

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/212/06**

**LAC/REV/82/04**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**MASERU E TEXTILE**

**APPLICANT**

**AND**

**DIRECTORATE OF DISPUTE  
PREVENTION AND RESOLUTION  
MAMOFOLO MASHILEHO**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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*Date of hearing: 23/10/07  
Review of DDP award - Evidence - Record of disciplinary proceedings constitute evidence of what was said thereat - Hearsay - Chairman of the enquiry's testimony of what was said at the enquiry cannot be hearsay - Evidence led at the enquiry - Arbitrator cannot ignore evidence led at the enquiry - The fairness of employer's decision to dismiss an employee can only be discerned from evidence led at the enquiry - It was irregular for arbitrator to ignore and dismiss evidence led at the enquiry which was presented by the Chairman of the enquiry - Strike - Work stoppage section 226(1)(c) of Act No.3 of 2000 - Only the Labour Court can hear unfair dismissal cases resulting from a strike or work stoppage - Award reviewed, corrected and set aside.*

1. This is an application for the review of the award of the learned arbitrator Malebanye. The review arises out of an award the learned arbitrator made on the 29<sup>th</sup> June 2004. The award was a sequel to the referral made by the 2<sup>nd</sup> respondent in which she had sought a declaration that her dismissal by the applicant company was unfair.
2. The dismissal of the 2<sup>nd</sup> respondent had come about after a work stoppage on the 28<sup>th</sup> January 2004. The 2<sup>nd</sup> respondent is alleged to have incited and intimidated other workers, in particular one Malisebo Maine to stop sewing as everybody in her line had stopped sewing.
3. One witness each testified on behalf of both parties. PW1 was the 2<sup>nd</sup> respondent herself. She testified that on the 28<sup>th</sup> January 2004, the Personnel Manager sent supervisors to inform them that they had to get a permission letter from work to be able to go and see a doctor and that even a doctor an employee has consulted must furnish the employee with a letter to show to the employer that one has been to a doctor. She testified that they were told that even expectant women should bring proof of their visit to prenatal clinic.
4. PW1 testified that this caused a dispute among the workers, by which I assume she meant that there was dissatisfaction among the workers. The workers demanded that the Personnel Manager must come and address them on the issue before they knocked off.
5. When they returned from lunch, some workers started with their work while others did not. She testified that she was sitting next to her machine and she called one Malisebo Maine "... wishing that she could say they bring me water." She stated that the supervisor retorted and asked her if Malisebo has been employed by her.
6. At 5.00 pm she was called to the office and served with a letter of suspension, and charged with influencing Malisebo

not to work. She stated that when the supervisor intervened she had not yet told Malisebo what she was calling her for. "I had just called her," she stated. (See p.5 of the record). She stated that the suspension letter also invited her to come for a hearing on the 5<sup>th</sup> February 2004.

6. The arbitrator asked her why she was saying her dismissal was unfair. She responded that:

*"Because I had not stated why I was shouting to that person. They did not know why I was calling her. Her supervisor did not wait to hear why I was calling her. Just after I called "hey Malisebo," she then asked whether she had been hired by me, where I then replied "oh" and then remained silent."* (See p.6 of the record).

Under cross-examination she was asked if it was noisy at the time that she shouted to Malisebo? She said it was noisy and the Personnel Manager even had to ask the supervisor what the noise was for? The company representative asked what the supervisor's response was and she said that the supervisor said "please go and ask Mamofolo" i.e. PW1.

7. She was further asked what did you want from Malisebo. She said she wanted her to tell one Mary to bring her water as no work was being done and she too was reclined and not sewing. (See p.7 of the record). She was asked what her response would be if Malisebo were to say that she had shouted at her that she (Malisebo) should not behave silly towards them (the rest of the workers). It was actually put to her that that is what Malisebo had said she had said to her. The witness responded that "she can say that Ntate Maretlane but you see there is nothing that I had spoken." It was further put to her that Malisebo was supported by the supervisor. She said that they can support each other if they had agreed to do so.
8. The witness does not say what would cause Malisebo and the supervisor to gang up against her and tell lies about

her. In general her testimony leaves a lot of questions unanswered. She does not for instance say why she had to call Malisebo to tell Mary to bring her water. Why could she not call Mary directly? The response of the supervisor that Malisebo is not employed by her is not consistent with what PW1 alleges she did namely; simply to call Malisebo and nothing further. That response shows that something more than merely shouting at Malisebo had been said.

