

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/08/2011
A0696/2010

IN THE MATTER BETWEEN

LAMBERT TAPOTSA MPHUTHING

APPLICANT

AND

SUN INTERNATIONAL (PTY) LTD
DDPR

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

Application for review of arbitration award. Applicant having raised three review grounds. Court only finding merit in one ground. Court finding that determination of common cause facts does not eliminate the right of parties to argue the matter, unless the right is specifically waived. Review being granted and matter being remitted to be heard de novo. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitral award in referral A0696/2010. The brief background of the matter is that Applicant was an employee of the 1st Respondent until his employment terminated by resignation. Following his termination and refusal by the 1st Respondent to pay him severance pay, Applicant referred his claim with the 2nd Respondent.
2. Subsequent to the referral, the matter was then conciliated upon but without success. Before the matter could be arbitrated upon, the learned Arbitrator *mero motu* raised a jurisdictional concern with parties. His concern was brought by the certificate of exemption that 1st Respondent had relied

upon, during conciliation to deny liability and therefore to refuse to make the requested payment to Applicant.

3. Having raised this jurisdictional concern, the learned Arbitrator together with parties determined facts which were common cause. With these facts, the learned Arbitrator then informed parties that He would use them to determine if He had jurisdiction to proceed to determine the matter by arbitration. Thereafter, an award was issued wherein the learned Arbitrator had declined jurisdiction to hear the matter. It is this award that Applicant wishes to have reviewed and corrected. To be specific, Applicant wishes to be awarded severance pay in the sum of M84,383.38, if successful in the review. We then directed parties to address Us and following is Our judgment.

SUBMISSIONS AND ANALYSIS

4. Applicant has raised three review grounds. Firstly, he claims that the learned arbitrator erred by admitting to have jurisdiction over the dispute, only to later change to claim that He does not have it. The Court was referred to paragraph 2 of the arbitration award, where the learned Arbitrator determined that he had jurisdiction, and to the award where He later claimed not to have it. It was argued that this is a grave irregularity that warrants interference with the arbitral award.
5. In answer, 1st Respondent submitted that jurisdiction of the Directorate of Dispute Prevention and Resolution (DDPR), depends on the way that a claim is framed. It was argued that a claim for severance payment falls within the jurisdiction of the DDPR in terms of section 226 (2) of the *Labour Code (Amendment) Act 3 of 2000*. Further that Applicant was trying to use the claim that falls within the jurisdiction of the DDPR to invalidate the exemption certificate which function lies with the Labour Appeal Court. It was argued that having realised this, the learned Arbitrator declined jurisdiction.
6. We wish to note that We concede that the nature of the claim, including the phrasing, determines which court has jurisdiction. For instance a claim for discrimination falls within the jurisdiction of the Labour Court while a claim that

involves inconsistency, particularly in unfair dismissal cases, falls within the jurisdiction of the 2nd Respondent yet both claims share a similar character of unequal treatment.

7. We therefore agree with 1st Respondent that the claim was phrased such that it fell within the jurisdiction of the 2nd Respondent. In terms of section 226(2)(c) as amended by section 4 of the Labour Code (Amendment) Act 5 of 2006, the DDP has jurisdiction to resolve by arbitration, *“a dispute concerning underpayment or non-payment of any monies due under the provisions of this Act;”* Therefore a claim for unpaid severance pay clearly fell squarely within the provisions of this section.

8. However, a decision maker is allowed in law to decline jurisdiction over a matter once s/he realises that whereas they thought that they had jurisdiction, they in fact did not. The rationale behind the principle was stated in the case of *Lepolesa & others v Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd [2011] LSLAC 4*, where the Court relied on an extract from the authority of *CASA v Tao Ying Metal Industries & others 2009 (2) SA CC* in the following, *“... if this is not done, the result would be the decision premised on an incurrent application of the law. That would infringe the principle of illegality.”* This is why it is permissible in law that a jurisdictional point can be raised at any time even during the proceedings. As a result, there is nothing irregular in the determination of the learned Arbitrator.

9. Applicant’s second review ground is that the learned Arbitrator erred in determining a matter that was not arbitrated upon. He submitted that the learned Arbitrator did not allow parties to argue the matter but rather proceeded on the basis of agreed facts. Applicant referred to the case of *Tsakatsi .v. Lesotho Electricity Company (Pty) Ltd LC/REV/36/2008*, that before a decision is taken to decline jurisdiction, the Court must hear parties. 1st Respondent answered that there was nothing wrong with the approach of the learned Arbitrator. It was added that if Applicant felt otherwise, then he should have

objected to the approach which he did not. It was prayed that this point be dismissed.

10. We have gone through the authority of *Tsakatsi .v. Lesotho Electricity Company (Pty) Ltd (supra)*. While the facts and issues for determination are different from those *in casu*, the principle equally applies. In that case, the Court made the decision that before declining jurisdiction to hear and determine a claim filed out of time, a party affected must be heard. This is what was also expected of the learned Arbitrator, to allow parties to address him on jurisdiction before he decided to decline on it.
11. We wish to comment that it was wrong for the learned Arbitrator to equate the determination of common cause facts to having heard parties. The common cause facts determination only goes towards eliminating the need to lead evidence and no more. Parties still needed to be given the chance to make arguments to influence the decision the learned Arbitrator to find in their favour, unless that right was specifically and expressly waived (see *Motebang Ramahloko v Commissioner of Police & another C of A (CIV) 11/2008*). And this was not the case *in casu*. Consequently, the learned Arbitrator erred.
12. The last ground was that the learned Arbitrator's award is stamped 16/10/2010 when it also dated 14/12/2010. It was argued that the stamp presupposes that it was issued on that day yet the judgment that the learned Arbitrator relied upon was delivered on 26/10/2010, which was after its issuance. It was argued that this is irregular. 1st respondent answered that this is clearly a typographic or stamp error which cannot vitiate the award. It was added that the learned Arbitrator is not responsible for stamps and therefore that He cannot be held to a mistake by the person who handles stamps.
13. We are in agreement with 1st Respondent that this is clearly an error in stamping which cannot vitiate the entire award. We fail to find merit in the argument of Applicant including the inference that he is attempting to have drawn from the

incidences. It therefore does not take Applicant's case further. The point is without merit and stands to be dismissed.

COSTS

1st Respondent had prayed for costs. Among others It had claimed *mala fides* on the part of Applicant in bringing this case for review. Given Our finding, this prayer falls away and we decline to award costs.

AWARD

We thus make an award as follows:

- 1) The review is granted.
- 2) The matter is remitted back to the DDPR to be heard *de novo* before a different arbitrator.
- 3) The order must be complied with within 30 days of issuance herewith.
- 4) 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**

MRS. RAMASHAMOLE

I CONCUR

MR. KAO

I CONCUR

**FOR APPLICANT:
FOR 1ST RESPONDENT:**

**MR. MOSUOE
ADV. MPAKA**