IN THE LABOUR COURT OF LESOTHO

LC/REV/19/07

HELD AT MASERU

IN THE MATTER BETWEEN

VODACOM LESOTHO (PTY) LTD **APPLICANT**

AND

DIRECTORATE OF DISPUTE PREVENTION AND RESOTION **1ST RESPONDENT**
MR. M. KETA- ARBITRATOR **2ND RESPONDENT**
MOTSIELOA LEBETE **3RD RESPONDENT**
ITUMELENG MAKOETLANE **4TH RESPONDENT**

JUDGMENT

Date of hearing : 11/09/07
Review of DDPR award – Contention that arbitrator failed to apply his mind to evidence tendered found to be unfounded – Arbitrator declaring 3rd and 4th respondents employees of applicant and not outsourced employees – Award ambiguous whether employees permanent members of staff in terms of HR manual and policy of applicant – Court finds 3rd and 4th respondents correctly declared employees but that they are not permanent members of staff in terms of manual – Review application dismissed.

1. These review proceeding arise out of the award of the 2nd respondent dated 31st January 2007. The award was a sequel to a

referral made by the 3rd and the 4th respondents under referral No. AO142/05. The referral was heard on the 2nd February 2005.

2. A preliminary point was raised on behalf of the then respondent (applicant herein) that the 3rd and 4th respondents were not employees of the applicant herein. On the 17th march 2005, the learned arbitrator made a ruling in which she declared that the 3rd and 4th respondents were employees of the applicant.

3. The applicant launched review proceeding in the Labour Appeal Court seeking an order that:

(a) The ruling issued by the learned arbitrator on the 17th March 2005 declaring 3rd and 4th respondents to have been employees of the applicant be reviewed and set aside.

(b) The matter be remitted to the DDPR for a new ruling by another arbitrator on the question whether the 3rd and 4th respondents were employees of applicant.

(c) The applicant is granted such further and or alternative relief as the Honourable Court may deem fit.

4. On the 26th July 2006, the Labour Appeal Court issued a judgment reviewing and setting aside the aforesaid award and remitted the matter to the DDPR to be heard de novo by a different arbitrator. The review application was however upheld on the ground other than that pleaded by the applicant. It was found that the arbitrator had allowed evidence to be led without an oath and without cross-examination of the witnesses. This finding does find support under the general prayer such further and alternative belief.

5. The matter was placed before arbitrator Keta on the 20th October 2006 for fresh hearing. The learned arbitrator heard evidence on both sides. At the conclusion of the arbitration a declaratory ruling was made that the 3rd and 4th respondents were employees of the applicant. The ruling was made on the 31st January 2007.

6. On the 16th March 2007, applicant filed yet another application for review in the following terms:

(i) That the ruling issued by the 2nd respondent on 31st January 2007, under Referral No. A0142/05 declaring the 3rd and 4th respondent to have been employees of the applicant, be reviewed and set aside.
(ii) That the applicant be granted such further and or alternative relief as the Honourable court may deem fit.

7. This review application was filed some forty nine days after the award was issued. It is however, not clear from the papers filed of record when the award itself was served upon the applicant. Section 228F of the Labour Code (Amendment) Act 2000, provides that a party seeking to review any arbitration award shall apply to the Labour Appeal Court, since amended to read Labour Court, within 30 days of the date the award was served on the applicant. (See Section 4 of the Labour Code (Amendment) Act 2006.). As we said it is not alleged in the papers when the award was served on the applicant and the respondents have not made any issue about the time lapse since the award was handed down. We assume therefore that it was filed timeously.

8. The grounds on which the review is sought are firstly that the 2nd respondent did not apply his mind to the direct evidence given by the witness for the applicant that for a contractual relationship to exist the applicant's HR policy and procedure manual requires that there must be a written contract and that a prospective employee has to go through a strict procedure of interviewing and negotiating his terms and conditions of employment, things that did not happen in casu. The 2nd respondent erred by not applying his mind to this clear and direct evidence and instead investigated the conduct of the parties and the surrounding circumstances.

9. It was further argued that 2nd respondent placed heavy reliance on the fact that the 3rd and 4th respondents were given induction programme, taken on site visits, provided with cellular phones and other facilities, but disregarded direct evidence that the two respondents were not provided those facilities because they were employees, but simply because they served in the Call Center and had to be provided as such to do their work properly.

