LAC/A/07/07

IN THE LABOUR APPEAL COURT

HELD AT MASERU

In the matter between

DANIEL SELITSE	**1ST APPELANT**
TLEBERE TLEBERE	**2ND APPELLANT**

AND

LEWIS STORES (PTY) LTD	**RESPONDENT**

CORAM:	**HON. K.E. MOSITO AJ**
ASSESSORS:	**MR. J. TAU** **MRS. M. MOSEHLE**
HEARD:	**9 JUNE, 2008**
DELIVERED:	**13 JUNE, 2008**

SUMMARY

Review of awards by the DDPR – Whether the reviewing court is entitled to delve into the merits and evidence before the DDPR when so reviewing it – This depends on the issue to be reviewed.
Whether unsworn testimony is admissible – such evidence not admissible – There being no testimony to sustain appellants' case befor the DDPR -
Appeal consequently dismissed with costs

JUDGMENT

MOSITO AJ

(e) Dissatisfied with the said award of the Arbitrator, the respondent company approached the Labour Court for review. The bases for the said review were detailed out in paragraph 5 of the founding affidavit of the company's manager, Mr. Tseka. It is contended in that paragraph that, the decision of third respondent [the Arbitrator] was flawed with procedural irregularities, improprietaries and/or illegalities on one, a combination of and/or all of the following factors

(i) The learned arbitrator misdirected herself in law in concluding that applicant bore a burden of proving that the dismissal.
(ii) It was irregular and improper to disregard the proceedings and evidence led in the disciplinary hearing.
(iii) It was irregular to conclude that applicant did not give evidence to corroborate my testimony whilst in fact there is evidence to show that I did not authorize first respondent to use the vehicle.
(iv) It was irregular and illegal to conclude that there is no evidence from applicant which convinced third respondent that first respondent was not assigned work to do on the 15th August 2004 whereas I have denied that, even at the disciplinary hearing stage.
(v) It was irregular and improper that since second respondent does not say he was assigned work, it was probable that first respondent was assigned that work even though I denied that allegation.
(vi) It is procedurally illegal to conclude that the dismissal is substantively unfair having regard to the testimony led in a disciplinary hearing.
(vii) It was improper to disregard the disciplinary code and procedure of applicant in deciding the matter.
(viii) It was improper to decide that first and second respondents were dismissed for damaging the company vehicle, whereas the dismissal was based on unauthorized use of the said vehicle.
(ix) It was procedurally improper to conclude that there were no thorough investigations done by the applicant before the dismissal whereas there was a disciplinary hearing.

1. This is an appeal from a decision of the Labour Court exercising its review jurisdiction over an award of the Directorate of Dispute Prevention and Resolution (DDPR).

2. The background to this appeal is as follows:-

   (a) At all times material to these proceedings, the 1st and 2nd appellants were employees of the respondent company (Lewis Stores (PTY) Ltd.

   (b) First appellant was dismissed by the respondent subsequent to a disciplinary hearing based on the allegation that he had without authorization handed over to the second respondent, a company vehicle. The said vehicle got damaged while in the possession of the second appellant. The second appellant was also dismissed on the grounds that he had driven the said company vehicle without authorization from the manager.

   (c) It suffices to mention at this stage that, both appellants were dismissed after disciplinary proceedings were held against each of them by the company.

   (d) The appellants then challenged their dismissals in the DDPR as a joint referral. After hearing the case, the DDPR's arbitrator handed down her award in favour of the appellants. The arbitrator's basis was that, although the disciplinary hearings were procedurally fair, they were however substantively unfair.

(x) It was a gross irregularity to re-instate first and second respondents which were no longer trustworthy to me in terms of the evidence.

(xi) It was improper to direct that I be separated with first and second respondents upon their re-instatement since that is entirely an internal procedure within the armbits of applicants.

(d) The appellants opposed the said application. The Labour Court ultimately heard the matter and handed down its judgment on the 25th day of October, 2007.

(e) The Court held in essence that the irregularities complained were sufficiently serious to warrant the court's interference with the award of the arbitrator. It further held that the evidence that ought to have been considered had been totally ignored, thereby leading to a conclusion that would not have been reached had that evidence been considered. The Labour Court held that wholly unreliable and self- conflicting evidence was improperly relied upon as well as evidence which was not sworn. For these reasons, the award of the DDPR was reviewed and set aside. The Court made no order as to costs.

