IN THE LABOUR COURT OF LESOTHO **LC/REV/59/2011**
A1049/2010

HELD AT MASERU

In the matter between:

PHAKISO RANOOANA **APPLICANT**

And

LESOTHO FLOUR MILLS (PTY) LTD **1st RESPONDENT**
DDPR – ARBITRATOR
(M. MOLAPO-MPHOFE) **2nd RESPONDENT**

JUDGMENT

Date: 26/02/2013; 05/03/2013; 02/05/2013
Review application of DDPR arbitral award. Applicant having raised three grounds of review. 1st Respondent failing to attend hearing to argue its case – Court proceeding to make a judgment on the basis of the submissions and arguments of Applicant. Court not finding merit in the grounds raised by Applicant. Court dismissing the review application. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDPR arbitral award in referral A1049/2010. It was heard over a series of dates, from the 26th February 2013 to the 2nd May 2013, at the end of which judgment was reserved for a later date. Four grounds of review were raised, in terms of which Applicant sought the review, correction and/or setting aside of the arbitral award of the 2nd Respondent.

2. The background of the matter is essentially that, Applicant referred a claim for unfair dismissal with the 2nd Respondent. On the 12th June 2011, an award was issued in favour of 1st Respondent, in terms of which Applicant's claim for unfair

dismissal was dismissed. Applicant then lodged a review under the current proceedings, which was duly opposed. Later on, Applicant filed a supplementary affidavit to his original founding affidavit. In opposition to the supplementary affidavit, 1st Respondent had raised a preliminary point of non-compliance with Rule 6 of the Rules of this Court.

3. On the 26th February 2012, both parties were called to make presentation on the issue. Having considered same, We come to the conclusion that the supplementary affidavits did not comply with the Rules of this Court and ordered their exclusion from these proceedings. We then directed parties to proceed with their arguments in the review application on the basis of their original founding affidavits. The matter was then set down for hearing on the 5th March 2013. On this day, only Applicant was able to present his case.

4. The matter was then postponed to the 2nd May 2013, by agreement, for 1st Respondent to argue the matter in opposition. Parties were further put to terms to submit their heads of argument on or before the said date. However, on the said date, only Applicant had filed his heads of argument and 1st Respondent was not in attendance. We then granted a grace period, during which several attempts were made through the office of the Registrar to secure 1st Respondent, but to not avail. We therefore proceed to judgment on the basis of the submissions of Applicant only. Our judgment is thus in the following.

SUBMISSIONS AND FINDINGS

5. The first ground of review was that the learned Arbitrator had relied on irrelevant hearsay evidence to come her conclusion. It was added that the learned Arbitrator relied on the evidence of one Masia Moloi, who had in turn relied on a video recording and documentary evidence both of which were irrelevant and hearsay. Reference was made to paragraph 5 at page 12 of the record of proceedings, where witness had stated that he relied on the video recording. It was added that only relevant evidence should be considered, as irrelevant evidence is inadmissible. The Court was referred to the case of *Lloyd v Powell Duffryn Steam Coal Co. Ltd 1914 AC 733* at 738 in support.

6. It was added that the said evidence ought to have been excluded as hearsay, as the learned Arbitrator rightly ruled so. However, notwithstanding the said ruling, the learned Arbitrator went ahead and found Applicant guilty on the basis of the evidence of the said Masia Moloi, thus committing a grave irregularity. The Court was referred to paragraph 2 from the bottom, at page 8 of the arbitral award.

7. Upon Our inspection the record, We have noted that at paragraph 5 on page 12 of the record, witness is recorded to have stated that he relied on the video recording for his evidence of the incidents. We have further noted that at paragraph 9 of the arbitral award, which appears on page 8, the learned Arbitrator made a ruling to exclude video recording from her analysis of the evidence. From these above, Applicant seems to suggest the presence of irrationality on the part of the learned Arbitrator, in that She excluded the video recording, on which witness had premised his evidence, but yet She found Applicant guilty.

8. Whenever an argument of irrationality is raised, the presumption is that the conclusion reached is not supported by the facts or the law or both. Put different, the presumption is that the conclusion reached is illogical, given the facts and the law. What constitutes an irrationality was explained in the case of *Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935*, by Lord Diplock. The learned Judge stated as thus,
   "So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

9. This above said is exactly what Applicant contests, that whereas the video recording had been excluded, logic dictates that the evidence of a party relaying on the video recording becomes hearsay and inadmissible. The suggestion is that there was no evidence to support the conclusion as the video recording was excluded. This logical conclusion depends two main factors to hold and these are whether video recording was the only piece of evidence adduced before the learned Arbitrator and if not, whether the learned Arbitrator relied on it to come to her conclusion.

