IN THE LABOUR COURT OF LESOTHO **LC/REV/113/2011**
A0621/2011

HELD AT MASERU

In the matter between:

LIKETSO MOKUBUNG **APPLICANT**

And

AON LESOTHO (PTY) LTD **1st RESPONDENT**
DDPR **2nd RESPONDENT**

JUDGMENT

Hearing Dates: 29th May 2013
Application for review of the 2nd Respondent arbitral award. Two ground of review – that the learned Arbitrator erred in finding that there was no procedural irregularity in the dismissal of Applicant when there was clear evidence to that effect – that the learned Arbitrator erred by ignoring the uncontroverted evidence of Applicant. Court finding that arbitrator ignored the evidence of Applicant on procedural irregularities in her disciplinary hearing – Court further finding that the irregularity does not warrant interference with the arbitral award. Court further finding that Applicant has failed to prove that she led uncontroverted evidence contradicting the misconduct she was charged with. Court finding that all evidence relating to the said charge was considered.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 2nd Respondent arbitral award. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Advocate Molati, while Respondent was represented by Advocate Mabula. The background of this application is that Applicant was employed by Respondent from the 1st December 1999, until She was dismissed for misconduct sometime in March 2010.

2. Thereafter, Applicant referred a claim for unfair dismissal with the 2nd Respondent, wherein she challenged both the procedural and substantive fairness of her dismissal. The said claim was dismissed through an arbitral award on the 27th October 2011, leading to the initiation of the current review proceedings. Two grounds of review were raised, in terms of which Applicant sought the review, correction or setting aside of the 2nd Respondent arbitral award. In the light of this backdrop, that the review proceedings proceeded on this day and Our judgment is therefore in the following.

SUBMISSIONS AND FINDINGS

3. Applicant's first ground of review was that the learned Arbitrator had erred in finding that no procedural irregularity was committed by 1st Respondent, in dismissing Applicant. It was added that there was clear evidence of procedural irregularity on the record. Specific reference was made to the testimony of 1st Respondent witness by names of Adv. Makeka, at page 163 of the DDPR record of proceedings.

4. It was submitted that the said evidence demonstrates that the complainant was one Mrs. Mohapeloa. Further that, the said Mrs. Mohapeloa was the Managing Director of the 1st Respondent company and a witness in the proceedings that led to the dismissal of Applicant. Furthermore, that as the Managing Director, the recommendation for the dismissal of Applicant was made to her and that pursuant to it, she made the decision confirming the dismissal of Applicant and even wrote a letter dismissing her from employment.

5. It was argued that Mrs. Mohapeloa was clearly a judge in her own cause and that this conduct constituted a clear breach of the principles of natural justice, particularly the *nemo judex in sua casu*. It was argued that by virtue of the fact that Mrs. Mohapeloa was a complainant, then there is no way that her decision to accept the recommendation to dismiss Applicant, could have been free from bias. The Court was referred to the cases of *Koatsa v National University of Lesotho 1991-1992 LLR-LB 163* at 173-174; and *R. v Susses Justices, ex parte McCarthy [1924] 1 KB 256* at 259, in support. It was further argued that once the rules of natural justice have been breached, it is immaterial if the same decision would have been

reached even if there never been any breach, but that the decision so made must be declared to be no decision at all. The Court was referred to the case of *General Medical Council v Spacman [1943] AC 627* at 644-5, in support of the latter proposition.

6. It was argued that in the light of the facts demonstrating a procedural irregularity, the learned Arbitrator made a finding that was different from the facts in that she found no procedural irregularity in the dismissal of Applicant. It was argued that the facts were before the learned Arbitrator but that She ignored them and that this constituted a grave irregularity. The Court was referred to the case of *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others 1995 (3) BCLR 305 (B)*, in support of the proposition.

7. In reply, it was argued on behalf of 1st Respondent that Applicant has imported the general application of the principles of civil procedure into the labour law arena. It was submitted that in the labour sphere, it is always the employer, as the interested party, that plays the major role in the discipline of its employees. It was added that this approach finds support in the *Labour Code (Codes of Good Practice) Notice of 2003*, wherein reference is made to employer and employee. On this basis, it was argued that it is impossible to have a wholly impartial party in labour matters.

