LAC/CIV/A/14/14

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:

LESOTHO PUBLIC SERVICE STAFF ASSOCIATION **APPELLANT**

And

SKHULUMI NTSOAOLE **1ST RESPONDENT**

DDPR ARBITRATOR (SHALE) **2ND RESPONDENT**

JUDGMENT

CORAM : The Hon. Acting Justice Keketso Moahloli

ASSESSORS : Mr. R. Mothepu
Mrs. M. Thakalekoala

Date of hearing : 13 November 2014

Date of judgment : 29 October 2015

SUMMARY

Appeal – against review judgement – task of Labour Appeal Court when hearing appeal against review judgment of Labour Court –

Evidence – resolving disputes of fact – techniques for evaluation of evidence – court must make findings on credibility of the various factual witnesses, their reliability and the probabilities – in the light of this court will then, as a final step, determine whether party bearing onus of proof has succeeded in discharging it –

Review – grounds for review of defective arbitration awards – section 228F (3) of Labour Code – meaning of "any grounds permissible in law" – meaning of "any mistake of law that materially affect the decision – reviewable irregularity – reviewable misdirections – failure to properly evaluate conflicting versions – application of criminal law test of proof beyond reasonable doubt in arbitration proceedings is a gross irregularity–

Work place misconduct – meaning and elements of misconduct of fraud, dishonesty, failure to account –

ANNOTATIONS

Cases:

Astral Operations Ltd v CCMA (1999) 20 ILJ 2609 (LC)

American Leisure Corporation, Durbanville CC v Van Wyk [2005] 11 BLLR 1043 (LC)

Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC)

Fouries Poultry Farm (PTY) (Ltd v CCMA [2001] 10 BLLR 1125 (LC)

Hira & Another v Booysen & Another, 1992 (4) SA 69 (A)

Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (AD)

Markhans v Matji NO [2003] 11 BLLR 1145 (LC)

Metcash Trading Ltd v Fob [1998] 11 BLLR 1136 (LC)

Moetsana v Tsikoane 1981 (2) LLR 378 (HC)

Notsi v Macpherson 1981 (2) LLR 268 (HC)

NUM v Associated Manganese Mines 2009 SA GBC 8.9.1

Potgietersrus Platinum Ltd CCMA (1999) 20 ILJ 2679 (LC)

R v Albertyn, 1931 OPD 178

R v Milne and Erleigh (7), 1951(1) SA 791

Reunert Industries (Pty) Ltd v Naicker [1997] BLLR 1173 (LC)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others (2006) ILJ 2076 (SCA)

SACCAWU V Irvin & Johnson (pty) Ltd (199) 20 ILJ 2302 (LAC)

Sasol Mining (Pty) Ltd v Commissioner Nggeleni & Others, (2011) 32 ILJ 723 (LC)

Sidumo & Another v Rustenburg Platinum Mines Ltd & Others, [2007] 12 BLLR 1097 (CC)

Southern Sun Hotel Interests (Pty) Ltd v CCMA [2009] 11 BLLR 1128 (LC)

Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA)

Telcordia Technologies Inc. v Telkom SA Ltd [2007] All SA 243 (A)

Venture Holdings Ltd v Biyana (1998) 19 ILJ 1266 (LC)

Statutes:

Labour Code Order No. 24 of 1992 (as amended by Act 9 of 1997, Act 3 of 2000, Act 5 of 2006 and Act 1 of 2010)

Books:

J. Grogan. Dismissal (2010 Juta)

J. Grogan. Labour Litigation and Dispute Resolution 2ed (2014 Juta)

M. Opperman. A practical Guide to Disciplinary Hearing (2011 Juta)

Oxford Dictionary of English 3 ed (UOP 2010)

The American Heritage Dictionary of Phrasal Verbs (Houghton Mufflin Harcourt Publishing Company 2005)

MOAHLOLI AJ (the assessors concurring)

INTRODUCTION

[1] Mr Skhulumi Ntsoaole (hereafter "Ntsoaole" or "the Employee" or "the Respondent") was employed as full-time Executive Secretary of the Appellant herein on a 3 year fixed-term contract. His contract was to run from 1 December 2007 to 30 November 2010. He was dismissed on 30 July 2010 following an internal disciplinary hearing in which he was found guilty of fraud, dishonesty, failure to account and insubordination. He subsequently referred a dispute to the Directorate of Dispute Prevention and Resolution ("the DDPR"), alleging that his dismissal was procedurally and substantively unfair. The DDPR (per award number A0589/09), ruled in his favour. It ordered his erstwhile employer, the Lesotho Public Service Staff Association (hereafter "the Appellant" or "the Employer" or "LEPSSA"), to pay him M176 100.00 compensation for the balance of his contract period, in terms of section 73(2) of the Labour Code Order 1992.

