IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU LAC/CIV/A/01/11

In the matter between:

TSEPISO POSHOLI APPELLANT

AND

CASHBUILD (PTY) LTD RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: Mrs M. Maloisane

Ms P. Lebitsa

Heard on: 13th JANUARY 2012

Delivered on: 30TH JANUARY 2012

SUMMARY

Appeal from the Labour Court – Appellant raising point not contained in his grounds of appeal. - Such practice not acceptable. – Appellant complaining on non-service of stay of execution application which was served on Appellant's trade union which was representing him – Appellant complaining that such service ought to have been served on him personally and not the union – no merit in such complaint.

Appellant complaining that Labour Court raised and decided point not canvassed by any of the parties, thereby committing an irregularity – Appellant unable to point out such irregularity on record. No substance in such a point.

Appeal having no merit and therefore dismissed with costs.

JUDGEMENT

MOSITO AJ

1. This is an appeal against the judgment of the Labour Court handed down on the 7th day of December, 2010. The judgement was a result of an application for review and setting aside of the award of the Arbitrator of the Directorate of Dispute Prevention and Resolution.
2. The facts are largely common cause. The Appellant was employed by the respondent company as a Systems supervisor. He was in charge of the cash office and staff in that office. Events giving rise to this litigation took place on Sunday the 21st day of April 2008. Appellant had gone to work and had been working as both the Systems Supervisor and Cashier.
3. As Systems Supervisor Appellant was admittedly responsible for company cash. On Saturday the 20th day of April 2008, the Appellant had been at work with cashier 'Makarabo. At close of business Appellant counted cash which was in the hands of cashier 'Makarabo. He found the change float to amount to M1,000.00 and the petty cash amounted to M600.00.

4. Appellant put the cash in two separate bags, sealed them and left them in the office with Makarabo while he went to the cash-up machine in the Manager`s office. Thereafter they closed the shop with 'Makarabo. The following day only Appellant came to work. He worked as both cashier and Systems Supervisor. Appellant himself testified that that day the shop opened at 8.00am and closed at 13.00 hours. These were the standard hours for Sunday.

5. Appellant averred that at between 12.00 noon and 13.00 hours he needed change for a customer. He went to the cash office to get the change. He took out the cash bags that were closed and sealed by him the previous day. He testified that he broke the seal to the change float bag which had contained M1,000.00 and found that it contained M300.00. In all M700.00 was missing. It was only then that he called the Manager and one Moeketsi to come and witness what he had discovered.

6. The Manager came and counted the money with the Appellant and the shortage was confirmed. The Manager wanted to know why there was a shortage. Appellant replied that he suspected 'Makarabo, because he had left her in the office when he had gone to the cash-up office. He averred further that he was fortified in his suspicion by the fact that 'Makarabo had had queries relating to missing money before. 'Makarabo was charged of the disappearance of the money found guilty and dismissed.

7. Subsequently the Appellant was also charged of breach of company policy, alternatively negligence, alternatively fraud and again alternatively dishonesty. It appears he was found guilty of all the

charges including the alternative charges. He was dismissed. He referred a dispute of unfair dismissal to the DDPR.

8. Evidence led on behalf of the Respondent by the Manager Mr Thabang Nkoale was that on the Sunday in question he was called by the Appellant who showed him the two bags which he had already opened. He reported that upon opening each of the two bags he found that part of the money that was in the bags was missing. One bag had contained M1,000.00 and it was short of M700.00. The other bag had M600.00 and M300.00 was missing.

9. It is common cause that after testifying on the shortage and the disciplinary case of 'Makarabo, Appellant was asked about the disciplinary case against himself and its outcome. He had been happy that 'Makarabo was disciplined and dismissed for the disappearance of the money. This according to him ought to shield him from blameworthiness. A further shield according to his testimony ought to be that he should have been given a written warning and asked to repay the money because one Agnes Ramane who was charged of dishonesty was given a final written warning and asked to repay the money.

10. It is further common cause that the representative of the Respondent did not challenge this aspect of Appellant's testimony. In her award the Learned Arbitrator accepted this aspect of the evidence as unchallenged. With regard to the disappearance of the money she stated: "I find that the applicant has failed..... to convince the Court that he did not commit the offence or (that) he was not an accomplice to this offence. I find on the balance of probabilities that Respondent had nobody to suspect but applicant in this incident and he [sic] had a valid and reasonable reason to lay charges against applicant."

11. After considering the facts presented before it, the Labour Court reviewed and set aside the award of the Arbitrator and replaced it with the order that the referral in AO570/08 is dismissed with no order as to costs.

