IN THE LABOUR COURT OF LESOTHO **LC/REV/17/10**

HELD AT MASERU

In the matter between:

'MABATHO TENENE **APPLICANT**

and

CHECKOUT SUPERMARKET (PTY) LTD **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Date: 17/06/11

> ***Review of an arbitral award - On the basis that the Arbitrator relied for his finding on a statement (purported confession) that was firstly not tendered as evidence before him and secondly made under duress - Applicant's Counsel contended that such constituted a gross irregularity which rendered the matter reviewable - The Court detected no irregularity in the circumstances of the case - Review application therefore dismissed.***

1. The applicant is 1st respondent's former employee. She instituted these proceedings following her dismissal from 1st respondent's employ on 24th April, 2009 on grounds of theft and fraud. She was serving as a Packer at the time. She challenged this dismissal on both substantive and procedural grounds before the Directorate of Dispute Prevention and Resolution (DDPR) in AO 346/09, and the application was unsuccessful. She is before this Court to seek the review, correction and setting aside of the DDPR award.

2. Her grounds for review (quoted verbatim) are that;

(i) The learned Arbitrator erred and misdirected himself by considering and relying on the statement which was not part of the evidence before the 2nd respondent;

(ii) The learned Arbitrator erred and misdirected himself by making a finding which is not supported by evidence that I testified that I pleaded guilty in my evidence in chief;

(iii) The learned Arbitrator erred and misdirected himself by holding that my dismissal was substantively fair when there is no evidence to support such a holding.

3. On the day of an otherwise scheduled hearing the 1st respondent was not in attendance. Therefore before we could proceed with the application, we had to satisfy ourselves that the 1st respondent had been properly served with the Notice of set-down. Applicant's Counsel submitted that the 1st respondent had been served with a notice of motion on 26th March, 2010, and subsequently with a notice in terms of Rule 16 (d) of the Labour Court (Amendment) Rules, 2006 on 6th July, 2010 to the effect that the applicant stood by her notice of motion. There was neither an intention to oppose nor an answer filed. Counsel for the applicant submitted that the only inference one can draw from this is that they are not opposing the application or are not interested. He therefore asked the Court to proceed with the matter as the 1st respondent is clearly aware it.

4. This matter had been postponed twice at the instance of the 1st respondent. On 16th September, 2010 the 1st respondent's representative, Mr. Thamae, appeared before Court and sought an indulgence to have the matter postponed to the 30th September, 2010 to enable him to answer applicant's papers, and the indulgence was granted. On 30th September, 2010 when 1st respondents were supposed to have filed an answer per their undertaking, they sought yet another postponement and requested that they be allowed to file an answer by 11th October, 2010. An indulgence was once more granted. The Court bent backwards for the second time because the 1st respondent had then briefed Counsel who said she was new to the matter, and asked for an indulgence to acquaint herself with it. Even for the current set-down of 10th November, 2010, they had still not answered and were not in attendance. A close analysis of the case reflected clearly that the 1st respondent had been properly served, and was aware of the current proceedings. Having satisfied itself that the 1st respondent had been properly served, the Court allowed applicant's Counsel to proceed on the merits of the case.

THE SUBSTANTIVE CLAIM

5. Applicant's case is that the learned Arbitrator committed a gross irregularity in that he relied for his finding on an alleged written confession by the applicant which had however not been tendered before him as evidence. Applicant's counsel further claimed that the learned Arbitrator went ahead to find applicant's dismissal to have been fair when she had clearly pointed out that the said confession had been made under duress. These factors, he contended, rendered the award reviewable. He stated that the law is clear that one cannot rely on evidence that is not before Court to make a decision.

6. Applicant's Counsel contended that the onus was on 1st respondent to prove that the dismissal was fair, and according to him the latter failed to discharge this onus. He therefore prayed that the award be corrected and set aside. He brought to the Court's attention p.2 of the record, which he pointed out that it clearly says in the opening statement that the reason for the dismissal was that the applicant confessed to the charge. Applicant's Counsel insisted that in order for the confession to have been admissible before the DDPR it ought to have been tendered as evidence. 1st respondent's opening statement at p.2 reflects that applicant's dismissal was based on her confession. We on review are however interested on whether the learned Arbitrator based his finding on the confession which was not even placed before the DDPR as evidence.

7. As aforementioned, the applicant had been charged with fraud and theft. Evidence tendered before the DDPR on behalf of the 1st respondent was that the applicant had placed two orders when she had been authorised to make only one. The two witnesses testified that the goods were duly delivered by the supplier but some were never received by the 1st respondent. According to the evidence tendered on behalf of the 1st respondent, two invoices were received from the supplier, invoice No. 14657 and 14658, but only goods pertaining to invoice No. 14658 had been received. Steven Bobby, for the 1st respondent, testified that the applicant had confessed to instructing Eusef, 1st respondent's driver, to accompany the driver of Koo Foods, to deliver stock worth Fifteen Thousand, Six Hundred and Seventy-Seven Maloti, Twenty Five Lisente (M15,677.25) to a Chinese Supermarket and they subsequently shared the proceeds. The 1st respondent linked the applicant to the theft because she is the one who according to their testimony placed the orders and even confessed to the theft through a written statement. The applicant denied ever making the orders. Regarding the confession, she conceded that she did sign the statement, but under duress. She testified that she had been

forced by Steve (Steven Bobby, the security personnel) to sign the statement and was threatened with being locked inside the store and taken to the police.

