

IN THE LABOUR COURT OF LESOTHO LC/REV/498/06

HELD AT MASERU

IN THE MATTER BETWEEN

WELCOME TRANSPORT (PTY) LTD APPLICANT

AND

MAKABELO NKOE 1ST RESPONDENT
THE ARBITRATOR (M. MONOKO) 2ND RESPONDENT

JUDGMENT

Date: 30/09/10

Review of DDPR award - Arbitrator making award in total disregard of evidence tendered on behalf of the applicant - Irrationality - Arbitrator acting irrationally in refusing a postponement despite valid and justifiable reasons for the Managing Director's inability to attend the arbitration - Award reviewed and set aside.

1. The 1st respondent was employed by the applicant company doing clerical work. On the 2nd September 2005 she was served with a letter containing several questions relating to misuse of money which the Managing Director wanted her to furnish answers to. According to the evidence adduced on behalf of the applicant by Halekhethe Ntaote, 1st respondent was ordered to settle down and not do her normal duties until she had answered all the questions.
2. Ms. Ntaote testified that moments later she realized that 2nd

respondent was no longer in the office. She learned from the security guard at the gate that the 2nd respondent had gone out through the gate carrying her bag. She testified that 2nd respondent came back on the 6th September 2005, to submit her response to the questions, but did not enter the office. She came back on another day that the witness did not recall and still did not enter the office. When she (the witness) enquired why she was not entering the office she said she was afraid that the Managing director would expel her.

3. At that point the learned arbitrator required the witness to hand in documentary evidence to substantiate her evidence. The witness said the document she was capable of producing was the dismissal letter dated 3rd November 2005. Asked what the letter entailed she stated that the letter narrated the events from 2nd September and captured the happenings as she just testified i.e. her coming to the office and not entering the office to the day the letter was written, which interpreted all that as constituting a desertion.
4. She was asked by the learned arbitrator, “so, briefly what do you want to show with this letter?” The witness responded:

“It is a letter that shows that ‘Me Mateboho was not dismissed from work. It was never indicated that she was dismissed from work, her contract was never terminated.’”
(p.10 of the transcribed record).

She was then asked to hand it in “so that we will look at it when we make a conclusion.” At that point the learned arbitrator learned that the author of the letter was Mr. André the Managing Director. He immediately dubbed it hearsay. Now this was totally irregular because the letter was not disputed by the 2nd respondent. Furthermore, even though Ms Ntaote was not the author she had testified firsthand about its contents, as events that she had firsthand knowledge of. The letter ought to have therefore been admitted.

5. The learned arbitrator made a hue and cry about the Managing director not being present to give evidence in person. It was

then that Ms Ntaote stated:

“yes Sir I indicated that Mr. Andrew is unable to come here because he cannot even sit down. He had been shot he is unable to walk.

Arbitrator: *So when will he be present?*

Ms Ntaote: *That is why I say I don't know as to when he will be able to walk and sit down, because he cannot walk and he cannot sit down, he has been shot on the two thighs. I think what I can give to show that he has indeed been shot is a medical form.”*

6. The exchange went on and Ms Ntaote sought to ask for a postponement to enable Mr. André to be present. The arbitrator refused to grant the postponement saying that was the only day he had to deal with the matter. (see p.13 of typed record). At the sametime he refused to accept the letter which he had asked for himself. The arbitrator asked her to state what her prayer on behalf of the company was. She stated that the company would accept liability for the months of September and October, but prayed for the relief of unfair dismissal and claims consequential thereon to be dismissed.
7. The next witness was Rapelang Letsie the office clerk who worked with the 1st respondent. She was asked to explain how 1st respondent left the employ of the applicant. She said there was a hearing held for the applicant and after that hearing she (applicant) disappeared. She was asked to explain what happened in the hearing. She responded as follows:

“In the hearing it was where she had been asked questions and she was given a period of two weeks to answer them and further that she would not do any job. So after we had that hearing she left and came back after some days with those answers, but she never entered the office. She went back again and never came back to work.” (p.20 of the transcribed record).
8. The witness stated that 1st respondent gave her the answers to

- the questions through the window. She came back later when she had come to ask for her wages. Even then she did not enter the office she stood at the door. She was asked if 1st respondent ever indicated that she was coming to work, the witness said she never did so.
9. During cross-examination it turned out that the hearing of the 2nd September was the 2nd held for the 1st respondent in just under two months. She had been to another hearing before which was held on the 27th July 2005. The 1st respondent sought to dispute that any hearing was held on the 2nd September and said she was only given the list of questions to answer. DW2 insisted that a hearing was held and that she took minutes/notes of the discussions.
 10. The 1st respondent for her part confirmed that on the 2nd September 2005, she was called to the MD's office where certain questions were put to her by the MD. She answered some of them verbally, but the MD directed that the questions he was asking be written down which was done. Thereafter the MD said he gave her two weeks to go and answer those questions.
 11. The witness stated that she brought the answers after 3 days and the MD said she should take them to the office. She stated that she asked the MD when she should come to work and he said she should go home he would write her a letter after he had checked the answers. Such a letter was never written until she took her case to the DDPR. She stated that she went to the DDPR to claim salary for the two months she had been at home, whilst waiting for the letter recalling her to work.
 12. The DDPR telephoned the office and the MD said they should send her to the office. On arrival she was directed to come back the following day, 3rd November 2005. The next day she was served with a letter that said she had deserted. She again went back to the DDPR to file a claim of unfair dismissal.
 13. Mr. Halekhethe Ntaote was asked what she had to say about 1st respondent's evidence. Her response was that the company

