

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/21/2015  
A0914/2014**

**IN THE MATTER BETWEEN**

**'MAMOSOTHO MOIMA**

**APPLICANT**

**AND**

**TFS WHOLESALE (PTY) LTD  
DDPR**

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

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**JUDGMENT**

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*Application for review of arbitration award. Only one ground of review having been raised - failure to apply mind. Matter being heard in default of 1<sup>st</sup> Respondent. Court finding in favour Applicant and granting the review. Matter being remitted to the DDPR for a hearing de novo before a different Arbitrator. Both sections 227(8) and 228A of the Labour Court being interpreted. Court restating the position that failure to apply a mind to relevant facts constitutes a reviewable irregularity. 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 A0915/14. Only one ground of review has been raised that the learned Arbitrator failed to apply Her mind to the law and facts and that led Her to making the wrong conclusion. The matter was heard in default of 1<sup>st</sup> Respondent.
2. The brief background is that Applicant was an employee of 1<sup>st</sup> Respondent until she was dismissed. Unhappy with her dismissal, she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly set down for conciliation and arbitration. On the first date of the hearing both Applicant and 1<sup>st</sup>

Respondent, were not in attendance but were represented by their representatives.

3. At the commencement of the proceedings, 1<sup>st</sup> Respondent representative applied for the dismissal of the referral on account of non-attendance of the Applicant in person. It had been argued on behalf of 1<sup>st</sup> Respondent that section 228A of the *Labour Code (Amendment) Act 3 of 2000*, required the presence of a *dominis litis* person in the strict sense, and not a representative. It was added that Applicant having failed to attend, the referral stood to be dismissed. The application was granted and the referral was dismissed.
4. It is this award that Applicant wishes to have reviewed, corrected and/or set aside. As earlier stated, the matter was heard in default of 1<sup>st</sup> Respondent, who had only filed its notice of intention to oppose and no further process thereafter. Having heard Applicant's arguments, Our judgment follows.

### **SUBMISSIONS**

5. Applicant's case is that the learned Arbitrator erred in failing to consider the submissions and explanation given by her representative, regarding her failure to attend the hearing. It was stated that it had been explained during the proceedings that Applicant was unable to attend because she had just recently found employment, and that she was attending to same.
6. It had also been argued on behalf of Applicant that conciliation could proceed without Applicant, as her representative had been fully mandated, and duly so, in terms of section 228A(1)(c) of the *Labour Code (Amendment) act (supra)*. It was argued that in terms of the said Act, a union official can appear on behalf of a party to the proceedings. The Court was referred to pages 3 to 4 of the record of proceedings in support of the above said.
7. It was argued that the learned Arbitrator failed to consider both the explanation given as well as the applicable law. It was added that as a result of Her failure to consider the two, the learned Arbitrator dismissed the matter in terms of

section 227 (8) of the *Labour Code (Amendment) Act (supra)*, which section did not even authorise Her to dismiss a matter where an Applicant party's representative was in attendance.

8. It was further submitted that in dismissing the matter, the learned Arbitrator caused undue prejudice to Applicant, which She could have avoided by simply postponing the arbitration proceedings. It was added that even then, this could only be done if conciliation, having been duly conducted, had failed to resolve the matter.

### **ANALYSIS**

9. We have gone through both the record of proceedings before the DDPR and the arbitration award. We do confirm that Applicant's representative did provide an explanation for failure of Applicant to attend the hearing, and did make submissions in reaction to the application for dismissal by 1<sup>st</sup> Respondent. We also confirm, as Applicant has stated, that the learned Arbitrator did not apply Her mind to the explanation given, as well as the submissions in support. In fact, We have found that they were not even considered at all.
10. In law, failure to either consider or apply a mind to facts constitutes a reviewable irregularity ( see *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*). This is more so where the facts not considered and/or given a thought, were material towards the decision given (see *Presitex Enterprise (Pty) Ltd v Soai Letsie and another LC/REV/162/2013*). *In casu*, the facts not considered and/or given a thought were material as they directly answered a claim for dismissal of the matter. Consequently, the learned Arbitrator erred in this regard.
11. We wish to comment that the provision of section 228A the *Labour Code (Amendment) Act (supra)*, do not require that an Applicant party appear in person in the strict sense, as suggested by the 1<sup>st</sup> Respondent. The section is couched as follows,  
“(1) *In any proceedings under this part (1) In any proceedings under this Part, a party to the dispute may appear in person or be represented only by -*

- (a) a co-employee;
- (b) a labour officer, in the circumstances contemplated in section 16(b);
- (c) a member, an officer of a registered trade union or employers' organization; or
- (d) if the party to the dispute is a juristic person, by a director, officer or employee....”

12. Clearly, the section elevates the status of an Applicant party's representative to that of an Applicant. This is particularly so where the presence of an Applicant party is not really required, as was the case *in casu*, at least for purposes of the conciliation of the matter. Consequently, the position suggested to the learned Arbitrator by the 1<sup>st</sup> Respondent is inaccurate, and cannot stand.

13. We wish to add that if the 1<sup>st</sup> Respondent contention were to be upheld, it would set a very ruinous precedent in law. It would mean that even in motion proceedings, where a party has already given evidence in an affidavit, they would have to be physically present even though their presence would not be necessary for that purpose.

14. We wish to further comment on the provisions of section 227(8) of the *Labour Code (Amendment) Act (supra)*. That section is couched as follows,

*“(8) 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.”*

15. While We concede that the provisions of section 227(8) of the *Labour Code (Amendment) Act (supra)*, vest the learned Arbitrator with the discretion to either dismiss, postpone or grant an award by default, such discretion must be exercised judiciously. This is signified by the use of the word ‘*may*’ in the section. Judicious exercise of discretion requires that the decision maker must consider all circumstances present and relevant to the matter, before making a decision. As We have shown earlier that not all facts and submissions were

considered, it cannot be said that the discretion to dismiss was judiciously exercised.

**AWARD**

We therefore make the following award,

- a) That the review application is granted.
- b) The matter is remitted to the DDPR to be conciliated upon and heard in arbitration should conciliation fail.
- c) That this order be complied with within 30 days of issuance.
- d) No order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 12<sup>th</sup> DAY OF OCTOBER 2015.**

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

**MR. MOTHEPU  
MISS LEBITSA**

**FOR APPLICANT:  
FOR RESPONDENT:  
ATTENDANCE**

**I CONCUR  
I CONCUR**

**MR. LETSIE  
NO**