 of the arbitration award under the heading *"Representations".* It was submitted that Applicant had explained that he came late to the proceedings because he had had a diabetic attack. When he arrived for the hearing, he learnt that it had just finalised. Further that Applicant had also given the prospects of success but that the learned Arbitrator nonetheless found that he had no prospects of success. It was argued that the learned Arbitrator had no basis of making these conclusions particularly because these averments were not challenged, as the rescission application was not opposed.

27. This ground suggests failure on the part of the learned Arbitrator to consider both the explanation given for the default as well as the averments in support of the prospects of success. We have considered the paragraph relied upon in support of this argument. In Our view, both the explanation for the default as well as the prospects of success were considered and determined on the basis of the considerations made.

28. On the one hand, in dealing with the explanation for the default, the learned Arbitrator made the following remarks,

"on the one hand [Applicant] said he came late because he was sick from diabetes. It is to be noted that this office never received any message that applicant would be late. Besides the applicant could not produce any documentary proof that he was attending medical treatment for diabetes on the date of hearing. His reasons for non-attendance are therefore unacceptable.

29. On the other hand, in dealing with the prospects of success, the learned Arbitrator remarked as follows,
" on the prospects of success, Mr. Lefeta stated that the respondent was involved in an accident in his driving duties in which passengers died and the vehicle was written off. He said the respondent also caused extensive damage to the third party vehicle in which he was involved in collusion. … Indeed during the proceedings the applicant stated that he was not going to demand damages from the respondent had the latter not filed this dispute with DDPR. It appears the applicant only filed this application to frustrate the respondent's claim."

30. Obviously the averments of Applicant in support of the application for rescission were considered and determined. There is no irregularity on the part of the learned Arbitrator, at least in the sense pleaded by Applicant on the second ground of review. What only remains is as We have already found that, in determining these requirements, the learned Arbitrator failed to exercise His discretion judiciously and further descended into the arena of dispute.

31. Having granted the review, this Court is vested with the discretion to either set aside the arbitration award and order a rehearing, or to correct the irregular award and substitute it with its own. The latter is awarded if the Court, having found that the award was irregular, is seized with sufficient facts to enable it to substitute the irregular finding with one that is correct.

32. Our decision to correct the arbitration award finds support in the decision of Mosito AJ in *Matsemela v Nalidi Holdings (Pty) Ltd t/a Nalidi Service Station LAC/CIV/A/02/2007,* where he had the following to say,
"When reviewing an award from the DPPR, Labour Court should also correct it …."

We are satisfied there are facts before Us that permit the substitution of the irregular finding with the correct one.

33. We are satisfied with the explanation given by Applicant for the default. If he was ill and there is no evidence to contradict that then the learned Arbitrator judiciously exercising His discretion ought to have found that the explanation given was reasonable. Further, We are satisfied with the prospects of success as they *prima facie* establish a case for refusal to pay the outstanding wages, on account of damage caused by 2nd Respondent. We therefore reiterate Our attitude that a judicious finding ought to have been that there are prospects of success.

AWARD

We therefore make an award in the following terms:

a) The application for review is granted;
b) The arbitration award in referral A0647/2010 is reviewed and corrected in the following,
   i. That the rescission application is granted;
   ii. The matter must be set down for hearing for determination in the merits.
c) That the order of this Court must be complied with within 30 days of receipt herewith; and
d) There is no order as to costs.

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

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

Mrs. RAMASHAMOLE **I CONCUR**
MEMBER

Mrs. THAKALEKOALA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RAFONEKE**
FOR RESPONDENT: **ADV. 'NONO**