[2] The Employer thereupon applied to the Labour Court (case number LC/REV/36/11) to review and set aside the DDPR's award. The Acting President of the Labour Court dismissed the application and directed the Employer to abide by the award within 30 days of her judgment.

[3] LEPSSA has now appealed to this court against this judgment, on the grounds that the "Acting President erred and misdirected herself in holding that the arbitrator did not commit a mistake which materially affected his decision in holding that:

(a) The onus was on the Appellant to furnish and produce "proof that there was a resolution" that respondent was barred from printing the cards where respondent did not even dispute that such instruction was made and there was no legal basis or evidence before him for saying that such an instruction had to be supported by a resolution of the National Executive Committee (NEC) and thereby considering irrelevant issues.

(b) The statement of the learned arbitrator to the effect that in disciplinary proceedings, the charge of fraud is a "criminal offence which has to be proved **beyond reasonable doubt**", did not influence the decision of the said arbitrator and therefore not a serious misdirection even after holding that it was "a loose statement" from the said arbitrator.

(c) That decision of the learned arbitrator to hold that since the Respondent did not benefit from the said fraudulent transaction when there was no evidence or denial that Respondent was also part of the RHA Company which received the money did not amount to a misdirection when the issue was whether the respondent committed an offence or not.

(d) That decision of the learned arbitrator to hold that Appellant should have deducted the money which Respondent **had unlawfully used without authorization** from Respondent's salary thereby unlawfully

substituting his own punishment for that imposed by the Appellant, was not a misdirection.

(e) That decision of the learned arbitrator to hold that it was the Appellant who failed to produce any proof of receipts that were returned to him while the dispute was not about the receipt in possession of the Appellant but about the receipts of the balance money amounting to M5681.13 which the 1st Respondent failed to account for and had even admitted failing to produce, was not a misdirection and failure to apply his mind to the relevant issue before him and consideration of irrelevant factors.

(f) That decision of the learned arbitrator to hold that that Appellant "had a duty to recover the loss by deduction from the Applicants salary" the money which Respondent failed to account for was not a misdirection.

(g) That decision of the learned arbitrator to hold that the Appellant failed to lay disciplinary charges against the treasurer who went with the 1st Respondent, thereby considering factors which were extraneous and irrelevant to the dispute before him. This was completely irrelevant to the proceedings.

(h) That decision of the learned arbitrator to hold that Appellant failed to follow its procedure when there was no evidence of such procedure laid before him, and making a wrong assumption that Applicant's constitution "should probably spell on what procedure" to follow, thereby considering the constitution which was not before him at all thus irrelevant to the proceedings before him was not a misdirection.

(i) That decision of the learned arbitrator to unlawfully and arbitrarily sett-off the sum of M3,900.00 being the amount for unlawful installation of the gate without the authority of the Appellant thereby misdirection himself by introducing and applying the wrong principles, relying on irrelevant considerations or using an arbitrary approach by imposing

his own sentence for the offence, which were not even part of the referral before him and without giving the Applicants opportunity to address him on that issue at all was not a misdirection.

(j) That decision of the learned arbitrator to hold that the onus of proof was on the Appellant even where it rested on the Respondent to give the explanation of his actions to his employer and misdirecting himself by imposing onus upon the Appellant to prove all the charges levelled against the 1st Respondent was not a misdirection.

(k) That the issue of litigation of the loss is not relevant in awarding Compensation to the respondent simply because it was raised from the bar, when such a requirement is mandatory under the law.

[4] The Respondent responded as follows to these grounds of appeal:

"(a) The arbitrator did not commit mistake of law by holding that the onus was on the appellant to prove that NEC made a resolution barring printing of cards as the decision could only be taken per such resolution. It was the first respondent's case that a go-ahead had been given by AGM. This was a relevant issue.

