IN THE LABOUR COURT OF LESOTHO **LC/REV/39/14**

HELD AT MASERU

In the matter between:

ELLERINES FURNITURES, LESOTHO (PTY) LTD **APPLICANT**

and

STEPHEN TS`EISI KHUELE **1st RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

03/08/17

Disciplinary hearing - The Arbitrator finding an employee's dismissal substantively fair but procedurally flawed on the basis that the employee was denied an opportunity to cross - examine the initiator in a disciplinary hearing - Employer contending that the person complained about was but an initiator and not a witness and could therefore not be cross - examined and argued that the Arbitrator failed to apply her mind to the relevant issue - The role of the initiator (prosecutor) in a disciplinary hearing considered - Court not able to establish why the Arbitrator chose to go along with the employee's version as opposed to the employer's - Court coming to the conclusion that the Arbitrator failed to apply her mind to the case that was before her and led her to arrive at an unreasonable outcome - Award reviewed and set aside.

INTRODUCTION

[1] The applicant was the General Manager of Ellerines Furnitures, Lesotho (Pty) Ltd. He had been dismissed from his employment after having been found guilty of misconduct following a disciplinary hearing against him. He subsequently filed a case before the Directorate of Disputes Prevention and Resolution (DDPR) in **A0 779/2013** wherein he claimed unfair dismissal on both substantive and procedural grounds. The Learned Arbitrator found the dismissal to have been substantively fair but found the employer to have flouted procedure. The DDPR ordered the payment of 1st respondent's salary for the months of March, April, May, June and July, 2013; accrued leave; and six months compensation for procedural impropriety.

[2] Circumstances that led to this dispute are that the 1st respondent was found to have taken the stock of Ellerines and given it to staff to motivate them without authorisation and, allegedly, reflected the said goods as ***"Return to Manufacturer" (RTMs)*** thereby falsifying the transaction. The term ***"RTM"*** is used for stock that is faulty and returned to the manufacturer. The 1st respondent had been charged with misconduct for giving the said stock belonging to the company away when he did not have authority to do so, and for acting dishonestly and fraudulently in using the ***"Return to Manufacturer"*** process in disguise for awarding company stock to employees. It was contended on behalf of the applicant that as a General Manager the 1st respondent had a duty of care towards applicant's assets but breached that duty by giving out company property as motivational gifts to staff without authorisation, resulting in a loss to the company. Having lost the case before the DDPR, the applicant approached this Court to have the DDPR award reviewed, corrected or set aside. Applicant's grounds of review are two - fold, the first relates to the finding of procedural impropriety and the other to the award of compensation to the 1st respondent.

GROUNDS OF REVIEW

PROCEDURAL IMPROPRIETY

[3] As aforesaid, the learned Arbitrator found 1st respondent's dismissal to have been valid, but the disciplinary process to have been flawed in that the 1st respondent had been denied an opportunity to cross - examine a Mr Van Dyk, the Ellerines' group Operations Executive, Africa. The applicant argued, to the contrary, that it was a misconception on the part of the learned Arbitrator to have concluded that the 1st respondent was not afforded an opportunity to cross - examine Mr Van Dyk when he was an initiator of applicant's case, a prosecutor in the criminal context, and not a witness. The basis of applicant's case is that the learned Arbitrator misdirected herself by failing to apply her mind properly and rationally to the case that was before her resulting in her making a finding that was not supported by the evidence that was tendered. 1st respondent's Counsel insisted that Mr Van Dyk testified during the disciplinary hearing and admitted to having been a witness thereat, and that the 1st respondent was entitled to have cross - examined him.

SETTING THE STAGE

[4] Employers must always ensure that disciplinary hearings are prepared and conducted fairly.

The purpose of disciplinary hearings is to ensure that accused employees have an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of their accusers before an adverse decision is taken. [1]

There are many role players in a disciplinary process. These may include:

The chairperson
The initiator/ prosecutor
The interpreter, if necessary
Witnesses
The Secretary
The accused employee
The accused employee's representative.

