LAC/REV/115/04

IN THE LABOUR APPEAL COURT

In the matter between:-

LESOTHO BREWING COMPANY APPLICANT

and

DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION 1ST RESPONDENT
MR M. MOSISILI 2ND RESPONDENT
LEHLOHONOLO KHAFISO 3RD RESPONDENT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

PANELLISTS : MR MOFELEHETSI
MR MOTHEPU

DATE OF JUDGMENT : 25TH APRIL 2008.

[1] This labour matter came on review in terms of section *228F* of the **Labour Code (Amendment) Act No.3 of 2000** prior to its recent amendment wherein all reviews of the arbitration awards are to be lodged before the Labour Court. This change was not only imperative

and practical but has brought about expeditious justice in labour litigation in Lesotho. Prior to this, this Labour Appeal Court was inundated with reviews from the Directorate of Dispute Prevention and Resolution.

[2] In his award, the Arbitrator **Mr. Mosisili** had ruled that the 3rd respondent's dismissal by his employer (present applicant) had been unfair and had ordered that the 3rd respondent be reinstated with effect from 1st September 2000 and that the employer pay him his arrear wages from the date of dismissal to the date of reinstatement.

[3] The 3rd respondent Lehlohonolo Khafiso had since October 2003 been employed as a liquor distribution truck driver whose main function was to deliver liquor to divers customers and also collect cash in the process.

[4] The main reason for his dismissal after disciplinary hearing was conducted at Mafeteng Depot on the 25 June 2004 was that the 3rd respondent had failed to deposit in the depot safe certain monies amounting to about (M11,762.71) on the 1st and 2nd June 2004.

[5] Before the Arbitrator, witness Mrs. Masekhantšo Sekhantšo – Human Resource Manager of Lesotho Brewing Company - was called to give evidence. It is however at once clear that her evidence was intrinsically in the form of hearsay in that she deposed to what she had been told or gathered from the relevant records. In the main her

evidence explained the procedures which the distribution truck driver had to follow in handling and depositing cash or monies collected daily from the customers. More importantly, she underscored the fact that all cash collected daily by the driver was to be deposited into what was described as a "*drop safe*" affixed to his truck whose keys were kept at the office by someone else than the driver.

[6] It was not in dispute that the 3rd respondent did not deposit monies on the 1st and 2nd June 2004 as expected and that when he was asked to explained this he explained that the keys to the drop safe were no where to be found.

[7] In brief, all she stated about the 3rd respondent was what she had been told about him. She ended her evidence by stating-

> *"…it is the driver's obligation to deposit (monies collected) every single day when he returns from trading. He does not have a duty … or discretion to decide to postpone the depositing to another day that is all*
>
> ***Arbitrator*** *: Is that all your evidence.*
>
> ***Respondent*** *: Yes, that is all.*
>
> ***Arbitrator*** *: The document that you are talking about, where is it? Is it here? Is it coming or ……?*
>
> ***Respondent*** *: It is coming…!"*

Unfortunately no such document, whatever it was, was ever produced before the arbitrator. It is also important to note that the applicant not did present before the arbitrator any document even purporting to detail the job description of 3rd respondent.

[8] She had also stated in her evidence that the 3rd respondent had been given two kinds of induction courses at the beginning of his service. She however did not conduct these inductions nor was she present at such courses.

[9] In our view any requisite knowledge about relevant regulations and procedures in the Lesotho Brewing Company had to be proven on a balance of probabilities and not to be assumed; these rules do in fact form the integral part or content of the contract of employment.

[10] When the applicant concluded its case, it is important to note that even the Human Resources Manager (in Maseru) could not testify truly about events that took place in Mafeteng and indeed she conceded that she had not conducted the induction for the 3rd respondent. No other witness was called to support the applicant's case. Such competent witnesses were the Mafeteng cashier or the Mafeteng Depot Manager who obviously had first hand information about this matter. None of them were called and this left a huge blot on the applicant's case.

[11] The *onus*[1] vested upon the applicant to show that the 3rd respondent's conduct had knowingly violated the regulations or rules governing the liquor deliveries and the depositing of monies collected.

[12] On hindsight, the applicant would have discharged the *onus* that rested on it if it called as witnesses such as the personnel at Mafeteng Depot on shop floor. That was not done and it was left to Mrs. Sekhantso to battle alone before the arbitrator.

[13] For his part, the 3rd respondent admitted that he did not deposit the monies on the 1st June 2004 collected because the cashier was not present to check him and that on the morning of the 2nd June 2004 he was instructed to make urgent deliveries to a Mafeteng liquor restaurant and thus due to pressure of work, he again could not deposit the monies; and that on the 3rd June 2004, the safe key could not be traced and when the safe was "*grinded*" open on the 4th June 2004, some money was found missing from the safe.

Law

[1] Section

[14] In a case where there are two mutually destructive stories, the party which bears the *onus* will lose if the respondent's version is probably true. Thus it has been stated that-

> *"Where there are two stories mutually destructive, before the* ***onus*** *is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the* ***onus*** *rests is true and the other false.*[2]*"*

[15] In our view *"better or best evidence"* could have been adduced but this was not done by the applicant to prove the 3rd respondent's transgression. Mrs. Sekhantso was made to shoulder the duty to testify on matters she had no first hand knowledge about.

[16] In the circumstances, we are of the view that (a) the version of the applicant and 3rd respondent were mutually destructive and (b) the applicant failed to discharge the *onus* it bore under section 66 (2) of the Labour Code No.24 of 1992.

[17] The application is therefore dismissed.

[18] **Order**: Because in terms of section 73 of the Labour Code the

[2] **Wessels JA** in **National Employers' Mutual General Insurance Association v Gany** – 1931 AD 187 at 199.

reinstatement of the 3rd respondent to the applicant's employ cannot be practicable, a compensation of three months' of his then current salary should be paid by applicant to 3rd respondent.

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S.N. PEETE

JUDGE – LABOUR APPEAL COURT

I agree : _____

L.C. MOFELEHETSI

PANELLIST

I agree : _____

M. MOTHEPU

PANELLIST

For Applicant : **Mr. Loubser**

For Third Respondent: **Mr. Shale**