IN THE LABOUR COURT OF LESOTHO

LAC/REV/153/05
LC/REV/436/06

HELD AT MASERU

IN THE MATTER BETWEEN

UNITED CLOTHING **APPLICANT**

AND

PHAKISO MOKOATSI **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date of hearing 07/08/07
Delivered: 24/08/07
Review of DDPR award - Evidence - Burden of proof - Duty to begin- Arbitrator calling on the defendant to begin - Unfair dismissal – Evidentiary burden shifts to the employer - The rule is he who makes positive assertion or he who seeks to alter status quo or pleads special defence assumes the evidentiary burden to prove – Evidence - Employer discharging evidentiary burden and proving that the dismissal was fair – Employee not being able to controvert the employer's testimony - Employee's own testimony contradictory - Arbitrator's failure to consider abundance of evidence adduced by applicant constituting irregularity – award reviewed and set aside.

1. This is an application for the review of the award of learned arbitrator Monoko dated 17th October 2005. In that award the learned arbitrator had found the dismissal of the 1st respondent substantively and procedurally unfair and ordered that he be

compensated by payment of eight months wages in lieu of reinstatement. The employer (applicant) has applied for the review and setting aside of that award.

2. The facts giving rise to this matter are in the nutshell that, the 1st respondent was employed by the applicant company as a wages clerk. In that position he was responsible among others, for issuing casual employees with identity cards and paying their wages.

3. On the 11th August 2005, 1st respondent appeared before a disciplinary hearing in which he was charged of gross negligence by failing to pay one 'Matseliso Molaoli, a casual employee of ID No. 2828, who had worked for the company for almost two (2) months and did not report the matter to his head of department. The 1st respondent was found guilty as charged and on the 19th August he was dismissed. The 1st respondent filed referral no. A0739/05 with the DDPR challenging his dismissal on a number of grounds.

4. Firstly, the 1st respondent complained that he was disciplined and dismissed for a fault that is not his. Secondly, he stated that contrary to the charge which he was advised of, he was found guilty of writing a requisition and that is what led to his dismissal. He complained further that the person who recorded the proceedings was also the representative of the personnel division and she did not write most of the things that were said. He also complained that the complainant was also the one who signed his letter of dismissal. Finally he complained that the presiding officer refused to allow him to be represented by his co-employees. (See pp 5-6 of the record of DDPR proceedings).

5. Despite 1st respondent having outlined as herein before stated, what his dissatisfaction was, the learned arbitrator did not invite him to lead evidence to substantiate his complaints. He instead called on the applicant herein (the respondent before the DDPR) to adduce evidence to prove that the dismissal of 1st respondent, (applicant before the DDPR) was fair. The respondent (applicant herein) adduced the evidence of three

witnesses. After the close of the case of the applicant the respondent tendered evidence of himself alone.

6. After hearing evidence the learned arbitrator concluded that on the balance of probabilities, he believed the 1st respondent's version that he committed no wrong for which he could have been dismissed. He based his finding on two items of evidence that the employee who was allegedly not paid on time had not been employed together with the other seven co- workers in her line. He found that for that reason it was understandable that her wages be paid at a later time than the others. The learned arbitrator went further and said that the lady who was allegedly not paid on time had no justifiable cause for complaint when her wages were paid later than others. He concluded by upholding 1st respondent's main defence that if there was any fault for which anyone was to carry a blame such blame must be carried by the finance manager Mr. Chirag.

7. The learned arbitrator also found that the 1st respondent was wrongly denied representation by his co-worker. He further found that it was irregular for the recorder of the minutes of the proceedings to have been taking the minutes and at the sametime giving evidence against the 1st respondent. It was on these basis that the learned arbitrator concluded that the dismissal of the 1st respondent was both substantively and procedurally unfair.

8. The applicant herein has sought the review of that award of the arbitrator on the following grounds:

   a) The arbitrator conducted the proceedings irregularly by making the employer to prove its case in defence before the employee could state or prove his case.

   b) The arbitrator erred by considering 1st respondent's claims whereas he had no jurisdiction to do so as the 1st respondent had claimed notice pay and severance pay, over which the arbitrator had no jurisdiction.

c) The arbitrator failed to consider the abundance of evidence brought by the applicant.