(b) Once the employer preferred a criminal charge, namely fraud, against the employee, then the employer has to prove all the criminal elements of fraud. This is a legal principle even in disciplinary proceedings. The arbitrator committed no mistake of law.

(c) Arbitrator correctly found that there was no evidence that first respondent had benefitted from the transaction of card. There was no such evidence placed before him. At any rate, it would be irrelevant whether or not he had benefitted in the absence of the employer's policy preventing him to transact with the employer.

(d) The fact that the arbitrator had ordered deduction of M3,900 from the amount he awarded to the first respondent is a matter that could rightly be complained against by the first respondent, not the appellant. The reason being that there had been no evidence before him that NEC in its meeting resolved that loan for the gate should not be given to first respondent.

(e) It was upon the applicant to establish evidence that would demonstrate that the first respondent had failed to account for the money and how. Production of receipt was pertinent. Appellant failed to substantiate the allegation by producing the receipts. The arbitrator rightly so held.

(f) Contention raised in (d) above relating to the deduction of M3,900 is reiterated.

(g) The arbitrator had merely mentioned that applicant had failed to lay disciplinary charges against the treasurer who bought equipment with the first respondent by way of passing. At any rate this would be a relevant issue that demonstrated inconsistent application of disciplinary measures by the applicant to its employees.

(h) It is not everybody in the organisation who has powers to discipline and to dismiss. It was upon the applicant to lay evidence pertaining to its procedures in that regard. Appellant produced no evidence, verbal or documentary to the effect that NEC had resolved that disciplinary proceedings be instituted against first respondent. This evidence was solicited by the arbitrator from the appellant to no avail. As such the arbitrator was left with no choice but to make a finding as he did.

(i) This ground is the same as the one raised in (d) above. Argument raised in (d) above is reiterated regarding the order of deduction of M3,900. Otherwise, contention raised in (b) above is reiterated.

(k) The appellant indeed raised the issue of **mitigation of loss** in respect of compensation from the bar during the arguments in the review application. It is accordingly submitted that the Court *a quo* did not misdirect itself in dismissing this ground together with the rest."

THE APPLICABLE LEGAL PRINCIPLES

Review of Defective DDPR Arbitration Awards

[5] The Labour Court may review and set aside an arbitration award issued by the DDPR on <u>any ground permissible in law</u> and <u>any mistake of law that materially affects the decision.</u>[1]

(A) <u>Any grounds permissible in law</u> are the common law grounds of review.

1. Firstly, proceedings of **inferior courts** may only be reviewed on the basis of:

(i) gross irregularity in the conduct of the proceedings;

(ii) bias, prejudice or personal interest in the case, on the part of the presiding officer ; and

(iii) mala fides by the presiding officer[2]

Gross irregularity in the conduct of the arbitration proceedings will only occur where the irregularity is material and has precluded a

[1] Section 228F (1) and (3) of the Labour Code Order No.24 of 1992 (as amended by Act 9 of 1997, Act 3 of 2000, Act 5 of 2006 and Act 1 of 2010) (hereafter "the Labour Code")

[2] See for example Notsi Macpherson 1981 (2) LLR 268 (HC) and Moetsana v Tsikoane 1981 (2) LLR 378 (HC) and the cases referred to therein.

proper and fair hearing.[3] Examples of gross irregularity which would be relevant to the present case if proved, include:

(i) making findings not justified on the evidence;[4]
(ii) mis-construction of evidence;[5]
(iii) applying the criminal law test of proof beyond reasonable doubt in arbitration proceedings;[6]
(iv) misconstruing the law relating to disciplinary inconsistency.[7]

2. Secondly, the common law grounds for reviewing decisions of other quasi-judicial bodies or authorities, were summarised as follows by the South African Appellate Division[8]

> "in order to establish review grounds it must be shown that the [decision-maker] failed to apply his 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 decision-maker misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the decision-maker was so grossly unreasonable as to