10. From Our inspection of paragraph 9 of the arbitral award, We have noted that the learned Arbitrator made reference to other evidence that was tendered by witness in support of his case. This is the report by Applicant in terms of which he admitted the offence that he was charged with and further stating that it was not first time that he had committed the same offence. This is the major premise against which Applicant was found guilty of misconduct. As a result, it cannot be accurate that the learned Arbitrator relied on the video recording to conclude that Applicant was fairly dismissed or that there was any irrationality on the award.

11. In Our opinion, the evidence before the learned Arbitrator supports the conclusion made and is thus rational. No reliance was made by the learned Arbitrator on the video recording to find Applicant guilty. On the issue of all documentary evidence tendered amounting to hearsay, no solid basis has been laid. It has just been alleged that all the documentary evidence was hearsay without any substantiating evidence. Without the basis, this argument is unfounded and thus stands to be dismissed. This Court has expressed this view in many of its decisions (see *Kopano Textiles (Pty) Ltd v Motšeare Qokolo & Others LC/REV/19/09);* also see *Lesotho Express Delivery Services (PTY) LTD v The Arbitrator – DDPR & another LC/REV/18/2010)*. Further, it is not clear how either the video recording or the documentary evidence were irrelevant. In the same vein, the absence of a valid basis of a claim makes it unfounded and worthy of dismissal.

12. On the second ground of review, it was submitted that the learned Arbitrator committed an irregularity in failing to observe the rules of logic pertaining to the circumstantial evidence when evaluating the evidence and drawing inferences. In amplification, it was submitted that there was no evidence at all to prove that the dismissal of Applicant was fair. Further, that assuming it circumstantial evidence, the learned Arbitrator failed to observe the requirements applicable in dealing with circumstantial evidence in civil proceedings.

13. The requirements applicable in dealing with circumstantial evidence in civil proceedings were identified as that follows,
a) the correct inference must be made from the proved facts;

b) the inference must be consistent with all the facts.

Reference was made to the cases of *SAR & H v Dhlamini 1967 (2) SA 203 (D)* and *Ocean Accident & Guarantee Corporation Ltd v Kock 1963 (4) SA 147 (A)* at 159C, in support. It was concluded that there was no evidence before the learned Arbitrator that caused her to form an inference that Applicant had committed the conduct charged off. It was argued that in the absence of such evidence, an inference cannot be drawn. The Court was referred to the cases of *Caswell v Powell Duffryn Association Collieries 1940 AC 152* at 169; *AA Onderlinge Assuransie Bpk v De Beer 1982 (2) SA 603 (A)*; and *Govan v Skidmore 1952 (1) SA 732 (N)* at 734D, in support.

14. The above argument derives its validity from the first ground of review. It assumes that the Court will find that all the evidence of Moloi Masia was inadmissible, and therefore that there is no evidence at all to proof the guilt of Applicant. We have indicated that the learned Arbitrator relied on the documentary evidence of Moloi Masia. Applicant has failed to demonstrate how that evidence becomes both irrelevant and inadmissible. This being the case, there was evidence before the learned Arbitrator and this evidence was considered in making a conclusion that Applicant was guilty. As a result, all arguments about circumstantial evidence become redundant.

15. On the third ground of review, Applicant submitted that the learned Arbitrator committed an irregularity in that She failed to take into account or to take into adequate account the rules of evidence in relation to the handing in and accepting or admitting exhibits in the form of documentary evidence. In elaboration of this point, Applicant submitted that there are certain requirements that must be observed in accepting documentary evidence. These were identified as follows,

a) Documentary evidence must be submitted after being authenticated;
b) It must be submitted by its maker or author.

16. Applicant further submitted that the documentary evidence that was submitted by Moloi Masia was not authored by him. Applicant made reference to page 10 of the record of proceedings where Moloi Masia is recorded to have said that he had not authored exhibits B – I. Applicant added

that no original documents were produced as it was just copies while no explanation was given as to why the originals could not be availed. When asked if both the authenticity of the copies was put into question or not, when the documents were tendered or even during cross examination, Applicant stated that it only came up during the closing submissions.