9. At the start of the proceedings Ms. Sephomolo for the applicant contended that the record is incomplete in that a cassette containing the last part of the cross-examination of the 1st respondent and submissions is missing. It was further pointed out that the annexures used at the arbitration proceeding had not been filed with the record by the DDPR.

10. Mr. Mochochoko on behalf of the 1st respondent pointed out that the part of the record that is missing is not material because no reliance is going to be made on it. Ms. Sephomolo conceded, but observed that they would be prejudiced by the absence of the minutes of the disciplinary hearing which they would want to rely upon. Parties agreed that since the minutes are common cause anyone of them who has a copy can hand it in and if both sides agree on its authenticity it will be incorporated as part of the record. After counsels liaised and agreed that the copy in the possession of Ms Sephomolo was an authentic copy, it was handed in by consent and it formed part of the record.

11. At the start of her submissions Ms Sephomolo indicated that she was abandoning ground 5.2 of her grounds of review concerning jurisdiction of the DDPR in respect of notice and severance pay. She was going to rely on only two grounds pertaining to the onus of proof and failure to consider applicant's evidence.

12. Ms Sephomolo referred to p.7 of the record where the learned arbitrator stated that "….in the case of unfair dismissal the respondent has a legal duty to prove the fairness of the dismissal and therefore the respondent has to start giving evidence." She averred that it was improper and irregular that the applicant was made to prove its defence before the 1st respondent substantiated his own. She submitted that it was prejudicial for the employer to have been required to lead evidence first to prove what the employer was disputing.

13. It is not correct that the employer was made to prove its defence; for the defence if any from the applicant would be in relation to the complaints that the 1st respondent listed. The employer was called upon to prove that the dismissal of the 1st respondent was fair and not to answer the allegations of the 1st respondent which he was himself still called upon to substantiate and the employer only acted in rebuttal to defend itself. The question which we should answer is the one of calling on the employer to prove the fairness of the dismissal because that is what the learned arbitrator did in this case.

14. It is not clear from the learned arbitrator's award where he derives the rule that in unfair dismissals the employer has the legal duty to begin. As it has been stated in P.J. Schwikkard *et al* Principles of Evidence 2nd Ed. P.536 onus of proof "…is the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial that the claim or the defence as the case may be should succeed." This is the concept of the onus of proof in its true and original sense and it has been referred to as "the overall onus" by Oglive-Thompson JA in Brand .v. Minister of Justice 1959(4) SA712(A) at 715. (See also Schwikkard et al supra at p.539).

15. The onus of proof must not be confused with the evidentiary burden, which as Schwikkard supra puts it at p.525 "refers to one party's duty to produce sufficient evidence for a judge to call on the other party to answer." That is merely a procedural duty that is imposed upon one or the other of the parties to enable the trial to be conducted effectively and it may shift from one litigant to another in the course of the trial (see p.540 of Schwikkard supra).

16. The guiding principle concerning the duty to adduce evidence is aptly captured by the often quoted passage from the judgment of Davies AJA in Pillay .v. Krishna 1946 AD946 at pp 951-2 where the learned judge of appeal stated:

> *"If one person claims something from another in a court of law then he has to satisfy the court that he is entitled to it.*

> *But there is a second principle which must always be read with it. Where the person against whom the claim is made is not content with mere denial of that claim but set up a special defence, then he is regarded* ***quoad*** *that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.*
> *….But there is a third rule which Voet states as follows: He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute….. The onus is on the person who alleges something and not on his opponent who merely denies it."*

Schwikkard et al at p.538 summarises the above passage in these words:

> *"The test for determining who bears the burden of proof as set out by Pillay .v. Krishna is beguiling, for it rather begs the question which of the parties can properly be said to be "asserting" or "denying" as the case may be. Netherless it usefully encapsulates the guiding principle which is that he who makes a positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo. Most often that will be the plaintiff and the defendant will bear the burden of proof only in relation to a special defence (emphasis added).*

17. These passages in particular the emphasized parts make it abundantly clear why some jurisdictions such as South Africa have long made it a tradition that in unfair dismissal cases the evidentiary burden to prove the fairness of the dismissal lies with the employer and that the employer has the duty to begin in relation to that burden. The rationale is simple, by terminating someone's employment the employer is interfering with the status quo and he must justify why he is doing so. On the other hand by disputing the dismissal the employee is infact the one who is in denial, that the dismissal is fair. The employer being the one who asserts the positive namely; that the dismissal is

fair he is generally the one on whom the burden of proof will lie. Alternatively by claiming that the dismissal is fair the employer is making a positive assertion.

