IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/90/2011**
A0198/2011

IN THE MATTER BETWEEN

BONGANI JEYI **APPLICANT**

AND

MONAHALI CONSTRUCTION (LTD) PTY **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Review being filed out of time together with an application for condonation. Applicant for condonation not being opposed. Court finding merit in the unopposed condonation application and granting same. Court further directing parties to address the merit of the matter. Applicant raising three ground of review. Only one ground of review sustaining. Court however, finding that the irregularity committed does not warrant the setting aside or correction of the arbitration award. Review application being refused. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the DDPR arbitration award in referral AO198/2011. The application has been filed out of time together with an application for condonation. Whereas, the condonation application had initially been opposed, such opposition was withdrawn and parties prayed that it be granted and they be directed to proceed into the merits of the matter. Having considered the condonation application, and having satisfied Ourselves of merit in same, We granted it. Our judgement in the merits of the matter is therefore in the following.

SUBMISSIONS

2. The first ground of review is that the learned Arbitrator erred by allowing 1st Respondent to oppose Applicant's condonation application verbally, contrary to the mandatory provisions of Regulation 4(3) of the *Labour Code (DDPR) Regulations of 2001*. It was submitted that in terms of that Regulation, a party wishing to oppose an application for condonation must do so in writing. It was added that as a result of this error, Applicant was denied the right to know beforehand that his application was opposed, the grounds for such opposition and was thus unable to issuably meet the challenge to his condonation application. It was argued that the mere fact that the opposition papers have to be served on the other party before hearing shows that the intention is to give that other party sufficient time to study and controvert the opposing reasons. It was argued that this was a clear violation of the mandatory provisions of Regulations 4(3)(b) and 4(4) of the *DDPR Regulations (supra).*

3. The Court was referred to the authority of *Nkisimane & others v Santam Insurance Co. Ltd 1978 (2) SA 430 (A)*, where the court made the following remarks in relation to statutory requirements. Specific reference was made to the remark by Trollip JA in the following,

   "Thus on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated consequence, and any purported compliance falling short of that is a nullity."

4. 1st Respondent answered that the learned Arbitrator acted in the interest of justice in allowing them to oppose the condonation from the bar. The Court was referred to the authority of *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ*. It was added that in so doing, the learned Arbitrator exercised His powers judiciously, while at the same time he avoided a piecemeal approach to the matter. It was further submitted that even if it was to be found that the learned Arbitrator mishandled the condonation application, that would not warrant the granting of the review, as the

irregularity complained of does not go into the merits of the condonation application itself.

5. The provisions of Regulation 4 of the *DDPR Regulations (supra),* are clear that where a party opposes an application for condonation they must notify the other party in writing about the reasons for opposition. These provisions are as follows:
   "4(1) …
   (2) …
   (3) Where a party to the dispute opposes the application for condonation, such application shall –
   (a) *be in writing; and*
   (b) state the reasons for opposing the application.
   (4) *The opposing statement shall be served on the other parties to the dispute and be filed with Senior Case Management Officer within 7 days of the service of the referral."*

6. It is without doubt that, in allowing Respondent to oppose the condonation without having first filed written reasons for opposition, the learned arbitrator committed an irregularity. We say this because the regulations are meant to prescribe the procedure that is to be followed in proceedings before the DDPR. Any deviation from the prescribed procedure by the regulations constitutes a procedural irregularity. We therefore find that the learned Arbitrator erred. The procedure adopted by the learned arbitrator has no support in law and is therefore an arbitrary act far from being in the interest of justice as 1st Respondent has attempted to suggest. In fact, not only is this the case, but even the authority of *Sidumo v Rustenburg Platinum Mines Limited (supra),* relied upon does not advance its case as it has been misapplied. The authority relates to the reasonableness of an award.

7. The above finding notwithstanding, We agree with 1st Respondent that the irregularity committed does not warrant the granting of a review of the arbitration award. We say this because the irregularity complained of does not go into the merits of the matter. Nothing has been pleaded or suggested in submission that if 1st Respondent had not been allowed to answer for the bar, the factual averments by Applicant would

have sustained the granting of the condonation application. Applicant has merely pleaded breach of procedural rules.

8. The second ground of review is that it was improper for the learned Arbitrator to have dealt with a *point limine* raised by 1st Respondent in the main claim, as She had already dismissed the condonation application for the late filing of the main claim. It was added that once the condonation application had been dismissed, it disposed off the matter and it was not necessary to deal with the main claims, which are the premise of the dismissal of the matter. 1st Respondent merely answered that while it may have not been necessary for the learned Arbitrator to entertain the main claim, having refused the condonation application, She nonetheless did what was just to parties by entertaining same.

9. We are in agreement with both parties that it was not necessary to deal with the main claims after the refusal of the condonation application. In fact, it is Our view that it was not only unnecessary, but also irregular for the learned Arbitrator to have done so. The effect of the refusal to grant the condonation application was that She lacked jurisdiction over the main claims. It is therefore Our view that the learned Arbitrator erred, at least to the extent of the decision to dismiss the applicant's claims for lack of jurisdiction, which was borne by the determination that there was no employment relationship between parties.

