

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/35/2010  
A0771/2009**

**IN THE MATTER BETWEEN**

**NALEDI LESALA**

**APPLICANT**

**AND**

**LESOTHO REVENUE AUTHORITY  
THE DDP  
THE LEARNED ARBITRATOR – NTENE**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT**

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**JUDGMENT**

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*Application for the review of arbitrator award. five grounds being earlier raised. Court finding that one ground constitutes a disguised appeal and dismissing same. Applicant only proceeding on the basis of two and abandoning the rest of the grounds. Court finding that Arbitrator failed to treat evidence of a single witness with caution. Court further finding that Arbitrator was wrong to rely on contents of an untendered document. Court granting the review application and remitting the matter to the DDP to be heard de novo. No order as to costs being made.*

**BACKGROUND OF THE DISPUTE**

1. This is an application for the review of the arbitral award in referral A0771/2009. Initially five grounds of review had been raised. On the earlier date of hearing of this matter, it had been argued on behalf of the 1<sup>st</sup> Respondent that all the grounds raised were appeal disguised in review. Having listened to the arguments of parties on the issue, We issued a written ruling that only one of the grounds was appeal and accordingly dismissed it.

2. On this day, out of the remaining review grounds, Applicant opted only to proceed on the basis of two in the following:

*“The learned arbitrator erred and misdirected herself in failing to treat the evidence of the single evidence of Ms Kose with caution more so when the learned arbitrator finds as a fact that respondent is therefore relying in on the single evidence of Kose to show that applicant was involved in the dishonest conduct.”*

*“The learned arbitrator erred and misdirected herself in admitting the evidence of Ms Kose that she observed applicant’s signature on a pro-forma invoice which pro-forma invoice was not tendered in as evidence. It is submitted that the truth of the contents thereof are hearsay and then inadmissible.”*

3. Both parties were given the opportunity to address Us on the remaining grounds and having heard them, Our judgement follows.

#### **SUBMISSION AND ANALYSIS**

4. On the first review ground it was argued that the learned Arbitrator had declared one Ms. Kose, witness for 1<sup>st</sup> Respondent, a single witness. That notwithstanding, the learned Arbitrator relied on Ms. Kose evidence to conclude that Applicant had signed the pro-forma invoice. This was said to be particularly irregular in that the learned Arbitrator failed to treat the said evidence with caution more so given that witness was not sure in certain facts. It was added that during the witness evidence, she testified that the signature of Applicant was on top of the document, but later during cross examination changed to say it was on the bottom of the document.

5. In answer, 1<sup>st</sup> Respondent submitted that Ms. Kose was not the single witness as there were other witnesses namely one Dlamini and Tšoanamatsie. It was submitted that it is this inaccurate to suggest that Ms. Kose was the only witness on whose evidence the learned Arbitrator had relied upon to make Her conclusion. It was further argued that assuming that Ms. Kose was the only witness and that the learned Arbitrator solely based her conclusion on Ms Kose’s evidence, the evidence of a single witness in law sufficient to secure a

conviction. It was added that this is where that evidence is so clear and satisfactory in every material respect. The court was referred to the authority of *R. v Mokuena 1932 OPD 79* at page 80.

6. It was also argued that the evidence of Ms. Kose was clear that Applicant had signed on the pro-forma invoice. The Court was referred to page 22 of the record. In addition, it was argued that even in the disciplinary hearing, Applicant did not deny signing the pro-forma invoice. It was concluded that, as a result it was not necessary for the learned Arbitrator to say that She cautioned Herself. It was said that it is enough that She satisfied herself that Ms Kose evidence was sufficient and then make Her conclusion.
7. Respondent does not refute the argument that the learned Arbitrator declared Ms Kose a single witness in relation to the evidence relating to the signature on the pro-forma invoice. In fact, We confirm that at page 4 of the arbitration award the learned Arbitrator made this conclusion. This is recorded as follows:  
*“Respondent is therefore relying on the single evidence of Ms Kose to show....”*
8. We wish to confirm the rule, in relation to the evidence of a single witness, that courts should generally not be ready to rely on the evidence of a single witness. However, as 1<sup>st</sup> Respondent has rightly put, there is an exception to this rule. The exception was clearly laid out in the case of *R. v Mokoena (supra)* to which We have been referred as thus,  
*“Evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by ....., but in my opinion that .... should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect.”*
9. According to Applicant, this requirement to the exception was not totally met. We share similar sentiments with Applicant for the reason that when the witness was asked about the signatures on the document in issue, she gave contradictory evidence. At some stage, she said signatures were on top and

later changed to say there were at the bottom. In law, contradiction in evidence suggest fabrication and such evidence cannot be relied upon. As a result, and in general, the learned Arbitrator should not generally have relied on the single evidence of Kose to find Applicant guilty of misconduct.