18. Indeed even in cases where the employer seeks to deny that an employee has not been dismissed and pleads a special defence that the employee resigned the burden shifts to the employer to prove the alleged resignation. (See Moodley .v. Seasand Investments (1989) 10 ILJ 1129. This explains why the employee will retain the evidentiary burden to prove special defenses that he pleads to counteract the employer's allegation that the dismissal was fair. In hoc casu the 1st respondent shouldered the evidentiary burden to prove allegations he made to challenge the fairness of the dismissal. Against the backdrop of this analysis we are unable to find that the applicant was prejudiced by the arbitrator's style or approach in these proceedings for each party shouldered the evidentiary burden that rested on it.

19. The question that next follows is whether the applicant through its representatives at the arbitration discharged the burden of proof and indeed the overall onus that lied on it to convince the learned arbitrator that the dismissal was fair. This question is but the flip side of the coin in regard to the second ground of review which was that the learned arbitrator failed to consider the abundance of evidence adduced by the applicant. To be able to answer these questions we will need to traverse the evidence of the parties as contained in the record of the arbitration proceedings.

20. On the side of the applicant evidence was led by the Assistant Personnel Manager Mrs. Mamotsoahae Taaso, the complainant, Ms 'Matseliso Molaoli and one Malekaota also an employee of the applicant. PW1 Mrs. Taaso testified first and she said that the 1st respondent was charged for failing to pay 'Matseliso Molaoli her wages on time. She averred that Matseliso was a casual employee who was employed from 23rd June 2005 to 25 July 2005.

21. She averred further that the concerned employee was a machinist working on line four. According to her contract as well as the policy of the company the said employee was supposed to have been paid her wages on the 15/07/05. The employee's name had been on the list from Personnel Department showing that she had to be paid on that day in terms of her contract. The 1st respondent had himself inserted the employee's name in the contract which served as a requisition for payment of wages of the employees listed therein. Despite all that the 1st respondent had failed to pay 'Matseliso as he should have done so.

22. On the 29th July 2005, 'Matseliso reported to the 1st respondent that she had not been paid her wages, PW1 testified. She stated further that, not only did 1st respondent fail to help her as he should have, but his response was rude and he failed to report the problem of the employee to his supervisor in the wages department. As if that was not enough, on the 5th August 2005, the 1st respondent paid out 'Matseliso Molaoli's wages to some other person not entitled to them. She concluded by stating that it was infact not only 'Matseliso Molaoli's wages that were not paid on time. Even after the 1st respondent was dismissed on the 19th August 2005, the applicant continued to receive calls from the Labour Department enquiring about employees whose wages had not been paid on time.

23. The 1st respondent was invited to cross-examine PW1. He initially said he had no cross-examination to make, but after he was warned about the danger of letting the applicant's testimony to go unchallenged he did ask some questions. In his cross-examination, the 1st respondent sought to challenge the correctness of the minutes on the ground that PW1 being the person who recorded them also took part in the case. PW1 was adamant that the record was correct. He further asked if the person he gave 'Matseliso's wages to on the 5th August 2005, was not entitled to be paid. PW1 again answered that she was supposed to be paid but with her own identity card number and not that of 'Matseliso Molaoli.

24. Applicant's second witness was 'Matseliso Molaoli herself. She testified that she was employed as a casual employee from the 23rd June 2005. She averred that when she was engaged she was engaged alone. It turned out that there was a shortage of one machinist in line four. She was sent to that section so that the number of machinists would increase from seven to eight. The 1st respondent himself included her name in the contract which would enable her to be paid her wages in accordance with it.

25. She averred further that the 1st respondent issued her with ID Card No. 2828. She stated further that she worked without any pay until the 29th July 2005, which was supposed to be her last day of work. She approached the 1st respondent to tell him that she had not been paid. He informed her that her cheque was not among those he had. He asked her to come back on Monday 1st August 2005.

26. On Monday the 1st respondent said he still did not have her cheque. He said she must come back on Friday 5th August 2005. On that Friday he again told her he still did not have her cheque. She then informed him that she did not have money for transport. Mr. Melcho who is 1st respondent's supervisor lent her M50-00 from his own pocket.

