IN THE LABOUR COURT OF LESOTHO **LC/REV/84/07**

HELD AT MASERU

IN THE MATTER BETWEEN

LEWIS STORES (PTY) LTD **APPLICANT**

AND

MOTEBANG RAPHAEL MAKHELE **1ST RESPONDENT**
ARBITRATOR – N. MOSHOESHOE **2ND RESPONDENT**

JUDGMENT

Date : 30/06/10
Review – Applicant relying on grounds of review which is not covered by his founding affidavit – Such amounts to an ambush and denies the respondent the opportunity to deal with the argument adequately – Irrationality – Applicant failing to prove that arbitrator was in anyway irrational in reaching at the conclusions he arrived at – The court finding that the findings were justified by evidence arbitrator heard – Application for review dismissed.

1. This is an application for the review and setting aside of the award of the learned arbitrator Moshoeshoe dated 22nd June 2007. In that award the arbitrator had found the dismissal of the 1st respondent on 21st March 2007, to be both procedurally and substantively unfair. Consequently the learned arbitrator ordered that the 1st respondent be reinstated in his job with effect from 23rd July 2007. He further ordered that 1st respondent be paid lost wages as a result of the dismissal which at the time amounted to M11,791-00.

2. On the 19th July 2007, the applicant filed the present application for the review of the award of arbitrator Moshoeshoe on a number of grounds, nine in all to be precise. The 1st respondent promptly filed his notice of intention to oppose. In terms of the Rules, the applicant was then enjoined to file the record after which, it had the option to supplement its founding affidavit or file a notice indicating that they stand by their initial notice of motion and founding affidavit. Only then would the 1st respondent be expected to file his opposing affidavit.

3. However, the applicant did not file the record in accordance with the rules until the 1st respondent decided to file his answering affidavit on the 19th September 2007. On the 6th August 2008, the Registrar wrote to counsel for the applicant calling on them to cause the record to be filed within 7 days failing which the application could be struck off for want of prosecution.

4. On the 18th August Counsel for the applicant responded to the Registrar's letter stating that he was unable to file the record as some of the tapes were inaudible. However, the letter was only dispatched and received at the court's Registry on the 19th August 2008. On the same day the 1st respondent had moved the court to dismiss the review for want of prosecution.

5. On the 21st August 2008, the applicant filed an application for stay of execution and rescission of the order of the court dismissing the review application. My sister Khabo DP granted the stay of execution on the 25th August 2008. The rescission application was opposed. However on the 4th November 2008 Counsel for the 1st respondent wrote to Counsel for the applicant indicating that they no longer oppose the rescission application. Accordingly, the rescission was granted and the matter was duly reinstated on the roll on the 23rd April 2009. Finally a reconstructed record was filed together with the notes kept by the arbitrator on the 21st June 2010.

6. The facts of the case are brief. The 1st respondent was dismissed from the employ of the applicant for allegedly abusing staff purchase account by using his staff account to buy

sofas for an outsider. This was vehemently denied by the 1st respondent. It is however common cause that the 1st respondent did buy Nelson Sofas from applicant's shop no.441. 1st respondent himself worked at shop no.393. He avers that he bought the sofas for himself and he delivered them at his home at Roma, Mahlanyeng. The delivery note confirmed this.

7. Applicant led evidence of 3 witnesses at the DDPR. The first witness was Mr. Khoase, who was the Manager of Shop No.393, where 1st respondent worked. A good part of his testimony was made up of what he was told by two staff members who met the lady who claimed that 1st respondent bought sofas for her. The said lady had wanted to meet PW1, as the sofas were allegedly dirty when she bought them and she had been promised that they would be exchanged. It was on the 7th March 2007, when the lady by the name of Mamoeketsi Nqhae had come to the shop. She was not able to meet with PW1.

8. On the 8th she was fetched from her home by two staff members who talked to her the previous day to meet PW1. PW1 testified that he called 1st respondent in the presence of three staff members to reconcile him with Mrs. Nqhae. The 1st respondent told him in the presence of the customer and the three staff members that he bought the sofas for himself and that he did not know Mrs. Nqhae for whom he is alleged to have bought the sofas.

9. PW1 testified that he told the customer that 1st respondent says he does not know her. She confirmed that she too did not know him. The person who was a go between was one Mr. Seala who undertook to talk to his friend working at Lewis so that he could buy the sofas for her at staff price. The witness stated that on Monday 12th March, he went to the customer's home to investigate and he did find the sofas the customer was complaining about. He asked her to make a report which she did. The 1st respondent was subsequently charged before a disciplinary hearing where he was found guilty and was dismissed.

