

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/43/2013
A0665/2012**

IN THE MATTER BETWEEN

NKOMO MOHLAPISI	1st APPLICANT
'MATELLO MAPURU	2nd APPLICANT
MOJABENG TOMO	3rd APPLICANT
MOLIEHI THIBELI	4th APPLICANT
TAHLEHO MAKAAKA	5th APPLICANT
MOKUANE HATLA	6th APPLICANT
LEHLOHONOLO LEHOKO	7th APPLICANT
TEBOHO NTŠOLI	8th APPLICANT
TEBELLO SEJAKE	9th APPLICANT
MANTALE NKANE	10th APPLICANT

AND

EXAMINATION COUNCIL	1st RESPONDENT
DDPR C/O MR. KALAKE T.	2nd RESPONDENT

JUDGMENT

Application for review of arbitration award. Applicant claiming that arbitrator ignored evidence. Court finding that evidence was ignored but that it does not render the award reviewable. Court refusing the review application and further not making an award as to costs.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0665/2012. The brief background of the matter is that Applicants were employees of 1st Respondent, at least as at the time of the referral of the matter. They had referred claims for underpayments with the 2nd Respondent. The matter was duly heard and an award later issued dismissing

their claims. It is this award that Applicants wish to have reviewed, corrected and/or set aside. Only one review ground has been raised on behalf of Applicants and having heard parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

2. Applicant's case is that they led evidence showing how much they earned and what others who did the same job as them earned. It was argued that this was evidence of underpayments which the learned Arbitrator ignored. It was submitted that had the learned Arbitrator considered this evidence in His award, He would have found that the Applicants had been underpaid. The court was referred to page 23 of the record of proceedings, where Applicants had given evidence that others earned M4000 and M5000 per month. The Court was further referred to page 25 the record reflects, where one of the Applicants testified that they earned M78.00 per day. It was argued that with these pieces of evidence the learned Arbitrator should have found that there were underpayments.
3. The Court was further referred to page 6 of para 13 of the arbitration award where the Arbitrator stated that there was no evidence yet same was presented before him. It was added that over and above the evidence shown on pages 23 and 25, there was also the referral document which the learned Arbitrator was enjoined to consider. It was prayed that on those basis, the review be granted.
4. 1st Respondent answered that Applicants did not present sufficient evidence to enable them to obtain the relief sought. It was argued that Applicants merely claimed to have earned M78.00 while others earned M4000.00 and M5000.00. It was added that they did not substantiate or attempt to demonstrate how that amounted to an underpay. Further that the learned Arbitrator could not have been expected to consider the referral it was not part of the evidence of parties but merely their claim that they had to prove in the proceedings.
5. It was further argued that in law, it is the obligation of an Applicant party to lead evidence to sustain their claim. It was

submitted that *in casu*, Applicants have failed on this obligation. The Court was referred to the case of *Ministry of Public Service & Another v Masefabatho Lebona C of A (CIV) 06/2012*, where the court held that in a claim for underpayments, it is the obligation of parties to prove their claim. It was prayed that this Court adopt a similar approach and dismiss this application, particularly because at page 6 of the award, specifically at paragraph 13, the learned Arbitrator had stated there was no sufficient evidence.

6. We have considered the referenced portion of the record by both parties. At page 23, a question is posed to one of the applicants and she answers as thus,

“Mr. Mabula : How much does a clerk earn now?
Ms. Makaaka : They earn about M4000 and M5000”

At page 25, the following is recorded,

“Mr. Mabula: I put it to you that M78 is above the minimum wage as prescribed by law of the clerk.
Ms. Makaaka: I do not agree because I do not know.”

7. We wish to first note that as a matter of procedure before courts of law, the only way to determine if evidence has been considered is if the decision maker makes mention of same in the analysis of evidence. Therefore, where evidence is not mentioned, then that is sufficient to serve as proof that it was not considered. *In casu*, We have perused the arbitration award and have discovered that there is nowhere where the above evidence has been mentioned. We therefore agree with Applicants that it has not been considered.
8. We have often stated before that the mere fact that evidence was ignored is not sufficient to justify the granting of a review application. One must go further to show the effect of the irregularity complaint of on the decision made. To answer this question, We must consider the probative effect of the evidence of Applicant which has not been considered on the conclusion made. Put differently, if considered, would the learned Arbitrator have made a different conclusion, as Applicants argue (*See J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*). If the answer is in the

affirmative, then the conduct of the learned Arbitrator will not only have amounted to an irregularity but one that is reviewable.

9. Applicants have claimed that if considered this evidence would lead to the conclusion that there were underpayments. On the contrary, the suggested conclusion would not sustain. The mere fact that Applicants were said M78 does not make it an underpayment. There would have to be more facts to substantiate that, which facts have not been given as evidence. We therefore agree with both the learned Arbitrator and 1st Respondent that Applicants have failed to give sufficient facts to sustain their claims.

10. We also wish to note that We accept and acknowledge the authority of *Ministry of Public Service & Another v Masefabatho Lebona (supra)*, and accordingly adopt the attitude taken there in these proceedings. We also wish to add that We agree with 1st Respondent that even the referral would not have advanced the case of Applicants in any way. The referral is a document that states the claim and not the evidence of parties. Therefore, notwithstanding its presence on record, parties are still expected to lead evidence in support of their claims, including evidence contained in the referral document so that it may be tested.

AWARD

We therefore make an award as follows:

- 1) The review is refused.
- 2) Award in A0665/12 remains in force.
- 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. MOTHEPU

I CONCUR

MR KAO

I CONCUR

**FOR APPLICANTS:
FOR 1st RESPONDENT:**

**ADV. 'NONO
ADV. RAFONEKE**