

IN THE LABOUR COURT OF LESOTHO

LC/REV/65/10

HELD AT MASERU

IN THE MATTER BETWEEN

NOKOANE MOKHATLA

APPLICANT

AND

LESOTHO BREWING CO.

1ST RESPONDENT

DDPR (ARBITRATOR

(MRS. LEBONE MOFOKA)

2ND RESPONDENT

JUDGMENT

Date: 10/11/2010

Review – Arbitrator committing a serious mistake of law which materially affected her award – Acceptance of a pension benefit cheque – whether such constituted a bar to applicant to challenge his dismissal – Evidence – Arbitrator erroneously relying in counsel’s submission without hearing evidence of circumstances of issuance and acceptance of the cheque – Award reviewed, corrected and set aside – Matter remitted to DDPR to proceed on the merits.

1. The applicant herein was dismissed from employment on the 23rd October 2009. On the 19th January 2010 he referred a dispute of unfair dismissal to the DDPR. Applicant averred in his Founding Affidavit that sometime in February 2010 he received a call from the Receptionist of the 1st respondent to present himself at the reception to collect his cheque. He obliged and on arrival was given a cheque of M40,590-30 from AON Lesotho. Subsequent enquiries established that the money was applicant’s contributory pension benefits.

2. At the arbitration the representative of the 1st respondent raised a preliminary point to the effect that applicant's acceptance of his pension benefit barred him from challenging the fairness of his dismissal. Reliance was made on the decision of this court in Tseliso Moiloa .v. Total Print House (Pty) Ltd & 2 others LC/REV/524/06. The learned arbitrator, allegedly relying on the Moiloa case upheld the point in limine and dismissed the referral.
3. Applicant applied for the review and setting aside of the award contending in essence that the learned arbitrator erred in upholding the preliminary point without hearing evidence pertaining to the circumstances under which the applicant accepted the pension benefits cheque. The applicant is correct. In his heads of argument Mr. Thulo for the applicant referred the court to the case of Burnkloof Caterers Ltd .v. Horseshoe Caterers Ltd 1974 (2) SA 125, where the court held that "conduct to constitute an acceptance, must be an unequivocal indication to the other party of such acceptance."
4. Mr. Thulo for the applicant rightly referred to the case of Bongani Tsotsi .v. Institute of Development Management 1985 - 1990 LLR 384; where the respondent in an apparent attempt to put to rest the dispute concerning the termination of the employment of the applicant, had issued him with a pension benefit cheque purporting it was in full and final settlement. The respondent had specifically recorded that if the applicant did not accept the cheque in full and final settlement he must return it. The applicant nonetheless accepted the cheque but issued a "without prejudice" receipt.
5. At the hearing the respondent raised the defence that the applicant had accepted the pension cheque in full and final settlement of all of claims between the parties. The Court per Kheola J as he then was said the applicant accepted the cheque in full and final settlement of his pension claims as set out in the Notice of Motion. The present case is identical with the Tsotsi case. Once the applicant issued the "without prejudice" receipt he clearly evinced no equivocation and the

respondent should have been under no illusion that the applicant was abandoning his claims.

6. The Moilola case on which so much reliance was placed, is very much different from the present case. In casu applicant referred a dispute of unfair dismissal and was subsequently issued a pension fund cheque, without even prior negotiations as to what the implications of its acceptance are going to be. Respondent cannot claim to have been led to believe that by accepting it the applicant was abandoning his claim which was already filed with the DDPR.
7. In the Moilola case, the applicant referred a dispute in which he claimed notice and then subsequently sought to challenge his dismissal. They settled a claim of payment of notice at conciliation. Demand for terminal benefits evinces acceptance of the termination of employment, hence the statement we made that applicant cannot approbate and reprobate at the sametime. There was clear evidence of the settlement agreement which the court relied upon in arriving at the conclusion that applicant had accepted his termination.
8. We are of the view that the learned arbitrator misapplied the decision in Moilola's case and thereby inappropriately denied the applicant the opportunity to prosecute his claim. This was a gross mistake of law which has materially affected the award of the learned arbitrator. Furthermore, we agree with counsel for the applicant that unlike in the Moilola case, the circumstances under which the pension cheque was sent to and accepted by the applicant were not common cause. If the learned arbitrator had ordered *viva voce* evidence she would have found as we have found that applicant accepted the cheque in full and final settlement of his pension fund but not in respect of his challenge to the fairness of his dismissal. This is totally different from Moilola's case who consciously claimed and settled for payment of notice which settles his claim to unfair dismissal. For these reasons the award of the learned arbitrator is reviewed, corrected and it is set aside. The matter is remitted to the DDPR to proceed on the merits.

THUS DONE AT MASERU THIS 24TH DAY OF FEBRUARY 2011

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

ADV. THULO
ADV. MABULA