[5] Focusing on the initiator, who is at the centre of this dispute, the function of the initiator is to lead the case against the employee whose conduct or poor performance is under scrutiny. The initiator is normally a company employee and generally acts as a company's legal representative during a disciplinary hearing. He or she plays the role of a prosecutor in a disciplinary hearing, investigates, prepares for a case, collects evidence on the issues that need to be proved and prosecutes a disciplinary case for the employer. It is his or her task to convince the chairperson of a disciplinary hearing that the accused employee is guilty. He or she is normally responsible for presenting the allegations levelled against the employee at a disciplinary hearing and arranges witnesses to attend on behalf of the company. He or she prepares a statement of a case, setting out all the facts relevant to the allegation, including all relevant documentary evidence upon which he or she intends relying, a list of witnesses, if any, who will be called in by him or her before the disciplinary panel. In certain cases, the employer may designate legal counsel to present a case instead of the initiator.

[6] It is 1st respondent's case that Mr Van Dyk was a witness at his disciplinary hearing. He indicated that the initiator gave evidence, tendered documents and his evidence was considered in a decision to dismiss him by the chairperson. In probing Mr Van Dyk on the issue, 1st respondent's Counsel, Advocate Ntema, asked in cross examination:-

Mr Ntema : You see the report on page 9 paragraph 2 states you tendered evidence but it does not have anywhere on this 14 pages where it states that the

[1] John Grogan Workplace Law, 11th ed., 2015 at p.277

applicant cross - examined or asked you any question, do you realise that?

Mr Van Dyk : ***The witness who tendered that evidence was cross - examined and l only tendered their given or provided evidence as you read further, you will see that those witnesses were called and testified on the evidence l handed in.***

Mr Van Dyk insisted that he was not a witness.

[7] The learned Arbitrator concluded in paragraph 23 of her award that; ***Procedurally, respondent in its evidence does not deny that <u>the initiator</u> gave some documentary evidence and applicant was not given an opportunity to cross - examine him yet the same evidence was used in determining whether the applicant be dismissed or not. This is a procedural irregularity that affects applicant's right to be heard"*** (underlining mine). The learned Arbitrator never provided grounds why she accepted respondent's version and rejected applicant's. She merely accepted 1st respondent's version that he was denied an opportunity to cross - examine Mr Van Dyk and concluded that there was a procedural impropriety. Even in paragraph 10[2] of the award it says that the 1st respondent challenged his dismissal procedurally ***"because he was not afforded an opportunity to cross - examine <u>the initiator</u> in the disciplinary hearing"*** (emphasis mine). As aforesaid, it is a normal practice in a disciplinary hearing to put the employer's case across and then to call in witnesses to substantiate the said case. This role is generally played by an initiator.

[8] It is common cause that the applicant fielded seven witnesses to prove its case against the 1st respondent. What of their evidence? Nothing seems to turn on it. It emerged from the record and from the learned Arbitrator's award[3] that the said witnesses testified to 1st respondent's giving away applicant's property to staff without authorisation and falsely recording it as merchandise returned to the manufacturer ***(RTM)***. The 1st respondent had an opportunity to rebut this evidence through cross - examination.

[9] On close scrutiny one discerns a confusion between the role of the initiator and that of a witness. The learned Arbitrator seems to have misconstrued the role of an initiator ***vis a` vis*** that of a witness. It is therefore our considered opinion that the learned Arbitrator failed to apply her mind to the case that was before her. The leading case on the issue is ***Johannesburg Stock Exchange v Witwatersrand Nigel***

[2] P. 4 of the award

[3] Paragraphs 20 and 21 of her award

Limited[4] in which the Supreme Court of South Africa laid down the grounds of review at common law. The Court held that in order to establish review grounds, it must be shown that the presiding officer failed to apply his or her mind to the relevant issues in accordance with the ***"behests of the statute and the tenets of natural justice."*** Such failure may be shown by proof, ***inter alia***, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the presiding officer misconceived the nature of the discretion conferred upon her or him or took into account irrelevant considerations or ignored relevant ones. ***In Coetzee v Lebea NO & Another***[5] the Court held that failure to apply one's mind constitutes a ground for review and that ***"the best way of applying one's mind is whether the outcome can be sustained by the facts found and the law applied."***

[10] Applying this principle to the present case, the learned Arbitrator erred in considering Mr Van Dyk as a witness when he was actually an initiator, and this led her to arrive at an unreasonable conclusion. Having come to this conclusion, we will not have to get into the question of whether it was appropriate for the learned Arbitrator to have awarded the amount of compensation that she ordered.

