

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/75/2013  
A0370/2013**

**IN THE MATTER BETWEEN**

**JIKELELE SERVICES**

**APPLICANT**

**AND**

**PUTSOE BOSULE  
DDPR**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Applicant for review of arbitration award. several grounds raised. All but one failing to sustain. Court finding that the irregularity committed does not warrant interference with the arbitration award. Court dismissing the review application and reinstating the arbitration award. no order as to costs being made.*

**BACKGROUND OF THE DISPUTE**

1. This is an application for the review of the arbitration award in referral A0370/2013. Several grounds of review have been raised on behalf of Applicant, all of which are based on failure to consider evidence. Parties were both present and duly made their presentations. Our judgement is therefore in the following.

**SUBMISSIONS**

2. First ground of review is that the learned Arbitrator failed to consider the evidence of Applicant that 1<sup>st</sup> Respondent was suspended on 17<sup>th</sup> October 2012. Having failed to consider this evidence, She made the wrong conclusion that it was common cause that 1<sup>st</sup> Respondent had been suspended on 27<sup>th</sup> October 2012. This evidence was said to appear at pages

3 and 4 of the record of proceedings before the DDPR and on annexure A1 and A2 to same.

3. Respondent answered that the learned Arbitrator considered all evidence and that in fact the evidence that suspension started on 27/10/2012 was not challenged by Applicant hence the finding by the learned Arbitrator that it started on 27<sup>th</sup> October 2012. The Court was referred to paragraph 5 of the arbitration award.
4. We have considered pages 3 and 4 of the record of proceedings and annexures A1 and A2. At page 3 and 4, which was the examination in chief of 1<sup>st</sup> Respondent, he is recorded testifying to the effect that he was suspended on 17<sup>th</sup> October 2012. At page 4, he tendered documents which were marked A1 and A2. These documents are notifications of hearing for the 29<sup>th</sup> October 2012 and the 2<sup>nd</sup> November 2010. Both documents reflect the date of misdemeanour as 17<sup>th</sup> October 2012.
5. We do confirm that the learned Arbitrator appears to have failed to consider the evidence of the date of suspension of 1<sup>st</sup> Respondent (Applicant before DDPR). We say this because no mention or consideration of some sort to same, has been made in Her arbitration award. This is perhaps why She made a factual conclusion that it is undisputed that 1<sup>st</sup> Respondent was suspended on the 27<sup>th</sup> October 2012, when it was in fact on the 17<sup>th</sup> October 2012. This is reflected under paragraph 5 of the arbitration award as thus,  
*“It is common cause that applicant was suspended from duty on the 27<sup>th</sup> October 2012 and was expected to attend his hearing on the 2<sup>nd</sup> November 2012.”*  
We therefore find that the learned Arbitrator acted irregularly by not considering this evidence.
6. The second and third grounds of review were argued together. It was submitted that the learned Arbitrator failed to consider the evidence of Applicant that the 1<sup>st</sup> Respondent suspension, which started on 17<sup>th</sup> October 2012, ended on 27<sup>th</sup> October 2012 when his fixed term contract ended. It was argued that evidence had been led that suspension started on 17<sup>th</sup> October 2012 and that the fixed term contract ended on 27<sup>th</sup> October

2012. The Court was referred to page 7 of the record of proceedings. It was added that having failed to consider this evidence, the learned Arbitrator concluded wrongly that 1<sup>st</sup> Respondent continued to be on suspension beyond the date of expiry of the contract.

7. In answer, 1<sup>st</sup> Respondent submitted that when one is placed on suspension, they remain employees until such suspension has been uplifted. It was added that *in casu*, 1<sup>st</sup> Respondent remained an employee of Applicant beyond 27<sup>th</sup> October 2012, as he was still under suspension. It was argued that the learned Arbitrator justified Her decision on paragraph 5 of the arbitration award. It was strongly denied that the learned Arbitrator ignored any evidence.
8. We have already held that the learned Arbitrator ignored the evidence of Applicant concerning the commencement of 1<sup>st</sup> Respondent suspension. Regarding the ending of the suspension period by lapse of contract, the learned Arbitrator is recorded as follows, at paragraph 5 of Her arbitration award,  
*“His contract of employment expired on the 27<sup>th</sup> October 2012, it does seem that after that October, 2012 applicant’s contract was extended because he continued in employment and waited for his disciplinary hearing.”*
9. We confirm that Applicant gave evidence of the ending of the contract of employment of 1<sup>st</sup> Respondent and the fact that it did not have automatic renewal. However, the learned Arbitrator disqualified this evidence and made a conclusion that the 1<sup>st</sup> Respondent’s contract was extended beyond 27<sup>th</sup> October 2012. Premised on this finding, the learned Arbitrator made a conclusion that 1<sup>st</sup> Respondent remained on suspension and an employee of Applicant. Therefore, We find that no evidence was ignored but rather that it was considered and disqualified. Consequently no irregularity has been committed.
10. The fourth ground of review was that having held that 1<sup>st</sup> Respondent was on suspension beyond the 27<sup>th</sup> October 2012, the learned Arbitrator made a wrong conclusion that 1<sup>st</sup>

Respondent was entitled to be paid wages and leave days. It was argued that the period of alleged entitlement was beyond 27<sup>th</sup> October 2012 which was date of termination of 1<sup>st</sup> Respondent contract. It was added that at termination of contract of employment parties' duties and obligations towards one another cease and this includes the duty to pay wages and the right to accrue leave days.

