IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/01/2010**
E051/2008

IN THE MATTER BETWEEN

LITEBOHO MOKOBORI **APPLICANT**

AND

EDGARS STORES LESOTHO (PTY) LTD
T/A JET MAFETENG **1st**
RESPONDENT
THE ARBITRATOR –
Ms. M MASHEANE (DDPR) **2nd**
RESPONDENT

JUDGMENT

Application for review of arbitration award. Ten grounds of review raised and two later withdrawn. Court not finding merit in the remaining grounds. Review being refused and no order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral E051/2008. Ten grounds of review had initially been raised on behalf of Applicant. However, on the date of hearing Applicant withdrew two grounds, specifically the seventh and ninenth grounds, and only proceeded on the basis of the remaining eight grounds.

2. The brief background of the matter is that Applicant was employed by the 1st Respondent until he was dismissed for misconduct. Unhappy with the award, he initiated the current review proceedings. Having heard the presentations of parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

3. The first review ground was that the learned Arbitrator erred by refusing Applicant the opportunity to call his witness. It was submitted that Applicant has sought the postponement of the matter to enable him to secure the attendance of his witness. It was submitted that the evidence of the witness was to prove that Applicant was not guilty of misconduct, by corroborating his evidence.

4. Respondent answered that it is not accurate that Applicant did at some point seek a postponement to secure his witness. It was argued in support that evident to this is the fact the record does not reflect the alleged events. Further that given that the record has not been challenged but accepted as true and accurate, the argument by Applicant be dismissed.

5. Applicant has not referred Us to any portion of the record where it is recorded that a postponement was sought for the purpose canvassed and refused. This being the case, We are inclined to accept the Respondent argument that no such postponement was made, for a simple reason that it is he who alleges that must proof. The principle was enunciated in the case of *Pillay v Krishna 1946 AD 946* at 952, where the court had the following to say,
   "In my opinion, the only correct use of the word "onus" is that which I believe to be its true and original sense (cf.D.31.22) namely the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence as the case may be …"

1. We wish to highlight the record of proceedings before the DDPR is meant to serve as proof of what happened in the proceedings. Having been accepted by both parties as accurate, We are bound to rely on it for Our conclusion. Consequently, We find that no postponement was sought as suggested by Applicant, for he has simply made a bare allegation without factual support from the record. It is trite law that bare allegations without supporting facts are both unsatisfactory and unconvincing (*see Mokone v Attorney*

General & others CIV/APN/232/2008). We therefore find that no irregularity was committed by the learned Arbitrator.

6. The second ground of review was that the learned Arbitrator erred in holding that Applicant was fairly dismissed. It was argued that in coming to this erroneous decision, the learned Arbitrator relied on irrelevant, hearsay, uncorroborated, self-contradictory and inadmissible evidence.

7. It was argued that Respondent witness by the name of Moipone gave evidence without first taking an oath. The Court was referred to page 4 of the record. It was submitted that as a result, the evidence of Moipone is inadmissible and ought not to have been considered by the learned Arbitrator. The Court was referred to the case of *Lewis Stores (Pty) Ltd v Makhapane and Others LC/REV/387/2006* ,in support of the argument.

8. It was further argued that the evidence of one Moliehi, witness for Respondent, was self-contradictory. It was submitted that at one point witness claimed that the window was not broken and at some point she said she never saw the window. The Court was referred to pages 10 and 11 of the record, for the two incidents.

9. It was furthermore argued that was one Lerato, witness for Respondent, gave contradictory account of the incident that led to the dismissal of Applicant. It was submitted that Lerato gave the impression that Applicant was the only user of the cards but later changed to say that all employees of Respondent had access. The Court was referred to pages 25 and 27 of the record, for a record of the two incidences.