[3] Reunert Industries (Pty) Ltd v Naicker [1997] BLLR 1173 (LC); Astral Operations Ltd v CCMA (1999) 20 ILJ 2609 (LC) at 2618 C-2619A; Telcordia Technologies Inc. v Telkom SA Ltd [2007] All SA 243 (A) at paras 85-88
[4] Venture Holdings Ltd v Biyana (1998) 19 ILJ 1266 (LC). American Leisure Corporation, Durbanville CC v Van Wyk [2005] 11 BLLR 1043 LC)
[5] Metcash Trading Ltd v Fob [1998] 11 BLLR 1136 (LC) at para 18.
[6] Fouries Poultry Farm (Pty) Ltd v CCMA [2001] 10 BLLR 1125 (LC)
[7] Southern Sun had Interests (Pty) Ltd v CCMA [2009] 11 BLLR 1128 (LC). Potgietersrus Platinum Ltd v CCMA (1999) 20 I & J 2679 (LC). Markhams v Matji NO [2003] 11 BLLR 1145 (LC) Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC0

[8] In Johannesburg Stock Exchange v Witwatersrand Nigel Ltd at p. 152A-D

warrant the inference that he had failed to apply his mind to the matter in the manner aforestated".

(B) Any mistake of law that materially affects the decision

In terms of this ground an award should be reviewable if it contains an error of law of such a nature that it affected the arbitrator's decision-making process. The mistake of law must have been sufficiently significant to influence the arbitrator to decide in a certain way. It has been held that a decision should be set aside on review if "by reason of its error in law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues'"[9]

Appeals Against Review Judgments

[7] As a court hearing an appeal against a review judgment of the Labour Court our task is to determine whether the DDPR arbitrator committed reviewable misconduct. This is done by an examination of, substantially, the same grounds for review that were raised in the court *a quo*, and usually, by evaluating the same material as was before the arbitrator. We are not sitting as a court of appeal against the decision of the arbitrator. Hence we may interfere with the decision of the DDPR under review only if we are satisfied that the DDPR committed a reviewable irregularity.[10]

[8] Therefore *in casu* the question which is foremost in our minds "is not whether the decision [of the DDPR arbitrator] is capable of being

[9] Hira & Another v Booyesn & Another, 1992 (4) SA 69 (A) at 93H-1
[10] See Grogan, Labour Litigation and Dispute Resolution (2014) at p 411

justified … but whether [the DDPR arbitrator] properly exercised the powers entrusted to him … The focus is on the process, and on the way in which the decision–maker came to the challenged conclusion".[11] Under the common law our focus is on either "the conduct of the decision-maker during the decision-making process, the procedure followed, or the decision-maker's reasoning."[12] In the present case the grounds of review (and later of appeal) relate to the decision-maker's reasoning.

[9] Reviewable misdirections by DDPR arbitrators may, *inter alia*, take the form of failure to apply the mind to the law or the evidence. For instance, where the reasons relied upon by the arbitrator in arriving at a certain conclusion are logically or legally flawed to such a serious degree as to warrant an inference that the arbitrator failed to apply his mind. But if the error in question is insufficient to warrant the conclusion that the arbitrator failed to apply his mind properly, the decision must stand. The error has to be so gross as to deny the aggrieved party a fair trial on the issue.

Resolving Disputes of Fact

[10] Before we start analysing the various arguments presented to us, we feel constrained to make a preliminary observation that many of our triers of fact (in this instance DDPR arbitrators) do not properly determine the factual basis of the case before pronouncing on the rights, duties and liabilities of the parties to the dispute. They do not always properly evaluate, analyse and assess the weight or cogency of the probative

[11] Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others (2006) ILJ 2076 (SCA) at para [31]
[12] Grogan, [2014] op cit, p 361

material admitted during the course of the hearing in order to correctly determine whether the party carrying the burden of proof has proved its allegations in accordance with the applicable standard of proof.

[11] This becomes very apparent where there are material disputes of fact in the allegations and responses of the parties. Failure to resolve these factual disputes in a logically coherent manner results in awards which are prone to successful review.

[12] The Supreme Court of Appeal of South Africa in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and others**,[13] enunciated following guidelines for evaluation of evidence:

> **"**The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. **To come to a conclusion on the disputed issues the court must make findings on *(a)* the credibility of the various factual witnesses, *(b)* their reliability, and *(c)* the probabilities. As to *(a)***, the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. **As to *(b)***, a witness' reliability will depend, apart from the factors mentioned under *(a)* (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. **As to *(c)***, this

[13] 2003 (1) SA 11 at 14I-15D (as edited in the headnote)

necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. **In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it.**" [emphasis added]

[13] It is now trite law that where an arbitrator or court fails to analyse the evidence in the manner set out above, it effectively fails to resolve the dispute and thereby denies the parties a fair hearing.[14]

ANALYSIS OF EVIDENCE AND ARGUMENT

[14] We shall now proceed to analyse the arguments of the parties in the light of the legal principles briefly discussed above as well as applicable authorities.

