IN THE LABOUR COURT OF LESOTHO **LC/REV/33/11**

HELD AT MASERU

In the matter between:

NALELI HOLDINGS (PTY) LTD **APPLICANT**

and

MAVIS RAMATOBO **1st RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

DATE: 21/07/14

Review of an arbitral award - Claim of unpaid wages - Employee claiming she had never been dismissed - The employer contending on the contrary that the employee knew that she had been dismissed - The "rationality test" - Employer maintaining that it was irregular for the Arbitrator to have concluded that the employee had been dismissed when there was sufficient evidence showing that she had been dismissed - According to them there was no rational connection between the Arbitrator's decision and the evidence placed before him - the Court finds award to have been justified - review application therefore dismissed.

1. The 1st respondent had been in the employ of the applicant as a Petrol Attendant from January, 2008. At the centre of the dispute is whether the 1st respondent had been dismissed or not, a controversy that emanated from the failure by the applicant to serve the 1st respondent with a notice of termination of the contract of employment. The versions between the parties differ on whether it can be said that there was termination of employment. The applicant contended, on the one hand, that it actually dismissed the 1st respondent but she intentionally frustrated the process of service of the notice of termination. The 1st respondent insisted, on the other hand, that she has never been dismissed and was still awaiting the outcome of the disciplinary hearing.

BACKGROUND FACTS

2. The dispute arose out of an incident that occurred at applicant's Filling Station in the early hours of 8th November, 2009. The applicant alleged that the 1st respondent whilst off-duty on 8th November, 2009 came to the Filling Station (her workplace) in the company of a man by the name of Lebohang driving a Mercedes Benz Compressor and they filled their tank using fake currency. The applicant felt she targeted them because she knew she would not be suspected by virtue of working at the Filling Station. The 1st respondent was subsequently charged with dishonesty and a hearing was held on 16th November, 2009 wherein she was found guilty but the sanction deferred. She was informed that the determination of an appropriate sanction would be made in due course.

3. On the applicant's Managing Director's version, the 1st respondent had been asked to provide details of where she would be contacted for communication of the penalty and she indicated that she would be at Ha Mots'oane in the Leribe District. It was applicant's case that the 1st respondent had ultimately been dismissed but they had failed to communicate the outcome of the disciplinary proceedings to her as they had tried in vain to locate her at Ha Mots'oane, the place she had said she would be at. Applicant's Managing Director testified before the Directorate of Dispute Prevention and Resolution (DDPR) that she went to Ha Mots'oane on two occasions but could not locate her and even enquired from 1st respondent's neighbour who had apparently been instrumental in finding her the job on her whereabouts but she indicated that the 1st respondent did not stay there. She said she then kept the termination letter.

4. 1st respondent's version was that she had never been dismissed. She pointed out that she had at all material times been at Lithabaneng, in the Maseru District, and often passed by the Filling Station as she stayed not very far from it and sometimes went there to buy paraffin and occasionally met Mrs Shale.

RESOLVING THE IMPASSE

5. The current dispute has been a subject of two cases before the DDPR. The 1st respondent initially approached the DDPR on Referral No. ***AO 202/10*** with a ruling made on 13th June, 2010 for a claim of unpaid wages for the two months of December, 2009 and January, 2010. The applicant's Managing Director had pleaded in defence that the 1st respondent was on suspension. The DDPR concluded that if the 1st respondent had been suspended pending investigations,

it was wrong to have withheld her wages. The applicant was ordered to pay the two months' wages.

6. The second matter is a subject of the current review application - ***A1090/10*** whose ruling was made in June, 2011. In this case the 1st respondent had claimed wages from February 2010 to December, 2010 when she referred the matter and a decision made in her favour. It is worth noting at this juncture that applicant's letter of dismissal was dated 20th May, 2010, and it was the delivery of this very letter to the 1st respondent that formed the crux of this second case. This was the letter that the applicant claimed to have failed to deliver by reason of 1st respondent's failure to provide an appropriate address.

7. The DDPR made a finding that the 1st respondent had not been dismissed and was therefore entitled to payment of her wages from February, 2010 to June, 2011 when the determination was made. The applicant is before this Court to have this award reviewed and set aside.

APPLICANT'S CASE

Applicant's Counsel basically raised two grounds of review. He submitted on behalf of the applicant that the Arbitrator's decision was irrational in that:

(i) he had failed to apply his mind properly to the facts and evidence placed before him, otherwise he would not have found that the 1st respondent was entitled to payment of wages beyond 2010 when she had already been dismissed. The applicant had also claimed payment of wages for the period she said she was on suspension ***viz***., December, 2009 and January, 2010. She had been awarded two months' wages for this period. As far as Counsel was concerned, it was irregular for the Arbitrator to have found that the 1st respondent had not been dismissed; and

(ii) that the Arbitrator disregarded the undisputed evidence that at the initial arbitration hearing wherein payment of December, 2009 and January, 2010 were sought it became clear to the 1st respondent that she had been dismissed.

8. Applicant's Counsel further contended that the evidence placed before the Arbitrator sufficiently proved that the 1st respondent had been dismissed and the conclusion that she had not been dismissed was baseless. He submitted that the 1st respondent knew before January, 2010 that she had been dismissed because when she went to enquire about her wages from Mrs Shale she told her that she

had ***"ruined"*** her employment. The 1st respondent acceded at p.12 of the Record that Mrs Shale made such a statement and told her to get out of her office.

