

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/69/2014  
A0235/2013**

**IN THE MATTER BETWEEN**

**SINOHYDRO CORPORATION LTD (PTY)**

**APPLICANT**

**AND**

**HLALELE RALIENYANE  
DDPR**

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

---

**JUDGMENT**

---

*Application for review of arbitration award. Applicant having raised four grounds. Applicant claiming that record is incomplete; that decision of arbitrator is unjustified, that Arbitrator awarded both compensation and reinstatement; and that Arbitrator awarded reinstatement where circumstances did not permit. Court not finding merit in all grounds raised. Court further finding that some of the grounds are appeal disguised as review as they challenge the decision of the arbitrator and not the procedure for reaching the aid decision. Court refusing 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 A0235/2013. The brief background of the matter is that 1<sup>st</sup> Respondent was an employee of Applicant until he was dismissed for misconduct. He then referred a claim for unfair dismissal with the 2<sup>nd</sup> Respondent. An award was thereafter issued in his favour, wherein Applicant was ordered to reinstate him without loss of wages, in terms of section 73 of the *Labour Code Order 24 of 1992*. It is this award that Applicant wishes to have reviewed, corrected and/or set aside.

Three grounds of review have been raised on behalf of Applicant, and having heard parties, Our judgment follows.

### **SUBMISSIONS AND ANALYSIS**

2. Applicant argued that the record of proceedings in arbitration proceedings before the DDPR is incomplete contrary to Regulation 30 of the *Labour Code (DDPR) Regulations of 2001*. It was argued that the record does not reflect the cross examination of Applicant's witness, one Mr. Xiao Bing. It was added that Mr. Xiao Bing had led evidence under cross examination that reinstatement was not practical. It was further argued that the record, on account of its incompleteness, does not reflect the parties' arguments on costs.
3. It was submitted in the case of *Lesotho Precious Garments v DDPR & Others LC/REV/24/2012*, the Labour Court held that an incomplete record warrants interference with the decision made and that such a matter must be remitted to be heard *de novo*. Further reference was made to the case of *Letšeng Diamonds (Pty) Ltd v DDPR & Others LAC/REV/111/2015*, to the effect that the Labour Appeal Court granted a review on account of an incomplete record. It was prayed that in the same vein, this Court remit this matter to be retried.
4. In answer, 1<sup>st</sup> Respondent submitted that Applicant has not shown the materiality of the evidence alleged to have been omitted from the record. It was argued that this being the case, this Court cannot review this matter solely on that basis. It was added that while the *viva voce* record may have omitted that evidence, the reasons advanced by Applicant for impracticality of reinstatement have been considered and disqualified by the learned Arbitrator, at page 9 of the arbitration award.
5. While We admit that Regulation 30 of the *Labour Code (DDPR) Regulations (supra)* requires that a complete record be kept, it is not in every instance of an incomplete record where this Court will order remittal for a rehearing. In so saying, We are simply acknowledging the requirements of this Regulation and the authorities cited by Applicant in support of this argument.

However, We note that these suggested approach is not a panacea for every incomplete record situation. The discretion is wide.

6. We say this because *in casu*, Applicant does not deny that what is reflected on page 9 of the arbitration award is its evidence of impracticality. It is trite law that what is not denied is deemed to have been accepted as the true and correct position (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242*). According to the learned Arbitrator, Applicant gave three reasons for impracticality of reinstatement and these were indeed considered and dismissed as being insufficient to justify why an award of reinstatement may not be made. It is thus Our view that the mere omission of this evidence in the transcribed record, does not warrant interference, more so where the evidence is reflected in the award, considered and disqualified without any challenge to same by Applicant. Therefore, this argument fails.
7. About the omission of arguments for costs in the record, 1<sup>st</sup> Respondent answered that they are reflected in the arbitration award at pages 9 – 10. He argued that what is reflected as parties arguments in these pages, has similarly not been challenged. It was argued that in the light of the circumstances, and in the same vein as in the case of the argument on impracticality of reinstatement, the omission does not warrant interference with the award.
8. We have gone through the referenced pages of the arbitration award and do confirm that there is a record of parties' arguments as to costs, which record has not been challenged by Applicant. This being the case, We maintain Our attitude in addressing Applicant's argument on the previous point of omission of evidence, on impracticality of the reinstatement of 1<sup>st</sup> Respondent. Consequently, this point also fails.
9. Applicant also argued that the learned Arbitrator made an award of costs for two days when the matter was only postponed once. It was argued that the two days award was inflated in as much as the day two award is unjustified. In answer, 1<sup>st</sup> Respondent submitted that the matter was

postponed on two occasions on account of Applicant. It was argued that this was the basis of the two day award of costs. It was submitted that the matter was first postponed on the 19<sup>th</sup> November 2013 and again on the 13<sup>th</sup> February 2014. The Court was referred to page 13 of the record in support. It was argued that the learned Arbitrator was justified in Her award.