(A) <u>Unauthorised production of members' identity cards</u>

[15] The employers' version at the DDPR was supported by three members of its NEC at the time in question, namely the General Secretary (Boitumelo Manong), the Vice President (Mohale Thipe) and a member, Libenyane Mofoka. Applicant was supported in his opposing version by the Treasurer and NEC member, Tsaletseng Matela. The arbitrator, without even bothering to assess the credibility and reliability of any of these witnesses just concluded that Ntsoaole's version was more convincing than the employer's.

[14] Sasol Mining (Pty) Ltd v Commissioner Nggeleni & Others, (2011) 32 ILJ 723 (LC) at paras 10 and 13. See also Sidumo & Another v Rustenburg Platinum Mines Ltd & Others, [2007] 12 BLLR 1097 (CC) at para 268

[16] He further concluded that since LEPSSA did not furnish any written resolution of the NEC to the effect that Ntsoaole was barred from printing the cards, it had failed to prove on a balance of probabilities that what it alleged was true. In so doing the arbitrator threw out the oral testimony of respondents' three NEC witnesses without even explaining why he found them not credible and reliable witnesses. He rushed to this conclusion even though he never challenged or put their testimony under scrutiny.

[17] Furthermore, the arbitrator readily accepted Ntsoaole's version as the probable one despite the numerous red flags his testimony raised. Namely that (i) he spoke to his friend Du Plessis (owner of RHA) to buy a machine for producing ID cards, even before LEPSSA invited quotations (p.93 of the record); (ii) subsequently he personally obtained a quotation from Du Plessis; (iii) he knew and negotiated with RHA, personally (iv) he went ahead and engaged the service of RHA even though the NEC had requested him to push their quote down from M15.00 to M10.00; (v) he generated invoices for the payment of RHA for the job himself, from LEPSSA's computer; (vi) he signed the said invoice in the place provided for RHA's manager (i.e. on behalf of RHA); (vii) he did this while a full-time employee of LEPSSA. The arbitrator accepted Ntsoaole's version without assessing the credibility and reliability of the witnesses as required by the principles governing evaluation of evidence where there are conflicting factual assertions.

[18] Another point of contention raised by the Employer is that the arbitrator wrongfully imposed a criminal standard of proof on the employer in a labour arbitration. The employer's basis for this was that at page 5 of his award the arbitrator said the following:

> "The charge of fraud is a criminal offence which has to be proven beyond reasonable doubt, **and** the [employer] did not satisfy the court (sic) as to what misrepresentation [the employee] made, how that misrepresentation induced [the employer] to contract with RHA and how [the employee] benefitted from the transaction." [my emphasis]

[19] The court *a quo* ruled that the above statement does not mean that the arbitrator used a criminal standard to arrive at his finding. I do not think that the arbitrator's statement ought to be read disjunctively as the court *a quo* did. To us the statement, read holistically, can only mean that the employer failed to prove the listed elements of the charge of fraud beyond reasonable doubt. It is not just a loose statement as the court *a quo* suggests. And, as we have already stated in paragraph 5 above, applying the criminal law test of proof beyond reasonable doubt in arbitration proceedings is gross irregularity.

[20] The misconduct of fraud, in labour law, has been defined as "an unlawful action perpetrated by a person with the intention to defraud or misrepresent or mislead a party in such a manner that it causes prejudice or potential prejudice to that party."[15] Opperman gives as an example of fraud "devious methods of obtaining tender and large sales to which an employee is a party". Of significance to the present case, Grogan points out that (i) misrepresentation may be inferred from conduct and (ii) the employer is not required to prove actual loss as potential loss is sufficient. In view of his, the arbitrator was clearly wrong to conclude that there was no fraud simply because the employer did not prove that Ntsoaole benefitted from the production of the cards. It is sufficient that

