

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/44/2013
A0087/2012**

IN THE MATTER BETWEEN

TŠEPO MOKAU

APPLICANT

AND

**LIQHOBONG MINING
DEVELOPMENT (PTY) LTD
DDPR
ARBITRATOR N. MOSAE**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

JUDGMENT

Application for review of arbitration award. Applicant having raised three grounds of review based on estoppel, ultra vires and lis pendens. Court finding that estoppel has been misapplied by Applicant. Further that the learned Arbitrator acted within the scope of his powers and therefore not ultra vires. Furthermore that the claim for lis pendens can at best be raised against the secondary matter. Review application being refused and award of DDPR being reinstated, subject to the direction of the Labour Appeal Court. 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 A0087/2012. The background of the matter is that Applicant was an employee of the 1st Respondent until his dismissal for misconduct. Unhappy with the dismissal, he referred a claim for unfair dismissal with the 2nd Respondent, coupled with another claim for unpaid overtime.
2. The matter was duly conciliated upon during which process, the unpaid overtime claim was resolved by settlement. The

matter then proceeded into arbitration only in respect of the unfair dismissal claim. At the commencement of the arbitration proceedings, 1st Respondent, who bore the evidentiary burden to prove the fairness of the dismissal, sought the indulgence of the learned Arbitrator to stay the proceedings to enable them to have the matter heard before the Labour Appeal Court, as a Court of first instance.

3. 1st Respondent reasons for the indulgence were that their key witness, one Thabo Khoboli was refusing to testify in the proceedings before the 2nd Respondent. Further that given the lack of power, on the part of the 2nd Respondent to subpoena a witness, they wished to apply before the Labour Appeal Court for an order to have the matter heard in that Court as a Court of first instance.
4. The indulgence was duly granted and parties were directed to bring feedback and for direction on the 10th October 2012. On the said date, parties appeared before the learned Arbitrator and reported that the application had just been made on that day and that they were waiting for a date of hearing. The learned Arbitrator then extended the indulgence with similar condition to the 1st November 2012. On the 24th October 2012, the application before the Labour Appeal Court was heard and finalized, and an award was made in favour of the 1st Respondent. Parties were then promised a full written judgment on the 26th of the same month. However, they only got it sometime in January of 2013.
5. On the 1st November of 2012, and contrary to the directive of the learned Arbitrator both parties failed to attend to appraise the learned Arbitrator with developments in the matter before the Labour Appeal Court. In an effort to extend the opportunity to be heard to both parties, the learned Arbitrator had the matter re-set for hearing on the 5th December 2012. Still on this day both parties failed to attend. The learned Arbitrator then proceeded to dismiss the matter for want of prosecution, citing among others His view that Applicant had lost interest in the matter, as he had failed to attend on the two stated occasions. It is this award that Applicant wishes to have reviewed, corrected and/or set aside.

6. We wish to note that this matter was not opposed and that Adv. Moshoeshoe, for 1st Respondent, was in attendance to confirm this. We intimated to parties that notwithstanding absence of opposition, it was still within Our discretion to either grant or refuse the application depending on its merits. Having heard Applicant's submissions, Our judgment follows.