27. On Monday 8th August 2005, PW2 says she met 1st respondent at the gate. He sent her to Personnel Department to go and explain her plight. At Personnel she met Mr. Masasa who informed her that in terms of the contract she ought to have been paid her wages on the 17th July 2005, together with her colleagues in line four. This date differs slightly from that given by PW1 which she said was the 15th July. But nothing much turns on this discrepancy as there is no evidence that 1st respondent challenged it. Mr. Masasa contacted 1st respondent by phone. He promised to come but never did.

28. On the afternoon of that day PW2 says she went back to Mr. Masasa. He sent her to 1st respondent's office and he in turn sent her back to Mr. Masasa. Mr. Masasa again called his (1st respondent's office), but he was not in the office until 5.00 pm

when PW2 had to leave for home, still without her wages. The following day she went back to Personnel and Mr. Masasa called 1st respondent's office again to enquire about PW2's cheque. This time he found him. He told Mr. Masasa to tell PW2 that he would pay her wages in two instalments starting Friday that week.

29. PW2 says she refused to accept that arrangement. At that point Mr. Masasa gave her the telephone so that she could voice her disapproval of the arrangement to 1st respondent personally. When she told him that she wanted her wages in full, the 1st respondent told her that if she did not want to understand what he was telling her, she was free to seek help elsewhere where she could get it.

30. PW2 says she sought to obtain the response of the 1st respondent for the second time and he repeated his rude response. She testified that she dropped the phone and went to PW1 to seek advise. The latter sent her to the Factory Manager who charged the 1st respondent as hereinbefore stated. In his cross-examination of PW2 the 1st respondent sought to establish that PW2 was infact employed alone and not at the same time as the other seven in line four. She confirmed that that was so. She further confirmed that 1st respondent is the one who issued her with ID Card No. 2828.

31. The third and the last witness for the applicant was Malekaota. She testified that she was also employed as a casual employee from 29th June 2005 to the 28th July 2005. She testified further that on the 3rd August 2005, the 1st respondent issued her with ID Card No. 2828. However, that same day, even before she could use it, the card was retrieved from her by the 1st respondent, who told her that it belonged to a lady in line four.

32. She averred that the 1st respondent promised to issue her with another card. On the 4th August 2005, the 1st respondent did issue her with another ID Card No. 2339. She testified that on the 5th August she was paid her wages, but she found that she was signing against ID No. 2828. She averred that she sought to bring this anomaly to the attention of the 1st respondent, but

he said she should sign for the money anyway. In his evidence the 1st respondent advanced two reasons why PW1 was not paid. The first was that for people to be able to be paid two lists are prepared. One from the Personnel Department and another one is prepared by Wages Department. Both lists are submitted to the Financial Manager Mr. Chirag, who is expected to check and compare them to ensure that no names appear in one list and not the other.

33. He averred that Mr. Chirag failed to do this and that he approved his list which did not have the name of PW1 and yet the list from Personnel had it. It was on these basis that the 1st respondent said he was not able to pay PW2 and if that was a fault, it was not his but that of Chirag.

34. The second reason which he gave was that he did not pay 'Matseliso on the date others were paid because she was not employed at the sametime with them. Had she been employed together with them there would have been no problem. This much 'Matseliso herself conceded that she was not employed together with her colleagues in line four. She was engaged later to fill a shortage. At the disciplinary hearing it was put to the 1st respondent that despite the fact that 'Matseliso was employed separately, the contract which is the basis of her payment does not indicate that she did not start with others and that after issuing of an ID Card to her Mr. Melcho had closed the contract without saying anyone did not start with others. There was no answer from 1st respondent.

35. The 1st respondent was asked under cross-examination who had included the name of Matseliso in the contract. He said it was included by himself. This is the same question that he was asked at the disciplinary hearing and his response had been the same. He was asked when he was going to pay PW2 because she did not have a separate contract from her co-workers in line four. He answered that her payment depended solely on her date of engagement.

36. He was asked further to explain why he was saying that 'Matseliso Molaoli's name did not appear in his list when he was

the one who personally included the name in the list with his own handwriting. He conceded that he included the name in the contract and added that she was however not employed by him. She was employed by Personnel Department, he averred. When he was asked yet again why he did not pay 'Matseliso when her name had been included by him in the contract he changed his answer and said he did not pay her because she did not come with others. Asked further when he planned to pay her, he said on the 5th August, which would be the last extension of her contract.

