

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/139/2014
J0064/2013**

IN THE MATTER BETWEEN

THIALALA SECURITY (PTY) LTD

APPLICANT

AND

**'MATSIETSI NTSIKI
LEHLOHONOLO LETŠELA
MOSIUOA LESESA
DDPR**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT**

JUDGMENT

Application for review of arbitration award. Three grounds of review having been raised. Court finding one ground sufficient to warrant the granting of the review. Court not finding it not necessary to consider other grounds. Court granting the review and correcting the arbitration award with terms. 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 J0064/2013. Three grounds of review have been raised on behalf of the Applicant. The matter was not opposed as Respondents formally withdrew same before Court.
2. The brief background of the matter is that 1st to 3rd Respondents were employees of Applicant until they were dismissed. Unhappy with the dismissals, they referred claims for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was heard in default of the Applicant before the learned Arbitrator Masheane. Thereafter, Applicant lodged an application for rescission.

The application was heard by Arbitrator Mofoka, who dismissed same.

3. Unhappy with the latter award, Applicant initiated review proceedings, wherein it sought the review and correction of the said award. As earlier indicated, three grounds were raised and argued unopposed. Having heard the submissions and arguments of Applicant, Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. The first ground of review is that the learned Arbitrator erred by hearing an application for the rescission of an award that was not heard by Her in default. It was submitted that the initial award was the result of a hearing before Arbitrator Masheane, while the award arising out of the rescission application was before Arbitrator Mofoka. The Court was referred to annexures A and B.
5. It was submitted that this is contrary to the *Labour Code (Directorate of Dispute Prevention and Resolution) Regulations of 2001*. Specifically, the Court was referred to Regulation 29 (3) and (4) of same. It was argued that in terms of these Regulations, an award *shall* only be rescinded by an arbitrator who granted or issued it. Further that an exception lies where the Director has shown good cause for the deviation.
6. It was submitted that *in casu*, the Director has not shown any cause why another arbitrator was appointed to hear the rescission of a matter heard by another arbitrator. It was added that what is affront is the fact both arbitrators in question remain in employment of the DDPR. The Court was invited to take judicial notice of that.
7. It was submitted that on this ground alone the arbitration award stood to be reviewed and corrected, by granting the rescission application. In support of the prayer, it was submitted that in the rescission application proceedings, Applicant had given evidence that it did not receive any process in these proceedings until the arbitration award. It was submitted that this evidence was not challenged.

8. It was added that the above notwithstanding, the learned Arbitrator, on own motion and outside the proceedings, made own investigations to negate the evidence of applicant. It was submitted that on the basis of Her findings, the learned Arbitrator found the explanation given on behalf of Applicant not reasonable. The Court was referred to pages 5 and 6 of the record of proceedings before the DDPR.
9. It was further submitted that the learned Arbitrator relied on Her own findings, which findings were not put to Applicant to react to, before a decision was made. It was argued that in so doing the learned Arbitrator did not only act unfairly towards Applicant, but also descended into an arena of dispute and relied on facts not subjected to challenge to dismiss the Applicant's case. The Court was referred to the arbitration award at paragraph 5.
10. We have gone through the awards, annexures A and B, and do confirm that one is the default award while the other is a rescission award. We also do confirm that the initial default award was issued by Arbitrator Masheane, while the latter was issued by Arbitrator Mofoka.
11. We also confirm that in terms of the *Labour Code (DDPR) Regulations (supra)*, an award can only be rescinded by an arbitrator who made it, unless there are special circumstances that warrant a deviation. We wish to add that the circumstances must be legal and not social or otherwise. The provisions of the *DDPR Regulations* in issue are couched as follows,
"29 (1)...
(2)...
(3) *Subject to sub-regulation (4) the arbitrator who issued the arbitration award or ruling shall hear the application for variation or rescission.*
(4) *The Director may, on given cause shown, appoint another arbitrator to hear the application.*"
12. Evidently, sub-regulation (3) has been breached and this is a procedural irregularity. The breach is also not sanctioned by sub-regulation (4), as there is neither any document that contains the reasons against which the decision to have a

different arbitrator hear the rescission, nor any claim or statement in the arbitration award to that effect. Consequently, this is one irregularity that warrants a review.

13. Regarding the relief sought, which is to grant the rescission application, We find for Applicant. We have been shown evidence on the record of proceedings before the DDR that Respondents did not contest the evidence of Applicant. In fact they stated their desire to have the matter reopened. This is clear from pages 5 - 6, as referenced by Applicant.
14. We wish to comment that We agree with Applicant that the learned Arbitrator Mofoka descended into the arena of dispute by making Her own findings, which were outside the proceedings and not put to Applicant, to reach Her conclusion. As a result, had She not unilaterally engaged in this exercise, She could have been inclined to grant the rescission. We say this because the explanation given by Applicant was not only accepted by Respondents, but they indicated their desire to have the matter reopened.
15. On the strength of this ground alone, We see no need to even proceed to consider other grounds of review. It is Our view that it would only be an academic exercise, for which this court was not established. We therefore proceed to make Our award.

AWARD

We therefore make an award as follows,

- a) That the review is granted.
- b) The award is corrected as follow,
 - (i) That the rescission application is granted; and
 - (ii) That the matter be heard in the merits.
- c) That this order be complied with within 30 days of issuance herewith.
- d) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 9th DAY OF OCTOBER 2015.

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

**MR. KAO
MRS. RAMASHAMOLE**

**I CONCUR
I CONCUR**

**FOR APPLICANT:
FOR RESPONDENT:
NTEMA**

**ADV. NTAOTE
ADV.**