IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/67/2011**
C092/2010

IN THE MATTER BETWEEN

SHOPRITE CHECKERS (PTY) LTD **APPLICANT**

AND

MAPASEKA RANTSANE **1st RESPONDENT**
SEITEBATSO CHAKA **2nd RESPONDENT**
DDPR **3rd RESPONDENT**

JUDGMENT

Two grounds of review having been raised. One ground being withdrawn. Applicant citing seven incidents of errors of law in support of remaining ground. Court finding merit in the first incident. Court further finding that the other incidents are premised on the first one. Court finding it unnecessary to consider other incident having determined that the learned Arbitrator erred in law on the first one. Review application being granted, matter being remitted to the DDPR for a hearing de novo and no order as to costs being made.

BACKGROUND TO THE DISPUTE

1. This is an application for the review of the arbitration award in referral C092/2010. Two grounds of review had initially been raised in the following:
   'I aver that the arbitrator in the above mentioned case erred and misdirected himself in first stating that he had jurisdiction to have entertained this matter and this matter shall be addressed at the hearing on a point in limine.'

   'I further aver that the arbitrator erred and misdirected himself in interpreting the law pertaining to written contracts, collective

agreements, as well as the Labour Code and amendments thereto as applicable to the minimum wages and ignored the dire consequences of his interpretation to the whole economy of Lesotho.'

2. The first ground of review was withdrawn and consequent thereto, We were addressed only in respect of the second review ground. Both parties were present and/or represented and they duly made their presentations. Having heard their presentations, Our judgement therefore follows.

3. Before We deal with the matter, We wish to note that in support of the remaining ground of review, seven incidents of errors of law were argued. These can be summarised as follows:
   a) Arbitrator erred in adopting the literal interpretation of the wages order that the wages orders applied to Respondents and that resulted in absurd results.
   b) In adopting the literal interpretation, arbitrator ignored the purposive interpretation and thus committed an error of law.
   c) Having concluded that the wages order applied to respondents, arbitrator erred in concluding that the wages orders make no reference to the number of hours an employee has to work prior to earning monthly, weekly or daily wages.
   d) Arbitrator erred in concluding that respondents were entitled to the statutory minimum wages stipulated in the wages order on the ground that the parties had bargained for a higher standard.
   e) Having concluded that the minimum wages applied to respondents, arbitrator erred in concluding that respondents were entitled to full monthly wages prescribed in the wages orders, relying on the common law principle that employees are paid against tender of services and not actual performance.
   f) Having concluded that the wages orders applied to respondents, arbitrator erred in concluding that the hourly rates in the daily, weekly and monthly wages in the minimum wage orders are themselves different.

g) Having concluded that the wages orders applied to respondents, arbitrator erred in finding that wages orders take precedence over a lesser contractual provision.

Having summarised the grounds that form the basis of the alleged error of law, we shall now proceed to deal with them.

SUBMISSION AND ANALYSIS

4. Applicant's case in the first incident of errors of law is that the learned Arbitrator erred by interpreting the 2007, 2008 and 2009 wages orders literally, to the effect that they applied to Respondents and that they should be paid monthly wages irrespective of the actual hours worked. It was submitted that the result is absurd and could not have been intended by the legislature. It was added that Respondents worked 100 hours per month and can thus not be paid similar to those who work 195 hours, as the literal interpretation suggests. It was further added that the interpretation adopted implies that even an employee who has worked only for an hour in a given month will be entitled to the full month wages merely because they are paid on a monthly basis.

5. It was further argued that the learned Arbitrator should have adopted an interpretation tool that would avoid absurdity and give meaning to the intention of the legislature. It was submitted that the proper tool of interpretation would have led to the interpretation that the minimum wage rates did not simply apply to employees who are paid on a monthly, weekly and daily basis. It was argued that rather, the learned Arbitrator ought to have found that in addition, the said employees must work full time basis in the specified periods in order for the wage rates to apply to them.

6. Respondents answered that as a general rule, the literal interpretation should be adopted as a first step in the process of interpretation. Further, that a departure from the literal interpretation, may only be made if there is an ambiguity in the statute or if the literal interpretation could lead to absurd results, which could not have been intended by the legislature. The Court was referred to the book by *Du Plessis L.M. (2002) Interpretation of Statutes, Butterworths*, in support of the argument.