10. We have gone through page 13 of the record of proceedings and wish to confirm that it is true that the matter was postponed twice. In terms of the record, at page 13,  
“On the 19<sup>th</sup> November 2013 and on the 13<sup>th</sup> February the matter was supposed to have proceeded but Mr. Xiao Bing was not here, Mr. Sekonyela asked for the matter to be postponed,.....”
11. This being the case, there is a basis for the award of two days as contrary to Applicant suggestion, there was more than one postponement. Over and above the lack of merit in Applicant’s argument, We are also of the view that this is an appeal and not a review ground, as it challenges the decisions of the learned Arbitrator to award two days costs. Consequently, We are fortified in Our decision to dismiss this argument.
12. Applicant further claimed that the learned Arbitrator had erred by awarding both reinstatement and compensation. It was argued that this is contrary to section 73 of the *Labour Code Order (supra)*, in that compensation is awarded in place of reinstatement and not with it. The Court was referred to page 11 of the arbitration award under the heading “Award,” specifically under (a) and (c).
13. 1<sup>st</sup> Respondent answered that it is inaccurate to suggest that both reinstatement and compensation were awarded. It was submitted that in the referenced portion, the learned Arbitrator awarded reinstatement and lost wages and not compensation. It was argued that the learned Arbitrator was right in Her approach as lost wages are ancillary to the award for reinstatement in terms of both section 73 of the *Labour Code Order (supra)* and the decision of this Court in *Standard Lesotho Bank v Raphael Mphizulu LC/REV/87/2011*.

14. We have also gone through the referenced portion of the arbitration award and do confirm, as 1<sup>st</sup> Respondent has put, that the learned Arbitrator only awarded reinstatement and lost wages as opposed to reinstatement and compensation. This is reflected as such,  
*“(a) The respondent company is hereby ordered to reinstate applicant in accordance with section 73(1) with effect from the 1<sup>st</sup> August 2014;*  
...  
*(c) The respondent company is further ordered to pay an amount of M75,067-86 to applicant comprising lost wages....”*
15. Clearly, nothing touches on compensation in the award and as such the argument cannot sustain. We wish to add that it is accurate that lost wages are ancillary to the award for reinstatement and therefore that it is proper to award them with reinstatement, as the learned Arbitrator did.
16. Lastly, Applicant claimed that the learned Arbitrator awarded reinstatement where the circumstances did not permit. It was argued that the Applicant had led evidence of impracticality and that notwithstanding the learned Arbitrator awarded the reinstatement of 1<sup>st</sup> Respondent. It was argued that this was a grave irregularity warranting the review of the award. The Court was referred to page 12 of the record where Applicant witness testified that reinstatement would not be accepted.
17. 1<sup>st</sup> Respondent answered that when asked to comment on the prayer of 1<sup>st</sup> Respondent to be reinstated, Applicant simply replied that it would not be accepted, without stating the circumstances that make reinstatement impractical. It was argued that in law, it is the obligation of the employer to demonstrate impracticality and having failed to do so, the learned Arbitrator was justified in awarding same. The Court was once more referred to the case of *Standard Lesotho Bank v Raphael Mphhezulu & Another (supra)*, in support.

18. We have perused the referenced portion of the record of proceedings. The following is recorded'

*“Respondent representative: Would you like to take that paper from the witness. Mr. Xiao-Bing the applicant had just claimed that he be reinstated, what you can say about his reinstatement?”*

*Respondent witness: Respondent would not accept the reinstatement.”*

19. Evidently, no justification was given to demonstrate the impracticality of reinstatement. As a result, the learned Arbitrator was right in Her award. Even if We were to consider the evidence of impracticality that is alleged to have been omitted in the record of proceedings, but considered in the award, We are of the view that the learned Arbitrator has reasoned Her conclusion and has thus not committed any irregularity. Consequently, this point also fails.

### **AWARD**

We therefore make an award as follows,

- 1) The review application is refused.
- 2) The arbitration award in referral A0235/13 is reinstated.
- 3) The said award must be complied with within 30 days of issuance herewith.
- 4) No order as to costs.

**THUS DONE AND DATED IN MASERU ON THIS 11<sup>th</sup> DAY OF FEBRUARY, 2015.**

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

**MR. KAO**

**I CONCUR**

**MR. MOTHEPU**

**I CONCUR**

**FOR APPLICANT:  
FOR 1<sup>st</sup> RESPONDENT:**

**ADV. SEKONYELA THANTSI  
MR. HLALEFANG SEOAHOLIMO**