

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/43/2010
A0546/2009**

In the matter between:

TEBOHO THATHO

APPLICANT

And

**SECURITY NORTH
DDPR**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 27th June 2013

Application for review of arbitration award. Applicant raising three grounds of review as follows,

-failure to keep a complete record of proceedings;

-failure to apply mind to the provision of the law; and

-failure to make a determination on issues before the arbitrator.

Only two grounds sustaining. Review application being granted.

Court finding it inappropriate to grant consequential relief sought.

Court directing that the matter be remitted back to the DDPR for determination of the jurisdictional point. 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 A0546/2009. The matter was heard and finalised on the appointed date of hearing. Both parties were in attendance and/or made representation.

2. The brief background of the matter is that Applicant was an employee of the 1st Respondent until he resigned from employment. He thereafter referred claims for unpaid weekly rest days, underpayments and unpaid public holidays with the 2nd Respondent. At the hearing, Applicant was advised by the learned Arbitrator that some of his claims had lapsed and that

he had to apply for condonation in order for the 2nd Respondent to have jurisdiction to hear and determine them. Thereafter the said application was made but was however unsuccessful. It is this award that Applicant wishes to have reviewed, corrected and/or set aside. Specifically, Applicant seeks an order granting the application for condonation and directing that the matter be heard in the merits.

3. Several grounds of review had been raised initially but were later reduced to only three namely that,
 - a. The learned Arbitrator failed to keep a complete record of proceedings contrary to Regulation 30 of the DDPR Regulations;
 - b. That the learned Arbitrator failed to apply Her mind to the provisions of the statute on prescription of claims; and
 - c. That the learned Arbitrator failed to make a finding on the issues before Her.
4. We wish to note that Applicant had raised a point of law in his heads of arguments wherein he had argued that the record of proceedings was not accurate and/or complete. Whereas, We had then questioned the properness of that approach, by agreement of the parties, We condoned this irregular step and allowed for the point to be argued as an additional ground of review. In the light of this background, Our judgment is in the following.

SUBMISSIONS OF PARTIES

5. On the first ground of review, it was argued that the record of proceedings that had been submitted did not truly reflect what took place in the arbitration hearing. It was submitted that when the learned Arbitrator directed Applicant to file an application for condonation to found jurisdiction, Applicant had argued that his claims were well within time. Applicant claims to have argued that the dispute arose only after the end of his contract of employment after the Respondent had failed to pay the owed monies contrary to his promise to do so.
6. Applicant argued that he had relied on the provisions of section 227(1) of the *Labour Code (Amendment) Act 3 of 2000*, for his argument. It was stated that the prepared record does not reflect this. It was argued that failure to keep a complete record

is a breach of Regulation 30 of the *Labour Code (DDPR) Regulations of 2001*. Specific reference was made to the following extract of the Regulation,

“30 (1) *The Directorate shall keep a record of –*

(a) any evidence given in an arbitration hearing; and

(b) any arbitration award or ruling made by an arbitrator.

(2) The record kept may be by hand-written notes or by means of an electronic recording.

...

(6) The transcript of the hand-written notes or electronic record so certified as correct shall serve as proof of its correctness unless the Labour court decides otherwise.”

It was prayed that on the strength of this point alone, the matter ought to be reviewed.

7. Respondent answered that the learned Arbitrator complied with the provisions of the *DDPR Regulations (supra)*. It was submitted that the said Regulations prescribe the keeping of the record of proceedings in any of the two formats namely, an electronic record and a handwritten record. It was argued that the submitted record, brief as it is, reflects both the evidence and the award.
8. Our perusal of the record reflects that there is a record that the learned Arbitrator kept that complies with the provisions of the *DDPR Regulations (supra)*, at least to some extent. We say this because We have noted that there is a record that reflects the submissions of Applicant in an application for condonation and an arbitration award which is subject of review. However, the record only reflects the actual condonation application and not the arguments of Applicant on the jurisdictional point that was *mero muto* raised by the learned Arbitrator.
9. The above being the case, We are in agreement with Applicant that the learned Arbitrator failed to keep a complete record. This notwithstanding, We decline to grant a review just on these bases. It is Our view that in order for a breach of procedure to warrant the review of an arbitration award, an applicant party must demonstrate the full effect of the breach on the decision made (*See JD Trading (Pty) Ltd t/a Supreme*

Furnishers v M. Monoko & others LAC/REV/39/2004). *In casu*, Applicant has done no more than to demonstrate a breach.