3. The Labour Court accordingly reviewed the said award. The appellants now appeal to this Court from the said judgment of the Labour Court. Their grounds of appeal are that:-

(a) The Court erred and misdirected itself on dwelling extensively as it did on the merits of the arbitration hearing.

(b) The court *quo* misdirected itself on [sic] engaging in an extensive analysis of the evidence thereby constituting itself as an appellate tribunal.

(c) The court erred and misdirected itself by its finding that second appellant's testimony was not sworn thereby concluding that it was inadmissible.
(d) Assuming, without conceding, that there was such unsworn testimony, the court erred in holding that such omission was fatal to appellants' case in an arbitration proceeding.
(e) The court erred and misdirected itself in its conclusion that the arbitrator had erred at a decision totally irreparable [sic.].
(f) Appellants reserved [sic] an opportunity to file additional grounds of appeal.

4. At the hearing of this appeal on the 9th day of June 2008, the above grounds were crystallised into only two issues. The first issue was that the Labour Court erred in examining the evidence that was before the DDPR in some details in as much as, in so doing, the said court constituted itself as an appellate court that it was not. The second issue was that the Labour Court erred in holding that the DDPR had ignored the evidence that ought to have been considered, and instead relying wholly on unreliable and self-conflicting evidence as well as evidence which was not sworn, thereby resulting in the conclusion that the DDPR ultimately arrived at. It is these two issues that we set out to consider in this judgment. We will deal with their *seriatim*.

5. In his address the learned counsel for the appellants, Advocate S. Ratau, pointed out that, the Labour Court engaged in an extensive analysis of the evidence adduced before the DDPR. He contended that, the Labour Court devoted almost all its time dealing with the evidence. He pointed out that, out of the 35 paragraphs of the judgment, 21 of these were wholly devoted to the analysis of the evidence before the DDPR. He therefore contended that since that court dwelt

extensively on the evidence, it was acting as an appellate court and not a reviewing court. He argued in essence that the Labour Court therefore performed the function of an appellate and not a reviewing court. He further contended that, in so doing, the Labour Court has misdirected itself. For this proposition, he relied on the judgment of this court in **JDG Trading (PTY) LTD t/a Supreme Furnishers v M. Monoko and Others, LAC/REV/3904.** In the later decision, in the course of drawing the distinction between an appeal and a review, this court *inter alia* pointed out that, an appeal is, in reality a re-evaluation of the record of proceedings of the court *a quo*. He then contended that, what the court a quo did *in casu*, was to re-evaluate the whole record of the DDPR thereby constituting itself as an appellate tribunal. He therefore contended that the court *a quo* erred in so doing.

6. In reaction to the foregoing submission, Mr. Ts'enoli for the respondent company contended that there was nothing wrong with the court having re-evaluated the evidence. He contended that since the issue before the Labour Court was that the DDPR had not properly applied its mind to the issues before it, regard being had to the nature of the evidence before it, the Labour Court was entitled to examine the evidence relied upon in order to determine whether the decision had been grossly unreasonable. He contended that as a reviewing Court, the Labour Court had wide powers. He referred to the remarks of Innes CJ in **Johannesburg Consolidated Investment Co,. Ltd vs Johannesburg Town Council 1903 TS 111 at 119** in which the Learned Chief Justice said:

> "So employed the expression 'review' seems to mean 'examine' or 'take into consideration.' And when a Court of law is charged with the duty of examining or considering a matter already dealt with by an inferior court, and no restrictions are placed upon it in so doing, it would appear to me that the powers intended to be conferred upon are unlimited. In other words, it may enter upon it in so doing, it would appear to me that the powers intended to be conferred upon it are unlimited. In other words, it may enter upon and decide the matter *de novo*. It possesses not only the powers of a Court of review in the legal sense, but it has the function of a Court of Appeal with the additional privilege of being able, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a Court of first instance."

7. Mr. Tsenoli further contended that there was need for the Court *a quo* to deal extensively with the evidence led at the DDPR, more so when the complaint was that it amounted to unreliable evidence. He contended on the authority of **George Molapo v Makhutumane Mphuthing and Others 1995 – 1996 LLR – LB 516 at 526** that, to give judgment against any man without any evidence whatsoever against him seems to be a greater irregularity than to reject legal evidence or admit illegal evidence, for it ignores the very object for which all the rules of evidence exist.

