

**HELD AT MASERU**

**In the matter between:**

**MICHAEL FAKO**

**APPLICANT**

**And**

**LESOTHO BREWING COMPANY (PTY) LTD  
THE ARBITRATOR – DIRECTORATE OF  
DISPUTE PREVENTION AND  
RESOLUTION - M. MOLAPO – MPHOFE**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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*Date: 2<sup>nd</sup> April 2013*

*Application for the review of the DDPAR arbitral award in referral A0948/2003. Applicant arguing that the learned Arbitrator ignored evidence to prove that he was employee and that he was unfairly dismissed. Court finding that the former argument superfluous as the learned Arbitrator found that Applicant was an employee of 1<sup>st</sup> Respondent. However, Court finding that the learned Arbitrator ignored evidence on the fairness or otherwise of the dismissal of Applicant. Court correcting the award of the 2<sup>nd</sup> Respondent and finding the dismissal of Applicant unfair both procedurally and substantively. Court further directing that the matter be remitted to the DDPAR for determination on the amount of compensation. No order as to costs being made.*

**BACKGROUND OF THE ISSUE**

1. This is an application for review of the DDPAR arbitral award in referral A0948/2003. It was heard on this day and judgment was reserved for a later date. The background of this matter is basically that Applicant lodged a claim for unfair dismissal with the 2<sup>nd</sup> Respondent. An award was issued on the 20<sup>th</sup> My 2010 dismissing the Applicant's claim and thus leading to the current review application. Under a believe that this review

application had been filed out of time, Applicant had also filed an application for condonation together with the review application.

2. However, later realising that the review application was well within time, the application for condonation was withdrawn and the matter proceeded in the merits. Only one ground of review, which is two pronged in nature, has been raised. It is to the effect that the learned Arbitrator ignored certain facts material to the matter before Her. Parties submissions and our judgment on the issues are reflected hereunder.

### **SUBMISSIONS AND FINDINGS**

3. It was submitted on behalf of Applicant that the learned Arbitrator ignored certain facts which if She had not ignored, She would have come to a finding that Applicant was an employee of 1<sup>st</sup> Respondent and that the Applicant had been unfairly dismissed. The Court was then referred to page 14 of the record (the arbitral award) at the 4<sup>th</sup> paragraph. It was argued that the content of the paragraph is to the effect that Applicant was an employee of the 1<sup>st</sup> Respondent. It was further submitted that in the paragraph dealing with the formulation of the award, the learned Arbitrator had also made a conclusion that Applicant was an employee of the 1<sup>st</sup> Respondent.
4. When asked what evidence was ignored, Applicant submitted that all evidence relating to the his employment with 1<sup>st</sup> Respondent was led and not challenged. Further that in reaction to that evidence, the 1<sup>st</sup> Respondent had simply stated that it had no records of Applicant and not that he was not its employee. Applicant further added that the certificate of service issued by 1<sup>st</sup> Respondent as proof of employment and other related facts were ignored. The Court was referred to page 28 of the record (DDPR record of proceedings). It was submitted that the learned Arbitrator ignored evidence that there had been litigation since 1987, instigated by 1<sup>st</sup> Respondent against Applicant, which fact ought to have convinced the court that there was an employment relationship between the parties.
5. It was furthermore submitted that evidence appearing on pages 34 to 36 of the record was ignored. It was stated that the said

evidence shows when and how Applicant was employed and dismissed. It was further submitted that the evidence at pages 36 to 39 of the record, under the cross examination of Applicant, related to his status *vis-a vis* 1<sup>st</sup> Respondent, which determination was made in his favour. It was stated that that evidence does not in any way challenge the fairness of the dismissal of Applicant, which leaves his case unrebutted. It was stated that rather than for the court to proceed to deal with this unchallenged evidence, it dismissed the matter. It was argued that in so doing, the court lost sight of who bore the burden of proving that the dismissal of Applicant was fair. Applicant thus prayed this applicant be granted as prayed in the notice of motion.

6. In reply, 1<sup>st</sup> Respondent submitted that the issue for determination before the 2<sup>nd</sup> Respondent was the employment relationship between the parties. It was stated that 1<sup>st</sup> Respondent denied knowledge of Applicant and as such it was Applicant's duty to prove the existence of the employment relationship. Reference was made to page 26 of the record where 1<sup>st</sup> Respondent denied employment relationship with Applicant. Reference was also made to page 30 of the record where the alleged employment relationship was clearly denied. It was argued that although the learned Arbitrator did in fact make a finding that Applicant was its employee, the ultimate conclusion to dismiss the referral was correct.
7. It was further submitted that the learned Arbitrator did not ignore the merits of the matter. It was stated that rather, She pronounced herself that the evidence of Applicant was not sufficient to guide her to make a fair and equitable determination. Reference was made to page 14 of the record at the last paragraph. It was argued that the learned Arbitrator considered all evidence that was placed before her and she has provided reasons in her award why she came to the conclusion that she made. 1<sup>st</sup> Respondent thus prayed that this application be dismissed.
8. In addressing the first leg of the Applicant's ground of review, We wish to comment that We agree with 1<sup>st</sup> Respondent that the 2<sup>nd</sup> Respondent had to make a determination on whether Applicant was an employee of 1<sup>st</sup> Respondent or not. Based on

the submissions of Applicant, We have perused page 14 of the record and specifically at paragraph 4 (unnumbered) thereof. The content of this paragraph is as follows,

*“Under cross examination, Sekhantso did however admit that as HR, LBC, her office was the custodian of the all personnel records and data of LLD. So this argument that applicant worked for LLD has no bearing at all.”*