- had not dismissed her. Asked about severance pay she said she believed 1st respondent was entitled to her severance pay. (p.35-36 of the typed record). The arbitrator even asked “should we show when we make the award that you have agreed that the severance pay of two years is due to her?” Ms Ntaote answered “yes because she has worked with the company.” (p.36).
14. At the instance of the arbitrator both sides made closing arguments. 1st respondent sought compensation of 12 months’ salary for unfair dismissal, one month salary in lieu of notice and M1,005-00 as severance pay. Ms Ntaote for the applicant denied that applicant was dismissed, as such she said he was neither entitled to notice nor compensation. As for severance pay she still repeated that the 1st respondent was entitled to it as such she was not disputing it. The arbitration was adjourned with parties being promised the award on the 26th March 2006.
 15. The award was however, handed down on the 28th March 2006. The learned arbitrator came to the conclusion that the dismissal of 1st respondent was substantively and procedurally unfair. He based his finding on the single evidence of the 1st respondent concerning the alleged promise by the Managing director to write 1st respondent a letter recalling her to work.
 16. In coming to the conclusion that he reached the learned arbitrator said nothing about the evidence of the two witnesses for the applicant who said 1st respondent used to come and stand at the door and never tendered to resume her duties. This is a crucial requirement for someone who is still interested to continue with their work and are being unreasonably denied that opportunity by the employer.
 17. Applicant’s witness DW1 said she even asked her (1st respondent) on one of the many occasions she came to stand at the door why she was not entering the office to which she is said to have said “she was afraid that Ntate Allen might expel her.” (p.8 of the typed record). She went on to say that she asked her what she had come to the office for and she said to collect her money for September. The 1st respondent did not

challenge this evidence at all and yet the learned arbitrator has not paid even a scant attention to it. He totally ignored it.

18. If it be true that Mr. Allen had said he would write 1st respondent the letter recalling her, she would have said so when DW1 asked her why she was not entering the office. Secondly, if they had had such a smooth communication with the MD regarding her possible recall, 1st respondent would have also made arrangements regarding her salary while she was at home. Her frequenting the office to check on her salary is clear evidence that she was not meeting with the MD and was hoping that one day she might find that her salary had been worked and left at the office. The evidence of the 1st respondent regarding her alleged communication with Mr. André cannot possibly be true in the circumstances.
19. In any event the learned arbitrator committed a grave irregularity by proceeding with the arbitration and finalizing it without hearing the side of Mr. Andre whom he was told under oath that he was indisposed. This is the person who would confirm or deny 1st respondent's claim that she was ever promised to be recalled at sometime in the future. This was a fitting case where a judicial exercise of the discretion to postpone a hearing to a later date should have been exercised in favour of the applicant. His (Mr. Andre) failure to be present was justifiable. The award of the learned arbitrator is reviewable on this ground alone. He acted irrationally and arbitrarily in refusing to postpone the hearing to enable the Managing Director to come and testify.
20. We are convinced as well that the learned arbitrator did not enquire into the claim of the witnesses of the applicant that the 1st respondent deserted for the reasons that they advanced. He

(the arbitrator) misdirected himself instead by interpreting the letter in a manner that landed him to the conclusion that 1st respondent was dismissed. By so doing he ignored the factors canvassed by the witnesses which were confirmed by the termination letter which in their view led them to the understanding that 1st respondent had deserted.

21. As we earlier said the learned arbitrator irregularly and improperly refused to admit the letter of dismissal when it was handed in by DW1, yet the letter was not in dispute even if its contents might be disputed. That the contents were in dispute did not mean that they should not be considered either. Clearly, therefore, the learned arbitrator acted irregularly in the conduct of the arbitration proceedings by ignoring evidence she had to consider and by denying the MD the opportunity to present his evidence and thereby rebut 1st respondent's evidence which was the sole basis on which he found in her favour.
22. The view that we hold is that the award is irregular as such it ought to be reviewed corrected and set aside. It is so ordered. We note however, that the parties were agreeable on the payment for the months of August, September and October as well as the severance pay. These the learned arbitrator could order to be paid as the applicant had no dispute on them. The learned arbitrator has already ordered payment of the three months' salary, but left severance pay on which there was no dispute. Even as we set aside the award, that does not affect severance payment which applicant consented to. For these reasons the applicant shall pay 1st respondent an amount of M1,005-00 as severance pay within 30 days of the receipt of this award.

THUS DONE AT MASERU THIS 19TH DAY OF NOVEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. CHOBOKOANE
MR. RUSSEL