

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/19/2013
K010/2011**

In the matter between:

‘MAK’HUMALO EVELYN HLEKWAYO

APPLICANT

And

**MOUNTAIN STAR LODGE (PTY) LTD
ARBITRATOR DDP (LLJ SHALE)**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 19th March 2014

Application for review of arbitration award accompanied by an application for condonation. Only one ground of review raised. Matter not opposed and no appearance made on behalf of 1st Respondent. Court granting the condonation but not finding merit in the review ground. Review application being refused. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDP arbitration award in referral K010/2011. Only one ground of review has been raised in terms of which Applicant seeks the review, correction and/or setting aside of the 2nd Respondent arbitration award. The matter is unopposed and no appearance has been made on behalf of the 1st Respondent, notwithstanding the fact that 1st Respondent was served with the notification of hearing of this matter for this day.
2. The brief background of the matter is that Applicant had referred claims for severance payment, unpaid public holidays, overtime, and weekly rest days. On the 16th May 2012, the matter was heard in default of the 1st Respondent. Thereafter an award was issued on the 8th June 2012, wherein Applicant was awarded severance payment while the rest of her claims

were dismissed. It is this award that Applicant seeks to have reviewed, corrected and/or set aside.

3. Realising that the referral of the review application was out of time, Applicant also applied for the condonation of the late referral of her review application. Having heard the submissions of Mr. Mosuo on behalf of Applicant, on the question of condonation, We granted same and directed that Mr. Mosuo proceed to address the court on the merits of the review application. Our judgment on the merits is therefore in the following.

SUBMISSIONS OF PARTIES

4. Applicant submitted that the learned Arbitrator erred in that He proceeded to hear the merits of the matter notwithstanding the fact that the matter had been unopposed and further that there had been no appearance for 1st Respondent on that day. It was argued that in terms of section 227(8) of the *Labour Code (Amendment) Act 3 of 2000*, the learned Arbitrator had three options namely to dismiss the referral; postpone it; or to grant an award by default.
5. It was added that having elected to grant the award by default, the learned Arbitrator was precluded from hearing the evidence of Applicant but to proceed to grant her claims as they appear in the referral form. It was argued that the conduct of the learned Arbitrator was a misconception of the provisions of section 227(8) and that this lead Him into making a wrong conclusion. It was said that in terms of section 227(8), the learned Arbitrator had no authority to hear evidence once He had elected to grant the award by default.
6. We confirm the content of section 227(8) of the *Labour Code Act (supra)*, save to say that We differ with Applicant in terms of the interpretation advanced. The said section provides as follows,
“If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the arbitrator may –
(a) postpone the hearing;
(b) dismiss the referral; or
(c) grant an award by default.”

7. We wish to comment that from the simple reading of the above quoted section, it neither requires the leading of evidence in either of the three scenario presented nor does it preclude the leading of same. As a result, the interpretation of section 227(8) that has been advanced by Applicant is not only narrow and self-suited, but also assumes that section 227(8) operates in a vacuum from other principles of law, and in particular the principles of evidence. This assumption must be discarded as being inaccurate.
8. It is a trite principle of evidence that he who alleges, bears the onus of proof. In the case of *United Clothing v Phakiso Mokoatsi & another LAC/REV/436/2006*, We explained the principle of the onus of proof in the following,
“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.”
This essentially means that claimant must lead evidence to substantiate his/her claim and that this obligation remains irrespective of whether the claim in issue is opposed or not.
9. What would rather prevail in the end is that if there is no evidence to contradict the evidence of the claimant, then the court must proceed to make a decision on the basis of the unchallenged evidence of the claimant and make an appropriate order (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*). For purposes of the case *in casu*, an appropriate order may be the dismissal or granting of the award by default. On the basis of this said, it cannot be accurate that the learned Arbitrator was precluded from requiring the leading of evidence and as such there is no irregularity on His part.

AWARD

Our award is therefore in the following terms:

- a) That the application for review is refused; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 20th DAY OF MARCH 2014.

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

**Mrs. THAKALEKOALA
MEMBER**

I CONCUR

**Mr. MOTHEPU
MEMBER**

I CONCUR

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

**MR. MOSUOE
NO APPEARANCE**