9. In Our view, the content of this paragraph does not in any way say that Applicant was an employee of 1<sup>st</sup> Respondent. Rather, it denies that the existence of an employment relationship between Applicant and LLD, which statement does not necessarily follow that he was an employee of 1<sup>st</sup> Respondent. However, paragraph 7 on the same page is direct in that it specifically states that Applicant was employee of 1<sup>st</sup> Respondent. This is captured by the learned Arbitrator as thus, *“There is one thing that applicant managed to convince this tribunal and that was the fact that he was an employee of the respondent ....”*
10. Notwithstanding Our stance above, We also wish to comment that whereas 1<sup>st</sup> Respondent argued that the employment relationship was challenged, with specific reference to pages 26 and 30 of the record, We hold a different view. Upon perusal of the said pages, there is nowhere where the said relationship is denied. In fact, at page 26, the witness, who joined 1<sup>st</sup> Respondent after Applicant had been terminated, merely testified that she could not find the employment records of Applicant and that those who worked for 1<sup>st</sup> Respondent before her said that they did not know Applicant.
11. At page 30, the same witness stated that if Applicant was an employee of 1<sup>st</sup> Respondent, he could not have been dismissed without a hearing. From these said, it is thus Our attitude that whereas Applicant bore the onus of proving the employment relationship, as suggested by 1<sup>st</sup> Respondent, he succeed in that extent as the learned Arbitrator made a conclusion that he was.
12. The conclusion that was made by the learned Arbitrator is the one sought by Applicant *in casu*. As a result, it Our opinion

that the argument that the learned Arbitrator ignored certain evidence that would have led Her to conclude that Applicant was an employee of 1<sup>st</sup> Respondent is superfluous. Whether the evidence appearing on page 14 or 28 of the record was ignored, the ultimate decision was in Applicant's favour that he was an employee of 1<sup>st</sup> Respondent. It is thus not clear what he hopes to achieved in raising this argument, in view of the finding made. Consequently, this challenge against the learned Arbitrator is dismissed as being superfluous and bearing a semblance of an abuse of the processes of this Court.

13. On the second leg of the review ground, We have noted that the evidence appearing on pages 34 to 36 is the evidence of Applicant in chief. As rightly stated by Applicant, the evidence gives an account of when Applicant was employed, his position at work, his salary at the time of termination and how as well as why he was dismissed from employment. Among the statements made is that he was dismissed on suspicion of theft and that he was not afforded a hearing and that he was summarily dismissed on account of suspicion.

14. We have noted that this evidence was not considered by the learned Arbitrator when making Her award. Rather than to consider the above evidence, She made the following comment, *"Can I then take applicant's un rebutted evidence and base my decision on it. Certainly not, ...."*

15. It is Our view that that evidence reflected in pages 34 to 36 of the record, was the merit of the Applicant's claim and that it ought to have been considered. We say this because Applicant had lodged a clam for unfair dismissal in terms of which he challenged both the procedural and substantive fairness of his dismissal. This is acknowledged by the learned Arbitrator in her summary of Applicant's evidence at page 2 of the arbitral award as thus, *"Thus how Mr. Fako says he was dismissed 24 years ago and challenges the dismissal both procedurally and substantively. He seeks to be compensated with M50 000.00."*

16. We are of the view that if the leaned Arbitrator had considered this evidence, She would have found that the dismissal of Applicant was unfair. We say this because, upon

perusal of the record, We have noted that the evidence of Applicant as to why, how and when he was dismissed has not been challenged and such it remains unrebutted as he says. This is also confirmed by the learned Arbitrator in her arbitral award at page 3, as noted above. In view of this, the Learned Arbitrator would have been bound by a principle of law that what has not been denied should be taken as true and accurate. In *Theko v Commissioner of Police and another LAC (1990-94) 239 at 242*, Steyn JA had the following to say in relation to unchallenged evidence:

*“I must point out that no attempt was made by the respondents to reply to or challenge the correctness of the averments contained in the affidavit of the attorney, Mr Maqutu. The issues in our view must therefore be resolved on the basis of the acceptance of the unchallenged evidence of an officer of this court”.*

17. As for evidence appearing on pages 36 to 39, it relates to the cross examination of Applicant. In that evidence, neither the substance nor the procedural aspect of the dismissal of Applicant is tested. Rather, 1<sup>st</sup> Respondent tried to discredit Applicant’s evidence of his employment with them. Indeed as Applicant has stated, this issue was determined by the 2<sup>nd</sup> Respondent in his favour, which essentially means that during that cross examination, his evidence of the procedural and substantive fairness of his dismissal was indeed not challenged. This only goes to fortify Our attitude that the learned Arbitrator ought to have proceeded to make a determination on the basis of Applicant’s unchallenged evidence.

18. In view of Our finding, We feel inclined to correct the award of the 2<sup>nd</sup> Respondent and substitute same with Our own. In coming to this conclusion, We are guided by the authority in *Matsemela v Nalidi Holdings (Pty) Ltd t/a Nalidi Service Station* where Mosito A. J had the following to say, *“When reviewing an award from the DPPR, Labour Court should also correct it ....”*  
It is Our view that the circumstances of the case *in casu* warrant that the award be corrected rather than for the entire proceedings to be set aside and heard *de novo*.

**AWARD**

We therefore make an award in the following terms:

- a) That the award of the DDPR is hereby reviewed and corrected in the following manner,
  - 1. That the dismissal of Applicant is unfair both procedurally and substantively.
- b) That the matter is remitted to the DDPR for the determination of the amount of compensation.
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 8<sup>th</sup> DAY OF JULY 2013.**

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

**Mrs. M. MALOISANE  
MEMBER**

**I CONCUR**

**Mr. L MATELA  
MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENTS:**

**ADV. SETLOJOANE  
ADV. LOUBSER**