

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/30/2013
A0735/2012**

In the matter between:

**LITEBOHO PHAILA
RETSELISITSOE NTEPELLE
RETSELISITSOE MABETHA
THABISO MAKOSHOLO**

**1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT**

And

**STALLION SECURITY (PTY) LTD
DDPR-ARBITRATOR N. MOSAE**

**1ST RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 16th April 2014

Application for review of arbitration award. One ground of review having been raised – that the learned Arbitrator ignored the evidence of Applicant. Court finding that the learned Arbitration ignored the evidence of Applicant. However, Court finding that even if considered, the ignored evidence would not influence the finding of the learned Arbitrator in favour of Applicant. Court dismissing the review application. 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 A0735/2012. Only one ground of review has been raised on behalf of the Applicants. The matter was heard and finalised on the scheduled date of hearing and both parties were in attendance and/or represented.
2. The background of the matter is that Applicants had referred claims for underpayments, non-payment of night shift allowance and unpaid public holidays. An award was issued by the learned Arbitrator on the 28th January 2013, in terms of which the first two claims of Applicants were dismissed while

the last one was granted. It is this award that Applicants wish to have reviewed, corrected and/or set aside.

3. We wish to note at this stage that at the commencement of the proceedings, We *mero muto* indicated to parties that We had realised that Applicants had raised a new review ground for the first time in reply to Respondent's answer. We directed parties to address Us as to whether it was proper to do so. Both parties made presentations but in the end agreed that the concerned ground would not be pursued, and rather that Applicants would only proceed on the basis of the grounds as appear in their founding affidavit. It is in the light of this background that We now proceed to deal with the matter.

SUBMISSIONS OF PARTIES

4. It was Applicants case that the learned Arbitrator erred in that He disregarded their evidence establishing that the exemption certificate granted to Letšeng Diamond Mine (Letšeng) by the Minister of Labour and Employment (the Minister), was also applicable to the Respondent as a subcontractor to Letšeng. Specific reference was made to annexure A to the Applicants founding affidavit, which is a copy of the minutes of the meeting between Letšeng and the Minister, in support.
5. Further reference was made to annexure B, which is an affidavit by the Labour Commissioner wherein she is alleged to have clarified the application of the exemption certificate to extend to Respondent company. It was argued that the affidavit of the Labour Commissioner contained facts drawn from the meeting that lead to annexure A. Further that the effect of the said affidavit was to correct the exemption certificate by extending its application to Applicants.
6. It was argued that having disregarded this evidence, the learned Arbitrator made a wrong conclusion that the exemption certificate did not apply to Respondents company and therefore to Applicants. It was submitted that if the learned Arbitrator had not disregarded the said evidence, He would have found that the exemption certificate applied to Applicants. It was prayed on these bases that the Court find the learned Arbitrator to have erred and to consequently grant

the review application and remit the matter to the DDPR to be heard *de novo*.

7. Respondent's case was that the learned Arbitrator did not disregard the evidence of Applicants at all. It was submitted that the evidence relating to Annexures A, was considered but rejected by the learned Arbitrator for want of merit. It was argued that the said minutes (annexure A), did not vary the exemption certificate hence the decision of the learned Arbitrator to reject it. Specific reference was made to annexure SS1 to the Respondent's answer, which is the exemption certificate, and to the arbitration award, which is annexure D to the Applicants founding affidavit.
8. It was further Respondent's case that the Labour Commissioner was a witness in the proceedings before the 2nd Respondent and that She either testified as to the contents of the said affidavit and/or ought to have testified as to same, if at all such evidence was important to the Applicants case. It was argued that even if the Court were to find that the affidavit was ignored, its contents were a mere opinion of the Labour Commissioner regarding the application of the exemption certificate, which would not in any way be binding on the learned Arbitrator.
9. It was submitted that on the basis of the above arguments, the learned Arbitrator was right in making a conclusion that the exemption certificate was not applicable to Respondent and therefore Applicants. The Court was referred to the said certificate, annexure SS1f, in particular to clause 3.1, which the learned Arbitrator relied upon in making a conclusion that the certificate was not applicable to Applicants. It was concluded that on the basis of this clause the learned Arbitrator was bound to make a conclusion that the exemption did not apply to Applicants. It was prayed that on these bases, the review application be dismissed.

ANALYSIS

10. We have gone through the arbitration award and have noted that there is nowhere in the award where the learned Arbitrator appears to have considered both annexure A or B. The conclusion that the certificate of exemption does not apply

to Applicants is based on the fact that clause 3.1 of the said certificate expressly provides that the said certificate applies to Letšeng. This is captured under paragraph 8 of the arbitration award. We are therefore drawn to agree with Applicants that their evidence was disregarded as they allege.

11. The next issue is whether the failure by the learned Arbitrator to regard the evidence of the applicants warrants the review and setting aside of the arbitrator award. To answer this question, We must consider the probative effect of the disregarded evidence on the conclusion made. Put differently, if considered, would this evidence have bound the learned arbitrator to make a different conclusion, as Applicants argue (*See JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*). If the answer is in the affirmative, then the conduct of the learned Arbitrator will not only have amounted to an irregularity but one that is reviewable.
12. We have gone through annexure A and have noted that there is nowhere in the said document where it purports to either vary or amend the exemption certificate. In fact, the said document, relates to a meeting between Letšeng and the Minister in relation to a company called Matekane Mining and not Respondent. Consequently, the content of the minutes would not have advanced the Applicants case in the sense suggested.
13. We have also gone through annexure B and have noted that this is a document that was made in support of a case that was pending between Matekane Mining and its employees and not specifically for the case of Applicants. As Respondent has rightly put the said document is the opinion and/or the understanding of the Labour Commissioner regarding the application of the exemption certificate. This is not only clear from the content of the affidavit (annexure B) itself, but also clear from annexure A.
14. In the affidavit, the labour Commissioner states that,
“I wish to aver that the exemption that was issued by the Honourable Minister to Letšeng Diamond Mines against the provisions of S117 and S118 of the Labour Code Order 1992

was meant to apply to all contractors operate under Letseng Diamond Mines. The exemption was issued from 28th July 2009.

15. On the minutes (annexure A) the following is recorded,
“*The meeting resolved that the Labour Commissioner will provide an affidavit with which she will testify to the understanding of the application of the exemption as well as the consultations that were held with the workers.*”
16. Consequently, the said affidavit, even if considered, would not have bound the learned Arbitration to find that the certificate of exemption applied to Applicants. We wish to comment that the argument that the Labour Commissioner testified or ought to have testified as to the contents of the affidavit, does not advance the Respondents case as it is speculative.

AWARD

Our award is therefore in the following terms:

- a) That the application for review is refused; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 25th DAY OF APRIL 2014.

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

**Mrs. THAKALEKOALA
MEMBER**

I CONCUR

**Mrs. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR 1st RESPONDENT:**

**ADV. T. MAPETLA
ADV. M. MABULA**