10. Moreover, it was argued that one Tlalane Tšoene had testified that there was no crack on the window and that evidence corroborated that of one Ngwenya. However, one Mrs. Moshe gave evidence that there was a crack, thus corroborating the evidence of the Applicant. It was submitted that the trio were the witnesses of Respondent, yet they gave contradictory versions of what took place. The

Court was referred to pages 72, 85 and 67 of the record respectively.

11. It was argued that it was wrong for the learned Arbitrator to have relied on the Respondent's contradictory evidence. It was added that the learned Arbitrator did not even address the contradictions, to justify Her reliance on the evidence of the said witnesses. It was argued that clearly, the learned Arbitrator simply did not apply Her mind to the facts before Her and that this led Her into making the wrong conclusion.

12. Respondent answered that the learned Arbitrator addressed all the issues complained of in Her award. It was added that Applicant is simply unhappy with the decision and that this is an appeal disguised as a review. However, Respondent conceded that the first witness by the name of Moipone was not sworn in before She gave evidence, save to say that even if ignored or disregarded, the evidence of other witnesses was still strong enough to lead to a finding of guilt on the part of Applicant.

13. We have gone through the record of proceedings at page 4. We have noted that there is no record of the administration of an oath on the witness. This being the case and in the light of the finding of the Court in *Lewis Stores (Pty) Ltd v Makhabane and Others (supra)*, We find that it was irregular for the learned Arbitrator to rely on evidence not taken on oath.

14. However, We do take note that Moipone was not the only witness for Respondent as there were other witnesses including one Ngwenya, Tlalane and Moshe. This being the case and coupled with the fact that Applicant has not shown the impact of the evidence of Moipone and how declaring it inadmissible alters the conclusion made, We are inclined to agree with Respondent that it does not nullify the award (see *J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004)*.

15. We have also considered the evidence of Moipone at pages 10 and 11 of the record. At page 10, the following is recorded:

"Ntate: Let's talk about Jet's windows, what happened to them when this incident occurred?
Moipone: They were still well, nothing happened to them."

At page 11, the following is recorded:
"Ntate: You saw the furniture shop's window what about Jet's window afterwards?
Moipone: I have never seen it."
Evidently, the evidence of Moipone was self contradictory. At one point she claimed to have seen Jet's window in a well state and later changes to claim that she never saw it.

16. About the evidence of Lerato, We have gone through the referenced pages, that is 25 and 27. Whereas it is suggested that an impression was created that Applicant was the only user of card and later changed to say everyone had access, that is not accurate, at least to some extent. We do confirm that evidence has been given at page 25 that everyone had access but there is nothing in the two pages that suggests that an impression was created as put by Applicant. We therefore find no contradiction contrary to Applicant's claim.

17. About the contradiction in the evidence of the three witnesses of Respondent, We do confirm that out of the trio two witnesses gave evidence that the window was not broken/cracked while the other said it was broken. That being the Respondent case before the DDPR was inconsistent, in that different and contradictory statements were made. In law, inconsistence in evidence suggest fabrications of facts. Fabricated facts cannot be relied upon. However, there are circumstances where inconsistencies may not nullify the decision made. This happens where the magnitude is not so high as to render the material evidence unreliable (see *FAWU v Ever Unison Garments LC/07/2004*).

18. Either circumstances prevailing, the decision maker is cast with the duty to address contradictions in evidence and justify the election made to either consider the evidence or not. The rational is simply that failure to consider evidence is a reviewable irregularity (see *J.D. Trading (Pty) Ltd t/a*

Supreme Furnishers v M. Monoko & others (supra). Whereas Applicant claims that the contradiction were not addressed in the award, Respondent rejects the suggestion.

19. We have gone through the arbitration award and have satisfied Ourselves that the learned Arbitrator not only considered the evidence but also applied Her mind to the contradictions in the evidence of witnesses to the proceedings. She came to the conclusion that it was odd for them to claim not to have seen the crack. This is reflected at page 10, paragraph 43 of the award. The learned Arbitrator clearly found the magnitude not to be so high as to nullify the award, hence Her conclusion that there was a crack on the window. The learned Arbitrator applied Her mind.

