

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/83/2011
A1113/2010**

IN THE MATTER BETWEEN

**WASHINGTON KOPANG THABANE
t/a PARADISE LODGE**

APPLICANT

AND

**'MATHABO MOROKA
DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Applicant raising two points of law that answer has been filed out of time; and absence of authority to represent on behalf of 1st Respondent. Court finding that answer is within time and further that Applicant is estopped from question the representation of 1st Respondent. Three grounds of review having been raised - that arbitrator ignored evidence of Applicant; that arbitration entertained a claim in respect of which She had no jurisdiction; and refusal to accept evidence of Applicant. Court not finding merit in all claims and dismissing the review application. 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 A1113/2010. Two points of law have been raised by Applicant. One relates to the answer while the other relates to the authority to represent. On the date of hearing, We adopted a holistic approach to the matter, in that We were addressed in both the points of law and the merits of the review application. We had promised parties that if We upheld the points of law, We would not consider the submissions of 1st Respondent, but that We would only do so in the event of points of law being dismissed. Having heard the holistic submissions of parties, Our judgement is therefore in the following.

SUBMISSIONS AND ANALYSIS

Points of Law

2. Applicant argued that 1st Respondent's answer had been filed out of time and that as a result, it should be excluded. Further that with the answer being excluded, 1st Respondent should be denied the right of audience, as the answer being the basis of the said right, will have been excluded. 1st Respondent answered that the answer was well within time and that if at all, it can best be termed premature. In support, it was submitted that Applicant had not filed a notice in terms of Rule 16 of the Rules of this Court. It was added that this is the notice that advises 1st Respondent to file her answer. Therefore, that without the notice, it cannot be said that 1st Respondent's answer is out of time.
3. The procedure for filing of processes in review proceedings before this Court is governed by Rule 16 of the *Labour Appeal Court Rules of 2002*. Rule 16 (7) thereof, deals with the procedure for filing an answer to an application for review. In terms of the Rule,
"(7) Any person wishing to oppose the application for review shall, within 14 days of receipt of a notice referred to in sub-rule (6) deliver an affidavit in answer to the allegations made by the applicant."
4. Sub-rule 6 provides as follows,
"(6) The applicant shall, within 7 days after the Registrar has made the record available, either –
 - (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or*
 - (b) deliver a notice that applicant stands by its notice of motion."*
5. In the light of the above Sub-rules, We are in agreement with 1st Respondent that her answer is not out of time. In order for the challenge raised by Applicant to validly stand, he ought to have advised 1st Respondent to file an answer, in terms of Sub-rule (6), and 1st Respondent must have failed to do so within the 14 days period prescribed under Sub-rule (7). Having failed to serve and file this notice, any claim of against the

breach of Sub-rule (7) cannot stand. Consequently, Applicant's point of law fails to sustain.

6. Applicant had also claimed that 1st Respondent representative, Mr. Mosuoë was not properly before Court as he had not been duly authorised to appear by 1st Respondent. Applicant argued that there was no authority to represent that had been filed on behalf of 1st Respondent, authorising Mr. Mosuoë to appear on her behalf. In answer, Mr. Mosuoë argued that Applicant was estopped from raising this point, especially after serving all process in this matter at his office, and further arranging the date of hearing with his offices. He added that he was duly authorised to appear by 1st Respondent. It was added that on the premise of these events, 1st Respondent formed the impression that the subject of authorisation was not an issue. It was argued that Applicant was blowing hot and cold and that this Court should not allow them to do so. It was prayed that this point be dismissed.
7. Applicant did not deny any of the factual allegations made by Mr. Mosuoë, that he has been corresponding with him (Mr. Mosuoë) in all processes in this matter, including towards the allocation of the date of hearing. This being the case, We find it startling that Applicant is now questioning Mr. Mosuoë's authority to appear on behalf of Respondent. In Our view, the principle of estoppels operates against him. This principle has been impeccably explained by *Schalk Van Merwe et al; Contract: General Principles 1st Ed. Juta & Co, p.23*, as follows,

“In terms of estoppel someone who has been brought under an incorrect impression (in other words who has been misled) by another and who in reliance on that impression has acted to his detriment, may prevent (estop) the other person from relying on the correct state of affairs before a court of law. If estoppel is raised successfully it has the effect the incorrect impression is maintained as if it were correct. Estoppel thus functions by means of a fiction.”

On the premise of the above said, We also find it more probable that Mr. Mosuoë has been properly authorised to appear I these proceedings. Therefore, this point also fails.