37. He was asked further what was the objective of sending a contract to him. He said it was to enable him to issue ID Cards so that the people could clock. He was asked where he would derive the information to enable him to pay people and to compile a list if the requisition or a contract is only meant to enable him to issue ID Cards. His answer was that the requisition sent to him did not include PW2 and that she only came with a separate requisition a few days later so that he could include her name.

38. It was put to him that in her evidence PW2 never said she came to him with a requisition. She had said in answer to 1st respondent's own questions that the 1st respondent was phoned by the Mr. Masasa of Personnel Department and instructed to include her name in the contract. PW2 had come to him on the basis of that instruction, but she had no paper with her and he had duly included her name in the contract and issued her with an ID Card. He conceded this was so.

39. It is clear from this testimony that the 1st respondent's two main defenses that he was dismissed for a fault which is not his and that Matseliso was not paid because she was not employed at the sametime with her co-workers fell apart under cross-examination. He conceded that Matseliso's name was in the list and that it was infact inserted by himself. Furthermore, the contract in which PW2's name appeared did not say that she did not start with others. For all intents and purposes she was to be treated as though she started with the other seven co-

workers since the contract did not make any distinction as to starting dates.

40. In response to one of the questions 1st respondent had said that PW2's pay date would be determined solely by the date of her employment. Since the contract did not say she did not start with others, it follows that she should have been paid on the date that the other seven in her contract were paid. Clearly therefore, neither of the two excuses could sustain 1st respondent's defence as to why he did not pay 'Matseliso on the due date as other employees.

41. Despite the fact that the two main excuses crumbled terribly under cross-examination, on the whole 1st respondent's testimony is riddled with serious contradictions. Under cross-examination he jumped from one excuse to another. Apart from seeking to hide behind the shadow of Chirag he advanced four other reasons as an explanation for not paying PW2's wages.

42. It is common cause that he once said 'Matseliso was not paid because she was not employed at sametime as the other co-workers. On another occasion in answer to a question, he said PW2 was not paid because she did not come together with others to collect her wages. Under the pressure of cross-examination, he conceded on several occasions that the name of 'Matseliso did appear in the list but sought to explain failure to pay her wages by saying she was not employed by him and that she was referred to him by Personnel Department. The fourth contradictory explanation he advanced, still under the pressure of cross-examination was that Matseliso was not paid because her name was not included in the initial requisition and that it was included a few days later after Matseliso had brought a separate requisition to him. Quite clearly this is all fabrication.

43. From the consideration of this evidence it is clear to us that applicant discharged the onus to prove that 1st respondent's dismissal was substantively fair. 1st respondent on the other hand failed to challenge the evidence produced by the applicant. It does appear that as counsel for the applicant pointed out the learned arbitrator failed to consider the

mountains of uncontroverted evidence which applicant adduced. In particular evidence showed that PW2 ought to have been paid or around the 15th July 2005. She was however not paid until approximately two months after her employment.

44. When PW2 brought the issue of non-payment of her wages to 1st respondent he dismally failed to help her to get her wages. Instead PW2 was thrown from pillar to post running between the Personnel Office and the office of the 1st respondent. In the end he became rude to her when she would not approve of his unilateral decision to split her payment into halves. To add insult to injury, he paid PW3, Malekaota who was employed after PW2, against PW2's own employee number. By the time he did this he knew that PW2 was fighting to get paid. None of this evidence was in any way controverted or denied by 1st respondent. If this factor had been considered by the learned arbitrator he would have come to a different conclusion on the substantive fairness of 1st respondent's dismissal. No doubt failure to do so is an irregularity which calls for interference with the learned arbitrator's award.

45. On the procedural aspect the 1st respondent contended that the person who took the minutes was also representing Personnel Department in the hearing. He averred that she did not write everything that was said. It is common cause that in his award the learned arbitrator found for the 1st respondent on this ground on the basis of a different factual averrement from that made by the 1st respondent. Whilst the 1st respondent was unhappy with the person who took the minutes because he also represented Personnel; the learned arbitrator's finding was for a different reason, and that was that she testified against the 1st respondent. This alone is an irregularity that calls for the interference with the award of the learned arbitrator.