9. The witness's own alleged response of merely remarking "oh" confirms this. If she had indeed said nothing beyond simply shouting, she (PW1) would have taken steps to defend herself when the supervisor retorted that Malisebo was not employed by her. She would have sought to show that the supervisor was attacking her for no reason. To make matters worse, when the Personnel Manager asked what the noise was for, the supervisor again put the blame on her and said ask Mamofolo, and still she said nothing to defend her professed innocence.
10. Her testimony is very much lacking in detail. She did not even tell the arbitrator what then transpired at the hearing. In the same way it was not until she was cross-examined that it emerged that at the time she shouted as she did to Malisebo, the atmosphere was not normal. It was noisy and workers were not working. Why work was not going on as she says she too was not working, she did not disclose. It was put to her more than once, what Malisebo with the support of the supervisor would say she actually said to her. She did not deny it save to seek to ridicule it.
11. DW1 was the Personnel Manager Mr. Maretlane. He testified that on the 28<sup>th</sup> January 2004, when workers returned from lunch, a shop steward by the name of Moramang Seipati came to inform him that the workers wanted to talk to him about things he had spoken to them about that morning. He answered that he could only speak to them at 5.00 pm because there was an urgent order that had to be dispatched. He went into the Director's office to

make a telephone call. When he came back he met the Director who asked him why workers were not working despite the last alarm having sounded.

12. He testified that he went back inside the factory, stood in the middle and shouted asking workers why they were not working. Some started to work while others still did not. He stated that he heard a noise coming from the direction of E line and C line. He stated further that he shouted to the supervisor of C line asking what the noise near her line was about. She responded that “I was coming to you Ntate. It is Mamofolo, there she is. Please ask Mamofolo what noise she is making?”
13. The witness testified further that he did not ask Mamofolo about the noise she was allegedly making. He took the supervisor’s response as a complaint because, she went further to tell him that Mamofolo had in fact threatened one Malisebo that she should not behave silly by continuing to work when everybody else was not working. Malisebo stopped working out of fear. He testified that on the basis of this complaint they issued Mamofolo with a charge and suspended her with full pay pending her case.
14. He testified further that a disciplinary hearing was held at which he and the supervisor who was the complainant were present. PW1 as the accused employee was also present. He testified; “we heard all until we came to the stage where we now had to call witnesses. And the 1<sup>st</sup> witness was one woman called Senate Letsie. And Senate Letsie says that she heard when Mamofolo called Maine (Malisebo). She says that when she called her she said “oh Mamofolo” in a loud voice. She says that she used these words “I believe that you were even being driven by this pregnancy.” We then called the witness which it was said she was calling asking her what Mamofolo Masihleho was saying when she called her. She indicated that she said that she should not show bad behaviour to them. Where she says when she glanced at people near her, she found out that they were not

sewing. Out of fear she then also stopped sewing being afraid that they might assault her.” (P.13 of the DDPR record).

15. The arbitrator intervened and asked the witness if he will bring the people to whom he was referring to come and testify. The witness answered:  
*“what if they had been there and they signed there. They have all written here. All the people who were there have signed here. Myself, the complainant, the respondent and the people who were recording them. And then before they were signed they were read to all of us and then it was signed. Even they have their copy I am surprised why they have not brought it.”*  
 (p.13 of DDPR record).
16. The arbitrator remarked that she was concerned about the admissibility of those statements. Indeed in her award the learned arbitrator dismissed Mr. Maretlane’s evidence as inadmissible hearsay. She then ruled that there was no evidence before her that 2<sup>nd</sup> respondent stopped any one from working. She held that such evidence could come from Malisebo and the supervisor who were not called to testify.
17. At the hearing hereof Mr. Mohaleroe for the applicant asked the court to review whether the learned arbitrator properly applied her mind to the principle of hearsay regard being had to the fact that the Personnel Manager personally investigated the reports he received and that he and the people who were there made statements which they signed after they were read to them.
18. The problem that the learned arbitrator caused for herself was to seek to ignore that a disciplinary hearing was held at which evidence was led and on the basis, of which the 2<sup>nd</sup> respondent was found guilty. It is a contradiction to say that an employer must prove that it dismissed an employee fairly and then disregard the facts that the employer present to you which he says he relied upon in finding the employee guilty as charged.

