

HELD AT MASERU

In the matter between:

NTHABISENG MOLIKO

APPLICANT

And

C & Y GARMENTS (PTY) LTD  
ARBITRATOR C. T. THAMAE  
DDPR

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT

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## JUDGMENT

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*Date: 19<sup>th</sup> November 2012*

*Application for review of arbitration award. Respondent filing an answer out of time together with an application for condonation. Condonation being granted and matter proceeding into the merits. Court finding that review application is based on what took place at the initial disciplinary hearing. Further that Applicant is challenging the decision of the learned Arbitrator and not the procedure of making the decision. Court not finding any irregularity on the part the learned Arbitrator. Review application being dismissed. No order as to costs being made.*

### **BACKGROUND OF THE ISSUE**

1. This is an application for the review of an arbitration award of the DDPR. It was heard on this day and judgment was reserved for a later date. In this application, Applicant seeks to have the arbitration award handed down on the 28<sup>th</sup> September 2011, reviewed, corrected and set aside. Five grounds of review were raised in the founding documents. However, at the commencement of the proceedings, Applicant withdrew four grounds leaving only one. In terms of this ground Applicant argued that the learned Arbitrator erred in law in that He made a conclusion that a recommendation of the chairman in the disciplinary hearing is final. Both parties made presentations in the matter and the ruling as wells as reasons are in the following.

## **SUBMISSIONS**

2. It was averred that the decision to dismiss an employee is the sole prerogative of the employer and not the chairman of the disciplinary hearing. It was submitted that the role of the chairman in such activities is merely to recommend to the employer to dismiss and not to make decisions with adverse impact of the rights of the employee. It was further argued that although the rules of the employer allowed for the chairperson to make the final decision to dismiss, this arrangement was contrary to the rules of natural justice. Reference was made to the case of **Gerald Lerotholi Mokhobo vs. 'Maleloko Mokalanya and Another LC/29/1998** in support of this argument, where the Court said the following,  
*"Even if the Company's rules and regulations designated Mr. Tom Sekhobe as entitled to proceed over disciplinary hearing and to fire the applicant in the event of a conviction, such authority would infringe the rules of natural justice and render the proceedings unfair."*
3. Applicant further stated that the chairperson is also the one who signed the letter inviting Applicant to the hearing but yet later stood in the proceedings as the chairperson. He argued that clearly in signing the letter he became the complainant yet it is trite that no man can be a judge in his own cause. According to Applicant, the fact that the same person who acted as the chairperson in the Applicant disciplinary hearing is also the deponent to the founding documents in these proceedings goes to validate her argument that he was biased and ought not to have proceeded as chairman in the initial proceedings. Reference was made to the case of **Motlatsi Melato vs. Maseru City Council and Attorney General 1997-98 LLR 40**, where the decision of the court in **Liebenberg vs. Brakpan Liquor Licensing Board 1944 WLD 52** was cited as thus,  
*"every person who undertakes to administer justice whether he is a legal official or is only for the occasion engaged in work of deciding rights of others, is disqualified ... if there are circumstances affecting him that might reasonable create a suspicion that he is not impartial."*
4. As a result, and in view of the above said, it was argued that the fact that the chairperson made this decision, this was *ultra vires* his powers for the reason that the principles of natural justice are imported into all disciplinary hearings. Reference was made to the case of **Lesotho Evangelical Church vs. John M. B. Nyabela 1980 (2) LLR 466** where the court said the following,  
*"discipline ... must be in conformity with the rules, such as there are, and the minimum requirements of the canons of natural justice must observed."*  
Applicant concluded that in accepting that the recommendation of the

chairperson is final and finding for Respondent, the learned Arbitrator committed both a gross error and misdirection.

