

HELD AT MASERU

In the matter between:

**LESOTHO FREIGHT AND BUS
SERVICE CORPORATION**

APPLICANT

And

**THE DDPR
M. MASHEANE (ARBITRATOR)
THABISO MOERANE**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

JUDGMENT

Date: 5th February 2013

Application for review of arbitration award. Court acting on own motion to raise a point of law – Courts jurisdiction to entertain a review of an earlier decision while the latter decision still stands - Both parties being given the opportunity to make formal presentations. Court finding that it is improper to review an earlier decision while the latter decision still stands – application for review being dismissed for want of jurisdiction 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 20th January 2011 in referral A0647/2010(a). It was heard on this day and judgement was reserved for a later date. Two grounds of review were raised by Applicant in terms of which it prayed that the DDPR award be reviewed, corrected and set aside. However, at the commencement of the proceedings, the Court raised the issue of its jurisdiction to entertain this application. Both parties were given the opportunity to make their addresses after which the Court then declined to hear the merits before pronouncing itself on this issue first.

2. Facts surrounding this matter are basically that 1st Respondent had referred claims for unfair dismissal and unlawful deductions with the DDPR. The matter was duly set down for hearing and on the date of hearing, the Applicant failed to attend. As a result, the matter proceeded and an award was issued in default and in favour of 1st Respondent herein. Then the Applicant lodged a rescission application seeking a rehearing of the matter granted in default. The rescission application was refused and the initial default award remained in force.
3. Dissatisfied with the arbitral award, Applicant then lodged the current application for review in which it sought to review the initial arbitral award A0640/2010(a). At the commencement of these proceedings, We *mero muto* raised a preliminary point concerning this Courts jurisdiction to entertain a review of the initial award in the subsistence of the latter award that dismissed the rescission application. In raising this point, We acted on the basis of the authority in *Thabo Mohlobo & others vs. Lesotho Highlands Development Authority LAC/CIV/A/02/2010*, that the Court has the power to raise a point of law on its own motion. The submissions of the parties, ruling and reasons are recorded in the following.

SUBMISSION OF PARTIES

4. It was submitted on behalf of Applicant that although they had applied for the review of the referral A0640/2010(a), notwithstanding the fact that the latter decision on the matter in A0640/2010(b) was still in force, the Court should look at the substance and not the form. It was stated that substance of the review is the same for both the review of the initial award and the rescission arbitral award. It was stated that they would have relied on same grounds to have the rescission award review, corrected and set aside.
5. Applicant pleaded with the Court to excuse the form and consider the substance. In support of this argument, reference was made to rule 27 of the *Labour Court Rules*, that this Court may condone any failure to adhere to its Rules. Applicant further submitted that they are unhappy with the initial decision which the rescission application has confirmed hence their approach. It was argued that notwithstanding their position, there is no rule or principle of law that this Court

should first review that rescission arbitral award before the initial arbitral award.

6. 1st Respondent replied that in motion proceedings, a party stands and falls by their papers. As a result, this Court cannot entertain what is not reflected on the papers of the Applicant. 1st Respondent averred that according to the affidavits of Applicant, what they seek is the review of the initial award and not the latter rescission arbitral award. As a result, neither the Rule of this Court that has been cited nor any argument raised by Applicant can exonerate them from the irregular procedure that they have adopted. It was thus prayed that this review application be dismissed on this ground alone.

ANALYSIS

7. We wish to start by giving a proper interpretation and the right invocation of Rule 27 of the Rules of this Court, for purposes of addressing a request for condonation of non-adherence to the Rules. Rule 27 may be successfully invoked where non adherence to the Rules relates to issues that do not go to the root of the claim or issues for determination. As a result, where the non-adherence is material to the determination of a claim or issues before Court, then Rule 27 cannot be successfully invoked.
8. *In casu*, Applicant has attempted to invoke Rule 27 to influence this Court to condone the form that they adopted in the present application and argued that the substance is of paramount importance. It is Our view that their non-adherence relates to an issue that is material to the determination of this matter. Applicant has applied the review of the initial award and not the rescission application. for this Court to allow them to amend their pleadings under the guise of Rule 27, in the fashion that they propose, is tantamount to allowing them to refer a fresh matter altogether from the bar. As a result, this is one of the situations under which Rule 27 cannot be successfully invoked to excuse the form.
9. We agree with 1st Respondent that it is trite that in motion proceedings, parties must stand and fall by their pleadings (*Pascal Molapi vs. Metro Group Limited & others LAC/CIV/R/09/2003* . This principle essentially means that a party cannot go beyond their pleadings in presentation of their

case in Court (*Frasers Lesotho Limited vs. Hata Butle (Pty) Ltd LAC (1995-199) 698 at 702*). Pleadings are meant to clarify all the issues between the parties that are going to be the subject of argument in court. As a result, a party cannot be allowed to plead one thing and then canvass the other during presentation of their case. If one of the parties were to be allowed to plead one thing and canvass another during the presentation of the their case, that would cause great prejudice and unfairness on the other party.

10. *In casu*, the Applicant seeks to challenge the arbitral award of the DDPR in A0640/2010(a). Reacting to the Court's remark, they then somersaulted against their pleading to argue that they are no longer challenging arbitral award A0640/2010(a) but arbitral award A0640/2010(b). Clearly their conduct is contrary to the dictates of the principle in pleadings that parties must stand and fall by their pleadings. In our view to allow Applicant to change as it seeks to, would bring great prejudice and unfairness upon them. Consequently, Applicants are held to their pleadings.
11. Applicant has also argued that there is no rule that a Court must first review a rescission arbitral award before it could proceed to deal with the initial arbitral award. In our view this argument is neither logically nor legally valid. We hold this view for the reason that in not challenging the rescission arbitral award, Applicant implies that it accepts it as valid. If this is the case, then they cannot challenge the initial arbitral award because the rescission arbitral award, which they have no quarrel with, has confirmed the initial arbitral award as valid. As a result for as long as the rescission arbitral award remains in force, the initial arbitral award cannot be subjected to any challenge.
12. In view of this said above, We have come to the conclusion that this Court has no jurisdiction to determine a review of the initial award in the subsistence of the rescission arbitral award.

AWARD

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

- a) That this review application is dismissed for want of jurisdiction;
- b) The award in A0640/2010(a) remains in force; and
- c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 18th DAY OF MARCH 2013.

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

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MR. N. T. NTAOTE
MR. L. MOLEFI**