THE COMPENSATION AWARD

[11] Just to put the question of compensation in perspective, the 1st respondent was awarded six months' compensation on account of applicant's procedural impropriety. As it is, the applicant contended that Mr Van Dyk never gave evidence but was an initiator. Applicant's Counsel challenged the award of compensation in circumstances where Mr Van Dyk was an initiator and not a witness and submitted that the 1st respondent could therefore not cross - examine him. According to the applicant, the initiator just handed in some documents on which the applicant was going to rely and the 1st respondent raised no objection thereto. The 1st respondent actually testified at the DDPR that:

Mr Khuele : … I had no objection to the documents tendered by the initiator, the policies tendered were irrelevant.[6]

[12] Applicant's Counsel, Mr Loubser, argued in the alternative, that assuming without conceding, that there was a procedural impropriety, it was irregular for the learned Arbitrator to have awarded compensation in circumstances where the

[4] 1988 (3) SA 132 (A)
[5] (1999) 20 ILJ, 129 (LC) at p. 130
[6] Page 87 of the record

1st respondent was a General Manager and was found guilty of a misconduct which the DDPR confirmed. According to him, if there was any deviation from procedure, it was minor considering the gravity of the misdemeanor and his status. He relied on the case of ***Dr D.C. Kemp t/a Centralmed v Rawlins***[7] which listed factors to be considered in whether or not to award compensation in circumstances where a dismissal has been found to be substantively fair but procedurally unfair. He indicated that the learned Arbitrator rightly tabulated the said factors but failed to relate them to the case that was before her. Applicant's Counsel submitted that the Learned Arbitrator's conduct constituted a reviewable irregularity in both the question of having regarded Mr Van Dyk as a witness as opposed to an initiator and having awarded compensation in circumstances that he felt it was due.

PREJUDICE

[13] Assuming, without conceding, that Mr Van Dyk's conduct was tantamount to giving evidence, the 1st respondent does not show what prejudice he suffered thereby. The story related by all the witnesses before the DDPR relating to the 1st respondent's alleged misdemeanor is consistent. Had the 1st respondent reflected the prejudice that he suffered by the alleged failure to cross - examine Mr Van Dyk, the Court could have been able to ascertain whether it was appropriate for Mr Van Dyk to have been cross - examined on the documents handed in. To show what difference it would have made in relation to the testimony of the seven witnesses fielded by the employer.

THE ORDER

i) **The DDPR award in A0 779/2013 is reviewed and set aside on grounds that the learned Arbitrator failed to apply her mind to the case that was before her by regarding the initiator in disciplinary proceedings, Mr Van Dyk as a witness and thereby liable to cross - examination; and**

ii) **There is no order as to costs.**

THUS DONE AND DATED AT MASERU THIS 03RD DAY OF AUGUST, 2017.

[7] [2009] 11 BLLR 1027 (LAC)

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

R.S. RAMPA **I CONCUR**
ASSESSOR

L. RAMASHAMOLE **I CONCUR**
ASSESSOR

For the Applicant : Mr P.J. Loubser
For the 1st Respondent : Adv., R. Ntema - Labour Department.

ANNOTATIONS

CASES REFERRED TO

Dr D.C. Kemp t/a Centralmed v Rawlins [2009] 11 BLLR 1027 (LAC)
Johannesburg Stock Exchange v Witwatersrand Nigel Limited 1988 (3) SA 132 (A)
Coetzee v Lebea NO & Another (1999) 20 ILJ, 129 (LC)

BOOKS

John Grogan Workplace Law, 11th ed., 2015