10. Having elected to do so, the learned Arbitrator ought to have treated that evidence with caution. Considerations are thoughts unless expressly spelled out. By this We simply mean that for Us and all interested parties to know that the learned Arbitrator had treated the evidence of Ms Kose with caution, She ought to have expressly said so in Her award. Otherwise, it is difficult, if not impossible, to determine if She did or did not. Failure to expressly say so leads to the conclusion that She did not. We therefore find that having declared Ms Kose a single witness, the learned Arbitrator failed to treat her evidence with caution.
11. On the second review ground, it was argued that the learned Arbitrator erred by admitting the evidence of Ms. Kose that she observed the Applicant's signature on pro-forma invoice which was never tendered as evidence. It was argued that the truth of the contents in the said invoice and the observation of Ms Kose on the contents were hearsay and therefore inadmissible.
12. It was added that exhibit 3, which was tendered by Respondent, was a sample of the invoice and not the actual invoice. Further that no explanation was given when the original document containing the signature could not be tendered. It was argued that it was thus irregular for the learned Arbitrator to have admitted and relied on such evidence. The Court was referred to the case of *Seisa Nqojane v National University of Lesotho LAC (1995-1999) 369 – 373*, in support.
13. In answer, 1<sup>st</sup> Respondent argued that Applicant neither denies that he signed on the pro-forma invoice nor does he challenge the credibility of the evidence of Ms. Kose. It was submitted that what is not challenged in law is taken to have been admitted. It was added that, that notwithstanding, the DDPR is not a court of law and is as such not bound by the

strict rules of procedure. In reply, Applicant rejected the suggestion that he never denied signing on the pro-forma invoice. The Court was referred to pages 37 – 55 of the record in support and page 4 of the award.

14. It is without doubt that the pro-forma invoice that Applicant is alleged to have signed was not tendered as part of the evidence. Further, that no explanation was given to the learned Arbitrator why the document was not and could not be tendered. The issue is whether it was necessary to submit a copy of the actual pro-forma invoice or not.
15. We agree with 1<sup>st</sup> Respondent that what is admitted cannot amount to hearsay. However, *in casu* the record reflects that Applicant denied signing the pro-forma invoice. In fact this evidence, which appears from pages 37 – 55, and has been summarised at page 4 of the arbitration award as thus:  
*“His denial of his involvement before this tribunal is an afterthought.”*
16. Clearly, Applicant denied signing the pro-forma invoice. This being the case it was necessary that 1<sup>st</sup> Respondent bring in the document in issue for the learned Arbitrator to make it her assessment. This was particularly important because the case of 1<sup>st</sup> Respondent for dishonesty was based on this document. Having failed to tender same, all challenged evidence relating to the documents becomes hearsay and is therefore inadmissible.
17. We wish to note that in certain instances, the Court may consider evidence relating to documents not tendered before it. However, there has to be an explanation for unavailability of the documents. In addition thereto, there has to be further evidence that demonstrates the truthfulness of the contents alleged to have been on the unavailable document. We wish to further note that while the DDPR is not a court of law, it is nonetheless bound by at least the basic principles of procedure. By this We mean that parties must lead evidence both in support and/or in defence of their case.

**AWARD**

We therefore make an award as follows:

- 1) That the review application is granted,
- 2) The matter is remitted to the DDPR to be heard *de novo* before a different arbitrator,
- 3) That there is no order as to costs, and
- 4) That the order be complied with within 30 days of issuance herewith.

**THUS DONE AND DATED AT MASERU ON THIS 3<sup>rd</sup> DAY OF DECEMBER, 2014.**

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

**MR. MOSEHLE  
MR MATELA**

**I CONCUR  
I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. TLAPANA  
ADV. MANYOKOLE**