IN THE LABOUR COURT OF LESOTHO **LC/REV/55/08**

HELD AT MASERU

In the matter between:

LETS'ENG DIAMONDS (PTY) LTD **APPLICANT**

and

BOFIHLA MAKHALANE **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION & RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date: 22/07/09

Review of arbitration proceedings - An award has to be based on a proper analysis of evidence.

INTRODUCTION

1. The applicant is an entity operating a diamond mining business and the 1st respondent was engaged as its Security Manager. Following a number of charges levelled against him the 1st respondent was found guilty of dishonesty by a disciplinary panel and was dismissed.

2. He challenged the said dismissal before the Directorate of Dispute Prevention and Resolution (DDPR) on both substantive and procedural grounds and sought reinstatement. The application was successful with the learned Arbitrator finding him to have been wrongly charged, and ordering his reinstatement. It is against this decision that the applicant is seeking review.

3. The grounds for review as set out in the founding affidavit on behalf of the applicant are that;

a) ***the arbitrator wrongly dismissed critical evidence which she wrongly referred to as hearsay when it was not;***

b) ***the Arbitrator, in law and in procedure, arrived at conclusions which were not based on facts or law in particular when she said the applicant had been wrongly charged. There are no grounds stated in the award for this conclusion.***

BACKGROUND TO THE DISPUTE

4. 1st respondent's dismissal is a sequel to an incident that occurred on 7th July, 2007, a day said to be a valuation day, and described by the applicant's counsel as very crucial for the type of business the applicant is engaged in. Applicant's charges against the 1st respondent emanated from a report by the Chief Executive Officer of Lets'eng Diamonds, Mr. Keith Whitelock who alleged that on 7th July, 2007 he was confronted with a situation which he had considered a very serious breach of security for Lets'eng Diamonds. He indicated that two factors had triggered this concern, one he had found two doors to the control room open, and secondly he had found the 1st respondent, Mr. Makhalane not present during a diamond evaluation exercise. It has emerged from the record that the valuation exercise was being undertaken by a gentleman just referred to as Charles, apparently from the Republic of South Africa. In a nutshell, the CEO had allegedly been concerned that diamonds were being evaluated without any security presence.

5. He stated that he looked for the 1st respondent, and raised his concern regarding security, and in reaction the latter informed him that he had delegated the security tasks to a Mr. Roelof Seeley, the Site Manager for Stallion Security, a private security firm engaged by the applicant. According to him Mr. Seeley was supposed to have remained with Charles. On being confronted Mr. Seeley indicated that he was indeed absent from the site on the day in question as he had obtained permission from the 1st respondent to go to a Ski Resort. The 1st respondent in turn denied ever allowing him to leave. It turns out that it was the word of the 1st respondent against that of Mr. Seeley. It was as a result of this incident that disciplinary charges were preferred against the 1st respondent and he was found guilty of dishonesty on the allegation that he had falsely denied ever giving Mr. Seeley permission to leave on the day that evaluation of diamonds was taking place. It is crucial to note that the 1st respondent was the Security Manager of the applicant, and as such a general overseer of applicant's security. Applicant's counsel pointed out that Mr. Seeley was under the control and supervision of the 1st respondent.

THE COURT'S ANALYSIS

6. It is not disputed that both the 1st respondent and Mr. Seeley were found by the Chief Executive Officer of Lets'eng Diamonds not to have been present when he passed by the Stallion Security control room, but the issue that confronted the DDPR was as to who had actually brought about the security lapse. It is also worth mentioning that the 1st respondent denied that there was even a security breach, but this is neither here nor there as it is not an issue before us. Faced with two diametrically opposed versions, the central question for determination by the DDPR was whether the 1st respondent had indeed given Mr. Seeley permission to leave on the day that caused security concerns. Having read the record, and the DDPR award it appears that the evidence that is critical in assessing on a balance of probabilities as to what could have transpired is that of the 1st respondent (the Security Manager), Messrs Roelof Seeley (Stallion's Security Company's Site Manager), Tefo Mochobi (Junior Assistant Manager) and Ts'epo Mokotjo (Applicant's Assistant Security Manager).