THE COURT'S EVALUATION

The verbal notification of the dismissal

9. As aforementioned, the dispute revolved on whether there was a dismissal or not. The Arbitrator ruled that there was no evidence on the attempts that the applicant's Managing Director made to locate the 1st respondent. As far as he was concerned, she made unsubstantiated allegations. The applicant is asking this Court to determine whether the finding of the Arbitrator that there had not been a dismissal was rational. The Court can intervene where a decision is found to be arbitrary, capricious, irrational, actuated by malice, ulterior or improper motive - ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (2003) 24 ILJ, 803 (LC)***.

10. A dismissal ***generally*** entails termination of employment at the instance of the employer and calls for some communication by the employer to the employee that the employer intends to terminate the contract of employment. It all boils down to the issue of handling the dismissal fairly both substantially and procedurally. Applicant's Counsel submitted that the 1st respondent became aware as far back as January, 2010 that she had been dismissed when applicant's Managing Director told her that she had ruined her job. The question of the communication of the dismissal appears to be at the root of this dispute. In terms of ***Section 69 (1) of the Labour Code Order, 1992***, the employer is obliged to provide a written statement of the reason for dismissal to any employee who is dismissed. Such statement has to be given to the employee either before dismissal, at the time of dismissal or within four weeks of the dis missal having taken effect.

11. Clearly, the dismissal had to be communicated to the employee, and naturally such communication had to be in clear and unambiguous terms. That one has ruined her job is not a proper communication of termination of employment. Firstly, it was verbal and in violation of ***Section 69(1) (supra)***; secondly, that one has ruined her job is not clear. It does not say that the employer is actually dismissing the employee.

12. Assuming that the 1st respondent herself frustrated the process of service of the termination letter. It is interesting to note that when applicant's Managing

Director talked of the 1st respondent ruining her job, it was before the hearing of ***AO 202/10*** and we feel she could have seized the opportunity when this matter was heard to point out that the 1st respondent had been dismissed instead of saying she was on suspension. The question of dismissal never came up. The matter was heard on 18th May, 2010 with a determination made in June, 2010. The letter of dismissal was written just two days after the hearing of the case on 20th May, 2010, when the hearing was held as far back as 16th November, 2009. As far as we are concerned, this impasse ought to have been resolved once and for all in ***AO202/10***. The applicant ought to have come out clear that she no longer needed 1st respondent's services. She could have been guided accordingly on the appropriate procedure.

The letter of dismissal

13. The applicant purported to have dismissed the 1st respondent by the letter of 20th May, 2010 which it claims its delivery was frustrated by her. As it is, the 1st respondent was never served with this letter of dismissal. An analysis of the record reflects that the applicant failed to furnish proof of the attempts that she made to locate the 1st respondent. The general rule is that ***"he who asserts must prove"*** - ***Pillay v Krishna and Another 1946 AD 946***. Too many questions remain unanswered. The person who she said she met at Ha Mots'oane could have provided evidence to corroborate her story. There is also no explanation why the applicant's Managing Director did not go to the 1st respondent's homestead. The 1st respondent testified that she went to the Filling Station on several occasions even to buy paraffin. This evidence was uncontested.

14. Immediately after the alleged fake currency incident of 8th November, 2009, Mr Selonyane, a supervisor telephoned the 1st respondent to inform her about it and to help him locate the said Lebohang. This meant Mr Selonyane had 1st respondent's contact numbers. This is reflected in the record. A question comes to mind, why was the 1st respondent not called to collect the letter of dismissal? As the Arbitrator pointed out in his award there was no evidence of the attempts made by applicant's Managing Director to locate the 1st respondent. We find the Arbitrator to have applied his mind to the case that was before him contrary to applicant's Counsel's submissions. According to ***Coetzee v Lebea NO and Another (1999) 20 ILJ, 129 (LC)*** the best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. Applicant's Counsel challenged the rationality of the Arbitrator's decision that the 1st respondent had not been dismissed. An irrational decision is

an unjustified or an unjustifiable decision. A decision is reviewable if it is one which a reasonable decision-maker could not reach - See ***Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097***. The test is whether the decision is justified/justifiable or supported by the facts and evidence.

15. Evaluating this case, the Court finds the Arbitrator's finding to have been rational and justifiable on the basis of the facts and the evidence tendered before him, we are therefore not in a position to disturb his award. It appears applicant's Manager did not treat the matter with the seriousness that it deserved or it could be that she was too upset with the incident of the fake money that it clouded her judgment. It was in the employer's interests that the 1st respondent received her letter of dismissal following the disciplinary hearing, and not succumbed to the cat and mouse game that seem to have been played by the parties. Employers should not be deterred from dismissing employees who deserve to be dismissed but they must ensure that the process is done fairly. The Court notes that the 1st respondent had not claimed for the two months that were awarded by the DDPR in AO 202/10 as averred by the applicant.

ORDER

16. On the above analysis, the Court makes the following order:

(i) The review application is dismissed;

(ii) The DDPR award in ***A 1090/10*** stands and it is to be complied with within thirty (30) days of the receipt of this judgment;

(iii) No order as to costs.

THUS DONE AND DATED AT MASERU THIS 21ST DAY OF JULY, 2014.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

MR L. MATELA **l CONCUR**
ASSESSOR

MRS M. RAMASHAMOLE **I CONCUR**
ASSESSOR

FOR THE APPLICANT: **MR N.T NTAOTE - EMPLOYERS' FORUM**

FOR THE 1st RESPONDENT: **MR L.J MOLEFI - LESOTHO WHOLESALERS, CATERING & ALLIED WORKERS' UNION**