10. Further more it was argued that 2nd respondent ignored significance of the clear and direct documentary evidence to the affect that the two respondents knew all along that they were employees of Adawa and that they continually made efforts to rather become employees of the applicant itself. Specific reference was made to annexure "L" which is the letter from the complainants addressed to the applicant on the 18th August 2003, in which the complainants requested the applicant to reconsider their employment status.

11. Evidence was led on both sides. Evidence on behalf of the 3rd and 4th respondents was led by the 3rd respondent Mr. Motsieloa Lebete. He testified that sometime in May 2002, he submitted an application for a job at the offices of the applicant. On the 30th May he was called by the Human Resources Manager Mr. Liphoto. On arrival at VODACOM he met a Ms Botsane who told him that she was a Call Centre Supervisor.

12. He testified further that Ms Botsane told them that the company had received their applications and that they were employing them, but she would first do a brief interview. Thereafter they were briefed and told that they would meet with Management on Monday.

13. On Monday they met with Ms Botsane, Mr. Matlowane, Mogale and Mabutla. We must mention that some of the names are likely to have been misspelled by the person who transcribed the record. For our part we have taken them as they appear in the record. Still on Monday the two respondents say they were inducted by Mr. Liphoto and Ms Khampane, the Administration Officer while Mr. Chris Thaele took them on tour of the sites.

14. PW1 testified further that they were allocated work by the Administration Officer and that she was also responsible for allocating them shifts. The Human Resources Manager told them that their salary would not be anything less than M3,500-00. They and the management agreed on medical aid, death cover, pension, staff cellphone allowance, airtime subsidy, roaming facility and other benefits otherwise accruing to permanent staff members of the applicant. He testified further that at one time he was even made a team leader.

15. Asked when he first knew that he was not regarded as an employee of the applicant, he said about a year after he was first employed. He averred that this was brought about by a letter they had written to the management asking for a written contract of employment. It was then that the Managing Director told them that they were employees of a company called ADAWA, which later changed its name to Menkhoaneng Holdings.

16. Asked if he knew the company, he said he had only heard about it. He however knew its Director a Ms Amina Joseph who was introduced to them by Mr. Liphoto on or around 5th June 2002. Mr. Liphoto told them that Amina was the owner of a cleaning company that is subcontracted to VODACOM. He told them further that due to budget problems they as VODACOM were facing, their salaries would for 2-3 months only, be paid by Amina.

17. PW1 testified that apart from bringing their pay at the end of the month they never had any interaction of any kind with Amina. Asked where they got their instructions he said they got them from the Human Resources Manager, the Administration Officer and the Managing Director. Asked how long they were paid by Amina he said the arrangement lasted until the time when they parted with the applicant. Asked why they allowed that situation to persist when they had allegedly been told that it was a 2-3 months arrangement, he said they had several meetings with Human Resources to discuss the issue but the Human Resources Manager would tell them that they still had budget problems (see p 66 and 67 of the record).

18. The witness testified further that when the meetings did not bear fruit they wrote to the managing Director. The letter is on page 253 of the record and it is dated 13th August 2003. In it the 3rd and 4th respondents together with two others who are not parties to these proceedings aver that :

> "*we have approached the Administration and Personnel offices for more than three occasions, sincerely requesting them to reconsider our employment status in the company-Vodacom Lesotho. But they have given us one answer that they are waiting for the executive management to make final decision. It is however over one year since we have been writing for the management*

to reconsider our employment status. Thanking you in advance for your assistance in this matter"

The letter is signed by the four Call Centre employees.

19. The Managing Director did not respond to this letter. PW1 says they wrote another letter dated 10th November 2003. This one the Managing Director answered by a letter dated 13th November 2003. In his response the Managing Director told them that, The Board of Directors had imposed a head count freeze on the applicant as a result it was not possible to employ any new staff as that would cause an increase on the head count.

20. The Managing Director further told them that "you are currently employed by Menkhoaneng Cleaning Services (Previously Adawa Cleaning Services) with whom we currently contract for your services." PW1 says that was the first time they learned that they were employed by a body other than the applicant. They thus wrote a letter to the Human Resource Manager in which they requested a meeting with the Management of the applicant. He stated that they also requested that the Management bring along Adawa as they as the workers "… did not know where and how to contact it or her." (see page 69 of the record). Asked why they wanted Adawa to be present at the meeting, PW1 said as it was the first time that they learned that they were employees of Adawa, they wanted the issue clarified in the presence of its management.