8. As can be observed, the foregoing arguments revolve around the concept of review. The word 'review' has both a wide and a restricted meaning. In this regard Innes CJ in **Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111** held the following at 114 - 6:

> 'If we examine the scope of this word as it occurs in our statutes and has been interpreted by our practice, it will be found that the same expression is capable of three distinct and separate meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal are brought

> before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings. . . .
>
> But there is a second species of reviews analogous to the one with which I have dealt, but differing from it in certain well defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. . . .
>
> Then as to the third signification of the word. The Legislature has from time to time conferred upon this Court or the Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the review procedures to which I have alluded.'

9. The second species of review referred to by Innes CJ above, is ordinarily referred to as review under the common law. It must be stated that in the foregoing judgment, Innes CJ was concerned with the powers of a superior court, and not a court of the status of our Labour Court. His remarks in that case must therefore be understood in that context. A superior court such as the High Court has wide review powers. A superior court such as the High Court has wide powers, including exercising the power of review on appeal in its discretion. Such is however, not the case with the Labour Court. It would therefore, be wrong to read into section 228F of Act No.3 of 2000 (as amended) an attempt to abolish the distinction between review and appeal. As Froneman DJP (dealing with section 145 of the Labour Relations Act of South Africa, which is *in pari materia* with our section 228F of Act No.3 of 2000 as amended), once pointed out in paragraph 33 **in Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC),** one must be careful not to extend the scope of review [in this section] for the wrong reasons. One such wrong reason would be the fact that the Labour Court

has no original or appeal jurisdiction in respect of the matters specified to be conciliated and arbitrated under the auspices of the DDPR and to compensate for this by an extended review.

10. Returning to Mr. Ratau's argument, he contended that the Labour Court acted like an appellate court, by dealing with the evidence before the DDPR. Taken to its logical conclusion, this contention means that the approach of the Labour Court blurred the distinction between review and appeal. As we pointed out in in **JDG Trading (PTY) LTD t/a Supreme Furnishers v M. Monoko and Others** (*supra*), review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal (**see Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W) at 46H, 48E**). Because of that fundamental difference between review and appeal, they are inconsistent remedies. Thus, if both are available, an appeal can be considered only once the review proceedings have been finalised as a decision in respect of the appeal would preclude the granting of relief by way of review (**see R v D and Another 1953 (4) SA 384 (A)**). Similarly, a successful review would obviate the need to consider the merits of an appeal. In the premises an appeal, unaccompanied by a review, presupposes the regularity and validity of the proceedings in which the decision that is being assailed was given.

11. Thus, if the essence of Mr. Ratau's argument was that a reviewing court is not entitled to delve into the evidence that was presented before a tribunal whose decision is sought to be reviewed, we have difficulties with this argument. In our view, when a reviewing court is faced with a situation in which it is to determine whether there was evidence before the Court *a quo* upon which a particular finding could be made, as in the present case, it is entitled to delve into such evidence. As clearly appears in the causes of complaint reflected in (iii); (iv);as well as (v) ,above appearing in paragraph 5 of the founding affidavit of David Tseka before the Labour Court, the Court had to delve into the evidence in order to determine the issues raised therein.

12. It is true as was pointed out in **Johannesburg City Council v Administrator, Transvaal and Another 1969 (2) SA 72 (T) at 76D - E** that a Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. It is therefore to be expected that the Labour Court should similarly be slow to assume a discretion which has by statute been entrusted to the DDPR. As to whether or not, in the light of the terms of section 228F of Act No.3 of 2000 as amended, the Labour Court is empowered to substitute its own decision for that of the DDPR as it has done *in casu*, this is a matter that was not argued before us. It is therefore not necessary to deal at length with a reviewing Court's power to substitute its own decision for that of an administrative authority or functionary. Suffice it to say that the remarks in **Johannesburg City Council v Administrator, Transvaal, and Another (supra)** that 'the Court is slow to

assume a discretion which has by statute been entrusted to another tribunal or functionary' does not tell the whole story.(**See Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA)).** Since we were not addressed on this issue in *casu,* we express no opinion on this issue. On the foregoing grounds, the first ground of appeal that the Court erred in delving into the analysis of evidence therefore fails.

13. The next question is whether the Labour Court erred in finding that second Appellant's testimony was not sworn, thereby concluding that it was inadmissible. Furthermore, whether the Court erred in finding that second Appellant's unsworn testimony was fatal to the matter before the Arbitrator.