19. Section 66(4) of the Labour Code Order 1992 (the Code) enjoins an employer to hold an enquiry prior to dismissing an employee. When an employer has conducted an enquiry as the code provides, the record of those proceedings constitute valid evidence of what was said at the hearing. The chairman of such an enquiry is the person best placed to testify on the content of the hearing.
20. The hearing or the enquiry is akin to an investigation and the person who carries out the investigation is the correct person to testify about the investigation and its findings. His evidence cannot be said to be hearsay. As things are, in casu the chairperson of the enquiry who was Mr. Marelane, even had the statements of the witnesses to prove that the employer had concrete evidence on which they found 2<sup>nd</sup> respondent guilty as charged.
21. There is no evidence that at that hearing the 2<sup>nd</sup> respondent had witnesses to disprove what the supervisor, Malisebo and Senate alleged she said. Surely the applicant clearly proved that the dismissal was fair in all respects. That is the enquiry that the learned arbitrator was called to make, whether the applicant dismissed 2<sup>nd</sup> respondent fairly. The learned arbitrator clearly misdirected herself and acted improperly and irregularly by disregarding the Personnel Manager's first hand account of the evidence on which he relied when he dismissed 2<sup>nd</sup> respondent.
22. The irregularity is so grave that it calls for this court's intervention with the award. Clearly evidence that had to be accepted was rejected on wrong grounds that it was hearsay when it was not. This resulted in the finding that there was no evidence that 2<sup>nd</sup> respondent did what she is alleged to have done when there was plenty of such evidence before the enquiry, which evidence was even presented before the learned arbitrator, by the chairperson of the enquiry.
23. Mr. Mohaleroe pinned his colours on this one mast that the learned arbitrator misconstrued the principle governing

hearsay and improperly rejected his witness's testimony as hearsay. He no longer pursued an equally valid ground that Mr. Maretlane raised in paragraph 6.2 of his founding affidavit. That was that "the arbitrator of the 1<sup>st</sup> respondent ignored the fact that on the 28<sup>th</sup> January 2004, there was a strike or work stoppage at the applicant's factory and the investigation pointed towards 2<sup>nd</sup> respondent as having stopped one Malisebo from continuing her work."

24. It is common cause that the disciplinary proceedings that resulted in the dismissal of the 2<sup>nd</sup> respondent were a sequel to that alleged strike or work stoppage. Section 226(1)(c) vests the jurisdiction to adjudicate unfair dismissal disputes for, inter alia, participation in a strike in the Labour Court. The 2<sup>nd</sup> respondent concedes in her testimony that there was a work stoppage which she was a part of. Clearly therefore, the learned arbitrator should not have proceeded with the arbitration of this dispute. Once conciliation failed she should have issued a certificate referring this dispute to this court for adjudication.
25. Even on this ground therefore, the award of the learned arbitrator falls to be reviewed and corrected in as much as she has arbitrated a dispute on which she lacked jurisdiction. For these reasons the award of the learned arbitrator in referral A0378/04 is reviewed, corrected and it is set aside.

There is no order as to costs.

THUS DONE AT MASERU THIS 6<sup>TH</sup> DAY OF NOVEMBER 2007.

**L. A. LETHOBANE**  
**RRESIDENT**



**M. MOSEHLE  
MEMBER**

**I CONCUR**

**M. THAKALEKOALA  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**MR. MOHALEROE  
MR. MOLATI**