7. It was argued that the language in the statute is clear and unambiguous and that no absurd results are reached by literally interpreting the wages orders. It was submitted that interpreting the wages orders otherwise than literally would affront the provisions of section 4(a) of the *Labour code Order 24 of 1992,* that the standards laid down in the Labour Code are the minimum legally obligatory standards which are without any prejudice to the rights of workers to bargain for and contract for higher standards.

8. It was argued that to further demonstrate the appropriateness of the tool of interpretation used by the learned Arbitrator, the *Wages Orders* and the *Labour Code* do not refer to the number of hours that an employee has to work before earning the monthly weekly or daily wages. It was added that the wages orders merely state the amounts to be paid and/or earned on monthly, weekly or daily.

9. We wish to note that We accept the principle that the literal interpretation is the first step, and that a departure from the literal interpretation can only be made where there is an ambiguity in the statute or if the results borne by the literal interpretation are absurd. In Our view, there is no question of ambiguity in the statute in as much as no such has been pointed out by either of the parties. We will therefore deal with the second ground of exception, namely the presence of an absurdity in the results.

10. The *Labour Code Wages Orders* provide for payment of employees' wages under three classifications namely those paid on a monthly, weekly and daily basis. There are specific amounts prescribed under each classification. It is neither disputed nor doubtful that Respondents were paid monthly. This being the case, in terms of the literal interpretation of the *Wages Orders*, they are applicable to Respondents and they are therefore entitled to be paid the full minimum prescribed monthly wages applicable to their sector.

11. The above notwithstanding, it is also undisputed that Respondents worked 100 hours per month. In terms of the *Labour code Wages Amendment Order of 1995*, an employee is

expected to work 195 hours per month. The literal interpretation of the *Wages Order* in issue, is to effect that both employees who work 100 hours and 195 hours are entitled to the same wages.

12. In Our view the above results are absurd and could not have been intended by the legislature. If the literal interpretation were to apply it would mean, and as put by Applicant, that an employee who worked for an hour in a month and received their wages on a monthly basis would be entitled to the full monthly wages due to an employee who worked 195 hours.

13. Clearly, the learned Arbitrator used the wrong tool in determining the applicability and otherwise of the minimum *Wages Orders* to the Respondents and thus committed a grave mistake of law. In the case of *J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko and others LAC/REV/39/2004*, the learned Dr. K. Mosito cited with approval the authority in *Hira & another v Booysen & another 1992(4) SA 69 (A),* where the Court was explaining the ambit of review for an error of law.

14. In the above authority, the learned Corbett CJ had the following to say,
"....by reason of its error of law, the 'tribunal' asked itself the wrong question,' or 'applied the wrong test,' or 'based its decision on some matter not prescribed for its decision,' or 'failed to apply its mind to the relevant issues in accordance with the behest of the statute,' and that as a result its decision should be set aside on review."
In Our view, the decision of the learned Arbitrator warrants a review as He applied the wrong test to the Applicant's case. He should have considered other tests other than the one that He adopted.

15. In view of Our finding on the first incident of error of law, We find it unnecessary to deal with the rest of the incidents. Our basis for the conclusion is not hard to find. All other incidents are premised on the conclusion that the *Wages Orders* are applicable to Respondents. The fact that the wrong tool and/or test was used, makes the other incidents immaterial for

determination by this Court, at least for purposes of this review.

16. A similar approach was adopted by the learned Dr. K. Mosito in *T & T Security Services (Pty) Ltd v Samuel Peapea LAC/CIV/A/21/2013*. In that authority there were three complaints that had been levelled against the decision of the learned Deputy President of the Labour Court. The Court determined that the other two derived from the first complaint and having dismissed same, the Court deemed it unnecessary to determine the other two complaints.

AWARDS

We therefore make an award as follows:

1) The application for review is granted;
2) The award in referral C092/2010 is reviewed and set aside;
3) The matter is remitted to the DDPR to be heard *de novo* before a different Arbitrator;
4) This order must be complied with within 30 days of issuance herewith; and
5) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 15th DAY OF SEPTEMBER 2014.

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

MRS. MOSEHLE	**I CONCUR**
MRS. LEBITSA	**I CONCUR**
FOR APPLICANT:	**ADV. MYBURG**
FOR 1st AND 2nd RESPONDENTS:	**ADV. LIMEMA**