IN THE LABOUR COURT OF LESOTHO **LC/REV/56/09**

HELD AT MASERU

IN THE MATTER BETWEEN

SELLOANE MAHAMO **APPLICANT**

AND

NEDBANK LESOTHO (PTY) LTD **1ST RESPONDENT**
DDPR (ARBITRATOR THAMAE) **2ND RESPONDENT**

JUDGMENT

Date: 28/10/2010
Review – Court found that the review was an appeal in disguise as applicant was unhappy with the finding of the arbitrator – Application for review dismissal with costs.

1. The applicant herein is seeking review of the award of the 2nd respondent which refused to classify her resignation from her position as teller as constructive dismissal and instead found it to be an invalid step taken with a view to frustrate pending disciplinary proceedings against her.

2. Applicant had been suspended on the 10th March 2006, whilst investigations were being carried out into the shortage of M4,000-00. Initial investigations had shown that on the 8th March 2006, an inter teller transaction between teller Motsoane and teller Manamathela was erroneously posted to applicant. This meant that the applicant ought to have had an imbalance as result of the M4,000-00 which was erroneously posted to her.

3. When she was checked however, she was found to balance. When she was questioned about the transaction she produced a cheque of M70,560-00 and said the owner had phoned and said he had erroneously over paid her by M4,000-00 and that he would come and collect the overpayment. The bank called the owners of the cheque and they denied ever calling applicant or making the statements applicant ascribed to them.

4. When confronted with the response of the customer the applicant confessed that she had lied because she had been afraid. On the 31st March 2006, applicant wrote a letter to the bank in which she confessed that she had taken the M4,000-00 in issue on the 8th March 2006. On the same day she drew a cheque "for M4,000-00 which I took on the 08-03-06." These were the words of the applicant in the letter that she forwarded the cheque with.

5. On the 3rd April 2006, applicant purported to resign from her employment with immediate effect. The latter responded on the 4th April indicating that the bank still considered applicant as an employee until her disciplinary case had been finalised. On the same day the bank served applicant with disciplinary charges accusing her of gross dishonesty and/or theft in that she took M4,000-00 of the bank for her personal use.

6. The hearing was scheduled to take place on the 10th April 2006. It was however postponed to 13th April. A lot of correspondence was exchanged between applicant and the Human Resources Manager concerning her purported resignation. In one of such correspondence dated 11th April 2006, the applicant made it clear that she would not attend the hearing scheduled for the 13th April 2006, because she was no longer an employee. True to her word, the applicant did not attend the hearing which proceeded in her absence. She was found guilty and dismissed.

7. As preparations were being made to process the disciplinary hearing against her, the applicant had also rushed to the DDPR on the 10th April to file a claim of constructive dismissal against the 1st respondent. Against the backdrop of the evidence as

herein summarised, the learned arbitrator came to what in the circumstances was an irresistible conclusion namely, that the applicant's resignation did not amount to constructive dismissal. He went on to say it was infact an international as opposed to a forced resignation due to unreasonableness of the employer.

8. The applicant applied for the review of the award of the learned arbitrator. The grounds of review was that the learned arbitrator had erred in not making an award on payment of applicant's severance pay and in holding that she had resigned on her own accord as opposed to being forced by unreasonable conduct of the employer.

9. The review was heard by Khabo DP on the 5th May 2009. Khabo DP upheld the contention and held that having found that applicant resigned of her own accord, the arbitrator ought to have determined whether in the circumstances applicant was entitled to severance pay. She went on to rule that in order to decide on applicant's entitlement or non-entitlement to severance pay, the arbitrator ought to first determine whether applicant's resignation was lawful. She remitted the matter to the DDPR to enable the arbitrator to make the determination on the issues which the court had found he ought to have decided, but failed to do so.

10. On the 29th June the matter was heard by the DDPR per the instruction of Khabo DP. The applicant was represented by her present attorneys of record. Mr. Sekonyela for the applicant impressed on the arbitrator that since he had already decided that the applicant resigned, the only issue that the arbitrator was called upon to decide was applicant's entitlement to severance pay. He contended that the arbitrator should be guided by section 79 of the Labour Code Order 1992, which provides that an employee who has completed more than one year of continuous service is entitled to severance pay. He submitted that in terms of section 79 (2) it is only employees who are lawfully dismissed for misconduct who are not entitled to severance pay.