11. In answer, 1<sup>st</sup> Respondent submitted that Applicant was still in employment beyond 27<sup>th</sup> October 2012 and was thus entitled to be paid. It was argued that in law, when an employee is under suspension, they must be paid. The Court was again referred to the decision of the learned Arbitrator on paragraph 5 of the arbitration award where the learned Arbitrator made reference to the book of *Grogan J. 10<sup>th</sup> Ed., Workplace Law, at page 140.*
12. This ground of review dependent on the second and third ground sustaining. In fact in Our view, it is more of a consequential relief than a primary relief. On its own, it an appeal as opposed to review ground as it is concerned with the conclusion rather than the method of reaching the conclusion. In the case of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, the Court explained the distinction between an appeal and a review as follows, *"The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgment already given. Where the reason for wanting to set aside a judgment is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of an appeal. where on the other hand, the real grievance is against the method of the trial, it is proper to bring the case for review."*
13. This above said notwithstanding, We have already dismissed the second and third grounds of review on account of their failure to disclose any irregularity on the part of the learned Arbitrator. Consequently, this ground must also fail. Even if this ground was to be taken as an independent review ground, it would still fail to sustain as it also does not disclose any irregularity on the part of the learned Arbitrator, but rather Her conclusion as being wrong.

14. We wish to comment that it is the correct position of the law that an employee who has been suspended, particularly one who has suspended been pending a disciplinary case, as *in casu*, remains an employee until terminated. As a result, in the period of being an employee, they are entitled to the full rights of other employees including the right to be paid and to accrue leave days. Our view finds support in the conclusion of the Court of Appeal of Lesotho in *'Masefabatho Lebona v Director of Public Prosecutions C OF A/CIV/34/1995*, where the Court explained suspension as follows,  
*"Suspension may be effected on an employee under two circumstances. Firstly, pending a disciplinary inquiry in which case an employee must continue to receive his/her salary. Secondly, as a punitive measure after an employee has been found guilty of a workplace offence, in which case it may be without pay."*
15. The last ground of review was that the learned Arbitrator ignored the evidence of Applicant that the deductions were lawful. It was submitted that Applicant had been ordered in referral A0444/13 to deduct certain monies from salaries of its employees. It added that these monies were agency union fees, payable under a collective agreement between a representative trade union, within the Applicant employment, called LEWA and Applicant. The Court was referred to the said arbitration award. The award is annexed to the Applicant Notice of Motion and Founding Affidavit, and marked LFM2. Further reference was made to page 9 of the record of proceedings.
16. 1<sup>st</sup> Respondent answered that the award notwithstanding, the deductions were unlawful as he had not authorised them. Further that it was denied that any evidence was ignored, but rather that the learned Arbitrator addressed the Applicant's case on paragraph 5 of the arbitration award.
17. Annexure LMF2 is an arbitration award which was obtained by Lesotho Workers Associations (LEWA) in default of Applicant herein. In terms of the said award, Applicant was to deduct amounts in the sum of M20.00 from all of its employees, as agency fees and to deposit same into the

account of LEWA. By this We confirm the existence of the said order.

18. However, upon Our perusal of page 9 of the record of proceedings where the evidence of this above referred award and its dictates is alleged to have been led, We noted the contrary. We say this because at page 9, the evidence is recorded as follows.

*“RW1: only thing I can say is that applicant was a member because at the Labour Department, he said that (inaudible) was not representing him because as the employer, we employed (inaudible) under Jikelele Services.*

*ARB: So?*

*RW1: Si he was a member of Labour. That’s why the money was deducted from his salary. M10 per month.”*

19. Clearly nothing in the above quoted extract touches on the arbitration award. What merely reflects is the evidence that Applicant’s salary underwent a deduction of M10 per month because he was a member of labour. It is without doubt that there was no evidence on record that the deduction was made pursuant to an arbitration award. Therefore the learned Arbitrator cannot be found to have faulted by not considering what was not before Her. Consequently, this point fails also.

20. In view of Our finding on the first ground of review, We shall now determine the effect of the ignored evidence on the decision made. 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 J.D. 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.

21. In the proceedings before the DDPR, 1<sup>st</sup> Respondent claim was non-payment of wages, leave days and unlawful deductions. Applicant’s case was that he was suspended indefinitely from the 17<sup>th</sup> October 2012 and that his

suspension went beyond the period of his employment. Applicant's defence was that the expiry of the contract of employment, extinguished the suspension and any duties and obligations that existed between the parties, including the referred claims. As We have already shown, the learned Arbitrator's conclusion was that 1<sup>st</sup> Respondent was entitled to the claims made for the reason that the contract went beyond its expiry date.

22. Clearly, the premise of the finding of the learned Arbitrator was not the actual commencement of the strike, but the fact that it ran beyond the date of expiry of the contract. We are therefore of the view that even if considered, the evidence of the commencement of the suspension of 1<sup>st</sup> Respondent would not have led the learned Arbitrator to find that the suspension ended with the lapse of the contract of employment of 1<sup>st</sup> Respondent.

**AWARD**

We therefore make an award in the following:

- (1) That the review application is refused;
- (2) The arbitration award in referral A0370/2013 remains in force; and
- (3) There is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 11<sup>th</sup> DAY OF JULY 2014**

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

**MRS. RAMASHAMOLE**

**I CONCUR**

**MRS. THAKALEKOALA**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. TŠOLO  
MR. MOKHAHLANE**