IN THE LABOUR COURT OF LESOTHO **LC/REV/88/07**

HELD AT MASERU

In the matter between**:**

PRESITEX ENTERPRISES (PTY) LTD **APPLICANT**

and

MOEKETSI LEKOPA **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date: 29/05/09

Review of arbitral proceedings - Where there is the word of the employer against that of the employee in arbitration proceedings, the Arbitrator has a duty to probe the matter further.

[1] This is an application for the review of arbitration proceedings in the referral application No. A0389/07 filed with the Directorate of Dispute Prevention and Resolution (DDPR). The 1st respondent is a former employee of the applicant, and this review application is a sequel to a dispute that arose following the termination of his services with the applicant. Following this termination the 1st respondent approached the DDPR challenging its substantive fairness, and was successful. Dissatisfied with this finding, the applicant filed the present review application on the following grounds; that

(i) The arbitrator failed to consider the evidence before her by totally disregarding the evidence of the applicant's two witnesses on grounds that it was hearsay;

(ii) The arbitrator also failed to acknowledge in her analysis that the 1st respondent brought no evidence to prove his own allegations; and lastly that

(iii) The arbitrator failed to guide the parties during the arbitration proceedings as to what constituted hearsay but rather allowed them to lead hearsay evidence and then only make a finding.

At the inception of the proceedings, applicant's counsel intimated to the Court that she was abandoning the third ground of review.

[2] The applicant had been charged before a disciplinary enquiry and found guilty for allegedly failing to obey lawful instructions from his supervisor, Thuso Ranthako on 8th March, 2007. The latter's testimony before the DDPR had been to the effect that he had ordered the 1st respondent to remove plastic wrapping from rolls of fabric, but he had refused. He had testified further that he later ordered him to cut fabric samples from the said rolls but he also refused and showed him his pay-slip to reflect how much he earned. He indicated that he reported these incidents to the Fabric Store Manager and later to the Personnel Officer following which disciplinary proceedings were instituted against the 1st respondent, and he was dismissed.

[3] The 1st respondent denied these charges laid against him. His version of events of 8th March, 2007 was that he was on that day charged with the duty of recording the rolls of fabric, and one Mokhopeli was removing the plastic wrapping from the said rolls of fabric, whilst Limpho was cutting pieces of sample from it. He testified that recording of the rolls, his task on the day in question, was the very last stage of the process they were engaged in. He contended that he later went out to lunch.

[4] Clearly, there is a dispute of fact as the two versions are intrinsically opposed. We have the word of the supervisor against that of the employee. It therefore calls for an indication of why the trier of facts prefers to take the evidence of one person as opposed to the other.

THE COURT'S ANALYSIS

[5] As rightly pointed out by the learned Arbitrator, the employer has an obligation to prove that the dismissal was fair. This is in terms of Section 66 (1) of the Labour Code Order, 1992 (as amended) which provides to the extent relevant that;
" An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is -

a) …

b) connected to the conduct of the employee at the workplace; or

c) …"

[6] Proof that the reason for the dismissal was valid entails proof that it was fair meaning that it was justifiable in the circumstances of the particular case. Procedural fairness was not an issue in the matter. The dismissal having been preceded by a disciplinary enquiry, the question then becomes what transpired at the disciplinary hearing. Whether the information that emerged at the hearing would have prompted a reasonable employer to have acted in the manner in which he acted, which in this case was to have dismissed the employee. Did the evidence tendered at the disciplinary hearing justify this action that was taken by the employer?

[7] The learned Arbitrator discarded the evidence of Ramots'abi Letsie, the Senior Personnel Officer and 'Mabafokeng Lieta, the Personnel Clerk on the basis that it was hearsay. Was this hearsay evidence? In terms of paragraph 3 of page 3 of the award, the learned Arbitrator indicated that their evidence was that ***"they received a report that applicant had refused to work or do the work that his supervisor had instructed him to do. They processed disciplinary action against him".*** The question is for what purpose was this piece of evidence tendered? Reading this assertion together with the record, the witnesses never alleged to have had first hand information, but theirs was to prove that a report was made to them by the supervisor. This piece of evidence would be hearsay if it was calculated to prove the truthfulness of the supervisor's evidence that the 1st respondent actually committed the alleged offence. At p.3 of the record Ramots'abi Letsie testified that ***"it could have been around the 8th March, 2007 after 11, the applicant's supervisor reported to me that the applicant was refusing to take instruction from him…"*** This just being a report, it was improper to have discarded the evidence as hearsay.