20. The third, fourth and tenth grounds of review were argued together. Applicant argued that the learned Arbitrator erred in that She failed to apply Her mind to the findings of the *inspection in loco*. It was submitted that at *inspection in loco*, it was found that there was a crack on the window. This notwithstanding, the learned Arbitrator made a finding that all witnesses did not see the crack. The Court was referred to paragraph 43 of the award.

21. Respondent answered that the learned Arbitrator had similarly addressed the issue in Her arbitration award. It was submitted that the learned Arbitrator applied Her mind to the evidence of the *inspection in loco*. The Court was specifically referred to page 13 of the arbitration award, where reference is also made to authorities on the issue.

22. We have already stated what is contained in paragraph 43 of the arbitration award. What We found is contrary to what is suggested by Applicant, as the learned Arbitrator does not make the suggested conclusion, but rather that She finds it odd that some of the witnesses claim not to have seen the crack when it was so visible. This being the case all arguments raised in this ground fail as they are based on a non-existent claim.

23. We wish to comment that We have also perused page 13 of the arbitration award. Regrettably, We are in disagreement with Respondent that it deals with the findings of the *inspection in loco*. The page focuses on mitigating facts and the appeal hearing at the plant level. This notwithstanding, We maintain Our finding as Respondent claim neither aids its defence nor alters Our decision on the issue.

24. The fifth ground of review is that the learned Arbitrator failed to apply Her mind to the unchallenged evidence of Applicant, in the form of invoices. It was argued that having failed to consider the invoices, The learned Arbitrator committed a reviewable irregularity. Respondent did not comment on this argument.

25. In law, what is not challenged is taken to have been admitted (see *Theko v Commissioner of Police and Another 1991-1992 LLR-LB 239 at 242).* In view of the Respondent's behaviour on the issue, We are inclined to accept the Applicant's version of the events, and to conclude that the learned Arbitrator did ignore the said invoices. However, We wish to note that it is not every piece of evidence that must be considered in making a conclusion. Rather consideration must only be made to evidence that is material to the matter. Therefore when a party claims that its evidence was ignored or disregarded, that party must go on to demonstrate the materiality of the said evidence *(See J.D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004)*. *In casu*, Applicant has failed to do so. Consequently, We find that the ignored invoices do not render the award reviewable.

26. The eighth ground was that the learned Arbitrator erred in holding that Applicant had received a letter dated 14th April 2008 and later relying on its content to make Her conclusion. It was argued that this letter was withdrawn from evidence by Respondent after Applicant had challenged its admissibility. The Court was referred to page 77 of the record in support.

27. Respondent answered that reference was made to the letter whose content was that Applicant was invited to submit mitigating factors. It was argued that there was such evidence on record and that it cannot be wished away. It was submitted that the learned Arbitrator was right to consider the contents of the letter.

28. In law, where reference is made to a document and its content, then that document must be placed before Court. The purpose is to have it tested for authenticity as well as veracity. Supportive of Our attitude is the view of the court 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;...*"

29. Once the evidence has passed this twofold test the Court can then rely on it to make its conclusion. *In casu*, Respondent made reference to a document and upon an objection by Applicant, she elected to withdraw it. That being the case, the document was never placed before Court for testing. Consequently it could not be relied upon. The learned Arbitrator was therefore wrong to rely on the said evidence to find against Applicant. However, in the same vein Applicant has not shown the materiality of the considered evidence to the conclusion made. We therefore find that the learned Arbitrator did not commit a reviewable irregularity.

30. The sixth and last ground was that the learned Arbitrator erred in not considering the fact that the charges against Applicant were not clear enough to enable him to prepare his case. It was argued that the learned Arbitrator had a duty to raise this issue in the proceedings. The Court was referred to Applicant's charge 3 that he did not follow the policies and procedures. Applicant argued that it was not clear which

policies and procedures were not followed, when or even how they were breached.