12. The Appellant was dissatisfied with that judgment and he noted an appeal to this Court. The grounds of appeal were rather prolix and not an epitome of the best draftsmanship. For what they are worth I reproduce them herein below;

> **1. The Leaned president erred in fact in:**
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> **1.1** Allowing Respondent to proceed with an Application for stay of execution of the DDPR Award without first verifying that the Service of process has been duly effected upon the Appellant **(**Appellant in the Court below) as an interesting party in those proceedings;
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> **1.2** Granting an Application for Stay of Execution launched by the Respondent without giving Appellant an opportunity to state his side of the story;
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> **1.3** Precluding Appellant`s Representative from addressing the Court on the issue of the Respondent`s non-compliance with the rules of Court/prescribed procedures;
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> **1.4** The Learned President misdirected himself in granting an Application for Reinstatement of an Application for review under Case No. LC/19/10 which was dismissed for want of prosecution in favour of the Respondent without considering the interest of the Appellant and the continuing prejudice suffered by the Appellant as a result thereof.
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> **The ruling of Law:**
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> **2.** The Learned President erred in-law:
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> **2.1** In granting relief, *mero motu* to a party which had not even asked for such relief;
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> **2.2** In exceeding powers vested in him by turning his reviewing Court to that of Appeal Court;
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> **2.3** In disregarding the Labour Appeal Court decision of *`Manthethe Mafethe vs Supreme Furnisher* at his disposal. And thereby compromising the doctrine of judicial precedent or that of *Stare decisis;*
>
> **2.4** In setting aside the decision of the Arbitrator just because he did not agree with her (Arbitrator);

2.5 The Learned President misdirected himself in holding that the Court on review is allowed to scrutinize the entire record of the proceedings for purposes of picking up reviewable irregularities.

2.6 The Appellant reserves his right to deliver further grounds of appeal on receipt of the record from the Court below.

13. When the matter was heard by this Court, it became clear that the Appellant Counsel could not direct his argument to the grounds of appeal as outlined above. First of all he sought to argue that the first issue is whether it is correct in law for a person who presided over the appeal/disciplinary hearing to later represent the other party (in this case the employer) against a party aggrieved by his own decision. He proceeded to argue that the related leg to the way he had formulated the issue in argument, was whether such conduct cannot be equated to confirming bias/partiality on the part of that Chairperson from the onset. It became clear that what Counsel was attempting to argue was not what was borne out by his grounds of appeal. In all fairness to Mr Mosuoe for the Appellant, he immediately abandoned this contention when confronted with the question whether that was one of the grounds of appeal contained in his grounds of appeal.

14. Mr Mosuoe then advanced another contention. He submitted that the Respondent surreptitiously approached the Labour Court for the relief sought simply because they never wanted to bring it to the attention of the Appellant or give the Appellant notice as they did not want the application to be opposed lest they fight a **"losing battle".** The difficulty with this contention is that it was premised on an erroneous belief that service had not

been effected on the Appellant when it is clear from the record that service had been effected on the union that represented the Appellant. Since all along Appellant had been represented by his Union, the offices of which he had appointed as the address of service when the Union was representing him, he cannot now be heard to complain that service was not effected on him personally. There was clearly no merit in this complaint.

15. Regarding the complaint that the Labour Court decided an issue that nobody had raised and relied on, Mr Mosuoe sought to argue that on perusal of the record of the arbitral proceedings, the Labour Court correctly found that the ground upon which the Respondent relied "was none". However, Mr Mosuoe sought to argue that the Labour Court took unnecessary step further, which he submitted the Labour Court did not have power to take as it was neither party`s case before it. He submitted further that it was a pure misdirection on the part of the Learned President to ***mero motu*** hunt or search for any reviewable irregularities. He was however not able to pinpoint the particular respect in which the Labour Court had misdirected itself apart from the fact that that Court had stated in paragraph 24 of its judgement that;

> "if it was not because in a review the Court scrutinizes the entire record which enables the Court to *mero motu* pick up reviewable irregularities even if they are not raised by the parties in their affidavits, this would be the end of this review application"

Whatever the correctness or otherwise of the formulation of the point of law quoted above, it does not appear anywhere that the

labour Court went out of its way to fish for irregularities and decide the case on the basis thereof without hearing the Appellant. In all fairness to Mr Mosuoe, he also informed this Court that he was unable to pinpoint such misdirection. I am of the view therefore that this complaint is without substance.

16. The last contention advanced by Mr Mosuoe was that the Respondent brought the matter on review on one ground, namely that, the DDPR-Arbitrator made a ruling that the evidence pertaining to consistency be excluded in the arbitration proceedings. In this connection, Mr Mosuoe argued that the duty of the Labour Court was a straightforward one: to peruse the record with a view to investigating the alleged ruling to exclude and/or not admit the evidence which was tendered by the Appellant to prove the act of inconsistency on the part of the Employer.

17. It appears from the record that when the case was proceeding before the DDPR, the Appellant`s representative handed in a disciplinary record involving another employee of the Respondent who had been disciplined and dismissed. The purpose of submitting that record to the Arbitrator was so that the Arbitrator could find that the Respondent had applied its rule in respect of which the Appellant was dismissed inconsistently. There was no objection, at least from the record, when the disciplinary record was handed in before the DDPR. The essence of the Appellant`s contention today is that the Labour Court had to peruse the record with a view to investigating some alleged ruling allegedly made by the Arbitrator in terms of which the

Arbitrator refused to admit the evidence which was tended by the Appellant. Indeed this is what the Labour Court did. It is therefore difficult to find the basis on which the Appellant now complains, moreso when the Appellant could not pinpoint such misdirection was committed.

18. In the circumstances of this case therefore it does not appear that there is any basis for interfering with the decision of the Labour Court and this Court is unable to find any. In the result, this appeal ought to fail. It is accordingly ordered that the appeal is dismissed with costs.

19. This is an anonymous decision of the Court.

K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Appellant: Mr P. M. Mosuoe

For Respondent: Adv. N. T. Ntaote