10. The witness was asked if a hearing was held and he answered in the affirmative. He was asked to tender evidence of proof of same. He handed in exhibit "A" which turned out to be the notice of disciplinary hearing. He further tendered two letters written by the customer, Mrs. Nqhae on the subject.

11. PW2 was Jeanette Motsabi who said Mrs. Nqhae was brought to her by Manthabiseng Moletsane. Mrs. Nqhae had a complaint from Shop 441. She asked her for her account and she told her that it was in 1st respondent's name. She said the merchandise she was complaining about was bought for her by 1st respondent. She asked how he came to buy for her. She explained that she came to the shop with one Seala. They met a salesperson by the name of Manthabiseng Moletsane who made a quotation for them. Seala then said he would talk to his friend Makhele to help them buy the sofas.

12. The arbitrator enquired where she was when Seala allegedly promised to talk to Makhele. She conceded that all what she said about Seala was related to her by Mrs. Nqhae. PW2 said she called Mr. Makhele to enquire about the claim of Mrs. Nqhae and Mr. Makhele denied buying for Mrs. Nqhae and added that he did not even know her. Manthabiseng Moletsane testified as PW3 and she confirmed that 1st respondent said he did not know Mrs. Nqhae and said he would not answer anything relating to her complaint. She stated further that she did see the sofas at Mrs. Nqhae's home. She said they were old and torn and yet they had only been bought in September.

13. It was put to the witness that there is no evidence to proof that the sofas she saw at Mrs. Nqhae's home were bought at Lewis. She insisted that they were bought at Lewis without producing proof of that assertion. She went on to show that Nelson Sofas are sold by Lewis.

14. For his part 1st respondent confirmed that he was confronted by PW2, who told him that he was investigating an allegation that he (Makhele) bought chairs for Mrs. Nqhae at Shop.441. He said Mr. Khoase said he should stay at home while he investigated the matter and that he should come for a hearing

on the 19th March 2007.

15. He testified further that the 19th March was a stay away. He however, managed to reach the hearing venue. The chairperson read him the charge and he denied any wrong doing. The chairperson allegedly said she was in a hurry and left saying 1st respondent could appeal to the DDPR if he was dissatisfied. He contended that the dismissal was unfair as he was not afforded the opportunity to defend himself, in the light of the way the hearing was conducted.

16. The learned arbitrator considered evidence of the applicant's witnesses to be hearsay to the extent that it was made of statements made by Mrs. Nqhae to the witnesses, yet she was not called to confirm them. He nonetheless said he found it a startling coincidence that the hearsay allegations of Mrs. Nqhae coincided with the 1st respondent's purchase of the sofas complained of. He thus ordered an inspection in loco in order to dispel the doubt brought about by this coincidence.

17. The inspection was conducted on the 24th May 2007. There was no one found at Mrs. Nqhae's house at Khubetsoana. The Court then moved to 1st respondent's home at Roma, Mahlanyeng. There the sofas which are the subject of this litigation were found. Both parties agreed that those were the sofas which 1st respondent bought at shop no.441.

18. Against the backdrop of this evidence the arbitrator found that 1st respondent's testimony regarding how the hearing was conducted was not challenged. He held that the applicant only submitted the notice of hearing but did not hand in the minutes to show how the hearing was conducted. He deduced from 1st respondent's testimony that he (1st respondent) was presumed guilty and was called to the hearing to prove his innocence. He made this remark in view of the evidence of the 1st respondent that when he denied wrongdoing, the chairperson allegedly said he must speak the truth because she could call witnesses to prove his culpability and that the arbitrator said to 1st respondent she was in a hurry, he would appeal to DDPR if he was not

satisfied. Accordingly he said the dismissal was procedurally unfair.

19. He also found the dismissal to be substantively unfair, because the letters that Mrs. Nqhae wrote were firstly contradictory. The first letter implicated the 1st respondent and the second retracted the first. Secondly, he ruled that the letters were hearsay in as much as their author was not called to testify on their contents. He also found evidence of all three witnesses of the applicant to be hearsay because it was all based on what Mrs. Nqhae told the witnesses. The said Mrs. Nqhae did not testify either at the disciplinary hearing or at the arbitration hearing. For these reasons he held the dismissal substantively unfair.