8. It was further argued that the rules of natural justice do not apply equally in the labour practice and in the general civil practice. The Court was referred to the case of *Maisaaka 'Mote v Lesotho Flour Mills LC/59/1995,* where it was held that the principles of natural justice are flexible in labour matters and that they have no fixed content. On this premise, it was argued that the procedure adopted in the hearing of Applicant was well within the confines of the *Codes of Good Practice (supra)*, hence the finding that there was no procedural irregularity.

9. Applicant's case is two pronged in nature. She argues that the learned Arbitrator ignored her evidence and further that as a result of the said act, the learned Arbitrator made a decision that was not supported by the evidence before Her. This in essence means that the irregularity complained of, derives from

the idea that the learned Arbitrator ignored the evidence of Applicant. Essentially, the second leg of the ground of review is premised on the idea that the first leg will be upheld. On the basis of this highlight, We now proceed to deal with the first leg of this review ground.

10. It is Applicant' argument that her evidence demonstrating an irregularity on the part of the Respondent in dismissing her was ignored, hence the learned Arbitrator's conclusion that there was no irregularity in her dismissal. This allegation has not been denied by Respondent, as Respondent has merely attempted to disqualify the argument that the evidence demonstrated an irregularity warranting a review of the 2nd Respondent arbitral award.

11. Given the position of the Respondent on the issue, We are inclined to find in favour of Applicant that indeed the said evidence was ignored by the learned Arbitrator. We are drawn to this conclusion by the principle of law that what has not been denied is deemed to be admitted and accepted as a true narration of the events in issue (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242;* also see *Standard Lesotho Bank vs. Tsietsi Polane & DDPR LC/ REV/77/07)*. In view of this finding, We now proceed to deal with the second leg of Applicant's ground of review.

12. As earlier indicated, it is the Respondent's case that the procedure adopted in the disciplinary proceedings for Applicant, was well within the confines of the law. The argument is premised on idea that the rules of natural justice do not apply to labour matters in the same manner as they do to the ordinary civil matters. We are in agreement with Respondent on this proposition, as this position has been pronounced by this Court and other Superior Courts, and also finds support in the *Codes of Good Practice*.

13. Section 10 and 11 of the *Codes of God Practice (supra),* deals with the substance and procedural requirements, in determining the fairness or otherwise of the dismissal of an employer for misconduct. This essentially means that these are the procedures that must be followed in the conduct of workplace discipline. Given the reason for the dismissal of

Applicant, these sections are applicable to her case. In these two sections, reference is made only to the employer and employee and no other party other than the two. *In casu*, Respondent is a juristic person and this essentially means that any employee with sufficient authority to represent it suffices to stand in as an employer, as Mrs Mohapeloa did in her capacity as the Managing Director of Respondent.

14. Further, in the case of *Maisaaka 'Mote v Lesotho Flour Mills (supra)*, the learned Judge had the following to say in relation to the rules of natural justice,
"fair hearing need not necessarily meet all the formal standards of the proceedings adopted by the courts of law."
The learned Judge further quoted with approval an extract from the learned Judge Edwin Cameron in his article *"The Right To A Hearing Before Dismissal", Part 1 (1986) 7 ILJ 183* at page 185, where the learned Judge submits that;
"the whole field of proper labour relations is characterised by an inherent flexibility, and natural justice should not be led into the trap of strict legalism."

15. Furthermore, in the case of *Montoe Mphaololi v Unity English Medium and others LC/150/1995*, the learned Judge made reference to the case of *Maisaaka 'Mote v Lesotho Flour Mills (supra)* and authorities cited therein, to come to the conclusion that a letter informing an employee about the charges that he faced did not need to be drafted in the way that charges are framed in the ordinary courts of law. This authority essentially fortifies the idea that there is a distinction between the application of rules in labour matters and in the ordinary civil practice.

16. In view of the above authorities, We are therefore in agreement with 1st Respondent that Applicant has imported the general application of the rules of natural justice, from the ordinary civil matters into the labour sphere. As rightly pointed out by Respondent, the key actors in labour matters are the employer and the employee. This essentially means that all the disciplinary processes centre around them. Therefore, the mere fact that Mrs. Mohapeloa was both the complainant and the one who made the decision to dismiss Applicant, cannot

sustain as a ground of bias, given the peculiar context within which labour matters operate.