21. The meeting was duly held even though Adawa did not attend. The Human Resource Manager suggested that the complainants contact executive Management. A meeting was then arranged with the Executive Head of Commercial, where issues such as salary increases and written contracts were discussed. PW1 testified that even at this meeting Adawa was not present. They were able to successfully negotiate salary increase. With regard to employment status, they were told that arrangements were being made for them to be recruited by another company, and they were encouraged to apply to that company. The complainants refused.

22. The new company was being suggested because Adawa's contract pertaining to Call Centre employees was being terminated. Since the complainants refused to endorse that arrangement, their contracts were terminated with effect from the end of January 2005.

The reason that was given was that they had refused to be employed by Mokorotlo Financial Services which is the one that was allegedly contracted to provide Call Centre employees for the applicant.

23. The applicant tendered the evidence of Mr Liphoto, the Human Resources Manager. He testified that it is the practice of the applicant to outsource some of its functions. He gave the example of security personnel who are employed by Securicor and security drives who are employed by BB Alert Security Services. In accordance with that practice, the applicant also outsources its cleaning services to a company called Adawa in terms of an agreement signed by the parties on the 25th February 1999.

24. He testified further that the applicant later agreed with Adawa that the agreement of 1999 be extended to enable Adawa to also provide four additional personnel to man the Call Centre of the applicant with effect from the 1st June 2004. The proposal to that effect was approved by the Managing Director on the 31st May 2002, and the agreement itself signed on the 12th June 2002. Asked why the agreement was only signed on the 12th June he said it was because one of the parties was not available.

25. DW1 testified further that 3rd and 4th respondents were among the four people provided by Adawa pursuant to the agreement signed on the 12th June 2002. He denied that the complainants were ever employees of the applicant. He however conceded that meetings were held between Vodacom and the complainants, but said at those meetings 3rd and 4th respondents were exploring employment opportunities with Vodacom. This the witness testified, was an indication that the 3rd and 4th respondents were aware that they were Adawa employees. (see p. 121 of the record)

26. Reliance was made on the letter of the 18th August 2003 which the complainants wrote to the managing Director. (Exhibit “L”). The witness testified that the fact that the complainants asked that their employment status be reconsidered is evidence that they were asking Vodacom to employ them directly. He testified further that the employment of the 3rd and 4th respondents as Call Centre agents came to an end when the applicant terminated the agreement with Adawa as far as Call Centre agents were concerned. Termination of the Call Centre contract meant that Menkhoaneng (Adawa) reverted

to the February 1999 position whereby it provided only cleaning services to applicant.

27. A new company called Mokorotlo Financial Services was engaged to provide Call Centre employees. This is the company which the 3rd and 4th respondents were advised to apply to, even though they declined. Asked whether the complainants underwent an induction when they joined Vodacom the witness said they did not. He also denied that the complainants were ever told that they were employees of Vodacom. He stressed that from the start they came into the company as employees of Adawa.

28. DW1 narrated a procedure that has to be followed for one to be appointed to the permanent establishment of Vodacom. In particular he stated that there has to be an application, which is followed by an interview. A successful candidate is then recommended to the Managing Director. If the latter approves the recommendation a formal offer will be made to the successful candidate. On acceptance of the offer a successful candidate serves a four month probation. He stated that these procedures were not followed in the case of the complainants.

29. The witness testified that the fact that the complainants were afforded telephone and airtime allowances including roaming facility does not mean that the complainants were permanent members of staff. The allowances were afforded to them for operational purposes to enable them to discharge their functions like answering customers' calls and calling them when necessary. The complainants were afforded training in order to improve their performance not because they were permanent members of staff. The arrangement to make one a team leader which PW1 testified he once was, is done informally within the section DW1 testified.

30. Paragraphs 8-10 of this judgment summarise the grounds upon which applicant seeks the review and setting aside of the learned arbitrator's award. The first ground is that the learned arbitrator failed to apply his mind to the direct evidence on behalf of the applicant detailing the steps that have to be followed for one to be considered an employee of Vodacom. This contention is proved false by the statement of the learned arbitrator at page 5 of his award where he opines in paragraph 4 as follows:

> *"I will just mention in passing that the respondent's only witness mentioned that there is a recruitment procedure in place and he explained it in details. The fact that the recruitment procedure was not followed in relation to the applicants does not in itself disqualify the applicants from being employees."*

The first contention must therefore fall away.

31. The second contention was that the learned arbitrator placed heavy reliance on the facilities and benefits afforded to the complainants and disregarded direct evidence that the 3rd and 4th respondents were not provided those facilities because they were employees of the applicant, but because they worked in the Call Centre and had to be provided as such to do their work properly. Once again I am unable to agree with this contention. Page 6 of the learned arbitrator's award in particular the 1st and the 4th paragraphs deal with that aspect of DW1's testimony albeit not so elegantly.