8. Applicant's Counsel insisted that it was anomalous to have charged the applicant with theft when she was not the one who took the goods to the Chinese Supermarket but Eusef. In his view she could have at least been charged with instructing somebody to commit theft and not theft. He submitted that the person who ought to have been charged with theft of the goods was Eusef and not the applicant, and contended that in the circumstances the 1st respondent had failed to prove theft. He concluded that it was therefore irregular for the learned Arbitrator to have found that the dismissal was substantively fair when there was no evidence to support such a finding. He submitted that the decision was simply made on the basis of a statement that the applicant was alleged to have made but which was never placed before Court.

9. In underscoring the principle that it is irregular for a decision-maker to make a decision unsupported by evidence, he relied on the case of ***Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others 1995 (3) SA 74 B.G.*** He prayed that the award be reviewed, corrected and set aside and the applicant be granted compensation for the unfair dismissal.

THE COURT'S ANALYSIS

10. The gist of applicant's case is that the 2nd respondent in reaching his decision relied on a confession the applicant was purported to have made without the said confession being tendered as evidence before Court. Secondly, that the learned Arbitrator ignored the fact that the applicant testified that the said statement was made under duress. Applicant's Counsel contended, as aforementioned, that this runs counter to an established principle that it is irregular for a presiding officer to make a finding that is not supported by evidence. We agree with him that the principle espoused in the ***Standard Bank of Bophuthatswana*** case (cited above) that a decision has to be supported by evidence is an established principle.

11. The applicant is purported to have made the confession at her workplace. These kind of statements made extra - judicially are referred to as ***'informal admissions'***. As a general rule such statements may be used in evidence against the accused. It is trite law that in order for such statements to be admitted as part of evidence they must have been made freely and voluntarily. An admission will be found to have been involuntary if it has been induced by a promise or threat from a person in authority- See Schwikkard & Others in Principles of Evidence, Juta & Co., 1997.

12. The issue at hand is therefore whether the learned Arbitrator indeed based his finding on a statement that was not placed before Court as evidence and also whether his decision was based on an involuntarily induced statement. The 1st respondent fielded two witnesses before the DDPR, Steven Bobby and Gert Martinus both security personnel. They both testified that the applicant confessed before them to having placed the order for the merchandise in issue and directing Eusef, 1st respondent's driver, to accompany the Koo driver to deliver it at a Chinese Supermarket (African Supermarket). The first witness, Steven Bobby, testified that the applicant told them that upon delivery of the goods at the supermarket Eusef was to be paid Seven Thousand Maloti (M7,000.00) for onward transmission to her. According to this piece of evidence, the applicant was duly paid for the said goods and she shared the proceeds with the guy from ***"receiving"*** and ***"the guy who took the goods to the Chinese shop"*** probably Eusef. The two witnesses testified that this conversation took place in front of Checkout Supermarket. Gert Martinus averred that the applicant was made to make a statement as it was their normal procedure so to do. The evidence adduced by the two witnesses was consistent.

13. Indeed, the said confession was not tendered as evidence before the DDPR, but looking at the record and the award, the learned Arbitrator does not appear to have based his finding on it. The two witnesses and the applicant gave ***viva voc`e*** evidence. The learned Arbitrator indicated in his award that he did not find the applicant to be a credible witness. He pointed out a number of factors to substantiate this point, for instance, he indicated that he found it absurd for the applicant to claim that she did not know why she had been dismissed when a disciplinary hearing had been held, and she had been given a letter of dismissal which she even tendered as part of her evidence; Secondly, that when she signed the alleged confession, she didn't know what she was signing for. The learned Arbitrator found it highly improbable that the applicant could sign for something she did not know. She was actually asked her age in cross-examination and she indicated that she was twenty-five (25) years of age. The learned Arbitrator further pointed out that under cross-examination the applicant did not deny the existence of the said confession but claimed not to remember its contents. He found the applicant to have ***"conveniently forgotten"***. An analysis of the DDPR proceedings and the award reflects that the learned Arbitrator clearly analysed the ***viva voc`e*** evidence that was tendered before him and reached a finding he found appropriate in the circumstances without necessarily relying on the purported confession.

14. On the issue of duress the learned Arbitrator pointed out that the applicant cannot claim to have signed the statement under duress when she had pleaded guilty (p.8 of the record) to the charges that were leveled against her at the disciplinary hearing. To this end, he indicated that he wondered whether when the applicant pleaded guilty at the disciplinary hearing she was still under duress. We find this aspect rather intriguing as well. One fails to reconcile a statement allegedly made under duress with a plea of guilty. The learned Arbitrator indicated that the applicant was very dodgy in her answers and her evidence was highly contradictory and therefore unreliable. The learned Arbitrator found that on a balance of probabilities, the applicant had committed the offences that she had been charged with.

15. From the foregoing, the Court comes to the conclusion that the learned Arbitrator did not base his finding on the confession but had analysed the ***viva voc`e*** evidence that was tendered before him. On this premise the review application is dismissed, and the DDPR award is allowed to stand.

16. The Court wishes to express its displeasure in the manner in which the 1st respondent handled this matter. The fact that they never bothered to attend an otherwise scheduled hearing nor filed any papers, and in view of the fact that the matter had been postponed twice at their instance, each time seeking an indulgence to go and prepare an answer. We do not take kindly to this kind of an attitude. Be that as it may, our role is to administer justice, and it is in that spirit that we reviewed the matter in a manner that we deemed fair in the circumstances.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 17TH DAY OF JUNE, 2011.

F.M. KHABO
DEPUTY PRESIDENT

M. THAKALEKOALA **I CONCUR**
MEMBER

R. MOTHEPU **I CONCUR**
MEMBER

FOR THE APPLICANT: **ADV. M.A. MOLISE**
FOR THE RESPONDENT: **NO REPRESENTATION**