17. The role that that was placed by Mrs. Mohapeloa in the entire disciplinary process, was well sanctioned by the applicable law in workplace discipline (see sections 10 and 11 of the *Codes of Good Practice (supra).* This essentially highlights the difference in the application of the rules of natural justice in labour matters. It therefore means that biasness cannot be pleaded merely from the fact that Mrs. Mohapeloa was the complainant and the person who made the decision to dismiss Applicant. There has to be more than just that in order for the procedure adopted to sustain as sufficient to render the decision to dismissal unfair.

18. Consequently, while We have found that there has been an irregularity in the arbitration hearing, such would not have altered the decision of the learned Arbitrator even if She had considered the evidence in issue. We say this because, even if she had considered this evidence, She would have been bound by the principles stated in the above authorities to find that there was no irregularity in Mrs. Mohapeloa being the complainant and the one who made the decision to dismiss Applicant. We therefore find that the irregularity committed does not warrant interference with the arbitral award for the reasons stated above.

19. The second ground of review is that the learned Arbitrator ignored the uncontroverted evidence of Applicant in making her decision. It was submitted that the ignored evidence demonstrated that Applicant did not commit the offence that she was charged and dismissed for. It was said that Applicant was charged for failure to disclose certain crucial information to the Respondent. Applicant further stated that in the ignored and uncontroverted evidence, she had testified to the effect that she made the disclosure to one Tebello, who is the administrator in the employee benefits team, that their client Telecom Lesotho was threatening to take its business to another broker. The Court was referred to the evidence of Applicant on page 76 of the DDPR record of proceedings.

20. In reply, Respondent submitted that the learned Arbitrator considered the evidence of Applicant. The Court was referred to paragraph 12 of the arbitral award. It was argued that the extract on page 76 is not relevant to the reason for the dismissal of Applicant.

21. We have perused the extract on page 76 of the record of proceedings before the DDPR and it reads follows,
"App: Tebello is an administrator in the employee benefits team. So She works or dealt with Telecom at the time at AON. So I called her in to corroborate what I was thinking and she consent that those people's cheques were returned by Telecom and Telecom wanted cheques to be issued in the name of Telecom. So we advised Telecom, this is what I told Mrs. Mohapeloa, that the fund rules of the Telecom pension fund do not allow for such a payment to be made to the employer."

22. The content of the above paragraph does not in any way suggest that Applicant disclosed to Mrs. Mohapeloa that its client was threatening to take its business away from them, to another broker. We are therefore in agreement with Respondent that the extract on page 76, is not relevant to prove the Applicant's case on this ground of review. Consequently Applicant has failed to prove that she led evidence to the effect that she disclosed the said information to Mrs. Mohapeloa.

23. The above notwithstanding, it is common cause that Applicant was dismissed for failure to disclose the above referred information to Mrs. Mohapeloa. Not only is this common cause, but the learned Arbitrator has also dealt with this issue under paragraph 5 of her arbitral award, as suggested by Respondent.

24. In this paragraph, the learned Arbitrator is recorded as thus,
"In her evidence in chief applicant denied receiving any information that Telecom was threatening to take their business away from respondent as they were satisfied with their services. However, from the evidence of Mrs. Mohapeloa it became clear that applicant did receive such information by letter which was presented to her by Ms. Phomane from

Metropolitan. Applicant put to Mrs. Mohapeloa that she did not know the author of the letter from Telecom. This shows that she was aware of such a letter, even if she did not know its author."

25. It is therefore Our finding that Applicant has failed to prove that she led evidence to prove that she led uncontroverted evidence to demonstrate that she made the necessary disclosure to Mrs. Mohapeloa. Further that, that notwithstanding, the issue was considered by the learned Arbitrator who came to the conclusion that Applicant knew the information but did not disclose. This is reflected under paragraph 12 as thus,
"Applicant was therefor aware of the threat to respondents business and did not act towards such threat. She further failed to disclose such information to respondent. the court therefore finds that applicant is guilty on the said charge."
Consequently, this ground of review cannot sustain and is accordingly dismissed.

AWARD

We therefore make an award in the following terms:

a) The application for review is refused;
b) The award in A0621/2011 remains in force;
c) That the said award be complied with within 30 days of receipt herewith; and
d) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 28th DAY OF OCTOBER 2013.

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

Mr. MOFELEHETSI **I CONCUR**
MEMBER

Mrs. MOSEHLE **I CONCUR**
MEMBER

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