

HELD AT MASERU

In the matter between:

**St. JAMES ACL HIGH SCHOOL
SCHOOL BOARD – St. JAMES
HIGH SCHOOL**

1st APPLICANT

2nd APPLICANT

And

**THATO MOKHOBO MOELETSI
ARBITRATOR DDP M. KETA**

1ST RESPONDENT

2nd RESPONDENT

JUDGMENT

Date: 13th February 2014

Application for review of arbitration award. Several grounds of review being raised. Applicant only motivating one. Respondents withdrawing their opposition. Matter proceedings on the basis of the unchallenged averments of Applicants. Court finding merit in the ground raised. Court granting the application for postponement and directing that the matter be set down in the merits. Further that Applicants be properly informed about the date of hearing. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 2nd Respondent arbitration award in referral A0242/2011. The facts surrounding the application are that 1st Respondent was an employee of the 1st Applicant school until her resignation. Following the resignation, she then lodged a claim for severance payment, unpaid leave and underpayments with the 2nd Respondent. The matter was then set down for hearing before the 2nd Respondent, but was postponed on a number of times until the 23rd February 2012.

2. On the above date, one Mr. Qhobela appeared to seek a postponement of the matter on behalf of the Applicants. He had stated that he no longer had the mandate to defend the matter as he had since resigned from the employment of Applicants. He sought the postponed to allow for the summoning on the proper parties to defend the matter. The prayer for postponement was refused and the matter proceeded undefended. An award was subsequent thereto issued in favour of 2nd Respondent. The award directed the Applicants to pay to 2nd Respondent an amount of M8, 605.53, in satisfaction of his claims. It is the said award the Applicants wish to have reviewed, corrected and/or set aside.
3. At the commencement of the proceedings before Us, parties noted an agreement that they wished to have made an order of court. The agreement was to the effect that 2nd Respondent withdrew its opposition to the matter and that it be determined on the basis of the pleadings and heads of argument filed record, on behalf of Applicants alone. The agreement was accordingly noted and made an order court. Our judgment on the matter is thus in the following.

SUBMISSIONS OF PARTIES

4. It was Applicant's case that the learned Arbitrator ignored relevant issues to the matter. In amplification, it was said that the learned Arbitrator ignored the evidence of Mr. Qhobela that the board of Respondent school was not aware about the matter proceeding on that day. It was submitted that if the learned Arbitrator had considered this evidence, He would have granted the postponed and directed that proper service be made on the right parties. It was argued that in so doing, the learned Arbitrator failed to consider relevant facts and that this is a reviewable irregularity.
5. In support of the above argument, the Court was referred to the authorities of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)*, where the following is recorded,
“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; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the manner aforestated”.

6. It was further argued that, if the learned Arbitrator was in doubt about the resignation of Mr. Qhobela, He ought to have requested that Mr. Qhobela furnish proof of his resignation to properly ascertain if he lacked the mandate. It was said that in the alternative, the learned Arbitrator ought to have postponed the matter to ascertain the issue of representation. It was concluded that having failed to explore these options, the learned Arbitrator conducted the proceedings contrary to section 12 of the *Constitution of Lesotho of 1993*, regarding the right of a party to a fair trial. It was concluded that this is evidence of a grave irregularity warranting the review and setting aside of the arbitration award.

ANALYSIS

7. It is a trite principle of law that whenever a party either withdraws its opposition to a matter before court or has not opposed same, the Court will accept the factual averments of the other party as true and accurate and then proceed to analyse them against the applicable principles of law (see *Theko v Commissioner of Police and another LAC (1990-94) 239 at 242; and Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623*).
8. We have considered both the arbitration award and the record of proceedings. We have noted that in the record, Mr. Qhobela did indeed inform the learned Arbitrator that the School Board was not aware about the proceedings. This is reflected on the first page of the record as thus,
“Arb: *When did you resign*
Res rep: last week Friday
Arb: by then the board was aware of this case
Res rep: I was aware but the board was not aware.”

9. We have noted that this evidence was not considered in the arbitration award as Applicants have suggested. We are of the view that if considered, this evidence would have influenced the learned Arbitrator into postponing the matter rather than to elect to proceed with it undefended. In so doing, the learned Arbitrator also denied the Applicants their constitutional right to a fair trial as provided for under section 12 of the *Constitution of Lesotho (supra)*. We therefore find that the learned Arbitrator committed a grave irregularity warranting the review correction and/or setting aside of His award.
1. However, We wish to comment that the learned Arbitrator was not under any obligation to require parties to present evidence. It is the responsibility of parties to present evidence that advances their claims. More relevant to the point, it is Our finding that the learned Arbitrator had no obligation to demand proof of resignation from Mr. Qhobela, as it was his responsibility to present same, if he felt it was material to his case. To expect the learned Arbitrator to involve in the proceedings in that fashion would be to descend him into the arena of dispute. This approach is highly shunned by Our Courts (see *Kopano Textiles v DDP* and another LC/REV/101/2007).
10. As the reviewing Court, once We have determined that the matter before Us is worthy of a review, We have two options open to Us. We can either remit the matter back to the initial trier for a hearing *de novo* or We can correct the noted irregularity. This approach finds support in the decision of Dr. Mosito AJ in the case of *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”
11. We only correct the award where We are seized with enough facts to enable us to do so and *vice versa* where such are absent. *In casu*, We have sufficient facts to enable us to correct the 2nd Respondent arbitration award. Consequently, We accordingly grant the application and correct the award of the 2nd Respondent.

AWARD

Our award is therefore in the following terms:

- a) That this application is granted;
- b) The award in A0242/2011 is reviewed and corrected in the following;
 - a. That the application for postponement is granted; and
 - b. The matter must be set down in the merits and Applicants must be properly notified of the date of hearing.
- c) That there is no order as to costs.

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

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

**Mrs. L. RAMASHAMOLE
MEMBER**

I CONCUR

**Mr. S. KAO
MEMBER**

I CONCUR

**FOR APPLICANTS: ADV. N. S. MOLAPO
FOR RESPONDENTS: ADV. P. NTŠENE**