[8] My brother, Lethobane P., faced with a similar situation where the employee had failed to disprove the evidence of the supervisor and the learned Arbitrator had rejected the evidence of the Personnel Manager on the basis that it was hearsay in ***Maseru E Textiles v Directorate of Dispute Prevention & Resolution and 'Mamofolo Masihleho LC/REV/ 212/06*** (unreported) held that it was irregular to have dismissed the Personnel Officer's evidence as hearsay when he related first hand the evidence that led him to dismiss the employee. This Court reiterated this concern on the misconstruction of hearsay evidence in ***TZICC Clothing Manufacturers v Directorate of Dispute Prevention and Resolution and Nthati Mahlapa LC/REV/125/2006*** (unreported) where the evidence of Mr Molekane, one of the Personal Managers, was also discarded on the basis that it was hearsay. In this case Mr Molekane in his capacity as a Personnel Manager had testified that one Anna, one of the Personnel Managers, had told the disciplinary enquiry of which he was part of, her complaint which the chairperson, Mr Nthathakane accepted and dismissed the 2nd respondent in the said case for the alleged infraction, not that he witnessed the alleged misdemeanour. This kind of evidence is normally led in order to inform the Tribunal/Court of the information upon which the employer relied on in arriving at the decision that he took.

[9] By virtue of being an alternative dispute resolution (ADR) machinery and not a court of law, the DDPR is inherently inquisitorial as opposed to being adversarial in nature. Faced with the word of the 1st respondent against that of the applicant, the learned Arbitrator ought to have taken the enquiry further, perhaps even sought the evidence of Mokhopheli and Limpho who were allegedly working along the 1st respondent, the other removing the plastic wrap from the rolls of fabric whilst the other was cutting samples from the said rolls, respectively. This Court pointed out in ***Lesotho Express Delivery Services v Nkoto Miriam Chabane & Directorate of Dispute Prevention & Resolution LC/REV/252/06*** (unreported) that it is trite that while arbitration is similar to litigation, it is less formal. Section 23 (1) of the Labour Code (Conciliation and Arbitration Guidelines) Notice, 2004 provides in part that arbitration ***"… is very much like a court except that [it] is more informal and less adversarial in the manner in which the hearing is conducted".*** Section 25 thereof further provides that ***"unless there are good reasons for doing otherwise, arbitration proceedings are inquisitorial in nature. This means that, it is the arbitrator's task to find out the truth by asking questions requiring the parties to produce documentary evidence and other forms of evidence that may lead to a just … determination of the dispute"***. The 1st respondent appears to have made a bare denial that he never refused instructions. One wonders: what could have prompted the disciplinary enquiry? A further probe was really called for.

[10] The learned Arbitrator averred in her award that having the word of the supervisor against that of the 1st respondent she took the version of the latter because the onus of proof lies with the employer (p.3 paragraph. 3 of the award). Indeed, the onus lies with the employer to prove that the reason for the dismissal was valid, but the employee also has a duty to dispute the employer's version and further substantiate his denial, not to just tender a bare denial.

[11] The Court does not have the benefit of the record of the disciplinary hearing and is therefore not in a position to ascertain whether the evidence that the employer acted upon was reasonable or sufficient to have acted on. The matter is therefore remitted to the DDPR to be heard ***de novo*** before a different Arbitrator.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 29TH DAY OF MAY, 2009.

F.M. KHABO
DEPUTY PRESIDENT

L. MATELA **I CONCUR**
MEMBER

M. MOSEHLE
MEMBER **I CONCUR**

FOR THE APPLICANT: ADVOCATE SEPHOMOLO
FOR THE 1ST RESPONDENT: ADVOCATE MOLISE