14. As a general rule, only sworn testimony can generally be placed as evidence before a court. The introduction of such unsworn evidence is irregular. This rule may in the case of civil proceedings in Lesotho, be traced from as far back as 1830. The **Evidence in Civil Proceedings Ordinance No.72 of 1830** made provision for admissibility or otherwise, of evidence in civil proceedings. Section 32 of the Ordinance provided for the admissibility of unsworn testimony in certain respects in a court of law. It however did not say whether the same rule of evidence would apply in proceedings such as the DDPR. Fortunately, there is a Legal Notice in respect of the DDPR. As this Court pointed out in **Vodacom Lesotho (Pty) Ltd v The Directorate of Dispute Prevention and Resolution LAC/REV/47/2005** at paras 15:

> "15. ...Section 26 (8) and (9) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004 provides as follows:-
> (8)The arbitrator must swear or affirm the witness in and advise the witness of the process of questioning."

15 Section 228 C (2) of the Labour Code (Amendment) Act confers upon the parties to a dispute before the first respondent a right to give evidence to call witnesses and to question the witnesses of any other party. The Arbitrator is enjoined, in terms of **Regulation 18(2) of the Directorate of Dispute Prevention and Resolution, L.N. 194 of 2001** to conduct the proceedings taking into account the provisions of the Code. Section 26 (1) of the **Labour Code (Conciliation and Arbitration Guidelines) Notice 2004,** L.N. No. 1 of 2004, provides for six stages that may be followed in arbitration proceedings Stage No. 4 of the six stages relates to the hearing of evidence.

16. Section 26 (8) of the Guidelines provides that the arbitrator must swear or affirm the witness in and advise the witness of the process of questioning. Section 26 (9) (a) – (h) of the guidelines provides that the arbitrator must permit cross examination of witnesses. There is no indication of record that Mr. Makhabane was ever sworn before giving his evidence on his own behalf. This was a fatal irregularity in respect of the admissibility of this evidence.

17. Faced with this real problem, Mr. Ratau contended that it could be that there was a typographical omission in transcribing the record of the DDPR so that, the transcriber might have omitted to mention that the witness was sworn as required

by law. In our view to accept this argument would be tantamount to venturing into an area of speculation and conjecture. There are no facts on the record to justify such a conclusion.

18. In the alternative, the learned counsel, Mr. Ratau, argued that assuming, without conceding that there was such an omission to administer such an oath, such omission could not be of such a fundamental nature as to vitiate the entire proceedings. The essence of this argument was to urge this court not to sponsor the triumph of formalism over substance. He contended that an examination of the record will reveal that there was still some evidence on the basis of which the DDPR could still have found in favour of the appellants even in the absence of the testimony of the second appellant. The essence of this argument is to invite this court to go through the evidence before the DDPR and determine whether, given that evidence, the DDPR could still have come to the same conclusion.

19. In the first place, we agree with Mr. Tsenoli that, in the particular circumstances of this case, the effect of the non-swearing of the second appellant was to render his evidence inadmissible. However, as was contended by Mr. Ratau, the question to be answered is whether that isolated incident would affect the entire proceedings before the DDPR, or render the evidence tendered by all the other sworn witnesses unreliable, as to justify interference with the award of the DDPR. It is to this aspect to which we now turn.

20. We have already agreed that the evidence of Mr. Makhabane appears not to have been sworn. We agree with the Labour Court that such evidence could not be

relied upon as it was inadmissible. The other witness's testimony did not establish Mr. Makhabane's entitlement to drive the vehicle on the eventful day. Mr. Selitse's evidence was not only inherently contradicting, but was also inconsistent with the other testimonies by other witness as far as it concerned the entitlement of Mr. Makhabane to drive the said vehicle on that day.

21. In the circumstances, we are unable to find any fault with the Labour Court's decision in the light of the testimony. It is therefore clear that we cannot accede to appellants' counsel's submission that, even if Mr. Makhabane's evidence were rejected as inadmissible, there was still some evidence upon which the arbitrator could still have held for the appellants.

22 It follows from the forgoing reasons that, this appeal cannot succeed. It is accordingly dismissed with costs.

23. My assessors agree.

K.E. MOSITO AJ
JUDGE OF THE LABOUR APPEAL COURT

For Appellants: **Advocate S. Ratau**
For Respondent: **Mr. P.V. Tsenoli**