10. The third ground of review is that the learned Arbitrator erred in concluding that applicant had not provided sufficient evidence to prove that he was an employee of 1st Respondent. It was argued that it is trite law that he who alleges bears the onus. It was submitted that *in casu*, 1st Respondent had claimed the non existence of an employment relationship between parties. As a result, it was 1st Respondent who bore the burden of proving the non-existence of the employment relationship.

11. The Court was referred to the case of *Pillay v Krishna 1946 AD 946* at 952 where DAVIS AJA had the following to say,

"In my opinion, the only correct use of the word "onus" is that which I believe to be its true and original sense (cf.D.31.22) namely the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence as the case may be …"

12. It was added that Davis AJA went on to state that,
"where the person against whom the claim is made is not content with ta mere denial of that claim but sets up a special defence, then he is regarded quod that defence as being the claimant; for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.…"

13. Further reference was made to the case of *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd 2004 (6) SA 252 (W) at page 257,* where G. J. Classes J had the made the following remark,
"The incidence of the burden of proof in this sense is on each issue a matter of substantive law. In a secondary sense, the phrase denotes the duty to adduce evidence in order to combat a prima facie case made by his opponent, sometimes called the "evidential burden."

14. Applicant went on to rely on the authority in *Kriegler v Minitzer & another 1949 (4) SA 821 (A)* at page 828, where the learned Greenberg JA, relying on a statement from *Phipson Evidence*, 8th Ed. At page 27, stated as thus,
"The burden of proof … rest upon the party, whether plaintiff or defendant who substantially asserts the affirmative of the issue.

And further that,
"The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him."

15. It was argued that contrary to above trite principles of law, the learned Arbitrator required Applicant to prove the existence of the said relationship. It was added that in so doing the learned Arbitrator also acted contrary to Regulation 20(2) of

the *DDPR Regulations (supra)*. The Court was also referred to paragraphs 13 to 15 of the arbitration award, where this determination is said to have been made.

16. In answer, 1st Respondent submitted that the approach that the learned Arbitrator adopted was reasonable, fair, objective and sanctioned by the principles of law. It was added that the learned Arbitrator duly exercised Her mind to the evidence before Her. Evident to this was the fact that She adjourned proceeds to allow parties to obtain evidence to support their claims, before proceeding to hear and determine the matter. It was denied that the learned Arbitrator erred at all.

17. We wish to note and accept that is trite law that he who alleges bears the onus of proof. This principle is consistent with Regulation 20(2) of the *DDPR Regulations (supra)*. *In casu*, 1st respondent claimed that 2nd respondent did not have jurisdiction to entertain Applicant's claims. In support of the claim, 1st respondent argued that there was no employment relationship between the parties. In Our view, 1st Respondent made sufficient averments which if not disputed by Applicant, by leading evidence of the existence of the employment relationship, entitled it to succeed in its claim of lack of jurisdiction. Consequently, the learned Arbitrator was not wrong in requiring Applicant to lead evidence to rebut the claim of non-existence of the employment relationship.

18. In adopting the above approach, the learned Arbitrator was not misplacing the application of the principle of onus of proof, but rather applied it properly. The principle was explained in the case of *United Clothing v Phakiso Mokoatsi and another LAC/REV/436/06* as follows,

"The duty that is cast upon a litigant to adduce evidence that is sufficient to persuade the court, at the end of the trial that claim or defence as the case may be should succeed."
Consequently, this ground fails.

19. Our finding finds support in the authorities cited by Applicant in support of his claim. As We have already stated, 1st Respondent claimed that the 2nd Respondent lacked

jurisdiction to entertain Applicant's claims. In amplification of its claim, 1st Respondent had alleged the absence of an employment relationship between parties. In reaction, Applicant raised a special defence of the existence of the employment relationship. As the authorities cited above dictate, the obligation was now on the part of the Applicant to prove his positive assertion which was made in defence to a claim of non-existence of a contractual relationship.

20. Notwithstanding Our finding on the second ground of review, We decline to set aside the arbitration award in referral AO198/2011. Our decision is premised on the fact that while it was not necessary to hear and determine the merits of the main claim or matters arising therefrom, after the condonation had been refused, that does not alter the fact that the late referral of Applicant's claim was not condoned. In the end, the 2nd respondent would still lack jurisdiction to hear and determine Applicant's claims.

AWARD

We therefore make an award in the following;

(1) That the review application is refused;

(2) The award of the 2nd respondent in referral A0198/2011 remains in effect; and

(3) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 16th DAY OF JUNE 2014

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

MR. MOTHEPU **I CONCUR**

MR. MATELA **I CONCUR**

FOR APPLICANT: **ADV. SELIMO**
FOR RESPONDENT: **ADV. KUMALO**