11. Mr. Sekonyela made no attempt to deal with the legality of

applicant's resignation. His reliance on section 79 was based on the assumption that the applicant's resignation was proper. However, the order of Khabo DP was that the arbitrator should make a determination, based on the facts of the case whether applicant's resignation was lawful.

12. The learned arbitrator did understand the court order to mean exactly that. He was persuaded by Mr. Setlojoane for 1st respondent that applicant's purported resignation was a veiled attempt to avoid disciplinary action. He went on to state that as things stand applicant was dismissed following her failure to attend the disciplinary hearing. He submitted that the enquiry into the lawfulness of the resignation should be made in the context of 1st respondent's position that the applicant is dismissed. I have no doubt that he was correct. The learned arbitrator also agreed with him and found that the resignation was not valid, which meant it was ineffective.

13. The effect of the finding that the resignation was not valid was to leave applicant with what she certainly did not want to hear namely, that she is dismissed. It is trite that the dismissal was based on applicant's admitted misconduct of taking for her own use bank money amounting to M4.000-00. It follows that as Mr. Sekonyela correctly submitted applicant would be disqualified to receive severance pay as she was lawfully dismissed for misconduct at least on 1st respondent account.

14. Applicant once again filed an application for the review of the award of the learned arbitrator. Applicant contended that the learned arbitrator erred and committed a mistake of law which materially affected her decision in:

    a) Holding that the resignation of the applicant was not valid.
    b) Failing to award severance pay notwithstanding that the law provides that severance pay shall not be payable only where the employee has been dismissed for misconduct.
    c) Reopening the matter contrary to the court order.
    d) Failing to address and make an award and assessment of all the claims made by the applicant in her referral.

15. In their Answering Affidavit the 1st respondent contended correctly that the first and the second grounds of review are a clear appeal as the applicant is dissatisfied with the finding of the arbitrator. We entirely agree that the complaint against the determination on the invalidity of the resignation of applicant is an appeal. It is trite that an appeal against the determination of the arbitrator is not allowed. However, even on the merits the finding of the arbitrator on this point is not challengeable. The resignation could still be pronounced invalid on another ground apart from that pronounced by the arbitrator. That is the purported immediate resignation of the applicant without serving notice. Accordingly, we find that there is no merit in this first ground of review.

16. Applicant contended that the arbitrator irregularly failed to award her severance pay despite the fact that she was not dismissed for misconduct. Not only is this an appeal, but we have already observed that applicant's attempt to avoid disciplinary process by purporting to resign was thwarted by the finding that her resignation was invalid. That meant that her termination which is common cause has been effected through the dismissal as opposed to her resignation which has been ruled invalid. Given the circumstances of her termination which is dismissal she was not entitled to severance pay. It follows that the arbitrator committed no error in not ordering its payment.

17. The contention that the arbitrator reopened the matter contrary to the court order was opposed by the 1st respondent's Human Resources Manager, who averred that the learned arbitrator acted within the confines of the ruling of Khabo DP. The applicant did not take the argument any further or even attempt to show in what manner the matter was reopened. Accordingly, she is taken to accede to the 1st respondent's submission that the arbitrator did not reopen the matter as alleged or at all.

18. The last contention was that the learned arbitrator failed to address and make an assessment of the claims the applicant

had made in her referral. In his answering affidavit the Human Resources Manager deposed that the arbitrator rightly did not address those claims because the order of Khabo DP specifically directed him to deal with the validity of the applicant's resignation and her entitlement or otherwise to severance pay. He is correct. Once again counsel for the applicant did not take this issue any further.

19. It follows from what we have said that this review application ought not to succeed. There is completely no merit in this review and for this reason it ought to be dismissed with costs. Accordingly, the application for review is dismissed with costs.

THUS DONE AT MASERU THIS 8TH DAY OF DECEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

L. MATELA **I CONCUR**
MEMBER

D. TWALA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. B. SEKONYELA**
FOR RESPONDENT: **ADV. SETLOJOANE**