[15] Opperman ( ) p.95 cf Grogan, Dismissal ( ) p194

Ntsoaole produced the cards without NEC's go-ahead and knowledge and represented both LEPSSA and RHA in that transaction (a classic example of conflict of interest and breach of his fieciary duties towards his employer). All this, coupled with all the red flags highlighted above raises a very strong likelihood that Ntsoaole improperly benefitted from this transaction and misled his employer in a manner that caused prejudice or potential prejudice to it. Opperman states that "the dubious actions of an employee could also lead to 'potential' damage, which may also be regarded as fraud."[16]

[21] To us it seems the arbitrator was not mindful that as far as charges involving dishonesty such as this one are concerned:-

(i) "employers are not required to prove the charges with the rigour expected of the state in criminal prosecutions - proof on a balance of probability suffices"; and

(ii) "apart from applying a less onerous standard of proof, the courts also accept broader formulations of the charge ….. provided the employer adduces sufficient evidence against the employee to warrant the inference that the employee acted dishonestly".[17]

(B) <u>Unauthorised installation of a gate at the employee's residence at the employer's expense</u>.

[16] At p.15. See also NUM v Associated Manganese Mines 2009) SA GBC 8.9.1
[17] Grogan, Dismissal at p208

[22] Regarding this charge, the arbitrator once more preferred the employee's version over the corroborated evidence of the employer's witnesses. In this case, as well, the arbitrator did not use the technique for resolving disputes of fact explained in the Stellenbosch case above in order to ascertain whose version was more probable. He did this despite significant contradictions in certain aspects of the testimony of Ntsoaole and that of his key witness, Tsaletseng Matela.

[23] For instance, Matela testified that Ntsoaole requested an advance to install the gate from the NEC through the President and the Treasurer, and the request was approved [p.111-112]. Whereas Ntsoaole himself testified that he only got permission from the President and the Treasurer, but was never given the opportunity to obtain the NEC's approval and ratification [p.94].

Secondly Matela testified that Ntsoaole was given money/advance for the gate to go find a service provider himself [p.112], whereas Ntsoaole testified that the supplier was paid directly by LEPSSA [p.95].

[24] In his grounds for review the Employer complained that instead of finding against Ntsoaole for using LEPSSA's funds to install the gate without prior approval of the NEC, the arbitrator unilaterally decided that instead of charging Ntsoaole "the [employer] should have deducted from [Ntsoaole's] salary money used to install the gate". The Employer contended that by unilaterally "substituting his own punishment for that imposed by the Appellant" the arbitrator misdirected himself.

[25] The Respondents' answer to this was that this was a matter which Ntsoaole, and not the Appellant could rightly complain of. In our view this defence does not address the concern raised by the Appellant at all.

The arbitrator's action is a classic example of an error in reasoning or logic which leads us to conclude that the arbitrator failed to apply his mind to the issue for determination. It was not the arbitrator's place to second guess the Employer as to what disciplinary action to take against the Respondent. It is trite law that an employer has managerial prerogative in matters of employee discipline.

(C) <u>Failure to account for M5681.03 left over from M22 000.00 allotted for purchasing office furniture</u>

[26] The arbitrator dismissed this charge for the reasons that:

(a) "The [employer] did not provide any proof of receipts that were returned against the money that [Ntsoaole] and the treasurer were given. He who alleges must prove";

(b) "If indeed [Ntsoaole] did not account for the money and admitted having misused it, [the Employer] <u>had a duty</u> to recover the loss from [employee's] salary"; and

(c) "Since [Ntsoaole] was with the treasurer on the trip, no evidence was led in relation to the treasurer also being charged disciplinarily about the failure to account for association funds."

[27] The Appellant challenged point (b) on the basis that the arbitrator's assertion that the Employer had a duty to recover the shortfall from the employee's salary was a misdirection. Appellant further contended that

by making point (c) the arbitrator was "considering factors which were extraneous and irrelevant to the dispute before him".