46. Furthermore, there is no evidence to sustain the 1st respondent's allegation that the person who recorded the minutes was also a representative of Personnel Department. The Minutes reflect that person as a "scribe" and nothing else. It is therefore a wild fabrication that she represented Personnel Department.

47. The 1st respondent complained further that the recorder of the minutes left out most of what was said. The minutes were taken by PW2. Under cross-examination she was asked by the 1st respondent about the accuracy of the minutes. She answered that she could attest to their accuracy as they were taken by her. She was never contradicted by any form of evidence in this regard. Her evidence in this regard is unchallenged and it must stand.

48. The 1st respondent also complained that the complainant was the one who signed his letter of dismissal. He did not detail how that has prejudiced the fairness of his dismissal. However, Mrs. Taaso asked him under cross-examination whom he would have preferred to have signed his letter of dismissal. He had no answer to that question. This was fair enough because it makes it abundantly clear that 1st respondent suffered no prejudice. He was complaining for the sake of complaining.

49. It was 1st respondent's complaint also that the chair of the proceedings was junior to the complainant. Again he was asked who he would have preferred to chair the disciplinary hearing. He said he did not know and that he asked for guidance from the chair. It would seem that this again is one of those complaints which can be categorized as clutching at the straws, for there is no rule that stipulates who should have chaired the proceedings in the circumstances. That is an arena that is left for management's discretion. To seek to decide who should be chair of disciplinary proceedings would clearly be usurping management prerogative and turning the court into a super manager which it is not.

50. Finally, 1st respondent complained that he was denied representation by his co-workers. In particular he said Mr. Chirag and Ms Mary Monare were to be his representatives and the chairperson refused and said they should just be observers. First the minutes do not reflect this and 1st respondent did not file any affidavit or lead any evidence to show that the minutes are defective in this regard.

51. Be that as it may, PW1 who represented the applicant at the arbitration asked 1st respondent significant questions. If due weight is given to those questions and the answers given, it will be hard to believe that 1st respondent was refused representation as he alleges. He was asked if he recalls that he told the presiding officer that he had a representative who would be his supervisor, he said he recalled. He was further asked if he remembers that the hearing had to be delayed by ten (10) minutes while waiting for that representative that he said he had. He confirmed that was so. He was asked further if he recalls that Mr. Melcho his supervisor came in with Ms Mary Monare and that the chairperson asked them what they had come to the hearing for.

52. He again conceded that such a question was put even though he sought to show that it was not asked by the presiding officer, but nothing turns on that distinction. He was asked further if he recalls that they were told that if they were to be representatives only one of them could be a representative. He again agreed that such a clarification was made. He was asked further "do you recall that Mary said she had come to listen only and when Mr. Melcho heard her say so he also said he had come to listen as head of department when his junior was tried?" To that he answered in the negative. However, these questions and the answers thereto paint a clear picture that the chairperson was not averse to 1st respondent's representation. He bent over backwards to accommodate it. If eventually the 1st respondent was not represented at the hearing it cannot be because the representation was refused. The burden lied with 1st respondent to prove that representation was refused. Other than his own say so, there is no evidence such as that of Melcho or Mary to support the allegation that representation was refused.

53. 1st respondent had also complained that contrary to the charge that he did not pay 'Matseliso Molaoli on time, he was found guilty of and was dismissed for writing a requisition. He did not pursue that claim any further at the arbitration as he did not adduce evidence to prove it. He left it at the stage of opening

statement. It can therefore be safely assumed that he abandoned it.

54. There is no doubt in my mind that as counsel for the applicant has said, the learned arbitrator has failed to consider and to apply his mind to the abundance of evidence that was adduced in support of the applicant's case. That evidence was not challenged. It follows that the applicant discharged the onus to proof the substantive fairness of the 1st respondent's dismissal. Even on the procedural side there is no justification for the finding that there was procedural unfairness. For these reasons the award of the learned arbitrator cannot stand. It is accordingly reviewed, corrected and it is set aside.

THUS DONE AT MASERU THIS 25TH DAY OF JULY 2007

L. A. LETHOBANE
RRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MS SEPHOMOLO**
FOR RESPONDENT: **MR. MOCHOCHOKO**