31. It was argued that in *Van Jaarsveld and Van Eck, Principles of Labour Law, at page 199-201*, it is said that the charges must be clear and specific. Further that Baxter, in his book, *Administrative Law 1984, at page 597* states that fairness requires strict adjuciable procedures. It was argued that on the strength of this said, the learned Arbitrator erred and that Her award warrants interference with.

32. Although Respondent has not reacted to this ground, We have observed that Applicant is not claiming to have raised the issue of an unclear charge with the learned Arbitrator. Rather, he seems to claim that the learned Arbitrator was cast with a duty to pick the point up. We say this because over and above the way the argument is couched, no reference has been made to the record to suggest that the issue was raised for address by the learned Arbitrator.

33. We have stated before that a party cannot canvass a new issue on review which was not brought to the attention of the learned Arbitrator in the arbitration proceedings. Supportive of our view is the finding of the Labour Court in *Lewis Stores (Pty) Ltd v Makhabane and Others (supra)*, where the Court had the following to say,
"While it is true that the arbitrator cannot overlook what transpired at the disciplinary hearing, however for failure to do so to be reviewable, the material must have been presented before the arbitrator. He cannot be said to have improperly overlooked something that he did not have the opportunity to consider."

34. We are also of the view that to allow such a practice would be to offend the maxim of *audi alteram partem*. The maxim of *audi alteram partem* applies to include the decision makers whose decisions are subject to review. In addressing this issue the Labour Court in *Central Bank of Lesotho v DDPR & Others LC/REV/216/2006,* at paragraph 31, had this to say,

"All this evidence was not considered by the arbitrator. It is not available to the 3rd respondent to come and contest for the first time before DDPR that the applicants erred on an issue that she never
canvassed before the applicant. The maxim audi alteram partem applies both ways. In other words if it had been raised timeously the applicants would have been able to deal with it. (see also Puleng Mathibeli .v. Sun International 1999-2000 LLR-LB 374 (CA) and Maleshoane Bohloa and Others .v. Jet Store Maseru (Pty) Ltd & OthersLC/REV/48/04 at p.7 paragraph 24 of the typed judgment (unreported)."

35. Our attitude further finds support in *Thabo Phoso .v. Metropolitan Lesotho LAC/CIV/A/10/2008*. In this case the learned Dr. K. Mosito had this to say,
"....the fact that the process had not been correctly served on the respondent could not be properly argued before this court because they were neither pleaded nor argued before the Labour Court. The Labour Court could not properly consider them."
In Our view of this said above, We find that the learned Arbitrator committed no irregularity.

36. Both parties had asked for costs. However, none of the parties gave convincing reasons for such an award to be made. Applicant claimed costs on account of frivolity. Given Our finding, Applicant request for costs falls off. Respondent merely claimed costs without any further motivation which leads on to assume that it meant that costs follow suit. Not only is speculation on Our part prohibited, but in the Labour Court being a court of equity and fairness, costs do not follow suit (*see Mokone v G4S Cash Solutions (Pty) Ltd LC/31/2012; Thabo Makhalane v The Ministry of Law and Constitutional Affairs & others LC/PS/A/02/2012; Thabo Moleko v Jikelele Services LC/40/2013; Kopano Textiles v DDPR & another LC/REV/101/2007; Sefatsa Mokone v G4S Cash Solution (Pty Ltd LC/31/2012)*. They are granted in extreme circumstances of frivolity and/or vexations conduct. These are not present *in casu*.

AWARD

We therefore make the following award.

1) Review application is refused.
2) The award in referral E051/2008 is reinstated and must be complied with within 30 days of issuance herewith.
3) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF FEBRUARY, 2015.

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

MRS. RAMASHAMOLE **I CONCUR**

MISS LEBITSA **I CONCUR**

FOR APPLICANT: **MR. MOLEFI**
FOR 1st RESPONDENT: **ADV. LOUBSER**