SUBMISSIONS AND ANALYSIS

7. Applicant's case was that the learned Arbitrator had erred by dismissing his referral following the learned Judge Mosito's decision to hear the matter before the Labour Appeal Court as a Court of first instance. It was argued that in view of the decision of the Labour Appeal Court, the learned Arbitrator became estopped from making an award that negates the judgment of the Labour Appeal Court. The Court was referred to the cases of *Hohaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 (1) SA 394 (A)* and *RAS Liquor Licensing Board Area 11 Kimberly 1966(2) SA 232 (c) at 238*, for the principle of estoppel and in support of the argument.
8. The principle of estoppels provides that,
“.....someone who has been brought under an incorrect impression by another and who in reliance on that impression has acted to his detriment, may prevent the other from relying on the correct state of affairs before a court.” (see *Schalk Van Merwe etal; Contract General Principles, 1st Ed. Juta and Co.*, at page 23.
9. While We accept and acknowledge the dictates of the principle of estoppel, as appears in both the authorities cited by Applicant and those of Our own, they have been misapplied to the case *in casu*. In fact, the argument by Applicant and the dictates of the principle do not link at all in as much as Applicant has failed to demonstrate the said link. This is a simple misapplication of the law and the argument must simply fail. The decision of the Labour Appeal Court does not estop the learned Arbitrator from making the decision that he made. In fact none of the elements of estoppel are present in the circumstances of the matter *in casu*, unless estoppel is claimed in some way other than the one that is anticipated in law.

10. Applicant also argued that the learned Arbitrator acted *ultra vires* his powers by making an award in respect of a matter for which he had agreed to have transferred to the Labour Appeal Court. The Court was referred to the cases of *National Executive committee of the Basotholand Congress Party .v. Maholela Mandoro CIV/APN/69/2004*; *Nortje .v. Fransman 1975 (1) SA 532 (c)*; Baxter, in his book *Administrative Law, 1984*, at page 426, in support of the argument.
11. From the common cause facts as set out by Applicant, there is no point in time where the learned Arbitrator agreed to have the matter transferred to the Labour Appeal Court. Rather what happened is that Applicant sought indulgence to make an application to have the matter heard at the Labour Appeal Court as a Court of first instance. As a result, the question of *ultra vires* an agreement is out of the picture completely. The principle of *ultra vires* presumes that one acted outside their authority. *In casu*, that authority is alleged to be the agreement to have the matter transferred to the Labour Appeal Court. There being no such agreement, the argument must also fail.
12. We are of the view that the learned Arbitrator acted well within His powers in terms of section 227 (8) (b) of the *Labour Code (Amendment) Act (supra)*. Both parties failed to attend and he dismissed the matter and this is what the said section empowers Him to do. This section is couched 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 –
...
(b) dismiss the referral; or”
Consequently, the claim of *ultra vires* cannot sustain.
13. Applicant further argued that the matter was *lis pindens* when the learned Arbitrator resolved to proceed and dismiss same. It was argued that the requirements of *lis pindens* were present at the time that the award was made. These requirements were stated to be the following,
a) That there be pending proceedings between the same parties; and

b) That the proceedings be based on same cause of action and subject matter.

It was argued that the learned Arbitration erred in proceeding to hear a matter that was before another Court.

14. It is clear, from the common cause facts that after obtaining an order for the matter to be heard before the Labour Appeal Court as a Court of first instance, the matter was never transferred. Therefore, the matter was still within the jurisdiction of the learned Arbitrator when He resolved to proceed to hear it and it remains so to date. We wish to further comment that when the learned Arbitrator resolved to proceed to dismiss the matter, he was unaware that the Applicant had been able to obtain the order sought as well as his intentions with the order obtained.

15. Even assuming that the matter had been secretly initiated with the Labour Appeal Court, the learned Arbitrator cannot be faulted for what was not brought to his attention to consider. Over and above that, it could at best be argued that the matter was *lis pendens* before the learned Arbitrator and not the other way round as proceedings before Him were initiated first. *Lis pindens* cannot sustain in the sense sought. Rather there is a way that Applicant can obtain redress against what happened in the proceedings before the 2nd Respondent, which route is not by way of review, and certainly not before this Court.

AWARD

We therefore make an award as follows:

- 1) The review application is refused.
- 2) The award remains in force until otherwise directed by the Labour Appeal Court.
- 3) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF FEBRUARY, 2015.

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

MR. MATELA

I CONCUR

MRS. RAMASHAMOLE

I CONCUR

FOR APPLICANT:

ADV. LEPHUTHING

FOR 1st RESPONDENT:

ADV. MOSHOESHOE