7. 1st respondent's evidence before the DDPR was to the effect that he never allowed Mr. Seeley to leave his work whilst the latter insisted that he had been permitted to leave. Mr. Tefo Mochobi testified that he had overheard the conversation between the 1st respondent and Mr. Seeley and heard the 1st respondent give him permission to go to the Ski Resort. The learned Arbitrator had dismissed this piece of evidence as hearsay, and concluded further that there was a discrepancy between the evidence of Mr. Seeley and that of Mr. Mochobi in that the former had testified that he had been given permission in the export room whilst the latter claimed the conversation had taken place in Mr. Seeley's office. The learned Arbitrator concluded that Mr. Mochobi was not speaking the truth. She had this to say at p.56 of the award:

> ***"One of the two sides is not telling the truth and it is Tefo Mochobi. It follows therefore that Roelie's word against the applicant still remains as such."***

The learned Arbitrator has pointed out that one of the parties was not telling the truth, but then she fell short of saying why and how she reached that conclusion. The conclusion was therefore made without any reasoning for its basis. Was it a question of credibility of the witness? She never said. Again one wonders whether the discrepancy is so major as to have discredited the whole evidence tendered by Mr. Mochobi. The importance of this piece of evidence would be whether the conversation regarding permission to go to the Ski Resort ever took place.

8. Mr. Mokotjo's evidence was to the effect that Seeley had approached him seeking permission to go to the Ski Resort and he refused on the basis that he could not leave on valuation day, but later reported that he had been allowed to go by the 1st respondent. The learned Arbitrator had dismissed this piece of evidence as hearsay. Was this hearsay evidence? Applicant's counsel submitted that it was not and in fact formed the basis of the present review application. We tend to agree with him. Mr. Mokotjo tendered this evidence in support of what had been said by Mr. Reeley. The evidence would constitute hearsay if it was the main piece of evidence, however in this case the person who had made the statement had testified to that effect. It was evidence tendered in corroboration of what had been uttered by Mr. Reeley. The learned Arbitrator duly stated during the DDPR proceedings that Mr. Seeley was a key witness on this issue - p.62 of the record. The 1st respondent had an opportunity to cross - examine him being the person who tendered the original evidence. It could be discarded on other grounds but surely not on the basis of it being hearsay.

9. Applicant's Counsel acceded that the Arbitrator might have misconstrued the evidence as hearsay, but as far as he was concerned it was not as gross an irregularity as he felt the learned Arbitrator had duly applied her mind to the case. He submitted that review is only applicable where it can be shown that the arbitrator acted arbitrarily and gross irregularity can be shown. He cited in support of his submission the decisions of ***Maharaj v Chairman, Liqour Board 1997(1) SA 273,*** and ***Mathobanyane v Vrystaatse Drankraak en 'N Ander 2000 (4) SA 342.*** It is our considered opinion that in the circumstances of this case this was crucial evidence, and the ***'due process'*** of the law has to be adhered to. We find the irregularity to be significant as it goes to the root of the enquiry of whether the 1st respondent had allowed Mr. Seeley to leave site despite the fact that there was an evaluation exercise that landed the parties at the DDPR.

10. 1st respondent's counsel argued that what applicants are seeking before this Court is an appeal under the guise of a review. Closely analyzing the application before us, we do not appear to have been called upon to assess the correctness of the decision, but the process towards the decision. What is important is not the conclusion reached but the reasoning towards such conclusion. It is common cause that the Labour Court has jurisdiction to review awards of the DDPR, but lacks appellate jurisdiction. Judicial review is concerned, not with the decision, but with the decision-making process- See ***Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141*** at ***154.*** Stelzner AJ., in his exposition in ***Solomon v***

Commission for Conciliation, Mediation and Arbitration & Others (1999) 20 ILJ, 2960 (LC) pointed out that;

> ***"the review process is designed to ensure that certain fundamental values are upheld, that 'due process' is followed in regard to administrative action, in this instance being arbitration proceedings."***

11. The effect of the learned Arbitrator ignoring the two pieces of evidence by Messrs. Mochobi and Mokotjo brings her award within the ambit of a review procedure as it impinges on her reasoning (the process) behind her award. The outcome is not relevant for our purposes as a review forum. In Solomon's case (***supra)*** the Court had observed that the decision of the learned Arbitrator had reached was plausible but since there were irregularities in reaching it, it had to be set aside.

12. On the reasoning above, the Court has decided to set the DDPR award aside and refer it back to be heard ***de novo*** before a new Arbitrator. This dispute seems to have very serious legal implications and is complicated. It therefore seems to require the attention of legal minds in order to come to finality, but it is not for us to order that legal representation be allowed when it is heard because it is a discretion that lies with the DDPR. There is no order as to costs as the parties have not brought the status quo upon themselves.

THUS DONE AND DATED AT MASERU THIS 22nd DAY OF JULY, 2009.

F.M. KHABO
DEPUTY PRESIDENT

L. MATELA **I CONCUR**
MEMBER

R. MOTHEPU
MEMBER **I CONCUR**
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FOR THE APPLICANT: **Mr. Loubser**

FOR THE RESPONDENT: **Mr. Makhaketso assisted by Ms Tau-Thabane.**