32. In the 1st paragraph, the learned arbitrator specifically holds that even though the facilities which the complainants enjoyed apply to permanent staff "they however applied to the applicants without distinction." This finding is consistent with his often repeated statement in the award that the Code does not exclude verbal contract of employment. Indeed the Human Resources Policy and Manual of the applicant recognizes more than one type of employment relationship. This can be inferred from the excerpts of the manual that are attached to the bundle in particular clause 7.5.1 of the manual, page 215 of the record which reads: "All employees of VCL except contract, temporary, casual and vacation personnel are required to serve a four month probation period." In other words, the learned arbitrator recognized in his award that even though the benefits the complainants enjoyed apply to permanent staff they applied to the complainants in accordance with the specific terms of their employment, which if not permanent may be temporary, casual or on contract.

33. Applicant contended further that the learned arbitrator ignored the significance of the clear and direct documentary evidence to the effect that 3rd and 4th respondents knew all along that they were employees of Adawa hence their plea that their employment status be

reconsidered. Once again the learned arbitrator has interrogated that evidence at page 7 of his award in the following words "….the fact that they requested the MD to reconsider their employment status does not mean that they knew that they were outsourced employees. The MD on the 13th November 2003 wrote a memorandum to the applicants clearly stating that they were not employees of the respondent. The applicants contention is that it was the first time that they heard that they were not employees of the respondent."

34. We are convinced that the learned arbitrator did consider all the aspects of the evidence. There was however, some contradiction in his analysis which has rendered his award ambiguous. This is brought about by the learned arbitrator finding the complainants to be employees of the applicant because the Code does not necessarily require that a contract must be written for it to be lawfully, while at the sametime seeking to justify the existence of the contractual relationship by making reference to the benefits that the complainants enjoyed, which he said they were provided in terms of the Human Resource Manual.

35. Quite clearly if the applicants are to be declared employees in terms of the Human Resource Manual they would have to discharge the onus that rests on them to show that their appointment has been done in accordance with the provisions of the manual. As Mr. Loubser on behalf of the applicant pointed out the complainants have not discharged that onus. Rather the evidence of DW1 clearly shows that they cannot be permanent employees as stipulated in the manual because their appointment has not been done in accordance with the procedures outlined therein. The fact that they were given certain benefits cannot in itself make them permanent members of staff. Indeed DW1's evidence that those benefits were given to them for operational reasons has not been contradicted.

36. On the other hand, the arbitrator's finding that the complainants are nonetheless employees of the respondent cannot be faulted. To this end the complainants discharged the evidentiary burden to prove that they are in any event employees, whether contract, casual or temporary. PW1's testimony that he applied for a job at Vodacom and was called to acknowledge his application by DW1 who even invited him to start work on Monday has not been contradicted. DW1

only sought to barely deny these averements, even then during cross-examination, but advanced no evidence himself to prove his denial.

37. Clearly once the 3rd and 4th respondents discharged the onus that rested on them, the burden of proof then shifted to the applicant to disprove their claims. This the applicant's witnesses failed to do. They could not for instance provide a narration of how the complainants were transferred to them by Adawa. Accordingly there is no evidence to contradict their evidence that following their application they were called by Human Resource to start work.

38. Furthermore, the complainants requested that the management of Adawa be present at the meetings where they were disputing the existence of an employment relationship between it and them. Adawa failed to turn up at such meetings and applicant who were requested by complainants to invite them have never explained why they did not attend. Even at the DDPR, Adawa never came forward to corroborate applicant's contention that the 3rd and the 4th respondents were its employees. This was despite the fact that the applicant could still contact Adawa in as much as the cleaning services contract still existed between them.

39. Against the backdrop of these observations, we are of the view that the learned arbitrator's determination cannot be disturbed. Suffice it only to clear the ambiguity that 3rd and 4th respondents are employees of the applicant, but not permanent members of staff as envisaged in the HR policy and manual. Their contract is clearly a month to month one without reference to a limit of time as envisaged by section 62(2) of the Labour Code Order 1992. As we observed even the HR policy of the applicant does recognize the possibility of such a contract between the parties. Accordingly, the review application is dismissed and we have made no order as to costs.

THUS DONE AT MASERU THIS 18TH DAY OF SEPTEMBER 2007

L. A. LETHOBANE
RRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. LOUBSER**
FOR RESPONDENT: **MR. NTAOTE**