10. The second and third grounds of review were argued together. It was submitted that the learned Arbitrator had failed to apply Her mind to the provisions of section 227(1) of the *Labour Code Act (supra)*. It was argued that in terms of the said section, a claim sounding in money must be referred to the 2nd Respondent within 3 years of the dispute arising. It was stated that *in casu*, it had been argued that the dispute arose after the resignation of Applicant as Respondent had promised to pay at termination.
11. On the basis of the above arguments, Applicant claimed the 2nd Respondent had jurisdiction over his claims and that an application for condonation was not necessary. This notwithstanding, the learned Arbitrator nonetheless directed Applicant to file an application for condonation which was eventually dismissed. It was added that in issuing this directive, the learned Arbitrator did not pronounce herself on the submissions of Applicant and therefore failed to make a decision on the issues before Her. It was prayed that the Court find that learned Arbitrator to have erred in a manner that materially affects Her decision by failing to apply her mind. The Court was referred to the section 228F(3) and the authority in *JDG Trading (Pty) Ltd t/a Supreme furnishers v Monoko & others LAC/REV/39/2004* and the authorities cited therein, in support of the suggestion.
12. It was submitted in answer that Applicant acted on the directive of the learned Arbitrator to file an application for condonation. It was added that, in directing Applicant to apply for condonation, the learned Arbitrator had relied on the law to determine if Applicant had to apply for condonation or not. Having filed same, the learned Arbitrator had to consider it and make a finding. It was argued that this point has no merit and stands to be dismissed.
13. We wish to start by commenting that We acknowledge the authorities cited by Applicant to demonstrate the powers of this Court to review arbitration awards. We have observed from submissions of parties that it is not disputed that Applicant

addressed the Court on the necessity to make an application for condonation. This being the case, We accept this is as a true reflection of what took place (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242; and Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623*). As We have already determined, there is no record of what took place at this stage of the proceedings either in the form of the actual record or an award of ruling. We are therefore drawn to agree with Applicant that the learned Arbitrator did not apply Her mind to the provisions of section 227(1), as Applicant had argued them, as well as the submissions of Applicant, in support of that jurisdictional point.

14. In fact, it is Our view that the learned Arbitrator did not only fail to apply Her mind but that She also failed to consider both the submissions of Applicant and the provision of section 227(1). In Our view, this is a material error as the defence raised by Applicant, namely that of a promise to pay, and again if well argued, could have the effect of breaking prescription from taking effect, and consequently affect the decision of the learned Arbitrator. Consequently, the learned Arbitrator erred failing to consider and apply Her mind to these issues and summarily directing that Applicant apply for condonation. This is an error that warrants interference with the arbitration award.
15. We wish to comment that in as much as the decision to require Applicant to apply for condonation may have been influenced by the provisions the law, that neither precluded nor excused the learned Arbitrator from considering and applying Her mind to the arguments of Applicant before She made a decision to require him to apply for condonation. Further, the fact that Applicant applied for condonation, in line with the directive of the learned Arbitrator, does not in any way cure the error committed.
16. The second leg of this ground of review was that the learned Arbitrator failed to apply Her mind to the provisions of Regulation 26 of the *DDPR Regulation (supra)*. It was argued that the learned Arbitrator made a conclusion that it was not allowable for Applicant to apply to amend his founding affidavit

to the condonation application. It was submitted that this is contrary to the provision of Regulation 26 in that it allows for same. It was argued that had the learned Arbitrator applied Her mind to this Regulation, She would have come to the conclusion that an amendment was allowed.

17. It was answered that the *DDPR Regulations (supra)* do not provide for an amendment of an affidavit. It submitted that an affidavit is a sworn statement and cannot be amended as that would amount to perjury. It was added that although the learned Arbitrator has not relied on perjury in refusing the amendment, Her award is well reasoned and this Court cannot meddle with it. It was concluded that the learned Arbitrator has fully applied her mind on this issue.
18. We agree with 1st Respondent that Regulation 26 does not provide for an application to amend an affidavit as Applicant likes to suggest. Rather, the Regulation merely lays down a guideline on what form an application must take as well as the procedure in dealing with applications. As a result, the said Regulation does not apply to Applicant's argument nor does it advance his case. Consequently, this review grounds fails. As for the rest of the arguments of 1st Respondent on this point, We reserve Our comment.
19. In view of Our finding on the first leg of the second and third grounds of review, the application for review must succeed. However, We decline to grant the consequential relief sought, that the condonation be granted and the matter be heard in the merits. Our reason is simply that the arguments for review are not based on the merits of the condonation application itself, but on whether the 2nd Respondent had jurisdiction to hear and determine the Applicant's claims without a condonation application being made. Further, by granting the condonation application, We would be implying that the learned Arbitrator was right to require Applicant to apply for same, yet We have found Her conduct to do so without considering the arguments of Applicant, to be irregular. This would be an irrationality worthy of a review of Our judgment.

AWARD

Our award is therefore in the following terms:

- a) That the application for review is granted and the award in referral A0546/2009 is set aside;
- b) The matter is remitted to the DDPR for determination of the jurisdictional point *mero muto* raised by the learned Arbitrator;
- c) Applicant must obtain a date of hearing with the DDPR within 30 days of receipt herewith; and
- d) 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**

**Ms. LEBITSA
MEMBER**

I CONCUR

**Mrs. RAMASHAMOLE
MEMBER**

I CONCUR

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

**MR. MOLEFI
ADV. MATOOANE**