5. In reply, Respondent submitted that they denied that the learned Arbitrator committed an irregularity in finding that the recommendation of chairperson of the disciplinary hearing is final. It was submitted that decision of the chairperson was based on the evidence of the rules of the employer. It was further argued that rules of the employer and in particular the Respondent Human Resources Policy, mandated him to do make a final decision to dismiss. In support of this argument, reference was also made to the case of **Lineo Moalosi vs. Catherine Xu and Another LC/23/04** where the court said the following,

*“Managers are not in law recognised as agents of the company although they may be clothed with such authority through administrative process of delegation. Thus is in the case of Mahlomola Seboka v. Lesotho Bank CIV/APN/227/91 (unreported) Maqutu J remarked as follows:*

*“companies and public bodies which have an artificial persona are strictly governed by the constitutions, memoranda of association and statutes if they are founded by some law. Anything not done in terms of their founding documents can be deemed not to have happened at all. Hence the action is null and void. The brains, the eyes, the ears, the mouth and hands of these bodies are their Board of Directors and committees. Usually matters of day to day administration, hiring and firing juniors members of staff and some matters of discipline are delegated to a manager or management.”*

6. We have considered all the evidence before us, and in particular the record of proceedings before the DDPR, the arbitral award and the submissions of parties. With particular reference to the review ground raised and submissions in support, We have noted a few issues that are worthy of mention. As a starting point, We are in agreement with the Applicant that the Rules of Natural Justice must live within every other rule as they form the basis of the rule of law. This is evident in the extract taken from the case of **Lesotho Evangelical Church vs. John M. B. Nyabela (supra)**. As a result, it is only legally logical that in any proceedings where these rules have not been observed, then such proceedings are rendered unfair on that account.
7. We also wish to highlight that within the Rules of Natural Justice, there are three precepts namely the rule against bias, the right to a hearing and the evidence rule. In the case at hand, Applicant has based her claim on the rule against bias as she contends that the chairperson in her initial disciplinary

hearing was both the complainant and the trier. She argues that the person who sat as the chairperson in her hearing is the same person who invited her to a hearing and ultimately dismissed her. To further fortify her argument, she made reference to the fact that the very same person is the one who deposed to an affidavit in defence of her claim before this Court. We are of the view that in the light of the facts presented before us concerning the proceedings at the initial hearing as well as the law pleaded, indeed a different conclusion possibly ought to have been made at the DDPR.

8. However, We are of the opinion that Applicant has not been able to motivate her case in a claim for review. We have not found any procedural irregularity on the part of the learned Arbitrator in making His conclusion as none have been pleaded. What comes out clear from the submission of the parties is that the learned Arbitrator made His decision based on His view and understanding of the facts before him, which conclusion is being challenged by Applicant. To fortify our view, the submissions of Applicant are based on the procedural irregularities that took place at the initial disciplinary hearing and not at the DDPR. The only connection that is being made with regard to the DDPR is that the learned Arbitrator ought not to have accepted the Respondent argument.
9. The issue in a review application is not whether the decision reached was correct or if a different conclusion ought to have been made. Rather a review is concerned with whether the processes adopted in making a conclusion were right or wrong. The Labour Appeal Court has set precedent over this issue in the case ***Thabo Mohlobo & Others vs. Lesotho Highlands Development Authority LAC/CIV/A/05/2010***. This position has been adopted by this Court in a plethora of cases (see ***Lesotho Highlands Development Authority vs. Thabo Mohlobo & Others LC/REV/09/2012; Lesotho Delivery Express Services (Pty) Ltd and Another LC/REV/18/2010***). In view of this said, We do not find any flaws on the procedure adopted by the learned Arbitrator in accepting Respondent arguments over those of Applicant. Consequently, this review ground cannot sustain.

**AWARD**

Having heard the submissions of parties, we hereby make an award in the following terms:

- a) That the review application is dismissed; and
- b) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 13<sup>th</sup> DAY OF DECEMBER 2012,**

**T. C. RAMOSEME  
DEPUTY PRESIDENT OF THE LABOUR COURT OF LESOTHO (AI)**

**Mr. L. MOFELEHETSI  
MEMBER**

**I CONCUR**

**Mrs. M. MOSEHLE  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. RASEKOAI  
ADV. KAO.**