Merits

8. The first ground of review was that the learned Arbitrator ignored the evidence of Applicant to effect that 1st Respondent had refused to comply with the laws of Lesotho, thus making the employment relationship impossible, when awarding reinstatement. It was said that 1st Respondent had refused to sign a written contract of employment and to undergo a medical examination, contrary to the directive of the Labour Department. It was argued that had this evidence been considered, when making the award, the learned Arbitrator would not have awarded reinstatement. The Court was referred to pages 56, 53 and 61 and 62 of the record of proceedings.
9. In answer, 1st Respondent submitted that no evidence was led on behalf of Applicant to demonstrate impracticality of reinstatement, or the refusal by 1st Respondent to comply with the Labour Laws of Lesotho. It was submitted that the referenced pages do not advance Applicant's case, as they do not demonstrate what is alleged to have happened. It was argued that Applicant, is merely unhappy with arbitration award, and that mere unhappiness is not a valid review ground.
10. We have gone through the record of proceedings and have noted that page 53 of the record deals with the evidence on under payments of 1st Respondent. Page 56 deals with the evidence on refusal of 1st Respondent to sign a contract presented to her for signature. All these appear to have been recorded during cross examination of 1st Respondent. At pages 61 to 62, are submission of Applicant on the issue of refusal to sign, wherein Applicant argues that 1st Respondent refusal to sign the contract of employment, made the continued employment relationship impossible, hence her dismissal.
11. We agree with 1st Respondent, only to the extent of the evidence on page 53, that it does not advance Applicant's case on this point. We further agree with 1st Respondent that this evidence, that is, evidence on page 56 was not lead to demonstrate the impracticality of reinstatement, in as much as it does not, but merely to justify the dismissal of 1st Respondent. Therefore nothing on record shows any evidence

on the practicality or otherwise of reinstatement as a remedy. About pages 61 and 62, these are submissions of Applicant, as We have already shown, they go nowhere near towards demonstrating that reinstatement was not practical. They simply confine themselves to justifying the dismissal.

12. We therefore find that no evidence was led on impracticality, in as much as the submissions do not address same and rightly so, as submissions are based on evidence tendered. As a result, the learned Arbitrator did not commit any irregularity. We are also drawn to conclude that Applicant is merely unhappy with the conclusion of the learned Arbitrator and is therefore unduly using this process to address his discontent. It is trite law that grounds that place a challenge on the conclusion are not for review but rather for appeal (see *J. D. Trading (Pty) Ltd t/a Supreme Furnishers vs. M. Monoko & others LAC/REV/39/2004*). This ground is therefore dismissed.
13. The second ground of review was that the learned Arbitrator erred in that She entertained a claim in respect of which She had no jurisdiction. It was argued that 1st Respondent claimed discrimination caused by the Labour Laws of Lesotho and that as such the learned Arbitrator had no jurisdiction over this claim. 1st Respondent answered that the claim of jurisdiction was never raised during the arbitration proceedings. It was argued that none of the referenced portions of the record of proceedings evidence this.
14. We have perused the record of proceedings before the DDPR and have noted that at page 52, 1st Respondent is recorded denying that she ever claimed that she was being discriminated against. At page 54, 1st Respondent is recorded refusing, to have his entitlements calculated on the basis of the gazette produced by Applicant. At page 56, and as We have already stated, Applicant is recording as refusing to sign a contract presented to him by Applicant.
15. In view of Our findings, there is no evidence that 1st Respondent claimed to have been discriminated against. Infact, the portions to which We have been referred, reflect 1st Respondent refusing the said claim. We therefore find that

neither discrimination nor a challenge to jurisdiction were claims before the learned Arbitrator, and that as such She cannot be found to have committed an irregularity in entertaining 1st Respondent's claim. Had the learned Arbitration considered and pronounced Herself on these issues, She would have exceeded her bounds of Authority by considering claims not before Her.

16. The third ground of review was that the learned Arbitrator refused to accept the evidence of Applicant that it had been declared a small business, by both the licensing authority and the Labour Department. As a result, the learned Arbitrator came to the wrong conclusion that there was no evidence challenging underpayments. It was stated that the learned Arbitrator rejected Applicant trader's licence. The Court was referred to pages 30 and 35 of the record of proceedings before the DDPR.

17. 1st Respondent answered that Applicant attempted to hand in a copy of the trader's licence without presenting the original for verification. Further that when the authenticity of the copy was challenged he undertook to bring proof in the form of the original, on the next date of hearing and that this he never did. It was added that the learned Arbitrator had ruled that upon presentation of the original, the copy would be accepted. The said document was refused when Applicant failed on his undertaking. The Court was referred to page 37 of the record where the undertaking is said to have been made.

18. Page 30 of the record of proceedings reflects the re-examination of Applicant. Applicant is asked on the category of his business and the question is objected to. Thereafter no answer is given on the question. At page 35, the 1st Respondent representative is recorded as refusing and objecting to the admission of a copy of the traders licence without presentation of the original. From these pages of the record, nothing turns on the refusal of the learned Arbitrator to accept evidence that Applicant's business had been declared as a small business.

19. However, at page 37, parties agree that the copy of the traders licence will be accepted and admitted into evidence

upon production of the original, on the next date of hearing. Thereafter the learned Arbitrator rules in favour of the agreement and directs parties to proceed to address other issues. This is the only point in the referenced pages where the learned Arbitrator makes a ruling. As a result, it cannot be accurate that any of these referenced pages reflect the learned Arbitrator as wrongly refusing to accept the evidence of Applicant. Consequently, this point also fails.

AWARD

On the basis of the above reasons, We make an award in the following,

1. That the review application is refused;
2. That the award in referral A1113/2010 remains in force; and
3. That no order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF JULY 2014.

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

MR. MOTHEPU

I CONCUR

MR KAO

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT :**

**MR. T. MOHALEROE
MR. P. MOSUOE**