[28] The misconduct of "failure to account for something" simply means failure to say how one has used, an amount of money that one is responsible for spending, especially in one's job. In other words failure to give a satisfactory record of something, typically money, that one is responsible for.[18] That is to say, failure to keep a record of and explain how money has been spent.[19]

[29] The arbitrator's reasons for dismissing this charge are untenable because:-

(i) He was wrong to have dictated to the Employer that it ought to have dealt with the misconduct through the route of reparation rather than by charging Ntsoaole disciplinarily. It is trite law that workplace discipline is the prerogative of the employer, not the DDPR arbitrator;

(ii) Ntsoaole never testified on this issue in his evidence in chief. He never challenged Thipe's testimony. Consequently the arbitrator exceeded his powers by fighting the employee's battles for him;

(iii) The employer had no legal duty to recover the money from the employee's salary. The arbitrator's assertion that he did was a reviewable error in law and logic.

[18] Oxford Dictionary of English 3 ed (UOP 2010), edited by Augus Stevenson
[19] The American Heritage Dictionary of Phrasal Verbs (Houghton Mufflin Harcourt Publishing Company 2005)

(iv) The principle of disciplinary inconsistency which the arbitrator purported to apply is not applicable to this case because:-

(a) the Employer could not charge the treasurer, an NEC member, internally in a disciplinary case;

(b) Ntsoaole was the person directly accountable because he was the one responsible for the day to day management of LEPSSA's financial affairs;

(c) if one member of a group of employees who committed a serious offence against an employer is not disciplined, it would not necessarily mean that the other miscreants should escape;[20]

(d) Ntsoaole's misconduct, as full- time head of LEPSSA, was different from that of the treasurer. Their roles and responsibilities were different;

(e) the alleged inconsistency is not *per se* unfair. It will only be unfair if it is also shown that it amounted to arbitrariness and bad faith.

[30] In the result, the arbitrator's reasons for dismissing the charge are not sustainable. They clearly amount to failure to apply his mind to the issue and are consequently reviewable.

[20] SACCAWY v Irvin & Johnson (Pty) Ltd (1999) 20 ILJ 2302 (LAC)

[31] The final point we wish to make regarding this charge is that Ntsoaole was never entitled to use the Employer's money for his own private purposes even if he intended repay it.

In criminal law the unauthorised borrowing of another's money with the intention of returning an equal sum of money to that person is regarded as theft, since money is fungible thing which is consumed/destroyed by use. [21]

(D) <u>Insubordination</u>

[32] Although this is listed in the award as one of the charges which were preferred against Ntsoaole, nothing further is said about it in the arbitrator's "analysis of evidence and submissions". The reason why is not apparent from the award.

(E) <u>Procedural fairness</u>

[33] The arbitrator states that he was unable to obtain copies of the "minutes of the meetings of the NEC, minutes of the disciplinary hearing, the applicant's contract of employment and the constitution of the association" from either party. Consequently his decision that the dismissal was procedurally unfair was based on what was before him. We assume that by this he means the conflicting evidence and assertions of the parties. He continues that "in the absence of those minutes [he] took it that indeed the NEC did not resolve to have applicant suspended and subsequently dismissed which was unprocedural since the

[21] R v Albertyn, 1931 OPDD 178; Rv Milne and Erleign(7), 1951(1)SA 791 (a)

constitution of the association should probably spell out what procedure ought to be taken in such circumstances."

[34] In our opinion this far-reaching conclusion is not supported by any rules of logic or deductive reasoning that we know of. To say that because he (the arbitrator) did not gain access to the minutes means that the NEC never decided to suspend and subsequently dismiss Ntsoaole is not the only logical or even probable conclusion that could be drawn. This is an error of logic which justifies the conclusion that the decision – maker (arbitrator) did not properly apply his mind to the issue. It amounts to a latent irregularity in the proceedings, which is so gross as to deny the Appellant a fair trial. It is an entirely irrational, capricious and arbitrary conclusion on a material issue that bears no relationship to the evidence.

[35] For the above reasons we find that the Acting President of the court *a quo* erred and misdirected herself in holding that there was no fault with the award of the arbitrator and that the arbitrator did not commit mistakes which materially affected his decision.

[36] We therefore make the following order:

1. The appeal is allowed with costs

2. The award of the DDPR is consequently set aside.

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KEKETSO MOAHLOLI, AJ
JUDGE OF THE LABOUR APPEAL COURT

I agree

_____

R. MOTHEPU
ASSESSOR

I agree

_____

M. THAKALEKOALA
ASSESSOR

Appearances:

Adv. B. Sekonyela for Appellant

Adv. N.T. Ntaote for Respondent