17. On the first leg of this ground, Applicant has indicated that this issue was never raised either at the time that the documents were being tendered or even during the cross examination of the witness who tendered them. If this is the case, the learned Arbitrator was right in assuming that their authenticity was not in question. It is trite law that documentary evidence may come in any one of the two forms, that is, as an original or a reliable duplicate. This rule is known as the Best Evidence Rule.

18. In *Garton v. Hunter [1969] 1 All ER 451, [1969] 2 QB 37*, in dealing the Best Evidence Rule, the learned Judge Lord Denning MR stated as thus,
"*The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available on one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.*"

19. It is clear from the above extract that even a duplicate of the original documents is admissible. Essentially, if a document is not an original copy, it is the responsibility of the party to challenge its reliability so that it may not admitted. Consequently, if Applicant was happy with the status of a copy that was tendered, the learned Arbitrator cannot be held at fault at this stage. The challenge ought to have been made during the proceedings to allow the learned Arbitrator to consider and apply her mind to it and not for the first time on review. The premise of this proposition is simply that the maxim of *audi alteram partem* applies both ways, that is, it must be afforded to all parties concerned (see *Puleng Mathibeli v Sun International 1999-2000 LLR-LB 374 (CA*)).

20. Moreover, it is trite law that evidence which may be otherwise be classified as hearsay, may be said to have been admitted by consent of parties. This happens where no objection is raised by a party to the admission of such evidence on record (see *Thoroughbred Breeders Association of South Africa v Price Waterhouse 1999 (4) SA 968 (W)*). In this instance, the consent of the parties is inferred from their conduct. *In casu*, no objection was raised upon the tendering of the alleged copies. It is my opinion that failing to object to the handing in of the concerned documents, amounted to an admission by conduct which is short of fault on the part of the learned Arbitrator.

21. As for the second leg, We do concede that that is a general rule. However, every general rule is subject of exceptions. The exceptions may include admissions or confessions (see *Schwikkard & Van Der Mervwe, Principles of Evidence, 2nd Edition* at page 288). *In casu* a report though not written by Masia Moloi, was written by Applicant and given to Masia by Applicant as an official report to explain his conduct. This is clear from the document itself which was tendered as exhibit I. The report constitutes an admission of guilt on the part of Applicant. In these circumstances, a document of this nature is admissible against the maker. Consequently, no irregularity has been committed by the learned Arbitrator.

22. On the fourth ground of review, Applicant submitted that the learned Arbitrator ignored relevant facts to the matter and considered those not relevant. In clarification, Applicant submitted that the learned Arbitrator ought not to have considered the evidence of Moloi Masia and one Molupe Moalosi. He argued that on the contrary, the learned Arbitrator ought to have considered the fact that there was no evidence that proved misconduct on the part of Applicant.

23. It is not clear from the submissions of Applicant why the evidence of both Masia Moloi and Molupe Moalosi should not have been considered. Further, it is also not clear how the said evidence can be said to have been irrelevant to the matter. This essentially makes that averments of Applicant bare, unfounded and worthy of dismissal. Furthermore, We have pronounced Ourselves in relation to issue of there being no evidence to prove the guilt of Applicant. We have stated that the learned Arbitrator relied on the report tendered by

Masia Moloi, which Applicant wrote to explain the events of the day in which an overload was found, to conclude that he was guilty. In that report Applicant had admitted guilt. Consequently, it cannot be accurate to argue that the learned Arbitrator ought to have considered that there was no evidence at all.

24. We are infact of an opinion that this ground is an appeal disguised as a review, in that it directly challenges the conclusion of the learned Arbitrator. The challenge suggests that the learned Arbitrator was wrong to have concluded that there was evidence to prove the guilt of Applicant. It is trite law that a challenge of this nature constitutes an appeal and not a review (see JDG Trading *(Pty) Ltd* t/a supreme *furnishers vs. M Monoko & 2 others LAC/REV/39/04)*. We therefore find that this ground is devoid of merit and further that it is an appeal disguised as a review, with each finding sufficient to warrant its dismissal.

25. Applicant had also prayed for costs of suit. Given our final conclusion on the matter, the prayer for costs has become redundant. We therefore see no reason to deliberate any further on it but to dismiss it.

AWARD

We therefore make an award in the following terms:

a) The review application is refused; and
b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 2nd DAY OF SEPTEMBER 2013.

T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO

Mr. MATELA **I CONCUR**
MEMBER

Mrs. MALOISANE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. MOSUOE**
FOR 1ST RESPONDENT: **ADV. MABULA**