20. At the hearing Mr. Thoahlane for the applicant addressed the Court on only one ground of review namely; that the conclusion of the arbitrator that the dismissal was procedurally and substantively unfair was irrational. He however said he was not abandoning those other grounds that are raised in the Founding Affidavit. This in our view does not make sense. The grounds which are not motivated are devoid of content. Counsel is enjoined to motivate his grounds of review to enable the Court to express an informed opinion on them. In the absence of motivation Counsel is failing in his duty to help the Court to decide the case in a fair and just manner.

21. The court is confronted with a long list of alleged irregularities which are not explained. Applicant's first complaint is that the company was directed to start the case and that this was improper. No reason was advanced why this was so, neither was an authority suggested for the proposition. Secondly, it was suggested that the arbitrator did not state that the court was in session on the 21st May when he ordered inspection in loco for the 24th May 2007. The 1st respondent in his answer noted the concern, but went on to state that applicant suffered no prejudice as a result. This submission has not been denied.

22. It was contended that the arbitrator did not order inspection in loco right away and that gave 1st respondent the chance to

remove the subject matter. The 1st respondent correctly stated in reply that the applicant did not object in this regard and that applicant is not alleging that 1st respondent did remove the subject matter as a fact. He stated correctly in our view that applicant's complaint in this regard is unjustified speculation.

23. It was alleged further on behalf of applicant that the arbitrator improperly allowed the proceedings in referral A0277/07 to proceed as a fresh matter whereas it was a sequel to a disciplinary hearing. This contention was denied by the 1st respondent who contended that what was before the arbitrator "was completely a fresh matter of an unfair dismissal." This contention has not been denied and we do not find any fault with it.

24. The three remaining grounds of review are essentially the very ground of irrationality which Mr. Thoahlane dwelt on at length. He contended that the conclusion of the arbitrator that the dismissal of 1st respondent was procedurally unfair was irrational in the light of uncontroverted evidence of Pheello Khoase that a hearing was held. Indeed 1st respondent did not dispute the fact that a hearing was held. What he challenged is the manner in which the said hearing was conducted. The finding of the arbitrator on procedural unfairness was based on the view he held after hearing 1st respondent's testimony that the latter was called to the hearing to prove his innocence.

25. Mr. Thoahlane contended further that 1st respondent's evidence of the manner in which the hearing was conducted was not put to applicant' witness PW1 to deal with it. This would appear ex facie the record to be so. However, this issue was not pleaded to enable the 1st respondent's Counsel to deal with it. Furthermore, even assuming it was put to Mr. Khoase, he was certainly not going to be competent to deal with it because he did not chair the hearing. He only appeared as a witness, as such he could not deal with the details of what transpired throughout the hearing.

26. In the premises, I would be inclined to dismiss this argument as an ambush because the applicants have had ample time to

supplement their founding affidavit to raise whatever further grounds they considered necessary but they failed to do so. This is the approach this Court adopted in the case of Ashraf Anwary .v. Maphali Ntsoele LC/REV/246/06 (unreported). There is no reason to depart from the rule laid in this case.

27. Counsel for the applicant argued further that the award was irrational where the arbitrator said the dismissal was substantively unfair because Mrs. Nqhae wrote letters which were handed in as evidence of her complaint. He contended that these letters were not denied. The 1st respondent has always denied the allegation of Mrs. Nqhae that he bought sofas for her. His denial was confirmed by two incidents. Firstly, that the second letter of Mrs. Nqhae retracted the first letter thereby making her version doubtful as to its truthfulness. Secondly, when the 1st respondent's home was inspected the sofas were found.

28. Mr. Thoahlane argued further that it was irrational to conclude that the two letters written by Mrs. Nqhae were hearsay, because they were not denied. We have already shown that the first letter has always been denied by the 1st respondent. The second letter of Mrs. Nqhae corroborated 1st respondent's denial by retracting the contents of the first letter. It follows from this that it is not correct to suggest that the learned arbitrator was in any way irrational. For these reasons this review application ought not to succeed. It is accordingly dismissed and the award of the DDPR is confirmed.

THUS DONE AT MASERU THIS 4TH DAY OF AUGUST, 2010.

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE **I CONCUR**
MEMBER

L. MOFELEHETSI **I CONCUR**
MEMBER

FOR APPLICANT: **MR. THOAHLANE**
FOR RESPONDENT: **MR. METSING**